

# THE EQUAL RIGHTS AMENDMENT REVISITED

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*[I]t's humiliating. A new amendment we vote on declaring that I am equal under the law to a man. I am mortified to discover there's reason to believe I wasn't before. I am a citizen of this country. I am not a special subset in need of your protection. I do not have to have my rights handed down to me by a bunch of old, white men. The same [Amendment] Fourteen that protects you, protects me. And I went to law school just to make sure.*

—Ainsley Hayes, 2001<sup>1</sup>

*If I could choose an amendment to add to this constitution, it would be the Equal Rights Amendment . . . . It means that women are people equal in stature before the law. And that's a fundamental constitutional principle. I think we have achieved that through legislation. But legislation can be repealed. It can be altered. . . . I would like my granddaughters, when they pick up the Constitution, to see that notion, that women and men are persons of equal stature. I'd like them to see that that is a basic principle of our society.*

—Ruth Bader Ginsburg, 2014<sup>2</sup>

## INTRODUCTION

A woman who has been discriminated against on the basis of her sex has several options for relief. If the discrimination was a result of state action, her attorney might first advise her to bring a claim that the state has failed to provide her “equal protection of the laws” as required by the Fourteenth Amendment to the Constitution.<sup>3</sup> Yet her lawyer might inform her that the Supreme Court did not understand that Amendment to contemplate protection against sex-based discrimination until more than 100 years after its adoption.<sup>4</sup> She might be informed that the focus of that Amendment at the time of adoption was discrimination on the basis of race; state action discriminat-

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1 *The West Wing: 17 People* (NBC television broadcast Apr. 4, 2001).

2 *The Kalb Report: Justices Antonin Scalia & Ruth Bader Ginsburg on the First Amendment and Freedom* (CSPAN television broadcast Apr. 17, 2014), <https://www.c-span.org/video/?318884-1/conversation-justices-scalia-ginsburg-2014>.

3 U.S. CONST. amend. XIV, § 1.

4 See *Reed v. Reed*, 404 U.S. 71 (1971). This was the first time that the Supreme Court recognized that sex-based discrimination violated the Equal Protection Clause of the

ing on that basis is subject to the most exacting of scrutiny on review. In contrast, her claim will be reviewed through the lens of a lower level of scrutiny, what has been judicially classified as intermediate review.<sup>5</sup> Her attorney might also inform her that at least one prior Justice has argued that intermediate review is too burdensome, and that the lowest standard of review of sex-based discrimination by the hand of the state would be more appropriate.<sup>6</sup>

Somewhat discouraged by this information, the woman might seek alternative channels of relief. Her attorney might propose an option rooted not in the Constitution but in the legislative process—a process representative of all things American: pluralistic debate, democratic disagreement, and efficient resolution. If her claim arose in the context of her employment, she might be advised to bring a claim under Title VII of the Civil Rights Act of 1964.<sup>7</sup> This route seems promising; the legislation was passed by the elected representatives of our nation as part of a great and lasting civil rights bill. Her lawyer might tell her the common story of how the word “sex” was added to the legislation. The Democratic Chairman of the House Rules Committee, Howard Smith of Virginia, proposed the addition in an attempt to delay the vote and retain the reign of Jim Crow laws.<sup>8</sup> Indeed, her lawyer might tell her that the “prank” addition “stimulated several hours of humorous debate, later enshrined as ‘Ladies Day in the House.’”<sup>9</sup>

While the woman might decide to follow her attorney’s advice and bring both of the above-mentioned claims, the history could, and perhaps should, give her pause. Is a late-in-the-day judicial interpretation of a watered-down post-Reconstruction amendment, and an Act born as a joke rooted in the inherent second-class nature of an entire sex really the best that fifty percent of the nation can hope for? The absence of normative and legal support for the critical notion that men and women are equal can and should be eliminated: the United States should ratify and adopt the Equal Rights Amendment to the United States Constitution.

This Note proceeds in three Parts. Part One chronicles the history of the Equal Rights Amendment, from the original attempt at passage through the various reiterations thereafter. Part Two describes the legal background, including constitutional and legislative protection against discrimination on the basis of sex. Part Three of this Note then demonstrates that a faithful understanding of the existing constitutional and legislative protections reveals inherent weaknesses. Specifically, the original understanding of the

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Fourteenth Amendment. The Fourteenth Amendment was adopted in 1868, 103 years prior to the decision in *Reed*. U.S. CONST. amend. XIV.

5 See *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

6 See *Antonin Scalia*, CAL. LAW. (Jan. 2011), <http://legacy.callawyer.com/2011/01/antonin-scalia/>.

7 42 U.S.C. §§ 2000e-2(a)–(d) (2012).

8 See, e.g., Louis Menand, *How Women Got in on the Civil Rights Act*, NEW YORKER (July 21, 2014), <https://www.newyorker.com/magazine/2014/07/21/sex-amendment>.

9 Jo Freeman, *How “Sex” Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 163 (1991).

Fourteenth Amendment did not contemplate protection from sex-based discrimination, and the word “sex” as a prohibited basis for discrimination in Title VII was added as a last-minute attempt by southern lawmakers to kill the legislation. These sources of law provide a shaky and wholly inadequate foundation for a norm as critical as sex equality. As the makeup of the Supreme Court shifts, judicially engrafted protections are susceptible to attack, and legislation can always be repealed. The solution, therefore, to ensuring equality of the sexes in a thoughtful and long-lasting manner—and in a manner that gives weight to the importance of the principle of equality—is through the passage of the Equal Rights Amendment.

## I. HISTORY OF THE EQUAL RIGHTS AMENDMENT

The first draft of the Equal Rights Amendment was drafted and introduced in Congress in 1923 by suffragist leader Alice Paul.<sup>10</sup> The Amendment as drafted stated that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”<sup>11</sup> The Amendment also provided that the “Congress shall have the power to enforce, by appropriate legislation, the provisions of this article,” and that the provisions would enter into effect two years “after the date of ratification.”<sup>12</sup> The introduction of this text was followed by decades of relative silence in Congress on the matter. But the silence in the halls of Congress stood in sharp contrast to the noise of the feminist movement in the 1960s and 1970s. In 1971, the Supreme Court determined that unequal treatment of women could violate the Equal Protection Clause of the Fourteenth Amendment.<sup>13</sup> Yet this was only an interpretation of what was implicit in the constitutional text by the Burger Court. The case declared that “the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways.”<sup>14</sup> The Court’s much narrower holding was that the Clause denies states the power “to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.”<sup>15</sup> While this was a powerful holding, it left many advocates wanting a more secure foundation than that provided by judicial interpretation for limits on state ability to discriminate on the basis of sex.

In a similar vein, legislation such as Title VII of the Civil Rights Act of 1964 includes “sex” as a prohibited ground for discrimination,<sup>16</sup> but legislation is easily repealed. Indeed, two political researchers recently studied the repeal of federal legislation by documenting all available repeal data from

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10 See *History of the ERA*, CNN, <https://www.cnn.com/2015/03/20/us/gallery/history-of-the-era/index.html> (last updated July 19, 2015).

11 H.R.J. Res. 208, 92d Cong. (1971).

12 *Id.*

13 See *Reed v. Reed*, 404 U.S. 71 (1971).

14 *Id.* at 75.

15 *Id.* at 75–76.

16 Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a)–(d) (2012).

1877 to 2012.<sup>17</sup> The authors argued that “shifts to the left or right in Congress’s membership . . . are an important cause of repeals.”<sup>18</sup> Leaving the security of sex equality to the whim of political ebbs and flows is concerning. At least eighty-nine partial or complete repeals of federal legislation occurred between the years of 1877 to 2012.<sup>19</sup> While this is a staggering figure, it fails to reflect the amount of power that Congress may exercise over legislation through alternate avenues that may require less political influence than does a full repeal. Congress could reallocate resources, redirect agency policy, or alter appointments within critical executive agencies in order to fundamentally change the import of legislation.<sup>20</sup> The advocates of the Equal Rights Amendment sought a more secure foundation.

As a result of these weaknesses, momentum grew in favor of passing an Equal Rights Amendment to the Constitution. Given the judicial and legislative backdrop, reasons to oppose the proposed amendment were arguably shrinking as more and more rights were being solidified for women.<sup>21</sup> In 1972, both houses of Congress were in favor of an amendment reading in pertinent part: “Equality of rights under the law shall not be denied or abridged by the United States or any state on account of sex.”<sup>22</sup> The Equal Rights Amendment passed with more than the necessary two-thirds votes in both the House and the Senate.<sup>23</sup> This early momentum continued with

17 Jordan M. Ragusa & Nathaniel A. Birkhead, *Parties, Preferences, and Congressional Organization: Explaining Repeals in Congress from 1877 to 2012*, 68 POL. RES. Q. 745 (2015).

18 *Id.* at 745.

19 *Id.* at 748–49.

20 *Id.* at 748 (“We note alternative ways Congress can ‘undo’ existing statutes. Perhaps most importantly, legislation often contains ‘sunset provisions’ where specific statutes are allowed to simply expire. . . . Alternatively, lawmakers may bypass statutory approaches to ‘undoing’ legislation, preferring instead to adjust an agency’s funding or choosing to ignore procedures for the agency’s implementation of a program.”).

21 For example, in 1963 Congress passed the Equal Pay Act, promising equitable wages for the same work. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2012). In 1965, the Supreme Court established the right of married couples to use contraception in the landmark case *Griswold v. Connecticut*, 381 U.S. 479 (1965), a holding that was extended to nonmarried individuals in 1972 in *Eisenstadt v. Baird*, 405 U.S. 438 (1972). For a thorough review of relevant legislation that affirmed the rights of women, see Susan Milligan, *Stepping Through History: A Timeline of Women’s Rights from 1769 to the 2017 Women’s March on Washington*, U.S. NEWS & WORLD REP. (Jan. 20, 2017), <https://www.usnews.com/news/the-report/articles/2017-01-20/timeline-the-womens-rights-movement-in-the-us>.

22 See DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 64 (1989) (quoting H.R.J. Res. 208, 92d Cong. (1971)).

23 See *History of the ERA*, *supra* note 10. Article V of the U.S. Constitution provides that

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

U.S. CONST. art. V.

ratification by over twenty states within months.<sup>24</sup> Then came Phyllis Schlafly.

Schlafly was an Illinois resident who rose to national prominence as the face against the Equal Rights Amendment.<sup>25</sup> In 1975 she founded the Eagle Forum, a conservative organization committed to advocacy against issues such as communism, abortion, and the Equal Rights Amendment.<sup>26</sup> Schlafly was, by all accounts, a woman of formidable energy.<sup>27</sup> Although a self-described housewife who became representative of the traditional image of wife and mother, she attended and graduated near the top of her class from Washington University Law School in 1978, well before law school classes had the gender balance seen today.<sup>28</sup> When asked about why she became a lawyer, Schlafly promptly joked that she “only went to law school to irritate the feminists.”<sup>29</sup> At her wedding ceremony, “she did not promise to obey, only to cherish.”<sup>30</sup> Moreover, she enjoyed opening her speeches by thanking her husband for allowing her to be present.<sup>31</sup> In many ways she was representative of the traditional woman, and in many ways she defied that image altogether.

Schlafly successfully led the revolution against the Equal Rights Amendment as an attack on traditional family values and the privileges of the wife.<sup>32</sup> Among other things, she argued that the Equal Rights Amendment was dangerous for the American family, would lead to same-sex marriage, and would result in the forced drafting of women into the military.<sup>33</sup> There was no dispute that the Equal Rights Amendment as proposed would require that women be subject to the draft on the same terms as men, a fact that Schlafly brought before constituents of every state to which she traveled. As she and her followers crossed the United States to lobby state conventions, their mission not only prevented ratification in many states, but led to the repeal of ratification in five states.<sup>34</sup> Ultimately, despite the early momentum, the

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24 See RHODE, *supra* note 22, at 64.

25 See *id.*

26 See Douglas Martin, *Phyllis Schlafly, 'First Lady' of a Political March to the Right, Dies at 92*, N.Y. TIMES (Sept. 5, 2016), <https://www.nytimes.com/2016/09/06/obituaries/phyllis-schlafly-conservative-leader-and-foe-of-era-dies-at-92.html>. The organization Schlafly founded called Eagle Forum still has an active website. See EAGLE FORUM, [www.eagleforum.org](http://www.eagleforum.org) (last visited Feb. 22, 2018).

27 See Martin, *supra* note 26.

28 *Id.*

29 Jessica Ravitz, *The New Women Warriors: Reviving the Fight for Equal Rights*, CNN (Apr. 16, 2015), <https://www.cnn.com/2015/04/02/us/new-womens-equal-rights-movement/index.html>.

30 Martin, *supra* note 26.

31 *Id.*

32 See, e.g., Nicole Hemmer, *What Phyllis Schlafly Owes Feminism*, POLITICO (Sept. 6, 2016), <https://www.politico.com/magazine/story/2016/09/phyllis-schlafly-death-house-wife-activism-feminism-214213>; Ravitz, *supra* note 29.

33 See *History of the ERA*, *supra* note 10.

34 See Hemmer, *supra* note 32. The five states that rescinded their previous ratifications were Nebraska, Tennessee, Idaho, Kentucky, and South Dakota. *A Short History of the*

Equal Rights Amendment fell three states short of the required three-quarters by the expiration date of 1982.<sup>35</sup>

Advocates for the Equal Rights Amendment have introduced the text in Congress every year since 1983 with little progress.<sup>36</sup> Every few years, however, the spark is revived. Following Justice Scalia's remarks that the Equal Protection Clause does not contemplate sex discrimination, advocates of the Equal Rights Amendment received new life.<sup>37</sup> More recently, the #MeToo movement highlighted the pervasive environment of sexual harassment in certain industries, leading many to question the potential lack of constitutional protection for women.<sup>38</sup> With each minirevival, the issue is highlighted and the gap in constitutional protection for women is further demonstrated. Passionate and thoughtful arguments can be found on both sides of the debate over the Equal Rights Amendment. While the arguments have fluctuated over time as a response to changing legislation and precedent, key points on each side remain. Some of the most prevalent and long-lasting concerns are the mandatory draft, employment inequalities, and the marriage relationship.

A person seeking to learn about the arguments for and against the Equal Rights Amendment can find an excellent starting point in an unlikely source: YouTube. A 1973 episode of William F. Buckley Jr.'s famous television show *Firing Line* provided a forum for two of the most prominent women on each side to debate.<sup>39</sup> The tenth anniversary of Buckley's death just passed, and he has been almost universally remembered as the father of postwar American conservatism.<sup>40</sup> Buckley had a wit that characterized his particular

ERA., EAGLE FORUM, <https://eagleforum.org/psr/1986/sept86/psrsep86.html> (last visited Feb. 23, 2018). Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia never ratified the proposed Equal Rights Amendment. *Id.*

35 See *History of the ERA*, *supra* note 10. Thirty-five of the thirty-eight required states ratified the Equal Rights Amendment. *Id.*

36 See *March 22, 1972 — Equal Rights Amendment for Women Passed by Congress*, N.Y. TIMES: THE LEARNING NETWORK (Mar. 22, 2012, 4:04 AM), <https://learning.blogs.nytimes.com/2012/03/22/march-22-1972-equal-right-amendment-for-women-passed-by-congress/>. "The ERA was introduced into every session of Congress between 1923 and 1972 when it was passed and sent to the states for ratification." CHRISTINE M. VENTER, INTERNATIONAL WOMEN'S RIGHTS, EQUALITY, AND JUSTICE 93 (2012).

37 See *March 22, 1972 — Equal Rights Amendment for Women Passed by Congress*, *supra* note 36.

38 See Nicole Guadiano, 'Me Too' Movement Renews Equal Rights Amendment Push, USA TODAY (Nov. 18, 2017), <https://www.usatoday.com/story/news/politics/2017/11/18/me-too-movement-renews-equal-rights-amendment-push/875903001/>.

39 See Hoover Inst., *Firing Line with William F. Buckley, Jr.*, YOUTUBE (Jan. 26, 2017), [https://www.youtube.com/watch?v=BP\\_87IAqItw](https://www.youtube.com/watch?v=BP_87IAqItw) (reproducing in a public forum *Firing Line with William F. Buckley, Jr.: The Equal Rights Amendment* (PBS television broadcast Apr. 15, 1973)).

40 See NR Symposium, *Remembering WFB on the Tenth Anniversary of His Death—A Symposium*, NAT'L REV. (Feb. 27, 2018), <https://www.nationalreview.com/2018/02/remembering-william-f-buckley-jr-symposium/>.

brand of conservatism and made for excellent TV. In one corner he placed Phyllis Schlafly, who was ready to defend traditional womanhood at the expense of a “silly” Amendment. In the other corner he placed feminist leader Dr. Ann Scott, undeterred by her status as an outsider in what seemed like a room of friends. Scott was a heavy hitter in the National Organization for Women and a fierce advocate for the Amendment.<sup>41</sup> At the time, the Amendment had passed both houses of Congress and was then facing judgment by the states. The stage was set, and both women defended their points of view admirably. While the interview is merely a sampling of the many voices for and against the Amendment, the participants’ arguments are representative of the basic views on either side.

The interview occurred while the Vietnam War was fresh in the minds of all present, and many men and women were therefore concerned about the prospect of wives and daughters being drafted into guerrilla warfare. As Buckley noted in the interview, many men felt that exempting women from the draft was the chivalrous thing to do. It was a service to them—an affirmative benefit—and therefore it was difficult to fathom why women would wish to be relieved from this privilege. In response, proponents argued that the sentiment of chivalry could simply be extended to men as well as women on the same terms. Moreover, being equal citizens requires equality in both the benefits and the burdens of citizenship. Dr. Scott argued as much: “[I]f women are to be citizens and citizens are to be subject to the draft, then women should take the responsibilities as well as the rights of citizenship.”<sup>42</sup> Nevertheless, the draft argument was compelling to many of the states that were lobbied by Schlafly.

Perhaps the most prominent argument against the Amendment, and the one most fervently advanced by Schlafly, was that the Amendment would be damaging to the traditional American marriage, and to the traditional role of the wife. Indeed, Buckley points out that the rescission of ratification by several states was mobilized not “by sexist males, but by women, many of whom on second blush are discovering in the Amendment implications they regard as inimical to the best interests of American women.”<sup>43</sup> Opponents feared the elimination of traditional laws that—while placing women as second-class or submissive to their husbands—required certain protections of women by their spouses. An illustrative example is domicile law. At the time, it was common for the domicile of a married woman to be automatically determined by the domicile of her husband.<sup>44</sup> Dr. Scott provided an anecdotal manifestation of such a law: she intended to run for elected office but was

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41 See *Ann L. Scott Dies; Feminist Leader*, N.Y. TIMES (Feb. 19, 1975), <https://www.nytimes.com/1975/02/19/archives/ann-l-scott-dies-feminist-leader-officer-of-now-a-poet-and-teacher.html>. Scott tragically passed away from cancer less than two years after this interview was filmed. *Id.*

42 See Hoover Inst., *supra* note 39.

43 *Id.*

44 *Id.*

disqualified as her domicile was based on that of her husband, who was temporarily residing elsewhere.<sup>45</sup>

In response, opponents would question how, if the woman is able to establish a domicile elsewhere, the family would be encouraged to stay together.<sup>46</sup> The seemingly sexist laws, upon closer examination, were therefore critical to the continued success and strength of the family unit. Relatedly, proponents of the Amendment also cited as evidence dated divorce laws that put decision-making power in the hands of the male spouse. Schlafly, however, saw divorce laws as granting affirmative benefits to women. For instance, following a divorce, the male spouse was often legally required, subject to criminal punishment, to provide for his former spouse. Schlafly and other opponents argued that the Amendment would make it such that a working woman would be legally required, subject to criminal punishment, to provide for her former husband following a divorce. This, in the view of opponents, would actually hinder the progress of the working woman, and eliminate an affirmative benefit provided to women in the law.

This line of thinking often led to the perverse conclusion that the main beneficiary of the Amendment would be an unlikely individual: the man. Indeed, he would have new colleagues on the battlefield lightening his load, and he would now be provided with new benefits of spousal support financially—benefits supported by the full backing of the civil and criminal legal systems. These fears took hold in legislatures across the nation, leading ultimately to the failure of the Equal Rights Amendment. While Phyllis Schlafly continued her zealous advocacy against the Amendment, many of the arguments sensibly advanced in the 1970s would hold much less weight today. Although the Selective Service System still requires young men to register, the United States now permits women to serve actively in all roles from medical units to combat roles.<sup>47</sup> Moreover, many of the outdated laws cited have since been repealed, leading to much of the equality that opponents of the Amendment feared as destructive to the traditional family.

The resistance to the Equal Rights Amendment was extremely contextual, rooted in the Vietnam War and (now) outdated values. Despite Schlafly's argument that the family would be torn apart by the movement for equality, legal and social changes have occurred, and the family has survived. Thus, while Schlafly maintained until her death that the Equal Rights Amendment would be detrimental to American principles, perhaps modern legislatures would not be so easily convinced to conform to her agenda. The context that fueled the opposition to the Equal Rights Amendment has been replaced by a context defined by women's participation in the workplace, defiance of gender norms, and the burgeoning #MeToo movement that contemporaneously highlights the strengths of women as well as how far we still

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45 *Id.*

46 *Id.*

47 See Rod Powers, *What You Need to Know About the U.S. Military Draft: United States Selective Service System*, BALANCE CAREERS, <https://www.thebalancecareers.com/all-about-the-draft-3332963> (last updated Feb. 14, 2018).



have to go to achieve equality. The juxtaposition of this movement with the absence of the Equal Rights Amendment has drawn critical attention by the press and scholars alike.<sup>48</sup> The movement has been joined by the TIME'S UP campaign, which seeks to provide legal support for victims of sexual assault, harassment, and inequality in the workplace, as well as other symbolic advances such as *Time* magazine naming its annual person of the year as “the Silence Breakers”—those who raised their voices and told their stories of sexual abuse and discrimination.<sup>49</sup> Advocates for the Equal Rights Amendment have set their sights on 2020, the 100-year anniversary of women gaining the right to vote, as the year to ratify what would be the Twenty-Eighth Amendment to the Constitution.<sup>50</sup> While the arguments that derailed the Amendment in the past remain important, the time is ripe to reconsider the value of the Amendment in light of new legal and social developments.

## II. THE LEGAL BACKGROUND

First, one should consider the Constitution. Advocates for the Amendment have long lamented the lack of constitutional protections for women. In 1929, a Senate committee met to consider the value of a proposed amendment to the Constitution that would read: “Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction.”<sup>51</sup> Maud Younger, Congressional Chairman of the National Women's Party, rose before the all-male body, and noted that Congress had before considered, and rejected, the inclusion of the equal rights of women in the Constitution:

In 1867, when the fourteenth amendment to the Constitution was being considered, the equal-rights society, meeting in New York under the leadership of Susan B. Anthony and others, then memorialized Congress, requesting that they do away with all discrimination based upon sex and race. The discriminations based upon race were abolished at this time, but it remains for this day and generation to do justice to the women of this country.<sup>52</sup>

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48 See *The Equal Rights Amendment in a #MeToo World*, HARV. KENNEDY SCH. (Mar. 8, 2018), <https://www.hks.harvard.edu/research-insights/policy-topics/gender-race-identity/equal-rights-amendment-me-too-world>; Leigh Ann Wheeler, *Will the #MeToo Movement Lead to the Equal Rights Amendment?*, HOUS. CHRON. (Dec. 1, 2017), <https://www.houstonchronicle.com/local/gray-matters/article/Will-the-MeToo-movement-lead-to-the-Equal-Rights-12398297.php>.

49 See Jessica Neuwirth & Molly Tormey, *The Time Is Now for the Equal Rights Amendment*, FORBES (Mar. 7, 2018), <https://www.forbes.com/sites/break-the-future/2018/03/07/the-time-is-now-for-the-equal-rights-amendment/#30f5108a5e71>; Stephanie Zacharek et al., *Person of the Year 2017: The Silence Breakers*, TIME (Dec. 18, 2017), <http://time.com/time-person-of-the-year-2017-silence-breakers/>.

50 See *The Equal Rights Amendment in a #MeToo World*, *supra* note 48.

51 *Equal Rights Amendment: Hearing Before a Subcomm. of the Comm. on the Judiciary on S.J. Res. 64*, 70th Cong. 1 (1929) (quoting S.J. Res. 64, 70th Cong. (1929)).

52 *Id.* at 2 (statement of Maud Younger, Congressional Chairman of the National Women's Party). The first elected female U.S. Senator, Hattie Caraway, would not be elected for four more years. *Women in the Senate*, U.S. SENATE, <https://www.senate.gov/>

Within this historical fact lies one of the first major fault lines in the debate: the application of the Fourteenth Amendment to women. As Younger noted, the Fourteenth Amendment was ratified, along with the other Reconstruction Amendments, in response to racial discrimination following the Civil War. The Thirteenth Amendment prohibited slavery and indentured servitude, the Fourteenth Amendment prohibited discrimination, and the Fifteenth Amendment provided *men* with the right to vote without regard to race.<sup>53</sup> Taken together, it seems evident that the purpose of the Reconstruction Amendments was to elevate the status of African-American men to that of their white counterparts. As Justice Scalia once noted,

In 1868, when the 39th Congress was debating and ultimately proposing the 14th Amendment, I don't think anybody would have thought that equal protection applied to sex discrimination . . . . Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that.<sup>54</sup>

There is ample historical evidence to support Justice Scalia's point. In fact, Younger's opening comments to the Senate committee provided such evidence. When confronted with the request to eliminate discrimination on the basis of race *and sex* in the Fourteenth Amendment, Congress declined to do so. More accurately, the nation interpreted the Fourteenth Amendment as failing to include protections for women. A faithful understanding of the Fourteenth Amendment's original meaning must concede that "[r]acial inequality was its crucible, its paradigm, its target, and its subtext. Sex-based denials of equal rights were not covered."<sup>55</sup>

While the text of the Fourteenth Amendment does prohibit states from denying "to any person within its jurisdiction the equal protection of the laws,"<sup>56</sup> not even Younger understood that language to provide protection for women.<sup>57</sup> A strictly textual analysis of the language might lead one to a different conclusion. Surely women are persons within the meaning of the text, thereby entitling them to equal protection of the laws. This understanding was not recognized by the Supreme Court for over 100 years, until *Reed v. Reed*.<sup>58</sup> This gap is further evidence that no one, not even the judiciary, viewed the Amendment to provide substantive protections against state discrimination on the basis of sex. Moreover, in *Reed*, the Court placed judicial review of discrimination on the basis of sex on a different plane than review

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artandhistory/history/common/briefing/women\_senators.htm#1 (last visited Oct. 9, 2018).

53 See U.S. CONST. amends. XIII, XIV, XV.

54 See *Antonin Scalia*, *supra* note 6.

55 See Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1283 (1991).

56 U.S. CONST. amend. XIV.

57 See *supra* note 52 and accompanying text.

58 404 U.S. 71 (1971).

of discrimination on the basis of race.<sup>59</sup> This difference, while subtle, indicates that the Court did not read the text of the Fourteenth Amendment to inherently include sex-based discrimination in the way that it inherently includes race-based discrimination.

This historical evidence could cut both ways, leading to some strange and perhaps ideologically inconsistent conclusions. For instance, many advocates for the Equal Rights Amendment celebrated the decision in *Reed*. Surely the Constitution should provide protections for women as persons within the meaning of the text. Yet advocates also argue that the lack of protections for women in the Constitution justifies and demands movement on the Equal Rights Amendment. In the same vein, opponents of the Equal Rights Amendment might have viewed the broad judicial interpretation of the Fourteenth Amendment in *Reed* with a critical eye, all the while arguing that the Equal Rights Amendment would be unnecessary and duplicative given existing protections for women in the law. The interplay between the Fourteenth Amendment and the value of the Equal Rights Amendment is both interesting and critically important.

Second, one should consider existing legislation prohibiting discrimination on the basis of sex. As previously noted, opponents of the Equal Rights Amendment often point out that protections for women are numerous in federal and state law, thereby decreasing the need for the Amendment. Title VII of the Civil Rights Act of 1964 stands out in this context.<sup>60</sup> The Civil Rights Act of 1964 was signed into law by President Lyndon B. Johnson on July 2, 1964.<sup>61</sup> Born under the Kennedy administration, President Kennedy emphasized that the legislation reflected the “democratic principle that no man should be denied employment commensurate with his abilities because of his race or creed or ancestry.”<sup>62</sup> The principle of sex equality was not mentioned.

Indeed, the word “sex” was not included in the legislation until two days prior to its passage when it was proposed by Congressman Howard Smith.<sup>63</sup> This proposal was not rooted in any particular passion for equality of the sexes. Rather, it was rooted in concern that white women would be disadvantaged in comparison to black women in the employment context were the legislation to only provide protections for discrimination on the basis of

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59 See *id.* at 76 (“The question presented by this case, then, is whether a difference in the sex of competing applicants . . . bears a *rational relationship* to a state objective that is sought to be advanced by the operation of [the legislation].” (emphasis added)).

60 Civil Rights Act of 1964, 42 U.S.C. § 2000e–2000e-17 (2012).

61 See Jacqueline A. Berrien, *Statement on 50th Anniversary of the Civil Rights Act of 1964*, EQUAL EMP’T OPPORTUNITY COMMISSION (July 2, 2014), <https://www.eeoc.gov/eeoc/history/cra50th/index.cfm>.

62 John F. Kennedy, President, Special Message to the Congress on Civil Rights (Feb. 28, 1963), <https://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-043-002.aspx>.

63 See VENTER, *supra* note 36, at 93 (“The prohibition against discrimination on the basis of sex was added as a last minute amendment.”); Menand, *supra* note 8.

race.<sup>64</sup> Smith was encouraged by the National Women's Party to advocate on behalf of white women, and endorsed the argument made by Congresswoman Martha Griffiths that "a vote against this amendment today by a white man is a vote against his wife, or his widow, or his daughter, or his sister."<sup>65</sup> Regardless of Smith's motives, the addition of "sex" was undeniably an afterthought—a tagalong on legislation developed to address pressing problems of racial discrimination in various contexts.

One might question whether the route to a destination truly matters. In the end, the word "sex" is included in the statutory language, and many successful lawsuits have been brought by women of all races seeking relief for sex-based discrimination in the employment context. As one female congresswoman present on the day of the proposal noted, "[the female congresswomen were] planning this all the time, and [they] were willing to let Smith get the credit so long as [they] got what [they] wanted."<sup>66</sup> Title VII has been instrumental in combating pressing issues such as sexual harassment and disparate treatment of women on the basis of sex in the workplace. Interpreting the Fourteenth Amendment to include sex-based discrimination has fostered opportunity and opened doors for women nationwide.

There is, however, something to be said for the fact that these two paths to relief, the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964, were not explicitly created for the purpose of combatting sex-based discrimination. Both were debated, proposed, considered, and created chiefly to combat the issues stemming from this country's history of slavery, segregation, and racism. One might be tempted to scientifically categorize this symbiotic relationship—between laws seeking to eliminate the badges and incidents of slavery and additions seeking to benefit women—as a commensalism relationship; a relationship in which women benefit and the civil rights movement remains unharmed. This characterization would be imprecise. While it is undeniable that the generous judicial interpretation of the Fourteenth Amendment and the last-minute addition to Title VII have benefitted women, these benefits stem from a weak normative foundation that undermines the entire endeavor. The equality of the sexes has only grown to be a more central principle in society across time, and such an important pillar should not be reduced to a secondary position in our laws. Analysis of the Fourteenth Amendment and Title VII through the lens of original understanding reveals concerning cracks that would not be present in a ratified Equal Rights Amendment.

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64 See Mary Anne Case, *No Male or Female*, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* 83, 90 (Martha Albertson Fineman ed., 2011).

65 *Id.* (citing 110 CONG. REC. 2580 (1964) (statement of Rep. Griffiths)).

66 See *id.*

### III. WHY THE EQUAL RIGHTS AMENDMENT MATTERS

#### A. *The Trouble with the Fourteenth Amendment*

The Supreme Court's treatment of sex-based discrimination through the Fourteenth Amendment has been, at times, surprising. After 100 years of silence, in *Reed v. Reed*, the Court held that such a cause of action was embedded in this post-Civil War Amendment.<sup>67</sup> As a law professor at Rutgers Law School, Ruth Bader Ginsburg wrote the brief for the appellant in the case. In so doing, Ginsburg urged the Court to consider sex-based discrimination under the same standard of review as race-based discrimination: "Legislative discrimination grounded on sex, for purposes unrelated to any biological difference between the sexes, ranks with legislative discrimination based on race, another congenital, unalterable trait of birth, and merits no greater judicial deference."<sup>68</sup> The Court rejected her proposed use of strict scrutiny and resorted instead to the lowest level of scrutiny: rational basis review.<sup>69</sup>

For many years this was the law. Sex-based classifications by the state, not rooted in any biological difference between the sexes, would be upheld so long as they bore a rational relationship to a legitimate or conceivable government purpose. But it was not long before the Supreme Court surprised us again. In a line of cases, the Supreme Court altered the standard for sex-based discrimination to *intermediate scrutiny* under which the Court is to inquire whether the statutory classification is substantially related to an important government objective.<sup>70</sup> This standard of review falls "[b]etween th[e] extremes of rational basis review and strict scrutiny."<sup>71</sup>

The Court then, again with little pomp and circumstance, ratcheted the standard upward. In *United States v. Virginia*, Justice Ginsburg stated that the state must show an "exceedingly persuasive justification" for sex-based classifications.<sup>72</sup> While the Court purported to be applying the precedent of intermediate scrutiny to the actions of the state, under the cover of darkness, a new requirement was layered on the important government objective. This addition was not lost on several members of the Court. Chief Justice Rehnquist, who concurred in the judgment, noted that "[w]hile the majority

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67 *Reed v. Reed*, 404 U.S. 71 (1971); see also *United States v. Virginia*, 518 U.S. 515, 560 (1996) (Rehnquist, C.J., concurring in the judgment) ("[I]n 1839 . . . [t]he adoption of the Fourteenth Amendment, with its Equal Protection Clause, was nearly 30 years in the future. The interpretation of the Equal Protection Clause to require heightened scrutiny for gender discrimination was yet another century away. Long after the adoption of the Fourteenth Amendment, and well into [the twentieth] century, legal distinctions between men and women were thought to raise no question under the Equal Protection Clause.").

68 Brief for Appellant at 5, *Reed*, 404 U.S. 71 (No. 70-4). Forty-six pages of Ginsburg's brief were devoted to the strict scrutiny argument, and only seven pages discussed the fallback argument of rational basis. VENTER, *supra* note 36, at 94.

69 See *Reed*, 404 U.S. at 76.

70 See, e.g., *Heckler v. Mathews*, 465 U.S. 728, 744 (1984); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980).

71 *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

72 *Virginia*, 518 U.S. at 531.

adheres to [the intermediate scrutiny] test today, it also says that the Commonwealth must demonstrate an ‘exceedingly persuasive justification’ to support a gender-based classification. It is unfortunate that the Court thereby introduces an element of uncertainty respecting the appropriate test.”<sup>73</sup>

Chief Justice Rehnquist’s critique seems almost complimentary in comparison to Justice Scalia’s dissent. Without hesitation, Justice Scalia felt compelled to “comment upon the manner in which the Court *avoids*” applying the “well settled” standard of intermediate scrutiny to the case.<sup>74</sup> Justice Scalia then proceeded to point out several competing strings of logic in the Court’s opinion. First, the federal government argued that strict scrutiny was the appropriate constitutional standard for evaluating claims of sex discrimination, and without mention of that argument or the brief, the Court “effectively accept[ed] it.”<sup>75</sup> Second, the Court cited frequently the precedent holding that claims of sex discrimination are subject to the constitutional standard of intermediate scrutiny, but then failed to answer “the question presented in anything resembling that form.”<sup>76</sup> Third, the Court, no fewer than nine times, invoked the phrase “exceedingly persuasive justification,” indicating a higher standard of review than intermediate scrutiny.<sup>77</sup> Because “some women” would be willing to undertake the program from which they were excluded, the state action failed to establish such a persuasive justification—a conclusion that more closely resembled a “least-restrictive-means analysis” associated with strict scrutiny.<sup>78</sup>

Justice Scalia’s reading of the Court’s constitutional analysis is not charitable. Yet he successfully highlights reasons for concern. Justice Ginsburg wrote for the Court that “thus far,” strict scrutiny has been reserved “for classifications based on race or national origin.”<sup>79</sup> She therefore not only predicts future adjustments but invites them.<sup>80</sup> The Court was able to, in a rather cavalier manner, ratchet up the standard for sex-based discrimination in the course of one opinion. The logical corollary is that little could prevent the Court from relaxing the heightened standard in its next opinion. The “destabiliz[ing]” impact of the majority is clear in the pages of the dissent:

[I]f the question of the applicable standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis review. The latter certainly has a firmer foundation in our past jurisprudence: Whereas no majority of the Court has

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73 *Id.* at 559 (Rehnquist, C.J., concurring in the judgment) (citations omitted).

74 *Id.* at 570–71 (Scalia, J., dissenting).

75 *Id.* at 571.

76 *Id.*

77 *Id.*

78 *Id.* at 572–73 (emphasis omitted).

79 *Id.* at 574 (emphasis omitted) (quoting *id.* at 532 n.6 (majority opinion)).

80 *See id.* (Scalia, J., dissenting). Justice Scalia characterizes this statement as “calculated to destabilize current law.” *Id.*

ever applied strict scrutiny in a case involving sex-based classifications, we routinely applied rational-basis review until the 1970's.<sup>81</sup>

Two important weaknesses are demonstrated by the foregoing debate. First, judicially engrafted rights are susceptible to alteration. Regardless of the standard one would wish to apply in the context of sex-based classifications or discrimination, the fact that the standard can be, and has been, changed with little more than the movement of one pen is evidence of this susceptibility. As long as the equality of women is bound in such a fragile fabric, there is cause for concern. A second weakness is hiding in the foregoing debate over the appropriate standard to apply: the fact that the Court has reserved the most stringent standard of review for classifications on the basis of race or national origin<sup>82</sup> is evidence that the Fourteenth Amendment was ratified to remedy, specifically and specially, that evil above all others. A century passed before the Court read the Equal Protection Clause to include women, and in so reading, the Court left the level of protection open to the manipulation of future generations. Sex is an immutable characteristic, like race, with which one is born and over which one does not have control. It is therefore not immediately apparent why discrimination on the basis of sex is subject to a lesser standard of review. A reasonable observer may fairly conclude that the norm packaged within that interpretation is of little value, or that women are somehow *less deserving* of protection by the Court's standards. One cannot be certain that passing the Equal Rights Amendment would mean that laws discriminating on the basis of sex would be subject to strict scrutiny. But the passage of the Equal Rights Amendment would strengthen the norm in a way that would present a much stronger argument to the Court that the value is critical to the substance of the Constitution and worthy of strict scrutiny.<sup>83</sup> The Equal Rights Amendment would certainly present a better legal basis for the application of strict scrutiny to sex discrimination than does the Fourteenth Amendment, as inconsistently interpreted, at present. Perhaps we can better communicate the importance of sex equality.

### B. *The Trouble with Title VII and Legislation Generally*

Great strides in the movement toward sex equality have been made in the legislative field. In the education context, for example, Title IX of the Education Amendments of 1972 mandates that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied

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81 *Id.* at 574–75.

82 See *Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 204 (2d Cir. 2006) (“Generally, for an equal protection claim to trigger strict scrutiny, the plaintiff must allege that a government actor intentionally discriminated against him or her on the basis of race or national origin.”).

83 Evidence that the Equal Rights Amendment would raise the standard for judicial review of gender discrimination through state action to that of strict scrutiny can be found at the state level. The Supreme Court of Texas, for example, has interpreted Texas's Equal Rights Amendment to require strict scrutiny review. See Wolfgang P. Hirczy de Miño, *Does an Equal Rights Amendment Make a Difference?*, 60 ALB. L. REV. 1581, 1581 (1997).

the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>84</sup> The Lilly Ledbetter Fair Pay Act of 2009 keeps the courthouse doors open to women who have experienced pay discrepancies on the basis of sex by softening the statute of limitations.<sup>85</sup> Title VII of the Civil Rights Act of 1964 prevents employment discrimination on the basis of sex.<sup>86</sup> While these and other pieces of legislation are of critical significance, they are subject to at least four weaknesses. First, Title VII was not initially driven by a genuine desire to effectuate the norm of sex equality. Second, legislation is always subject to repeal. Third, legislation works slowly to chip away at discrimination on a context by context basis, inherently leaving gaps within which discrimination can thrive. Fourth, federal courts have used contrasting tools of statutory interpretation in order to understand and effectuate legislation, leading to differing interpretations throughout the nation. Each of these weaknesses would be eliminated with the passage of the Equal Rights Amendment.

As discussed, the history of Title VII does not leave one with the feeling that sex equality was critically important to the Eighty-Eighth Congress. One might reasonably question why this should matter. From a contemporary perspective, Title VII functions well as a tool for righting the wrongs produced by employment discrimination on the basis of sex. Those victims who successfully recover through Title VII claims likely would not be concerned with decades old history that bears no effect on the conclusion of present-day litigation. The trouble, though, is that laws, as a normative matter, reflect societal values. The entire endeavor of sex equality is diminished when the ground on which the movement stands cannot fairly be characterized as reflecting that most important concept that men are equal to women and women are equal to men. A statute written with racial animus and, at best, indifference to the equality of women, surely cannot be the best reflection of this important principle.

More critically, legislation can always be repealed or relaxed. In 1974, for example, Congress passed the National Maximum Speed Law which imposed a maximum speed limit of fifty-five miles per hour throughout the United States.<sup>87</sup> As anyone who has driven on a highway is likely aware that, over twenty years later, Congress returned speed limit authority to the states by repealing the law.<sup>88</sup> The Civil Rights Act of 1964 itself “repealed the black codes and Jim Crow laws.”<sup>89</sup> These examples are simple illustrations of the fact that legislation can never be carved into stone. Whether by repeal, by alterations in appropriations, or by changes in leadership in critical agencies charged with administering statutes, the impact of legislation can be

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84 20 U.S.C. § 1681(a) (2012).

85 42 U.S.C. § 2000a (2012).

86 *Id.* § 2000e-2(a)-(d).

87 See 7 *Dubious Laws That Congress Repealed*, CNN, <https://www.cnn.com/2012/07/11/politics/gallery/repealed-laws/index.html> (last updated July 11, 2012).

88 *Id.*

89 *Id.*



increased or decreased according to political prerogatives. A more recent example of nonenforcement of a statute by political prerogative and agency control is the deferred action programs implemented under immigration legislation. Pressure has been placed on Congress from both sides of the political aisle to rewrite immigration legislation. In the absence of such changes, the executive branch has, under both the Obama and Trump administrations, altered the impact of the legislation to fit the policy preferences of their respective administrations.<sup>90</sup> In the Obama administration, this took the form of extending deferred action programs providing temporary administrative relief from the force of immigration legislation for children born in the United States to immigrant parents *to* the parents themselves.<sup>91</sup> In the Trump administration, this has taken the form of ending the deferred action program altogether while waiting for congressional action.<sup>92</sup> Present immigration legislation has fallen prey to the varying political goals of changing executive administrations. What matters in this context, it seems, is the values of those individuals situated in the West Wing—an ever-changing place in which the security of sex equality is not best housed.

To be sure, it seems too late in the day for Congress to take a major step back on critical civil rights legislation. Yet prominent scholars have argued for the repeal of Title VII.<sup>93</sup> The mere possibility of repeal is daunting in and of itself, as it gives a somewhat temporary feeling to the existence of sex equality achieved through the legislative avenue. The possibility that rights will be eliminated is always looming. As presidential administrations change, so do legislative agendas. Legislation is undeniably of critical importance, not to be easily diminished. But without a more concrete basis in the law, it is difficult to secure *permanently* the rights that legislation protects and the norms that legislation promotes.

Moreover, legislation is often context specific. Title IX prevents sex discrimination in the context of state-funded educational opportunities. Title VII prevents sex discrimination in the context of employment. While legislation has the capacity to prevent harm in a step-by-step manner, Congress likely does not have the constitutional power to enact sweeping legislation impacting and eliminating all elements of sex discrimination. One should not diminish the importance and normative value of legislation that elimi-

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90 See Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html>; Kevin D. Williamson, *Enforcement, Without Apology*, NAT'L REV. (Jan. 17, 2018), <https://www.nationalreview.com/2018/01/enforce-daca-no-apology-needed-only-congress-can-change-law/>.

91 See The Dep't of Homeland Sec.'s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. 1, 2 (2014).

92 See Editorial, *Congress, Stop Delaying DACA*, WASH. POST (Apr. 9, 2018), [https://www.washingtonpost.com/opinions/congress-stop-delaying-daca/2018/04/09/0af22804-3855-11e8-acd5-35eac230e514\\_story.html?utm\\_term=.5efb5edd9f31](https://www.washingtonpost.com/opinions/congress-stop-delaying-daca/2018/04/09/0af22804-3855-11e8-acd5-35eac230e514_story.html?utm_term=.5efb5edd9f31).

93 See Richard A. Epstein & Erwin Chemerinsky, *Should Title VII of the Civil Rights Act of 1964 Be Repealed?*, 2 S. CAL. INTERDISC. L.J. 349 (1993).

nates inequality in a given sector or context. Yet Congress is notoriously slow moving. Putting aside the potential constitutional issues, it seems a fool's errand to wait patiently for Congress to eliminate discrimination through context-specific legislation. This would be, by another name, allowing discrimination to thrive in those areas that have not been so fortunate to be the subject of a massive legislative overhaul.

Finally, a key problem with legislation overall is illustrated by the current jurisprudence surrounding Title VII. Federal judges across the nation are tasked with interpreting the language of Title VII, including questions such as what remedies are available, what litigation prerequisites are necessary, and for whom the statute was written. The question of which individuals can bring colorable claims under Title VII for discrimination "because of sex" has produced a split in the courts of appeals.<sup>94</sup> More specifically, courts of appeals are split on the issue of whether the language should be read to include discrimination on the basis of sexual orientation.

A panel of three judges on the Eleventh Circuit Court of Appeals held in March 2017 that under Title VII, an individual could not bring a claim that they were discriminated against on the basis of their sexual orientation.<sup>95</sup> There, the court felt bound by precedent that held that discharge on the basis of sexual orientation was not actionable under Title VII.<sup>96</sup> So the law stands, and will continue to stand, absent a holding to the contrary by the Supreme Court, within the jurisdiction of the Eleventh Circuit. An individual seeking to recover for discrimination on the basis of his or her sexual orientation in Alabama, Florida, or Georgia will be unable to do so under Title VII. This individual stands in sharp contrast to her peers in Illinois, Indiana, Wisconsin, Connecticut, New York, and Vermont, who can now bring actionable claims under Title VII for discrimination on the basis of sexual orientation.<sup>97</sup> In both the Second and Seventh Circuits, federal judges have concluded that the language "sex" encompasses sexual orientation.<sup>98</sup>

What serves as the critical difference between the individual in Alabama and the individual in Wisconsin? At present, nothing more than geography differentiates these plaintiffs. Yet their likelihood of recovery is drastically

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94 Compare *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017) (holding that discrimination on the basis of sexual orientation is not actionable under Title VII), with *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc) (holding employee was entitled to bring a Title VII claim on the basis of sexual orientation), and *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017) (en banc) (holding that discrimination on the basis of sexual discrimination is, at least in part, discrimination on the basis of sex, and is thus actionable under Title VII).

95 See *Evans*, 850 F.3d 1248.

96 See *id.* at 1255 (citing *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (per curiam)).

97 Both the Second and Seventh Circuits have held, en banc, that the language of Title VII includes discrimination on the basis of sexual orientation. *Zarda*, 883 F.3d 100; *Hively*, 853 F.3d 339.

98 *Zarda*, 883 F.3d 100; *Hively*, 853 F.3d 339.

different under Title VII depending on the interpretive conclusions of judges in their respective jurisdictions. Therein a critical issue with federal legislation is revealed—a plaintiff’s rights should not vary on the basis of zip code or state line. As federal judges struggle to interpret this fundamental piece of legislation, the rights contained therein are continually jeopardized and devalued.<sup>99</sup> Expectations and reliance interests are damaged, and inequitable application of such a critical piece of civil rights legislation will persist. Unfortunately, until the Supreme Court chooses to hear a case on the matter, Americans across the nation will remain unsure whether or not their individual rights are protected on the same terms as their peers under Title VII. Judicial interpretation thus presents a unique problem with creating a regime of equality through the medium of legislation.

### C. *The Equal Rights Amendment as a Democratic Solution*

The solution to pervasive discrimination is clear. The United States should, through the constitutionally prescribed system, ratify the Equal Rights Amendment to the Constitution. Passage of the Amendment would eliminate the blurry and ever-changing precedent on the proper standard of review to be applied in cases of sex discrimination, and would shut down any potential for abuse in the form of future alterations of the precedent. It would silence concern that a five-Justice majority could forever impact the remedies available to women through the stroke of a pen in one opinion. It would vindicate the requests of inspirational women who advocated before Congress in the past, as well as the forty-six pages of then-Professor Ginsburg’s brief in *Reed v. Reed*.<sup>100</sup> It would settle the law.

Passage of the Equal Rights Amendment would bypass the legislative backlog and inefficiency of Congress. It would fill the gaps left by context-specific legislation, eliminating existing safe-harbors for discriminatory behavior. It would put an end to the concern that the courts are misreading a statute to include a value of sex equality that was never meant to be found. It would establish a reliable basis for litigation, as amendments are much more difficult to repeal than simple legislation. It would narrow the space in which judges could differ on matters of statutory interpretation, as the importance of legislation existing to protect the equality of men and women would shrink in the shadow of the blanket protection of the Amendment.

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99 See Recent Case, *Statutory Interpretation—Title VII—Seventh Circuit Holds Sexual Orientation Discrimination Is a Form of Sex Discrimination—Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017) (*en banc*), 131 HARV. L. REV. 1489, 1496 (2018) (“Ultimately, judicial interpretations of Title VII are not without consequence. Most fundamentally, as courts continue to clarify the scope of what constitutes prohibited discrimination ‘because of’ a protected characteristic, vulnerable employees may rely on these pronouncements to understand the protections accorded to them by law. Given this potential impact, it is perhaps understandable that some judges may relish the opportunity to ‘update’ this landmark statute, while others may be instinctively wary of any attempts to subvert our ‘constitutional structure.’”).

100 See Brief for Appellant, *supra* note 68.

Moreover, passage of an amendment is an inherently democratic process. The resounding voice of thirty-eight states as well as representatives in Congress would send an important message regarding the importance of sex equality in our laws.

Finally, and most importantly, passage of the Equal Rights Amendment would concretely demonstrate the importance of the norm of sex equality in our country. The Constitution serves as a blueprint, enumerating our most cherished values and goals. It represents in a tangible manner what we as a nation view to be of critical importance, worthy of withstanding the test of time as a guide to all citizens. It would be of immeasurable value to have the equality of men and women written in no uncertain terms in that document such that each young American reading the Constitution for the first time would understand that value to be among our most prized.

Of course, one might anticipate several objections to this conclusion. As an initial matter, this Note does not advocate throwing out the Fourteenth Amendment to the Constitution or Title VII of the Civil Rights Act of 1964. While this Note has aimed to shine a light on some of the holes inherent in those laws, the Equal Rights Amendment would simply supplement the existing legal framework by establishing a better normative and interpretive foundation for litigation moving forward. One might also point out the challenging nature of the amendment process. In this political climate it seems as though convincing California and Texas to agree on a proposal would be a feat, let alone convincing thirty-eight states to do so. Indeed, the least-populous thirteen states of the Union could derail the entire process. In a 2014 interview, Justices Scalia and Ginsburg were asked what amendment, if any, they would propose to the United States Constitution.<sup>101</sup> Justice Ginsburg was quick to answer that she would propose the Equal Rights Amendment.<sup>102</sup> In a somewhat surprising answer, Justice Scalia proposed amending the very provision of the Constitution that controls amendments.<sup>103</sup> He thoughtfully noted that while the amendment process should be hard, reasonable people could agree that the process should not be *that* hard.<sup>104</sup> Perhaps, in a manner reflective of these Justices' across-the-aisle friendship, we should give due consideration to both of their proposals.

#### CONCLUSION

It is time to ratify the Equal Rights Amendment to the United States Constitution. While well-intentioned Justices have engrafted sex equality into their reading of the Fourteenth Amendment, one cannot deny that the purpose of that post-Reconstruction Amendment was to eliminate discrimination on the basis of race, an interpretation confirmed by a century of judicial

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101 *The Kalb Report: Justices Antonin Scalia & Ruth Bader Ginsburg on the First Amendment and Freedom*, *supra* note 2.

102 *Id.*

103 *Id.*

104 *Id.*

silence on sex discrimination as well as the disparate standards used in analyzing race- and sex-based claims.

Moreover, while great strides have been made in Congress, the nature of legislation is narrow and transient, and the normative foundations of certain laws, such as Title VII of the Civil Rights Act of 1964, are shaky at best. When courts differ in their interpretations of important pieces of legislation, the normative foundations of given laws are further diminished as individuals face deprivation of reliable information that would help them to structure their suits. The Equal Rights Amendment would not be subject to these issues and would memorialize a critical value in our nation's most revered document.

While Ainsley Hayes from *The West Wing* admirably argues against the Equal Rights Amendment by rejecting having “her rights handed down to [her] by a bunch of old, white men,”<sup>105</sup> perhaps an amendment to the Constitution ratified by thirty-eight states deserves more than such a witty brush-off. Justice Ginsburg should have the last word. Perhaps one day we will no longer have to hope that our “granddaughters, when they pick up the Constitution . . . [will] see that . . . notion that women and men are persons of equal stature.”<sup>106</sup> Perhaps one day it will be a reality.

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105 *The West Wing: 17 People*, *supra* note 1.

106 *The Kalb Report: Justices Antonin Scalia & Ruth Bader Ginsburg on the First Amendment and Freedom*, *supra* note 2.

