

WHY THE EQUAL RIGHTS AMENDMENT WOULD ENDANGER WOMEN'S EQUALITY: LESSONS FROM COLORBLIND CONSTITUTIONALISM

KIM FORDE-MAZRUI*

ABSTRACT

The purpose of the Equal Rights Amendment (ERA) to those who drafted it and those who worked for nearly a century to see it ratified, is women's equality. The ERA may be on the cusp of ratification depending on congressional action and potential litigation. Its supporters continue to believe the ERA would advance women's equality. Their belief, however, may be gravely mistaken. The ERA would likely endanger women's equality. The reason is that the ERA would likely prohibit government from acting "on account of sex" and, therefore, from acting on account of or in response to sex inequality. Put simply, government would have to ignore sex, including sex inequality.

Consider race. The purpose of the Equal Protection Clause (EPC)

Copyright © 2021 Kim Forde-Mazrui.

* Professor of Law and Mortimer M. Caplin Professor of Law, University of Virginia. Director, University of Virginia Center for the Study of Race and Law. I am grateful for helpful comments I received from Scott Ballenger, Jay Butler, Naomi Cahn, John Duffy, Thomas Frampton, Larry Solum, Gregg Strauss, and Mila Versteeg, and from participants in virtual workshops at the University of Virginia School of Law, Loyola University, Chicago, School of Law, and the UC Davis School of Law. A special thanks to my research assistants, Anna Bobrow, Meredith Kilburn and Danielle Wingfield-Smith. I am especially grateful to my current research assistant, Christina Kelly, whose work has been extraordinary in quality, quantity, and efficiency, including during holiday breaks under intense time pressure. Finally, I thank the Editors of the *Duke Journal of Constitutional Law & Public Policy* for their excellent work and patience, especially Hayley Lawrence and Jordan Ryan. I previously made some of the observations in this article in much briefer form. See Kim Forde-Mazrui, *A Liberal Case Against the Equal Rights Amendment*, RICH. TIMES-DISPATCH (Jan. 16, 2020), https://www.richmond.com/opinion/columnists/kim-forde-mazrui-column-a-liberal-case-against-the-equal/article_a6356b64-5862-528e-a73f-e900cccf4b8e.html, and Kim Forde-Mazrui, *The ERA's Threat to Sex Equality*, GENDER POL'Y REP. (July 14, 2020), <https://genderpolicyreport.umn.edu/the-eras-threat-to-sex-equality/>.

to those who drafted and ratified it was racial equality. In the late twentieth century, however, the Court began interpreting the EPC in a way that prevents further progress toward racial equality. Through its “strict scrutiny” test, the Court has essentially imposed on states and the federal government a constitutional rule of “colorblindness,” a rule that prohibits state-sponsored decisions that take account of race even when aimed at reducing racial inequality and even when pursued through laws that employ race-neutral means. As race-equality scholars know all too well, colorblind constitutionalism tends to lock in racial inequality.

This article argues that the ERA likewise threatens to lock in women’s inequality. Currently, the Court applies “intermediate scrutiny” to sex-based classifications under the EPC, a scrutiny that prohibits virtually all state-sponsored sex distinctions that harm women. Intermediate scrutiny, however, allows sex distinctions that promote women’s opportunities or otherwise advance women’s equality. Under the ERA, the Court would likely apply “strict scrutiny,” which essentially amounts to a constitutional rule of “sex-blindness,” prohibiting state-sponsored decisions that take account of sex even when designed to advance women’s equality and even when pursued through laws that employ sex-neutral means. Furthermore, the ERA would endanger single-sex settings, especially educational and extracurricular programs.

Moreover, the ERA would not prohibit any state-sponsored discrimination against women that is not already unconstitutional under the EPC. Nor does the ERA apply at all to the private sector in which most of the concerns of ERA supporters occur, such as unequal pay, sexual harassment, and violence against women. It is also doubtful that the ERA would have any impact on reproductive rights. What is needed is an alternative ERA that would explicitly authorize, or even require, proactive efforts to advance women’s equality.

TABLE OF CONTENTS

INTRODUCTION	3
I. THE NEED FOR AN ERA.....	6
A. <i>Current Laws Designed to Promote Women’s Equality</i>	6
B. <i>Persistent Women’s Inequality and the Inadequacy of Current Law</i>	8
II. THE ERA AND ITS SUPPORTERS’ ASPIRATIONS	12
A. <i>The ERA’s Text and Brief History</i>	12
B. <i>ERA Aspirations</i>	14
III. THE ERA’S LIKELY EFFECTS.....	17

A. <i>The Likelihood of Strict Scrutiny</i>	17
B. <i>Self-Executing Effects (Without Legislative Implementation)</i> ..	29
1. The (Redundant) Good: No Government Discrimination Against Women	29
2. The Bad: No Application to Private Discrimination, Disparate Impact, Pregnancy or Abortion	30
3. The Ugly: The ERA Would Likely Prohibit Affirmative Efforts to Advance Women's Equality	33
C. <i>The ERA's Indirect Effects (If Pursued Through Legislation)</i> ..	50
1. The Bad: No New Legislative Authority to Advance Women's Equality	50
2. The Ugly: The ERA Could Harm Women's Equality Through Existing Civil Rights Laws	52
D. <i>Stability and Recognition of Women's Equality</i>	53
IV. ALTERNATIVE ERAS	57
CONCLUSION	62

INTRODUCTION

In 2020, Virginia became the thirty-eighth state to approve the Equal Rights Amendment (ERA), reaching the minimum number of states required to amend the United States Constitution.¹ Though the ERA's legal validity remains an open question,² it has achieved a milestone for those who seek its enactment. ERA supporters believe the amendment would advance and strengthen women's equality.³ Support for the ERA is understandable given that women's equality in America remains grossly under-achieved⁴ and the Constitution does not explicitly guarantee sex equality.

That support, however, may be gravely mistaken. The ERA is unlikely to advance women's equality and, indeed, would endanger that

1. Timothy Williams, *Virginia Approves the E.R.A., Becoming the 38th State to Back It*, N.Y. TIMES (Jan. 16, 2020), <https://www.nytimes.com/2020/01/15/us/era-virginia-vote.html>.

2. Such difficulties include that the ERA was not ratified by the original 1979 deadline set by two-thirds of Congress in legislation proposing the amendment to the states, or during Congress's purported extension by a simple majority to 1982, and because five states voted to rescind their prior ratifications by 1982. Saikrishna Bangalore Prakash, *Of Synchronicity and Supreme Law*, 132 HARV. L. REV. 1220, 1295 (2019); DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION 1776-1995* at 408-09, 415 (naming the rescinding states as Idaho, Kentucky, Nebraska, Tennessee, and South Dakota). These issues are outside the scope of this article.

3. See discussion *infra* Section II.B.

4. See discussion *infra* Section I.B.

goal. The ERA would likely prohibit our political institutions and courts from advancing women’s equality.⁵ The best outcome for women’s equality is for the ERA to expire. Moreover, not only is no ERA better than the current ERA, even better for women’s equality would be an alternative, more empowering sex-equality amendment.⁶

This article makes three claims. First, and most importantly, the ERA would endanger equality *for women*⁷ because it would likely prohibit government from addressing sources of women’s inequality that government is authorized to address under current law.⁸ The reason is that the ERA would likely require the government to be “sex blind,” that is, ignore virtually all distinctions based on sex. Sex-blindness would preserve the status quo of sex hierarchy by forbidding efforts to remedy women’s inequality as such efforts necessarily require taking account of, or “seeing,” sex. Race law provides an important and troubling lesson. The Court’s colorblind constitutionalism, its increasing trend to forbid government from taking account of race in decision-making, has resulted in leaving significant racial inequalities beyond the power of government to remedy.⁹

Second, to the extent the ERA’s dictates would promote women’s equality, those dictates already exist under current equal protection doctrine.¹⁰ Third, the ERA would have no effect on key goals of ERA supporters, such as advancing equal pay and reducing sexual harassment and violence against women.¹¹ In short, the ERA is unnecessary, inapplicable and, worst, dangerous to women’s equality.

5. See discussion *infra* Sections III.B.3 and III.C.2.

6. See *infra* Section IV for elements of an alternative amendment that would actually promote women’s equality.

7. This article focuses on the potential effect of the ERA on the condition of women as compared to men. It does not address the ERA’s effect on the condition of gay and lesbian persons compared to heterosexual persons or on transgender or non-binary persons compared to cisgender persons. The great degree of confusion over the ERA’s effect on women’s equality justifies limiting the scope of this article to that subject. To the extent people of different sexual orientations and gender identities include women, this article’s analysis includes them. The ERA’s effects that may be distinctive to people of particular sexual orientations or gender identities are critically important and merit their own, in-depth analysis in other scholarship.

8. See *infra* Sections III.B.3 and III.C.2.

9. See generally Kim Forde-Mazrui, *The Canary Blind Constitution: Must Government Ignore Racial Inequality?*, 79 L. & CONTEMP. PROBS. 53, 56 (2016) (explaining the trend of colorblind constitutionalism and its threat to addressing the sources of racial inequality); Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2346 (2000) [hereinafter *Race-Neutral Affirmative Action*] (explaining why equal protection doctrine logically prohibits race-neutral laws to promote racial equality).

10. See *infra* Section III.B.1.

11. See *infra* Sections III.B.3 and III.C.2.

The article has four parts. Part I describes current laws that aim to promote women's equality and identifies significant inequalities that nonetheless persist. Part II describes the ERA and how its supporters believe it would aid in securing laws and policies to promote women's equality: namely, that the ERA would protect women against discrimination and harassment in the workplace, promote equal pay, support women's reproductive rights and parental responsibilities, and prohibit, or enable Congress to prohibit, violence against women.

Part III, the article's main contribution, explains what the actual effects of the ERA would likely be. Most importantly, the ERA would likely prohibit government from adopting laws or policies intended to advance women's equality, including with respect to discrimination, harassment, pay, parental responsibilities and violence. The ERA would also likely jeopardize single-sex schools and other educational programs. Part III also argues that the ERA is unnecessary to prohibit state-sponsored intentional discrimination against women because such discrimination is already presumptively unconstitutional under the Equal Protection Clause. The ERA would also fail to challenge laws that disparately impact women and would fail to apply at all to the private sector in which the majority of pay discrimination, sexual harassment and violence occurs. The ERA would thus not advance the goals of its supporters but would instead block promising reforms that could be pursued under current law. Part IV suggests the kinds of provisions that an alternative, more promising ERA could include if women's equality is to be advanced by constitutional amendment. A lesson of Part IV is that the ERA is not just worse than the status quo, it is far worse than what could be achieved for women's equality through an alternative amendment.

I. THE NEED FOR AN ERA

“I believe the rights of women and girls is the unfinished business of the twenty-first century” – Hillary Clinton¹²

“We have come a long, long way, but we have a long, long way to go before the problem is solved.” – Dr. Martin Luther King, Jr.¹³

A. *Current Laws Designed to Promote Women’s Equality*

The Supreme Court did not interpret the Equal Protection Clause of the Constitution to protect women until the early 1970s.¹⁴ Since then, the Court has increasingly interpreted the Equal Protection Clause to prohibit state-sponsored sex discrimination. For any such discrimination to withstand constitutional scrutiny, the government must demonstrate an “exceedingly persuasive” justification.¹⁵ When applying the test that has come to be called “intermediate scrutiny,” the government must demonstrate that the discriminatory use of sex is “substantially related” to an “important” governmental interest.¹⁶ This test invalidates the great majority of state-sponsored sex discriminations, especially those against women.

Several federal laws expressly aim to advance women’s equality. One of the first was the Equal Pay Act of 1963, which prohibits men and women from receiving different pay for doing substantially the same work unless an employer can demonstrate that the difference in pay is based on a factor “other than sex.”¹⁷ The Civil Rights Act of 1964

12. Hillary Clinton, Secretary of State, Keynote Address at Girls, Inc. Annual Luncheon (Mar. 7, 2017).

13. Dr. Martin Luther King, Jr., Convocation Speech at Illinois Wesleyan University (February 10, 1966).

14. See *Reed v. Reed*, 404 U.S. 71, 75 (1971) (The first case to apply a more searching degree of judicial scrutiny to sex-based classifications, holding that because “[§ 15-314] provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause”); see also Deborah L. Brake, *Sex As A Suspect Class: An Argument for Applying Strict Scrutiny to Gender Discrimination*, 6 SETON HALL CONST. L. J. 953, 954 (1996) (explaining that in *Reed*, “the Supreme Court for the first time applied a higher level of scrutiny to sex discrimination.”).

15. See *Univ. of Miss. Sch. for Nursing v. Hogan*, 458 U.S. 718, 724 (1982) (stating that “[t]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an ‘exceedingly persuasive justification’ for the classification”); *United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (explaining that a court confronted with a state-sponsored sex classification must determine whether the state’s proffered justification is “exceedingly persuasive” and, moreover, “[t]he burden of justification is demanding and it rests entirely on the State”).

16. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

17. Equal Pay Act, 29 U.S.C. § 206(d) (2018).

prohibits intentional sex discrimination in virtually all aspects of employment.¹⁸ It also prohibits most employment practices that have an unintentional disparate impact on the basis of sex unless such practices are shown to be “job-related . . . and consistent with business necessity.”¹⁹ The Pregnancy Discrimination Act (PDA) protects women from discrimination on the basis of “pregnancy, childbirth and related medical conditions.”²⁰ The PDA also requires accommodation of pregnant employees if accommodations are made for other employees similar in their ability or inability to work.²¹ The Family and Medical Leave Act requires employers to provide unpaid leave to employees to care for a child or other relative.²² The Lilly Ledbetter Fair Pay Act allows claims of sex (and other) discrimination in compensation to be brought that previously would have been time barred by the statute of limitations.²³ Indeed, as Justice Alito documented in *Bostock v. Clayton*

18. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.) (prohibiting intentional sex discrimination in compensation, terms, conditions, or privileges of employment).

19. See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (allowing respondent to answer a disparate impact claim by proving the challenged employment practice is necessary to the business).

20. Pregnancy Discrimination Act, 42 U.S.C.A. § 2000e(k) (West, Westlaw through P.L. 112-3 (excluding P.L. 111-296, 111-314, 1U-320, 111-350, 111-377, and 111-383)). The Act extends protection from employment discrimination to “pregnancy, childbirth, or related medical conditions.” *Id.* (excluding P.L. 111-296, 111-314, 1U-320, 111-350, 111-377, and 111-383)). The Act extends protection from employment discrimination to “pregnancy, childbirth, or related medical conditions.” *Id.*

21. See *id.* (“The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.”). The Court interpreted the same-treatment clause of the PDA in *Young v. Utd. Parcel Svc.*, 135 S. Ct. 1338, 1348–55 (2015).

22. Family Medical Leave Act, 29 U.S.C.A. §§ 2601–54, 2601(a)(5), 2601(b)(4) (West, Westlaw through P. L. 113–63).

23. See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2 (2009) (superseding the Supreme Court’s holding in *Ledbetter v. Goodyear Tire & Rubber Co. Inc.*, 550 U.S. 618 (2007), which had required that a charge of compensation discrimination be filed within 180 days (or 300 days in some jurisdictions) from the discriminatory, pay-setting decision. The Act relaxed this strict application of the statute of limitations and instead decreed that a claim of discrimination starts anew with each paycheck that delivers compensation affected by a discriminatory decision. The Act also extended protection to pay discrimination based upon race, color, religion, national origin, age or disability. A person subject to pay discrimination can now file a charge within 180 (or 300) days of any of the following: (1) An employer adopts a discriminatory pay decision or other practice; (2) An individual becomes subject to a discriminatory pay decision or other practice; or (3) An individual is affected by a discriminatory pay decision or other practice, which includes each time an individual receives pay that is reduced because of a discriminatory pay decision or other practice.).

County, over one hundred federal laws and executive orders prohibit sex discrimination in a broad range of contexts.²⁴

B. Persistent Women's Inequality and the Inadequacy of Current Law

Despite the foregoing laws against sex discrimination, ERA proponents remain justifiably concerned about the persistence of women's inequality. Women are statistically worse off than men across a wide range of economic and social measures. Women's income,²⁵ wealth,²⁶ and professional attainment²⁷ lag significantly behind that of men. Women are underrepresented in a range of occupations, including police, fire, construction, technology, company management, corporate boards, and business ownership.²⁸ In such occupations, moreover, women earn less than men²⁹ and are much more likely to be harassed on the job.³⁰ In education, girls and women face discrimination and continue to be underrepresented in certain fields, such as STEM, medicine, and business.³¹ Women remain significantly less likely to hold positions of power, whether in the private sector or in government institutions.³² And women's health, particularly their reproductive

24. See *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1768–70 (2020), (Alito, J., dissenting) (describing several such laws); *id.* at Appendix C (listing many more laws that prohibit sex discrimination).

25. Jennifer Safstrom, *Salary History and Pay Parity: Assessing Prior Salary History as a "Factor Other than Sex" in Equal Pay Act Litigation*, 31 YALE J.L. & FEMINISM 135, 139 (2019).

26. Janice Traflet & Robert E. Wright, *America Doesn't Just Have a Gender Pay Gap, It has a Gender Wealth Gap*, WASH. POST (Apr. 2, 2019), <https://www.washingtonpost.com/outlook/2019/04/02/america-doesnt-just-have-gender-pay-gap-it-has-gender-wealth-gap/>.

27. See Safstrom, *supra* note 25, at 135, 154.

28. U.S. BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK 46–64 tbl. 11 (2019); Matt Egan, *Still Missing: Female Business Leaders*, CNN MONEY (Mar. 24, 2015), <https://money.cnn.com/2015/03/24/investing/female-ceo-pipeline-leadership> (stating that women held 16.5% of the top four executive board positions and 14% of all executive board positions in S&P 500 companies); AM. EXPRESS, THE 2017 STATE OF WOMEN-OWNED BUSINESSES REPORT: SUMMARY OF KEY TRENDS 3 (2017) (stating that women-owned businesses accounted for 39% of all U.S. firms).

29. *The State of the Gender Pay Gap 2020*, Payscale (Jul. 31, 2020), <https://www.payscale.com/data/gender-pay-gap#section06>.

30. See Women's Initiative, *Gender Matters: Women Disproportionately Report Sexual Harassment in Male Dominated Industries*, CTR. FOR AM. PROGRESS (Aug. 6, 2018), <https://www.americanprogress.org/issues/women/news/2018/08/06/454376/gender-matters/>.

31. U.S. BUREAU OF LABOR STATISTICS, *supra* note 28, at 46–64.

32. See *id.* at 2; see also Judith Warner, Nora Ellmann, & Diana Boesch, *The Women's Leadership Gap*, CTR. FOR AM. PROGRESS (Nov. 20, 2018), <https://www.americanprogress.org/issues/women/reports/2018/11/20/461273/womens-leadership-gap-2/> (American women lag substantially behind men in terms of their representation in leadership positions.); Gary M. Kramer, *Limited License to Fish Off the Company Pier: Toward Express Employer Policies on Supervisor-Subordinate Fraternization*, 22 W. NEW ENG. L. REV.

needs, are inadequately served compared to men's.³³ Women are far more likely than men to experience domestic battering, sexual assault, and rape.³⁴ Many of the foregoing disparities, moreover, tend to be especially acute for poor women and women of color.³⁵ As Professor Brandy Faulkner observes, "We know that women still face sex and gender discrimination, but we don't all experience it in the same way. Intersections of race and class position us differently in the power-based hierarchy of sex and gender."³⁶

Women's equality advocates have identified several gaps in current law which they believe contribute to women's inequality. One is that the intermediate-scrutiny test is more permissive of sex discrimination than is the stricter test which the Court applies to race discrimination.³⁷

77, 81–84 (2000).

33. Keegan Warren-Clem, *Unnecessary, Avoidable, Unfair, and Unjust: [En]Gendered Access to Care in the PPACA Era and the Case for a New Public Policy*, 13 *IND. HEALTH L. REV.* 119, 122–23, 158–59 (2016).

34. See *Statistics*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/statistics> (last visited March 1, 2021) (one in four women and one in nine men experience severe intimate partner physical violence, intimate partner contact sexual violence, and/or intimate partner stalking with impacts such as injury, fearfulness, post-traumatic stress disorder, use of victim services, contraction of sexually transmitted diseases, etc.; one in five women and one in seventy-one men in the United States has been raped in their lifetime).

35. See, e.g., Brandy S. Faulkner, *Will the ERA Lift All Boats?*, *GENDER POL'Y REP.* (July 14, 2020), <https://genderpolicyreport.umn.edu/will-the-era-lift-all-boats/> (observing that sex-based disparities affect poor women and women of color more significantly, especially with respect to health and income); U.S. BUREAU OF LABOR STATISTICS, *supra* note 28, at 4 (explaining that "the ratio of the working poor to all individuals who were in the labor force for at least 27 weeks was 5.3 percent for women and 3.8 percent for men. . . . The working-poor rates for Black and Hispanic women were 10.0 percent and 9.1 percent, respectively, compared with 4.5 percent for White women and 2.5 percent for Asian women."); Warren-Clem, *supra* note 33, at 126–27 (discussing how limited financial resources inhibits one's "ability to acquire [health] care" and explaining that the pay gap between men and women exacerbates women's ability in particular to access health services).

36. Faulkner, *supra* note 35.

37. See, e.g., Lee Epstein, Andrew D. Martin, Lisa Baldez, & Tasina Nitzschke Nihiser, *Constitutional Sex Discrimination*, 1 *TENN. J. L. & POL'Y* 11, 49 (2004) (finding that in state court decisions where intermediate scrutiny was applied, the litigant alleging sex discrimination prevailed 47 percent of the time, suggesting that a litigant is "nearly as likely to win as they are to lose" under intermediate scrutiny. In contrast, the success rate of litigants in state courts applying strict scrutiny (the same test used for race-based discrimination), is 73 percent); Sarah M. Stephens, *At the End of Our Article III Rope Why We Still Need the Equal Rights Amendment*, 80 *BROOK. L. REV.* 397, 408, 412 (2015) (arguing "[t]he 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 [I]ntermediate scrutiny is not functional because it does not provide a clear and consistent rule"); See "A New Era for the Equal Rights Amendment," *Equal Rights Amendment Conference Transcription*, 23 *RICH. PUB. INT. L. REV.* 145, 159 (2020) (panel presentation of Kate Kelly) (describing how, under intermediate scrutiny, it is "easier to pass and keep sexist laws on the books" and that the ERA would change this by applying strict scrutiny instead to such laws).

For state-sponsored race discrimination, the Court applies “strict scrutiny,” which requires the government to demonstrate that discriminating by race is “necessary” or “narrowly tailored” to achieve a “compelling interest.”³⁸ Such a test invalidates virtually all race-based discriminations, including discriminations that would be upheld if subject only to the intermediate scrutiny applied to sex-based discriminations. Some ERA proponents thus regret that intermediate scrutiny could uphold sex discrimination that would be prohibited if courts applied strict scrutiny to sex discrimination.³⁹

Another shortcoming of current constitutional law is that laws or policies with an unintentional disparate impact on women are immune from challenge unless they are proved to be intentionally designed to discriminate against women. The Court made this clear in *Personnel Administrator of Massachusetts v. Feeney*, in which the Court upheld a state hiring and promotion preference for veterans, despite its having an overwhelmingly disparate impact against women.⁴⁰ At the time, the military excluded women from most military positions, so very few women would qualify for such preference.⁴¹ The Court had already held in *Washington v. Davis* that the Equal Protection Clause only prohibits race discrimination that is purposeful.⁴² In *Feeney*, the Court applied the same rule to sex discrimination and explained that purposeful discrimination requires that the state adopted the law “because of” and not merely “in spite of” the law’s effect on the

38. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that “racial classifications . . . must be analyzed . . . under strict scrutiny . . . [S]uch classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests”).

39. See, e.g., Stephens, *supra* note 37, at 411 (pointing to Justice O’Connor’s dissent in *Nguyen v. INS*, 533 U.S. 53 (2001), as a recent example of where the application of the intermediate scrutiny standard operated to uphold a law that reflected the sexist assumption that a child born out of wedlock was the sole responsibility of the mother, which is exactly the type of sex-based stereotype intermediate scrutiny is supposed to strike down); *id.* at 426–27 (“Women continue to be treated unequally under the law . . . because the intermediate scrutiny standard permits gender discrimination . . .”); Robin Bleiweis, *The Equal Rights Amendment: What You Need To Know*, CTR. FOR AM. PROGRESS (Jan. 29, 2020), <https://www.americanprogress.org/issues/women/reports/2020/01/29/479917/equal-rights-amendment-need-know/> (stating that the ERA would “bolster[] the argument that judicial review of cases alleging sex discrimination should utilize the highest level of legal scrutiny, requiring a compelling state interest to deem a particular sex-based action or practice constitutional. Heightened scrutiny would make it harder to dismiss or reject sex discrimination claims and protections outright.”).

40. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 281 (1979).

41. *Id.*

42. *Washington v. Davis*, 426 U.S. 229, 245 (1976).

protected group.⁴³ Thus, notwithstanding that Helen Feeney was more qualified than the veterans hired over her, her repeated rejections for promotion were upheld because disparate impact alone does not implicate the Equal Protection Clause.⁴⁴

Two additional gaps in legislative protections of women have raised concerns. First, the disparate-impact provision of Title VII of the Civil Rights Act of 1964, which prohibits employment policies with unintentional but unjustified disparate impacts based on “race, color, religion, sex, or national origin,” appears not to apply to sex differences in pay.⁴⁵ Second, Congress cannot prohibit private violence against members of vulnerable social groups, including women. The reason is because the Supreme Court struck down the provision of the Violence Against Women Act that proscribed gender-motivated violence, holding that Congress did not have power under the Commerce Clause or Equal Protection Clause to prohibit violence between private individuals.⁴⁶

Beyond these particular gaps in the law, women's equality advocates point to systemic disadvantages that women face in employment, corporate leadership, and access to political power, which current laws have failed to correct. For example, the work-schedule expectations of the American workplace continue to disadvantage female employees, including highly educated professionals, who disproportionately need to divide their time between work and family

43. *Feeney*, 442 U.S. at 258.

44. *Id.* at 273 (“[T]he Fourteenth Amendment guarantees equal laws, not equal results.”); see also Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness*, 36 RUTGERS L.J. 1201, 1223–27 (2005) (critiquing the Court's refusal to recognize disparate impact against women as constitutionally problematic).

45. See *Cnty. of Washington v. Gunther*, 452 U.S. 161, 168 (1981) (permitting Title VII action for intentional sex-pay discrimination under reasoning that would deny disparate-impact claims for sex-pay discrimination); see also Joseph E. Broadus, *No Disparate Impact: Gunther's Significant but Ignored Limitations on Sex-Based Pay Disparity Claims under Title VII*, 12 NAT'L BLACK L.J. 10, 10 (1990) (observing that there is no disparate-impact liability for sex differences in pay because of *Gunther*). The failure of Title VII to prohibit employment practices with a disparate impact on women with respect to pay is why proposed legislation would recognize such a claim. See The Paycheck Fairness Act, S.270, 116th Congress (2019–2020).

46. *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that the Commerce Clause did not authorize the Violence Against Women Act (VAWA)); *Id.* at 621 (holding that the Equal Protection Clause did not authorize the VAWA because equal protection only applies to *state* action).

responsibilities.⁴⁷ Equality advocates also criticize inadequate access to and protection for family planning and reproductive rights.⁴⁸

Thus, despite a range of constitutional and legislative protections against sex discrimination, sex inequality remains significant. The interest of equality advocates in the ERA is accordingly understandable.

II. THE ERA AND ITS SUPPORTERS' ASPIRATIONS

A. *The ERA's Text and Brief History*

The ERA's text reads:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or 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.⁴⁹

Drafted by Alice Paul and Crystal Eastman,⁵⁰ the ERA was first proposed in 1923⁵¹ following the adoption of the 19th Amendment in 1920.⁵² After decades of congressional inaction, Congress approved the ERA in 1972 with the requisite two-thirds' consent of each chamber.⁵³

47. See Nicole Buonocore Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiver Conundrum for "Real" Workers*, 39 STETSON L. REV. 777, 777-78, 781-82 (2010) ("Most employers build workplaces around norms and policies designed for employees who can work full-time and overtime with no interruptions throughout their entire career. In other words, most workplaces are designed around men.").

48. See KHIARA BRIDGES, *REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION* 37-60 (2011).

49. H.R.J. Res. 208, 92nd Cong. (1971).

50. See JULIE SUK, *WE THE WOMEN: THE UNSTOPPABLE MOTHERS OF THE EQUAL RIGHTS AMENDMENT* 28 (2020).

51. Deborah Machalow, *The Equal Rights Amendment in the Age of #metoo*, 13 DEPAUL J. FOR SOC. JUST. 1, 1 (2019); Ruth Bader Ginsburg, *The Need for the Equal Rights Amendment*, 59 A.B.A. J. 1013, 1013 (Sept. 1973).

52. *The 19th Amendment*, Online Exhibits, NAT'L ARCHIVES, <https://www.archives.gov/exhibits/featured-documents/amendment-19> (last visited Jan. 12, 2021).

53. Ginsburg, *supra* note 51, at 1013; Joan A. Lukey & Jeffrey A. Smagula, *Do We Still Need A Federal Equal Rights Amendment?*, 44 BOSTON B.J. 10, 28 (Jan./Feb. 2000) ("The ERA was introduced in every session of Congress from 1923 to 1972, when it was passed by Congress and sent to the states for ratification. The ratification process burst out of the starting gate, with the ERA garnering 22 of the necessary 38 state ratifications in its first year, and eight more in 1973. By 1976, however, only three additional states had ratified the proposed amendment. Congress extended the initial seven-year time limit by three years, but by the June 30, 1982 deadline, the ERA fell three states short of the 38 states required for ratification. The amendment has been reintroduced in every Congressional session since that time.").

Although the amendment did not contain a time limit for ratification (unlike some amendments),⁵⁴ the legislation sending the amendment to the states set a seven-year time limit, expiring in 1979.⁵⁵ Thirty-five states voted in favor of the ERA by 1979,⁵⁶ three states shy of the required thirty-eight. Congress passed legislation purporting to extend the time limit to 1982, but no additional states ratified it and five states purported to rescind their earlier ratification by 1982.⁵⁷

After the ERA spent decades in dormancy, ERA advocates gained inspiration to seek ratification when, in 1992, the congressional Archivist accepted as validly ratified the 27th Amendment.⁵⁸ Proposed by James Madison, the amendment was sent to the states by Congress for ratification in 1789 but the 38th state did not approve it until 1992, over two hundred years after the ratification process began.⁵⁹ The acceptance of the “Madison Amendment” suggested that the ERA might still be adopted despite the passage of time, at least if Congress were to pass legislation extending or eliminating the deadline. By early 2020, three states, Nevada (2017), Illinois (2018) and Virginia (2020), voted to ratify the ERA, making thirty-eight states to have voted for the ERA.⁶⁰ The federal House of Representatives then passed a resolution in 2020 to remove the 1982 deadline, but the Senate has not taken any action on it.⁶¹ Though the expiration of Congress’s deadline and the purported rescission by some states raise questions about the

54. See U.S. CONST. amend. XVIII, § 3 (stating that the proposed article “shall be inoperative” unless ratified by the states “[a]s provided in the Constitution, within seven years from the date of the submission . . . to the states by the Congress.”); see also U.S. CONST. amend. XX, § 6 (stating that three-fourths of state legislatures must ratify the amendment within “seven years from the date of its submission” or it would be inoperative); see also U.S. CONST. amend. XXI, § 3 (setting a seven-year time limit for the states to ratify the amendment, otherwise it would become inoperative); see also U.S. CONST. amend. XXII, § 2 (explaining that the amendment would be inoperative unless ratified by the states within seven years of its submission by Congress).

55. See Lukey & Smagula, *supra* note 53, at 10.

56. *Id.*

57. H.R.J. Res. 638, 95th Cong., 92 Stat. 3799 (1978) (extending the ERA ratification deadline to June 30, 1982); DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995, at 408–09, 415 (naming the rescinding states as Idaho, Kentucky, Nebraska, Tennessee, and South Dakota).

58. 138 CONG. REC. 11,656 (1992).

59. Gerard N. Magliocca, *Buried Alive: The Reboot of the Equal Rights Amendment*, 71 RUTGERS U. L. REV. 633, 639 (2019).

60. Ryan W. Miller, *3 State Attorneys Sue to Recognize ERA as 28th Amendment*, USA TODAY (Jan. 30, 2020), <https://www.usatoday.com/story/news/nation/2020/01/30/era-virginia-illinois-nevada-attorneys-general-announce-lawsuit/4618804002/>.

61. Removing the Deadline for the Ratification of the Equal Rights Amendment, H.R.J. Res. 79, 116th Cong. (as passed by H.R., February 13, 2020).

ERA's legal status, this article focuses on what the likely effect of the ERA would be on women's equality if it were incorporated into the Constitution.

B. ERA Aspirations

ERA supporters, whose diverse views are grouped here for simplicity, believe that the ERA would advance women's equality in three key ways. First, the ERA should directly change the self-executing operation of the Constitution in ways that promote women's equality.⁶² Second, the ERA should indirectly promote women's equality by authorizing Congress to enact equality-advancing laws that Congress currently lacks constitutional authority to enact.⁶³ And third, the ERA should establish greater legal stability for and recognition of the equal rights of women.⁶⁴

One of the direct, self-executing effects anticipated by ERA supporters is that the ERA would prohibit laws that have an unintentional disparate impact against women unless the government can demonstrate a strong justification for such laws.⁶⁵ Thus, for example, a state or federal employer's practice of setting salary of new employees based on prior salary or barring employees from sharing salary information with coworkers would be legally vulnerable under the ERA as both tend to have a disparate impact on women's pay.⁶⁶

62. See *supra* notes 40 to 46 and accompanying text; see also *infra* notes 73 to 90.

63. See Wharton, *supra* note 44, at 1209 (describing how *United States v. Morrison* illustrates that “[t]he conservative majority of the Supreme Court has limited the power of Congress to pass laws protecting sex equality and other individual rights even in instances where an abysmal record of state failure in enforcing equality exists.”).

64. See Ginsburg, *supra* note 51, at 1014 (listing a number of state laws that would be “destined for the scrap heap” should the ERA pass, including ones that expressly mandate that only men can occupy certain government positions, like governor and secretary of state); see also Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 884 (1971) (explaining how the adoption of a constitutional amendment has a political and psychological impact that serves to strengthen efforts to abolish existing “[d]iscriminatory laws, doctrines, attitudes and practices [that] are set deep in our legal system”).

65. See Serena Mayeri, *A New E.R.A. or A New Era? Amendment Advocacy and the Reconstitution of Feminism*, 103 NW. U. L. REV. 1223, 1226 (2009) (explaining that by the early 1980s, proponents of the ERA wanted “[a] constitutional response not only to intentional discrimination . . . but also to the unintentional perpetuation of inequality through laws and policies that appeared neutral on their face—a conception of equality that included . . . remedies for disparate impact discrimination . . .”); Stephens, *supra* note 37, at 416 (arguing that the ERA would eliminate the need to provide evidence of purpose or intent to discriminate in order to “[i]nvalidate governmental action that has a disparate impact on gender.”).

66. See generally Nancy Levit & Joan Mahoney, *The Future of Comparable Worth Theory*, 56 U. COLO. L. REV. 99 (1984) (explaining that these salary-setting practices based on prior wages

In addition to its direct effect, some ERA supporters argue that the ERA would empower Congress to enact laws that Congress currently cannot. In *United States v. Morrison*,⁶⁷ the Court invalidated the provision of the Violence Against Women Act (VAWA) that created civil liability for private individuals who perpetrate gender-motivated violence.⁶⁸ The Court held that Congress lacked authority under the Commerce Clause and the Equal Protection Clause to regulate private violence that is not part of economic activity.⁶⁹ Kate Kelly, a prominent ERA supporter with *Equality Now*, contends that the ERA would empower Congress to re-enact VAWA under Section 2 of the ERA.⁷⁰ Kelly also predicts that the ERA could validate the congressional ban on female genital mutilation,⁷¹ which a federal court recently invalidated under *Morrison*, because such a practice by private actors is not “economic activity” and thus not within Congress’s Commerce Clause power to regulate.⁷²

Finally, ERA supporters claim that the ERA would promote stability and recognition of women’s equality.⁷³ Stability would be advanced by (1) expressly protecting sex equality in the Constitution, thereby making it less susceptible to dilution through judicial

have a disparate impact on women due to historic discrimination and should be evaluated under a disparate impact theory of liability, which would not require a showing of intentional discrimination); Torie Abbott Watkins, *The Ghost of Salary Past: Why Salary History Inquiries Perpetuate The Gender Pay Gap And Should Be Ousted As A Factor Other Than Sex*, 103 MINN. L. REV. 1041 (2018) (identifying disparate impact against women of considering past salary); Brian P. O’Neill, *Pay Confidentiality: A Remaining Obstacle to Equal Pay after Ledbetter*, 40 SETON HALL L. REV. 1217 (2010) (identifying pay confidentiality policies as source of unequal pay).

67. 529 U.S. 598 (2000).

68. *Id.* at 598–99 (holding that neither the Commerce Clause nor § 5 of the 14th Amendment give Congress the authority to enact a civil federal remedy for the victims of gender-motivated violence, as provided for in the Violence Against Women Act (VAWA)).

69. *Id.* at 613 (concluding that “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity”).

70. See “A New Era for the Equal Rights Amendment,” *supra* note 37.

71. *Id.*

72. See *United States v. Jumana Nagarwala et al.*, No. 17-cr-20274 (E.D. Mich. Nov. 20, 2018) (invalidating federal ban on genital mutilation because not within Congress’s Commerce Power nor is it necessary and proper to enforce a treaty).

73. See Ginsburg, *supra* note 51, at 1014 (arguing that “major legislative revision” to existing statutes that discriminate on the basis of sex will “probably” not occur “without the impetus of the Equal Rights Amendment”); see also Brown et al., *supra* note 64, at 885 (“The demand for equality of rights before the law is only a part of a broader claim by women for the elimination of rigid sex role determinism. And this in turn is part of a more general movement for the recognition of individual potential, the development of new sets of relationships between individuals and groups, and the establishment of institutions which will promote the values and respect the sensibilities of all persons.”).

interpretation⁷⁴ and (2) shielding sex equality from the risk that Congress could weaken or repeal current statutory protections.⁷⁵ For similar reasons, some also believe that reproductive rights would be more secure under the ERA than under current law, which relies on judicial interpretations of the Due Process Clause.⁷⁶

The ERA would also serve a symbolic or expressive purpose: It would explicitly recognize that women are equal to men. Justice Ginsburg, among others, has observed that including sex in the Constitution would establish an explicit constitutional value that women are equal to men.⁷⁷ This principle is important in itself, but it

74. See, e.g., Martha F. Davis, *The Equal Rights Amendment: Then and Now*, 17 COLUM. J. GENDER & L. 419, 441–42 (2008) (arguing that ERA lawsuits would be subject to strict scrutiny, which is less open to interpretation than the current intermediate scrutiny standard and would lead to less judicial discretion in how the standard is applied); Wharton, *supra* note 44, at 1213 (“Lower courts, commentators, and even Supreme Court Justices, have criticized the intermediate standard as vague, poorly defined and malleable, providing insufficient guidance in individual cases and giving broad discretion to individual judges in deciding the importance of an interest and whether the classification is substantially related.”).

75. Jessica Neuwirth, *Time for the Equal Rights Amendment*, 43 N.Y.U. REV. L. & SOC. CHANGE 155, 157 (2019) (“The legal framework for addressing sex inequality is a patchwork quilt of legislation that is full of holes [L]egislation can be rolled back with any change in the political winds of Congress.”); Lauren Walker, *After Nearly a Century, 2020 May Usher in the Equal Rights Amendment*, TRUTHOUT (Dec. 20, 2019), <https://truthout.org/articles/after-nearly-a-century-2020-may-usher-in-the-equal-rights-amendment/>.

76. See Stephens, *supra* note 37, at 414–16, 422 (citing the Supreme Court’s decisions in *Geduldig v. Aiello*, 417 U.S. 484 (1974), and *Harris v. McRae*, 448 U.S. 297 (1980), where the Court refused “[t]o 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” and arguing that “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”); see also Eleanor Mueller & Alice Miranda Ollstein, *How the Debate Over the ERA Became a Fight Over Abortion*, POLITICO (Feb. 11, 2020), <https://www.politico.com/news/2020/02/11/abortion-equal-rights-amendment-113505> (“Advocates for the ERA acknowledge that abortion needs to be part of the conversation. Any debate over women’s rights, they say, must also address control over when and whether to have children.”).

77. Nikki Schwab, *Ginsburg: Make ERA Part of the Constitution*, U.S. NEWS & WORLD REP. (Apr. 18, 2014), <https://www.usnews.com/news/blogs/washington-whispers/2014/04/18/justice-ginsburg-make-equal-rights-amendment-part-of-the-constitution> [<https://perma.cc/BD9V-FXCB>] (speaking to an audience at the National Press Club, Justice Ginsburg said “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 is a basic principle of our society.”); Brown et al., *supra* note 64; Catharine A. MacKinnon, *Toward a Renewed Equal Rights Amendment: Now More Than Ever*, 37 HARV. J. L. & GENDER 569, 579 (2014) (“[A]n ERA would provide an inspiration and impetus for public policy and a powerful symbolic support for women’s equality at all social levels at the apex of the legal system in a culture in which law has power and meaning, and sometimes leads.”); Neuwirth, *supra* note 75 (“[A]mending the Constitution to include sex equality as a fundamental human right will send a clear public message that women are no longer to be treated as second-class citizens. The intentional omission of women has perpetuated a lack of respect for women and engendered a culture that allows sexual harassment to continue unchecked.”). Although Justice Ginsburg

could also reinforce and strengthen government's and society's resolve to enforce existing laws and adopt new laws to achieve women's equality.⁷⁸

Women's equality is undoubtedly a compelling interest of constitutional magnitude. The legal and policy reforms to which ERA supporters aspire are promising, if they could be implemented. Regrettably, the ERA would probably not facilitate such reforms, but rather, as explained below,⁷⁹ would likely make them more difficult to pursue.

III. THE ERA'S LIKELY EFFECTS

A. *The Likelihood of Strict Scrutiny*

The ERA provides that "Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex."⁸⁰ This would effectively ban intentional government discrimination against women in legislation or executive action. The ERA probably would not ban sex discrimination absolutely, but would likely subject such discrimination to strict scrutiny, which, as with race discrimination, would require government to justify sex discrimination as necessary to achieve a compelling interest.⁸¹ Strict scrutiny differs from the intermediate scrutiny in at least four important ways. First, the government's interest must be "compelling" and not just "important."⁸²

supported adding the ERA to the Constitution, it should be acknowledged that she believed that the process would need to begin anew because of the congressional deadline on the ERA that expired; Ariane de Vogue, *Ruth Bader Ginsburg says deadline to ratify Equal Rights Amendment has expired: 'I'd like it to start over'*, CNN (Feb. 10, 2020), <https://www.cnn.com/2020/02/10/politics/ruth-bader-ginsburg-equal-rights-amendment/index.html> (Responding to a question from a moderator at a Georgetown Law event, Justice Ginsburg said she "would like to see a new beginning" for the ERA and would "like it to start over." Referring to comments she made at a separate event at Georgetown in 2019, the article also quotes Justice Ginsburg as saying, "I hope someday it will be put back in the political hopper, starting over again, collecting the necessary number of states to ratify it.").

78. Brown et al., *supra* note 64.

79. See *infra* Sections III.B.3 and III.C.2.

80. See *supra* text accompanying note 49.

81. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989).

82. *Compare Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that "racial classifications . . . must be analyzed . . . under strict scrutiny . . . [S]uch classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests") with *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)) (requiring the state to show, under intermediate scrutiny "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives").

Second, the means used must be “necessary” or “narrowly tailored,” whereas intermediate scrutiny requires only that the means be “substantially related” to achieving the government’s interest.⁸³ Third, strict scrutiny only permits remedying discrimination if it can be identified “with particularity”; mere generalized statistics indicating historical or “societal” discrimination are insufficient.⁸⁴ By contrast, intermediate scrutiny has permitted the government to remedy past discrimination against women based on generalized, society-wide statistics of sex inequality.⁸⁵ Fourth, strict scrutiny does not permit quotas.⁸⁶ Intermediate scrutiny does appear to accept quotas, at least those that are entirely for one sex. Consider that single-sex settings such as restrooms, locker rooms, prisons, dorm rooms, sports, etc., amount to exclusive quotas for each sex. Similarly, although the Court invalidated the Virginia Military Institute’s all-male admissions quota, it did so for reasons unique to the case, indicating that the Court was not invalidating *all* single-sex schools.⁸⁷ Given that the Court upholds quotas that reserve particular settings exclusively for one sex, it seems likely that the Court would, under intermediate scrutiny, uphold milder quotas that merely guarantee some percentage to each sex.

83. *Adarand*, 515 U.S. at 227; *Virginia*, 518 U.S. at 533.

84. *See, e.g., Croson*, 488 U.S. at 485 (applying strict scrutiny to a race-based measure, the Court stated that neither “broad-brush assumptions of historical discrimination” nor “societal discrimination” suffice to establish a compelling interest. Instead, strict scrutiny requires the government to demonstrate with particularity the discriminatory actions that a discriminatory preference is expected to compensate for).

85. *See, e.g., Califano v. Webster*, 430 U.S. 313, 317 (1977) (citing *Schlesinger v. Ballard*, 419 U.S. 498, 506–510 (1975)) (upholding law allowing women to exclude more low-earning years for social security retirement benefits because “[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women [is] an important governmental objective”); *see also Kahn v. Shevin*, 416 U.S. 351, 353 (1974) (upholding state law allowing widows, not widowers, a property tax exemption because, “[w]hether from overt discrimination or from the socialization process,” such women faced more difficult barriers in the job market than widowers).

86. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (citing *Univ. of Cal. v. Bakke* 438 U.S. 265, 315–17 (1978)) (reinforcing that to satisfy the “narrowly tailored” requirement of strict scrutiny “a race-conscious admissions program cannot use a quota system . . . [A] university may consider race . . . only as a ‘plus’ in a particular applicant’s file . . . [U]niversities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks”).

87. *Virginia*, 518 U.S. at 533 n.7, 535 (1996) (affirming that single-sex education provides “pedagogical benefits to at least some students . . . and that reality is uncontested in this litigation.” Justice Ginsburg goes on to state that creating a diverse array of educational options can justify the existence of a single-sex program if that is in fact the motive behind the design. She also clarifies that the court is addressing “specifically and only an educational opportunity recognized . . . as unique, an opportunity available only at Virginia’s premier military institute, the Commonwealth’s sole single-sex public university or college.”).

Unlike intermediate scrutiny, then, strict scrutiny virtually always invalidates the discriminations to which it is applied, especially discriminations against historically disadvantaged groups.⁸⁸ It is highly unlikely that any discrimination against women would survive strict scrutiny. Accordingly, the ERA would prohibit intentional discrimination by government against women in hiring, pay and promotions, by public schools and public institutions of higher education, and by government discrimination through harassment or violence.

Why strict scrutiny would likely apply to state-sponsored sex discrimination under the ERA warrants explanation as strict scrutiny is a central premise of this article's claims. One cannot predict with certainty what test the Court would apply to sex distinctions under the ERA. That many ERA supporters assumed that strict scrutiny would apply⁸⁹ does not necessitate that result. The Court could choose an approach to state-sponsored sex discriminations from among several options, including absolute, strict, intermediate, or rational basis scrutiny. By absolute scrutiny, I mean a categorical ban on all state-sponsored discriminations on account of sex with no exception. Alternatively, the Court might apply absolute scrutiny with specific exceptions, such as for discriminations based on physical characteristics unique to one sex, as a few states have done under state constitutional law.⁹⁰ Strict or intermediate scrutiny has already been explained.

88. Legal scholar Gerald Gunther famously described strict scrutiny as "strict in theory, fatal in fact." The Court denies that strict scrutiny is always fatal (*see Adarand*, 515 U.S. at 237), and it has upheld race-based affirmative action in higher education under strict scrutiny. *See Grutter v. Bollinger*, 539 U.S. 306, 343 (2003); *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2208 (2016). Many observers believe the Court would not uphold affirmative action for remedial purposes. *See Rhonda V. Magee Andrews, Affirmative Action after Grutter: Reflections on a Tortured Death, Imagining a Humanity-Affirming Reincarnation*, 63 LA. L. REV. 705, 710–11 (2003) (arguing that the Court should use affirmative action as a remedial tool and listing reasons why continued pressure is needed to convince the courts to do so). Observers also believe its future in higher education is in serious doubt since Justice Kennedy left the Court. *See Scott Jaschik, The Impact of Justice Kennedy*, INSIDE HIGHER ED. (June 28, 2018), <https://www.insidehighered.com/news/2018/06/28/departure-justice-kennedy-could-erase-supreme-court-majority-backing-consideration> ("[Justice Kennedy] wrote key decisions on affirmative action and other topics that matter to colleges. Kennedy's departure could erase the Supreme Court majority backing the right of colleges to consider race in admissions.").

89. *See Gail Heriot, The Equal Rights Amendment: Back for an Encore Performance*, 9 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 29, 29 (2008) ("Leaders of the ratification movement argued that the amendment would be interpreted by the courts to impose a strict scrutiny standard on all laws that discriminate on the basis of sex like that already imposed on racially discriminatory laws."). *See also supra* text accompanying notes 37 and 74.

90. *See Davis, supra* note 74, at 433 (noting, for example, that Washington State adopted an absolute scrutiny test with exceptions for characteristics that distinguish between the sexes).

Finally, the Court could apply rational basis scrutiny, which would uphold state-sponsored sex discrimination unless a challenger can prove that the discriminatory law does not rationally serve any legitimate governmental interest.

For several somewhat overlapping reasons, the Court is likely to apply strict scrutiny or, worse, absolute scrutiny to state-sponsored sex discrimination. First, it is implausible that the Court would apply rational basis scrutiny because that scrutiny is typically applied to discriminations that are not constitutionally suspect. Such a result would subject state-sponsored sex discrimination to a less exacting standard than is currently applied under the Equal Protection Clause and would instead apply the standard applicable to non-suspect classifications, such as regulations of television cable companies⁹¹ and opticians.⁹² It also seems highly unlikely that the Court would apply intermediate scrutiny as that would mean that the ERA would make no change regarding how the Court analyzes laws that discriminate on account of sex. The Court already applies intermediate scrutiny to sex discrimination under the Equal Protection Clause, so applying the same scrutiny under the ERA means that the ERA would merely duplicate existing law rather than changing it. Thus, the Court is likely to apply either strict scrutiny or absolute scrutiny.

Other reasons support the likelihood that the Court would apply strict scrutiny over a more lenient test. First, the text of the ERA is categorical. Unlike the Equal Protection Clause, which speaks of “equal protection” in general terms, which could imply some flexibility for interest balancing, the ERA specifically bans the denial or abridgment of rights “on account of sex,” without exception.⁹³ Nor does it limit the ban to particular contexts, such as public education, employment or public contracting,⁹⁴ but instead applies across the

91. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955).

92. *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 314–15 (1993).

93. See 118 Cong. Rec. 9568 (1972) (statement of Sen. Bayh) [hereinafter *Statement*] (“[T]he basic principle on which the Amendment rests may be stated shortly: sex should not be a factor in determining the legal rights of men or of women.”); see also *Brake*, *supra* note 14, at 956–58 (arguing that a string of Supreme Court decisions “may indicate the Court’s willingness to reconsider strict scrutiny for gender classifications in the future” (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982); *J.E.B. v. Alabama*, 511 U.S. 127, 154 (1994); *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring))).

94. Several states have amended their state constitutions to prohibit discriminating against or granting preferential treatment to individuals on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, and public contracting. See, e.g., CAL. CONST. Sec. 31; NEB. CONST. Art. I-30; OKLA. CONST. Art. 2, Sec. 36A; MICH. CONST. Art. I, Sec. 26; ARIZ. CONST. Art. 2, Sec. 36. Gail Harriot suggests a similar scope for the ERA. Harriot,

board to “equal of rights,” implying no exceptions.⁹⁵

Second, the Court’s approach to racial equality claims under the Equal Protection Clause suggests how the Court would approach sex equality claims under the ERA. The Court views the central purpose of the Equal Protection Clause as prohibiting race discrimination. Indeed, Justice Scalia interpreted the Equal Protection Clause’s application to race as so clear as to constitute a *textual* prohibition of race discrimination.⁹⁶ Likewise, the central purpose of the ERA is plainly to prohibit sex discrimination, a purpose expressed by its text. “Sex” would thus likely be a suspect classification under the ERA and sex-based distinctions would be subject to strict scrutiny.

It is true that the Court has interpreted “equal protection” to apply only intermediate scrutiny to sex discrimination, so one might believe that current doctrine is more useful to predict the impact of the ERA than equal protection doctrine as applied to race. But the lesser scrutiny applied to sex is likely due to differences between race and sex that has led the Court to tolerate sex distinctions—many of which benefit women—more than the Court tolerates race distinctions. The ERA would likely eliminate or minimize such differences. The Court has not explained fully why sex discrimination receives a lesser level of scrutiny than race discrimination, but the Court in *United States v. Virginia* offered some explanation:

The heightened [intermediate] review standard our precedent establishes does not make sex a proscribed classification. Supposed “inherent differences” are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring: “[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.”

supra note 89 (proposing that a new ERA should apply only to public education, employment and contracting).

95. Brown et al., *supra* note 64, at 872, 887, 896 (explaining that the proponents of the ERA have always advocated that the ERA is a “broad mandate for the unified treatment of men and women” and have defined “rights” to include “all forms of privileges, immunities, benefits and responsibilities of citizens.” However, the authors argue that the ERA would not foreclose legislatures from “continu[ing] to classify on the basis of real differences in the life situations and characteristics” of individuals and would enable Congress to pass laws based on physical characteristics unique to one sex or laws based on privacy considerations.).

96. See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 980 n.1 (1992) (Scalia, J., dissenting) (“The Court’s suggestion . . . that adherence to tradition would require us to uphold laws against interracial marriage is entirely wrong. Any tradition in that case was contradicted by a *text* — an Equal Protection Clause that explicitly establishes racial equality as a constitutional value.” (emphasis in original, cleaned up)).

“Inherent differences” between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.⁹⁷

The Court thus justified strict scrutiny for racial classifications based on race being a proscribed classification, *i.e.*, virtually always forbidden; whereas intermediate scrutiny for sex classifications accepts that sex is sometimes an acceptable ground for differential treatment, albeit not when used to perpetuate the subordinated status of women. I have offered the following additional observations for why race currently receives higher scrutiny than sex:

The greater suspectness accorded racial over sex-based classifications has not been clearly explained, but it may reflect a perception by the Court that discrimination against minorities has been more invidious, that the insularity of minority communities makes empathy with their interests less likely to develop on the part of the majority, that their small population undermines their ability to protect themselves in the political process, and that “real differences” between the sexes make it more likely that there are legitimate reasons to differentiate on the basis of sex than on the basis of race.⁹⁸

The foregoing observations may explain the Court’s current approach to sex discrimination under the Equal Protection Clause. The ERA’s express and categorical prohibition of discrimination on account of sex would, however, likely eliminate the Court’s ambivalence toward applying strict scrutiny to sex discrimination. The ERA, by its express terms, prohibits government from discriminating “on account of sex,” period. As such, the Court would have difficulty explaining why it should subject sex discrimination to a more permissive standard than the strict scrutiny it applies to race discrimination. Indeed, given that the ERA’s prohibition of sex discrimination is more textually categorical than the general language of the Equal Protection Clause, the Court may find that absolute scrutiny is more justified than strict scrutiny under the ERA, let alone intermediate scrutiny.⁹⁹

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

98. Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 321 (2011).

99. The Equal Protection Clause reads “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within

Still other doctrinal indicators tend to predict strict scrutiny for sex discriminations analyzed under the ERA. In *Frontiero v. Richardson*, a four-justice plurality of the Court applied strict scrutiny to a sex discriminating law.¹⁰⁰ Three other justices concurred in the judgement but did not join the strict scrutiny analysis by the four-justice plurality because they believed that the ERA, whose ratification was then pending in the states, would compel application of strict scrutiny.¹⁰¹ Thus, seven justices believed that strict scrutiny should apply to sex discrimination, four under the Equal Protection Clause and three if the pending ERA were ratified.

Virginia also supports applying strict scrutiny for sex discrimination under the ERA. The Court explained in that case, as quoted above,¹⁰² that sex only receives intermediate scrutiny because sex, unlike race, is not a proscribed classification.¹⁰³ The ERA would make sex a proscribed classification, implying that sex-based distinctions should be treated as presumptively unconstitutional as race-based distinctions. The Court would also have difficulty explaining why a constitutional amendment explicitly proscribing sex discrimination would not demonstrate a level of skepticism for sex discrimination equal or close to the high standard of scrutiny for race discrimination. Although race discrimination is not expressly prohibited by the Equal Protection Clause, all justices agree that the Equal Protection Clause's primary concern is race discrimination. The Court's application of strict scrutiny to race discrimination, based on an understanding that race discrimination is prohibited by the Fourteenth Amendment,¹⁰⁴

its jurisdiction the equal protection of the laws." US CONST. amend. XIV, § 1. The proposed ERA reads in part "Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex." H.R.J. Res. 208, 92nd Cong. (1971).

100. 411 U.S. 677, 688 (1973).

101. *Id.* at 692 (Powell, J., concurring).

102. *See supra* note 97 and accompanying text.

103. *See* United States v. Virginia, 518 U.S. 515, 533 (1996) (noting that sex is not a "proscribed classification"). By "proscribed" classification, the Court in *Virginia* seems to mean that race, unlike sex, is virtually always prohibited as a basis of classification, whereas sex, though generally improper, can be used for equality-advancing purposes.

104. Justice Thomas's opposition to virtually all state-sponsored race distinctions is well known. The views of the other originalists on the Court, namely, Justices Gorsuch and possibly Barrett, regarding race distinctions remain to be seen. Court observers plausibly predict, however, that they will be very skeptical of state-sponsored uses of race, including for so-called benign purposes, such as affirmative action. Vinay Harpalani, *The Supreme Court and the Future of Affirmative Action*, AM. CONST. SOC'Y (Oct. 28, 2019), <https://www.acslaw.org/expertforum/the-supreme-court-and-the-future-of-affirmative-action/> ("The Court now has a solid conservative majority, with three of the Justices having previously voted to strike down race-conscious admissions policies Justices Neil Gorsuch and Brett Kavanaugh are also widely thought to

suggests that strict scrutiny would apply to sex discrimination if it were *explicitly* prohibited by the Equal Rights Amendment.

Applying strict scrutiny to sex discrimination is also supported by the Court's famous *Carolene Products* footnote four, especially its first paragraph:

There may be narrower scope for operation of the presumption of constitutionality *when legislation appears on its face to be within a specific prohibition of the Constitution*, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. [citing First Amendment cases]

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. [citing cases involving the rights to vote, disseminate information, organize, assemble peaceably]

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities[;] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry . . .¹⁰⁵

Sex discrimination does not comfortably satisfy the second and third paragraphs because, respectively, women have legal access to the political process and women are neither insular nor a minority, although women have certainly been the object of prejudice. The ERA

oppose such policies. Barring an unexpected vote from one of these Justices, a cert grant [of *Students for Fair Admissions v. Harvard*] will likely mean the end of affirmative action in university admissions. Even if the Court does not abrogate the compelling interest in diversity altogether, it could still require universities to fully exhaust race-neutral alternatives to attain this diversity. This would make *Grutter's* narrow tailoring standard virtually impossible to meet and effectively accomplish the same end.”); *How Amy Coney Barrett Would Reshape the Court and the Country*, POLITICO MAG. (Sept. 26, 2020), <https://www.politico.com/news/magazine/2020/09/26/amy-barrett-sotus-legal-experts-422028> (Professor William Araiza of the Brooklyn School of Law reasons that with the confirmation of Justice Barrett, the solid 6-3 conservative majority bloc could lead Chief Justice Roberts to “embrace more aggressive transformation in the law” and “trigger change across an entire range of issues” including affirmative action. Professor Mark Tushnet of Harvard Law School predicts that the Court, with the addition of Justice Barrett, will hold race-based affirmative action policies at public universities unconstitutional).

105. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938) (emphasis added).

would, however, place sex discrimination firmly within the first paragraph because it would make, “on its face,” a right against discrimination “on account of sex” an express constitutional right. The Court has not consistently followed *Carolene Products* footnote four so strict scrutiny under the ERA is not guaranteed simply because sex discrimination would be expressly prohibited.¹⁰⁶ However, the Court’s approach to express rights has often been stricter than strict scrutiny, categorically protecting certain rights.¹⁰⁷ The ERA’s express protection against discrimination on account of sex is thus probably more likely to receive some level of strict or absolute scrutiny than the more flexible balancing test reflected in intermediate scrutiny under the Equal Protection Clause.

Originalism also supports strict or absolute scrutiny under the ERA. The prevailing approach among originalists today is to interpret constitutional text according to its public meaning at the time of the text’s ratification. “At its most basic,” Professor Keith Whittington explains, “originalism argues that the discoverable public meaning of the Constitution at the time of its initial adoption should be regarded as authoritative for purposes of later constitutional interpretation.”¹⁰⁸ The text, interpreted in accordance with evidence of contemporary public meaning, could support an absolute ban on sex distinctions, but at the very least it would support strict scrutiny.

First, originalists typically prioritize constitutional text. The ERA explicitly prohibits abridgement or denial of rights “on account of sex,” so an originalist may well interpret its public meaning to be that the government is categorically prohibited from using sex to make legal distinctions. The ERA does not expressly admit of any exception for denial or abridgement of equal rights on account of sex. Such a strict reading would likely invalidate all sex-conscious state efforts to promote women’s equality.

Contemporary evidence during the 1970s, the primary period of the ERA’s ratification, supports this interpretation. ERA supporters claimed that the ERA would result in strict scrutiny or something more

106. Adam Winkler, *Fundamentally Wrong about Fundamental Rights*, 23 CONST. COMMENT. 227, 228–29 (2006) (explaining that only two of the first ten amendments referred to in *Carolene Products* Footnote Four have triggered strict scrutiny at the Supreme Court level: the First and Fifth Amendments).

107. *Id.* at 229–32 (explaining that the Court has interpreted most of the rights found in the Bill of Rights according to “categorical rules” rather than by applying strict scrutiny).

108. Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 377 (2013).

absolute.¹⁰⁹ After sex discrimination began receiving intermediate scrutiny under the Equal Protection Clause, ERA supporters began insisting that strict scrutiny was necessary to afford women full equality.¹¹⁰

Although it is unlikely that applying strict scrutiny under *the Equal Protection Clause* reflects the Fourteenth Amendment’s original public meaning (strict scrutiny was not developed until the mid-twentieth century), strict scrutiny may accurately reflect the public meaning of *the ERA*—considering that ERA supporters sought heightened scrutiny as a goal for the amendment. Furthermore, originalists tend to support judicially-crafted tests, such as strict scrutiny, when the test promotes results consistent with the original public meaning.¹¹¹

109. See Brown et al., *supra* note 64, at 900 (“The courts will have to maintain a strict scrutiny of [sex] classifications if the guarantees of the Amendment are to be effectively secured.”); Davis, *supra* note 74, at 422 (“[T]he amendment would result in strict scrutiny for governmental policies that discriminate based on sex and lead to a greater consideration of the particular impact of decisions on women even in the private sector.”) Wharton, *supra* note 44, at 1202 (“In the 1970s . . . it seemed possible that either through judicial interpretation of the Equal Protection Clause of the Fourteenth Amendment or ratification of the proposed Federal ERA, sex equality would receive rigorous protection under the Federal Constitution.”).

110. E.g., Stephens, *supra* note 37, at 411 (pointing to Justice O’Connor’s dissent in *Nguyen v. INS*, 533 U.S. 53 (2001), as a recent example of where the application of the intermediate scrutiny standard operated to uphold a law that reflected the sexist assumption that a child born out of wedlock was the sole responsibility of the mother, which is exactly the type of sex-based stereotype intermediate scrutiny is supposed to strike down); *id.* at 426–27 (“Women continue to be treated unequally under the law . . . because the intermediate scrutiny standard permits gender discrimination . . .”).

111. See Kermit Roosevelt III, *Interpretation and Construction: Originalism and its Discontents*, 34 HARV. J. L. & PUB. POL’Y 99, 101 (2011) (arguing that originalist judges seek to interpret the Constitution as it was understood by the people who ratified it, but in some cases, where the drafters of an amendment included language with “a fixed meaning but a floating set of applications”, as is the case with the Equal Protection Clause, this approach cannot be strictly adhered to. Instead, the judge has to contemplate “whether a particular practice is out of step with current views about equality.” As a result, judges have developed various tests, including strict scrutiny, to determine if a law adheres to the People’s intention when they ratified an amendment with “flexible” and “adjusting” constraints. Reaching the “ratifier-approved answer” is not the sole motivation for creating tests like scrutiny test, but it is probably the most attractive to originalists.); see also Randy E. Barnett, *Interpretation And Construction*, 34 HARV. J. L. & PUB. POL’Y 65, 70 (2011) (explaining that when the text of an amendment is “vague” or “ambiguous”, originalists choose from a number of constitutional construction methods based on their personal “normative reasons” for preferring originalist interpretation to begin with. If an originalist judge’s primary motivation is to “protect the background rights retained by the people”, the judge will likely favor rules of construction that contain a “presumption of liberty that places the burden on the government to justify its restrictions on liberty as necessary and proper.”). Barnett’s description of originalist decision making closely parallels the strict scrutiny test which requires the government to demonstrate that any infringement of equal protection guarantees be “necessary” or “narrowly tailored” to achieve a “compelling interest.” See *supra* note 38 and accompanying text. See also Fallon, *infra* note 117, at 1334–35 n.358 (“The history of strict judicial scrutiny is a case study in judicial efforts to implement the Constitution through

Applying strict scrutiny would arguably advance the ERA's categorical ban on discrimination "on account of sex." Originalist justices have acquiesced in strict scrutiny to enforce a near-categorical ban on race distinctions which, they believe, reflects the Equal Protection Clause's original public meaning.¹¹² If anything, justices that strongly encourage an originalist approach to interpreting equal protection tend to favor an especially stringent form of strict scrutiny to presumptively invalid classifications.¹¹³

If the ERA were ratified, the decades it has taken to ratify it would complicate the originalist analysis. The public meaning of "[e]quality of rights . . . shall not be denied or abridged . . . on account of sex" may mean something different today than it did to the majority of ratifying states in the 1970s. The difficulty of interpreting the public meaning of constitutional amendments ratified over decades lends support to Professor Sai Prakash's¹¹⁴ and then-Professor and again Justice Ruth Bader Ginsburg's¹¹⁵ conclusions that constitutional amendments, to be

doctrinal tests that at best approximate, without perfectly expressing, the historical or semantic meaning of constitutional language.").

112. Justices Scalia and Thomas, advocates of originalism, both accepted application of strict scrutiny to race-based classifications, albeit an especially strict version of it. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520–21 (1989) (Scalia J., concurring) (citing *Lee v. Washington*, 390 U.S. 333, 334 (1968)) ("only a social emergency rising to the level of imminent danger to life and limb," such as a prison race riot, could justify separating people by race); *see also* *Grutter v. Bollinger*, 539 U.S. 306, 351 (2003) (Thomas, J., concurring in part) (citing *Korematsu v. United States*, 323 U.S. 214, 216 (1944)) (agreeing with the proposition that a "pressing public necessity may sometimes justify the existence of racial discrimination").

113. *Croson*, 488 U.S. at 520–21 (1989) (Scalia, J., concurring) (agreeing with the majority "that strict scrutiny must be applied to all governmental classification by race"; *Bollinger*, 539 U.S. at 379–80 (2003) (Thomas, J., dissenting) (arguing that the majority should have applied a more stringent version of strict scrutiny to evaluate whether University of Michigan's consideration of race in admissions was narrowly tailored to achieve their stated interest); *cf.* *Craig v. Boren*, 429 U.S. 190, 221–22 (1976) (Rehnquist, J., dissenting) (objecting to the creation and application of the intermediate scrutiny standard in a context that does not justify an elevated level of review and arguing that the Court should stick to the dual framework of strict scrutiny versus rational basis analysis for Equal Protection Clause issues).

114. *See* Prakash, *supra* note 2, at 1295 (stating that, despite his support for the ERA, "the 1972 ERA is no longer viable. As noted earlier, the Constitution is best read as imposing a reasonable time constraint between congressional proposal and ratification").

115. Ruth Bader Ginsburg expressed support for an inherent time limit on the ratification of constitutional amendments as a law professor in 1978 and reiterated that view as applied to the ERA as a Justice in 2020. *See* *Extending the Ratification Period for the Proposed Equal Rights Amendment: Hearing on H.J. Res. 638 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 95th Cong.* 121–22 (1978) (statement of Prof. Ruth Bader Ginsburg, Columbia Law School) (stating that "[i]mplicit in Article V is the requirement that ratification of a proposed constitutional amendment occur within some reasonable time" and that "even 20 years would constitute a rational, constitutional time period."), quoted in Prakash, *supra* note 2, at 1295 & nn.397–98. *See de Vogue, supra* note 77 (reporting, after Virginia's vote to ratify the ERA, that Justice Ginsburg believes the original ERA has expired).

valid, must be ratified within a reasonable period of time, including the ERA. Regardless, originalist evidence supports strong protection against sex discrimination under the ERA, whether under strict scrutiny or a more absolute ban.

That most states that have constitutional guarantees of sex equality apply strict scrutiny to sex discrimination¹¹⁶ further supports that the ERA's public meaning is that sex should virtually never be a basis of state-sponsored discrimination. Also, originalist approaches to constitutional interpretation tend to identify infringements on rights in categorical terms, *i.e.*, a law is or is not constitutional by reference to public meaning rather than by reference to how such a law would fare under a scrutiny test.¹¹⁷ That might explain why Justice Thomas supports virtually absolute colorblindness for race, as did Justice Scalia.¹¹⁸ Thus, two prominent originalists believe that a constitutional provision guaranteeing racial equality permits virtually no distinctions by race. Therefore, originalists may well interpret the ERA's public

116. See, e.g., Wharton, *supra* note 44, at 1240 (“[M]ost courts have interpreted their ERAs as requiring higher justification for gender-based classifications than the intermediate standard of review used by the Supreme Court in interpreting the Equal Protection Clause.”); Lisa Baldez et al., *Does the U.S. Constitution Need an Equal Rights Amendment?*, 35 J. OF LEGAL STUD. 243, 265–67 (2006) (“[T]he presence of an ERA significantly increases the likelihood of a court applying a higher standard of law, which in turn significantly increases the likelihood of a decision favoring the equality claim.”). There is not complete consensus among states on applying strict scrutiny to sex discrimination under state constitutional ERAs. See Wharton, *supra* note 44, at 1240 n.179 (citing cases from Connecticut, California, Hawaii, Illinois, Massachusetts, New Hampshire and Texas where strict scrutiny was applied in sex discrimination lawsuits). Although most states apply strict scrutiny, some apply a kind of intermediate scrutiny. See *id.* at 1242 (“[A] minority of states assess the validity of sex-based classifications under their equality guarantees using a standard . . . much like the federal intermediate standard of review” including Virginia, Utah, Alaska and New Jersey.) Others apply an absolute prohibition of sex-based distinctions. See JENNIFER FRIESEN, CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES § 3-2(e)(1) (3d ed. 2000) (naming Pennsylvania, Colorado, Washington, Maryland and New Mexico as “absolutist”).

117. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1270, 1293 (2007) (describing that, before the 1960s, the Court's constitutional interpretation of fundamental rights required a “categorical prohibition” of any infringement on them and that strict scrutiny was not developed as an analytical framework until the early 1960s). See also *District of Columbia v. Heller*, 554 U.S. 570, 584–85, 627, 635 (2008) (writing for the majority, Justice Scalia failed to apply a scrutiny test and instead interpreted the original meaning of the Second Amendment to hold that a law which forbids an individual from possessing a firearm in the home is unconstitutional).

118. See *supra* note 112. Despite their strong aversion to any state-sponsored race distinctions, including for remedial or diversity purposes, Justices Scalia and Thomas have acknowledged narrow circumstances in which governmental race discrimination would survive judicial scrutiny. As Professor Richard Fallon also observes, other conservative justices also preferred a strict version of strict scrutiny. See Fallon, *supra* note 117, at 1307–08 n.233 (citing Justices Rehnquist, Kennedy and Scalia complaining when the majority applied strict scrutiny in a manner that the justices thought was too deferential).

meaning as prohibiting all or virtually all sex distinctions under a standard that might be called “super-strict” scrutiny—if not absolute scrutiny.

Absolute or some sort of super-strict scrutiny would only compound my concerns with the ERA, discussed below. Those concerns are premised on the Court applying strict scrutiny with the effect of prohibiting virtually all sex distinctions even for women's equality-advancing purposes. An absolute prohibition would guarantee that effect. Despite the real possibility of absolute scrutiny, I expect that the Court will apply strict scrutiny to sex distinctions under the ERA. First, the Court applies strict not absolute scrutiny to racial classifications, permitting some race distinctions,¹¹⁹ even though race is the most suspect of equal protection concerns. Second, the Court would likely be influenced by cultural norms that accept some sex distinctions, leading the Court to apply a test that could allow for narrow exceptions. The rest of this article's analysis assumes that the Court would apply strict scrutiny to state-sponsored, sex-motivated laws and actions rather than ban them outright.

B. Self-Executing Effects (Without Legislative Implementation)

1. The (Redundant) Good: No Government Discrimination Against Women

This section considers direct effects of the ERA, *i.e.*, from its self-executing operation without congressional implementation, that are promising for women's equality. The caveat is that these benefits are, essentially, already achieved under the Equal Protection Clause. As argued in the previous section, the ERA would likely result in the Court applying strict scrutiny to state-sponsored sex discrimination. The ERA's tangible benefit to women then is that it would make such

119. Despite the difficulty of satisfying strict scrutiny, the Court has permitted the use of race as one of many factors in college and law school admissions. *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2210 (2016) (internal citation omitted) (“[A]dmissions officers can consider race as a positive feature of a minority student's application . . . race is but a factor of a factor in the holistic-review calculus.”); *see also* *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) (“the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body”). Of course, the conservative justices that remain on the Court would have invalidated those race-based programs and the addition of conservative justices Gorsuch, Kavanaugh and Barrett leaves the permissibility of race-based affirmative action in serious doubt. Likewise, the more conservative Court may, as discussed above, apply a categorical ban on sex distinctions under the ERA.

discrimination very difficult to survive constitutional challenge. In evaluating the potential benefits of the ERA, however, we should recognize that discrimination against women is already presumptively unconstitutional under current equal protection doctrine. As explained previously, the Court subjects governmental sex discrimination to intermediate scrutiny, which invalidates virtually all discriminations against women. The reason is that intermediate scrutiny is unlikely ever to find that discriminating against women substantially serves important governmental interests. The ERA's purported benefits for women is thus mitigated because the ERA's guarantees are redundant with existing law.

This is not to say that raising the level of scrutiny from intermediate to strict makes no difference—it certainly does. The main difference, however, is that under strict scrutiny, “benign” sex discrimination, *i.e.*, discrimination for the benefit of women, would likely be struck down more often than under intermediate scrutiny. As explained below,¹²⁰ the ERA would likely prohibit discrimination against men even more than does current equal protection law, and the Court would likely interpret laws and policies designed to advance women's equality as discrimination against men.

2. The Bad: No Application to Private Discrimination, Disparate Impact, Pregnancy or Abortion

The ERA would fail to address three sources of sex inequality that ERA supporters aspire to correct. First, the ERA would probably not apply to (or allow Congress to correct for) discrimination by private actors, such as companies and individuals. Rather, it is clearly limited to discrimination by federal and state actors: “Equality of rights under the law shall not be denied or abridged *by the United States or any State* on account of sex.”¹²¹ Accordingly, employment concerns, such as discrimination in pay, hiring and promotion, harassment, and lack of maternity leave in private companies, organizations, and private colleges and universities, would remain constitutional.¹²² Nor would

120. See *infra* Sections III.B.3 and III.C.2.

121. See *Statement, supra* note 93 and accompanying text; see also Brown et al., *supra* note 64, at 905 (explaining that ERA would only apply to state action).

122. Many of these concerns are currently prohibited under statutory law. See *supra* section I.A. But to the extent ERA supporters believe we need an ERA to make such prohibitions permanent and to prohibit other forms of sex discrimination in the private sector, the ERA would not advance this goal.

the ERA prohibit violence against women or any other mistreatment of women by private individuals.

Second, the ERA would likely permit laws and policies that have an unintentional disparate impact against women. In *Washington v. Davis*, the Court held that the central purpose of the Equal Protection Clause is to prohibit invidious racial discrimination.¹²³ Such discrimination must, at a minimum, be purposeful.¹²⁴ As previously explained,¹²⁵ the Court in *Personnel Administrator of Massachusetts v. Feeney* held that purposeful discrimination requires that the government took action “because of,” and “not merely in spite of,” its adverse effect on a protected group.¹²⁶ Laws and government policies that have a disparate impact are not subject to rigorous judicial scrutiny unless the challenger proves that the government intended the disparate effect.¹²⁷

It seems likely that the Court would interpret discrimination under the ERA similarly, that only purposeful discrimination triggers the amendment's protections. The Court has repeatedly applied *Davis*, a unanimous decision on the meaning of discrimination under the Equal Protection Clause, without any suggestion that it would be reconsidered.¹²⁸ The Court in *Davis* considered purposefulness as inherent in the concept of discrimination, a view it would in all likelihood apply to the meaning of discrimination under the ERA.¹²⁹ The Court in *Davis* also expressed concern that interpreting the Equal

123. 426 U.S. 229, 239 (1976) (“The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.”).

124. *See id.* (“A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurors of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination.” (quoting *Akins v. Texas*, 325 U.S. 398, 403–04 (1945))).

125. *See* discussion *supra* Section I.B.

126. *See* *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (“‘Discriminatory purpose’ . . . implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part ‘because of’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”).

127. *Id.*

128. *E.g.*, *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 330 (2014) (Scalia, J., concurring) (noting that the Court has decided “dozens of cases confirming the exceptionless nature of the *Washington v. Davis* rule”); *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (“[O]ur decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose.” (citing *Washington v. Davis*, 426 U.S. 229, 240 (1976))).

129. *See* *Washington v. Davis*, 426 U.S. 229, 245 (1976) (“As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory”)

Protection Clause to presumptively forbid laws that have a disparate impact without proof of intent would unduly involve the courts in reviewing such legislation.¹³⁰ A similar effect could result from judicial scrutiny of all laws that disparately impact women. Thus, there is good reason to expect that the Court would interpret discrimination under the ERA in the same way as discrimination under the Equal Protection Clause in that only *purposeful* sex discrimination would implicate the ERA.

Third, the ERA would fail to expressly protect pregnancy or abortion rights. Nor is it likely that reproductive rights will be protected through judicial interpretation either. In 1974, in *Geduldig v. Aiello*, the Court held that, under the Equal Protection Clause, discrimination on the basis of pregnancy is not discrimination on the basis of sex.¹³¹ In 1976, in *General Electric Company v. Gilbert*, the Court extended that reasoning—that pregnancy discrimination is not sex discrimination—to Title VII’s prohibition on sex discrimination.¹³² In 1978, Congress repudiated the Court’s statutory interpretation of “sex” in *Gilbert* by passing the Pregnancy Discrimination Act, which defines “sex” in Title VII to include “pregnancy, childbirth and related medical conditions.”¹³³ Though the Court now treats pregnancy discrimination as sex discrimination for Title VII purposes,¹³⁴ the Court has never suggested that it was mistaken in interpreting sex discrimination for constitutional purposes as not including pregnancy discrimination. Moreover, the Court has never interpreted abortion restrictions as sex discrimination under the Equal Protection Clause, but rather it has viewed such restrictions as burdening a woman’s fundamental liberty interest under the Due Process Clause.¹³⁵

130. See *id.* at 247–48 (expressing concern that many laws with an economic impact would be subject to judicial review).

131. See 417 U.S. 484, 494 (1974) (holding that state law disability insurance denial of pregnancy coverage did not discriminate on the basis of sex under the Equal Protection Clause).

132. See 429 U.S. 125, 145–46 (1976) (holding that a “disability-benefits plan does not violate Title VII because of its failure to cover pregnancy-related disabilities.”).

133. See Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (The Act extends protection from employment discrimination to “pregnancy, childbirth, or related medical conditions.”).

134. See *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 685 (1983) (“The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman’s pregnancy is, on its face, discrimination because of her sex.”).

135. See, e.g., *Roe v. Wade* 410 U.S. 113, 129 (1973) (agreeing with appellant that a woman’s decision to terminate her pregnancy is a matter of personal liberty, which is a right embodied in the Fourteenth Amendment’s Due Process Clause); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 834 (1992); *June Med. Svcs. v. Russo*, 140 S. Ct. 2013, 2014 (2020).

Consequently, the ERA is unlikely to change the Court's constitutional interpretation of sex discrimination to include discrimination on the basis of pregnancy or abortion. The ERA does not define sex (at all, let alone to include reproductive rights), and there is no reason to believe that the Court would interpret sex differently under the ERA than it does under the Equal Protection Clause. Accordingly, laws or policies that discriminate against, or fail to accommodate, pregnant women or that unduly burden women's access to abortion likely would not violate the ERA.¹³⁶

3. The Ugly: The ERA Would Likely Prohibit Affirmative Efforts to Advance Women's Equality

This section makes the most important claim of this article. The ERA's most harmful, self-executing effect is that it would likely prohibit government from enacting laws or adopting policies designed to advance women's equality. The reasons are two-fold. First, as previously explained,¹³⁷ the ERA would likely raise the scrutiny applied to sex discrimination from intermediate scrutiny to strict scrutiny. Second, as explained below, the Court would then likely apply strict scrutiny to sex-conscious laws designed to advance women's equality, not just sex-conscious laws that harm women.

Many ERA supporters would likely applaud my prediction that the Court would apply strict scrutiny to state-sponsored sex discrimination because that would make such discrimination against women even more constitutionally vulnerable than under the current intermediate scrutiny standard.¹³⁸ If strict scrutiny would apply only to laws that harm women's equality, support for the ERA would be justified. The danger for women's equality, however, is that the Court would likely interpret the ERA to apply strict scrutiny even to laws and policies designed to support women. The Court has interpreted equality rights for decades¹³⁹ in a formalistic, symmetrical way that views any benefit to one group as discrimination against the group not benefited. For example, consider race. The Court views affirmative efforts to increase minority representation in higher education, government contracting,

136. See Davis *supra* note 74.

137. See *supra* Section III.B.1.

138. See *supra* note 37 and accompanying text.

139. Since 1976, the Court has interpreted the Equal Protection Clause to apply intermediate scrutiny to discrimination against both sexes. See *Craig v. Boren*, 429 U.S. 190, 197 (1976). Since 1989, the Court has applied strict scrutiny to all racial classifications including for the benefit of racial minorities. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989).

employment, and political participation as discrimination against whites.¹⁴⁰ The Court thus applies strict scrutiny to all race-conscious government decision-making even when intended to advance racial equality.¹⁴¹ The effect, essentially, is that government must largely ignore race and racial inequality—it must be “color blind.”

The Court’s skeptical view that laws designed to benefit racial minorities are as “suspect” as laws designed to benefit whites reflects the Court’s *anti-classification* approach to equal protection. The anti-classification approach views the constitutional problem as classifying people by their race.¹⁴² By contrast, the *anti-subordination* approach views the constitutional problem as the impact of laws on historically subordinated groups.¹⁴³ The anti-subordination approach would permit race-conscious laws designed to benefit historically disadvantaged minorities significantly more than does the anti-classification approach.

With respect to sex discrimination, the Court would likely interpret the ERA in accordance with the anti-classification approach, *i.e.*, subject all sex-motivated laws to strict scrutiny even if designed to benefit women. First, the text of the ERA does not distinguish between men and women suggesting that men would have the same right to complain about laws or policies designed to benefit women as women would have to complain about laws or policies designed to benefit men. Second, under equal protection doctrine, the Court follows an anti-classification approach with respect to the level of scrutiny it applies to

140. See, e.g., *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2208 (2016) (applying strict scrutiny on behalf of white plaintiff challenging college admissions policy that favored Black and Latino applicants); see also *Croson*, 488 U.S. at 505 (1989) (applying strict scrutiny on behalf of white-owned construction company to government race-based set-aside program designed to increase minority participation in government-funded construction contracts); see also *Ricci v. DeStefano*, 557 U.S. 557, 563 (2009) (holding that fire department’s cancelling test results because of disparate impact against Black candidates constituted discrimination against white candidates).

141. E.g., *Croson*, 488 U.S. at 505 (applying strict scrutiny to local affirmative action plan designed to remedy past discrimination); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (remanding for lower court to apply strict scrutiny to federal race-conscious program to increase minority participation in government construction contracting).

142. See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10–11 (2003) (explaining the anti-classification and the anti-subordination approaches).

143. *Id.* at 9 (“Antisubordination theorists contend that guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification and argue that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups.”).

all classifications, whether suspect, such as race,¹⁴⁴ quasi-suspect, such as sex,¹⁴⁵ or non-suspect, such as age.¹⁴⁶

Currently, under equal protection doctrine, the Court has allowed affirmative action and other proactive policies to benefit women that it would not have upheld if it applied strict scrutiny to sex classifications.¹⁴⁷ As previously explained, the ERA would likely subject all sex-conscious government decision-making to strict scrutiny.¹⁴⁸ Following the anti-classification approach, the Court would likely apply strict scrutiny to laws designed to benefit women with the effect that government would have to be “sex-blind,” *i.e.*, ignore sex and sex inequality. The effect would be that laws and government policies designed to improve women’s opportunities would likely be subject to strict scrutiny—because they necessarily take account of sex—and likely struck down.

To elaborate, consider four kinds of state-sponsored affirmative efforts to advance the interests and equality of girls and women: (1) sex-based affirmative action, (2) single-sex settings, including education, (3) sex-neutral affirmative action, and (4) efforts to eliminate or modify policies that have a disparate impact against women. Sex-based

144. *See, e.g., Croson*, 488 U.S. at 508 (holding that race-based preferences to benefit minority-owned construction firms are just as suspect and subject to strict scrutiny as preferences for whites).

145. *See generally* *Craig v. Boren*, 429 U.S. 190 (1976) (holding that all sex classifications receive intermediate scrutiny, including the case at hand that involved a higher beer-purchasing age for men than for women).

146. *See, e.g., Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (holding that age classifications only receive rational basis scrutiny and upholding a mandatory retirement age for police officers).

147. *See, e.g., Califano v. Webster*, 430 U.S. 313, 317 (1977) (upholding law allowing women to exclude more low-earning years for social security retirement benefits because “[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women [is] an important governmental objective.”); *Kahn v. Shevin*, 416 U.S. 351, 353 (1974) (upholding state law allowing widows, not widowers, a property tax exemption because, “[w]hether from overt discrimination or from the socialization process,” such women faced more difficult barriers in the job market than widowers); *United States v. Virginia*, 518 U.S. 515, 530 (1996) (citing with approval cases upholding sex-discriminatory laws for compensatory or remedial purposes, and indicating that sex is treated differently from race). Such sex-based preferential laws were thus based on societal disparities and speculative, though plausible, assumptions about the socialization of women. Such justifications could not survive strict scrutiny. *See, e.g., Croson*, 488 U.S. at 485 (applying strict scrutiny to a race-based measure, the Court stated that neither “broad-brush assumptions of historical discrimination” nor “societal discrimination” suffice to establish a compelling interest. Instead, strict scrutiny requires the government to demonstrate with particularity the discriminatory actions that a discriminatory preference is expected to compensate for).

148. *See* discussion *supra* Sections III.A and III.B.1; *see also* *Davis*, *supra* note 74 and accompanying text.

affirmative action refers to policies that take account of sex to benefit women. An example is when an employer or school of higher education gives favorable weight to a female applicant's sex. STEM, business and medical schools, for example, seek to admit qualified women to reduce their significant underrepresentation in those fields. Another example is state and federal policies that give some priority to awarding some government contracts to women-owned firms or to firms that subcontract with women-owned firms.¹⁴⁹ Recall that under equal protection doctrine, race-based affirmative action policies are usually unlawful because the Court subjects them to strict scrutiny. But for sex-based affirmative action, existing equal protection law applies intermediate scrutiny, which has allowed affirmative action policies for women. That the Court, applying strict scrutiny under the Equal Protection Clause, tends to strike down similar policies when designed to benefit racial minorities suggests that, applying strict scrutiny under the ERA, it would likewise strike down such policies when designed to benefit women.¹⁵⁰

Justice Stevens lamented that, because of the different scrutiny levels for race and sex, race-based affirmative action had become more difficult to enact than sex-based affirmative action. Dissenting in *Adarand*, though he did not criticize sex-based affirmative action, he found it counterintuitive that state-sponsored efforts to remedy discrimination against women would be more lawful (under intermediate scrutiny) than race-based efforts to remedy discrimination against Black people (under strict scrutiny):

[A]s the law currently stands, the Court will apply “intermediate scrutiny” to cases of invidious gender discrimination and “strict scrutiny” to cases of invidious race discrimination, while applying the same standard for benign classifications as for invidious ones. If this remains the law, then today’s lecture about “consistency” will produce the anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African Americans — even though the

149. See Davis, *supra* note 74, at 448–49 (describing affirmative action policies).

150. See Brake, *supra* note 14, at 961 (“[R]ace-based affirmative action that is designed to remedy discrimination against racial minorities must now meet a stricter legal test than sex-based affirmative action that is designed to remedy discrimination against women.” (citing *Adarand Constructors v. Pena*, 515 U.S. 200, 247 (1995)) (Stevens, J., dissenting)); Heriot, *supra* note 89, at 30 (“the ERA would very likely be interpreted to invalidate the many state-sponsored “affirmative action” programs that currently give preferential treatment to women and women-owned businesses.”).

primary purpose of the Equal Protection Clause was to end discrimination against the former slaves.¹⁵¹

Under the ERA, the anomaly criticized by Justice Stevens would be eliminated because affirmative-action programs to remedy discrimination against women would become as difficult to legally justify as race-based affirmative action. The Court would likely subject sex-based affirmative action to strict scrutiny, as it currently does for race, and therefore more likely prohibit such policies.¹⁵² The Court would also likely invalidate current federal policies designed to increase women's access to small business ownership and to employment in companies with government contracts.¹⁵³ Even maternity-leave policies could be challenged under the ERA as discrimination against men.¹⁵⁴

The trend across the country among states to diversify corporate boards illustrates how the ERA could invalidate equality-advancing laws that might be upheld under current law. Several states have enacted or are considering laws that would either mandate or pressure corporations to enhance gender and racial diversity on corporate boards and in senior management.¹⁵⁵ California has led the way, passing a law in 2018 that mandates gender quotas on corporate boards, the minimum number of women determined by reference to the number of directors on each board. In 2020, California added race and LGBTQ quotas. Failure to comply risks steep fines.

Under equal protection doctrine, courts would very likely invalidate the racial-quota mandate. Even if the state could convince

151. *Adarand*, 515 U.S. at 247 (Stevens, J., dissenting).

152. See discussion *supra* Section III.A; see also *supra* text accompanying note 116 (explaining why the Court is likely to apply strict scrutiny under the ERA); see also Brake, *supra* note 14 and accompanying text.

153. See 13 C.F.R. § 127.101 (2019) (Small Business Administration provides affirmative action program for contracting with female-owned businesses); see also 41 C.F.R. § 60-2.1 (2019) (U.S. Department of Labor requires federal contractors and subcontractors to adopt affirmative action programs that advance women. These include training programs and outreach programs).

154. See, e.g., Tennessee Maternity Leave Act (TMLA), TENN. CODE ANN. § 4-21-408 (West 2011) (mandating that employees who have been employed by the same employer for at least 12 consecutive months can take 4 months of unpaid maternity leave for “adoption, pregnancy, childbirth and nursing an infant”).

155. See Michael Hatcher & Weldon Latham, *States are Leading the Charge to Corporate Boards: Diversify!*, HARV. L. SCH. FORUM ON CORP. GOV. (May 12, 2020), <https://corpgov.law.harvard.edu/2020/05/12/states-are-leading-the-charge-to-corporate-boards-diversify/> (describing trend among states and in Congress to either encourage or mandate inclusion of women on corporate boards). Apparently, Congress has also considered such legislation, see *id.*, although the likelihood of Congress passing such legislation seems quite unlikely.

the courts that racial representation on corporate boards were a compelling state interest (which is doubtful under the current Court),¹⁵⁶ the quota would be invalidated as a per se impermissible means.¹⁵⁷ By contrast, the gender quota might survive intermediate scrutiny because, first, courts would more likely accept that gender diversity on corporate boards is an important government interest, a lower bar than the compelling interest requirement of strict scrutiny. Second, courts are more likely to hold that a gender-based quota is a “substantially related” means to achieving the interest even though quotas are not considered narrowly-tailored means under strict scrutiny.¹⁵⁸

Under the ERA, however, California’s gender quota would more likely be invalidated than under current law. If the courts were to apply absolute scrutiny under the ERA, the quota would, of course, be per se unconstitutional. If the courts were to apply strict scrutiny, the quota would still be invalidated for the same reasons as the race-based quota would be under equal protection law.

Another kind of sex classification that would be vulnerable under the ERA’s strict scrutiny are single-sex settings, such as schools,¹⁵⁹ extracurricular activities such as sports,¹⁶⁰ and other single-sex

156. See *supra* text accompanying note 104.

157. See *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *supra* text accompanying 86. Interestingly, separate lawsuits have been filed against both the gender quotas and the racial quotas mandated by California law. The case challenging the racial-quota mandate has the easier case, only needing to convince the court that the mandate fails “strict scrutiny review” that “can only be justified by a compelling governmental interest, and its use of race and ethnicity must be narrowly tailored to serve that compelling interest.” Kevin LaCroix, *California Board of Directors Diversity Bill Signed Into Law, Challenged by Lawsuit*, THE D&O DIARY (Oct. 11, 2020), <https://www.dandodiary.com/2020/10/articles/corporate-governance/california-board-of-directors-diversity-bill-signed-into-law-challenged-by-lawsuit/>. The case challenging the gender-quota mandate, by contrast, has to convince the court that the mandate does not even advance an important government interest. See Cydney Posner, *Federal District Court dismisses a challenge to California board gender diversity statute*, COOLEY PUBCO (Apr. 21, 2020), <https://cooleypubco.com/2020/04/21/court-dismisses-challenge-to-sb-826/>.

158. See *supra* text accompanying note 86 (explaining that under *Grutter*, strict scrutiny does not permit quotas)

159. *United States v. Virginia*, 518 U.S. 515, 596–98 (Scalia, J., dissenting) (concluding that “[u]nder the constitutional principles announced and applied today, single-sex public education is unconstitutional . . . [and] is functionally dead. . . . The enemies of single-sex education have won”). Scalia goes on to describe how devastating the decision is for private institutions which receive a substantial amount of funds from the government. See also Carrie Corcoran, *Single-Sex Education After VMI: Equal Protection and East Harlem’s Young Women’s Leadership School*, 145 U. PA. L. REV. 987, 1010–11 (1997) (arguing that the higher the level of scrutiny that the Court employs, the less likely it is that East Harlem’s Young Women’s Leadership School, an all-female academy, “will pass constitutional muster”).

160. See *id.* (arguing that sports, such as football or wrestling, would be open to “any woman ready, willing, and physically able to participate . . . as a constitutional matter”); see also Eugene

settings¹⁶¹ including bathrooms, dormitories, locker rooms, prisons,¹⁶² and military quarters.¹⁶³ I do not claim that such single-sex arrangements would necessarily be unconstitutional. My claim is that they would *more likely* be unconstitutional under the ERA than under current doctrine simply because strict scrutiny is more difficult to satisfy than intermediate scrutiny. Circumstances that involve strength and other athletic differences, or which raise privacy or safety concerns, might justify sex-exclusive sports, bathrooms, locker rooms, and prison and military quarters. The Court's opinion in *Virginia* lends some support to this possibility. The Court invalidated the male-only admissions policy of VMI but accepted that, "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs."¹⁶⁴ Of course, there the Court applied intermediate scrutiny, so the ERA might preclude such accommodations, but the Court's acceptance of such adjustments based on sex at least suggests it believes that physical

Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, 1339, 1382–83 (1997) (interpreting the recently passed California Civil Rights Initiative, which stated "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting", to conclude that "men's sports teams must become open to all . . . even if a women might be more likely to be injured when playing against men"); *but see* *Adams v. Baker*, 919 F. Supp. 1496, 1504 (D. Kan. 1996) (Exclusion of girls from boys' wrestling team violates the Equal Protection Clause, and privacy is not a sufficient justification for the exclusion because "wrestling is an athletic activity and not a sexual activity." Note that the case involved total exclusion from the only available wrestling team, rather than the creation of separate boys' and girls' teams.).

161. *See Virginia*, 518 U.S. at 596 (Scalia J., dissenting) (internal citations omitted) (arguing that the majority "indicates that if any program restricted to one sex is unique, it must be opened to members of the opposite sex who have the will and capacity to participate in it").

162. Joseph E. B. White, *Educational Opportunities in Correctional Facilities*, 4 GEO. J. GENDER & L. 407, 418 (2002) (claiming that state constitutions, most of which apply strict scrutiny to gender classifications, may provide broader protection for female prisoners) (citing *Molar v. Gates*, 159 Cal. Rptr. 239, 249 (Ct. App. 1979) (applying strict scrutiny to evaluate an equal protection claim under the state constitution and finding the policy of placing pre-trial male prisoners in minimum security facilities, but placing pre-trial female prisoners in maximum security facilities, violated the state constitution. The court held that the alleged prohibitive administrative cost of maintaining separate facilities was not a compelling governmental interest. However, protecting female prisoners from sexual assault was a compelling governmental interest but was not a sufficient reason to exclude females from minimum security facilities)).

163. John Galotto, *Strict Scrutiny for Gender, Via Croson*, 93 COLUM. L. REV. 508, 521–22 (1993) (arguing that the majority of the Court in *Frontiero v. Richardson* opted not to apply strict scrutiny to sex-based classifications out of fear that it could invalidate certain laws that discriminate against women, such as exclusion from the draft, or be applied fatally to distinctions between bathrooms and locker rooms).

164. *Id.* at 550 n.19.

differences and privacy concerns are in some meaningful way “real” differences that might justify separation by sex.¹⁶⁵

The ERA would more likely invalidate other single-sex settings that less directly implicate privacy concerns or physical differences. Single-sex dormitories and halls within dormitories at public colleges would be more vulnerable than single-sex bathing, dressing, and sleeping quarters as the privacy need for their single-sex status is more attenuated. Single-sex schools would be especially vulnerable as students can generally study and attend classes without significantly implicating privacy, safety, or physical differences. Even if women face a greater risk of sexual assault on coeducational campuses than all-female ones,¹⁶⁶ the Court is unlikely to view excluding an entire sex as a justified response to such a risk. Indeed, the Court in *Virginia* wrote disapprovingly of justifications for excluding women from police forces based on the risk of sexual misconduct.¹⁶⁷ That the great majority of colleges and universities are coeducational would undermine an all-female school’s claim that excluding men was necessary to advance a compelling interest.

In *Virginia*, the Court expressed a willingness to uphold single-sex education if it were designed to diversify educational opportunities.¹⁶⁸ The Court cautioned, however, that any such sex-based classifications

165. Indeed, the Court viewed physical differences as permanent. *See id.* at 533 (stating that “[p]hysical differences between men and women, however, are enduring”).

166. My research did not discover any reliable studies comparing sexual assault rates on coeducational and all-female campuses. That rates would be higher on co-educational campuses is certainly plausible. *See Is there Still a Need for Women’s Colleges?*, COLLEGESTATS.ORG, <https://collegestats.org/2013/02/is-there-still-a-need-for-womens-colleges/> (last visited Jan. 10, 2021) (reasoning that since 90% of sexual assaults are committed by people (mostly men) known to the victim, it follows that such gender-based violence is less likely to occur at women-only institutions. According to the article, “72% of women’s college alumni reported feeling safe on campus, compared with 64% at private and co-ed liberal arts institutions and only 37% at flagship state schools.”). Of course, because the burden would be on the state to justify an all-female public institution, a dearth of reliable findings on sexual assault rates would make the constitutionality of such institutions that much more difficult to prove under strict scrutiny.

167. *See Virginia*, 518 U.S. at 544 (1996) (reviewing with disapproval professions that previously excluded women including police departments that claimed hiring women would “lead to sexual misconduct”) (citing C. Milton et al., *Women in Policing* 32–33 (1974)); *See also Molar v. Gates*, 159 Cal. Rptr. 239, 249 (Ct. App. 1979) (applying strict scrutiny to sex discrimination claim under state constitution and holding that, while protecting female prisoners from sexual assault during pre-trial detention was a compelling governmental interest, the state was not justified in placing females prisoners in maximum security facilities instead of making minimum security facilities safe for them).

168. *See Virginia*, 518 U.S. at 535–37 (explaining that creating a diverse array of educational options can justify the existence of a single-sex program if that is in fact the motive behind the design).

had to be consistent with promoting equal opportunity for women:

Sex classifications may be used to compensate women “for particular economic disabilities [they have] suffered,” to “promot[e] equal employment opportunity,” to advance full development of the talent and capacities of our Nation’s people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.¹⁶⁹

The Court’s language suggests that single-sex education could be constitutional under equal protection doctrine provided it did not deny opportunities to girls or women, or otherwise reinforce the inferiority of or unfounded stereotypes about them. The Court thus did not rule out single-sex education if the opportunities provided to both sexes were equal in tangible and intangible ways.¹⁷⁰ The Court held only that VMI’s single-sex admissions policy was not constitutionally justified given the uniqueness of VMI’s educational approach.¹⁷¹ The Court reached this conclusion under intermediate scrutiny,¹⁷² distinguishing sex from race.¹⁷³

Under the ERA, by contrast, the Court would likely apply strict scrutiny. It is most unlikely that state-run, single-*race* schools would survive strict scrutiny. Likewise, single-sex schools under the ERA would be vulnerable. Even if the Court found a way to distinguish single-sex from single-race schools, the ERA would likely require a greater justification for single-sex schools than is currently required under the Equal Protection Clause.

Consider a third kind of affirmative effort to advance women’s equality, namely, *sex-neutral affirmative action*.¹⁷⁴ These are laws or

169. *See id.* at 533–34.

170. *Id.* at 535 n.8; Valorie K. Vojdik, *Girls’ Schools After VMI: Do They Make the Grade?*, 4 DUKE J. GENDER L. & POL’Y 69, 82 (1997).

171. *See Virginia*, 518 U.S. at 534 (describing the ways in which VMI’s “unique” education was not and could not be replicated at a separate, all-female institution); *id.* at 554 (“[W]e rule here that Virginia has not shown substantial equality in the separate educational opportunities the Commonwealth supports . . .”).

172. *See id.* at 535–36 (“In cases of this genre, our precedent instructs that ‘benign’ justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.” (citing *Weinberger v. Weisenfeld*, 420 U.S. 636, 648 (1975); *Califano v. Goldfarb*, 430 U.S. 199, 212–13 (1977))).

173. *See id.* at 532–33 (“Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court . . . has carefully inspected official action that closes a door or denies opportunity to women (or to men). The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed inherent differences are no longer accepted as a ground for race or national origin classifications.”).

174. The term *sex-neutral affirmative action* draws from my previous work, which referred

government policies designed to promote women's equality that rely on sex-neutral criteria. For example, family or parental (not maternal) leave policies are sex-neutral because both mothers and fathers qualify. But to the extent a legislature that designed such policies to support working women, however, as is plausibly the case with the federal Family and Medical Leave Act,¹⁷⁵ such policies could be legally vulnerable under the ERA. The reason follows the logic of the Court's treatment of race under the Equal Protection Clause, which would invalidate most efforts to address race inequality, even through race-neutral means.¹⁷⁶ Similarly, laws or policies designed to benefit women would likely trigger strict scrutiny under the ERA and be struck down even if such laws or policies employed sex-neutral means.

Two lines of Court doctrine support this argument. First, the Court applies strict scrutiny to laws and government policies that discriminate against racial minorities even if such laws use race-neutral means.¹⁷⁷ According to that reasoning, the Constitution's prohibition on purposeful racial discrimination would be illusory if government could discriminate against minorities so long as it uses policies race-neutral on their face. For example, if a public university raised its admission

to laws or government policies designed to promote race equality that rely on race-neutral criteria as *race-neutral affirmative action*. See Forde-Mazrui, *Race-Neutral Affirmative Action*, *supra* note 9, at 2351.

175. See *Nev. Dep't. of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (noting that Congress was motivated to pass the Family and Medical Leave Act by the historic "denial or curtailment of women's employment opportunities" that could be traced "[d]irectly to the pervasive presumption that women are mothers first, and workers second"). See also Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal*, 16 AM. U. J. GENDER, SOC. POL'Y & L. 459, 472–73 (2008) ("Despite the fact that the FMLA is on its face gender-neutral, there were many gendered dynamics behind its passage. The law was a continuation of feminist efforts toward equal employment for women, and was lauded by many feminist groups. . . . Congress's view of those who suffered most from the lack of leave policies—and therefore those who stood to benefit most from the FMLA— were working women.").

176. Because overt affirmative action is legal, despite it having to survive strict scrutiny, there are not yet many examples of the use of race-neutral means to benefit minorities in service of equality. The Court has, however, subjected race-neutral electoral districts to strict scrutiny because the Court concluded that the districts were drawn with attention to race. See *Shaw v. Reno*, 509 US 630, 631 (1993) (holding that electoral district, although drawn overtly based on geography and not race, was subject to strict scrutiny because "bizarre" shape indicated a state purpose to district voters based on race); *Miller v. Johnson*, 515 U.S. 900, 901 (1995) (invalidating electoral district because legislature was motivated by an overriding race-based purpose).

177. See, e.g., *United States v. Fordice*, 505 U.S. 717, 717 (1992) (observing that the University of Mississippi unconstitutionally raised its minimum ACT score in order to limit the admission of Black applicants); *Gomillion v. Lightfoot*, 364 U.S. 339, 339 (1960) (invalidating a re-drawn city district because it was designed to exclude Blacks from the city); *Washington v. Davis*, 426 U.S. 229, 229 (1976) (assuming that a literacy test would be subject to strict scrutiny if intended to exclude Black applicants for police officer jobs but holding that such an intention was not proven and that therefore strict scrutiny does not apply).

standards for all applicants for the purpose of excluding Black applicants¹⁷⁸ or a police department administered a particular knowledge test to all applicants for the purpose of excluding Black applicants,¹⁷⁹ the Court would subject such actions to strict scrutiny and would most likely invalidate them.

Second, since 1989, the Court has consistently held that discrimination through race-based means for the purpose of *benefiting* racial minorities is as presumptively unconstitutional as discrimination *against* minorities.¹⁸⁰ The Court explains, following its anti-classification approach, that all racial classifications are subject to strict scrutiny regardless of which race is burdened or benefitted because equal protection rights are individual rights guaranteed to all persons, regardless of their race.¹⁸¹

The two principles from these lines of doctrine are that (1) state-sponsored use of *race-neutral* means to discriminate against racial minorities is as presumptively unconstitutional as discrimination against minorities through race-based means, and (2) state-sponsored discrimination to *benefit* racial minorities is as presumptively unconstitutional as discrimination *against* minorities in favor of whites. Combining these principles,¹⁸² state-sponsored use of *race-neutral* means to *benefit* racial minorities is as presumptively unconstitutional as the use of *race-based* means to discriminate *against* racial minorities.

178. See *Fordice*, 505 U.S. at 736 (noting that the University of Mississippi's raising the minimum ACT score to exclude Black applicants was unconstitutional).

179. See *Davis*, 426 U.S. at 245–48 (assuming that if District of Columbia Police Department had intentionally used a literacy test to exclude Black applicants, it would have been subject to strict scrutiny, but on the record, the Court held that proof of intent had not been made and therefore the use of the test was not subject to strict scrutiny).

180. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989) (using strict scrutiny to strike down government program that reserved a portion of public contracting opportunities for minority-owned businesses); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204–05 (1995) (remanding for lower court to apply strict scrutiny to federal race-conscious program to increase minority participation in government construction contracting).

181. See *Croson*, 488 U.S. at 493–94 (“The Equal Protection Clause of the Fourteenth Amendment provides that ‘[n]o State shall . . . deny to *any person* within its jurisdiction the equal protection of the laws.’ . . . As this Court has noted in the past, the ‘rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.’ . . . ‘The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.’” (first quoting U.S. CONST. amend. XIV § 1; then quoting *Shelley v. Kraemer*, 334 U.S. 1, 22, (1948); and then quoting *Regents of the Univ. of Cal. v. Bakke* 438 U.S. 265, 289–90 (1978))).

182. See generally Forde-Mazrui, *Race-Neutral Affirmative Action*, *supra* note 9 (explaining why equal protection doctrine logically prohibits race-neutral laws to promote racial equality); Forde-Mazrui, *The Canary Blind Constitution*, *supra* note 9 (explaining the trend of colorblind constitutionalism and its threat to addressing the sources of racial inequality).

Put more simply, all races must be treated the same, and discrimination through facially neutral means is still discrimination. Otherwise, government could freely discriminate against whites in favor of minorities so long as government used race-neutral means, which would violate the Court's insistence that whites have the same equal protection rights as minorities. Although the Court has not explicitly endorsed such a position, past cases have trended consistently in that direction.¹⁸³ The upshot is that any law or government policy designed to benefit racial minorities through race-neutral means, such as the top ten percent college admissions plan in Texas,¹⁸⁴ are vulnerable to constitutional challenge as policies designed to favor racial minorities at the expense of whites.

That logic would likely apply to sex-neutral affirmative action policies designed to benefit women. Such policies would logically be subject to heightened scrutiny, notwithstanding that they are facially sex-neutral, because they are designed to benefit women. In contrast to race-neutral affirmative action to benefit minorities, however, sex-neutral affirmative action to benefit women would currently be subject to intermediate scrutiny and thus more likely upheld than race-neutral affirmative action. Under the ERA, sex-neutral policies designed to benefit women and to reduce sex inequality would likely be subject to strict scrutiny and struck down as discrimination against men.

For example, if a state or Congress passed a law requiring companies to provide paid parental or family leave, the law could be challenged as unconstitutional depending on the legislature's motivation. The law would be sex-neutral in content as it would grant parental or family leave to both male and female parents—not just to mothers. If, however, a company could show that one of the legislative motives was to support working women, it could challenge the law as discriminating against men, even if the policy would benefit both women and men. That the leave would be available to men would not preclude the company, or a male employee who does not need the

183. For elaborations of this point, see Forde-Mazrui, *supra* note 182 and accompanying text.

184. The Texas system of higher education allocates a high percentage of admissions to applicants who graduate in the top ten percent of their high school class. The policy does not take account of race in its administration. It was designed, however, to increase the admission of people of color. Under the Court's colorblind constitutionalism, the Texas Top Ten Percent Plan could be invalidated as discriminating for the benefit of Blacks and Latinxs. See Michelle Adams, *Isn't It Ironic? The Central Paradox at the Heart of "Percentage Plans,"* 62 OHIO ST. L.J. 1729, 1732 (2001) (arguing that percentage plans, designed to be a race-neutral alternative "to achieve the same ends as race-conscious affirmative action" are not "insulate[d] . . . from constitutional challenge"). See generally Forde-Mazrui, *Race-Neutral Affirmative Action*, *supra* note 9.

leave, from claiming discrimination against men. They could claim that the legislature intended for the policy to benefit *women* and, as a result, company resources are diverted to a policy intended to benefit women rather than to policies designed to benefit employees regardless of sex. Under current equal protection doctrine, a sex-neutral law motivated by a purpose to benefit women would be subject to intermediate scrutiny but likely would be upheld. Under the ERA, by contrast, the Court would likely apply strict scrutiny because of its discriminatory legislative purpose (*i.e.*, to benefit women) and, accordingly, strike it down. Thus, laws and government policies designed to reduce sex inequality and to support women's opportunities, even through sex-neutral means, would risk invalidation under the ERA.

The fourth kind of affirmative effort to reduce sex inequality that would be endangered by the ERA is the elimination or modification of policies that unintentionally have a disparate impact against women. In 2009, in *Ricci v. DeStefano*, the Court held that an employer's refusal to use promotion-test results—because doing so would unintentionally have a disparate impact on Black employees who took the test—was discrimination against the white test-takers, and thus violated Title VII.¹⁸⁵ *Ricci* illustrates the Court's colorblind approach to antidiscrimination law. The exact scope of the Court's holding is unclear. Under a narrow reading, the employer's refusal to use the test results was discriminatory because the test had already been administered and scored, so discarding the test results would harm those individuals who already took the test under those existing rules. By this reading, *Ricci* only prevents an employer from changing or eliminating a test or other policy after identifiable individuals have relied to their detriment on the existing test or policy. But this reading would not prohibit an employer from changing or eliminating tests or other policies to avoid racially disparate impacts in the future.

A broader reading of *Ricci*, by contrast, provides that any time an employer changes a test or policy to avoid a racially disparate impact, even if the change would take effect only in the future, the change would discriminate against the racial groups that benefit from the

185. See *Ricci v. DeStefano*, 557 U.S. 557, 579 (2009) (citations omitted) (“As the District Court put it, the City rejected the test results because ‘too many whites and not enough minorities would be promoted were the lists to be certified.’ . . . Without some other justification, this express, race-based decision-making violates Title VII’s command that employers cannot take adverse employment actions because of an individual’s race.” (quoting *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 152 (D. Conn. 2006))).

existing test or policy. Put simply, to intentionally *avoid* a racially disparate impact could itself constitute racial discrimination.¹⁸⁶

The narrow reading of *Ricci* gains some support from the Court's observation that the city had announced the rules and procedures of the test and that those who took the test had invested time and expense in studying for it:

The injury arises in part from the high, and justified, expectations of the candidates who had participated in the testing process on the terms the City had established for the promotional process. Many of the candidates had studied for months, at considerable personal and financial expense, and thus the injury caused by the City's reliance on raw racial statistics at the end of the process was all the more severe.¹⁸⁷

In my assessment, however, the broader reading is a more accurate indicator of how the Court will interpret and apply disparate-impact liability in the future. Here is the key passage where the Court explains why discarding the test results was discriminatory and therefore required a strong justification:

Our analysis begins with this premise: The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense. All the evidence demonstrates that the City chose not to certify the examination results because of the statistical disparity based on race—*i.e.*, how minority candidates had performed when compared to white candidates. As the District Court put it, the City rejected the test results because “too many whites and not enough minorities would be promoted were the lists to be certified.” Without some other justification, this express, race-based decision-making violates Title VII's command that employers cannot take adverse employment actions because of an individual's race.

... Whatever the City's ultimate aim—however well-intentioned or benevolent it might have seemed—the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white. The question is

186. Professor Ian Haney-Lopez pointedly captures this reading of *Ricci*: “[C]onsidering racial impact in order to avoid potential discrimination itself constitute[s] racial discrimination. That bears repeating, though the logic induces vertigo: to consider race, even in order to avoid discrimination, *is* discrimination.” Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1873 (2012).

187. *Ricci*, 557 U.S. at 594.

not whether that conduct was discriminatory but whether the City had a lawful justification for its race-based action.¹⁸⁸

For two reasons, I interpret the Court's conclusion that the city discriminated by race as premised on the city's racial motivation simpliciter rather than on the narrower fact that the test had already been administered. First, the Court's language in its "premise" passage emphasizes the race-based motivation for the city's decision, not the individuals harmed by the decision. An employer's decision to change or eliminate a test because of its future racial impact would likewise be a race-based decision based on the racial distribution of the likely effect of the test. The Court's reference to individuals injured by the city's action seems to reflect more a concern with the harm inflicted by the city's decision than the reason the city's decision was discriminatory.

My second reason for finding the broad reading of *Ricci* indicative of the Court's trajectory is considering the counterfactual of reversing the racial groups. Consider if Blacks and Latinos had done very well on the promotion test. Imagine that the city discarded the promotion-test results because, in the city's view, too many Blacks and Latinos would be promoted based on the test results. Assume that evidence revealed city councilmembers stating, "A disproportionate number of Blacks and Latinos scored well on the promotion test so let's discard the test results." That would seem to be patently discriminatory. Now consider if city councilmembers instead said, "We should certify these test results because the test has already been administered, but let's change the test for the future to one that promotes fewer Blacks and Latinos." Would that not also seem discriminatory even though the change in the test would only be in the future? If changing policies for the future to avoid disparate impacts on racial minorities seems more acceptable than changing policies to increase disparate impacts on minorities, it is likely because harming historically disadvantaged groups seems more troubling than seeking to help them. The problem for this intuition is that the Court's formalistic, anti-classification approach views race-motivated policies as equally suspect regardless of whether the policies are designed to perpetuate white supremacy or to remedy racial inequality.

The broad reading of *Ricci* is not a foregone conclusion, but it likely reflects the Court's increasingly colorblind approach to disparate impact liability. That approach also has constitutional implications for

188. *Id.* at 579–80.

changing policies to avoid disparate impacts on the basis of race and sex. Although the Court in *Ricci* was interpreting racial discrimination under a statute (Title VII), the Court would presumably interpret what constitutes intentional race discrimination under the Equal Protection Clause in a similar manner.¹⁸⁹ That the Court, as previously explained, interpreted sex discrimination under Title VII in *Gilbert* the same as it did under the Equal Protection Clause in *Geduldig* illustrates the Court's tendency to interpret concepts of discrimination similarly under constitutional and statutory law.¹⁹⁰ Consequently, for race, any government institution that changed a policy to avoid a racially disparate impact could be challenged as having acted unconstitutionally because, in doing so, it considered race. Moreover, such a challenge would likely succeed because avoiding a racial disparity from an employment practice is not a compelling interest under strict scrutiny.¹⁹¹ Rather, per *Croson*, discrimination to remedy a racial disparity requires proof that the disparity likely resulted from discrimination that can be identified with "particularity."¹⁹²

Likewise, for sex, the Court would presumably interpret the Equal Protection Clause to hold that a government employer's changing a policy because of its unintentional disparate impact against women constitutes sex discrimination against men. The difference being that under current law, the Court would likely allow the change under the more lenient intermediate scrutiny test. The Court has upheld sex-based preferences on the basis of statistical disparities under intermediate scrutiny, despite not accepting similar disparities under strict scrutiny to justify race-based preferences.¹⁹³

189. See *Ricci*, 557 U.S. at 594 (Scalia, J., concurring) (noting the Court indicated that it need not reach the equal protection claim because it could decide the issue under Title VII, but finding it difficult to see why the analysis that led the Court to view the fire department's discarding of a disparately impacting promotion test as race discrimination would not apply in a constitutional analysis).

190. See *supra* notes 131–134 and accompanying text.

191. In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 485 (1989), the Court held remedying a racial disparity in the award of government construction contracts through race-based means would only be compelling if the disparity were shown to have resulted from identified discrimination. It follows that avoiding an unintentional racial impact would not be considered compelling as the disparate impact would not be attributable to identified discrimination.

192. *Id.* at 492 (explaining that "as a matter of state law, the city of Richmond has legislative authority . . . [to] use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment.").

193. See *supra* note 147 and accompanying text; see *Croson*, 488 U.S. at 485.

Under the ERA, by contrast, the Court would likely apply strict scrutiny to an employer's policy change designed to avert an unintentional disparate impact "on account of sex." Under this more stringent standard, such an action would be less likely to survive constitutional review. Presumptively then, the ERA would prohibit the government from changing an existing policy that disparately impacts women in order to reduce that impact. For example, assume that a state or the federal government, to reduce a disparate impact against women, banned employers from considering an applicant's salary at a previous employer in setting the salary for the applied-for position.¹⁹⁴ Under the ERA, the Court could hold that banning the consideration of prior salary to avoid depressing women's pay constitutes sex discrimination against men. A disgruntled company, or a male applicant who would benefit from sharing his prior salary, could claim that the policy has the purpose and effect of benefiting women at the expense of men. The Court may well apply strict scrutiny and invalidate the policy. Sex-blindness, which the ERA would likely require, means that disparities between men and women must virtually always be ignored.

Indeed, that the ERA threatens the government's ability to change policies that disparately impact women suggests that it may likewise prohibit any effort to eliminate disparate impact in the private sector as well. The Court's reasoning in *Ricci*, that changing a test with a racially disparate impact against minorities constitutes intentional discrimination against whites who benefited from the test, suggests that Title VII's disparate impact basis of liability is constitutionally vulnerable. By this reasoning, a congressional or state requirement that private employers change policies with a disparate impact is arguably a requirement that private employers engage in intentional discrimination. Government can no more require private actors to discriminate than it can discriminate itself.

As Justice Scalia put it in his *Ricci* concurrence,¹⁹⁵ when the "evil day" comes that disparate impact liability has to be constitutionally reconciled with equal protection doctrine, such liability for sex-based disparate impacts would more likely survive scrutiny if evaluated under intermediate, rather than strict, scrutiny. For strict scrutiny, the purported intentional discrimination of avoiding a disparate impact must be justified by a compelling interest. Regarding race, the Court

194. See Levit, *supra* note 66; Watkins, *supra* note 66.

195. See *Ricci*, 557 U.S. at 594 (Scalia, J., concurring) (citing Richard Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003)).

has held that remedying what it calls “societal discrimination,” *i.e.*, statistical racial disparities plausibly attributable to discrimination but which are not identified with “particularity,” is not “compelling.”¹⁹⁶ By contrast, the Court has upheld remedying societal, sex-based discrimination as “important” and lawful under intermediate scrutiny.

Disparate-impact liability essentially holds employers responsible for the statistical disparities resulting from their employment practices without requiring any proof, much less particularized proof, of intentional discrimination. As explained previously,¹⁹⁷ the Court has upheld preferential legislation for women justified by generalized, society-wide sex disparities, without requiring the legislation to be tailored to particularized discrimination. Liability for employer policies with a disparate impact against women would thus more likely survive under the intermediate scrutiny of the Equal Protection Clause than under the strict scrutiny of the ERA.

C. The ERA’s Indirect Effects (If Pursued Through Legislation)

1. The Bad: No New Legislative Authority to Advance Women’s Equality

There is no good here. The ERA would create no new legislative authority to advance women’s equality that does not already exist. Currently, federal and state governments can generally prohibit sex discrimination in the public and private sectors.¹⁹⁸ A significant exception to such authority is that Congress cannot prohibit gender-motivated, private violence and other discrimination by private actors

196. *Croson*, 488 U.S. at 485, 492 (“[T]o show that a plan is justified by a compelling governmental interest, a municipality that wishes to employ a racial preference cannot rest on broad-brush assumptions of historical discrimination. . . . Findings of *societal* discrimination will not suffice. . . . As a matter of state law, the city of Richmond has legislative authority . . . [to] use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment.”).

197. See *supra* note 147 and accompanying text.

198. 29 U.S.C. § 206(d); 42 U.S.C. § 2000(e). See generally, *e.g.*, *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974) (applying the Equal Pay Act to prohibit sex discrimination in private companies); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (applying Title VII protections in a private setting); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 612 (1984) (upholding the authority of states to prohibit sex discrimination in the private sector, rejecting First amendment challenge to state law ban on sex discrimination by private club).

that is not part of economic activity.¹⁹⁹ The ERA is quite unlikely to change this.

Some ERA supporters disagree, believing that Section 2 of the ERA, which gives Congress authority to enforce the amendment, would permit Congress to prohibit violence against women by private actors.²⁰⁰ Professor Julie Suk's recent book²⁰¹ on the women pioneers who championed the ERA lends support to this view. Suk argues that many ERA advocates in the 1960s and '70s, including Ruth Bader Ginsburg and Congresswomen Martha Griffiths and Patsy Mink, saw the ERA as a catalyst for legislatures to overhaul existing laws that were inconsistent with the principle of equal rights. They envisioned that federal and state legislation would follow the adoption of the ERA with reforms to eliminate obstacles to women's equality.²⁰²

I support expanding legislative authority to advance women's equality. I seriously doubt, however, that the text of the ERA would achieve that goal. In *United States v. Morrison*, the Court held that Congress could not prohibit private violence against women because the Commerce Clause permits Congress to regulate only economic activity.²⁰³ More importantly for predicting the ERA's effect, the Court reiterated in *Morrison* that Congress cannot regulate private, sex-motivated violence under the Fourteenth Amendment because that amendment only restricts *state-sponsored* discrimination.²⁰⁴ In

199. See *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (“We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. The constitution requires a distinction between what is truly national and what is truly local. . . . The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.” (citing *United States v. Lopez*, 514 U.S. 549, 568 (1995))).

200. See Neuwirth, *supra* note 75, at 156 (claiming that the ERA would provide a “solid constitutional basis for legislation advancing women’s equality”); MacKinnon, *supra* note 77, at 578 (“An ERA, as a constitutional amendment, would expand the congressional authority to legislate” in the area of gender-based violence); Wharton, *supra* note 44, at 1229–39 (examining the extent to which state ERAs extend to private actors, finding that many contain “broad language” and “open-textured provisions” that “differ[] markedly from the language of the Fourteenth Amendment and more readily support[] extension to private actors.”). See also *supra* notes 67–71 and accompanying text (discussing ERA supporter expectations that it would expand congressional authority to prohibit gender-motivated violence and genital mutilation).

201. See generally SUK, *WE THE WOMEN*, *supra* note 50.

202. See *id.* at 132–35.

203. See *Morrison*, 529 U.S. at 613 (holding that “thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature”).

204. See *id.* at 627 (stating VAWA is not authorized by the Commerce Clause); see *id.* at 628 (Souter, J., dissenting) (“The Court says both that it leaves Commerce Clause precedent

explaining why the Fourteenth Amendment does not permit Congress to regulate private, sex-motivated violence, the Court relied on the *Civil Rights Cases* of 1883, which held that Congress could not prohibit racial discrimination by private companies under the Fourteenth Amendment.²⁰⁵ The ERA likewise only applies to *state-sponsored* discrimination: “Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex.”²⁰⁶ Therefore, its enforcement provision would only permit Congress to punish or otherwise regulate state-sponsored, sex-motivated violence and other private discrimination. Nor would the ERA expand the Commerce Power to reach private violence and discrimination against women.

2. The Ugly: The ERA Could Harm Women’s Equality Through Existing Civil Rights Laws

As discussed above, the ERA’s self-executing operation could harm women’s equality in the private sector by invalidating laws that create liability for private-employer policies that disparately impact women.²⁰⁷ In addition, the ERA could *indirectly* harm women’s equality in the private sector by influencing how courts interpret civil rights statutes that regulate both state and private actors. As the Court has become increasingly strict against affirmative action under constitutional law, the Court has also taken a harder stance against affirmative action under Title VII and other civil rights laws.²⁰⁸ In the shadow of equal protection doctrine, the Court is already likely to impose interpretations of civil rights laws that make it difficult for private companies to engage in affirmative action for women. Indeed, the case that narrowed the permissibility of affirmative action under Title VII was a sex discrimination case.²⁰⁹ The reason that the Court’s statutory interpretations tend to follow its constitutional interpretations is to avoid confronting a constitutional issue, which may

undisturbed and that the Civil Rights Remedy of the Violence Against Women Act of 1994, 42 U.S.C. § 13981, exceeds Congress’s power under that Clause.”)

205. See *id.* at 599 (syllabus) (“[T]he Fourteenth Amendment places limitations on the manner in which Congress may attack discriminatory conduct. Foremost among them is the principle that the Amendment prohibits only state action, not private conduct.” (citing *Civil Rights Cases*, 109 U.S. 3, 11 (1883))).

206. See *supra* text accompanying note 49 (emphasis added).

207. See *supra* note 122 and accompanying text.

208. See *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 631–37 (1987) (upholding affirmative action for a woman under seemingly stricter standard than the test applied previously in *Ut. Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979)).

209. *Id.* (upholding preferential hiring of women over men under fairly restrictive test).

arise if legislation permits actions that the Constitution forbids. Because Title VII applies identically to state and private employers, the Court is inclined to interpret the statute as holding state and private employers to the same standards. The Court thus tends to hold that Title VII permits state *and* private employers to do only what the Constitution permits state employers to do. Because the ERA would make it more constitutionally suspect for state employers to engage in sex-based affirmative action, the Court would likely interpret Title VII more restrictively with respect to affirmative action for women by public -- and private -- employers. A similar effect is likely with other civil rights laws that prohibit sex discrimination, such as Title IX, which applies equally to state and private schools, colleges, and universities that receive federal funds. Interpreting Title IX to invalidate sex-conscious policies could jeopardize a host of policies at state and private colleges designed to benefit women.²¹⁰

D. Stability and Recognition of Women's Equality

Two other goals of ERA supporters are stability and recognition of women's equality. The first aims to stabilize constitutional protection of women's equality by explicitly guaranteeing such equality in the

210. The two areas in which Title IX protections designed to benefit women could be most detrimentally impacted by the ERA are university admissions policies and sex-segregated athletic teams. The legislative history of the ERA illustrates how the adoption of the amendment could invalidate the exemption in Title IX that allows single-sex public universities to discriminate on the basis of sex in their admissions policies. Report of the Senate Comm. on the Judiciary, Equal Rights for Men and Women, S. Rep. No. 689, 92d Cong., 2d Sess. 16-17 (1972) ("With respect to education, the Equal Rights Amendment will require that State supported schools at all levels eliminate . . . official practices which exclude women or limit their numbers. . . . [A]dmission would turn on the basis of ability or other relevant characteristics, and not on the basis of sex. . . . State schools and colleges currently limited to one sex would have to allow both sexes to attend"); Patricia Werner Lamar, *The Expansion of Constitutional and Statutory Remedies for Sex Segregation in Education: The Fourteenth Amendment and Title IX of the Education Amendments of 1972*, 32 EMORY L. J. 1111, 1159 (1983) (arguing that the adoption of the ERA will necessitate the application of strict scrutiny to sex in the same way that it is applied to race and as a result, "single-sex public schools would be prohibited." The impact of strict scrutiny and the ERA would not be limited to public universities, but private as well because "[t]he Title IX exemptions that would allow federal funding of private single-sex institutions . . . would constitute unacceptable support of private discrimination which would violate the fourteenth amendment if practiced by the state."); Rebecca A. Kiselewich, *In Defense of the 2006 Title IX Regulations for Single-Sex Public Education: How Separate Can Be Equal*, 49 B.C. L. REV. 217, 254-60 (2008) (explaining that though the text of Title IX prohibits sex discrimination in athletics, courts have recognized various government objectives to justify the existence of single-sex sports teams, most notably to "maintain, foster, and promote athletic opportunities for girls." However, the Supreme Court has yet to weigh in on the constitutionality of sex-segregated athletic teams and there exists a spirited debate among scholars as to whether the continued existence of such "separate but equal" teams harms rather than helps women).

Constitution, rather than relying on judicial interpretations of the Equal Protection Clause—interpretations that might change.²¹¹ The second goal is to enshrine in our Constitution an express recognition that women are equal to men.²¹²

These goals are unquestionably important. As to stability, I agree that the Court would be less likely to decide that women’s equality is unprotected by the Constitution if there were an express provision guaranteeing such equality. My concern, however, is that the Court’s likely interpretation of the ERA—that all sex distinctions are presumptively unlawful even when they benefit women—would be worse for women’s equality than the unlikely risk that the Court would reverse fifty years of equal protection precedent. Moreover, Congress is very unlikely to repeal civil rights laws prohibiting sex discrimination, especially government discrimination, which is the only discrimination that the ERA would prohibit. Also, stability could be achieved through an alternative ERA that avoids the harms of the current ERA. The next Part discusses that option.

Regarding recognition, three reasons suggest that this goal does not justify the ERA. First, a formal expression of equality is not worth the cost of undermining substantive equality.²¹³ Second, it could harm

211. See *Davis supra* note 74; Wharton, *supra* note 44, at 1213 (“Lower courts, commentators, and even Supreme Court Justices, have criticized the intermediate standard as vague, poorly defined and malleable, providing insufficient guidance in individual cases and giving broad discretion to individual judges in deciding the importance of an interest and whether the classification is substantially related.”).

212. See MacKinnon, *supra* note 77, at 579 (“[A]n ERA would provide an inspiration and impetus for public policy and a powerful symbolic support for women’s equality at all social levels at the apex of the legal system in a culture in which law has power and meaning, and sometimes leads.”); Brown et al., *supra* note 64; Neuwirth, *supra* note 75 (“[A]mending the Constitution to include sex equality as a fundamental human right will send a clear public message that women are no longer to be treated as second-class citizens. The intentional omission of women has perpetuated a lack of respect for women and engendered a culture that allows sexual harassment to continue unchecked.”). Although Justice Ginsburg supported adding the ERA to the Constitution, it should be acknowledged that she believed that the process would need to begin anew because the congressional deadline on the ERA had expired. See de Vogue, *supra* note 77. Professor Julie Suk’s recent book on the ERA offers a moving understanding of how the ERA would recognize women. Suk posits that the ERA would enable women to be recognized as Founding Mothers because women drafted the ERA, voted for it in Congress, and championed it in state legislatures as activists and legislators. See SUK, *WE THE WOMEN*, *supra* note 50, at 3 (“If and when the ERA is added to the Constitution, our Constitution will officially have founding mothers as well as founding fathers. The ERA will be the only piece of our nation’s fundamental law that was written by women after suffrage, adopted by women leading the way in Congress, given meaning by women lawyers and judges, and ratified by women lawmakers in state legislatures of the twenty-first century . . .”).

213. This point applies equally to Suk’s desire to recognize women as Founding Mothers. See *supra* note 212. Initially, I observe that it is unclear why serving in the Congress and state

equality for other groups who are not explicitly mentioned in the Constitution by lending credence to the claim that the Constitution protects only those groups explicitly mentioned therein. The Constitution does not name any group in the Equal Protection Clause;²¹⁴ rather, it applies to “persons.” That has allowed the Court to expand protections to subjugated groups as their discrimination has become recognized by society and the courts, including different racial and national-origin groups,²¹⁵ women,²¹⁶ gays and lesbians,²¹⁷ “hippies,”²¹⁸ undocumented immigrant children,²¹⁹ noncitizens,²²⁰

legislatures that ratify a constitutional amendment is necessary to consider women as founding mothers. Women have brought about as activists the passage of many constitutional amendments, including the nineteenth amendment, protecting the right to vote against sex discrimination, without serving in Congress or most state legislatures, and yet they certainly deserve recognition as mothers of such amendments. Indeed, Suk’s book inspiringly recounts the role of women in the suffrage movement producing the nineteenth amendment, from Seneca Falls in 1848, to Elizabeth Cady Stanton and Susan B. Anthony’s initial drafting of the nineteenth amendment, to the suffragists who testified before Congress for decades in favor of the amendment, to Representative Jeannette Rankin who advanced the amendment in Congress although lost her congressional seat by the time the amendment was approved by Congress. *See* SUK, *WE THE WOMEN*, *supra* note 50, at 4. Second, if my concerns over the ERA come to pass, it would be ironic, arguably tragic, for women to author an amendment that harms women’s equality.

214. *See* U.S. CONST. amend. XIV (referring to “persons” with no explicit mention of race); *But see* U.S. v. Virginia, 518 U.S. 515, 599 (1996) (Scalia, J., dissenting) (stating that race discrimination, unlike sex discrimination, is protected by the “text” of the Equal Protection Clause).

215. *See generally, e.g.*, *Strauder v. West Virginia*, 100 U.S. 303 (1880) (Blacks); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (Chinese nationals); *Hernandez v. Texas*, 347 U.S. 475 (1954) (Mexicans); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (Whites); *Hernandez v. New York*, 500 U.S. 352 (1991) (Latinos/Hispanics).

216. *See, e.g.*, *Reed v. Reed*, 404 U.S. 71, 77 (1971) (“By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause.”).

217. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 635 (1996) (“We must conclude that Amendment 2 classifies [gays and lesbians] not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause . . .”).

218. *See* U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 537–38 (1973) (holding that a law terminating food stamp benefits for unrelated people living in the same household violated the Equal Protection Clause. A look at the legislative history revealed that the new regulations were “specifically aimed at the ‘hippies’ and ‘hippie communes’”).

219. *See Plyler v. Doe*, 457 U.S. 202, 223–24 (1982) (holding that children have the right to equal access to education under the Equal Protection Clause, regardless of their immigration status).

220. *See Graham v. Richardson*, 403 U.S. 365, 376 (1971) (“We hold that a state statute that denies welfare benefits to resident [noncitizens] and one that denies them to [noncitizens] who have not resided in the United States for a specified number of years violate the Equal Protection Clause.”).

nonmarital children,²²¹ and people with mental disabilities.²²² The ERA would, for the first time, expressly identify a particular group for equality protection, implying that the absence of explicit protections for other groups means that they are not constitutionally entitled to full equality. The very goal of recognition is predicated on the claim that full women's equality requires such recognition. If women are fully equal to men only if the Constitution expressly says so, then the message to the other groups mentioned above,²²³ as well as yet-to-be-protected groups, such as gay, transgender,²²⁴ mentally or physically disabled,²²⁵ undocumented immigrants, and impoverished people is that they are not fully equal until they can amend the Constitution in their favor, a political and practical impossibility.

Third, recognition could be achieved through an alternative ERA that overcomes the shortcomings and harmfulness of the original ERA.

221. See *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (“[Nonmarital] children are not ‘nonpersons.’ They are humans, live, and have their being. They are clearly ‘persons’ within the meaning of the Equal Protection Clause of the Fourteenth Amendment.”).

222. See generally *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (invalidating a city's rejection of a petition to establish a home for people with mental disabilities).

223. I noted above that several groups have been protected by the Court under the Equal Protection Clause, yet I am saying here that their status may be less secure under the ERA. See *supra* notes 215-222. My point is that, although they have been protected in unusually problematic cases, the Court does not as yet accord all the groups heightened protection under the Equal Protection Clause. Of course, given this article's case against strict scrutiny, that may be a blessing. I believe, however, that intermediate scrutiny for such groups would better serve their equality interests than the rational basis with teeth that seems to apply on an ad hoc basis currently. The ERA might dissuade the Court from applying intermediate scrutiny to protect such groups on the ground that each group needs a constitutional amendment to protect them.

224. I noted above that the Court has protected gays and lesbians under the Equal Protection Clause. See *Romer v. Evans* 517 U.S. 620, 635 (1996). I doubt that the ERA would encourage the Court to retreat from the precedents, but it could suggest that the Court should not apply a more heightened scrutiny to sexual-orientation discrimination than the rational basis with teeth it has done so far. I also recognize and support that the *Bostock* case might lead the Court to recognize gender identity and sexual orientation as sex discrimination under the Equal Protection Clause and, similarly, might lead the Court to interpret the ERA to protect gender identity and sexual orientation under the ERA. As previously noted, see *supra* note 7 and accompanying text, this article does not directly address the implications of the ERA for LGBTQ+ rights, which likely raises distinctive issues compared to the equality of women compared to men. I certainly encourage scholars and others to give attention to the potential costs and benefits of the ERA for LGBTQ+ rights compared to the Equal Protection Clause. See, e.g., Kate Kelly, *The Equal Rights Amendment is a Queer Movement*, 309 QSALTLAKE MAG. (Mar. 2020), <https://amp.issuu.com/qsaltlake/docs/qsaltlake/s/10229917>.

225. Though it is true that the Court protected mental disability rights in *Cleburne*, see generally 473 U.S. at 432, and I doubt the Court would pull back from that precedent, it did so under rational basis scrutiny. It is still open to the Court to protect persons with disabilities under heightened scrutiny, preferably intermediate scrutiny, not strict scrutiny. But the ERA could discourage higher protection for people with disabilities than the Court has already accorded them.

Women's inequality remains a serious problem in America, and if a constitutional amendment can prohibit practices that perpetuate such inequality and encourage policies that would promote women's equality, such an amendment should be drafted, proposed and ratified. The next Part identifies some models on which to base such an alternative ERA.

IV. ALTERNATIVE ERAS

Equality advocates have proposed alternative amendments that would better promote women's equality than the ERA. Representative Carolyn Maloney (D-NY), for example, has proposed an amendment moderately more promising than the ERA. Her proposal reads:

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.²²⁶

The main difference between Maloney's proposal and the ERA is that hers inserts into the ERA a beginning sentence declaring that "Women shall have equal rights" in the United States. The ERA only refers to "sex," not "women." Maloney's proposal has three potential benefits over the original ERA. First, by emphasizing women, courts might interpret it to allow some sex discrimination designed to benefit women that would not be allowed if designed to benefit men. Second, that the first sentence states that women will have equal rights, without stating that such rights are against discrimination *by the government*, might support an interpretation that the rights would include a right against private discrimination. Third, by mentioning women explicitly, it sends a stronger recognition message that women are equal to men.²²⁷

226. H.R.J. Res. 35, 116th Cong. (2019).

227. A fourth difference between Maloney's proposed ERA and the original ERA is that Maloney's would authorize *states*, as well as Congress, to enforce the amendment, whereas the original ERA would only authorize Congress to enforce the amendment. That seems unlikely to grant states any additional power, however. First, unlike the federal government, states are presumed as a matter of constitutional law to be authorized to pursue whatever goals their state constitutions permit unless the federal Constitution limits such power. Thus, states are already

Such potential benefits, though plausible, are not likely to result. First, the Court would be unlikely to authorize discriminatory laws or policies designed to benefit women because the rest of the amendment still guarantees equality of rights simply “on account of sex,” *i.e.*, to everyone, not just women, and thus men should still be entitled to complain that a law for the benefit of women discriminates against men. Second, without more, stating that “equal rights” are guaranteed to women would likely be interpreted in the conventional way in which rights are understood in American constitutional law, as negative rights against the government. The second sentence reinforces that view as it declares that equality of rights shall not be denied by states or the federal government. The third benefit, that a stronger message of women’s equality would be expressed, is true. That message is outweighed, however, by the inadequacy of the proposed amendment to correct the shortcomings of the ERA. Nonetheless, the Maloney amendment appears to be moderately less harmful to women’s equality than the original ERA.

Other Western countries’ constitutions and international conventions are also worth considering, especially because ERA supporters have noted that Canada and many European countries are ahead of the United States in protecting women’s equality because women’s equality is explicitly guaranteed in these nations’ constitutions.²²⁸ For example, the constitutions of some European

empowered to advance women’s equality without an express authorization in the Constitution. Second, the express authorization for states to enforce the ERA would not give states the authority to discriminate on account of sex in violation of Section 1 of the Maloney amendment, even for the benefit of women. The Court in *Adarand* held that Congress could not engage in race-based affirmative action for remedial purposes any more than states could, notwithstanding that Section 5 of the Fourteenth Amendment authorizes Congress, but not the states, to enforce the amendment, including the Equal Protection Clause. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 201 (1995) (stating that “congruence” between the Fifth and Fourteenth Amendment requires that the federal government comply with equal protection restraints on race-based decision-making).

228. *See Davis, supra* note 74, at 455 (“The ERA’s absence from U.S. law is particularly glaring in light of the constitutional provisions adopted by sister nations, such as Canada and the nations of Europe, that specifically address sex-based discrimination.”) (citing to the European Convention on Human Rights art. 14, Nov. 4, 1950 (explicitly mentioning “sex” as one of the many grounds on which a person cannot be discriminated against or denied the equal “enjoyment of rights and freedoms” set forth in the Convention) and to the Canadian Charter of Rights and Freedoms, Part I, art. 15, 1982 (stating that individuals cannot be discriminated against on the basis of “sex”)); Gila Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women’s Equality*, 10 WM. & MARY J. WOMEN & L. 459, 481 (2004) (“Feminists note the protection afforded to women in American jurisprudence is far from being consistent with the standards of protection for women in other western countries, or the protections afforded to women in international law through [the Convention on the Elimination of All Forms of

countries expressly allow or require sex-conscious policies that advance women's equality. Professor Julie Suk has analyzed the sex-equality provisions of several countries with sex-equality ratings higher than the United States and found that their constitutions make explicit authorizations for policies designed to increase women's representation in professional careers, corporate boards, and political institutions.²²⁹ Many also have explicit provisions to support mothers and to break down traditional sex roles.²³⁰

Suk observes, for example, that France and Germany contain “three features that function to reduce gender inequalities: nondiscrimination, authorization of special measures to promote sex equality, and protection of mothers.” The French Constitution provides: “[France] shall ensure equality before the law, without distinction of origin, race, or religion. It shall respect all beliefs. . . . Statutes shall promote equal access by women and men to elective offices and posts as well as to professional and social positions.”²³¹

In international law, the most comprehensive, multi-national treaty on women's equality is the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Convention prohibits discrimination against women. It also authorizes “special measures” to advance women's equality until such measures are no longer needed. CEDAW also expressly authorizes legislation to protect maternity. In relevant part, the Convention provides

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when

Discrimination Against Women] . . .”).

229. See Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 *YALE J. L. & FEMINISM* 381, 385 (2017) (describing the various constitutional provisions in other countries that substantively concern women's status).

230. See *id.* at 381–82, 405–408.

231. See *id.* at 421.

the objectives of equality of opportunity and treatment have been achieved.

Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.²³²

Advancing an approach analogous in some ways to European and international approaches, feminist scholars Catherine MacKinnon and Kimberlé Crenshaw have proposed an amendment with explicit language that would not only authorize legislative and executive measures to remedy sex inequality, but it would also *mandate* such measures:

Section 1. Women in all their diversity shall have equal rights in the United States and every place subject to its jurisdiction.

Section 2. Equality of rights shall not be denied or abridged by the United States or by any State on account of sex (including pregnancy, gender, sexual orientation, or gender identity), and/or race (including ethnicity, national origin, or color), and/or like grounds of subordination (such as disability or faith). No law or its interpretation shall give force to common law disadvantages that exist on the ground(s) enumerated in this Amendment.

Section 3. To fully realize the rights guaranteed under this Amendment, Congress and the several States shall take legislative and other measures to prevent or redress any disadvantage suffered by individuals or groups because of past and/or present inequality as prohibited by this Amendment, and shall take all steps requisite and effective to abolish prior laws, policies, or constitutional provisions that impede equal political representation.

Section 4. Nothing in Section 2 shall invalidate a law, program, or activity that is protected or required under Section 1 or 3.²³³

In addition to requiring remedial measures, the MacKinnon-Crenshaw proposal makes clear that the amendment would protect sexual orientation and gender identity and would extend protection beyond sex to include race and other yet-to-be-recognized stigmatized groups who share “like grounds of subordination.” It would also require Congress and the states to redress “any disadvantage suffered

232. United Nations Convention on the Elimination of All Forms of Discrimination against Women, Articles 3 and 4, <https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (last visited Mar. 7, 2021). I thank Professor Jay Butler for bringing CEDAW to my attention.

233. Catharine A. MacKinnon & Kimberlé W. Crenshaw, *Reconstituting the Future: An Equality Amendment*, 129 YALE L. J. FORUM 343, 359–62 (2019).

by individuals or groups because of past and/or present discrimination.” This would largely avoid the restrictive scope of the original ERA both as to women and as to other groups that the original ERA leaves out.

A potential drawback with the MacKinnon-Crenshaw proposal for some sex equality advocates is its mandatory rather than permissive approach. One might believe that the complexities of remedying inequalities by sex and other traits supports leaving it to the political process to determine what remedial measures are, on balance, most effective. A constitutional mandate to engage in remedial measures suggests that courts would have authority to enjoin the political branches to engage in judicially-fashioned remedial policies. Where the original ERA would likely prohibit sex-conscious remedial measures, the alternative of mandating sex-conscious remedial obligations arguably goes too far in the other direction.

I propose, as a basis for deliberation, the following amendment that takes an approach between the ERA and the Mackinnon-Crenshaw proposal:

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

Section 2. Nothing in Section 1 shall be construed to prevent Congress or the States from acting on account of sex to advance sex equality. Nor shall this amendment be construed to prevent groups from seeking equal rights under other provisions of the Constitution.

Section 3. Congress and the several States shall have the power to enforce, by appropriate legislation, the provisions of this article. Congress's power to redress inequality in the public and private sectors shall extend at least as far as that of the States.

I observe some key features of this proposal. First, Section 1 incorporates the benefits of the Maloney amendment of expressly recognizing “Women” as having equal rights. Second, Section 3 grants state enforcement power. Although that is probably not necessary, it may help to clarify for state officials and courts that the amendment does not reduce states' authority to engage in sex-conscious equality-advancing measures. Third, the last sentence of Section 3 ensures that Congress can regulate sex discrimination and sex-motivated violence in the private sector as much as states can. This would effectively overturn the holding of *Morrison* that Congress cannot regulate private violence

and other private discrimination that is not part of economic activity. Accordingly, although individuals and groups might retain privacy rights to discriminate by sex in, for example, admission to a home or exclusive private club, Congress can regulate, as far as states can, violence against women and discrimination in circumstances not protected by individual rights. Fourth, Section 2 immunizes sex-conscious, equality-advancing measures from challenge under Section 1. Fifth, Section 2 *authorizes* such measures but does not *require* them, according government discretion to determine what remedial measures would be most effective. Finally, the last sentence of Section 2 makes clear that guaranteeing sex equality does not imply that other groups must secure a constitutional amendment to achieve equal rights under the Constitution.

The foregoing examples suggest that an alternative ERA could be drafted that ensures that courts could not block legitimate efforts to advance women's equality. In support of the original ERA, however, one might concede that an alternative ERA would be preferable but still seek final ratification of the original ERA for the time being. If an alternative ERA could be ratified, the reasoning goes, it could be ratified as soon as politically feasible. In the meantime, should we not secure ratification of the original ERA?

No. For two reasons, ratifying the original ERA and then pursuing a better alternative would endanger women's equality. First, the original ERA would not improve the status quo—rather, it would make things worse for women's equality by proscribing sex-conscious strategies to reduce sex inequality. Second, ratifying the ERA would make ratifying an alternative amendment more difficult. Much of the public would believe that the goals of the ERA had been achieved and that efforts to ratify another amendment would be unnecessary. And some people who would have supported an alternative ERA might be reluctant to complicate the Constitution with repeated amendments on the same subject matter. In short, amending the Constitution to advance women's equality is likely a “one and done,” and we need to get our one shot right.

CONCLUSION

The ERA would likely require courts to treat sex more like race, subjecting all state-sponsored sex discriminations to strict (or even absolute) scrutiny, rather than to the intermediate scrutiny applied to sex classifications under current equal protection doctrine.

Unfortunately for racial equality, the Court has applied strict scrutiny to prohibit race-conscious efforts to remedy past discrimination, and the current Court is likely to prohibit affirmative efforts to achieve racial diversity as well. Courts are also moving toward invalidating both laws that aim to reduce racial inequality through race-neutral means and laws that create liability for policies that disparately impact racial minorities. The ERA would ask the Court to do the same with sex. The effect would be that government policies designed to advance women's equality or to avoid having a disparate impact against women would be presumptively unconstitutional, even if pursued through sex-neutral means.

The failure of the ERA to address the sex inequalities of today is not the fault of those who proposed the ERA or of those who have fought for its ratification over the ensuing decades. When proposed in 1923, few, if any, Americans imagined that constitutional provisions that guarantee race and sex equality would be interpreted by courts to invalidate efforts to achieve race and sex equality. Intentional discrimination against Blacks and women, by government and private actors, was pervasive. Race and sex equality advocates sought to enlist the courts in prohibiting discrimination against Black people and women. But no one thought that constitutionalizing race or sex equality would prohibit the very political institutions that were oppressing Blacks and women from trying to rectify that oppression. Nonetheless, that is the state of the current Supreme Court jurisprudence on race, one that requires color-blindness even at the expense of racial equality and one that will likely be reinforced by the recent rightward shift of the Court. Similarly, the ERA would likely mandate sex blindness at the expense of women's equality.

Though it can be very disappointing to have come this far in constitutionalizing the ERA, we should not let hope for what could have been blind us from what could happen with the current ERA. The courageous advocates of the ERA can take pride in the legislative and judicial protections of sex equality that have no doubt been brought about because of their activism. What is needed now is a fresh start, a new ERA designed to fit the inequalities that persist today and one that prevents the courts from blocking such reforms. In the immediate term, we need to put the original ERA to rest.