Session 1: The Meaning of a 21st Century ERA

1 - The Puzzles and Possibilities of Article V, David E. Pozen & Thomas P. Schmidt

2 - A Dangerous Imbalance Pauli Murray's Equal Rights Amendment and the Path to Equal Power, Julie Suk

3 - An Equal Rights Amendment for the 21st Century, Julie Suk

Session 2: ERA and the 14th Amendment’s Gender Equality Jurisprudence: From Reed v. Reed to U.S. v. Virginia and Beyond

1 - The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law, Cary Franklin

2 - Fundamentally Wrong About Fundamental Rights, Adam Winkler

3 - The Political Economy of Recognition, Kendall Thomas

Session 3: ERA and Abortion: Equality Arguments for Reproductive Rights

1 - A New E.R.A. or a New Era - Amendment Advocacy and the Reconstitution of Feminism, Serena Mayeri

2 - After Suffrage: The Unfinished Business of Feminist Legal Advocacy, Serena Mayeri

3 - Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade, Melissa Murray

4 - Why Restrict Abortion, Reva Siegel

5 - The Pregnant Citizen, Reva Siegel

6 - Brief of Amicus Curiae in Allegheny Reproductive Health Center v. Pennsylvania DHS, ERA Project

7 - Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel in Dobbs
Session 4: Gender Justice and the ERA in Practice

1 - Privacy Rights and Public Families, Khiara M. Bridges

2 - Fetal Protection Laws Moral Panic and the New Constitutional Battlefront, Michele Goodwin

3 - Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality, Kate Andrias & Benjamin Sachs

4 - Legislative approaches to nondiscrimination at work: a comparative analysis across 13 groups in 193 countries, Jody Heymann et al

5 - Where do Women Stand? New Evidence on the Presence and Absence of Gender Equality in the World’s Constitutions, Adele Cassola et al

6 - Protections of Equal Rights Across Sexual Orientation and Gender Identity: An Analysis of 193 National Constitutions, Amy Raub et al
Legal scholars describe Article V of the U.S. Constitution, which sets forth rules for amending the document, as an uncommonly stringent and specific constitutional provision. A unanimous Supreme Court has said that a “mere reading demonstrates” that “Article V is clear in statement and in meaning, contains no ambiguity, and calls for no resort to rules of construction.” Although it is familiar that a small set of amendments, most notably the Reconstruction Amendments, elicited credible challenges to their validity, these episodes are seen as anomalous and unrepresentative. Americans are accustomed to disagreeing over the meaning of the constitutional text, but at least in the text itself we assume we can find some objective common ground.

This paper calls into question each piece of this standard picture of Article V. Neither the language nor the law of Article V supplies a determinate answer to a long list of fundamental puzzles about the amendment process. Legally questionable amendments have not been the exception throughout U.S. history; they have been the norm. After detailing these descriptive claims, the paper explores their doctrinal and theoretical implications. Appreciating the full extent of Article V’s ongoing ambiguity, we suggest, counsels a new approach to judging the validity of contested amendments, undermines some of the premises of originalism and textualism, and helps us to see new possibilities for constitutional change. Because the success or failure of attempted amendments turns out not to be exclusively or even primarily a function of following the
rules laid out in the canonical document, all constitutional amending in an important sense takes place outside Article V.

INTRODUCTION .................................................................................................................. 2319
I. “EXTERNAL” LIMITS TO ARTICLE V’S (OR ANY AMENDING CLAUSE’S) RESOLVING POWER ...................................................................................................................... 2325
II. “INTERNAL” LIMITS TO ARTICLE V’S RESOLVING POWER: TEXT .......................................................................................................................... 2328
   A. Interpretive Puzzles ..................................................................................................... 2328
   B. Putting These Puzzles in Perspective ....................................................................... 2334
III. “INTERNAL” LIMITS TO ARTICLE V’S RESOLVING POWER: PRECEDENT .................................................................................................................. 2339
   A. The Bill of Rights ...................................................................................................... 2339
   B. The Eleventh Amendment ......................................................................................... 2342
   C. The Twelfth Amendment .......................................................................................... 2346
   D. The Reconstruction Amendments .......................................................................... 2347
   E. The Sixteenth Amendment ....................................................................................... 2351
   F. The Seventeenth Amendment .................................................................................. 2353
   G. The Eighteenth Amendment .................................................................................... 2354
   H. The Nineteenth Amendment ..................................................................................... 2356
   I. The Twenty-First Amendment ................................................................................. 2358
   J. The Twenty-Second Amendment ............................................................................ 2360
   K. The Twenty-Seventh Amendment? ......................................................................... 2362
   L. The Twenty-Eighth Amendment? ............................................................................ 2365
      1. Article the First ...................................................................................................... 2365
      2. The Titles of Nobility Amendment .......................................................................... 2367
      3. The Equal Rights Amendment ............................................................................... 2368
   M. An Article V Convention? ....................................................................................... 2370
IV. LIVING WITH ARTICLE V AMBIGUITY: JUDGING CONTESTED AMENDMENTS .................................................................................................................. 2371
   A. The Highly Incomplete Liquidation of Article V ...................................................... 2372
   B. Revisiting Coleman ................................................................................................. 2377
V. EMBRACING ARTICLE V AMBIGUITY: LESSONS FOR INTERPRETERS AND REFORMERS ........................................................................................................... 2384
   A. Originalism and Textualism ....................................................................................... 2384
   B. Amendment Inside and Outside Article V ................................................................. 2387
   C. Loosening the Constitutional Cage Through Article V Thayerianism ......................... 2389
CONCLUSION .......................................................................................................................... 2395
INTRODUCTION

One of the distinctive features of the original U.S. Constitution was its capacity for lawful change. In George Washington’s words, the Constitution “contain[ed] within itself a provision for its own amendment.” 1 That provision was and is Article V, which instructs that an amendment shall become “Part of this Constitution” when “propose[d]” by “two thirds of both Houses” of Congress and “ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof.” 2 The Supreme Court gave voice to the standard view of Article V when it wrote in 1956 that “[n]othing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process.” 3

Constitutional theorists have challenged or complicated this view in a variety of ways. Akhil Amar has suggested that the Constitution may be amended by a national popular referendum. 4 Some have proposed that norms without a foothold in the canonical document may nevertheless attain “constitutional” status. 5 And many have emphasized the extent to

---


2. U.S. Const. art. V. Article V also permits “the Legislatures of two thirds of the several States” to apply to Congress to “call a Convention for proposing Amendments,” which then go to the states for ratification. Id. No such convention has yet been called. See infra section III.M.


which new propositions of supreme law, including propositions that depart sharply from prior understandings, may emerge and become entrenched in the absence of formal amendment. Virtually all constitutional lawyers, however, take as given that conformity with Article V’s “amendatory process” has determined ever since the Founding what is and is not “put into” the written Constitution, and therefore what its text does and does not say.

This paper questions Article V’s capacity to perform that function. It is by now familiar that the perceived clarity of the constitutional text is “constructed” to a significant degree by norms of legal argument and other social practices. We endeavor to show that what counts as the constitutional text in the first place is also constructed to a significant degree by such practices. Part of the reason is that the ultimate rule of recognition in any system is a matter of official and popular acceptance, rather


7. Even the most radical Article V revisionists do not necessarily dispute this. Although Amar contends that the Constitution may lawfully be amended by a popular referendum or comparable mechanism, he never suggests that such an amendment has in fact occurred. See, e.g., Amar, Consent of the Governed, supra note 3, at 457–61. Likewise, although Bruce Ackerman advances an elaborate theory of constitutional change outside Article V, he never suggests that new words have been put into the Constitution’s text by a procedure that does not purport to follow Article V. See, e.g., 2 Bruce Ackerman, We the People: Transformations 15–31 (1998) [hereinafter Ackerman, We the People].

8. Although this piece is technically an “Article,” it will be referred to as a “paper” throughout to avoid confusion with references to Article V.


10. Amar has made a conceptually similar, but empirically narrower, point about the original Constitution. While most assume that the parchment Constitution in the National Archives is the authoritative document, a printed version with minor differences was transmitted to and ratified by the states. See Akhil Reed Amar, America’s Unwritten Constitution: The Precedents and Principles We Live By 63–68 (2012) [hereinafter Amar, America’s Unwritten Constitution]. That latter version is probably the legally operative one. Id. But there would be no way to ascertain which version is legally operative simply by studying the documents themselves. Id.; cf. Laurence H. Tribe, The Invisible Constitution 6 (2008) [hereinafter Tribe, The Invisible Constitution] (“[N]othing in the visible text can tell us that what we are reading really is the Constitution . . . .“).
than constitutional design. Even an amending clause that looks itself like
the system’s “supreme criterion of law”11 owes its efficacy, and indeed its
legality, to extratextual forces.12 But another, more U.S.-specific part of the
reason—and the one on which this paper focuses—is that neither the
language of Article V nor subsequent constructions of Article V specify the
amendatory process in enough detail to establish in many cases which
amendments are valid and which are not. Article V continues to be
shrouded in a remarkable amount of legal uncertainty, which further
attenuates the link between its contents and the failure or success of any
given amendment effort.13

Leading scholars have characterized Article V as an unusually clear
and constraining constitutional provision.14 The Supreme Court has said
that a “mere reading demonstrates” that “Article V is clear in statement
and in meaning, contains no ambiguity, and calls for no resort to rules of
construction.”15 Yet, as we explain, the text of Article V leaves open
numerous fundamental questions, from the time limits (if any) on an
amendment’s pendency to the substantive limits (if any) on an amend-
ment’s subject matter to the role (if any) of the President and state gover-
nors in the amendatory process to the respective roles (if any) of Congress
and the courts in deciding whether an amendment has been validly
adopted.16 Debates during the drafting and ratification of the Constitution

12. See infra Part I.
13. A “successful” effort to enlist Article V, for purposes of this paper, is one that results
in a new amendment widely understood to have become part of the written Constitution.
In other words, we equate success with sociological legitimacy. And we contend that amend-
ment success is not exclusively or even primarily a function of following the rules laid out in
Article V.
14. See, e.g., Adrian Vermeule, Judging Under Uncertainty: An Institutional Theory
of Legal Interpretation 270 (2006) [hereinafter Vermeule, Judging Under Uncertainty]
(listing the “rules governing . . . constitutional amendment” as an example of “clear and
specific constitutional text[ ]”); Richard Albert, Constitutional Disuse or Desuetude: The
Case of Article V, 94 B.U. L. Rev. 1029, 1035 (2014) [hereinafter Albert, Constitutional
Disuse or Desuetude] (“The simplicity and clarity of Article V’s enabling clause allow us to
identify when the Constitution has been formally amended . . . .”); David R. Dow, The Plain
Meaning of Article V, in Responding to Imperfection, supra note 1, at 117, 117 (“The mean-
ing of Article V . . . is an example of yet another text the meaning of which is essentially
clear.”); John Harrison, The Lawfulness of the Reconstruction Amendments, 68 U. Chi. L.
Rev. 375, 457-61 (2001) (depicting Article V as privileging “clarity” and “certainty” over
other values).
16. See infra section II.A. This is by no means the first work to observe that Article V is
vague or underspecified in certain respects. See, e.g., Richard B. Bernstein with Jerome
Agel, Amending America: If We Love the Constitution So Much, Why Do We Keep Trying
to Change It? 248 (1993) (“The procedures outlined in Article V pose a host of unresolved
difficulties.”); Walter Dellinger, The Legitimacy of Constitutional Change: Rethinking the
Amendment Process, 97 Harv. L. Rev. 386, 432 (1985) [hereinafter Dellinger, Legitimacy
of Constitutional Change] (acknowledging that “[t]he spare language of article V leaves
shed hardly any light on these questions. More than two centuries later, post-ratification practice has done little to resolve them, or to establish much of anything concerning the never-used amendment-through-convention procedure. As a result, the overwhelming majority of amendments added to the Constitution since 1787 have faced credible challenges to their validity—challenges that were beaten back by proponents at the time but that in many respects have never been definitively dispelled—while other amendments have plausibly satisfied Article V’s formal criteria yet nevertheless failed to gain widespread acceptance.

Charles Black once advised Congress that “[f]undamental law should be not merely of arguable, but of clear legitimacy,” and that accordingly the “legitimization of constitutional amendments” is an area “where, perhaps more than anywhere else, square corners should be cut.” The actual experience of constitutional amendment throughout U.S. history has been far messier. Article V contains so many ambiguities and lacunae that it can be expected to yield, and in fact has yielded, amendments of only “arguable” legal legitimacy at the time of their adoption. Consider, in this regard, that no fewer than twenty-six of our twenty-seven recognized amendments failed to comply with a requirement of presidential approval that Black himself found “plain” on the face of the Constitution.
Recent controversies over the Twenty-Seventh Amendment and the Equal Rights Amendment (ERA) underscore just how many questions about Article V remain unsettled at this late date.\(^2\) The Twenty-Seventh Amendment was “ratified” by the requisite number of states nearly 203 years after it was proposed by Congress alongside the amendments that became the Bill of Rights. As the Supreme Court opined in the 1921 case *Dillon v. Gloss*, there is a serious objection that this violates an implicit condition of Article V that ratification take place within a reasonable time frame.\(^2\) The *Dillon* Court specifically stated that it was “quite untenable” to think that what is now the Twenty-Seventh Amendment could be revived “by some future generation.”\(^2\) And the Justice Department’s Office of Legal Counsel disagreed with members of Congress over whether the Archivist of the United States was required to refer the amendment to Congress prior to its official certification.\(^2\)

Meanwhile, the ERA has not, at this writing, been accepted by the legal community as part of the Constitution because several state ratifications occurred after a deadline imposed by Congress, among other complications, even though the amendment seems to have checked all of the boxes for validity indicated on the face of Article V. In addition to the ERA, five amendments have been proposed by Congress but never ratified by a sufficient number of states.\(^2\) Or, at least, so goes the conventional wisdom. A recent lawsuit contends that the other amendment proposed by Congress alongside the current Twenty-Seventh and the Bill of Rights, regarding congressional apportionment, *did receive* the requisite number of ratifications in the eighteenth century.\(^2\) These unsuccessful amendments dwell in a kind of legal purgatory due to the apparent acceptance

approved by the President before it “take[s] Effect.” According to Black, this instruction would seem to mean, “if plain words can have plain meaning,” that once passed by Congress a proposed amendment must be approved by the President. Charles L. Black, Jr., On Article I, Section 7, Clause 3—And the Amendment of the Constitution, 87 Yale L.J. 896, 899 (1978) [hereinafter Black, On Article I]. Only one amendment has ever received a presidential signature prior to state ratification: President Abraham Lincoln’s on the Thirteenth. See Harrison, supra note 14, at 389 n.70; infra note 130. The so-called Corwin Amendment, proposed by Congress in 1861 but never ratified, was “inadvertently presented” to and then signed by President James Buchanan. Cong. Globe, 38th Cong., 2d Sess. 630 (1865) (statement of Sen. Trumbull); see also Bernstein with Agel, supra note 16, at 91. The presentment issue is discussed in detail infra section III.B.

\(^2\) For more extensive discussion of both amendments, see infra sections III.K, III.L.3.

\(^2\) 256 U.S. 368, 375 (1921) (“We conclude that the fair inference or implication from Article V is that the ratification must be within some reasonable time after the proposal.”).

\(^2\) Id.


of the Twenty-Seventh Amendment after its long dormancy. Even more striking, there is a colorable argument that enough states have “applied” for a constitutional convention to obligate Congress to call one—even though few, if any, members of Congress appear to realize this.28

Beyond its intrinsic interest, Article V’s ambiguity carries significant doctrinal and theoretical implications. On the doctrinal side, it points toward a new defense of, and twist on, the Supreme Court’s ruling in Coleman v. Miller that Congress has the power to “promulgate” or “proclaim” constitutional amendments after ratification.29 Many commentators have criticized Coleman on textual and historical grounds, but the persistent controversy over the validity of amendments suggests a distinct prudential rationale for allowing one organ of government to resolve the status of a new amendment more quickly and democratically than the Court is capable of. Congress, we suggest, is the branch best suited for this task—and could further bolster its comparative competence through the use of subconstitutional mechanisms such as special commissions and advisory referenda.

On the jurisprudential side, our account informs multiple debates about constitutional change through and beyond Article V. Because the success or failure of an attempted amendment bottoms on social acceptance, which throughout U.S. history has not turned on punctilious adherence to a set of rules, all constitutional amending in an important sense takes place “outside” as well as “inside” Article V. Textual and extratextual considerations are entwined right from the start of the law-recognition process. Article V, in consequence, may have more play in the joints than is typically realized. Given the extreme antidemocratic potential of the double-supermajoritarian Article V formula, there is a strong case for what might be called Article V Thayerianism: an interpretive presumption favoring ease of amendability on those (many) questions that Article V does not clearly resolve. Vicki Jackson has warned that “sociocultural beliefs in the difficulty of amendment . . . may contribute to the difficulty of amendment today,” as claims about the impossibility of amendment “can become self-fulfilling.”30 Our descriptive analysis of Article V bears out this warning, while our proposed adaptation of Thayerianism furnishes a practical tool for breaking out of the vicious cycle that Jackson identifies. At the same time, our showing of the constructedness of the constitutional text holds lessons for constitutional interpretation more
The paper proceeds in five parts. Part I sets the general jurisprudential stage by explaining the inherent limits of Article V, or any constitution’s amending clause, to determine which efforts at constitutional change will be seen as legally valid. Part II catalogs the many questions about the amendment process that the text of Article V fails to answer, and it explains that these uncertainties are striking both from a comparative perspective and because of Article V’s unique function as the gateway to the constitutional text. Part III provides a historical review of amendment efforts, which reveals that legally plausible contestation over amendment validity is the norm in U.S. practice, not the exception, and that many important questions about the amendment process remain unsettled. Parts II and III are the empirical centerpiece of the paper. Taken together, they confound any notion that Article V is a clear\(^{32}\) or “straightforward”\(^{33}\) guide to amendment, even though there is arguably no more fundamental issue in U.S. law than what is or is not inscribed in the constitutional text. Moving from deconstruction to reconstruction, Part IV considers doctrinal implications of this account and argues, in particular, that it provides a stronger basis for Coleman than the reasons given by the Court. Finally, Part V explores broader implications for constitutional theory and interpretation.

I. “EXTERNAL” LIMITS TO ARTICLE V’S (OR ANY AMENDING CLAUSE’S) RESOLVING POWER

The main descriptive burden of this paper is to demonstrate that Article V of the U.S. Constitution is significantly less clear and constraining, and therefore significantly less determinative of the success or failure of attempted amendments, than is generally assumed. But before turning to those claims, let us imagine a hypothetical country, Sovereignia, with an amending clause in its written constitution, known as Article X, that is as precise as a legal directive can be, spelling out in meticulous detail and with meticulous care the requirements for any amendment to be added. Would the requirements of Article X, in themselves, dictate which attempted amendments are considered part of the supreme law of Sovereignia?

They would not be capable of doing this for at least two reasons. First, in the terminology of Friedrich Waismann, the sort of language used in

\[^{31}\text{On all points previewed in this paragraph, see infra Part V.}\]

\[^{32}\text{See supra notes 14–15 and accompanying text.}\]

\[^{33}\text{See, e.g., Paul M. Schwartz, Constitutional Change and Constitutional Legitimation: The Example of German Unification, 31 Hous. L. Rev. 1027, 1088 (1994) (“Article V sets out a relatively straightforward process for changing the Constitution.”).}\]
any amending clause might be “open texture[d].”34 Even the most “carefully delimited empirical terms,” according to Waismann, “might nevertheless produce uncertainty in the face of unforeseen and virtually unimaginable instances.”35 And because legal rules are written in and dependent on “empirical” language, law might necessarily be open textured as well—not just in a system that treats legal rules as defeasible but also in one that treats the literal meaning of rules as binding in all cases, without exceptions or modifications to avoid absurd or unjust outcomes.36 If this is right, then no matter how detailed the drafting of Article X or how rigid Sovereignia’s interpretive culture, the potential for future uncertainty based on unanticipated developments will remain. When such developments arise, the plain meaning of Article X will run out; any resulting disputes as to the validity of an amendment will have to be resolved with reference to something other than the internal resources of Article X.37

Second, and more fundamentally, even if no confusion ever arises as to the meaning of Article X, nothing contained within Article X or any other clause of Sovereignia’s constitution can explain why Article X is treated as the authoritative means of amending the constitution—or ensure that it will continue to be treated this way in the future. It is always possible that the citizens and officials of Sovereignia will decide one day to interpret Article X in a less literal manner; or to recognize alternative amendment rules as equally authoritative; or to deny the validity of an amendment that indisputably satisfied the requirements of Article X; or to ignore the requirements of Article X altogether (as the Founding generation of Americans effectively did with the amendment procedures in the

35. Frederick Schauer, On the Open Texture of Law, 87 Grazer Philosophische Studien 197, 198 (2013) [hereinafter Schauer, Open Texture] (discussing Waismann’s ideas); see also Stewart Shapiro & Craige Roberts, Open Texture and Analyticity, in Friedrich Waismann: The Open Texture of Analytic Philosophy 189, 192 (Dejan Makovec & Stewart Shapiro eds., 2019) (describing open texture as “a kind of semantic indeterminacy” that cannot be ruled out in advance “since we do not know where the indeterminacy comes from”). Waismann was not entirely clear what he meant by associating open texture with “empirical” terms and concepts, see Joost Jacob Vecht, Open Texture Clarified, Inquiry, July 2020, at 4, but no one seems to dispute that codified legal language qualifies as empirical in his sense.
36. See Schauer, Open Texture, supra note 35, at 202 (“If Waismann’s idea is sound, then open texture is indeed an ineliminable feature of law... precisely because it is ineliminable in language.”).
37. Although we find his formulation helpful, we do not mean to endorse all of Waismann’s ideas or to wade into debates about open texture in the philosophy of language. The point here is simply that even the clearest amendment rule conceivable may give rise to legal underdeterminacy.
Articles of Confederation\(^{38}\); or to ignore their written constitution altogether. That the people of Sovereignia treat Article X as the exclusive gateway to constitutional amendment is a contingent social fact, subject to change whether or not Article X itself changes. All constitutions and all constitutional provisions, as Frederick Schauer and others following H.L.A. Hart have detailed, “owe their ‘constitutionality’ to logically and politically antecedent conditions” that “are not themselves legal or constitutional in any important sense.”\(^{39}\) Article X may inform the rule of recognition in Sovereignia with respect to the validity of constitutional amendments.\(^{40}\) But the ultimate rule of recognition determining what is and is not considered the law of Sovereignia, or any other system, is predicated on public acceptance.\(^{41}\)

None of the above is meant to be controversial. The practical-minded reader might fairly ask, though, how much these conceptual caveats matter. In countries such as the United States, one particular amending clause has been treated as the gateway to the constitutional text. While many

---

38. The Articles of Confederation required any amendment to “be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.” Articles of Confederation of 1781, art. XIII, para. 1. On the Constitution proposed by the Philadelphia Convention as a violation of this requirement, see Bruce Ackerman & Neal Katyal, Our Unconventional Founding, 62 U. Chi. L. Rev. 475, 479–80 (1995); Richard S. Kay, The Illegality of the Constitution, 4 Const. Comment. 57, 67–70 (1987). Even a constitution that purported to make itself “unalterable,” such as the constitution for the Carolinas drafted by John Locke, Fundamental_consts. of Carolina of 1669, art. 120, could in practice be amended if there were sufficient public and official support.

39. Schauer, Amending the Presuppositions, supra note 3, at 160–61; see also, e.g., Larry Alexander & Frederick Schauer, Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance, in The Rule of Recognition and the U.S. Constitution 175, 192 (Matthew Adler & Kenneth Einar Himma eds., 2009) (noting “the unavoidable dependence of law on the nonlegal environment in which it exists, not simply to decide how law should be interpreted . . . but more broadly to determine just what is to count as law and what is not”); Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221, 1291 (1995) (“Ultimately, one must step outside the Constitution—as with any legal text—to identify criteria for legitimating that body of law . . . .”).

40. But cf. Michael C. Dorf, How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition, in The Rule of Recognition and the U.S. Constitution, supra note 39, at 69, 73 (observing that “one must look outside the Constitution itself for the rules and standards governing how amendments are recognized as having satisfied the criteria” of an amending clause).

41. See Schauer, Amending the Presuppositions, supra note 3, at 150 (“The ultimate rule of recognition is a matter of social fact, and so determining it is for empirical investigation rather than legal analysis.”); Young, supra note 5, at 422 (describing the ultimate rule of recognition as “predicated on social acceptance”); see also H.L.A. Hart, The Concept of Law 97–120 (1961) (discussing the “ultimate rule of recognition” in similar terms). We bracket the questions of exactly how and by whom a norm must be “accepted” to qualify as legally valid or sociologically legitimate. Cf. Fallon, Legitimacy and the Constitution, supra note 20, at 1805 (“elid[ing]” the same questions).
argue that the small-c constitution, or the “constitution in practice,”42 has been updated through judicial rulings, framework statutes, and more, no one seriously suggests that the big-C or written Constitution has been revised through a process that does not purport to comply with Article V.43 The requirements of a clear and concrete amending clause, widely seen as the definitive route to formal constitutional change, could go a very long way toward determining which attempted amendments are accepted as valid and which are not.

In principle, then, the success or failure of attempted amendments rests unavoidably on extralegal or prelegal foundations. But in practice, such success or failure might, in certain systems, be tightly tied to the rules of an amending clause, so that the sociological legitimacy as well as the legality of amendments is in effect a function of their fit with those rules. Alternatively, an amending clause might contain vague language yet nonetheless give rise to a body of law that supplies determinate legal answers to the vast majority of real world questions raised by amendment efforts.44

Is either true of the United States?

II. “INTERNAL” LIMITS TO ARTICLE V’S RESOLVING POWER: TEXT

The short answer is no. This Part first tours the many ambiguities and lacunae in Article V’s text, before discussing why these underdeterminacies are so significant.45 The next Part then surveys the history of successful constitutional amendments to show that the lived experience of Article V has been, and continues to be, beset by legal uncertainty.

A. Interpretive Puzzles

Article V provides in full:

42. David A. Strauss, The Irrelevance of Constitutional Amendments, 114 Harv. L. Rev. 1457, 1459 (2001) [hereinafter Strauss, Irrelevance of Amendments] (noting the distinction between “the small-c constitution—the fundamental political institutions of a society, or the constitution in practice—and the document itself”); see also Primus, Unbundling Constitutionality, supra note 5, at 1082 (associating the small-c constitution with “the web of documents, practices, institutions, norms, and traditions that structure American government”).

43. See supra notes 4–7 and accompanying text.


45. We describe Article V as “underdeterminate,” rather than “indeterminate,” because it does have a core of relatively clear meaning. Cf. Lawrence B. Solum, On the Indeterminacy Crisis: Critiquing Critical Dogma, 54 U. Chi. L. Rev. 462, 473 (1987) (distinguishing between underdeterminacy and indeterminacy in law). Essentially every reader of Article V agrees, for instance, that the “Houses” of Congress referenced therein are the U.S. Senate and House of Representatives rather than, say, the personal residences of individual members.
The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.46

This run-on sentence immediately presents a host of puzzles that, the next Part shows, are not clearly resolved by context. Bracketing for the moment all issues regarding how “a Convention for proposing Amendments” is supposed to work, consider the following questions raised by each clause in order.

- “two thirds of both Houses”: Does this voting rule require the support of two-thirds of each chamber, voting separately, or two-thirds of the total membership of Congress, voting together?47 And does it require the support of two-thirds of all members of the House and Senate or only the support of two-thirds of those present, assuming there is a quorum? Or two-thirds of those present and voting, such that abstaining members can contribute to the quorum without

46. U.S. Const. art. V. The text reproduced here and in other quotations of the Constitution is drawn from the parchment version on display in the National Archives. As noted above, a distinct version of the Constitution was printed and distributed to the states, which may be more authoritative because it was voted upon by state ratifying conventions. See supra note 10; see also Denys P. Myers, For a Master File of the Constitution, in S. Doc. No. 87-49, at 67, 70–71 (1961) (noting “slight” discrepancies among the texts that were voted on by the state conventions). These two versions contain numerous differences in capitalization and punctuation; for a list of all the variations in Article V, see Philip Huff, The Constitution of the United States: A Variorum 21–22 (Apr. 15, 2017), https://ssrn.com/abstract=2778049 [https://perma.cc/947X-52F9] (unpublished manuscript). In addition, a third version of the Constitution was printed on September 18, 1787, “at the Philadelphia Convention’s behest,” and “formed the basis for the earliest newspaper printings of the Constitution.” Philip Huff, How Different Are the Early Versions of the United States Constitution? An Examination, 20 Green Bag 2d 163, 165 (2017). That version contained a significant typo in Article V. It said that Congress could not regulate the slave trade prior to the year 1708 rather than 1808—rendering the provision inoperative. Id. at 171–72. The typo was corrected in most, but not all, early newspaper and pamphlet printings disseminated to the public as the debates over ratification began. See Leonard Rapport, Printing the Constitution: The Convention and Newspaper Imprints, August–November 1787, Prologue, Fall 1970, at 69, 82–83. This all goes to show yet again that the literal identity of “the constitutional text” rests on extratextual foundations.

47. See Dow, supra note 14, at 118 (noting this ambiguity); Kay, Formal and Informal Amendment, supra note 6, at 244 (same). In several other places, the Constitution uses the clearer phrase “Each House.” E.g., U.S. Const. art. I, § 5, cls. 1–3.
counting in the denominator for the two-thirds calculation? Must both chambers vote on an amendment within a single session? If not, does an amendment passed by one chamber remain pending and available for approval by the other chamber indefinitely? Once an amendment has cleared the two-thirds hurdle (however understood) and been “propose[d]” to the states, may Congress rescind it? If so, does rescission likewise require two-thirds super-majorities?

• “shall deem it necessary”: What does it mean for an amendment to be “necessary”? Is Congress required to make any kind of finding of necessity in the process of promulgating an amendment? Is such a finding, whether express or implicit, a legal determination reviewable by a court?

• “Amendments”: Is there any limitation on the scope of permissible constitutional reforms implicit in this term? Could an entirely new Constitution be passed through Article V’s procedures, or would that no longer constitute an “Amendment”? Does the choice of the term “Amendment” suggest that constitutional changes pursued through Article V must be incremental and limited to a “perfecting” role?


51. See 1 Annals of Cong. 430 (1789) (statement of Rep. Vining) (contending that both houses must agree that an amendment is “necessary” before deliberating on a proposal).

52. See Philip A. Hamburger, The Constitution’s Accommodation of Social Change, 88 Mich. L. Rev. 259, 300–01 (1989) (arguing that most Framers and ratifiers envisioned amendments as limited to a “perfecting” role); see also Thomas M. Cooley, The Power to Amend the Federal Constitution, 2 Mich. L.J. 109, 118 (1893) (“[A]n amendment . . . in the very nature of the case, must be in harmony with the thing amended, so far at least as concerns its general spirit and purpose.”); Walter F. Murphy, Merlin’s Memory: The Past and Future Imperfect of the Once and Future Polity, in Responding to Imperfection, supra note 1, at 163, 177 (“The word amend . . . means to correct or improve; amend does not mean ‘to
“ratified”: When and how must a state legislature “ratify” an amendment for that ratification to be effective? Is there a time limit? Must both houses of a bicameral state legislature approve an amendment in the same legislative session? Must they adopt a simple majority voting threshold, or can they set their own voting procedures? Does it matter if those procedures are contained in the state constitution? And must each state legislature vote on the identical text, or can differences in punctuation or wording defeat ratification of an amendment?

“Legislature”: What is a “Legislature” for purposes of Article V? If the people of a state participate directly in the process of making laws, can they qualify as the “Legislature”? May a state hold an advisory or binding referendum on ratification? If the state governor plays a role in the normal legislative process, must the governor play the same role in the Article V process? If the lieutenant governor may break a tie in the state senate for other matters, like the Vice President does at the federal level, may the lieutenant governor cast a tiebreaking vote for ratification?

“three fourths”: How should “three fourths” be understood in circumstances where the denominator is not cleanly divisible by four? If a state initially rejects a proposed amendment, can the
deconstitute and reconstitute,” to replace one system with another or abandon its primary principles.”), Roman J. Hoyos, Article V and the Law of Constitutional Conventions 28–29 (2020), https://ssrn.com/abstract=3729119 (unpublished manuscript) (maintaining that “the 1787 convention’s decision to use the term amendment rather than alteration suggests that Article V does not envision a general revision power”).


55. See Herman V. Ames, The Proposed Amendments to the Constitution of the United States During the First Century of Its History, in 2 Annual Report of the American Historical Association for the Year 1896, at 5, 297 (1897) (“There has been a great lack of uniformity in the actual practice by the governors of the States in this respect.”).

56. See Coleman v. Miller, 307 U.S. 433, 447 (1939) (dividing equally on whether this question is justiciable).

57. In the First Congress, a Senate committee apparently took the position that “nine states out of thirteen had sufficed to ratify the Bill of Rights,” even though three-fourths of thirteen is 9.75. David P. Currie, The Constitution in Congress: The Federalist Period, 1789–1801, at 208 (1997) [hereinafter Currie, The Federalist Period] (citing 6 Annals of Cong. 1537 (1797)). South Carolina Representative Robert Goodloe Harper countered with the arresting claim that “there must be twelve ratifying States to be three-fourths [of fourteen], as intended by the Constitution, because that number would be three-fourths of sixteen,
state later change its mind and be counted toward three-fourths (and, if so, how)? Conversely, once a state has ratified an amendment, can it subsequently rescind its ratification (and, if so, how)? What if only one house of the state legislature votes to rescind ratification? If new states join the Union while an amendment is pending, do they necessarily affect the numerator and denominator?

- “Conventions”: If an amendment is ratified by state conventions rather than legislatures, who chooses the process to be followed—Congress or each state? Are there any limits or requirements regarding how a convention is to operate? How are the delegates to such conventions selected? Can a statewide referendum or other plebiscitary process qualify as a “convention”?

- “one or the other Mode of Ratification”: Does Congress have complete discretion in specifying which mode of ratification shall be followed? Or are there certain sorts of amendments that must be ratified pursuant to certain modes? When choosing a mode of ratification, may Congress put a time limit on it (and, if so, how)? Once in place, may such time limits be extended (and, if so, how)? For example, does the imposition or modification of a deadline require a two-thirds vote?

These are some of the uncertainties that are apparent on the face of Article V and, as the next Part details, have given rise to legal controversy. If one burrows into the text’s silences and elisions, the uncertainties compound. For instance, is Article V the sole method of amendment consistent with the Constitution, or does the Constitution preserve for “We the People” the option to amend the text through other routes, such as a national referendum?58 Apart from the procedures used, are there substantive limits on acceptable amendments implicit in the constitutional structure or in the concept of popular sovereignty?59 For example, could

which was the nearest number to fourteen capable of four equal divisions.” 6 Annals of Cong. 2281 (1797).

58. The most famous argument for an unenumerated constitutional “right” to amend the document outside Article V belongs to Amar. See supra notes 4, 7 and accompanying text. As Amar notes, Article V “emphatically does not say that it is the only way to revise the Constitution.” Amar, Consent of the Governed, supra note 3, at 459. Amar concedes that government officials are stuck with Article V; his argument applies only to “People-driven” amendment efforts. Id. at 460. For a prominent rebuttal of Amar on textual and historical grounds, see Henry Paul Monaghan, We the People[s], Original Understanding, and Constitutional Amendment, 96 Colum. L. Rev. 121, 130–73 (1996).

59. For illustrative discussions of this issue, see Richard Albert, America’s Amoral Constitution, 70 Am. U. L. Rev. 773, 786 (2021) (arguing that “nothing in America’s modern Constitution is legally immune to change”); Douglas Linder, What in the Constitution Cannot Be Amended?, 29 Ariz. L. Rev. 717, 733 (1981) (arguing that the amending power remains limited by Article V’s express prohibition against restructuring the Senate and by an implied prohibition against amendments that “create any new limitations on the amending power” itself); Walter F. Murphy, An Ordering of Constitutional Values, 33 S. Cal. L.
the First Amendment be repealed, or is it too fundamental to the republican underpinnings of the constitutional project? Could an amendment change the amendment process or make itself unamendable? If not, does it follow that the one unexpired substantive limit stated in the text of Article V—the final clause providing that no amendment shall deprive a state of “equal Suffrage” in the Senate without its consent—is void?

An additional set of uncertainties involves the legal role of the President. There is no express mention of the executive branch in Article V. But Article I, Section 7, Clause 3 of the Constitution seems to demand that every order, resolution, or vote requiring the concurrence of the House and Senate be presented to the President for approval. Must every Article V amendment, then, be presented to the President before being transmitted to the states for ratification? If so, does the President have the power to veto a proposed amendment?

Yet another fertile source of uncertainty is the provision for a state-initiated convention to propose amendments to the Constitution, which has never been successfully invoked. Article V says virtually nothing about how this process works. How does a state submit an “application” to Congress? May a state rescind an application once submitted? Do applications for a convention remain pending in perpetuity, or do they expire after some period of time? Can the states call a “limited” convention to craft amendments for a particular purpose, or even to propose a specific

---

60. See, e.g., John Rawls, Political Liberalism 239 (expanded ed. 2005) (suggesting that an “amendment to repeal the First Amendment and replace it with its opposite” should be deemed “invalid” by the Court); Amar, Consent of the Governed, supra note 3, at 505 (contending that repealing the core of the First Amendment would be “unconstitutional . . . despite formal compliance with Article V”).

61. See Linder, supra note 59, at 722–28 (reviewing arguments to this effect); see also Vile, Limitations on the Amending Process, supra note 59, at 379 (explaining that some members of Congress argued in the period leading up to the Civil War “that the equal suffrage provision is not legally binding” but rather “a mere declaration”). The other substantive limit stated in the text of Article V (“no Amendment which may be made prior to [1808] shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article”) has been a legal nullity since 1808.

62. U.S. Const. art. I, § 7, cl. 3; see supra note 21 and accompanying text.


64. Cf. Harisay v. Clarno, 474 P.3d 378, 379 (Or. 2020) (determining, as “an issue of first impression,” that Oregonians’ “initiative power” does not “authorize the people to directly apply for a federal constitutional convention”).
amendment, or would a convention have plenary power to devise any amendments it wants? If a limited convention is permissible, how similar must the various state applications be to trigger such a convention? Does Congress have any discretion in determining whether a convention should be called or in specifying its procedures and the scope of its authority? How would delegates to such a convention be apportioned and selected? What internal procedures would the convention follow to draft and approve amendments? Would the delegates vote by state, as in the Philadelphia Convention, or according to some population-based formula? Whatever the answer to these questions, note that the product of any such convention would be submitted to the states, thus layering on top of these uncertainties all of the uncertainties regarding the state ratification process cataloged above.

The final lacuna in Article V, which Part IV revisits, is in some ways the most fundamental. Given the myriad puzzles raised by the text, it will often be unclear whether the requirements of Article V have been satisfied. Who decides, then, whether an amendment has been validly promulgated? If there is a disagreement among the branches, does any branch have the ultimate say? And does an amendment become effective as soon as the final state needed to reach three-fourths ratifies it, or only when ratification has been confirmed by the appropriate federal organ?

B. Putting These Puzzles in Perspective

There are many provisions of the Constitution that are vague or underdeterminate in certain respects and many questions of constitutional law that have not yet been resolved by the Supreme Court. What is special about the case of Article V? Two things, we think: the extent of the underdeterminacy and the function of Article V in our constitutional order.

The sheer number of questions about constitutional amendment that Article V leaves open is striking. The questions, moreover, are not limited to subsidiary or minor matters. The silences and ambiguities of Article V—How many members of Congress must vote on an amendment? How long may an amendment remain pending? How is a state ratifying convention to be constituted? Does the President have a role? Is there anything an

65. See Robert G. Natelson, Proposing Constitutional Amendments by Convention: Rules Governing the Process, 78 Tenn. L. Rev. 693, 715 (2011) (“Perhaps no Article V question has been debated so fiercely, on so little evidence, as whether applying states may limit the scope of a convention for proposing amendments.”). Compare Michael B. Rappaport, The Constitutionality of a Limited Convention: An Originalist Analysis, 81 Const. Comment. 53, 56 (2012) (contending “that the original meaning of the Constitution allows for limited conventions” and “forbids runaway conventions”), with Michael Leachman & David A. Super, Ctr. on Budget & Pol’y Priorities, States Likely Could Not Control Constitutional Convention on Balanced Budget Amendment or Other Issues 2 (2017), https://www.cbpp.org/sites/default/files/atoms/files/7-16-14sp.pdf ("There is no guarantee that a convention could be limited to a particular set of issues . . . .").
amendment cannot change?—go to the heart of the amendment process and the conception of popular sovereignty that it embodies.

It is difficult to nail down the extent to which Article V, or any legal directive, is underdeterminate. But perhaps some headway can be made by drawing two comparisons. The first is to other structural provisions of the U.S. Constitution. The Constitution devotes more than six times the number of words to presidential eligibility and elections as it does to constitutional amendments, going into such niceties as what constitutes a quorum and how electoral votes are to be transmitted to the capital. The Constitution devotes nearly three times as many words to the rules for dealing with presidential vacancies and disabilities. Both of these other processes have generated high-profile legal controversies of their own, including in and around the 2020 presidential race. But much more often, they have generated legally uninteresting compliance, whether because their language is more determinate than that of Article V, because frequency of usage enhances legal clarity over time, or both. At a minimum, the Constitution’s treatment of presidential change, as compared to its treatment of constitutional change, shows that its authors were capable of greater procedural specificity when they wished.

Moreover, the legal uncertainty associated with Article V is not just a product of a spare text and limited precedent. It also follows from the absence of an authoritative interpreter. For most provisions of the Constitution, as every U.S. law student learns, the federal judiciary is widely understood (and understands itself) to enjoy interpretive supremacy. When the judiciary has recognized exceptions to this rule, it is generally on account of “a textually demonstrable constitutional commitment of the issue to a coordinate political department.” Thus, while the Constitution is vague about many details of the impeachment process, the Supreme Court accepts that the Senate has “the sole Power to try all Impeachments.” By contrast, the Court, Congress, and the executive

66. Compare U.S. Const. art. V (143 words), with id. art. II, § 1, cls. 1–5, (479 words), and id. amend. XII (398 words).
67. Compare id. art. V (143 words), with id. amend. XXV (388 words).
69. See David E. Pozen & Adam M. Samaha, Anti-Modalities, 119 Mich. L. Rev. 729, 769–70 (2021) (documenting this feature of the U.S. system). This is not to deny that “many different government bodies and civil-society groups contribute to the long-run development of constitutional law.” Id. at 770.
branch have each, at times, claimed interpretive primacy over the question whether an amendment has become part of the Constitution.72

The second comparison that throws some light on the extent of Article V’s underdeterminacy is to amending clauses in other democracies’ written constitutions. Consider Canada. As Walter Dellinger has observed, the “detailed provisions” of the “Canadian amendment procedures . . . answer several perplexing questions that Article V of the American Constitution has left to speculation.”73 The Canadian text makes clear that a “proposed amendment lapses unless ratified by the requisite number of assemblies within three years of the adoption of the resolution which initiated the amendment procedure.”74 The approval of an amendment may be revoked at any time before the amendment is proclaimed.75 The amendment process is not itself amendable, except with the agreement of every province and the federal parliament.76 Pursuant to an “intricate” framework elaborated across a dozen subsections, “[e]ach of Canada’s five formal amendment procedures is specially designated for amending specific constitutional provisions.”77

Canada’s amendment scheme may be particularly well reticulated, but many other constitutions around the world specify time limits for ratification of amendments,78 substantive limits on their content,79 and distinct procedures for different categories of amendments.80 Within the

72. See infra notes 265–272 and accompanying text; infra section IV.B.
74. Dellinger, A Comparative Perspective, supra note 73, at 299. This time limit applies to one of Canada’s five amendment procedures. See Richard Albert, The Structure of Constitutional Amendment Rules, 49 Wake Forest L. Rev. 913, 944–45 (2014) [hereinafter Albert, Structure of Amendment Rules].
75. Dellinger, A Comparative Perspective, supra note 73, at 299.
76. Id. at 299–300.
77. Albert, Structure of Amendment Rules, supra note 74, at 921, 945.
78. See id. at 952 (explaining that “temporal limitations” on the amendment process “are commonly entrenched in written constitutions”).
United States, most state constitutions likewise have amending clauses that are significantly more detailed and precise than Article V.\footnote{For a thorough inventory of every U.S. state’s constitutional amendment rules, see Amending State Constitutions, Ballotpedia, \url{https://ballotpedia.org/Amending_state_constitutions} [last visited Aug. 5, 2021]. The amending clause in our home state of New York, for example, is over five times as long as Article V. N.Y. Const. art. XIX (807 words).} Other democracies’ amending clauses, meanwhile, seem less perplexing than Article V not because their procedures are more detailed and precise but rather because they are simpler and more streamlined—employing what Richard Albert calls a “comprehensive single-track framework.”\footnote{See Albert, Structure of Amendment Rules, supra note 74, at 937–39 (categorizing ten of the thirty-six democracies in his study as adopting such a framework and noting that it “has the virtue of clarity”).}

This is far from a complete survey, of course, and textual comparisons across constitutions of different ages and lengths are vexed. Our point is merely that the revision rules in many other constitutions seem on their face to raise fewer interpretive puzzles than does Article V. Even the most carefully crafted amending clause cannot foreclose future uncertainty, as Part I explains, and disputes about the meaning of such clauses are bound to arise sooner or later in Canada and elsewhere.\footnote{Cf. Otto Pfersmann, Comparative Hermeneutics of Constitutional Revision Clauses and the Question of Structural Closure of Legal Systems, 40 Cardozo L. Rev. 3191, 3194–96 (2019) (discussing “interpretative problems” common to all constitutional revision clauses).} But we think it is fair to say that, both globally and domestically, the U.S. Constitution stands out in just how many questions about the amendment process it leaves to “speculation.”\footnote{Dellinger, A Comparative Perspective, supra note 73, at 298.}

The fact that Article V is so underdeterminate would not necessarily matter much if it were addressed to some obscure issue of governance. But the topic of Article V could hardly be more important. Unlike other vague provisions in the Constitution, Article V sets out the rules of formal constitutional change and thereby constitutes the constitutional text itself. As Bruce Ackerman explains, Article V can be seen as “\textit{the} most fundamental text of our Constitution, since it seeks to tell us the conditions under which all constitutional texts and principles may be legitimately transformed.”\footnote{Bruce A. Ackerman, The Storrs Lectures: Discovering the Constitution, 93 Yale L.J. 1013, 1058 (1984) [hereinafter Ackerman, Discovering the Constitution].}

In Gordon Wood’s words, Americans “institutionalized and legitimized revolution” by enabling sweeping social change through a preestablished

\begin{quote}
\end{quote}
legal process. Constitutions are often described as focal points that coordinate expectations and “channel disputes.” The underdeterminacy of Article V threatens these coordination and channeling functions by eliciting reasonable disagreement not just about the Constitution’s meaning but also about its very terms.

During the Constitutional Convention of 1787, James Madison made a similar observation. He urged that the amendment process be made clearer because “difficulties might arise as to the form, the quorum &c. which in Constitutional regulations ought to be as much as possible avoided.” This is not just an American instinct. The European Commission for Democracy Through Law (known as the Venice Commission), which advises the Council of Europe on constitutional matters, concluded in its 2009 report on constitutional amendment procedures that “[r]ules and procedures on constitutional amendment should be as clear and simple as possible, so as not to give rise to problems and disputes of their own.”

It is an interesting question whether and under what circumstances this conclusion should be qualified on account of the potential benefits of uncertainty. Ackerman, for instance, has suggested that wise constitutional drafters will follow the U.S. Framers in recognizing “the limited extent to which they [can] legitimately specify the higher lawmaking procedures to be followed by succeeding generations.” As Part V discusses, some play in the joints may help keep the amendment process from thwarting change that is overwhelmingly desired by the people. Regardless, the point remains that significant amounts of legal uncertainty concerning a purportedly exclusive constitutional amendment clause raise very different—and potentially more destabilizing—issues than such uncertainty surrounding, say, a rights guarantee.

86. Gordon S. Wood, The Creation of the American Republic, 1776–1787, at 614 (1969). Note that Wood’s characterization of Article V implicitly rejects the idea that amendments are limited to an incremental, “perfecting” role. See supra note 52 and accompanying text.

87. See Pozen & Samaha, supra note 69, at 793 n.313 (collecting sources).


89. 2 The Records of the Federal Convention of 1787, at 630 (Max Farrand ed., 1937); see also supra note 19 (quoting Charles Black to similar effect). Madison was talking specifically about the convention procedure, but his general point—that the amendment rules ought to be as clear as possible—applies equally to the whole of Article V.


91. Ackerman, Discovering the Constitution, supra note 85, at 1058.

III. “INTERNAL” LIMITS TO ARTICLE V’S RESOLVING POWER: PRECEDENT

A skeptic may respond at this juncture: Even if one can conjure up an array of interpretive puzzles when squinting at the text of Article V in isolation, surely most of the important issues have been cleared up by a quarter millennium of historical practice and judicial doctrine. The law of Article V, in other words, might be considerably clearer than the language of Article V. We turn in this Part to that body of law and demonstrate that the skeptic’s response misses the mark. Ever since the Founding, amendments of uncertain legal validity have been the norm in the United States, not the exception. According to the conventions of mainstream constitutional reasoning, the overwhelming majority of recognized amendments had significant arguable legal infirmities at the time of their adoption. And still to this day, the “gloss” of judicial and nonjudicial precedent has not cleared up many of the uncertainties regarding the operation of Article V that the previous Part discusses.

The best way to establish these points, we believe, is to review the history of debates over the validity of amendments that are widely seen to have become part of the constitutional text. If anything, focusing on successful efforts to amend the Constitution ought to bias our results toward suggesting greater clarity and settlement about the Article V process than really exists. But even the successful amendments, it turns out, have left a legacy of legal contestation and confusion.

A. The Bill of Rights

The story of legally dubious amendments begins at the beginning, with the Bill of Rights. The most serious concern with the procedure used for these amendments is that the First Congress did not present them to President Washington for his consideration before they went to the states.

93. A qualifier such as “arguable” is unavoidable here because one cannot adjudicate all of these issues without a full-blown theory of constitutional interpretation, about which people will disagree. Cf. infra note 325 (discussing limitations of this paper’s approach). Past Article V infirmities do not necessarily mean that an amendment is presently infirm, insofar as longstanding acceptance can cure or render irrelevant earlier legal concerns. See Greenawalt, Rule of Recognition, supra note 11, at 640–42; see also supra note 20; infra note 424.

94. The ten amendments that comprise the Bill of Rights were not the first ten amendments sent to the states. Congress’s first proposed amendment would have changed the apportionment formula for the House, but it fell just short of ratification. See Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1137, 1143 n.52 (1991) [hereinafter Amar, The Bill of Rights]. Congress’s second proposed amendment prohibited a congressional salary increase without an intervening election. Id. at 1145. That amendment also fell short in the eighteenth century and was left for dead—until revived in the twentieth century as the Twenty-Seventh Amendment. Recent litigation has similarly sought to revive the “first” first amendment. We come back to both of these developments later. See infra sections III.K–L. We mention them here to highlight that legal controversy over amendment validity dates back to, and indeed continues to involve, the very first amendments proposed by Congress.
for ratification, notwithstanding Article I, Section 7’s language on presidential approval.95 “The Annals reveal no discussion of this important question” in either the House or Senate.96 The next section considers this issue in more detail in conjunction with the Eleventh Amendment, which prompted Hollingsworth v. Virginia.97 For now, it suffices to say that there is a serious argument that presidential presentment is mandated by the plain terms of the Constitution. The most significant counterargument, even by the time of Hollingsworth, is based on historical practice—but of course that argument was not available the very first time Article V was enlisted.

A second concern involves the role of new states. Article V says nothing about what to do with states that join the Union after an amendment has been submitted to the states but before the amendment has been ratified. Nor is the answer to this question obvious as a matter of policy or political morality. Excluding new states from ratification might unduly privilege their predecessors; including them might disrupt and delay an ongoing process. When the Bill of Rights was proposed by Congress, the Union contained eleven states. Nine ratifications were therefore required to reach three-fourths.98 By 1791, three more states had joined the Union, increasing the necessary number of ratifications to eleven.99 Thomas Jefferson declared the Bill of Rights part of the Constitution in 1792, counting the new states in both the numerator and denominator.100 We are not aware of any discussion as to why this position was taken. But if one only counts states that are part of the Union at the moment an amendment is proposed, constitutional history would look “dramatically different”: The first amendment proposed by Congress, on congressional apportionment, would be ratified, and the Bill of Rights would not have made it into the document until the twentieth century.101

A final legal objection to the Bill of Rights is that there were discrepancies in the instruments of ratification sent by the states to the federal

95. See supra note 21 and accompanying text.
96. Currie, The Federalist Period, supra note 57, at 115. Delaware Representative John Vining raised a separate objection: that, under the language of Article V, both Houses of Congress had to concur by a two-thirds vote that a proposed amendment was “necessary” before proceeding to consider it. 1 Annals of Cong. 430 (1789). This objection did not carry the day and apparently was not pursued further. See Edward S. Corwin & Mary Louise Ramsey, Constitutional Law of Constitutional Amendment, 26 Notre Dame L. Rev. 185, 191 (1951).
97. 3 U.S. (3 Dall.) 378 (1798).
99. Id. But cf. supra note 57 (noting controversy in the First Congress over how to construe the “three fourths” requirement for state ratification).
101. See id. at 598–99. This assumes, perhaps implausibly, that such a change in counting method would not otherwise have changed the course of amendment history. It also elides the question whether Massachusetts and Virginia should have had to re-ratify because the new states of Maine and West Virginia were carved out of their respective borders.
government. Take the Second Amendment as an example. In its 2008 opinion in District of Columbia v. Heller, the Supreme Court quoted the text as follows: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”102 This is the version of the Second Amendment that was proposed by Congress and ratified by Delaware (though “arms” was uncapitalized).103 But according to their ratification resolutions, New Jersey ratified a Second Amendment with no commas,104 New York, Pennsylvania, Rhode Island, and South Carolina ratified a version with only the middle comma;105 and Maryland and North Carolina ratified a version with the middle and last commas.106 Thomas Merrill, in an unpublished paper, has similarly documented an evolution in how the Fifth Amendment’s Takings Clause is punctuated.107

This may be more than constitutional flyspecking. After all, “punctuation is a permissible indicator of meaning.”108 Judge Laurence Silberman

103. Resolution of Congress Proposing Amendatory Articles to the Several States (Mar. 4, 1789), in 2 Documentary History of the Constitution of the United States of America, 1786–1870, at 321, 322 (1894) [hereinafter Documentary History]; Delaware Ratification Resolution (Jan. 28, 1790), in Documentary History, supra, at 347, 349. This documentary compilation was derived from official records held at the Department of State. We have not independently confirmed that the compilation in fact reflects the original documents on file.


105. Rhode Island Ratification Resolution (June 15, 1790), in Documentary History, supra note 103, at 357, 359; Pennsylvania Ratification Resolution (Mar. 10, 1790), in Documentary History, supra note 103, at 352, 354; South Carolina Ratification Resolution (Jan. 19, 1790), in Documentary History, supra note 103, at 340, 342.

106. North Carolina Ratification Resolution (Dec. 22, 1789), in Documentary History, supra note 103, at 330, 332. There were also differences in capitalization in the various states. For an overview of all these differences, see Ross E. Davies, Which Is the Constitution?, 11 Green Bag 2d 209, 210–11 (2008).


108. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 161 (2012). It is debatable what the Founding generation thought about the significance of punctuation. On the one hand, Chief Justice John Marshall wrote that “the construction of a sentence in a legislative act does not depend on its pointing [i.e., punctuation].” Black v. Scott, 3 F. Cas. 507, 510 (C.C.D. Va. 1828); see also Caleb Nelson, Preemption, 86 Va. L. Rev. 225, 258 n.102 (2000) (discussing the “relatively casual attitude toward punctuation” taken by British and American legal authorities at the time of the Founding). On the other hand, during the Constitutional Convention, the Committee on Style apparently tried to effect a major change in congressional power through punctuation (the insertion of a semicolon) until it was caught in the act. See Philip Hamburger, The New Censorship: Institutional Review Boards, 2004 Sup. Ct. Rev. 271, 317 n.112 (describing an attempt to create a separate spending power by adding a semicolon to the first paragraph of Article I, Section 8).
began the merits portion of his D.C. Circuit opinion affirming in *Heller* with a reference to the “provision’s second comma.” Justice Antonin Scalia’s opinion for the Court in *Heller* divided the amendment into two clauses and cited a source that seemed to place weight on the same comma. Merrill has argued that the punctuation of the Takings Clause could very well affect its modern meaning. If Congress proposes and some of the states (but not three-fourths) ratify a text that most objective observers at the time would understand to mean X, while other states ratify a slightly different text that most would understand to mean Y, it is not at all clear that either text should be seen as part of the Constitution. And if punctuation can change the meaning of a legal text, it does not seem far-fetched to insist that states ratify an identical text.

B. The Eleventh Amendment

In the 1793 case *Chisholm v. Georgia*, the Supreme Court held that Georgia could be sued without its consent by a citizen of another state. The day after the decision was announced, a constitutional amendment to


110. Justice Scalia wrote that the “Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause.” District of Columbia v. Heller, 554 U.S. 570, 577 (2008). For support, he cited a “Linguists’ Brief” that had suggested the second comma was significant, as it “marks the customary separation of an adverbial clause . . . from a main clause.” Brief for Professors of Linguistics and English Dennis E. Baron et al. in Support of Petitioners at 5–6, *Heller*, 554 U.S. 570 (2008) (No. 07-290).

111. Merrill, supra note 107, at 8–11.


113. Another significant question that arose in Congress as it debated the Bill of Rights concerned the placement of amendments. Specifically, should amendments be woven into the text of the original Constitution, or should they appear as supplements at the end of an unchanged original text? James Madison favored the former approach; Roger Sherman was the leading proponent of the latter. See Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* 177–90 (2018). Sherman prevailed, of course. Id. at 189. According to Jonathan Gienapp, this decision “numbers among the most important milestones in the entire sweep of American constitutional history” by fostering the perception of “the original Constitution as a ‘sacred’ text,” fixed for all time, rather than an “organic, evolving” project. Id.; see also Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* 231–35 (2019) [hereinafter Albert, Constitutional Amendments] (reviewing the Madison–Sherman debate).

114. 2 U.S. (2 Dall.) 419 (1793).
overrule Chisholm was introduced in the House. In its final form, the amendment passed the House and Senate by large majorities in 1794, was ratified by the requisite number of states in 1795, and was declared part of the Constitution by President John Adams in 1798.

As with the Bill of Rights, however, President Washington had never approved the amendment before it was sent to the states. This fact formed the basis for a challenge to the amendment’s validity in Hollingsworth v. Virginia, in which plaintiffs argued that the “amendment ha[d] not been proposed in the form prescribed by the Constitution” because it “was never submitted to the President for his approbation.” The Supreme Court tersely rejected this challenge. The report of the decision contains only the following explanation: “The Court, on the day succeeding the argument, delivered an unanimous opinion, that the amendment being constitutionally adopted, there could not be exercised any jurisdiction . . . .” During the defendant’s oral argument, though, Justice Samuel Chase had made the following statement: “The negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution.”

Justice Chase’s statement is dubious on its own terms. According to Article I, Section 7 of the Constitution, the veto power extends not only to “ordinary cases of legislation” but also to “Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment).” A resolution or vote proposing a constitutional amendment seems to fall within the latter category. Perhaps Justice Chase meant to suggest that Article V sets forth “its own separate higher-lawmaking track” not subject to the presentment rules of Article I. But Congress and the Court have arguably taken the opposite position with respect to

116. See John V. Orth, The Judicial Power of the United States: The Eleventh Amendment in American History 12–29 (1987); see also 1 Charles Warren, The Supreme Court in United States History 101 n.2 (1922) (discussing “the extremely informal and careless manner in which the ratification was promulgated” by President Adams).
117. 3 U.S. (3 Dall.) 378, 379 (1798).
118. Id. at 382.
120. U.S. Const. art. I, § 7, cl. 3.
121. Amar, America’s Constitution, supra note 49, at 594 n.7 (noting this theory without endorsing it).
the quorum rules of Article I,122 and to call Article V a separate track risks begging the question whether the Presentment Clause applies by its plain terms to the amendment process.

Another possible view is that presidential presentment is superfluous because Article V already requires a two-thirds vote, which is enough to override a veto.123 This view is not persuasive. When Presidents veto a bill or resolution, they must state their “Objections,” and the bill or resolution must be “reconsidered” by both chambers of Congress in light of those objections.124 As the Hollingsworth plaintiffs’ counsel pointed out, this reconsideration requirement presumes a dialogic model of governance in which the President’s objections might influence some members of Congress.125 Even a “Bill” that initially passes by a two-thirds vote in both chambers still needs presidential approval or repassage after a veto before it becomes law.126 In addition, if the initial vote in either chamber was taken with a quorum but less than full membership, a presidential veto could cause the number of members present and voting to be different upon reconsideration.127

In short, the Court’s ruling in Hollingsworth is questionable as a matter of constitutional text and structure. Charles Black has described it as “an unreasoned decision, uttered in the teeth of plain constitutional language, and with no really adequate reason even projectable.”128 In 2000, the Supreme Court of Wyoming invalidated a proposed amendment to its state constitution on the ground that it had not been presented to the governor, under a provision that is identical in relevant part to the federal presentment requirement.129 If Black and the Wyoming high court are correct, then Hollingsworth deserves little if any deference on the merits—and all thoroughgoing textualists must face the prospect that twenty-six of our twenty-seven ostensible amendments are void.130

123. See Amar, America’s Constitution, supra note 49, at 594 n.7 (describing this as the other “main” theory that has been offered in support of Justice Chase’s contention).
127. See Tillman, A Textualist Defense, supra note 119, at 1277–83; Sopan Joshi, Note, The Presidential Role in the Constitutional Amendment
This suggestion contravenes the contemporaneous understanding of virtually every relevant official involved in the amendment process. In *Hollingsworth*, the Virginia Attorney General (as well as Justice Chase) argued that presentment was unnecessary, not that it had occurred. 3 U.S. (3 Dall.) at 381 & n.*. A few years later, the Senate debated and specifically rejected a motion to “present” the proposed Twelfth Amendment to “the President . . . for his approbation.” William Plumer’s Memorandum of Proceedings in the United States Senate 1803–1807, at 79–80 (Everett Somerville Brown ed., 1923). After President Lincoln was presented with and approved the Thirteenth Amendment, the Senate passed a resolution “declar[ing] that such approval was unnecessary” and “inconsistent with the former practice in reference to all amendments heretofore adopted, and being inadvertently done, should not constitute a precedent for the future.” Cong. Globe, 38th Cong., 2d Sess. 629–30 (1865). President Andrew Johnson, who opposed the Fourteenth Amendment, noted that the amendment had not been “submitted by the two Houses for [his] approval” and observed in a letter to Congress that “the steps taken by the Secretary of State” to transmit the proposed amendment to the states “are to be considered as purely ministerial, and in no sense whatever committing the Executive to an approval.” Cong. Globe, 39th Cong., 1st Sess. 3349 (1866). This understanding has persisted in Congress and the Supreme Court. See, e.g., *INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983). Under these circumstances, we do not think it is persuasive to say that a requirement of presentment and approval, if one exists, was constructively satisfied.

For similar reasons, we do not think it is persuasive to say that the amendments took effect on account of ten days of presidential inaction. See U.S. Const. art. I, § 7, cl. 2 (“If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return . . . .”). First, it is not clear, as a textual matter, that the approval-through-inaction mechanism carries over from Clause 2 to Clause 3 of Article I, Section 7. See Tillman, A Textualist Defense, supra note 119, at 1320 (noting this ambiguity). Second, it seems a stretch to attach any significance to ten days of inaction when neither Congress nor the President contends that the President has a veto power. Finally, even if one were inclined to invoke this provision, thirteen amendments (the Bill of Rights and the Fifteenth, Eighteenth, and Twenty-Seventh Amendments) would have been pocket vetoed because they were passed fewer than ten days prior to the end of a congressional session and therefore would have been ineffective absent approval. See Joshi, supra, at 994 tbl.1.

Seth Tillman defends the outcome of *Hollingsworth* based on a creative reading of Article I, Section 7, Clause 3 (which he calls the “ORV Clause”). He takes the position “that ‘[e]very order, resolution or vote to which the concurrence of the Senate and House [is] necessary’ refers to single-house action taken pursuant to prior authorizing or later ratifying legislation.” Tillman, A Textualist Defense, supra note 119, at 1364. In other words, Congress can “delegate lawmaking authority” to a single house, or possibly even a single committee, and the ORV Clause ensures that such legislation must still be presented to the President. Id. at 1334 n.144. As Tillman acknowledges, his proposal conflicts with the near-unanimous understanding of the ORV Clause from the Founding to the present, including the views of James Madison, Joseph Story, the Federalist Papers, and the Court in *Chadha*. Id. at 1364–65. In any event, even if Tillman’s reading were otherwise correct, it is not clear why the ORV Clause would not also apply by its plain terms to constitutional amendments. See Gary Lawson, *Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas Under the Orders, Resolutions, and Votes Clause*, 83 Tex. L. Rev. 1375, 1386 (2005) (“Does the ORV Clause also apply to amendment resolutions under Article V? The answer seems to be yes.”).
C. *The Twelfth Amendment*

Congress’s efforts to pass the Twelfth Amendment, which revamped the nation’s system for selecting presidents, surfaced a number of novel legal questions. One group of senators argued that Article V could not be used to “ingraft new principles into the Constitution which will destroy the rights of individual States, without the consent of those States.” The Senate debated whether a two-thirds majority was required for all votes respecting constitutional amendments, or only for the vote on the final proposed amendment. Most contentiously, the Senate debated whether Article V requires two-thirds of the full House and Senate to propose an amendment, or only two-thirds of a quorum. The issue arose because the Senate had a total membership of thirty-four, and the amendment passed the Senate by a vote of 22 to 10, with the votes of two senators unrecorded. The amendment thus crossed the two-thirds threshold among those voting, but not among the whole body, and an objection was raised on that ground.

The objection has real force. To revise the Constitution is an extraordinary step, and Article V’s supermajority voting rules demand “a geographically broad and numerically deep consensus” to make it happen. Yet, as Senator William Plumer of New Hampshire explained, if two-thirds of a quorum sufficed to propose an amendment, “it would follow that twelve senators . . . might propose an amendment contrary to the opinion & against the will of twenty two senators,” and a “little more than one full third of the Senate” could “be considered as constitutionally performing the act that required the concurrence of two thirds.” In contrast to Article V, moreover, the Constitution’s impeachment and treaty clauses expressly refer to “two thirds of the [senators] present.” Of course, Article I provides that “a Majority of each [House] shall constitute a Quorum to do Business,” and a quorum was present for the vote on the

---

131. As explained in the preceding footnote, the question of presidential presentment also resurfaced in the Senate debate. Interestingly, it seems that no senators invoked the Court’s recent decision in *Hollingsworth*, much less suggested that it had settled the question. Currie, The Jeffersonians, supra note 122, at 58. The Senate nonetheless resolved by a vote of 23 to 7 that the proposed amendment need not be submitted to President Jefferson for his approval. Id.
132. 13 Annals of Cong. 788 (1803).
134. Id.
135. Id. at 61.
137. Currie, The Jeffersonians, supra note 122, at 61–62 (emphasis omitted) (quoting a speech by Senator Plumer that was recorded in his diary but not in the Annals).
138. U.S. Const. art. I, § 3, cl. 6 (emphasis added); id. art. II, § 2, cl. 2 (emphasis added).
139. Id. art. I, § 5, cl. 1.
Twelfth Amendment. But the validity of the first eleven amendments had apparently been premised on the proposition that the amendment process was special and, therefore, not subject to another provision of Article I—the requirement of presidential presentment.

Ultimately, the objection was overruled in the Senate and the proposed amendment went to the House, where Federalist representatives “essentially reiterated what Plumer had said” in arguing that the Senate had not legally approved it. The House voted 85 to 34 to take up the Senate resolution and then 84 to 42—exactly two-thirds of a quorum—to approve the Twelfth Amendment. Over a century later, the Supreme Court agreed that two-thirds of a quorum was sufficient, in light of longstanding congressional practice. But David Currie, on whose scholarship we have drawn throughout this section, likely spoke for many when he opined in 2001: “I still have trouble convincing myself that when the Framers prescribed a two-thirds majority to ensure broad support for constitutional amendments they meant it could be provided by fewer than half the members.”

D. The Reconstruction Amendments

In 1861, Congress approved in its lame-duck session an amendment, known as the Corwin Amendment, which would have protected slavery in the South by prohibiting any future amendment giving “Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.” The Corwin Amendment failed to attain ratification, but

140. Currie, The Jeffersonians, supra note 122, at 62. Some House Republicans countered with the argument that the first ten amendments had been approved only by two-thirds of those present. See id. at 63; see also Mo. Pac. Ry. Co. v. Kansas, 248 U.S. 276, 281–82 (1919) (making the same argument). But the historical record is hazy on this point; “it was entirely possible that [those amendments] had in fact been endorsed by two thirds of all the members.” Currie, The Jeffersonians, supra note 122, at 63.


142. Nat’l Prohibition Cases, 253 U.S. 350, 386 (1920); Mo. Pac. Ry. Co., 248 U.S. at 281. There is an additional wrinkle: Does Article V require two-thirds of those present, or only two-thirds of those present and voting? See infra section III.J.

143. Currie, The Jeffersonians, supra note 122, at 64. One might counter that the Framers operated against a background presumption that a quorum was sufficient for legislative business, and Article V should be read in that context. But the very existence of debate in Congress shows that such a presumption was not universally shared by the Founding generation, at least as applied to amendments. Congress’s resolution of the issue, moreover, did not quell contemporaneous debate. After Congress proposed the Twelfth Amendment, the legislatures of three states, “in their resolutions rejecting the amendment, reiterated the charge of unconstitutionality.” Ames, supra note 55, at 295.

it raised two novel Article V questions that were not resolved then and have not been resolved since: whether an amendment can make itself una-
mendable, 145 and whether a state can choose to ratify an amendment by convention even if Congress provides for ratification by legislatures. 146
Another oddity of the Corwin Amendment is that, Hollingsworth notwithstanding, it was presented to President James Buchanan, who promptly added his signature. 147

The next set of amendments to make it out of Congress, aimed at dismantling rather than entrenching slavery, generated still fiercer legal controversy as the nation emerged from the Civil War. Uniquely among the Article V disputes recounted in this Part, the disputes associated with the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments have received prominent attention in the contemporary constitutional literature. 148 The most substantial objections clustered around three issues: the composition of Congress, the legitimacy of the state legislatures that ratified the amendments, and federal coercion of the states. 149

After the Civil War, Article V was pushed to the breaking point by some stark numerical realities. There were thirty-seven states in the Union in 1868, meaning twenty-eight states were needed to ratify a constitutional amendment. 150 Eleven states had seceded, or purported to secede, and formed the Confederacy. 151 Ten of those states could block an amendment by themselves, assuming no defections from the Northern states—which was not a safe assumption. The former Confederate states would also have

145. See id. at 530–34 (describing the March 1861 congressional debates on this question).
147. See supra note 21.
148. Throughout this section, we cite what we take to be the leading works in this genre.
149. Other legal issues surfaced as well. One was whether states may rescind their ratifications. Both New Jersey and Ohio ratified the Fourteenth Amendment and then tried to reverse course, but Congress, when it promulgated the Fourteenth Amendment, listed both of them among the ratifying states. See Coleman v. Miller, 307 U.S. 433, 448–49 (1939) (opinion of Hughes, C.J.). There were also quorum questions at the state level in addition to the federal level. Indiana had a general rule in its state constitution requiring two-thirds of the legislature to be present to conduct business, but the speaker of its House of Representatives ruled that a majority of the total membership sufficed to act on the Fifteenth Amendment. See Lester Bernhardt Orfield, The Amending of the Federal Constitution 66 n.87 (1942).
151. See Colby, supra note 150, at 1644; Harrison, supra note 14, at 422.
enough clout in Congress to block any amendment proposal.\textsuperscript{152} Navigating these obstacles demanded a series of bold legal maneuvers.

First, the Congresses that proposed the Reconstruction Amendments excluded many of the representatives and senators sent from states that had been part of the Confederacy, pursuant to each chamber’s power to “be the Judge of the Elections, Returns and Qualifications of its own Members.”\textsuperscript{153} The Reconstruction Amendments were adopted by two-thirds of a quorum composed mostly of Northern Republicans, and it is exceedingly doubtful that all of the amendments could have passed had the Southern representatives and senators been seated.\textsuperscript{154}

Second, in proclaiming the Thirteenth Amendment ratified by three-fourths of the states on December 18, 1865, Secretary of State William Henry Seward included several former Confederate states in the count.\textsuperscript{155} Two weeks prior, Congress had refused to seat any senators or representatives from those same states.\textsuperscript{156} How could state “legislatures” validly ratify constitutional amendments but not elect senators? Moreover, in the First Military Reconstruction Act of 1867, Congress declared that there were “no legal State governments” in the South and that existing “civil governments” were “provisional only.”\textsuperscript{157} President Andrew Johnson argued in his veto message that, because the bill “denies the legality of the Governments of ten of the States which participated in the ratification of the amendment . . . abolishing slavery,” the implication is that “the consent of three-fourths of the States . . . has not been constitutionally obtained” for the Thirteenth Amendment.\textsuperscript{158}

The Southern state governments that ratified the Fourteenth and Fifteenth Amendments, meanwhile, were the products of military reconstruction. The Reconstruction Acts divided the former Confederate states into five military districts and instructed the Union Army to register voters, with universal adult male suffrage, and to hold elections for constitutional

\textsuperscript{152} See Ackerman, We the People, supra note 7, at 102.


\textsuperscript{154} See, e.g., Ackerman, We the People, supra note 7, at 102 (“Every student of the period recognizes that, were it not for the purge of Southern Senators and Representatives, the ‘Congress’ meeting in June would never have mustered the two-thirds majorities required to propose the Fourteenth Amendment.”). It is less clear that the Fifteenth Amendment would have been rejected if Congress were complete, see Kyvig, supra note 141, at 180, though opponents of the amendment effort did object on this ground, see David P. Currie, The Reconstruction Congress, 75 U. Chi. L. Rev. 383, 454–55 (2008) [hereinafter Currie, The Reconstruction Congress].

\textsuperscript{155} Currie, The Reconstruction Congress, supra note 154, at 397.

\textsuperscript{156} Amar, America’s Constitution, supra note 49, at 366.


\textsuperscript{158} 12 The Papers of Andrew Johnson, February–August 1867, at 91 (Paul H. Bergeron ed., 1995).
Those conventions yielded ten new governments that promptly ratified the Fourteenth and Fifteenth Amendments. Many argued then and afterward that these reconstructed governments lacked legal authority to ratify amendments.

In addition, the Southern state legislatures were arguably coerced into ratifying. The Reconstruction Acts provided that these states would be entitled to representation in Congress only when the Fourteenth Amendment “ha[d] become part of the Constitution.” This pressure to ratify, according to Ackerman, amounted to a “naked violation[] of Article V.” There is little doubt that the unreconstructed Southern states would not have ratified voluntarily, as it “would be difficult to overstate the depth and breadth of opposition to the Fourteenth Amendment” within their white populations. Southern states still under military supervision “faced the same pressure to ratify” the Fifteenth Amendment.

These interrelated legal problems have elicited powerful responses. John Harrison, for instance, has argued that the amendments were “legally effective” (even if not strictly speaking “legal”) under the de facto government doctrine, which recognizes that “a government de facto may bind the state for which it acts despite defects in its claim to power.” Amar has defended the legality of the Reconstruction Amendments on the basis of Congress’s authority to judge its members’ qualifications and to guarantee a republican form of government in the states. And, stepping back, it is notable that the Reconstruction Congresses went to such lengths even to try to adhere to the forms of Article V, given the dire circumstances.

But wherever one comes out in these debates, the legal legitimacy of the Reconstruction Amendments at the time of their adoption is at least contestable—as countless scholars have recognized. As Harrison recounts,
“[a]ll those who participated in reconstruction, including those who were paying attention to the process of constitutional amendment, knew that something very unusual and legally doubtful was going on.”170 “The Republicans . . . got away with something Article V probably was supposed to prevent.”171

And yet, no one in their right mind would deny that the Reconstruction Amendments are part of the Constitution today (though the Georgia General Assembly denied this as late as 1957172), which illustrates our thesis in an especially dramatic fashion. The sociological legitimacy of the Reconstruction Amendments is not a function of their original legal legitimacy; it does not derive from a judgment about whether Article V’s rules were followed.173 Rather, it derives from the fact that these amendments have been accepted by most officials since the 1860s and have become deeply embedded in the nation’s laws, practices, and ethos.174 Their authoritative legal status is quite literally beyond dispute in our political culture, just like the status of the Constitution itself.175

E. The Sixteenth Amendment

After a long period of disuse, the machinery of Article V creaked back into motion in the early twentieth century, yielding a spurt of four amendments in a decade. The first of these was the Sixteenth Amendment, which overruled the Supreme Court’s decision in *Pollock v. Farmers’ Loan & Trust*

L.J. 1711, 1729 (1990) (book review); see also supra note 20 (explaining this paper’s use of the term “legal legitimacy”).

170. Harrison, supra note 14, at 409.

171. Id. at 458.


173. See Greenawalt, Rule of Recognition, supra note 11, at 641 (“The present authority of these amendments may depend more on their acceptance for over a century than on their actual adoption by a process that may or may not now be thought to conform to what article V prescribes.”).

174. In this respect, the addition of the Reconstruction Amendments to the Constitution resembles the addition of Texas to the Union. Both acts were constitutionally dubious at the time—there is a plausible constitutional argument that new territory must be annexed through the treaty power, not through congressional resolution—but are now politically and practically settled. See Mark A. Graber, Settling the West: The Annexation of Texas, the Louisiana Purchase, and *Bush v. Gore*, in The Louisiana Purchase and American Expansion, 1803–1898, at 83, 83–103 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005).

Co. and expressly authorized a federal income tax. The amendment “sailed through both houses of Congress” in 1909. After hitting a few speedbumps in the states, including the opposition of New York Governor and future Chief Justice of the United States Charles Evan Hughes, it was deemed ratified four years later.

The most persistent, but by no means the only, set of legal challenges to the Sixteenth Amendment involves discrepancies among the state ratification instruments. When Secretary of State Philander Knox certified the amendment in 1913, just four states had sent him instruments of ratification with the language of the amendment exactly as Congress had approved it. The rest had variations in capitalization and punctuation, and some even had differences in wording. The instrument from Oklahoma, for instance, said “from any census or enumeration” instead of “without regard to any census or enumeration,” Illinois’s said “remuneration” instead of “enumeration,” and Missouri’s said “levy” instead of “lay.”

The Office of the Solicitor of the Department of State prepared a memorandum for Secretary Knox addressing these discrepancies. The Solicitor’s Office concluded that they were “probably inadvertent” and that the legislatures in question had “intended . . . to ratify the amendment proposed by Congress.” The Office also noted that similar discrepancies had existed with earlier amendments. It therefore recommended that Knox certify the amendment. A spate of “tax protester” lawsuits in the 1980s placed heavy emphasis on this memorandum in challenging the validity of the Sixteenth Amendment. Courts uniformly rejected these

176. 158 U.S. 601 (1895); see U.S. Const. amend. XVI (“The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”).
178. See Kyvig, supra note 141, at 204–07.
179. See generally Danshara Cords, Tax Protestors and Penalties: Ensuring Perceived Fairness and Mitigating Systemic Costs, 2005 BYU L. Rev. 1515, 1537–40 (cataloging common tax protestor arguments that the Sixteenth Amendment was not properly ratified); Christopher S. Jackson, Note, The Inane Gospel of Tax Protest: Resist Rendering Unto Caesar—Whatever His Demands, 32 Gonz. L. Rev. 291, 301–07 (1996–1997) (same). Some argued, for instance, that the amendment was invalid because certain state legislatures lacked authority under their state constitutions to ratify such a taxation measure, or because the amendment transgressed federalism-based substantive limits on Article V. See, e.g., Raymond G. Brown, The Sixteenth Amendment to the United States Constitution, 54 Am. L. Rev. 843, 847–53 (1920).
180. Memorandum from Off. of the Solic., Dep’t of State, Ratification of the 16th Amendment to the Constitution of the United States 6 (Feb. 15, 1913) (on file with the Columbia Law Review).
181. Id. at 7–8 (emphasis added).
182. Id. at 15.
183. Id. at 8–15.
184. Id. at 16.
claims, often imposing sanctions along the way. By and large, these courts relied on the political question doctrine and some version of the enrolled bill rule, without reaching the merits of the plaintiffs’ Article V arguments.

We agree that this litigation is frivolous. The interesting question is why. The basic answer, in our view, is that the long acceptance and sociological legitimacy of the Sixteenth Amendment make it unthinkable that a court in the 1980s would or should entertain a challenge to the amendment’s validity—not because the merits of the underlying Article V questions are obvious.

F. The Seventeenth Amendment

Throughout the 1890s, “Congress was deluged with petitions and published appeals for direct popular election of senators.” Many senators were wary of reforming their own institution, and Southern senators were especially wary of increased federal involvement in elections. But the public pressure continued to mount. Thirty-one states petitioned Congress for change (one short of the number required to trigger a convention), and in 1910, after the Senate voted down a popular election amendment, ten senators who had opposed the measure lost reelection. The Senate approved the amendment in 1911. The text approved by the Senate, however, was different from the text that the House had already approved. A conference committee wrangled for nearly

185. See, e.g., United States v. Sitka, 845 F.2d 43, 47 (2d Cir. 1988); United States v. Stahl, 792 F.2d 1438, 1441 (9th Cir. 1986); Sisk v. Comm’r, 791 F.2d 58, 61 (6th Cir. 1986); United States v. Thomas, 788 F.2d 1250, 1253–54 (7th Cir. 1986); United States v. Foster, 789 F.2d 457, 463 (7th Cir. 1986); United States v. Wojtas, 611 F. Supp. 118, 121 (N.D. Ill. 1985).

186. See, e.g., Miller v. United States, 868 F.2d 236, 242 (7th Cir. 1989); Lysiak v. Comm’r, 816 F.2d 311, 313 (7th Cir. 1987). This wave of tax protester litigation was fomented by a popular book, Bill Benson & M.J. Beckman, The Law That Never Was: The Fraud of the 16th Amendment and Personal Income Tax (1985). See, e.g., Wojitas, 611 F. Supp. at 119 (describing how the plaintiff’s attorney submitted the book to the court in support of the plaintiff’s motion). One of the book’s authors was subsequently found to have engaged in fraud. See United States v. Benson, 561 F.3d 718, 724 (7th Cir. 2009).

187. The enrolled bill rule holds that when “the presiding officers of the House and Senate sign an enrolled bill (and the President ‘approve[s]’ it), ‘its authentication as a bill that has passed Congress should be deemed complete and unimpeachable.’” NLRB v. Noel Canning, 575 U.S. 551, 551 (2015) (quoting Marshall Field & Co. v. Clark, 143 U.S. 649, 672 (1892)). While the enrolled bill rule limits the types of challenges “the judicial department” may entertain, Clark, 143 U.S. at 672, it does not bear on what is required by Article V.

188. See supra notes 102–112 and accompanying text (explaining why it is at least plausible to believe that states must ratify an identical text).

189. Kyvig, supra note 141, at 209.

190. Id. at 209–12.

191. Not all of the states formally requested a convention; some only asked that Congress propose an amendment. See Caplan, supra note 63, at 63–65.

192. See Kyvig, supra note 141, at 212.
This intercameral wrangling led to a thorny Article V question. The Seventeenth Amendment is one of only two recognized amendments to have been passed by the House and the Senate in different legislative sessions. Is that permissible? In a recent article, Saikrishna Prakash argues that, as a matter of constitutional text and structure, it is not, as Article V implicitly requires that amendments be proposed by both chambers of Congress in the same legislative session. “This reading of the Constitution,” Prakash notes, “would suggest the rather immodest conclusion that the Thirteenth and Seventeenth Amendments, neither of which passed in a single session, failed to satisfy the standards of Article V.”

G. The Eighteenth Amendment

The Eighteenth Amendment, on Prohibition, raised many more legal questions and led to some of the Supreme Court’s most significant pronouncements on Article V. First, the amendment included a novel provision stating that it would “be inoperative unless it shall have been ratified . . . within seven years.” Opponents argued vigorously that Congress could not impose a time limit on ratification when Article V says nothing about the matter. In *Dillon v. Glass*, however, the Court rejected a challenge on this ground in concluding “that the fair inference or implication from Article V is that the ratification must be within some reasonable time after the proposal.” The Court continued:

> Whether a definite period for ratification shall be fixed so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification.

In other words, Congress’s power to impose a time limit is either implicit in Article V or perhaps grounded in the Necessary and Proper Clause.

Second, a wide range of scholars, states, and alcohol-industry groups argued that the Eighteenth Amendment violated inherent individual-
rights and federalism limitations on Article V. A district court in 1930 endorsed a procedural variant on the federalism objection, holding that the amendment should have been ratified by state conventions rather than state legislatures given the extent to which it transferred power to the federal government. As far as we are aware, this is the only instance in which a federal court has invalidated an Article V amendment. The Supreme Court reversed.

Third, the Eighteenth Amendment raised the question whether referenda may play a part in the process of state ratification. In Ohio, citizens concerned about malapportionment in the state legislature decided to amend the state constitution to require that controversial federal amendments be submitted to a popular referendum after approval by the legislature. Soon afterward, the Ohio legislature approved the Eighteenth Amendment by a wide margin, and the U.S. Secretary of State included Ohio’s ratification in the official count when he proclaimed the Eighteenth Amendment adopted. The people of Ohio, however, narrowly rejected the Eighteenth Amendment in a referendum after this proclamation. The Supreme Court held that this referendum was a constitutional nullity in *Hawke v. Smith (No. 1)*. The Court said that the “legislature,” as used in Article V, is “the representative body which ma[kes] the laws of the people.” The decision was excoriated in the press, and both its reasoning and its “elitist anti-populistic” tone continue to garner criticism.

Shortly after *Hawke*, the Court rejected an array of other challenges to the Eighteenth Amendment, including that Congress had not properly found the amendment “necessary”; that “two thirds” means two-thirds of

---

199. See Jason Mazzone, Unamendments, 90 Iowa L. Rev. 1747, 1815 n.364 (2005) (collecting scholarly sources arguing that the Eighteenth Amendment violated inherent substantive limits on the amending power); Roznai, supra note 79, at 673 n.107 (same).


202. See Kyvig, supra note 141, at 242. Specifically, a ratification by the legislature would not be effective for ninety days. Id. If, during that period, six percent of voters signed a petition for a referendum, the legislature’s action would not be effective unless approved by a majority of voters in the referendum. Id.

203. Id.

204. Id. at 243.


206. Id. at 227.

207. See Kyvig, supra note 141, at 246 (collecting prominent criticisms); see also id. at 245 (“*Hawke v. Smith* left a large and lasting impression that the Article V amending process denied democratic choice in the case of national prohibition.”).

the whole membership of Congress, not a quorum; and that the amendment transgressed substantive limits on the amending power. The Court heard an extraordinary five days of oral argument on these questions and related ones involving the scope of the amendment and the National Prohibition Act. But the Court issued only a brief per curiam opinion, stating its conclusions “without an exposition of the reasoning by which they ha[d] been reached.”

H. The Nineteenth Amendment

The women’s suffrage amendment was ratified on the heels of Prohibition and raised similar procedural issues. A companion case decided the same day as Hawke held that the Ohio legislature’s ratification of the Nineteenth Amendment could not be overturned by referendum. When the case was argued, thirty-five of the thirty-six states needed to ratify the amendment had done so. If Hawke had come out the other way, it would have been a significant setback for the amendment effort, as there were movements afoot to hold referenda in several states.

Hawke also led indirectly to the final ratification of the Nineteenth Amendment, which unfolded in a dramatic scene in Tennessee. The Tennessee Constitution contained (and still contains) a provision prohibiting the legislature from acting on a federal constitutional amendment without an intervening election following Congress’s proposal of the amendment. Governor Albert Roberts refused to call a special session of the legislature to consider the Nineteenth Amendment before election day, thinking himself constrained by this provision. But after Hawke and some arm twisting by President Woodrow Wilson, he

210. See Kyvig, supra note 141, at 246. Edward Corwin opined at the time that “[n]ot since the Milligan case was argued in 1866 has a more notable array of counsel stood up before the court.” Edward S. Corwin, Constitutional Law in 1919–1920: I: The Constitutional Decisions of the Supreme Court of the United States in the October Term, 1919, 14 Am. Pol. Sci. Rev. 635, 651 (1920). For a colorful eyewitness account, see 2 Philip C. Jessup, Elihu Root 479–80 (1938).
211. Nat’l Prohibition Cases, 253 U.S. at 388 (White, C.J., concurring); see also id. (expressing “profound[] regret” over this absence of explanation). Justice Oliver Wendell Holmes wrote elliptically in a letter to then-Professor Felix Frankfurter that there were “good reasons” for “not giving reasons,” but he did not elaborate. Alexander M. Bickel & Benno C. Schmidt, Jr., The Judiciary and Responsible Government 1910–21, at 546 (1984) (quoting Letter from Oliver W. Holmes to Felix Frankfurter (June 22, 1920)). To this day, the “reasons for not giving reasons that Holmes alluded to remain obscure.” Id. at 546–47.
213. See Kyvig, supra note 141, at 244.
convened the legislature, which voted to ratify by a razor-thin margin. Opponents of the amendment immediately filed a motion to reconsider, only to realize that their motion would fail unless they could buy time to persuade more colleagues. Thirty-seven antisuffrage legislators therefore decamped to Decatur, Alabama, to deprive the House of a quorum. Governor Roberts certified that Tennessee had ratified the amendment, and President Wilson’s Secretary of State in turn certified the Nineteenth Amendment. But that did not stop the Decatur contingent from returning; ordering the sergeant-at-arms to amass a quorum; and, with many prosuffrage members absent from the hall, voting to grant reconsideration and reject ratification.

This mess came before the U.S. Supreme Court in Leser v. Garnett. The Court held that the ratification by Tennessee (and several other states) could be treated as valid even if obtained in violation of the state constitution or state rules of legislative procedure. Once a state legislature has transmitted a “duly authenticated” ratification resolution to the U.S. Secretary of State, the Court suggested, federal judges should not look behind the curtain. Separately, the Court also rejected a claim that the Nineteenth Amendment was invalid because “so great an addition to the electorate, if made without the State’s consent, destroys its autonomy as a political body.” The Court noted that this theory, if accepted, would also invalidate the Fifteenth Amendment, which “ha[d] been recognized and acted on for half a century.” And that proposition, whatever its legal merits, simply “cannot be entertained.”

216. See Kyvig, supra note 141, at 238, 245.
217. A trial court also granted an injunction prohibiting the governor from certifying the ratification vote to Washington, but the injunction was quashed by the Tennessee Supreme Court. See Clements v. Roberts, 230 S.W. 30, 36 (Tenn. 1921).
218. See Kyvig, supra note 141, at 238.
220. 258 U.S. 130 (1922).
221. Id. at 137.
222. Id.
223. Id. at 136. For a comprehensive summary of arguments made against the substantive validity of the Nineteenth Amendment, which the Court briskly brushed aside in Leser, see Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 Harv. L. Rev. 947, 997–1006 (2002).
224. Leser, 258 U.S. at 136.
225. Id.
I. The Twenty-First Amendment

The Twenty-First Amendment, “repeal[ing]” Prohibition, is the only amendment in U.S. history ratified by state conventions rather than state legislatures. That choice sprang from a lingering feeling, intensified by Hawke, that ratification of the Eighteenth Amendment had not accurately reflected public opinion. Conventions would allow for a more direct appeal to the people. As a result, the Twenty-First Amendment brought up a host of new legal questions that have never been definitively resolved or adjudicated.

The threshold question was whether Congress or the states should set the rules governing the formation and operation of the conventions. Many members of Congress, the bar, and the academy expressed the view that Congress had the power to set these rules if it wished, although this view was by no means unanimous. But Congress never really had to bother.

226. We are not aware of any novel challenges to the validity of the Twentieth Amendment, which moved up the dates of the presidential inauguration and the beginning of the congressional term to shorten the lame-duck period. Presumably, this reflects the larger lack of controversy over the amendment: Within about a year after being proposed by Congress, it became the first amendment to be unanimously ratified by the states on the first pass. See Kyvig, supra note 141, at 274 (“To say that the states welcomed the lame duck amendment would be an understatement.”); Edward J. Larson, The Constitutionality of Lame-Duck Lawmaking: The Text, History, Intent, and Original Meaning of the Twentieth Amendment, 2012 Utah L. Rev. 707, 734 (“Because the states acted so quickly and with virtually no dissent, there was often little debate in the state legislatures.”). The House’s proposed version of the amendment included a provision requiring that “ratification shall be by legislatures, the entire membership of at least one branch of which shall have been elected subsequent to [the] date of submission.” 75 Cong. Rec. 4059 (1932). That provision was removed by the conference committee when the House and Senate versions of the amendment were reconciled, but it serves as an interesting precedent for building novel conditions of ratification (beyond deadlines) into the text of proposed amendments. See infra notes 377–380 and accompanying text.


228. See Ratification of the Twenty-First Amendment to the Constitution of the United States: State Convention Records and Laws 3 (Everett Somerville Brown ed., 1938) [hereinafter Ratification of the Twenty-First Amendment] (“Much of the criticism of the Eighteenth Amendment was based on the claim that its ratification had not properly reflected the opinion of the people of the country.”). Defiance of Prohibition was widespread. As Pauline Sabin, the head of a Prohibition reform organization, put it: Proponents “thought they could make prohibition as strong as the Constitution, but instead they have made the Constitution as weak as prohibition.” Sean Beienburg, Prohibition, the Constitution, and States’ Rights 229 (2019).

229. For summaries of these debates, see Clement E. Vose, Constitutional Change: Amendment Politics and Supreme Court Litigation Since 1900, at 111–12 (1972) [hereinafter Vose, Constitutional Change]; Abraham C. Weinfeld, Power of Congress Over State Ratifying Conventions, 51 Harv. L. Rev. 473, 474–75 (1938). The states themselves were also in disagreement. California petitioned Congress to pass a law regulating the conventions. See Ratification of the Twenty-First Amendment, supra note 228, at 515. New Mexico, on the other hand, declared that any rules from Congress would be “null and void” and that state officers were “authorized and required to resist to the utmost any attempt to execute any and all such congressional dictation and usurpation.” Id. In the end, twenty-one states
By the time Congress proposed the amendment, twenty-nine states were already in the process of legislating how their conventions would take place. 230

Many of the choices made by states in establishing these conventions were contentious and challenged at the time. 231 “The widespread use of at-large districts,” for instance, “disregarded both historical precedent and the advice of legal and constitutional experts commissioned to make recommendations.” 232 Indeed, even though more than half the states used at-large elections, the Maine Supreme Judicial Court held that this practice violated Article V. 233 A number of states required delegates to vote in accord with whatever position they had pledged to support when elected or in accord with the result of a statewide referendum. 234 This, too, was controversial, because it broke with the historical understanding of a convention as an authentically deliberative body. As one leading scholar put it, “a delegate must be free to decide how he individually will vote, to ratify or not to ratify,” and “he must not be subject to any legal process either to compel him to vote in a given way or to punish him if he does not so vote.” 235 The Maine high court agreed. 236 The Alabama Supreme Court came out the opposite way, upholding a law requiring delegates to pledge that they would abide by the result of a statewide referendum on the ground that a convention is “more truly representative when expressing the known will of the people.” 237

In the end, the lawsuits challenging the ratification process did not carry the day. But the U.S. Supreme Court never weighed in. 238 And the

231. See Vose, Constitutional Change, supra note 229, at 121–26 (describing litigation filed by opponents of repeal).
232. Thomas F. Schaller, Democracy at Rest: Strategic Ratification of the Twenty-First Amendment, Publius, Spring 1998, at 81, 88; see also Noel T. Dowling, A New Experiment in Ratification, 19 A.B.A. J. 383, 384 (1933) (“Election at large, for all delegates, involves a break-away from prior notions concerning the composition of conventions. The idea of local representation permeates our political thinking and possibly is to some extent imported into the Constitution by the term ‘convention.’”).
233. In re Opinion of the Justices, 167 A. 176, 179 (Me. 1933) (“[W]e do not deem it permissible for the state, under the terms of article 5 of the Federal Constitution, to organize a convention wherein the delegates entitled to participate are all elected at large.”).
236. In re Opinion of the Justices, 167 A. at 180 (“A convention is a body or assembly representative of all the people of the state. The convention must be free to exercise the essential and characteristic function of rational deliberation.”).
238. See Vose, Constitutional Change, supra note 229, at 121 (“No great cases resulted and none ever reached the United States Supreme Court.”). In addition to the Alabama
litigation did little to settle or clarify what constraints Article V might impose on the process of ratification by state conventions.\textsuperscript{239}

\textbf{J. The Twenty-Second Amendment}

The Twenty-Second Amendment codified the unwritten norm, which President Franklin Roosevelt had transgressed, against presidents serving more than two terms.\textsuperscript{240} From a procedural point of view, the most striking thing about the amendment is the final vote tally in the House of Representatives: 81 to 29.\textsuperscript{241} The size of the House, then as now, was 435 members.\textsuperscript{242} A quorum therefore required at least 218 members, and two-thirds of a quorum required at least 146 members. How was the Twenty-Second Amendment sent to the states with so few “yeas”—less than a fifth of the total House membership?\textsuperscript{243}

The answer comes from the House Rules. As the Supreme Court has observed, the “Constitution has prescribed no method” for determining the presence of a quorum, “and it is therefore within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact.”\textsuperscript{244} The “method” the House has settled on is to \textit{presume} the presence of a quorum unless the fact is challenged.\textsuperscript{245} Furthermore, the Speaker of the House determined in 1890 that all members present in the House would count toward a quorum, even if they did not vote.\textsuperscript{246}

\begin{itemize}
\item 239. Cf. Recent Cases, 47 Harv. L. Rev. 126, 130 (1933) (observing that “[t]he opposing views of [the Alabama and Maine] decisions indicate the lack of both authority and satisfactory analogies” regarding how ratification of Article V amendments by convention is supposed to work).
\item 241. 93 Cong. Rec. 2392 (1947).
\item 243. United States v. Ballin, 144 U.S. 1, 6 (1892).
\item 244. See Charles W. Johnson, John V. Sullivan & Thomas J. Wickham, Jr., House Practice: A Guide to the Rules, Precedents, and Procedures of the House 756 (2017) (“A quorum is presumed to be present unless a point of no quorum is entertained and the Chair announces that a quorum is in fact not present or unless the absence of a quorum is disclosed by a vote or by a call of the House.”). The Court has implicitly blessed this method in a separate context. See NLRB v. Noel Canning, 573 U.S. 513, 553 (2014) (“Senate rules presume that a quorum is present unless a present Senator questions it.”).
\item 245. See Johnson et al., supra note 244, at 760. The Speaker made this change to defeat the obstructionist “disappearing quorum” tactic, by which minority-party members would prevent a quorum by refusing to vote. See Josh Chafetz, Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past, 131 Harv. L. Rev. 96, 112–14 (2017).
\end{itemize}
The upshot is that the House can pass a bill—or apparently an amendment—with fewer than half of its members voting, as long as no one questions whether a quorum is present.\textsuperscript{246}

That is what happened with the Twenty-Second Amendment. The House passed by a vote of 285 to 121 an initial version of the proposed amendment that would have prevented anyone from being elected President who had served any part of two terms.\textsuperscript{247} The amendment was then reworked in the Senate into its current form, which provides that someone who serves as President for less than two years of another’s term may still be elected twice.\textsuperscript{248} This was clearly a “material change,”\textsuperscript{249} requiring a new vote in the House. The new vote, approving the Senate version, was 81 to 29.\textsuperscript{250} One representative “object[ed] to the vote on the ground a quorum is not present.”\textsuperscript{251} But he subsequently withdrew his objection without explanation, and a count never took place.\textsuperscript{252}

While the final vote seems to have been effective under House rules, there is reason to be skeptical. Even if one is willing to accept that a bare quorum may vote on a constitutional amendment, the idea that a handful of representatives could propose an amendment in the absence of an actual quorum may be a bridge too far. The final House vote on the Twenty-Second Amendment severely strained both the text (“two thirds of both Houses”) and the supermajoritarian spirit of Article V. Moreover, the Supreme Court has given added reason for skepticism. In the \textit{National Prohibition Cases}, the Court approved the application of the general quorum rule to constitutional amendments, but it advised: “The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present—assuming the presence of a quorum.”\textsuperscript{253} The Court did not say two-thirds of the members present and voting. Perhaps this was a slip-up by the Court, but the Twenty-Second Amendment.

\begin{itemize}
\item \textsuperscript{246} See Thomas J. Wickham, Constitution, Jefferson’s Manual, and Rules of the House of Representatives 83 (2019) (“The majority required to pass a constitutional amendment . . . is two-thirds of those Members voting either in the affirmative or negative, a quorum being present, and Members who only indicate that they are ‘present’ are not counted in this computation.”).
\item \textsuperscript{247} See Stephen W. Stathis, The Twenty-Second Amendment: A Practical Remedy or Partisan Maneuver?, 7 Const. Comment. 61, 67 (1990).
\item \textsuperscript{248} Id. at 68; see U.S. Const. amend. XXII.
\item \textsuperscript{249} 93 Cong. Rec. 2389 (1947) (statement of Rep. Michener).
\item \textsuperscript{250} Id. at 2392.
\item \textsuperscript{251} Id. (statement of Rep. Forand).
\item \textsuperscript{252} See Corwin & Ramsey, supra note 96, at 192–94.
\item \textsuperscript{253} 253 U.S. 350, 386 (1920). A half-century earlier, Senator Lyman Trumbull had put the point similarly on the floor of Congress: “[I]t was decided” during debates on the Corwin Amendment, he said, that “two thirds of the Senators present, a quorum being present, was sufficient to carry a constitutional amendment.” Cong. Globe, 40th Cong., 3d Sess. 1642 (1869) (emphasis added).
\end{itemize}
Amendment emphatically did not receive a vote of two-thirds of a present quorum. 254

To be clear, we are not suggesting that judges (or anyone else) today could or should disregard the Twenty-Second Amendment, which has been an entrenched feature of our constitutional order for more than seventy years. As with the Sixteenth Amendment, courts would almost certainly dismiss any lawsuit challenging the Twenty-Second Amendment without reaching the merits. 255 But the amendment’s current status as part of the Constitution is not due to painstaking, or even particularly conscientious, adherence to the rules of Article V.

K. The Twenty-Seventh Amendment 256

The Twenty-Seventh Amendment brings this story full circle. It was proposed by Congress in the early days of the republic, but it is the most recent amendment to have gained entry to the Constitution . . . if indeed it did gain entry. The fact that leading constitutional scholars still refer to

254. We have not been able to ascertain whether those who voted on the Twenty-Second Amendment were the only members present in the House, in which case there was not a quorum, or whether there was in fact a quorum present in the House (in keeping with the presumption in the House Rules) and the amendment failed to obtain a “vote of two-thirds of the members present.” Nat’l Prohibition Cases, 253 U.S. at 386. Either way, Article V would not be satisfied per the rule announced by the Court in 1920.

255. See supra notes 185–188 and accompanying text.

256. We are not aware of significant novel challenges to the Twenty-Third through Twenty-Sixth Amendments. These “modest” amendments were “narrowly drawn reforms that produced only marginal change.” Kyvig, supra note 141, at 349. The Twenty-Third Amendment contained, for the first time, a ratification time limit in the resolution proposing the amendment rather than in the text of the amendment itself. See Allison L. Held, Sheryl L. Herndon & Danielle M. Stager, The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States, 3 WM. & MARY J. WOMEN & L. 113, 126 (1997). The validity of this time limit was never tested, however, because the amendment (which authorized presidential electors for the District of Columbia) was ratified within a year. See Michael J. Garcia, Caitlain Devereaux Lewis, Andrew Nolan, Meghan Totten & Ashley Tyson, Cong. Rsch. Serv., The Constitution of the United States of America, S. Doc. No. 112-9, at 40 n.15 (2017). When the Twenty-Fifth Amendment was certified as part of the Constitution, President Lyndon Johnson signed the certification, although apparently only as a witness. See Certification of Amendment to Constitution of the United States, 32 Fed. Reg. 3287, 3287–88 (Feb. 25, 1967); Remarks at Ceremony Marking the Ratification of the Presidential Inability (25th) Amendment to the Constitution, 1 Pub. Papers 217–18 (Feb. 23, 1967); Stephen W. Stathis, Presidential Disability Agreements Prior to the 25th Amendment, 12 Pres. Stud. Q. 208, 212 (1982). The Twenty-Sixth Amendment, which was the “most quickly ratified constitutional amendment in our history,” Tex. Democratic Party v. Abbott, 978 F.3d 168, 186 (5th Cir. 2020), featured a reprise of the debate in Tennessee over whether a state constitution could validly require an intervening election before the legislature ratified the amendment. The Tennessee Supreme Court held this state constitutional limitation invalid. See Walker v. Dunn, 498 S.W.2d 102, 106 (Tenn. 1972); supra notes 214–225 and accompanying text.
PUZZLES AND POSSIBILITIES

it as the “purported”\(^\text{257}\) or “alleged”\(^\text{258}\) Twenty-Seventh Amendment highlights how many questions about Article V have remained open in the two centuries between its proposal and ratification.

What is now regarded as the Twenty-Seventh Amendment, which prohibits a congressional salary increase from taking effect before an intervening election, was proposed as the second of twelve amendments sent to the states in 1789 (the third through twelfth were the Bill of Rights). By the time the Bill of Rights was ratified in 1791, only six states had ratified the so-called Congressional Pay Amendment, and it fell into a long state of dormancy.\(^\text{259}\) About a hundred years later, the Ohio legislature voted to ratify the amendment to protest the “Salary Grab” Act of 1873, in which Congress gave itself a large and retroactive salary increase.\(^\text{260}\) But that was an isolated maneuver, and the concomitant introduction in Congress of numerous proposals for a new congressional pay amendment suggests that many regarded the original version as dead.\(^\text{261}\) Nonetheless, the Congressional Pay Amendment was resurrected a century later, owing to the dogged efforts of a University of Texas undergraduate and public displeasure at congressional salary increases.\(^\text{262}\)

Maine and Colorado ratified the amendment in 1983 and 1984. News coverage of those ratifications prompted a Wyoming legislator to report that his state had also ratified the amendment in 1977—a fact that had somehow escaped notice in the nation’s capital.\(^\text{263}\) After that, it was off to the races. By 1992, forty-one states had ratified.\(^\text{264}\)

Since 1984, the Archivist of the United States has been assigned the statutory responsibility to “publish[]” new amendments.\(^\text{265}\) The Archivist sought the advice of the Justice Department’s Office of Legal Counsel (OLC). OLC opined that there was no time limit on ratification, brushing aside the Supreme Court’s contrary language in Dillon as “dictum,” and


\(^{259}\) See Bernstein, supra note 25, at 532–33.

\(^{260}\) Id. at 534.

\(^{261}\) Id.

\(^{262}\) See Kyvig, supra note 141, at 464–65; Bernstein, supra note 25, at 536–39.

\(^{263}\) Kyvig, supra note 141, at 465; Bernstein, supra note 25, at 537.

\(^{264}\) Bernstein, supra note 25, at 539. The ratification of Idaho raised a variant of an old problem: whether the state could require that a proposed amendment be submitted to the people in a referendum prior to ratification. The Idaho Attorney General opined that such a requirement was unconstitutional, but following a favorable referendum vote, the legislature ratified anyway. Id.

that the Congressional Pay Amendment had been validly ratified. OLC also opined that Congress has no role in proclaiming an amendment part of the Constitution, despite the contrary views of seven Justices in Coleman. In keeping with OLC’s advice, the Archivist “certified” in the Federal Register that the “Amendment has become valid, to all intents and purposes, as a part of the Constitution of the United States.”

Congressional leadership was “stunned.” Several members took to the floor to reassert Congress’s primacy in judging the validity of an amendment. Senator Robert Byrd, for instance, invoked the “firm historical understanding . . . that the Executive’s function with regard to certifying constitutional amendments is purely ministerial” and insisted that “Congress should have the opportunity to decide substantive questions” of amendment validity. Numerous members of Congress expressed concern about whether ratification of the Twenty-Seventh Amendment would furnish a precedent for reviving other seemingly lapsed amendments. Nevertheless, in the end Congress voted overwhelmingly for a resolution validating the Twenty-Seventh Amendment.

Yet even as countless pocket Constitutions and textbooks have flown off the presses since 1992 with the Twenty-Seventh Amendment included, “there is, at least at this time, no consensually agreed-upon, positivistic ‘given’ that allows us to say that we are simply engaging in description when granting the amendment the status of ‘law.’”


269. Bernstein, supra note 25, at 540.

270. 138 Cong. Rec. 11,654 (1992) (statement of Sen. Byrd); see also, e.g., id. at 11,779 (statement of Rep. Fish) (“Where . . . there may be lingering concerns as to the validity of the amendment, it is appropriate for Congress to resolve such doubts . . . .”); id. at 11,860 (statement of Sen. Grassley) (“[T]he Supreme Court made clear in 1939 in the Coleman decision that Congress has the authority to say whether the timeliness standard has been met.”); id. at 11,871 (statement of Sen. Roth) (stating that “the functions of” the Archivist “are ministerial only: To count the number of ratifications of an amendment and not to act as a constitutional tribunal to ‘decide doubtful questions’ of law”).

271. See, e.g., id. at 11,655 (statement of Sen. Byrd) (“I do not intend our action with regard to this amendment to serve as a precedent or model for any other amendment . . . .”); id. at 11,780 (statement of Rep. Edwards) (“The House . . . should be clear that this is an exception, not a precedent.”). Although one senator stated that the Senate had “decided to declare that four [sic] other proposed and pending amendments . . . were to be considered to have lapsed,” id. at 11,870 (statement of Sen. Sanford), neither the Senate nor the House took formal action on that question. Senator Jesse Helms provided the more accurate assessment: “I regret that some questions are left unanswered.” Id. at 11,871.

272. Id. at 11,869 (Senate); id. at 12,052 (House).

273. Levinson, Authorizing Constitutional Text, supra note 257, at 113.
academic authorities on the amendment process, Dellinger and Prakash, maintain that the amendment is not part of the Constitution. Justice Scalia stated at a public event that he is inclined to agree. Ackerman has written that “the so-called twenty-seventh amendment should be treated as a bad joke by sensible citizens.” A unanimous Supreme Court, including Justices Oliver Wendell Holmes and Louis Brandeis, suggested that the amendment was unrevivable a century ago. On the other hand, eminent constitutional scholars such as Amar, Michael Stokes Paulsen, and Laurence Tribe have taken the opposite position. Perhaps the best an editor of the Constitution can do is to adopt the approach suggested by William Van Alstyne: Include the Twenty-Seventh Amendment, but with an asterisk.

In light of the history of legal contestation and confusion recounted above, an asterisk would be a fitting way for the written Constitution to end.

L. The Twenty-Eighth Amendment?

Or maybe that is not quite the end. Supporters of other amendments proposed by Congress over the years claim that these amendments, too, have already become part of the canonical document. As a matter of Article V law, it is not clear that all of these claims are wrong.

1. Article the First. — The very first amendment proposed by Congress, denominated “Article the First” in the same package of amendments that contained the Bill of Rights and the putative Twenty-Seventh, involved the size of the House of Representatives. The ratification history is obscure,

276. Ackerman, We the People, supra note 7, at 490 n.1.
280. See Resolution of Congress Proposing Amendatory Articles to the Several States, in Documentary History, supra note 103, at 321, 321–22. Article the First would have set an initial minimum number of representatives based on population, until the national population reached a certain number, at which point it would have mandated a minimum of 200 representatives and a maximum of one per fifty thousand. Id.; see also Amar, The Bill of Rights, supra note 94, at 1143–45. The language is convoluted enough that unless one adopts some sort of “scrivener’s error” theory, its meaning is misrepresented on the Senate’s official website. See Congress Submits the First Constitutional Amendments to the States, U.S. Senate, https://www.se nate.gov/artandhistory/history/minute/ Congress_Submits_1st_Amendments_to_States.htm (last visited Aug. 5, 2021) (claiming that if Article the First were adopted, the House “would today have more than 6,000 members”). A possible source of confusion is that a congressional
but it appears to have fallen just short. Of the states that voted to add the Bill of Rights to the Constitution, only Delaware declined to ratify Article the First, probably because, as a small state, its power would shrink in a larger House. This left the amendment one state shy of ratification. And the failure of Massachusetts and Connecticut to ratify not only this amendment but also the Bill of Rights "poses something of a mystery." In Massachusetts, the two houses of the legislature approved slightly different sets of amendments, and a joint committee never reconciled the differences. In Connecticut, the lower house of the legislature apparently approved eleven of twelve proposed amendments in 1789, including Article the First, but the upper house tabled the issue until the next session. At the next session, the upper house approved all twelve amendments, but the lower house only approved the Bill of Rights (and maybe the Congressional Pay Amendment—the journal contradicts itself). The two houses could not reconcile their resolutions, so no notice of ratification was ever sent to the capital.

A recent pair of lawsuits, however, alleges that Connecticut did ratify Article the First. The basic claim is that the ratification was effective

conference committee at the eleventh hour "inexplicably" changed "less" to "more" in the final clause, converting a minimum to a maximum and introducing a "technical glitch[]."

281. See Amar, The Bill of Rights, supra note 94, at 1143. As Amar explains, numerous historians have bungled this ratification count in a variety of ways. Id. at 1143 n.52.


284. Id.; Myers, Massachusetts and the First Ten Amendments, supra note 282, at 11–12.


286. Id.; see also Grimes, supra note 283, at 28 n.40.
because both houses approved Article the First, albeit during two different legislative sessions, and that any state rule requiring approval by both chambers during a single session is superseded by Article V. Both lawsuits, unsurprisingly, were dismissed on standing and political question grounds. But the legal arguments they press are by no means untenable on the merits.

2. The Titles of Nobility Amendment. — The so-called Titles of Nobility Amendment, proposed by Congress in 1810, has had a similarly checkered legal history. It fell short of the necessary number of state ratifications. But confusion about its status persisted for years. In an official 1815 compilation of the laws of the United States, published with the authorization of Congress, the Titles of Nobility Amendment appeared in the Constitution as the Thirteenth Amendment. The editors of the compilation explained that there had “been some difficulty in ascertaining” whether it had been ratified, because the “evidence to be found in the office” of the Secretary of State was “defective.” The editors considered [it] best to include the supposed “thirteenth” amendment with that prefatory note. The official edition of the Constitution printed for the Fifteenth Congress also contained the amendment. Secretary of State John Quincy Adams, in a letter from 1817, seemed to be under the impression that the amendment was part of the Constitution. Even today, historians give conflicting accounts of how close the amendment was to ratification.


289. This proposed amendment provides in full:

If any citizen of the United States shall accept, claim, receive or retain any title of nobility or honor, or shall, without the consent of Congress, accept and retain any present, pension, office or emolument of any kind whatever, from any emperor, king, prince or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them, or either of them.

Resolution Proposing an Amendment to the Constitution of the United States (Nov. 27, 1809), in Documentary History, supra note 103, at 452, 452.

290. See 1 Laws of the United States of America 74 (John Bioren & W. John Duane eds., 1815).

291. Id. at ix.

292. Id.

293. See Ames, supra note 55, at 188; Silversmith, supra note 100, at 587 (citing 31 Annals of Cong. 530–51 (1817)).

294. Silversmith, supra note 100, at 587 n.62. Adams later corrected himself. Id.

295. Compare, e.g., Bernstein with Agel, supra note 16, at 176 (“one state short”), and Kyvig, supra note 141, at 117 (one state short), with Silversmith, supra note 100, at 595–96 (“[I]t was never a single ratification short . . . .”). Silversmith appears to have the better of the argument.
Throughout the early to mid-1800s, “the general public continued to think that [the Titles of Nobility] amendment had been adopted.”296 The amendment frequently appeared in official state codes, in printed editions of the Constitution, and in textbooks.297 By the end of the nineteenth century, it was “commonly recognized” that the Titles of Nobility Amendment had failed.298 But the whole episode confirms once again that the constitutional text is constituted to a significant extent by public attitudes and that those attitudes can become detached from Article V.

3. The Equal Rights Amendment. — The final, and in our view strongest, contender to be the twenty-eighth amendment is the ERA, which would prohibit the denial or abridgement of “[e]quality of rights under the law . . . by the United States or by any State on account of sex.”299 The odyssey of the ERA recapitulates many of the uncertainties already canvassed above.300 It was proposed by Congress in 1972, and the accompanying resolution set a ratification deadline of seven years.301 As that deadline approached, only thirty-five states (of thirty-eight needed) had ratified, and several of those had purported to rescind their ratifications,302 so Congress voted by simple majority to extend the ratification deadline by three years.303 President Jimmy Carter signed the resolution extending the deadline while disclaiming that it was constitutionally necessary.304 No
additional states ratified before the expiration of the new deadline. Beginning in 2017, however, Nevada, Illinois, and Virginia each ratified, pushing the total number of ratifications over the three-fourths line if one counts the states that later rescinded.305 OLC opined in January 2020 that the ERA had expired and was no longer pending before the states.306 But the House of Representatives passed a resolution the next month eliminating the deadline, and Senators Ben Cardin and Lisa Murkowski have introduced a similar measure in the Senate.307 Meanwhile, a number of lawsuits regarding the status of the ERA are pending at this writing.308

There is a credible argument that the ERA is already part of the Constitution based on Article V. To start, many officials and scholars have taken the view that purported rescissions are ineffective, given, among other things, the value of finality and the textual commitment to states of the power to “ratif[y]” only.309 Several nineteenth-century treatise writers advised that rescissions were ineffective.310 And “[e]very state legislature that passed a resolution rescinding a prior ratification of the ERA did so under the cloud of an express opinion that such an action would be a legal nullity.”311 As for Congress’s attempt to impose a deadline, that too was arguably invalid. After all, as OLC observed in 1992, “the plain language of Article V contains no time limit on the ratification process.”312 It is at least arguable, then, that Congress has no power to create a ratification time limit through a resolution that does not itself go through the Article V process.313


311. Id. at 423.


313. See, e.g., Danaya C. Wright, “Great Variety of Relevant Conditions, Political, Social and Economic”: The Constitutionality of Congressional Deadlines on Amendment Proposals Under Article V, 28 Wm. & Mary Bill Rts. J. 45, 77–92 (2019); Mason Kalfus,
The Supreme Court did state in *Dillon* that Congress has the power “to fix a definite period for” ratification.\(^{314}\) But this statement rested (again, arguably) on the logically prior conclusion that Article V requires that “ratification must be within some reasonable time after the proposal.”\(^{315}\) *That* conclusion did not survive the Twenty-Seventh Amendment, at least in the view of Congress and the executive branch.\(^{316}\) Moreover, even if one believes that Congress has an implied power to control ratification deadlines and that the ERA’s deadline has expired, it may be that retroactively extending such a deadline is a permissible exercise of this power. Not only that, it may be Congress’s exclusive prerogative under *Coleman* to judge whether its extension of the deadline is valid.\(^{317}\) For now, of course, the ERA does not appear in printed copies of the Constitution. But the story may not be over, especially given recent shifts in power in Washington.

M. *An Article V Convention?*

A brief coda: Our focus has been on the Article V “track” of congressionally initiated amendments, because that is how every amendment in U.S. history has been passed. There is also the separate and unused track of amendments proposed by a federal convention. Article V is “strikingly vague” on how such a convention would be triggered and how, if triggered, it would operate.\(^{318}\) Over the years, the states have sent hundreds of

Comment, Why Time Limits on the Ratification of Constitutional Amendments Violate Article V, 66 U. Chi. L. Rev. 437, 446–67 (1999); cf. Clinton v. City of New York, 524 U.S. 417, 445–46 (1998) (holding that Congress cannot change by statute the constitutional process for enacting legislation). It is also notable that the ERA’s time limit was worded differently than prior time limits. The resolution proposing the ERA stated that it would be valid “when ratified . . . within seven years,” whereas prior limits had stated that the proposed amendment would be “inoperative unless,” or valid “only if,” ratified within a certain time period. Suk, We the Women, supra note 300, at 177 (emphasis added). In light of this contrast, the ERA’s time limit was arguably just hortatory.

314. Dillon v. Gloss, 256 U.S. 368, 375–76 (1921). It is debatable whether this issue was properly before the Court in *Dillon*, given that the Eighteenth Amendment had been ratified well within the deadline set by Congress. In addition, the deadline was in the text of the proposed amendment itself, not in the accompanying resolution. *Dillon* is therefore “dubious” authority at best for the validity of the ERA’s limit. Robert Hajdu & Bruce E. Rosenblum, Note, The Process of Constitutional Amendment, 79 Colum. L. Rev. 106, 126 n.75 (1979); see also Virginia v. Ferriero, 525 F. Supp. 3d 36, 57 (D.D.C. 2021) (noting that whether Congress may impose a deadline by resolution “is a question of first impression”).


316. See Prakash, Of Synchronicity, supra note 16, at 1226 (“While the Supreme Court once claimed that the states had to ratify proposed amendments within a reasonable period of time after their receipt, the political branches later decided otherwise.”).


318. Laurence H. Tribe, Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment, 10 Pac. L.J. 627, 632 (1979); see also Michael B. Rappaport, Reforming Article V: The Problems Created by the National
applications to Congress for an Article V convention. Some are limited to a particular subject; some are unrestricted or “general.”³¹⁹ Paulsen, after tabulating all of the applications that had arrived by 1993, concluded that “there are, at present, forty-five states with their lights ‘on’ for a general convention.”³²⁰ In other words, “Congress is obliged to call a constitutional convention and has been for some time.”³²¹

Paulsen’s conclusion rests on some questionable premises about how to count state applications. Based on his belief that Article V permits only unrestricted conventions for proposing amendments, he puts applications that are limited to a certain subject, but not conditioned on a convention adopting such a limit, into the “general” column.³²² Even so, the fact that there is a colorable argument that recent Congresses have been obliged to call a constitutional convention—all of the rules of which would have to be invented more or less from scratch—is another vivid illustration of how little is settled about the law of Article V.

IV. LIVING WITH ARTICLE V AMBIGUITY: JUDGING CONTESTED AMENDMENTS

The vast majority of Article V amendments, as Part III shows, have faced credible challenges to their validity.³²³ This Part first explains why

---


³²⁰. Id. at 756.

³²¹. Id.; see also Robert G. Natelson, Counting to Two Thirds: How Close Are We to a Convention for Proposing Amendments to the Constitution?, 19 Federalist Soc’y Rev. 50, 53–60 (2018) (arguing that Congress is one state application short of being obliged to call a convention to propose a balanced budget amendment); Walker Hanson, Note, The States’ Power to Effectuate Constitutional Change: Is Congress Currently Required to Convene a National Convention for the Proposing of Amendments to the United States Constitution?, 9 Geo. J.L. & Pub. Pol’y 245, 258 (2011) (“Even when considering the rescissions of Oregon, North Dakota, and Wyoming as valid, those three rescissions combined with the rescissions of the other eight states since 1993 leave a total of thirty-four states with valid applications before Congress calling for an Article V convention . . . .”). Colorado recently rescinded its outstanding applications for an Article V convention. H.J. Res. 21-1006 (Colo. Apr. 27, 2021).

³²². See Michael Stokes Paulsen, How to Count to Thirty-Four: The Constitutional Case for a Constitutional Convention, 34 Harv. J.L. & Pub. Pol’y 837, 839–55 (2011) (detailing his methodology). In this 2011 essay, Paulsen concluded that the number of states with “lights on” for a general convention had dropped from forty-five to thirty-three—just below the two-thirds threshold—on account of post-1993 rescissions. Id. at 856–58.

³²³. More specifically, Part III shows that these challenges were credible in terms of the interpretive conventions used by mainstream constitutional lawyers. We take no position in this paper on the ultimate persuasiveness of the challenges in their day or on the appropriateness of the conventions. This synoptic approach means that we do not apply any particular interpretive method in depth; we have not, for example, attempted any sort of
such challenges are likely to keep arising, given this history and the extent of legal uncertainty that persists. It then asks how, as a matter of institutional design, disputes over Article V compliance might best be resolved in the future.

A. The Highly Incomplete Liquidation of Article V

The standard view of constitutional lawyers today is that at most a “handful” of amendments, above all the Reconstruction Amendments, have raised any meaningful legal difficulties. And these difficulties can be dismissed as outliers, not only because of their statistical rarity but also because of the extraordinary upheaval wrought by the Civil War and the “fluky” circumstances of the Twenty-Seventh Amendment. We hope we have turned this standard picture upside-down and shown that just about every recognized amendment suffers from a credible defect under Article V. Even the five relatively modest amendments that did not (as far as we know) face contemporaneous legal challenges built on questionable past practices such as quorum rules and the absence of presidential presentment.

The fact that amendments have generated significant legal controversy in the past would not necessarily matter much in the present if, over time, the law of Article V had become progressively clearer. Many underdeterminate provisions of the Constitution have spawned rich bodies of case law interpreting their terms or otherwise had their meaning “liquidated” and settled by practice. But for the most part, as Part III illustrates rigorous investigation into the original public meaning of Article V or into originalist theories of constitutional construction for resolving Article V underdeterminacies.

325. Strauss, Irrelevance of Amendments, supra note 42, at 1486.
326. Presidential presentment did not occur for the Twentieth Amendment or the Twenty-Third through Twenty-Sixth Amendments. See supra note 21. The House votes on the Twentieth Amendment, 75 Cong. Rec. 5027 (1932), Twenty-Third Amendment, 106 Cong. Rec. 12,570–71 (1960), and Twenty-Fifth Amendment, 111 Cong. Rec. 15,216 (1965), and the Senate vote on the Twenty-Third Amendment, 106 Cong. Rec. 12,858 (1960), were all taken without recording yeas and nays, so it is entirely possible that these amendments received only two-thirds of a quorum, not two-thirds of the whole membership of each chamber. In the case of the Twenty-Third Amendment, for example, the Congressional Record reports that, “[i]n the opinion of the Chair, two-thirds of the Senators present and voting . . . voted in the affirmative.” Id. at 12,858. The Congressional Record does not indicate how many senators were “present and voting.” Senator Everett Dirksen had “suggest[ed] the absence of a quorum” immediately before the vote, but the quorum call was rescinded by unanimous consent in response to a request from Senator Lyndon Johnson. Id. In the House, the Twenty-Third Amendment passed by “two-thirds,” but an earlier roll call had revealed that only 325 members were present. Id. at 12,562, 12,571. Two-thirds of 325 is well under the 290 members that would constitute two-thirds of the full membership. The lack of clarity on the final votes for these amendments reflects that the quorum rules were taken for granted.
in detail, this has not happened with Article V. Recurring contestation over amendment validity has not yielded anything like a robust body of congressional, executive, or judicial precedent on the key questions raised by Article V. A large proportion of the interpretive puzzles that section II.A identifies—many of which go to the core of the amendment project—have never been resolved.

The Supreme Court has directly addressed the meaning of Article V only a handful of times. To recapitulate: In Hollingsworth v. Virginia, Justice Chase asserted during oral argument that the President “has nothing to do with the proposition, or adoption, of amendments to the Constitution.” Over 120 years later, in Hawke v. Smith (No. 1), the

\[328\] 3 U.S. (3 Dall.) 378, 381 n.* (1798); see also Hawke v. Smith (No. 1), 253 U.S. 221, 229 (1920) (citing only Hollingsworth for the statement that “[a]t an early day this court settled that the submission of a constitutional amendment did not require the action of the President”); supra notes 117–130 and accompanying text.

\[329\] We are not aware of any Supreme Court decisions about the amendment process in the long interval between Hollingsworth and Hawke. In Luther v. Borden, 48 U.S. (7 How.) 1 (1849), which concerned the validity of a new purported state constitution in Rhode Island, the Court suggested in dicta that questions regarding the amendment process may be nonjusticiable. Id. at 53. In White v. Hart, 80 U.S. (13 Wall.) 646 (1872), the Court likewise suggested that the validity of the Reconstruction Amendments was nonjusticiable. Id. at 649. In Myers v. Anderson, 238 U.S. 368 (1915), which concerned the constitutionality of Maryland’s “Grandfather Clause,” several parties raised constitutional objections to the Fifteenth Amendment. The attorney defending the state’s law—named, oddly enough, William Marbury—argued that the Fifteenth Amendment was unconstitutional as applied to Maryland under the Equal Suffrage Clause, because Maryland had never ratified the amendment. In openly racist terms, Marbury submitted that “compelling” states to expand the franchise to non-whites “would be in substance and effect depriving the original State . . . of all representation in the Senate.” Vose, Constitutional Change, supra note 229, at 39 (quoting Brief for Plaintiff in Error, Myers v. Anderson, 238 U.S. 368 (1915)). An amicus brief also rehearsed procedural objections to the passage of the Fourteenth and Fifteenth Amendments. Id. at 40–41. The Court did not address these arguments in its unanimous opinion in Myers, nor in another case decided the same day about Oklahoma’s Grandfather Clause, Guinn v. United States, 238 U.S. 347 (1915). There is an intriguing hint, however, that the arguments may have gotten some internal traction at the Court. Marbury’s son later recounted in a letter to Justice Felix Frankfurter that Justice James Clark McReynolds—an “intimate” of Marbury who joined the Court while Myers was pending—told Marbury that “the Fifteenth Amendment election cases had been the subject of a terrific controversy.” Benno C. Schmidt, Jr., Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part 3: Black Disfranchisement From the KKK to the Grandfather Clause, 82 Colum. L. Rev. 835, 867 (1982) (quoting Letter from William L. Marbury, Jr. to Felix Frankfurter (Sept. 25, 1958)). Marbury’s son went on: “Apparently, Justice Lurton had prepared a dissenting opinion in which he followed my father’s argument in the Myers case. This so scandalized the Chief Justice that he suggested that Lurton resign. When Lurton refused to do this the majority of the court held up a decision until his death.” Id. Justice Frankfurter passed the letter on to Alexander Bickel, though
Court held in a “shocking[]** decision that a state could not require a proposed amendment to be submitted to a popular referendum after being ratified by the state legislature.** In the National Prohibition Cases, the Court concluded, in an unreasoned summary opinion, that Congress does not need to declare that an amendment is “necessary” when it proposes an amendment; that the two-thirds vote in each chamber “is a vote of two-thirds of the members present—assuming the presence of a quorum”; and that the Prohibition Amendment was “within the power to amend reserved by Article V of the Constitution.”** In Dillon v. Gloss, the Court stated in dicta that ratification of an amendment “must be within some reasonable time after its proposal” and that Congress could fix “a definite period for ratification . . . as an incident of its power to designate the mode of ratification.”** In Leser v. Garnett, the Court held that a state could not place limits on its legislature’s power to ratify a federal amendment in its state constitution and that “official notice” of ratification from a state to the U.S. Secretary of State “was conclusive upon him” and “upon the courts.”** In United States v. Sprague, the Court held that, as between state legislatures and state conventions, the “choice . . . of the mode of ratification, lies in the sole discretion of Congress.”** Finally, in Coleman v. Miller,** which the next section discusses in more detail, a splintered Court determined that “the effect both of previous rejection and of

---

331. 253 U.S. 221, 231 (1920); see supra notes 202–208 and accompanying text. In Arizona State Legislature v. Arizona Independent Redistricting Commission, 576 U.S. 787 (2015), the Court suggested in dicta that Hawke extended to the governor’s role in the amendment process. Id. at 808 (“In the context of ratifying constitutional amendments, in contrast, ‘the Legislature’ has a different identity, one that excludes the referendum and the Governor’s veto.”). On the other hand, Justice William Rehnquist, in a solo opinion denying a stay, wrote that the question whether the word “Legislatures” in Article V “encompasses the voters of a State who have power to enact laws by initiative” is “by no means settled.” Uhler v. AFL-CIO, 468 U.S. 1310, 1311 (1984) (Rehnquist, J., in chambers) (discussing the meaning of the word “Legislatures” in the Application Clause).
332. 253 U.S. 350, 386 (1920); see supra notes 210–211 and accompanying text.
334. 258 U.S. 130, 136–37 (1922); see supra notes 214–225 and accompanying text. The Court also rejected the argument that the Nineteenth Amendment was invalid because it made “so great an addition to the electorate . . . without the State’s consent.” Leser, 258 U.S. at 136. The Court did not explain its reasoning, other than to say that the argument would also render the Fifteenth Amendment invalid. Id.
335. 282 U.S. 716, 730 (1931); see supra notes 199–201 and accompanying text.
attempted withdrawal” and “whether [an] amendment had been adopted within a reasonable time” were political questions, “not subject to review by courts.”

These opinions cover relevant ground, but not all that much ground—only a fraction of the landscape of interpretive puzzles canvassed in section II.A. And the extent to which the Court has settled even the questions it has purported to answer is far from clear. Nearly half of the above-listed statements on Article V are dicta, unreasoned ipse dixits, or both. Few if any of the opinions are widely respected by constitutional lawyers, and questions such as the President’s role in the amendment process and the meaning of Hollingsworth remain the subject of debate, at least in law reviews. Several opinions have been blatantly contradicted by subsequent practice: The Twenty-Second Amendment was approved by the House without “a vote of two-thirds of the members present,” as was said to be necessary in the National Prohibition Cases; the Twenty-Seventh Amendment mocks the Dillon Court’s contention that it was “quite untenable” to think an amendment proposed in 1789 was still pending in 1921; and states have continued to experiment with direct democracy in the ratification process, Leser notwithstanding. Among the uncontradicted opinions, most just label certain issues as political or nonjusticiable, casting no light on their merits.

337. 307 U.S. at 449, 454 (opinion of Hughes, C.J.). The quotations are taken from Chief Justice Hughes’s “Opinion of the Court,” which was joined by Justices Harlan Fiske Stone and Stanley Forman Reed. Id. at 435. Justice Hugo Black, writing for himself and three other Justices, would have ruled that “Congress has sole and complete control over the amending process, subject to no judicial review.” Id. at 459 (Black, J., concurring). The Court subsequently confirmed that in Coleman it had “held that the questions of how long a proposed amendment to the Federal Constitution remained open to ratification, and what effect a prior rejection had on a subsequent ratification, were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp.” Baker v. Carr, 369 U.S. 186, 214 (1962). OLC has questioned the authoritativeness of both Coleman opinions. Cong. Pay Amendment, 16 Op. O.L.C. 85, 95 n.11, 99–102 (1992).


340. Dillon v. Gloss, 256 U.S. 368, 375 (1921); see supra section III.K.


342. The case law in the lower federal courts is similarly sparse. And given the de facto repudiation of Article V principles announced by the Supreme Court, one would expect any lower court precedent to be even less stable. The two most significant lower court cases both involve the ERA. The first is Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975) (three-judge court), an opinion authored by then-Judge John Paul Stevens about ratification of the ERA in Illinois. The court held that state legislatures were free to set their own voting and quorum rules for ratifying federal constitutional amendments, but that a state constitution

Electronic copy available at: https://ssrn.com/abstract=3834066
It would be fair, of course, to say that some questions have been resolved by a combination of Article V’s text, judicial doctrine, and historical tradition. No amendment would be rejected at this point for lack of presidential presentment (although the rise of textualism and originalism as interpretive methods may make the practice of nonpresentment increasingly awkward). Nor would an amendment be rejected for receiving only two-thirds of a quorum of both houses, rather than two-thirds of the entirety of both houses (although it is conceivable that a member of Congress could persuade colleagues with such an objection). But few and far between are the Article V practices that have been “open, widespread, and unchallenged since the early days of the Republic,” and it seems to us that the unsettled questions substantially exceed the settled ones in both number and significance.

Perhaps the simplest response to anyone who nonetheless maintains that history has resolved most of the important puzzles in Article V is to point to the two most prominent recent amendment efforts and the legal tumult each has occasioned. While the controversies over the Twenty-Seventh Amendment and the ERA have idiosyncratic elements, the procedural issues they raise are strikingly basic. They highlight just how little the law of Article V has developed since the Founding. If controversy over the Twenty-Seventh Amendment has quieted a bit in recent years, this probably has more to do with the amendment’s relative unimportance and the unlikeliness that Congress would ever contravene it than with considered acceptance of its validity.

In sum, the Supreme Court’s unanimous pronouncement that a “mere reading demonstrates” that “Article V is clear in statement and in could not specify a supermajority requirement that would bind a state legislature acting on such an amendment. Id. at 1306–08. The second is a district court decision from Idaho holding that states could rescind prior ratifications and that Congress’s attempt to extend the ERA ratification deadline was invalid. Idaho v. Freeman, 529 F. Supp. 1107, 1150–54 (D. Idaho 1981), vacated as moot sub nom. Carmen v. Idaho, 459 U.S. 809 (1982). The Supreme Court granted certiorari before judgment, but the new ratification deadline expired while the case was pending, so the Court vacated the district court’s decision as moot.

343. See supra section III.B; supra note 21 and accompanying text (discussing the view that nonpresentment is incompatible with clear constitutional text).

344. See supra section III.C (discussing the plausibility of the view that a two-thirds vote of the full chamber is required).


346. See supra sections III.K, III.L.3.

347. See Strauss, Irrelevance of Amendments, supra note 42, at 1486–87 (describing the Twenty-Seventh Amendment as having “no significant effect” and “remarkable for [its] relative lack of importance”).
meaning, contains no ambiguity, and calls for no resort to rules of construction."\textsuperscript{348} seems to us exactly backward. As Part II illustrates, a mere reading demonstrates that Article V is shot through with ambiguities and calls for constant resort to rules of construction. As Part III shows, this ambiguity is borne out by, and persists through, 230 years of history. Americans tend to take the text of the Constitution as a given and to regard constitutional interpretation as something that operates on that text. But if our descriptive arguments thus far have been sound, then there is no constitutional text that precedes interpretation. To identify what is or is not "in" the constitutional text is itself a complex act of constitutional interpretation. And given the amount of legal uncertainty that continues to enshroud the Article V process, one can expect all but the most uncontroversial new amendments to elicit credible challenges to their validity in the years ahead.

B. Revisiting Coleman

If we are right that controversy over the validity of amendments is likely to persist for the foreseeable future, then it behooves us to reflect on our system for resolving such disputes. When some groups in the polity insist that an attempted amendment has satisfied the rules of Article V and others disagree, with both sides advancing credible legal arguments, who should decide whether the amendment has become part of the Constitution? We submit that the degree of ongoing Article V ambiguity documented in this paper lends new support to the Coleman Court’s inclination to leave such matters to Congress, while also suggesting possible institutional innovations.

In Coleman v. Miller, a splintered Supreme Court determined in 1939 that Congress has the ultimate authority to promulgate or proclaim an amendment after ratification by the states.\textsuperscript{349} Chief Justice Hughes, writing for himself and Justice Harlan Fiske Stone in what was styled the "Opinion of the Court," found that Congress has "control over the promulgation of the adoption of [an] amendment."\textsuperscript{350} He further found that the two questions before the Court—the effect of a state’s prior rejection of an amendment on a subsequent ratification, and whether too long a period had elapsed between proposal and ratification—were political questions not fit for judicial review.\textsuperscript{351} Justice Hugo Black penned a concurrence, joined by Justices Felix Frankfurter, Owen Roberts, and William O. Douglas. He similarly suggested that it was Congress’s role to "proclaim[]" an amendment part of the Constitution, and he would have held that all

\textsuperscript{349}. 307 U.S. 433, 450 (1939).
\textsuperscript{350}. Id.
\textsuperscript{351}. Id. at 450–54.
questions related to the amendment process were “political” and beyond
the purview of the courts.352

_Coleman’s_ reference to a congressional “promulgation” or “procla-
amation” power has been criticized on the ground that Article V makes no
reference to any role for Congress after the initial proposal of an amend-
ment. The text instructs that an amendment is “valid . . . when ratified by
the Legislatures of three fourths of the several States,” not when promul-
gated by Congress following the final state ratification.353 And the Supreme
Court has in fact adjudicated a number of disputes about the amendment
process, albeit infrequently, going all the way back to _Hollingsworth_,354
which predates _Marbury_.355

These criticisms of _Coleman_ have some force, but they slight a pruden-
tial rationale for the Court’s ruling that the Court itself did not articulate
but that this paper’s historical account helps to reinforce.356 On account
of the underdeterminacy of Article V and the momentousness of formal
constitutional change, there is a strong possibility that significant conflicts
over the validity of amendments will arise and yield no clear answers, only
“political questions.”357 Partly for this reason, the Court has avoided reach-
ing the merits of an Article V dispute for over ninety years.358 There is a
consequent interest in enabling some nonjudicial institution to resolve
authoritatively whether the Constitution has been amended.

The ongoing saga of the ERA exemplifies this concern. At least three
pending lawsuits allege, not at all frivolously, that the ERA is already part
of the Constitution.359 Meanwhile, proponents of the ERA are pressing
Congress to retroactively extend the ratification deadline, which, if done,

352. Id. at 457–58 (Black, J., concurring).
353. U.S. Const. amend. V.
354. Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798); see also supra notes 328–337
and accompanying text (cataloging cases).
355. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). For prominent criticisms of
_Coleman_ along these lines, see Cong. Pay Amendment, 16 Op. O.L.C. 85, 99–105 (1992);
Dellinger, Legitimacy of Constitutional Change, supra note 16, at 397–405; Paulsen, A
General Theory, supra note 50, at 709–18.
356. Cf. Pozen & Samaha, supra note 69, at 732–33, 775–76 (explaining that “pruden-
tial” arguments in constitutional law tend to emphasize system-level considerations of
administrability, workability, and the like).
357. See Baker v. Carr, 369 U.S. 186, 217 (1962) (listing factors that indicate the pres-
ence of a “political question”). In some Article V disputes, not just one or two but all six of
the _Baker_ factors may arguably be triggered. See Thomas E. Baker, Towards a “More Perfect
Union”: Some Thoughts on Amending the Constitution, 10 Widener J. Pub. L. 1, 7–8 (2000)
(“The Article V amendment power bears all the constitutional hallmarks of a nonjusticiable
or political question . . . .”); Thomas Millet, The Supreme Court, Political Questions, and
(analyzing the applicability of the _Baker_ factors to Article V cases).
358. The last such ruling was United States v. Sprague, 282 U.S. 716 (1931), issued in
February 1931. See supra note 335 and accompanying text.
359. See supra note 308 and accompanying text.
would immediately raise a difficult new Article V question. No one can predict with any confidence whether or how the constitutional fate of the ERA will be determined, as all three branches of government continue to vie for interpretive supremacy with regard to Article V and many lawyers now flatly deny the precedential value of Coleman.

The status quo of second-order uncertainty about how to resolve first-order Article V uncertainty does not necessarily reflect any sort of crisis in self-government or the rule of law. Policentric decisionmaking procedures can generate deliberative and participatory benefits as well as stable political equilibria under certain conditions, including on questions of constitutional interpretation. In contrast to the "juricentrism" that characterizes much of contemporary constitutional culture, a more fluid form of departmentalism has prevailed in the Article V context throughout U.S. history. We could keep muddling through.

Yet even if the status quo is defensible, it carries significant costs in terms of predictability, efficiency, and popular responsiveness. The ERA example is, again, instructive, as countless hours of legal and political mobilization have been devoted not only to the question whether we should have an ERA but also to the question whether we do have an ERA— with no clear end to the legal wrangling in sight and the very real possibil-

---


361. See supra notes 265–272 and accompanying text.

362. See Kalfus, supra note 313, at 445 ("Many scholars have concluded that the Court’s reformulation of political question analysis, coupled with Coleman’s conflict with Court precedent, render Coleman ‘dead.’").


364. See David E. Pozen, Judicial Elections as Popular Constitutionalism, 110 Colum. L. Rev. 2047, 2055–56 (2010); see also Nikolas Bowie & Daphna Renan, The Separation-of-Powers Counterrevolution, 131 Yale L.J. (forthcoming 2022) (manuscript at 22–46) (on file with the Columbia Law Review) (discussing the “juristocratic” understanding of separation of powers disputes that has prevailed since Reconstruction).
ity that the ERA will fail without creating any precedent on Article V outside the executive branch. Most worrisome, in a nation with one of the most demanding amendment criteria and lowest formal amendment rates in the world, the absence of any clear Article V dispute-resolution mechanism makes it harder to revise the constitutional text by perpetuating legal uncertainty and proliferating institutional veto points. Even after supermajorities of both chambers of Congress and the state legislatures have approved a change to this text, legal objections from any one of the federal legislative, executive, or judicial branches may be enough to derail an attempted amendment. It is for these sorts of reasons that many theorists of constitutional design, from Madison in 1787 to the Venice Commission in 2009, have advised that confusion regarding the amendment rules themselves “ought to be as much as possible avoided.”

If, in line with this view, one of the existing organs of government ought to be assigned primary responsibility for resolving disputes over amendment validity, Congress seems best suited to the task. The basic reasons are straightforward. Unlike the judiciary, Congress is not bound by a case or controversy limitation. It can take years for a case to wend its way up to the Supreme Court, and many amendments do not give rise to


366. See Richard Albert, American Exceptionalism in Constitutional Amendment, 69 Ark. L. Rev. 217, 225–31 (2016) (reviewing comparative evidence and explaining that, among democracies, “the United States ranks in the three lowest average annual revision rates”); Donald S. Lutz, Toward a Theory of Constitutional Amendment, in Responding to Imperfection, supra note 1, at 237, 260–61 (finding that the U.S. Constitution has the world’s “second most difficult amendment process,” behind only the now-defunct Yugoslav Constitution).

367. 2 The Records of the Federal Convention of 1787, supra note 89, at 630 (James Madison); see also supra notes 89–90 and accompanying text.

368. To say that the validity of contested amendments is a “political question” entrusted primarily to Congress is not necessarily to deny any role for the judiciary. It may be that judicial review is appropriate for “plainly ultra vires action”—for instance, if Congress were to assert that thirty-five was three-fourths of fifty. Richard H. Fallon Jr., Political Questions and the Ultra Vires Conundrum, 87 U. Chi. L. Rev. 1481, 1490 n.36 (2020) (citing Laurence H. Tribe, A Constitution We Are Amending: In Defense of a Restrained Judicial Role, 97 Harv. L. Rev. 433, 433 (1983)). In addition, the prudential argument for congressional primacy may be weaker in the case of an amendment proposed by an Article V convention or an amendment that reforms Congress itself.
justiciable controversies at all. Should an Article V controversy be entertained, the Court’s precedents are sparse and not well ordered in this area. Congress, on the other hand, can act promptly to assess the validity of an amendment as soon as the final state has purportedly ratified. More important, questions about the Article V process will often involve highly charged, legally underdetermined judgments, which risk taxing the Court’s institutional competence and compromising its institutional clout. These separation of powers concerns become all the more acute when Article V has been activated in order to overturn the Court’s own constitutional rulings. The sociological legitimacy of amendments, this paper shows, has never had a tight relationship with their procedural propriety. As the most geographically representative, deliberatively transparent, and electorally accountable branch, Congress will in general be best positioned to determine whether an amendment has gained broad social acceptance and to generate additional political support once such a determination has been made.

Relative to the Court, the executive branch also has stronger democratic credentials and the ability to act with greater dispatch. But the text of Article V makes no mention of the executive. And one of the very few propositions of Article V law that historical practice has settled is that the President has no legal role in proposing an amendment to the states. In light of this practice, which dates back to the Bill of Rights, it is odd to

369. Cf. Tara Leigh Grove, The Supreme Court’s Legitimacy Dilemma, 132 Harv. L. Rev. 2240, 2250–54 (2019) (book review) (explaining how politically divisive rulings can undermine the Court’s sociological legitimacy). Of course, the Court could bring more determinacy to the law of Article V by weighing in on more Article V questions. But the history of widespread disapproval and even defiance of the Court’s pronouncements on Article V, see supra notes 338–341 and accompanying text, gives reason to doubt that the Court could ever definitively clear up this body of law when motivated majorities object to its conclusions.


371. See supra Part III.

372. See Neal Kumar Katyal, Legislative Constitutional Interpretation, 50 Duke L.J. 1335, 1363 (2001) (“Society needs a democratic mandate rather than a judicial one for some decisions . . . . Impeachment, war powers, and the decision whether a constitutional amendment has been ratified are some examples.”); Post & Siegel, Legislative Constitutionalism, supra note 363, at 2030 (“If the Court has particular strengths in explicating the Constitution as a rule of law, Congress is especially well-situated to respond to changes in constitutional culture.”); see also Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev. 1359, 1377 n.80 (1997) (explaining that “a single national legislature” like the U.S. Congress may be best positioned to fulfill an “authoritative settlement function” for certain constitutional issues, including political questions). Insofar as Congress, in resolving specific Article V disputes, is more likely than the Court to leave some play in the joints of Article V law, we believe this is a virtue rather than a vice. See infra section V.C.

373. See supra sections III.A–B.
think that the President would play any sort of significant role at the conclusion of the Article V process.\footnote{One could perhaps argue, on some sort of division of power grounds, that the exclusion of the President from the "proposal" stage makes it all the more appropriate that the President be given a decisive role at the "promulgation" stage. Cf. Black, On Article I, supra note 21, at 899 (maintaining that Hollingsworth should not be extended "one inch"). But it would create a textually as well as functionally bizarre asymmetry to read Articles I and V to exclude presidential presentment on the front end of the amendment process while requiring it on the back end. And given the extraordinary amount of national consensus already required by the amendment process, there are powerful democratic reasons not to introduce yet another hard veto point.} It is odder still to think that such a role would be played by subordinate executive officers such as the Archivist of the United States, who currently has the statutory duty to "publish[]" an amendment upon receiving "official notice" that it has been adopted.\footnote{See supra note 265 and accompanying text. This duty used to be performed by the Secretary of State. See Act of Apr. 20, 1818, ch. 80, § 2, 3 Stat. 439; Bernstein, supra note 25, at 540 n.218 (explaining that Congress transferred responsibility for certifying amendments from the Secretary of State to the Administrator of General Services in 1951 and then to the Archivist in 1984). We have not found any evidence suggesting that Congress intended to delegate to the Archivist the authority to resolve the status of contested amendments. It is perfectly consistent with the statutory text to regard a congressional proclamation of an amendment’s ratification as the relevant "official notice" that triggers the Archivist’s duty of publication.}

That said, Congress is less than ideal as an arbiter of Article V validity in a number of respects. Rising levels of polarization within each chamber increase the risk of raw partisan conflict, gamesmanship, and perceptions of bias. Congress’s popular approval rating currently sits near a historic low.\footnote{See Harry Enten, Congress’ Approval Rating Hasn’t Hit 30% in 10 Years. That’s a Record., CNN (June 1, 2019), https://www.cnn.com/2019/06/01/politics/poll-of-the-week-congress-approval-rating [https://perma.cc/QP8P-6BR7].} And in some instances, a disputed amendment might affect Congress itself in ways that call into question its members’ ability to assess the amendment’s constitutional status in good faith, as when the Seventeenth Amendment fundamentally changed the Senate by introducing direct election of senators. This section has suggested that the Coleman Court was correct to conclude that, for settling whether an amendment has satisfied Article V, Congress will typically be the least bad option among the branches of government. Might there be any other options?

There are no silver bullets, but potentially useful subconstitutional moves can be made within the Coleman framework. One possibility is a national referendum. Beginning with the Eighteenth Amendment’s time limit,\footnote{See supra notes 196–198 and accompanying text.} Congress has on several occasions built a ratification condition into the text of an amendment. In a similar spirit, Congress could include a provision in future proposed amendments stating that they will be inoperative unless validated in a certain sort of post-ratification referendum, thereby effectively precommitting Congress to “proclaim” validated amendments despite any procedural objections that might arise along the
way. Alternatively, Congress could reserve for itself or for each chamber separately the authority, through a simple majority vote, to call for a national referendum on an amendment’s validity after the amendment has—in the view of the members calling for the referendum—attained a sufficient number of ratifications. Another possibility is for Congress to convene, either through the ordinary legislative process or through the Article V mechanism just described, a special commission to issue a non-binding opinion on the validity of a disputed amendment and the steps that would be required, if any, to cure legal defects. Congress could form such a commission today to help it assess the status of the ERA and build bipartisan buy-in for whatever position it ultimately adopts.

The above discussion provides only a skeletal sketch of these options, which would take a whole other paper to elaborate in full. The key point, for present purposes, is that ongoing confusion over how to decide Article V disputes creates an opportunity to innovate in limited, pragmatic ways that honor Coleman’s prudential wisdom while moderating some of the risks of relying on Congress. By enlisting the assistance of a referendum or commission, Congress can remain in the driver’s seat when it comes to judging Article V amendments without necessarily serving as the exclusive or even the final decisionmaking body.

378. See Amar, America’s Constitution, supra note 49, at 418. Amar, recall, has argued that a national referendum may be used to bypass Article V altogether. See supra notes 4, 7, 58 and accompanying text. The proposal here could be seen as a hybrid between Amar’s much bolder proposal and the existing Article V process. Any such referendum would add another step, and another effective veto point, to what is already an arduous amendment process. But we expect that a referendum would be very unlikely to fail if the amendment in question had already plausibly navigated the hurdles of Article V—and that a successful referendum would put immense, productive pressure on Congress to accept the result forthwith. Consider, by way of analogy, the pressure that the Brexit referendum exerted on the U.K. Parliament. See Meg Russell, Brexit and Parliament: The Anatomy of a Perfect Storm, 74 Parliamentary Affs. 443, 448 (2021) (“[T]he clear reservations of many parliamentarians about the Brexit decision were overshadowed by the referendum result, with most MPs on both the government and opposition side accepting that it must be respected. Parliament hence actively, if reluctantly, ceded its sovereignty to the public on the principle of Brexit.”). In moving to submit a potential amendment directly to the American people for an advisory referendum, one U.S. Senator argued to his colleagues in 1861 that the people’s “sentiments and their opinions will be our safest guide upon this question, . . . disabled as we are by our own distractions and divisions in Congress from acting upon it.” Cong. Globe, 36th Cong., 2d Sess. 264 (1861) (statement of Sen. Crittenden).

379. This proposal might be challenged on Chadha grounds, see generally INS v. Chadha, 462 U.S. 919 (1983), but such a challenge would be undercut by building the option to call a referendum into the text of the amendment itself. By doing this, the referendum would already plausibly have navigated the Article V process by the time it is initiated. See Amar, America’s Constitution, supra note 49, at 418.

380. Such a commission, in our view, would ideally be instructed by Congress to apply some version of the Article V Thayerianism proposed infra section V.C.
V. EMBRACING ARTICLE V AMBIGUITY: LESSONS FOR INTERPRETERS AND REFORMERS

The dispelling of any notion that Article V supplies a straightforward guide to amendment holds lessons for academics and advocates as well as government officials. That descriptive undertaking is, again, the heart of this paper, and space constraints require us to be brief in this final Part. Here, we first argue that our account of Article V ambiguity complicates two prominent debates in constitutional theory.\textsuperscript{381} We then close by considering how it could open up new possibilities for constitutional change.

A. \textit{Originalism and Textualism}

One of the most sweeping developments in constitutional law over the past several decades, as countless commentators have observed, has been the rise of originalism and its close cousin textualism as a preferred mode of interpretation.\textsuperscript{382} With the confirmation of Justice Amy Coney Barrett, there are now multiple “self-avowed originalists” on the Court.\textsuperscript{383} Scholarly interest in originalism shows no signs of abating.

Originalism is a complex phenomenon, more a cluster of related methodologies than a single, well-defined one.\textsuperscript{384} But an important normative justification for all its variants has been the idea that it is the interpretive approach most consistent with a commitment to popular

\textsuperscript{381} Our account also has potential implications for more general debates in legal theory. For instance, scholars “typically assume that bright-line rules are more constraining on judicial and administrative decisionmakers than context-saturated standards.” Connor N. Raso & William N. Eskridge, Jr., \textit{Chevron} as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Defe rence Cases, 110 Colum. L. Rev. 1727, 1812 (2010). The Article V ambiguity and flexibility documented in these pages challenge that assumption. As a formal matter, the key terms in Article V are much more rule-like than standard-like: There are no references in the text to reasonableness, equity, all-things-considered balancing, or anything of the sort. It is partly for this reason, we suspect, that Article V is believed by many to be more constraining than it really is.


\textsuperscript{384} See, e.g., Lawrence B. Solum, Cooley’s Constitutional Limitations and Constitutional Originalism, 18 Geo. J.L. & Pub. Pol’y 49, 54 (2020) (describing originalism as “a family of constitutional theories” united by certain ideas about the fixity and constraining force of the constitutional text).
The original meaning of the constitutional text, on this view, “is both binding and uniquely legitimate” because of the way the text was ratified through the special supermajoritarian procedures laid out in the Constitution. The rules of Article V play a crucial role in this picture. They not only determine which amendments have become part of the canonical document but also, once satisfied, endow the communicative content of these texts with a legal authority that never fades over time, unless and until a new Article V amendment comes along and overrides them. “The Article V amendment process and originalism,” in John McGinnis’s words, “march under a single banner.”

This paper’s descriptive account helps reveal a new sense in which this picture of Article V as arbiter and embodiment of the sovereign will may be too simple. The vast majority of recognized amendments have not been adopted in clear compliance with Article V. All but one has been adopted in clear defiance of a requirement of presidential presentment that, as a textual matter, plausibly applies to the Article V process. The single most transformative set of amendments, many believed at the time of their adoption and still believe today, amounted to a “naked violation[] of Article V.” And ever since the Founding, the meaning of Article V has been continually contested without, on many significant questions, reaching any resolution. Nothing in the language or law of Article V tells us definitively, for instance, that the Twenty-Seventh Amendment is part of the Constitution while the ERA is not. In U.S. constitutional culture, the degree to which an attempted amendment has complied with a discrete set of legal rules has always had an attenuated connection to its ultimate constitutional fate. What is and is not “in” the Constitution is ultimately

385. See Kurt T. Lash, Originalism, Popular Sovereignty, and Reverse Stare Decisis, 93 Va. L. Rev. 1437, 1440 (2007) (stating that “popular sovereignty and the judicially enforced will of the people” is “the most common and most influential justification for originalism”).

386. Lawrence B. Solum, Communicative Content and Legal Content, 89 Notre Dame L. Rev. 479, 514 (2013); see also Colby, supra note 150, at 1631–38 (summarizing the standard “popular sovereignty” argument for originalism).

387. See Steven G. Calabresi & Saikrishna B. Prakash, The President’s Power to Execute the Laws, 104 Yale L.J. 541, 551 (1994) (“The central premise of originalism . . . is that the text of the Constitution is law that binds each and every one of us until and unless it is changed through the procedures set out in Article V.”); cf. Stephen E. Sachs, Originalism as a Theory of Legal Change, 38 Harv. J.L. & Pub. Pol’y 817, 820–21 (2015) (“What originalism requires of legal change is that it be, well, legal; that it be lawful, that it be done according to law. This is a requirement of procedure, not substance.”).


389. See supra Part III.

390. See supra section III.B; supra note 21 and accompanying text.

391. Ackerman, We the People, supra note 7, at 111; cf. Colby, supra note 150, at 1630–31, 1662–66 (suggesting “the possibility that the shortcomings in the framing of the Fourteenth Amendment could seriously undermine the normative appeal of originalism more generally”).
determined by a complex, ongoing, and not especially predictable dialectic between formal government actions and popular and political beliefs and perceptions. Provocatively put, the Constitution is not so much a collection of texts that have passed through a unique legitimating process as a collection of texts that Americans agree to regard as the Constitution, despite wide variations in and serious questions about the manner in which they were added.\footnote{392}

If this is right, it calls into question the legal and empirical basis for the popular sovereignty justification of originalism. There are no clear rules to indicate, in many cases, whether an attempted act of sovereign constitutional authorship meets the criteria laid out in the Constitution. Nor do the details of how any given piece of purported constitutional text was created—including both the forms that were followed and the degree to which the overall process could be characterized as supermajoritarian—seem to determine its sociological legitimacy in any mechanical manner. The process of formal constitutional change has always been less legalistic and more chaotic than standard originalist narratives about Article V seem to presume.

None of this necessarily upends “the great debate” between originalism and living constitutionalism or indicates that originalism is less democratic than alternative approaches.\footnote{393} Critics have pointed out numerous other difficulties with the popular sovereignty case for originalism.\footnote{394} And proponents of originalism have offered numerous other justifications that do not depend on the character of the process that led to the text’s enactment. Prakash, for instance, defends originalism as a logical entailment of the hermeneutic enterprise while expressly “contest[ing] the interpretive assertion that . . . originalism is a legitimate means of making sense of the Constitution merely or primarily because of the manner in which the Constitution was ratified and amended.”\footnote{395} William Baude and Stephen Sachs have launched a defense of originalism as “our law” on openly presentist, positivist grounds, with no direct connection to Article V or VII.\footnote{396} Our intervention in the debate is simply to suggest that the popular sover-

\footnote{392. There is an interesting parallel, which we do not have space to pursue, to the historical processes through which certain texts are canonized as part of sacred scripture while others are denied that status in a given theological tradition. See Frank Kermode, The Canon, in The Literary Guide to the Bible 600 (Robert Alter & Frank Kermode eds., 1987). The Constitution itself can be thought of as a kind of canon in this sense.}


\footnote{394. See Colby, supra note 150, at 1602–63 (summarizing difficulties).}


eighnty case for originalism is subject not only to the standard counterarguments about the dubious democratic bona fides of an ancient text but also to a new counterargument about the dubious legal bona fides of nearly every provision of that text.

B. Amendment Inside and Outside Article V

A foundational debate in constitutional theory concerns whether and how the written or big-C Constitution may legitimately be updated outside the procedures specified in Article V.\textsuperscript{397} The “outsider” position is most closely associated with Amar and Ackerman.\textsuperscript{398} According to Amar, the Constitution is best read to preserve for the people an unenumerated right to amend its terms through something akin to a national referendum.\textsuperscript{399} According to Ackerman, the Reconstruction Amendments were adopted in violation of Article V but were nonetheless legally legitimate because their adoption conformed to the true, unwritten criteria for higher lawmaking.\textsuperscript{400} Conversely, the Twenty-Seventh Amendment was adopted in conformity with Article V but is nonetheless illegitimate because it violated those unwritten criteria.\textsuperscript{401} The “insider” position is the conventional view—the view that Article V supplies the exclusive route to formal constitutional change, that “[n]othing new can be put into the Constitution except through the amendatory process.”\textsuperscript{402}

Our account collapses some of the space between these two positions. Given the long history of procedural creativity and the pervasive legal uncertainty that we document, there is no clear line demarcating what is “inside” or “outside” Article V. Ackerman labors heroically to show that the Reconstruction Amendments were valid additions to the Constitution even though brought into existence in a manner that is very plausibly inconsistent with Article V. We do not disagree with Ackerman’s conclusion; we disagree with the premise that the Reconstruction Amendments were quite so extraordinary in this regard. Within broad boundaries, the degree to which an attempted amendment stays inside the four corners of Article V has not been decisive in determining whether it

\textsuperscript{397} The unwritten or small-c constitution has been updated many times over by judicial decisions, framework statutes, and other developments that have little to do with Article V. See supra notes 42–43 and accompanying text. The focus here is on the more radical proposition that the constitutional text itself may be changed outside Article V.

\textsuperscript{398} Cf. James E. Fleming, We the Unconventional American People, 65 U. Chi. L. Rev. 1513, 1540 (1998) (book review) (“In recent years, some constitutional scholars have noted the emergence of a ‘Yale school’ of constitutional theory, by which they refer to Ackerman’s and Amar’s theories of amending the Constitution outside Article V.”).

\textsuperscript{399} See Amar, Consent of the Governed, supra note 3, at 462–94; Amar, Philadelphia Revisited, supra note 4, at 1044–76.

\textsuperscript{400} See Ackerman, We the People, supra note 7, at 99–252.

\textsuperscript{401} Id. at 490 n.1.

\textsuperscript{402} Ullmann v. United States, 350 U.S. 422, 428 (1956); see also supra note 3 and accompanying text.
becomes accepted by Americans as part of the written Constitution. All constitutional amendment, in this sociological sense, takes place “outside” Article V.

That being the case, it is notable how little headway Amar’s relatively straightforward proposal has made in convincing Americans that they can amend the Constitution through a national referendum established by and employing a simple majority vote. Especially in light of the constitutional order’s steady shift toward greater nationalism and majoritarian democracy ever since the Civil War, his proposal strikes us as no less plausible as a matter of constitutional text, structure, and “spirit” than the notion that an Article V amendment could (like the Twenty-Seventh Amendment) remain pending for more than two centuries before being ratified. Yet, even though the law of Article V is so unsettled and so many amendments have questionable Article V credentials, the assumption that all revisions to the written Constitution must be pursued through the Article V process continues to hold a powerful sway on the U.S. legal and political community, at least among elites. This persistent combination of Article V obscurity and Article V exclusivity suggests that the two may reinforce one another: If determined majorities had not found Article V to have such play in the joints, its status as the exclusive gateway to the constitutional text may well have proved unsustainable long ago.

These observations may also hold a clue as to how Article V exclusivity could unravel in the future. If Amar’s proposal is just as constitutionally coherent as numerous amendments that are accepted as part of the document, then the same sort of political mobilization that potentiated those amendments may be sufficient to potentiate amendment-by-referendum

404. See Sanford Levinson, The Political Implications of Amending Clauses, 13 Const. Comment. 107, 114 (1996) (remarking that “Amar’s method” of amending the Constitution by popular referendum “is not only untried but also, for most Americans, I suspect unthinkable”).
405. Cf. Philippe Nonet & Philip Selznick, Law and Society in Transition: Toward Responsive Law 76–79 (Routledge 2d ed. 2017) (1978) (discussing the tension that all legal institutions face between the need to limit discretion and discipline decisionmaking, on the one hand, and the need to remain responsive to new pressures and contingencies, on the other). Article V’s status as the exclusive gateway to the constitutional text may also have proved unsustainable if the Court had not, over time, been so accommodating of legal and social change outside the Article V process. See Strauss, The Living Constitution, supra note 327, at 115–16 (arguing that “[s]ome form of living constitutionalism is inevitable” in light of the difficulty of formal amendment).
as well. At least for those willing to look past its novelty, Amar’s proposal is not necessarily more legally outlandish than any number of things that have been done in the name of Article V. The constitutional text, accordingly, is not the principal problem for Amar; constitutional culture is. Perhaps calling attention to just how fast and loose Americans historically have played with Article V, as this paper has done, will conduce to greater cultural openness to experimenting with other legally plausible (if unavoidably problematic) modes of updating the constitutional text in the service of deepening democracy. But in case Amar’s argument is destined to remain off-the-wall in our lifetimes, we close with a more modest reform proposal of our own.

C. Loosening the Constitutional Cage Through Article V Thayerianism

For all of the ambiguities we have identified, the hard core of Article V remains. Unless a first-ever Article V convention is called, those who would revise the written Constitution need to convince others that two-thirds of both chambers of Congress have approved, and three-quarters of the states have ratified, an amendment. There are many different ways to count to two-thirds and three-fourths, as we emphasize throughout Parts II and III, but a plausible double-supermajoritarian showing of some sort must be made. In comparison with the approaches taken by other democracies, this is an exceptionally difficult amendment process. And the actual rate of amendment in the United States has been exceptionally low. As many have argued, the practical difficulty of revising the written Constitution invites judges to update supreme law through creative

406. See Schauer, Amending the Presuppositions, supra note 3, at 160–61 (“[C]onstitutions are always subject to amendment by changes—amendments—in the practices of a citizenry, in the practices of its officials, and in the practices of its judges.”). The precise mechanisms and pathways through which constitutional orthodoxies change over time remain "enigmatic," Pozen & Samaha, supra note 69, at 792, but potential contributors presumably include social movements, partisan politics, and judicial appointments as well as academic argument.


408. See 1 Laurence H. Tribe, American Constitutional Law 109–10 (3d ed. 2000) [hereinafter Tribe, American Constitutional Law] (observing that the sociological legitimacy of a non-Article V amendment would ultimately depend upon “social and cultural practices,” but expressing doubt that such an amendment could succeed anytime soon); see also Richard Albert, The Case for Presidential Illegality in Constitutional Amendment, 67 Drake L. Rev. 857, 873–75 (2019) (discussing, with reference to examples from other countries, how “the sociological and moral force” of a successful yet “illegal” constitutional referendum could compel “the legal and political elite to recognize the validity of this unconventional change to the U.S. Constitution”). See generally Peter Suber, The Paradox of Self-Amendment: A Study of Law, Logic, Omnipotence, and Change (1990) (describing various modes of amending an amendment process).

409. See supra note 366 and accompanying text.
readings and undermines even the possibility of genuine collective self-rule—leaving our democracy “trapped inside the Article V cage.”\footnote{410}{See, e.g., John Ferejohn & Lawrence Sager, Commitment and Constitutionalism, 81 Tex. L. Rev. 1929, 1954 (2003) (discussing “the standard critique” that “the obduracy of Article V acts to suppress the people’s voice in our constitutional affairs, and thus is either flatly undemocratic, or at least more antidemocratic than we would like”); David Singh Grewal & Jedediah Purdy, The Original Theory of Constitutionalism, 127 Yale L.J. 664, 668, 679 (2018) (book review) (arguing that “the Article V amendment procedure [has come] perilously close to choking off further sovereign action by the people,” producing “a political community that is at once committed to ruling itself and unable to do so”).}

Yet without exiting the cage altogether, as an Amarian referendum or a true revolution would have us do, perhaps we might loosen its bars. When one combines the classic democratic case against Article V’s “obduracy”\footnote{412}{Ferejohn & Sager, supra note 410, at 1954.} with this paper’s new account of Article V’s ambiguity, the promise of what could be called \textit{Article V Thayerianism} comes into focus. The label refers to James Bradley Thayer’s famous proposal that judges should defer to a coordinate legislative branch on constitutional questions except when the latter has made a “very clear” mistake.\footnote{413}{James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 144, 154–55 (1893).} Thayerianism is typically advocated today as a means of respecting the constitutional judgment and authority of the legislature and thereby limiting the countermajoritarian character of constitutional law—virtues that become all the more significant under conditions of high-level interpretive uncertainty.\footnote{414}{Cf. G. Edward White, Historicizing Judicial Scrutiny, 57 S.C. L. Rev. 1, 48–50 (2005) (explaining that Thayer himself did not defend the clear-mistake rule, as “[m]odern commentators tend to,” in terms of “countermajoritarian constraints”).} This argument transposes readily to the Article V context, where countermajoritarian concerns are especially acute and legal uncertainty is especially rife. If it were to take hold, Article V Thayerianism would neutralize the potential chilling effects of this uncertainty and promote institutional innovation in the amendment process. Simply put, Article V Thayerianism would make it easier to amend the Constitution, at least at the margins.

Article V Thayerianism could be operationalized in more or less ambitious ways. A narrow version would have judges refrain from blocking amendment proposals by Congress or amendment ratifications by state legislatures on Article V grounds, unless the actions are seen as “clearly” inconsistent with Article V. Given \textit{Coleman’s} nonjusticiability ruling, this version would not necessarily mark any observable advance on the status quo—though \textit{Coleman’s} precedential status is far from secure and could

---

\footnote{410}{Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It) 20–21 (2006) [hereinafter Levinson, Our Undemocratic Constitution] (capitalization omitted).}

\footnote{411}{Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It) 20–21 (2006) [hereinafter Levinson, Our Undemocratic Constitution] (capitalization omitted).}

\footnote{412}{Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It) 20–21 (2006) [hereinafter Levinson, Our Undemocratic Constitution] (capitalization omitted).}

\footnote{413}{Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It) 20–21 (2006) [hereinafter Levinson, Our Undemocratic Constitution] (capitalization omitted).}

\footnote{414}{Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It) 20–21 (2006) [hereinafter Levinson, Our Undemocratic Constitution] (capitalization omitted).}

\footnote{415}{Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It) 20–21 (2006) [hereinafter Levinson, Our Undemocratic Constitution] (capitalization omitted).}
use buttressing.\textsuperscript{416} A more expansive version, which we favor but which raises additional complications, would be internalized by legislative and executive officials as well as by judges. Members of Congress, on this approach, would likewise apply a rule of clear mistake when called on to resolve the validity of contested steps forward that are taken in the amending process. The hard core of Article V would not be affected. Aspiring amenders would still need to persuade two-thirds of Congress and three-fourths of the states in a constitutionally credible manner. But the fuzzy edges around core would become more permeable, zones of permission and experimentation rather than additional vetogates on the path to constitutional change.

As with all versions of Thayerianism, just how permissive Article V Thayerianism would prove may vary depending on who is applying it. Those who see more clarity in the law of Article V will tend to find more clear mistakes in need of correction. In principle, however, the Thayerian proposal is potentially compatible with any interpretive approach, as it says nothing about the method of constitutional interpretation that is to be used—only about what is to be done when that method generates an uncertain legal conclusion. Originalism could lead to an especially permissive version of Article V Thayerianism, given how little light was shed on the workings of Article V during its drafting and ratification\textsuperscript{417} and the growing recognition among originalists that constitutional decisionmakers must rely on normative judgment in situations where the communicative content of the constitutional text is too vague or ambiguous to fully determine a legal result.\textsuperscript{418}

What would Article V Thayerianism look like in practice? Most immediately, the ERA would be recognized as part of the Constitution as soon as Congress so declares.\textsuperscript{419} As Part III discusses, the Article V objections to the ERA are substantial but not “clearly” fatal, especially if Congress takes new action to extend the ratification deadline.\textsuperscript{420} Accordingly, if Congress

\begin{footnotesize}
\begin{enumerate}
\item See supra section IV.B.
\item See supra note 17 and accompanying text.
\item See Pozen & Samaha, supra note 69, at 777–78; see also Lawrence B. Solum, Originalist Methodology, 84 U. Chi. L. Rev. 269, 295 (2017) (noting that one approach originalists might take in situations of textual underdeterminacy is to adopt “a Thayerian default rule of deference to democratic institutions”).
\item As Julie Suk details in a forthcoming article, Ruth Bader Ginsburg’s writings and testimony before becoming a judge support a primary role for Congress in resolving the current status of the ERA. See Julie C. Suk, The Procedural Path of Constitutional Inclusion: Justice Ginsburg’s Cautious Legacy for the Equal Rights Amendment, 110 Geo. L.J. (forthcoming 2022) (on file with the Columbia Law Review).
\item See supra section III.L. A recent district court opinion called the question whether Congress “may revive the ERA” a “difficult issue” and did not resolve it. Virginia v. Ferriero, 525 F. Supp. 3d 36, 61 (D.D.C. 2021). In its 2020 opinion finding the ERA to be dead, OLC acknowledged that Congress’s authority to “modify” a ratification deadline presents a “difficult question.” Ratification of the Equal Rights Amendment, 44 Op. O.L.C., slip op. at 3 (Jan. 6, 2020).
\end{enumerate}
\end{footnotesize}
were to pass a joint resolution retroactively waiving the deadline and directing the Archivist of the United States to publish the ERA as the Twenty-Eighth Amendment, the Archivist should promptly do so. More generally, Article V Thayerianism might empower aspiring amenders to take advantage of quorum rules, to consider amendments passed by one chamber in the other chamber during subsequent legislative sessions, to demand a supermajority vote for rescissions of amendment proposals and ratifications, to hold binding or advisory state referenda on ratification, and so on and so forth.

Perhaps the most promising avenue of Thayerian experimentation would involve ratification through conventions. Congress could, for instance, propose an amendment and provide for at-large elections of state convention delegates on a single day. Doing so would effectively create an amendment “Election Day” and convert each state vote into a referendum.

421. A middle option, which we find appealing, would be for Congress to retroactively extend the deadline while at the same time providing that it will treat rescissions as effective. See Magliocca, supra note 360, at 635; Hemel, supra note: 317. This would be a departure from strict Thayerianism, in the sense that it would not read Article V in the most permissive fashion possible. But such a departure may be prudentially warranted in light of the unique circumstances of the ERA (specifically, the multiple rescissions and twofold extension of the ratification deadline), and it would return the ratification process to the state legislative arena for a final push. Cf. Goldwater v. Carter, 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring in the judgment) (suggesting that the efficacy of rescission “might be answered in different ways for different amendments” (quoting Dyer v. Blair, 390 F. Supp. 1291, 1302 (N.D. Ill. 1975) (three-judge court))).

422. For an arguable limit case, the House in 1969 passed a constitutional amendment abolishing the Electoral College and providing for direct election of the President, but the Senate did not follow suit. See 115 Cong. Rec. 26,007–08 (1969). Is it clear, as a matter of Article V law, that the Senate could not revive this proposed amendment? See Seth Barrett Tillman, Noncontemporaneous Lawmaking: Can the 110th Senate Enact a Bill Passed by the 109th House?, 16 Cornell J.L. & Pub'Y Pol'y 331, 345 n.31 (2007) (arguing that the House and Senate need not act contemporaneously in the amendment process).

423. Unless it is overturned or defied, Hawke v. Smith (No. 1), 253 U.S. 221 (1920), would prevent a state from holding a referendum undercutting ratification after legislative approval. But a state could still, consistent with Hawke, hold a referendum prior to legislative consideration and choose to bind itself to the result.

424. Article V Thayerianism is a heuristic to adjudicate present and future disputes over the validity of amendment efforts, such as the ERA. For disputes about past amendment efforts, we believe it makes sense for systemic stare decisis reasons to defer to longstanding social and official consensus about the textual content of the Constitution. As William Baude has suggested to us, one might call this the “pocket constitution method”: Copies of the Constitution in general circulation and carried around by people are presumptively correct, absent a clear inconsistency with Article V. Hence, while there may be a colorable argument that Article the First, on congressional apportionment, satisfied the requirements of Article V, see supra section III.L.1, that argument is not so clearly correct as to upset the overwhelming consensus spanning more than two centuries that the amendment was never adopted. Conversely, while the Titles of Nobility Amendment appeared for a time in (some) pocket constitutions, see supra section III.L.2, its noncompliance with Article V was clear. The Twenty-Seventh Amendment is an intermediate case. Despite the controversy surrounding its initial promulgation, it has appeared in pocket constitutions for three decades now and is not clearly in violation of Article V. See supra section III.K.
on the proposed amendment. Congress could even include a provision in the proposed amendment stipulating that it will be inoperative unless approved by a majority of all voters on Election Day. In addition to increasing the democratic legitimacy of the resulting amendment, this maneuver would streamline the Article V process in two ways: It would require only a single electoral victory in each state, rather than a victory in both houses of bicameral state legislatures, and it would circumvent partisan gerrymandering in those legislatures.

More radical possibilities are also imaginable. Consider the final clause in Article V providing “that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.” For those who believe the two-senators-per-state rule to be inconsistent with the value of political equality, this clause reflects “a truly extraordinary” and grossly undemocratic “instance of dead-hand control.” As Robert Dahl once lamented, “those fifteen words end all possibility of amending the constitution in order to reduce the unequal representation of citizens in the Senate.”

But is this so clear? Many workarounds to the Equal Suffrage Clause have been proposed over the years, from an amendment repealing the clause paired with another amendment changing the Senate apportionment formula, to an amendment preserving the Senate in name but “relocating” its powers to a new body, to the proposition that the one-person-one-vote equal protection principle announced in *Reynolds v. Sims* should be understood to apply to the Senate, to the centuries-old argument that the clause has never been legally operative. These proposals vary in their degree of legal boldness; depending on one’s general approach to constitutional interpretation and one’s specific views on the Equal Suffrage

---


426. U.S. Const. art. V.


432. See supra note 61 and accompanying text.
Clause, some may seem clearly impermissible. But most are “at least thinkable” as a matter of orthodox constitutional interpretation. For those who find such proposals not just legally thinkable but legally credible, Article V Thayerianism and the principle of popular sovereignty that underwrites it counsel openness to reform.

Even more important than its direct effects on the legal environment for attempted amendments, however, may be Article V Thayerianism’s indirect effects on the cultural environment. A striking finding from the comparative constitutional literature is that the procedural difficulty of a country’s formal amendment rule is not strongly correlated with its rate of amendment. Some countries with stringent amendment rules rewrite their constitutions frequently; some countries with lax amendment rules rewrite their constitutions only rarely. More consequential than the amendment rule itself, it seems, is the prevailing “amendment culture.” In the United States, Jackson suggests that perceptions of the difficulty of satisfying Article V not only tend to be “overstated” but also have become “self-fulfilling” by deterring political actors from trying to pursue amendments. The determinants of amendment culture are enigmatic, so we cannot say with any confidence what the precise effects of interpretive reform would be, in the United States or any other system. There is also an endogeneity complication because, just as the embrace of Article V Thayerianism might change U.S. amendment culture, a change in U.S. amendment culture might be needed for Article V Thayerianism to gain traction. Cultural change has to start somewhere, however, and it does not seem far-fetched to think that growing appreciation for just how many questions the law of Article V does not clearly resolve, combined with growing levels of scholarly support for Article V Thayerianism, could

---


437. See Ginsburg & Melton, supra note 434, at 687, 701.
nudge the U.S. “legal complex” \textsuperscript{438} in a more amendment-friendly direction. Above and beyond any discrete arguments we have advanced, we hope this paper contributes to such a shift.

CONCLUSION

A written constitution’s rules for its own amendment help “define its very essence.” \textsuperscript{439} Our ambition in this paper has been to explore the “essence” of the U.S. Constitution through a critical study of how the rules of Article V have been developed and applied over time. The standard account of Article V depicts it as all but freezing our constitutional text, if not our democracy as well. \textsuperscript{440} Yet for all of Article’s V ostensible “clarity” \textsuperscript{441} and “rigidity,” \textsuperscript{442} the picture that emerges from this study is one of persistent legal contestation, confusion, and innovation.

Descriptively, we have tried to offer a robust empirical showing of the underdeterminacy of the American rule of recognition for constitutional enactments. Prescriptively, we have suggested that this showing holds untapped promise for those who wish to revise the Constitution. Ever since the Founding, the bars of “the Article V cage” \textsuperscript{443} have been significantly looser than the conventional wisdom appreciates. And still to this day, the law of Article V remains remarkably unsettled not just on minor technicalities but on fundamental questions of substance and procedure. Recovering the full story of Article V adventurism, and recognizing the full scope of legal discretion left in its wake, are important tasks for enriching our understanding of constitutional history and theory. They may also be necessary first steps toward unfreezing the constitutional text today.


\textsuperscript{439} Amar, Philadelphia Revisited, supra note 4, at 1102 n.208.

\textsuperscript{440} For the freezing metaphor, see Daniel Lazare, The Frozen Republic: How the Constitution Is Paralyzing Democracy (1997); see also Albert, Constitutional Amendments, supra note 113, at 96 (collecting similar statements by leading scholars).

\textsuperscript{441} E.g., Albert, Constitutional Disuse or Desuetude, supra note 14, at 1035; Harrison, supra note 14, at 459, 461; Paulsen, A General Theory, supra note 50, at 761.


\textsuperscript{443} Levinson, Our Undemocratic Constitution, supra note 411, at 20.
ESSAY

A DANGEROUS IMBALANCE: PAULI MURRAY’S EQUAL RIGHTS AMENDMENT AND THE PATH TO EQUAL POWER

Julie C. Suk*

In January 2020, Virginia became the thirty-eighth and final state needed to ratify the Equal Rights Amendment ("ERA"). Because Virginia’s ratification—and those of Nevada and Illinois—occurred four decades after Congress’s ratification deadline, the viability of the ERA remains contested and uncertain. Opponents raise many procedural and substantive objections to adding the ERA to the Constitution, based largely on the fifty-year delay between its adoption by Congress and
ratification by the states. Some objectors argue that the ERA is no longer
necessary because litigation under the Equal Protection Clause, culminating in United States v. Virginia in 1996, accomplished many of
the ERA’s goals without a formal amendment. Others argue that an ERA
adopted by Congress in the early 1970s neglects and may exacerbate
twenty-first-century gender inequalities, especially those experienced by
women engaged in low-wage work and women of color.

This Essay recovers the aspiration of the 1970s ERA to overcome
gendered disempowerment, which was most acutely experienced by
Black women. That aspiration did not become part of the “de facto” ERA
through Fourteenth Amendment litigation. Whether the ERA would
sufficiently respond to “intersectional” discrimination, as it later came to
be known, became a point of contention in Illinois’s 2018 ratification
debates. This Essay begins by highlighting the leading roles that African
American women legislators have played in sponsoring and framing the
1972 ERA in the three states that have ratified it after the statutory
deadline. It posits that this should matter to the ongoing debates about the
legitimacy of these post-deadline ratifications. These states ratified the

Fourteenth Amendment because it failed to show persuasive justification for gender-based
admissions at the Virginia Military Institute).

necessarily opposed to the current ERA revival effort, many scholarly commentators, most
notably David Strauss, have viewed the failure of ERA ratification as irrelevant, since, in their
view, the ERA’s goals were achieved through judicial interpretation. See David A. Strauss,
(noting that in certain situations, “though the proposed amendment failed, constitutional law
changed almost exactly as it would have if the amendment had been adopted” and describing
the ERA as “rejected, yet ultimately triumphant”).

8 See Joan C. Williams, The Misguided Push for an Equal Rights Amendment, N.Y. Times
[https://perma.cc/A3XG-J8SV]; Kim Forde-Mazrui, A Liberal Case Against the
[https://perma.cc/XAP2-6TGM].

9 See Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black
Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,
1989 U. Chi. Legal F. 139, 140.

10 See generally Julie C. Suk, We the Women: The Unstoppable Mothers of the Equal Rights
Amendment ch. 10–12 (2020) [hereinafter Suk, We the Women] (documenting the individual
contributions of African American women state legislators like Pat Spearmen of Nevada;
Kimberly Lightford, Liseta Wallace, and Juliana Flowers of Illinois; and Jennifer Carroll Foy
ERA long after the deadline imposed by an overwhelmingly white male Congress, but they did so as soon as women—including women of color and LGBTQ women—accumulated the modicum of power necessary to insist on their constitutional inclusion. These legislators’ twenty-first-century vision of the ERA resonates with Pauli Murray’s testimony in favor of the ERA in congressional hearings in the 1970s, which built on her work as a member of the President’s Commission on the Status of Women, as a founder of the National Organization for Women in the 1960s, and as a board member of the ACLU. Murray built a strategy for women’s empowerment using the race equality victories under the Fourteenth Amendment as a template. Her writings laid the intellectual architecture for the gender equality victories won by Ruth Bader Ginsburg throughout the 1970s. Murray argued that African American women had the most to gain from an ERA, which could end their disempowerment, beyond merely winning litigated cases. The quest for empowerment, more so than doctrinal legal change, is driving the ERA’s twenty-first-century resurgence. Women seek empowerment not only to help themselves but also to help save democracy from dangerous abuses of power that threaten its legitimacy.


14 See id. at 61–62; see also Brief for Appellant at 5, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4) (analogizing sex to race and arguing that illegitimate legislative differentiations between sexes merit no deference).

15 See Murray ERA Testimony, supra note 11, at 428; see also Pauli Murray, The Negro Woman’s Stake in the Equal Rights Amendment, 6 Harv. C.R.-C.L. L. Rev. 253, 253 (1971) (“Negro women as a group have the most to gain from the adoption of the Equal Rights Amendment. Implicit in the amendment’s guarantee of equality of rights without regard to sex is the constitutional recognition of personal dignity which transcends gender.”).
Part I begins in the present, highlighting the leadership and opposition by Black women in the state legislative debates leading to ERA ratification since 2017. Part II analyzes Pauli Murray’s 1970 written testimony to the Senate Judiciary Committee, in which she articulated African American women’s stake in the ERA for a congressional audience. Part III situates Murray’s vision of the ERA in the context of her 1960s writings for the President’s Commission on the Status of Women and as a co-founder of the National Organization for Women. Coining the term “Jane Crow” to focus on discrimination faced by Black women, Murray’s initial ambivalence about the ERA centered her work on a litigation strategy based on the Fourteenth Amendment. But by the end of the decade, she persuaded ERA skeptics, including colleagues at the ACLU, where she served on the Board, to pivot and support the ERA. Part IV develops the implications of Murray’s analysis of equal rights as equal power for contemporary efforts to overcome women’s underrepresentation in positions of power. Part V concludes.

I. BLACK WOMEN AND THE ERA’S RESURGENCE

The Nevada legislature took the nation by surprise on March 22, 2017, by ratifying the Equal Rights Amendment on the forty-fifth anniversary of Congress’s two-thirds\(^{\text{5}}\) vote to send it to the states for ratification.\(^{\text{16}}\) The Nevada ratification came forty years after the last state to ratify the ERA (Indiana in 1977) and thirty-five years after Congress’s last deadline (1982) for state ratification.\(^{\text{17}}\) The primary sponsor of the ERA ratification resolution in Nevada was state senator Pat Spearman, an African American ordained minister who had given a speech at the 2016 Democratic National Convention advocating for LGBTQ equality.\(^{\text{18}}\) In Nevada, she rallied a coalition of legislators of color and women across generations and political parties to support a post-deadline ERA


\(^{\text{17}}\) See Jane J. Mansbridge, Why We Lost the ERA 13 (1986).

\(^{\text{18}}\) See 2020 Democratic National Convention, State Senator Pat Spearman at DNC 2016, YouTube (July 26, 2016), https://www.youtube.com/watch?v=orQqhCEFmG [https://perma.cc/G36V-AMEN].
ratification.\textsuperscript{19} The ratification resolution stated that it would be up to Congress—who imposed the deadline in the first place—to accept or reject the late ratification, but as far as the Nevada legislature was concerned, the ERA was still “meaningful and needed as part of the Constitution of the United States and that the present political, social and economic conditions demonstrate that constitutional equality for women and men continues to be a timely issue in the United States.”\textsuperscript{20}

The Illinois legislature followed in May 2018, and the Virginia legislature in January 2020. Black women legislators were at the forefront of these states’ ratification battles as well. Following Senator Spearman’s leadership in Nevada in 2017, Illinois Representative Juliana Stratton, who went on to become the first African American elected Lieutenant Governor of the state, made extensive floor speeches advancing ERA ratification in 2018.\textsuperscript{21} In Virginia, African American women legislators of three generations—baby boomer (Mamie Locke), gen X (Jennifer McClellan), and millennial (Jennifer Carroll Foy)—were the primary patrons of the ratification resolution, describing themselves as bringing Virginia to the right side of history.\textsuperscript{22} It is fair to say that the thirty-sixth, thirty-seventh, and thirty-eighth ratifications of the ERA in 2017–2020 would not have occurred without the political efforts of these Black women, who were elected as lawmakers representing the people of their states.

Why did these women make the ERA a twenty-first-century priority? Senator Spearman explained: “Women earn 80 percent of what men earn. African-American women earn 68 percent of what men earn. Latinas earn 60 percent of what their male counterparts earn.”\textsuperscript{23} Even if the ERA would not outlaw these pay disparities, she told her Senate colleagues, quoting Ruth Bader Ginsburg’s 1978 law review article during the Nevada ratification debate, “With the Equal Rights Amendment, we may expect Congress and the state legislatures to undertake in earnest, systematically and perversely, the law revision so long deferred,”\textsuperscript{24} to legislate more

\begin{flushleft}
\footnotesize
\textsuperscript{19} See Suk, We the Women, supra note 10, at 130.
\textsuperscript{21} See Suk, We the Women, supra note 10, at 144–45, 153.
\textsuperscript{22} See id. at ch. 12.
\textsuperscript{24} Id. at 5 (quoting Ruth Bader Ginsburg, The Equal Rights Amendment Is the Way, 1 Harv. Women’s L.J. 19, 26 (1978)).
\end{flushleft}
effectively against unequal pay. Similarly, in making Virginia the thirty-eighth and final state needed to ratify the ERA, Senator Jennifer McClellan spoke of her enslaved female ancestors, defined as property and unable to own property, even after their male brethren were emancipated. She continued:

This year we’ve already made history, with the most diverse General Assembly ever seated [in Virginia]. . . . And yet, in so many areas, we still have a long way to go. Whether it’s the boardrooms, whether it’s the highest offices, in states, or in the country. Too often, women are not there, because they’ve had to overcome years of discriminatory laws.25

In Virginia, women constituted nearly one-third of the legislature for the first time in history.26 It was not a coincidence that this was the legislature that finally ratified the ERA. Finding this long-unpaved road to women’s empowerment was a purpose of the ERA. Nonetheless, Black women did not monolithically support the ERA in these three states. In Illinois, ERA ratification squeaked by, winning with only one vote to spare, because of opposition votes by two progressive African American Democratic women in the House of Representatives. Representative Mary Flowers, who has sponsored legislation to reduce maternal mortality, especially among African American women,27 and to require the accommodation of pregnant workers,28 voted against ERA


ratification.\textsuperscript{29} During floor debates, she noted that the ERA was the brainchild of Alice Paul, “a very proud racist woman.” Furthermore, she suggested that the Amendment would “put wealthy women against poor working women.” Specifically, she said, “wealthy women . . . don’t have to worry about lifting heavy bags and heavy boxes. They don’t have to worry about having babysitters.”\textsuperscript{30} Flowers’s objections were joined by Representative Rita Mayfield, another Black legislator who has sponsored legislation to address African American maternal mortality, paid family leave, and other women’s issues.\textsuperscript{31} Mayfield expressed concern that the ERA would work against the acknowledgment of racial inequalities.\textsuperscript{32}

Although Flowers and Mayfield voted against ERA ratification, the positive vote in Illinois reflected the responses by Juliana Stratton and Litesa Wallace, another African American legislator who affirmed Flowers’s and Mayfield’s concerns about whether the ERA could meet the needs of African American women. Wallace specifically emphasized the importance of childcare, as “a single mother who has survived damn near anything you can think of.”\textsuperscript{33} Unlike Flowers and Mayfield, Wallace voted for the ERA. But she simultaneously called for “some serious soul searching about” the fact that “we refuse to recognize intersectionality . . . in damn near every debate that occurs in this Body.”\textsuperscript{34}

Stratton argued that the ERA would require all government employers to examine unequal pay practices and strengthen protections for pregnant workers. Ultimately, Stratton said, “as a black woman in particular, . . .
have experienced discrimination. Not just from being a woman in America but also from being a woman of color.”

But this was a reason to embrace the ERA: “I truly do believe that our Constitution, that living, breathing document that guides us and sets forth the ideals of this country, must reflect what we hope to be and serve as our compass.” Therefore, the ratification vote in Illinois should not be read as a rejection of Flowers’s and Mayfield’s objections, but as a reflection of how late ratifications have incorporated objections to contribute to a race-conscious meaning of the ERA.

II. PAULI MURRAY’S ERA IN CONGRESS, 1970

Questions about whether the ERA would respond to the needs of poor working women and Black women are not new. They were part of the ERA’s legislative history in 1970. Pauli Murray’s written statement to the Senate Judiciary Committee hearings in September 1970 argued, “Negro women as a group have the most to gain from the adoption of the Equal Rights Amendment.” Murray was the intellectual architect of the Fourteenth Amendment litigation strategy that Ruth Bader Ginsburg successfully implemented in the 1970s to challenge laws that discriminated on the basis of sex. Ginsburg, who had carefully studied Pauli Murray’s memos, articles, and briefs of the 1960s to write her groundbreaking ACLU brief in Reed v. Reed, acknowledged her intellectual debt to Pauli Murray by including Murray’s name as a co-author on the cover sheet of the Reed v. Reed brief. The late Justice Ruth Bader Ginsburg is recognized as the “founding mother” of modern constitutional sex equality law because of her briefs and arguments in the landmark Supreme Court cases beginning with Reed. But Pauli

35 Id. at 342-43.
36 Id. at 343-44.
37 Murray ERA Testimony, supra note 11, at 428.
38 See Mayeri, supra note 12, at 61–62.
39 See Brief for Appellant, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4).
Murray’s theory of constitutional gender equality formed the foundation for the achievements that made Ginsburg famous.

While Murray’s ERA testimony is largely forgotten, it articulated original and nuanced arguments about what the ERA could add to the Fourteenth Amendment litigation strategy that went on to be successful, and why Black women would benefit from the ERA. Ginsburg, who also advocated for the ERA throughout the 1970s in her scholarly writings and as a witness in congressional hearings about extending the ERA deadline, achieved success in other parts of the ERA legal agenda, specifically, the eradication of gender classifications in the law that reflected gender stereotypes. Murray, meanwhile, associated the ERA with an analysis of gendered power that had gotten lost as the anti-classification trajectory of Equal Protection took hold, but which remains necessary despite Ginsburg’s victories for legal feminism.

In introducing the meaning of the ERA for Black women, Murray’s testimony began by telling her own life story in the context of that of her family dating back to slavery: “My parents were born during Reconstruction; my grandmother was born in slavery, the progeny of rape by a white master of his octoroon slave.” With the American legal order beginning with

the ideas that Blacks were inherently inferior to Whites and Women were inherently inferior to Men... [Murray said,... I have

41 See, e.g., Ginsburg, supra note 24, at 22–26 (arguing for the legislative and judicial benefits of the Equal Rights Amendment in that it removes any “historical impediment” to women’s equality); see also Equal Rights Amendment Extension: Hearings on S.J. Res. 134 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 95th Cong. 262–71 (1979) (statement of Ruth Bader Ginsburg, Professor, Columbia University School of Law) (arguing for congressional extension of the time to ratify the Equal Rights Amendment).

42 See, e.g., Reed v. Reed, 404 U.S. 71, 76–77 (1971) (holding that arbitrary classifications on the basis of sex and preference of one sex over the other violates the Equal Protection Clause).


44 Murray ERA Testimony, supra note 11, at 428.
experienced numerous delays in my career, not for the traditional reasons given for the failure of women to develop on par with men in our society (marriage, child-rearing, etc.), but by a combination of individual and institutional racism and sexism—Jim Crow and Jane Crow.\textsuperscript{45}

Murray struggled throughout her career to find stable employment, finally achieving tenure as a professor of American Studies at Brandeis at the age of 60. She was never hired to be a professor at any law school, including those that recruited RBG during this period, despite her brilliance and groundbreaking legal work that her contemporaries acknowledged.\textsuperscript{46} Murray’s written ERA testimony stated, “[T]he road over which I have travelled is the experience of most Negro women in America. Born in genteel poverty, I have shared the experience of domestic workers, service workers, lower paid clerical workers,” which she combined with her “intimate knowledge of the problems of race and sex discrimination, particularly in employment opportunity.”\textsuperscript{47} Black women experienced “more than the mere addition of sex discrimination to race discrimination”; they experienced “the conjunction of these twin

\textsuperscript{45} Id.

\textsuperscript{46} Spottswood Robinson, who became a judge on the U.S. Court of Appeals for the D.C. Circuit, and Thurgood Marshall, who became a Supreme Court Justice, used the paper Pauli Murray wrote as a law student to help shape their winning arguments in \textit{Brown v. Board of Education}, 347 U.S. 483 (1954). See Bell-Scott, supra note 12, at 215. Ruth Bader Ginsburg relied on Pauli Murray’s law review articles, legal memoranda, and legal briefs when writing her influential brief in \textit{Reed v. Reed}. See Mayeri, supra note 12, at 61–63; Irin Carmon & Shana Knizhnik, \textit{Notorious RBG}: The Life and Times of Ruth Bader Ginsburg 53–55 (2015). Pauli Murray also had a decades-long friendship with Eleanor Roosevelt, who long recognized Murray’s brilliance in various collaborations around civil rights and women’s rights. It was Eleanor Roosevelt who invited Murray to join the Civil and Political Rights Subcommittee of President Kennedy’s Commission on the Status of Women, which Roosevelt chaired. See Bell-Scott, supra note 12, at 307. Eleanor Roosevelt died shortly after the Commission began its work in 1962. Id. at 316. While Murray longed to be a law professor at a school like Yale Law School, she understood that law schools were still “an almost exclusively male preserve,” for which she was “unlikely to receive serious consideration . . . [as] teaching jobs were not readily forthcoming to women of any race. Despite Yale Law School’s enormous prestige and its reputation for successfully placing graduates holding its higher degrees, I was an embarrassment.” Murray, \textit{Song in a Weary Throat}, supra note 12, at 469. In 2016, nearly three decades after Murray’s death, Yale University recognized the magnitude of her work by naming a residential college after her. See Lakshmi Varanasi, \textit{Yale Will Name a New Residential College After Awesome Civil Rights Activist Pauli Murray}, Slate (Apr. 28, 2016), https://slate.com/human-interest/2016/04/yale-names-new-residential-college-after-pauli-murray.html [https://perma.cc/4JHZ-X63D].

\textsuperscript{47} Murray ERA Testimony, supra note 11, at 428.
immoralities. Long before critical race scholars used the term “intersectionality,” Murray explained that Black men could aspire to the power and status of white men. And white women benefited from the law’s protections. White mothers were placed on a pedestal, though it was really more like a cage, to borrow terminology that Ruth Bader Ginsburg often used. But pedestal or cage, Black women were excluded from it, as many Black women had no choice but to work outside of their own homes, often working, as Murray pointed out, as “private household workers or service workers outside of the home,” subject to the lowest wages and exposed to the risk of sexual violence.

The Equal Rights Amendment had a role to play because only a formal constitutional amendment could carry the weight of according Black women the respect that they had been deprived of for so long. Murray noted that, “when the dominant white male is afflicted by racism and sexism, albeit unconscious, his hostility toward the Negro female who asserts her rights as a person is unbounded.” Within this dynamic of domination and resistance to change, “[i]n her struggle for survival with dignity, therefore, the Negro woman stands almost alone and must appeal to the fundamental law of the land to give her a footing upon which to build some semblance of stability for herself and for her children.” An explicit constitutional provision carried tremendous symbolic power, consciously affirming the equal status of those who were abused for so long. Decades later, Nevada senator Pat Spearman embraced the ERA’s symbolic importance during Nevada’s ratification debates: “Symbols are not just symbols. They are powerful because they point to what we believe in and what we hold dear.”

Murray also pointed out that efforts to advance women’s rights through the Fourteenth Amendment had, to date, failed. She had argued since 1962 that the Fifth and Fourteenth Amendment prohibition of race
discrimination should be extended to prohibit sex discrimination, but until *Reed v. Reed* (decided in 1971, a year after Murray’s ERA testimony), the Supreme Court had not been responsive to the claims of “Jane Crow.” But more importantly, Murray suggested that, even if the Supreme Court were to expand the Fourteenth Amendment to strike down sex discrimination in the future, the Equal Rights Amendment could still do more. She offered an ambitious vision of equal power for women, decades ahead of the feminists in Europe who put gender parity into their constitutions in the late 1990s. It is worth quoting Murray’s vision at length:

Finally, I appeal to this Committee and to the United States Senate to use the uniquely human gift of vision and imagination in a creative approach to the Equal Rights Amendment. . . . I suggest that what the opponents of the Amendment most fear is not equal rights but equal power and responsibility. I further suggest that underlying the issue of equal rights for women is the more fundamental issue of equal power for women. No group in power has surrendered its power without a struggle. Many male opponents of equal rights for women recognize the more fundamentally revolutionary nature of the changes which a genuine implementation of such an amendment would bring about. A society in which more than half of the population is absent from the formal authority and decision-making processes is a society in dangerous imbalance. Those who argue in support of the idea of fundamental differences between men and women only reinforce the compelling reasons why women should have access to equal power through the implementation of equal constitutional rights.  

Murray’s testimony expanded the ERA debate beyond what the Amendment would do as law—and towards whom the Amendment would empower politically. That empowerment, more so than the changes in law, could fundamentally alter men’s lived experience, as white men in particular would have to surrender some of the power and privilege they took for granted. Allowing the continued disproportionate power of


57 Murray ERA Testimony, supra note 11, at 432–33.
men, when women were more than half the population, put the nation in a perpetual state of illegitimate government. Murray proposed that democratic government could perform better and be legitimized if Congress were composed of at least one-third women:

A Congress of the United States in which one-third or more are women (if one uses the formula of the percentage of the labor force who are women) and the unique experiences of this untapped resource are likely to accelerate our progress toward the solution of such massive problems as pollution, poverty, racism and war. . . . The adoption of the Equal Rights Amendment and its ratification by the several States could well usher in an unprecedented Golden Age of human relations in our national life and help our country to become an example of the practical ideal that the sole purpose of governments is to create the conditions under which the uniqueness of each individual is cherished and is encouraged to fulfill his or her highest creative potential.\(^{58}\)

Fifty years after these remarks, the Congress of the United States has more women elected than ever before, but they only constitute twenty-five percent of Congress,\(^{59}\) still short of the one-third Murray proposed as an antidote to the “dangerous imbalance” that impaired solutions to “pollution, poverty, racism and war.” Murray ended her 1970 testimony by appealing to the senators’ sense of their “place in history,” a theme that would dominate the Virginia ratification debates in 2020.\(^{60}\)

III. THE MAKING OF PAULI MURRAY’S VISION FOR THE ERA

Murray’s ERA testimony reveals a proposed amendment that took up the history and continued subordination of women of color as early as

\(^{58}\) Id. at 433.


1970, much earlier than is often assumed. Murray was often decades ahead of her time in her thinking about what equality under the law could mean—she urged a frontal attack on *Plessy v. Ferguson*’s “separate but equal,”61 a decade before the men leading civil rights litigation thought it could possibly succeed,62 as they tried to challenge specific inequalities without attacking segregation per se. Similarly, Murray’s vision of how an ERA could empower Black women, based on their unique experience of legal subordination, speaks directly to the twenty-first-century disagreements among African American women lawmakers about the ERA’s responsiveness to intersectional concerns. Murray’s account resonates, not only because she explicitly theorized intersectionality, or “Jane Crow” as she called it, but also because her own support of the ERA evolved from a position of initial skepticism.

Murray’s doubts about the ERA grew out of the opposition by feminists who defended the interests of working-class women in industry. Social reformers like Florence Kelley and Eleanor Roosevelt, as well as progressive organizations like the National Consumers League and the ACLU, opposed the ERA prior to 1970.63 ACLU lawyer Dorothy Kenyon was, with Murray, the other person that Ruth Bader Ginsburg listed as an

---

61 In writing a paper as a third-year law student in 1944 proposing that segregation per se was unequal regardless of whether the separate facilities could be equalized, Murray looked at the work of sociologists and psychologists. See Rosenberg, supra note 12, at 147-50; Murray, Song in a Weary Throat, supra note 12, at 329. That literature included the work of psychologist Mamie Phipps Clark, who had completed a master’s degree at Howard University a few years before Murray received her law degree there and who worked with her husband Kenneth Clark on the doll studies that the Supreme Court cited in *Brown v. Board of Education*, 347 U.S. 483, 494 n.11 (1954), as the Court concluded that “[s]eparate educational facilities are inherently unequal.” Id. at 495.

62 See Rosenberg, supra note 12, at 171 (noting that, in 1953, Spottswood Robinson took a second look at Murray’s 1944 paper proposing the overruling of *Plessy v. Ferguson*, 163 U.S. 537 (1896), at which point he persuaded Thurgood Marshall to make a frontal attack on *Plessy*).

honorary co-author of her Reed v. Reed brief, and Kenyon had testified against the ERA in Congress in 1929. Kenyon and her allies worried that the conservative male justices sitting on the Supreme Court would use the abstract constitutional guarantee of “equality of rights” to strike down labor legislation that protected women workers from exploitation. Kenyon described the ERA as “a blind man with a shotgun,” shooting down all sex distinctions under the law, impervious to whether they could help women achieve equality or not. Pauli Murray and other skeptics proposed in 1962 that piecemeal litigation under the Fifth and Fourteenth Amendments would be better suited to invalidate the sex distinctions that kept women down, while preserving those necessary to secure a true “equality of right.” Kenyon and Murray collaborated on this strategy in one case with some success. In a 1966 decision in White v. Crook, a three-judge panel was persuaded by their argument that Alabama’s statutory exclusion of Black and white women from juries, as well as the systematic exclusion of Black men, violated the Equal Protection Clause. Because the state did not appeal the district court’s decision, the Supreme Court never had the opportunity to weigh in.

As she worked on the brief in White v. Crook, Murray published, along with Justice Department Office of Legal Counsel attorney Mary Eastwood, a law review article titled Jane Crow and the Law: Sex Discrimination and Title VII. There, Murray and Eastwood noted that the Commission’s reluctance to endorse the ERA in 1962 was premised on the assumption that the Supreme Court would clarify whether the

---

65 See Equal Rights Amendment, Hearing on S.J. Res. 64 Before a Subcomm. of the S. Comm. on the Judiciary, 70th Cong. 42 (1929) (statement of Dorothy Kenyon, Attorney at Law, New York City).
66 Id.
68 251 F. Supp. 401 (M.D. Ala. 1966). Note that Murray and Kenyon also collaborated on an amicus brief in Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), in which the NAACP represented a white woman in a Title VII lawsuit challenging an employer’s policy of not hiring mothers of preschool-age children. Although the plaintiff in this case was white, the NAACP and Murray saw that, if the law permitted discrimination against working mothers, African American women would be particularly disadvantaged by it. See Mayeri, supra note 12, at 51–52.
Fourteenth Amendment prohibited sex discrimination.\textsuperscript{70} But by that point, courts had “over-simplified” the question of whether a sex classification was reasonable by generally accepting all such classifications as valid.\textsuperscript{71} The Jane Crow article proposed, in the alternative, that courts scrutinize the distinctions.\textsuperscript{72} This did not, however, mean that “equal rights for women is tantamount to seeking identical treatment with men.”\textsuperscript{73} They recognized that “[t]o the degree women perform the function of motherhood, they differ from other special groups.”\textsuperscript{74} However:

When the law distinguishes between the ‘two great classes of men and women,’ gives men a preferred position by accepted social standards, and regulates the conduct of women in a restrictive manner having no bearing on the maternal function, it disregards individuality and relegates an entire class to inferior status.\textsuperscript{75}

Thus, the clarification that they urged courts to provide would interpret the Constitution as prohibiting laws that classified persons by sex, while permitting laws that classified by function, “to give adequate recognition to women who are mothers and homemakers and who do not work outside the home.”\textsuperscript{76} The law ought to “recognize[ ] the intrinsic value of child care and homemaking.”\textsuperscript{77} Instead, existing laws wrongly assumed that “financial support of a family by the husband-father is a gift from the male sex to the female sex and, in return, the male is entitled to preference in the outside world.”\textsuperscript{78}

Although Murray’s Fourteenth Amendment strategy prevailed at the district court in \textit{White v. Crook}, other courts did not follow. In 1967, the Fifth Circuit deferred to a Mississippi Supreme Court decision rejecting the proposition that the statutory exclusion of women from juries violated the Fourteenth Amendment and barred a removal of a state rape prosecution to federal court.\textsuperscript{79} Murray drew on her experience as a civil rights attorney working for racial justice to call for an organization similar

\begin{itemize}
\item \textsuperscript{70} See id. at 236.
\item \textsuperscript{71} Id. at 237.
\item \textsuperscript{72} See id. at 238.
\item \textsuperscript{73} Id. at 239.
\item \textsuperscript{74} Id.
\item \textsuperscript{75} Id.
\item \textsuperscript{76} Id. at 241.
\item \textsuperscript{77} Id.
\item \textsuperscript{78} Id.
\item \textsuperscript{79} See Bass v. Mississippi, 381 F.2d 692, 697 (5th Cir. 1967).
\end{itemize}
to the NAACP for women’s rights—a proposal that evolved into the founding of the National Organization for Women.\textsuperscript{80} Murray’s Jane Crow co-author, Mary Eastwood, authored a memo for NOW calling for a dual strategy of simultaneously pursuing Fourteenth Amendment litigation to challenge sex discrimination while advocating for a formal amendment under Article V—the Equal Rights Amendment—to the Constitution.\textsuperscript{81} The memo insisted, however, that the ERA would not invalidate “[m]aternity laws,” authorizing maternity leave, for instance, “because such laws are not based on sex;”\textsuperscript{82} they were based on function. Furthermore, “recognizing the value of child care and homemaking would be consistent with the principle of equality of rights under the amendment.”\textsuperscript{83}

By March 1970, Murray urged the ACLU, where she served on the Board, to abandon its longstanding opposition to the ERA. She wrote, “I do not believe today that the alternative of the use of the Fourteenth Amendment is a sufficient basis for strong opposition to the proposed Equal Rights Amendment.”\textsuperscript{84} Whereas Dorothy Kenyon and other social reformers had opposed the ERA in 1929 due to fears of handing it over to a conservative male judiciary, in 1970, Murray argued, to the contrary, that a constitutional amendment could temper the conservative turn likely to be taken by Nixon appointees replacing the Warren Court.\textsuperscript{85} Even Dorothy Kenyon, after opposing the ERA on behalf of working women for decades, wrote in a 1970 letter to a friend that, while she was still committed to the Fourteenth Amendment strategy, “in the meantime it’s worth passing the equal rights amendment if only to stir up the men.”\textsuperscript{86}

Kenyon’s change of heart stemmed in part from frustration that caused her to empathize with the militants in the struggle for racial justice. Two

\textsuperscript{82} Id. at 8.
\textsuperscript{83} Id.
\textsuperscript{85} See id. at 3.
\textsuperscript{86} Serena Mayeri, Constitutional Choices: Legal Feminism and the Historical Dynamics of Change, 92 Calif. L. Rev. 755, 798 & n.203 (2004).
months before she came out in support of the ERA, she wrote to another friend, “I know exactly how the Black Panthers feel, ignored[,] passed over, segregated (intellectually at least), and frustrated until they are ready to kill.” If a conservative court was reluctant to take an expansive view of the Fourteenth Amendment, the creation of a clear legislative history embracing that expansive view for the ERA could require the courts to enforce women’s equal status. Ultimately, Murray believed that civil rights for Blacks and women were “indivisible”; she warned the ACLU against giving “the impression that it is preoccupied with the demands of Blacks, but opposes the demands of women.” Within months, Murray submitted her ERA statement to the Senate Judiciary Committee, inserting an ambitious, intersectional vision of the ERA into the Amendment’s legislative history.

IV. LEGITIMIZING EQUAL POWER IN THE TWENTY-FIRST CENTURY

Pauli Murray’s account of why the ERA was necessary (in addition to the Fifth and Fourteenth Amendments) focused on changing power dynamics, beyond changing legal doctrine. An ERA adopted to undo a dangerous imbalance of power could help resolve ongoing conflicts about the constitutionality of affirmative action for women and other groups that have been excluded from power. Since 1978, the Supreme Court has interpreted the Equal Protection Clause of the Fifth and Fourteenth Amendments as constraining, rather than requiring, affirmative action. Even when the Court has allowed affirmative action programs to survive, it scrutinizes race-conscious action as a potential threat to equal protection that must be overcome; it does not begin with recognizing unequal power as the starting point that must be overcome, whether by race-conscious action or not.

In 2018, the California legislature adopted a new law in an effort to tip the dangerous gendered imbalance of power in corporations. The 2018

---

87 Id. at 798 & n.202.
88 Memorandum from Pauli Murray to ACLU Equality Committee, supra note 84, at 3.
law took a modest step towards reducing gender-unequal power by requiring all corporations registered to do business in California to elect at least one woman to their board of directors, essentially prohibiting corporate boards that consisted exclusively of men.\textsuperscript{91} Boards with six or more members must have at least three women, boards with five members must have at least two, and boards with four members or fewer must have at least one woman.\textsuperscript{92}

Imbalance of power is dangerous because it slides easily into abuse of power. The #MeToo movement brought that dynamic into clearer focus as Hollywood power-broker Harvey Weinstein was finally exposed for his decades of abusing women sexually.\textsuperscript{93} The California law followed over a decade of laws enacted in several European countries requiring gender balance on corporate boards of directors.\textsuperscript{94} Since 2003, a statute in Norway has required publicly traded companies to have gender-balanced boards of directors.\textsuperscript{95} Boards may not have more than sixty percent male or female directors.\textsuperscript{96} This formulation—requiring boards to select women for at least forty percent of its board positions—was adopted in France as well, following constitutional conflicts over similarly framed laws applying to political parties’ candidates for elected office.\textsuperscript{97} In

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{91} See Cal. Corp. Code § 301.3 (West 2020).
\item \textsuperscript{92} See id.
\item \textsuperscript{94} For analysis of the comparative constitutional issues raised by these quotas, see Julie C. Suk, Gender Parity and State Legitimacy: From Public Office to Corporate Boards, 10 I*CON 449 (2012); Julie C. Suk, Gender Quotas After the End of Men, 93 B.U. L. Rev. 1123 (2013); Julie C. Suk, An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home, 28 Yale J.L. & Feminism 381 (2017) [hereinafter Suk, An Equal Rights Amendment for the Twenty-First Century].
\item \textsuperscript{96} See id.
\item \textsuperscript{97} See Loi 2000-493 du 6 juin 2000 de favoriser l’égale access des femmes et des hommes aux mandats électoraux et fonctions électives [Law 2000-493 of June 6, 2000 on Tending To Promote Equal Access of Women and Men to Electoral Mandates and Elective Functions], Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 7, 2000, p. 8650. This formula was also used in the 2010 statute requiring gender balance on corporate boards. Loi 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et
\end{itemize}
\end{footnotesize}
France, as in Germany, Italy, and Belgium, constitutional amendments adopted in the 1990s and early 2000s clarified the legitimacy of these gender balance laws for leadership positions in the political and economic spheres. In France, for instance, a 2008 amendment to the French Constitution reads, “The law shall promote the equal access by women and men to the electoral mandate and to positions of social and professional responsibility.” That amendment led to the adoption of additional laws requiring gender balance in leadership positions in various institutions, including corporate boards and senior government positions.

It appears that the French constitutional amendment was effective in overcoming women’s underrepresentation, at least in some domains. The city of Paris was recently fined $110,000 after mayor Anne Hidalgo, the first woman to be elected to the position, appointed women to more than sixty percent of senior staff positions in 2018. After the long history of women’s underrepresentation was overcome, the legislature amended the quota law applicable to senior government positions in 2019 to eliminate fines, as long as overall gender balance is respected. It went into effect des hommes au sein des conseils d’administration et de surveillance et à l’égalité professionnelle [Law 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Administrative and Supervisory Boards and Professional Equality], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 28, 2011.

98 See Grundgesetz [GG] [Basic Law], art. 3, § 2 (2019), translation at http://www.gesetze-im-internet.de/englisch_gg/index.html; 1958 Const. art. 1 (Fr.); see also Julie C. Suk, An Equal Rights Amendment for the Twenty-First Century, supra note 94, at 405 (highlighting the use of statutory provisions and constitutional amendments across the globe to combat inequality).

99 1958 Const. art. 1 (Fr.).


103 See id.
in 2020. In the United States, however, the underrepresentation of women and minorities remains a problem that some states are beginning to address through legislative quotas.

In California, before the ink was dry on the 2018 corporate board law, legislators worried that the law would be challenged on federal or state Equal Protection grounds because it employs a gender classification, which might not survive intermediate scrutiny under existing Equal Protection doctrine.104 Within months of the law’s passage, two lawsuits were brought to challenge the constitutionality of the California law. In the first lawsuit, the conservative thinktank Judicial Watch is representing California taxpayers who would like the law struck down on the grounds that it imposes a “quota system for female representation on corporate boards” that employs “gender classifications,”105 in violation of the California Constitution’s equal protection guarantee. As the complaint points out, California courts have endorsed “strict scrutiny” for gender classifications under the California Equal Protection Clause.106 Applying that test, the complaint argues that California cannot make the difficult showing required by “strict scrutiny.”107 To meet that legal standard, California would have to identify a compelling state interest and show that treating the sexes differently is the only way to protect that interest. Another lawsuit challenging the law was filed in November 2019 in a federal court by a shareholder of a California corporation, represented by the Pacific Legal Foundation, the same organization that has supported lawsuits challenging race-conscious affirmative action at many universities.108 That lawsuit alleges that the California law “is a sex-based classification that violates the Fourteenth Amendment” under the Equal Protection Clause.109 The district court dismissed the suit, holding that a shareholder who was compelled to vote for a woman candidate for the board of directors lacked standing to challenge the statute.110 Nonetheless,

---

106 Id.
107 Id.
109 Id. at 5–6.
the Pacific Legal Foundation has appealed the standing-based dismissal to the Ninth Circuit,\(^{111}\) where several amicus briefs jump to the merits and argue that a “Woman Quota” to overcome women’s underrepresentation in corporate power violates the Fourteenth Amendment’s Equal Protection Clause.\(^{112}\) Eventually, whether in this lawsuit or another one with a proper litigant, courts will confront the issue of whether a quota to end a severe imbalance of power between women and men violates the existing constitutional guarantee of equal protection. Meanwhile, the California legislature adopted another law in September 2020 requiring corporate boards to have at least one director from an underrepresented community, defined as “an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.”\(^{113}\)

Pauli Murray’s “equal power” theory of the Equal Rights Amendment could resolve any ambiguity about the constitutional status of gender-based affirmative action in the face of serious power imbalances. The equal power theory of the ERA evolved from a decade-long quest for a constitutional framework that would abolish sex distinctions in the law that perpetuated women’s inferior status, while preserving those necessary to achieve real equality. Murray’s earlier writings on “Jane Crow,” responding to African American women’s experiences from enslavement to domestic work to breadwinning motherhood, elucidated a vision of constitutional equality that concerned itself, first and foremost, with equal status and equal power, rather than equal treatment in all circumstances.\(^{114}\)

If added to the Constitution, the ERA could legitimize legislative measures to overcome women’s underrepresentation in positions of power. Such a conclusion is consistent with Murray’s broad and ambitious vision of the ERA, which recognized the compatibility of constitutional equality with maternity benefits and valued childcare and household work. Unlike the Equal Protection Clause, the ERA always

\(^{111}\) See, e.g., Appellant’s Opening Brief, Meland v. Padilla, No. 20-15762 (9th Cir. July 22, 2020).

\(^{112}\) See, e.g., Brief of Linda Chavez as Amicus Curiae in Support of the Appellant at 8, Meland v. Padilla, No. 20-15762 (9th Cir. July 29, 2020); Brief of Amicus Curiae Independent Women’s Law Center at 3, Meland v. Padilla, No. 20-15762 (9th Cir. July 30, 2020).


\(^{114}\) See Murray & Eastwood, supra note 69, at 239.
included the reduction of women’s disadvantage. Reasoning from the experience of Black women, the ERA would challenge “a society in dangerous imbalance.”[115] Because Black women “historically have suffered the most violent invasions of that personal dignity and privacy which the law seeks to protect,”[116] their perspective opens up a path for remaking constitutional equality through the critique of power, rather than through the critique of stereotype alone. Today, legislative agendas to overcome women’s underrepresentation, to reduce maternal mortality (especially among Black women), to accommodate the needs of pregnant workers on the job, and to lift women out of the low wages that render them vulnerable to sexual abuse and harassment could benefit from the political legitimacy of a constitutional anchor, as well as from the legal immunity should such measures be challenged on other constitutional grounds.

V. CONCLUSION

Some proponents of constitutionalizing gender equality in the twenty-first century have suggested that the 1970s ERA should be abandoned to make way for the introduction of a newly drafted ERA. A few months before her death, Justice Ruth Bader Ginsburg publicly stated that, while the ERA was the Amendment that she most wanted to add to the Constitution, she wished for a “new beginning” for the Amendment, citing the controversy over late ratifications and rescissions in some states of the ERA that Congress adopted in 1972.[117] In December 2019, law professors Catharine MacKinnon and Kimberlé Crenshaw proposed in the Yale Law Journal Forum a new equality amendment that would explicitly articulate, in its text, the Amendment’s authorization of affirmative action and inclusion of intersectional concerns.[118]

When any new amendment is proposed, it is fair to assume that its legitimacy would depend on it clearing the process articulated in Article

---

[116] Id. at 428.
[117] Justice Ginsburg recently said, “I would like to see a new beginning. I’d like it to start over,” because “a number of States have withdrawn their ratification [of the ERA], so if you count a latecomer [like Virginia] on the plus side, how can you disregard States that said, ‘We’ve changed our minds’?” Interview with Supreme Court Justice Ruth Bader Ginsburg, Searching for Equality: The 19th Amendment and Beyond, Geo. L., at 43:55 (Feb. 10, 2020), bit.ly/2tUgeUw.
V of the Constitution, which would mean adoption by two-thirds of both houses of Congress and ratification by thirty-eight states. In these times of polarization, it is difficult to imagine any proposal meeting these requirements. Assuming that the 1972 ERA, now ratified by thirty-eight states, can be legitimized through congressional action to remove the ratification deadline (a contested matter that is the subject of other writings by this author), this Essay shows how even the 1970s ERA could respond to the concerns of unequal power and intersectionality that have animated the Amendment’s twenty-first-century revival. A close attention to the ERA’s deep legislative history reveals a framer in Pauli Murray, who was way ahead of her time. She envisioned a constitutional foundation for the public policies to reverse centuries of women’s exclusion from power, which are now finally being enacted. When challenged under nineteenth- and twentieth-century ideas of equal protection, a transgenerational ERA completed in the twenty-first century could provide a crucial shield.

An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home

Julie C. Suk†

ABSTRACT: The last few years have seen a renewed push to constitutionalize sex equality in the United States. A generation after the federal Equal Rights Amendment (ERA) failed to be ratified by the requisite number of states, the ERA is on the platform of the 2017 Women’s March on Washington. Oregon added a sex equality guarantee to its state constitution in 2014, joining 22 state constitutions and most constitutions around the world. Feminist coalitions, Hollywood celebrities, and members of Congress are vocally endorsing an ERA revival. Why is an ERA desired now, when judges have interpreted the Fourteenth Amendment to prohibit sex discrimination? Today’s ERA proponents want the Constitution to do something about women’s continued economic disadvantages, the unfair treatment of pregnant women and mothers in the workplace, women’s underrepresentation in leadership positions, and the inadequate responses to violence against women. Yet, the legal functions they attribute to the proposed constitutional guarantee—such as strict scrutiny for sex distinctions—are unlikely to respond to these post-industrial problems of gender inequality. Nonetheless, this Article proposes a new vision of the ERA’s legal function, drawing on the experience of global constitutionalism. Focusing on countries that adopted constitutional amendments on sex equality after the ERA’s failure, this Article shows how the constitutional right to sex equality can promote gender balance in positions of political and economic power, combat practices that disadvantage mothers in the workplace, and shift family care policies to increase fathers’ participation in childcare. In Europe, constitutional

† Professor of Law, Benjamin N. Cardozo School of Law, jsuk@yu.edu. Many thanks to the participants in faculty workshops at Chicago-Kent, Cardozo, University of Cincinnati, and Columbia Law Schools, and the Comparative Constitutional Law Roundtable at James Madison’s Montpelier, and students in Constitutional Law at LUISS-Guido Carli in Rome and Hunter College High School, for reading and reacting to earlier drafts. Thanks also to the Woodrow Wilson Center in Washington, D.C. and the ABA and Second Circuit institutes for high school teachers for inspiring and engaging this paper. I am especially grateful to Jessica Bulman-Pozen, Mathilde Cohen, Erin Delaney, Rosalind Dixon, Liz Emens, David Fontana, Jamal Greene, Stéphanie Hennette-Vauchez, Vicki Jackson, Olatunde Johnson, Jeremy Kessler, David Law, Ruth Rubio-Marín, Serena Mayeri, Ralf Michaels, Russell Miller, Henry Monaghan, Douglas NeJaime, Giovanni Piccirilli, Reva Siegel, Nicholas Stephanopoulos, Susan Sturm, Mila Versteeg, and Joan Williams for their insights, criticisms and encouragement. Thanks also to Emily Foster and Shira Sandler for research and editorial assistance.

Copyright © 2017 by the Yale Journal of Law and Feminism
sex equality amendments since the 1990s go beyond outlawing sex discrimination; these new amendments engender and legitimize legislative efforts to disrupt the traditional gendered division of roles in the family and public spheres. Constitutional courts in Germany and France have construed these amendments as articulating actual equality between women and men as a principle by which the constitutional order’s legitimacy is measured, rather than as an individually enforced right. In the United States, there are some synergies between European constitutional innovations in gender equality and public policies that are emerging piecemeal at the state and local level. States are leading the way in legislating pregnant worker fairness, paid parental leave, and childcare. A motherhood movement and a wide range of actors from across the political spectrum are driving these new laws. These developments can shape an updated vision of constitutional sex equality for the United States. Taking inspiration from global constitutionalism, and recognizing the potential of state constitutionalism, this Article identifies the emerging new infrastructure of social reproduction—rather than antidiscrimination—as the normative core for the twenty-first-century ERA.

INTRODUCTION ................................................................................................ 383
I. THE ERA REVIVAL ...................................................................................... 386
   A. A Popular Constitutional Movement ............................................ 386
      1. Pay Inequity ............................................................................. 388
      2. Unfair Treatment of Pregnant Workers and Mothers .............. 389
      3. Violence Against Women ........................................................ 390
      4. Women’s Underrepresentation in Leadership ......................... 391
      5. Post-Industrial Gender Inequalities ........................................... 391
   B. The Mismatch Between ERA Politics and Law ................................ 393
II. SEX EQUALITY IN GLOBAL CONSTITUTIONALISM ...................................... 399
   A. Sex Equality Provisions and Global Gender Gap Rankings .......... 399
   B. Antidiscrimination ........................................................................... 402
   C. Substantive Equality ....................................................................... 402
   D. Maternity Protection ................................................................... 405
III. FROM ANTIDISCRIMINATION TO ACTUAL EQUALITY: TWO JURISDICTIONS WITH RECENT AMENDMENTS ............................................................... 407
   A. Germany ......................................................................................... 408
      1. The 1950s: Antidiscrimination and Traditional Gender Roles 408
      2. Heightened Scrutiny for Sex Distinctions from the 1970s to the 1990s 409
      3. The “Actual Implementation of Equal Rights”: Amendment, Affirmative Action, and Disparate Impact 412

107
INTRODUCTION

The Equal Rights Amendment (ERA) to the U.S. Constitution was proposed almost a century ago. The ERA would have guaranteed sex equality. A generation after the ERA met its demise in 1982, a new movement led by members of Congress, feminist coalitions, and Hollywood celebrities is now reviving the push for the ERA. Since 1982, the Supreme Court has applied heightened scrutiny to sex distinctions, invalidated laws based on gender stereotypes, and recognized the right to same-sex marriage. Meanwhile, in November 2014, Oregon became the twenty-third state in the United States to add a sex equality provision to its state constitution.1 And, in the intervening century since the ERA entered into American constitutional consciousness, sex equality provisions have been added to many other constitutions throughout the world, notably in European social democratic states. These developments should enrich and change our thinking about whether the ERA is desirable today. They should broaden our imagination about what constitutional sex equality can accomplish.

This Article reconceptualizes the ERA for the twenty-first century as the legal infrastructure of gender equality. The ERA that was adopted by Congress in 1972 primarily prohibited discrimination on grounds of sex by government.

1. See OR. CONST. art. 1, § 46.
But a new constitutional amendment on sex equality ought to go beyond nondiscrimination. For women to gain fully equal status in post-industrial democracies, basic institutions need to be redesigned to alter the status quo where women and men play different and unequal roles in producing the next generation of citizens. Social reproduction—the mechanisms by which a society reproduces itself to enable its survival beyond the present generation of citizens—is a concern for constitutional law. A constitution constitutes a polity that lives on beyond the lifetimes of the constitution-makers. Constitutions contain implicit or explicit plans for how the citizens who make up that polity will be made and raised. For hundreds of years, the survival of modern societies depended on gender-differentiated, unequal roles in economic, political, and family life. A constitutional commitment to gender equality thus must include a commitment to new institutions that enable the polity to continue in the absence of gender-unequal roles. An Equal Rights Amendment for the twenty-first century is best conceptualized as a right to egalitarian institutions rather than a right against discrimination. Proposing an Equal Rights Amendment today can reorient the way we think about constitutional rights more broadly, and the function of constitutional rights in our legal and economic system.

Instead of using the constitutional right to sex equality as a shield against sexist government action, this Article proposes that a constitutional guarantee of sex equality be approached as a foundation for federal and state governmental initiatives to build gender-equal infrastructures. We need not start from scratch; we can take inspiration and ideas from other constitutional orders around the world that have begun to move in this direction through the process of constitutional change. New legislation and government programs that reduce women’s disadvantage have a constitutional valence, due in part to new sex equality amendments added to constitutions in recent memory. Not all constitutional sex equality clauses around the world have bite, but it is worthwhile to closely engage those that do. Sex equality amendments enacted in the late twentieth and early twenty-first centuries in Europe provide examples of constitutional amendments undertaken with consciousness of post-industrial manifestations of gender inequality. They should help us think about the goals of constitutional sex equality in the United States today.

In the United States, the failure to ratify the ERA led legal feminists to pursue change in the 1980s and 1990s through the Equal Protection Clause and anti-discrimination statutes. Their successes produced a sex equality jurisprudence under the Equal Protection Clause and Title VII of the Civil Rights Act that many legal scholars regard as a “de facto ERA.” Thus, it is widely believed that a formal constitutional amendment in the form of an ERA, if adopted today, would not make a significant difference to the law of sex equality, and that it would be merely symbolic. This Article challenges this understanding. A twenty-first-century ERA can significantly disrupt the remaining
manifestations of gender inequality, such as pay inequity; women's economic
disadvantages related to pregnancy, maternity, and caregiving; women's
underrepresentation in positions of economic and political power; and violence
against women. But in order to do so, the legal imagination of the ERA would
have to stretch beyond strict scrutiny, disparate impact, and other familiar
antidiscrimination tools to which ERA proponents continue to cling. European
countries have intervened more robustly on pay inequity, parental leave, early
childhood education, and women's equal representation in leadership, and this
Article explores the relationships between these interventions and the countries' constitutional amendments.

Part I describes the current ERA revival effort, detailing arguments in legal and political discourse about why an ERA is needed now. Part I points out the mismatch between the early twenty-first-century problems that concern today's ERA movement, and the legal solutions that the proponents believe the ERA offers. Identifying this mismatch is important in overcoming some of the resistance to the ERA and in revealing the legal potential of the gender equality right.

In that vein, Part II turns to global constitutionalism. ERA proponents often note that the vast majority of the world's constitutions explicitly guarantee sex equality. Part II raises the questions of whether, why, and how sex equality in foreign constitutions should matter to the U.S. trajectory. In international rankings of gender equality, the United States does better than most countries with sex equality in their constitutions, but we still lag behind many European countries. Most European countries have guaranteed sex equality in their constitutions since World War II, and several others amended their constitutions in the past twenty-five years, responding to the more recent manifestations of gender inequality that most concern today's ERA movement. Part II identifies three types of constitutional provisions in global constitutionalism that concern women's status: nondiscrimination guarantees that name sex as a prohibited ground; additional sex equality provisions that refer to some form of substantive equality (such as "actual" equality or a duty to promote women's equal access to positions of power); and motherhood clauses, which declare the state's duty to protect mothers.

Part III zeroes in on two countries that amended their constitutions to clarify the meaning of sex equality after the United States' ERA failed in 1982: Germany and France. In Germany and France, amendments in 1994 and 1999 transformed constitutional sex equality—from formal to substantive, and from an individual constitutional right to a structural principle that legitimizes the constitutional political order. These amendments were primarily concerned with affirming the legitimacy of state efforts to promote women's advancement in politics and employment, but they have also been broadly construed to speak to the role of the state in transforming men and women's social functions in the
family. Constitutional change occurred through litigation, amendment, and legislation invoking the sex equality provision.

Part IV draws out some common threads between global gender constitutionalism and state constitutional law in the United States. Almost half of the United States’ state constitutions have provisions that explicitly commit to sex equality or non-discrimination on grounds of sex. Some state courts have interpreted these provisions as requiring strict scrutiny, disparate impact liability, and equal treatment by non-state actors. In addition, states have begun to adopt legislation on paid parental leave, pregnancy accommodation, equal pay, and other policy issues at the core of the ERA movement’s agenda. While these legislative initiatives have not been framed in legal or political discourse as enforcements of the ERA, Part IV proposes a constitutional framing. State courts have not interpreted state ERAs to go much beyond federal equal protection sex jurisprudence, but their legislatures are adopting paid parental leave regimes, rights to early childhood education, equal pay laws that reach beyond pay discrimination, and laws that protect flexible work arrangements. Whatever their purpose, these laws are forming the twenty-first-century infrastructure of social reproduction: they enable children to be raised without depending on the incumbent unequal infrastructure of female child-rearers and male breadwinners. The developing infrastructure responds to the shared concerns of twenty-first-century women’s constitutionalism in post-industrial societies around the world.

Part V considers what is gained and lost by giving constitutional status to the new gender-equal form of social reproduction required to achieve post-industrial sex equality. A constitutional amendment can give coherence to these piecemeal legislative initiatives, and nudge lawmakers, lawyers, and judges to build the other necessary pieces of this infrastructure.

I. THE ERA REVIVAL

A. A Popular Constitutional Movement

ERA bills have been reintroduced in Congress every year for the last few years with the sponsorship of Congresswoman Carolyn Maloney. New discussions of the Equal Rights Amendment have come up, not only in Congress

and political rallies, but in conversations with Supreme Court Justices, a new documentary and book by advocates, and even in Oscar acceptance speeches. The Guiding Vision and Definition of Principles for the January 2017 Women’s March on Washington includes “an all-inclusive Equal Rights Amendment to the U.S. Constitution.” In a recent interview at the National Press Club, Justice Ginsburg was asked what amendment she would add to the Constitution. She replied:

If I could choose an amendment to add to this Constitution, it would be the Equal Rights Amendment. It means that women are people equal in stature before the law. That’s a fundamental constitutional principle. I think we have achieved that through legislation, but legislation could be repealed, it can be altered. I mentioned Title VII of the Civil Rights Act, and the first one was the Equal Pay Act. But that principle belongs in our Constitution and is in every constitution written since the Second World War. So I would like my granddaughters, when they pick up the Constitution, to see that that notion, that women and men are persons of equal stature, I’d like them to see that that is a basic principle of our society.

In 2014, many women’s organizations, including the National Organization for Women (NOW), the National Women’s Political Caucus, and Feminist Majority, formed the ERA Coalition, devoted to passage and ratification of the ERA.


8. When Patricia Arquette won an Academy Award for Best Supporting Actress in 2015, she ended her acceptance speech with the following: “To every woman who gave birth to every taxpayer and citizen of this nation, we have fought for everybody else’s equal rights. It’s our time to have wage equality once and for all and equal rights for women in the United States.” See Lauren Moraski, Patricia Arquette gives rousing Oscars speech, CBS NEWS (Feb. 22, 2015), http://www.cbsnews.com/news/patricia-arquette-gives-rousing-oscars-speech/.


10. See Justices Scalia and Ginsburg, supra note 5.

The current ERA movement is primarily concerned with the difficulties that women continue to face in the United States, despite the fact that the Equal Protection Clause of the Constitution has been interpreted to prohibit sex discrimination, and many statutes also prohibit sex discrimination. These problems include pay inequity, violence against women, employers’ failures to accommodate pregnancy, and the general lack of public support for childcare, which negatively affects working mothers. The movement is also concerned with women’s underrepresentation in positions of political and economic power. ERA proponents argue that putting sex equality into the text of our Constitution, in the form of the ERA, would have a positive impact on all these fronts.

In providing an overview of ERA proponents’ understanding of these problems, I rely on a few main sources: press releases by the members of Congress who have supported the ERA, the ERA Coalition President Jessica Neuwirth’s book *Equal Means Equal*, 12 Kamala Lopez’s documentary film by the same name, 13 and documents available on the ERA Coalition’s website. 14 Meryl Streep sent Neuwirth’s book to every member of Congress in 2015. Kamala Lopez’s documentary presents itself as the rallying cry of the new ERA movement, and was produced by Patricia Arquette, whose Oscar speech and media appearances have called for the ERA. 15 *Equal Means Equal* has been shown at Women’s Equality Day events across the country, including at a gathering of UN Women.

1. Pay Inequity

The persistence of women’s unequal pay, suggesting the inadequacy of existing antidiscrimination and equal pay laws, is a central issue for the ERA campaign. Congresswoman Carolyn Maloney has invoked the Supreme Court’s 2011 decision in *Wal-Mart v. Dukes* 16 as an example of a problem that the ERA would address: “The Wal-Mart case decided by the Supreme Court . . . is a classic example of how far attitudes must still come. The facts of the case support the view that over a million women were systematically denied equal pay by the world’s largest employer.” 17 The question in *Wal-Mart* was whether all the women who had been denied promotions at Wal-Mart could proceed in one class action lawsuit, despite the varying facts surrounding their claims. The Supreme Court held that it was not a viable class action lawsuit.
Court answered in the negative. The Court's decision to de-certify the class was taken by ERA proponents as a symptom of U.S. law's inadequate commitment to eradicating pay and promotion practices that disadvantage women. In the movement's documentary film, *Equal Means Equal*, the Wal-Mart case, along with the Supreme Court's decision in *Ledbetter v. Goodyear*, are invoked as evidence of the need for the ERA.

2. Unfair Treatment of Pregnant Workers and Mothers

ERA proponents also highlight employers' unfair treatment of pregnant workers, which is often permitted by law. The documentary *Equal Means Equal* recounts the stories of pregnant women who asked to carry water bottles on the job, to be relieved of their duty to lift heavy objects, or for other accommodations from their employers. Many of these women were fired or involuntarily put on unpaid leave. The failure to accommodate pregnant workers is not necessarily illegal. As the recent Supreme Court case *Young v. UPS* affirmed, pregnant workers are entitled to accommodations only to the extent that the employer accommodates other workers similarly situated in their incapacity to work. Employers are not required to give any special accommodations to pregnant workers that they do not give to other disabled workers, and employers may deny pregnant workers accommodations that they provide to a subset of disabled workers for special reasons.

ERA proponents want the law to require the accommodation of pregnant workers, and they believe the ERA could play a role in doing so. As Neuwirth says, "The ERA could create a right to sex equality that in the context of pregnancy recognizes that women and men have equal rights to work and have children at the same time." Neuwirth suggests that the Equal Rights Amendment "could change the legal landscape... What this might mean in the context of pregnancy is recognition... that women and men have biological differences and that the workplace cannot be structured solely around the biology of men, ignoring the biology of women." Properly construed, the ERA would make it:

impossible to consider the accommodation of pregnancy in the workplace as any kind of "preferential treatment" or discrimination

---

18. See *Ledbetter v. Goodyear Tire Co., Inc.*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. Although *Ledbetter* was reversed by a statute that makes each discriminatory paycheck a separate adverse employment action, the fact that the Supreme Court ruled against *Ledbetter* under Title VII is invoked as evidence of the need for a more robust expression of commitment to sex equality.

19. *Young v. United Parcel Servs., Inc.*, 135 S. Ct. 1338, 1350 (2015) ("We doubt that Congress intended to grant pregnant workers an unconditional most-favored-nation status.").

20. *Neuwirth*, supra note 7, at 34.

21. *Id.* at 49.
against men. Rather, the failure to accommodate pregnancy would be rightly recognized as a form of discrimination against women that disadvantages them in the workplace and violates their right to sex equality.22

3. Violence Against Women

Another major theme of the ERA movement is the persistence of violence against women—and the law’s inadequate response to it. The film Equal Means Equal spends a significant amount of time documenting violence against women. One type of legal injustice is the harsh criminal punishment of battered women who kill their batterers in alleged self-defense. When a battered woman’s self-defense argument does not succeed, even in the face of ample evidence of the man’s past repeated violence against the woman, the woman may be sentenced to decades of imprisonment. The film suggests that law enforcement inadequately prevents, prosecutes, and punishes violence against women. By contrast, law enforcement excessively prosecutes and punishes women who attempt to prevent or end the violence that they have suffered.

Similarly, government does too little to prevent or punish the sex trafficking of young girls, which persists throughout the world, including in the United States. The documentary tells the stories of teenage girls who have been kidnapped and forced into prostitution. Some of them have been prosecuted for prostitution, while their pimps have managed to continue their activities on the streets, escaping prosecution and punishment.

The book Equal Means Equal also devotes some attention to violence against women, including the Supreme Court’s decisions related to the issue. In 2000, the Supreme Court struck down the private civil remedy provision of the Violence Against Women Act (VAWA).23 The Court held that Congress lacked constitutional authority under the Commerce Clause or under Section Five of the Fourteenth Amendment to authorize individuals to sue alleged perpetrators of gender-motivated violence in federal court.24 In that particular case, the Court’s holding meant that a female college student who had been raped by a fellow student on a college campus could not pursue a remedy.

The Supreme Court’s decision in Castle Rock v. Gonzales is also a significant target of ERA proponents. In Castle Rock, a woman unsuccessfully sued her town for its police force’s failure to enforce a restraining order against her husband.25 Because the restraining order was not enforced, the violent husband succeeded in abducting and murdering their three children. Under these circumstances, the Supreme Court found no violation of the woman’s

22. Id.
24. Id. at 617-18, 625-27.
An Equal Rights Amendment for the Twenty-First Century

The ERA Coalition suggests that "[a]n ERA could require that states meet Constitutional sex equality standards in the enforcement of their laws against gender violence and expand the federal power to legislate against these crimes."  

4. Women’s Underrepresentation in Leadership

A video that was a precursor to the Equal Means Equal documentary illustrates "[t]he Situation Today Without the ERA," noting that "[w]omen are 52% of the population but only 17% of Congress," that "[w]omen are 46.5% of the workforce but only 12% of its corporate officers," and that "[w]omen are 55% of Hollywood’s audience but only 9% of its directors." Women’s underrepresentation in positions of decision-making power is another inequality that concerns ERA proponents.

An August 2015 report of Congress’s Joint Economic Committee, issued on the ninety-fifth anniversary of the Nineteenth Amendment, lists the "[e]conomic challenges facing women today." First on the list is the fact that "[a]lthough women hold over half of all professional-level jobs, they are underrepresented in leadership positions, holding about 5 percent of CEO positions and only 17 percent of board seats at Fortune 500 companies." In addition to pay inequities, the list also includes the lack of paid leave for new mothers and the earnings gap between mothers and women without children. In 2007, Representative Carolyn Maloney directly linked the underrepresentation of women in government and business to her support for the Equal Rights Amendment.

5. Post-Industrial Gender Inequalities

The issues on the twenty-first-century ERA agenda are post-industrial manifestations of gender inequality. All of these problems—pay inequity, failure to accommodate pregnancy and motherhood in the economic sphere, violence against women, underrepresentation of women in leadership—arise in the context of the transformation of gender roles that evolved throughout the twentieth century. When the U.S. Constitution was adopted, and even at the moment when the Nineteenth Amendment empowered women to vote, women

26. Why We Need an Equal Rights Amendment, supra note 14.
and men occupied traditional roles and functions in creating, raising, and sustaining the next generation of American citizens. The industrial economy allocated market work to men, and the unpaid caregiving work of raising the next generation of workers was left to women. In economist Heather Boushey’s view, the “American Wife” was America’s silent partner, helping to grow the American economy by supporting her breadwinning husband and raising children. Or, as Anne-Marie Slaughter puts it, “women at home” was America’s “infrastructure of care” in past generations.

But throughout the twentieth century, these roles eroded with deindustrialization and the emergence of post-industrial economies with large technology and service sectors. These economies depend on the market work of women. By the late twentieth century, the traditional assumption that one parent (the mother) was available full-time to raise children, fully supported by a (male) breadwinner, no longer held. By 1970, around the time that Congress adopted the ERA, 30% of women were in the workforce; today, 59% are. Among mothers with children under the age of eighteen, 70% participate in the labor market. Most families with children need two incomes to afford housing, healthcare, education, and other basic needs. As of 2006, two-paycheck couples were more numerous than male-breadwinner households were in 1970. In addition, nearly 40% of families with children have a sole female breadwinner. Fewer than one-third of children in 2012 lived in a family with a stay-at-home caregiver. As Arlie Hochschild has noted, “[w]omen’s move into the economy is the basic social revolution of our time.” What this means is that the male-breadwinner, female-caregiver family is no longer a viable or feasible structure for raising the next generation of U.S. citizens. The twenty-first-century gender inequalities that form the core concerns of the current ERA movement are symptoms of this incomplete economic transition. Throughout the twentieth century, the male-breadwinner, female-caregiver family slowly declined as a structure for raising the next generation, as an increasing number of mothers

34. Id.
37. See Boushey, supra note 30, at 7.
38. Id., fig. 1.1.
became breadwinners. While the twenty-first-century parent is typically both caregiver and breadwinner, our institutions have not adapted to this new reality. Pay inequity, unfair treatment of pregnant workers, violence against women, and women's underrepresentation in leadership illustrate the gap between our institutions and the reality we now inhabit. A constitutional response is appropriate.

Take, for instance, the problems of pay inequity and unfair treatment of pregnant workers and working mothers; these issues arise because of the change in the roles of men and women in social reproduction. Paying men more than women may have made sense in an economic system that assumed that men were breadwinners and women were dependent caregivers. Men had to make a "family wage." Not accommodating pregnancy nor paying for parental leave also made sense in an industrial economy in which women did not work and raise children at the same time. But now the post-industrial economy depends on women's participation in the labor market, including during women's childbearing and childrearing years. Twenty-first-century economies depend on women's work, and thus leave a gap in the functions covered in the past by the American Wife. A system-wide solution is needed.

The violence against women highlighted by ERA activists can also be understood as a problem with post-industrial specificity. Violence against women is in part a reaction to the threats to masculinity occasioned by the late-twentieth-century dynamics of post-industrial economies. Deindustrialization and the decline of manufacturing are linked to the decline of the man's dominion within the household as the exclusive breadwinner. Deindustrialization brought about higher levels of male unemployment, and the accompanying downward mobility, stress, and demoralization are associated with higher incidence of violence against women. The rise of sex trafficking is also explained by the profitability of an underground sector that has grown in this late-twentieth-century economic context.

B. The Mismatch Between ERA Politics and Law

For those convinced of the need for law to intervene more robustly on these post-industrial gender inequality problems, it is not obvious that a constitutional amendment would be effective or appropriate, even if it were politically feasible. Many U.S. constitutional law scholars believe that the Supreme Court’s approach to sex discrimination under the Equal Protection Clause has produced a "de facto
ERA.43 As feminist law professor Mary Anne Case observes, “the current constitutional law of sex discrimination is almost exactly what E.R.A. supporters in the 1970s hoped for from the E.R.A.”44 At the same time, Professor Reva Siegel has suggested that the “de facto ERA” achieved through Equal Protection jurisprudence reflects compromises made by feminist ERA proponents in efforts to gain public support in the face of a growing opposition movement.45 It is thus important to map out and evaluate current ERA proponents’ understandings of why a constitutional amendment is needed now, and how it would work as a legal intervention.

Today’s ERA proponents envision the ERA as doing three things that current Equal Protection sex equality doctrine does not do. First, they propose that the ERA would require strict scrutiny for sex classifications in the law, such that sex distinctions would be treated just like race distinctions facing an Equal Protection challenge.46 Second, ERA proponents believe that the ERA would invalidate government practices that have a disparate impact on women.47 Third, they believe that the congressional power to enforce the ERA would sweep more broadly than its analogue in Section Five of the Fourteenth Amendment,48 and would thus empower Congress to legislate more robustly on matters like violence against women.

The difficulty is that there is nothing in the text of the ERA that obviously requires strict scrutiny, disparate impact, or expanded congressional authority any more so than does Equal Protection. The proposed ERA, which could become law if ratified by three more states,49 reads in relevant part as follows:


44. See Mary Anne Case, The Supreme Court Has Delivered on Many of the ERA’s Promises, N. Y. TIMES ROOM FOR DEBATE (Sept. 8, 2016), http://www.nytimes.com/roomfordebate/2016/09/08/was-the-eras-defeat-really-a-loss-for-feminism/the-supreme-court-has-delivered-on-many-of-the-eras-promises.


46. Congresswoman Maloney’s explanation of the ERA on her website reads: “This critical amendment would guarantee the equal rights of men and women by: make[sic] sex a suspect category subject to strict judicial scrutiny, clarifying the legal status of sex discrimination for the courts. This would prohibit sexual discrimination in the same way we have prohibited discrimination on the basis of race, religion, and national origin.” See Carolyn B. Maloney, Equal Rights Amendment, https://maloney.house.gov/issues/womens-issues/equal-rights-amendment.

47. See NEUWIRTH, supra note 7, at 19-31.

48. See Maloney, supra note 46; see also NEUWIRTH, supra note 7, at 68.

49. By the 1982 deadline for ratification of the ERA by the states, only 35 states had ratified the constitutional amendment. Ratification by 38 states is required to amend the Constitution. ERA proponents believe that ratification by three additional states, accompanied by congressional action extending the 1982 deadline, is all that is needed to add the ERA to the Constitution. The theory is that, since it was valid for Congress to extend the ERA deadline in 1978, it would be valid for Congress to extend it again now. See THOMAS H. NEALE, CONG. RESEARCH SERV., THE PROPOSED EQUAL RIGHTS AMENDMENT: CONTEMPORARY RATIFICATION ISSUES 13 (2014); Allison L. Held, Sheryl L. Herndon & Danielle M. Stager, The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States, 3 WM. & MARY J. WOMEN & L. 113 (1997); see also Representative Robert E. Andrews,
Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. 50

The U.S. Supreme Court applies intermediate, not strict scrutiny to sex classifications under the Equal Protection Clause, and refuses to recognize disparate impact liability under Equal Protection. Courts embracing the justifications for these approaches could easily apply the same rationale to enforcing the Equal Rights Amendment. Furthermore, the U.S. Supreme Court has taken a limited view of Congress’s power to enforce the Equal Protection Clause. In Morrison v. United States, the Court held that Congress did not have the power to enact the Violence Against Women Act’s civil rights remedy provision, which permitted victims of gender-motivated violence to sue their alleged perpetrators in federal court for civil damages. 51 The Court held that Congress had to be proportionate and congruent in exercising its enforcement power, and thus could not strike too broadly at private conduct that would not itself violate the Equal Protection Clause. Courts could easily take the exact same approach to the ERA, particularly since Section 1 of the ERA only prohibits abridgment of equal rights by the federal and state governments, and not by private actors.

For these reasons, the proposed ERA will not require a different approach to strict scrutiny, disparate impact, or congressional enforcement authority than that already present in the de facto ERA as established through Equal Protection sex equality jurisprudence. Of course, the mere fact that the ERA would create a new and separate textual source for sex equality reasoning would at least permit a different approach to strict scrutiny, disparate impact, or congressional enforcement authority if courts were looking to justify one. But this possibility alone cannot be enough to motivate a formal constitutional amendment. After all, those who are zealously committed to strict scrutiny, disparate impact, and expanded enforcement authority against sex discrimination can continue to litigate cases that urge the Supreme Court to overrule its precedents rejecting strict scrutiny for sex classifications or disparate impact liability under Equal


50. See S.J. Res. 16, 114th Cong. (2015). This text is identical to the 1972 text that was adopted by the requisite two-thirds majorities of Congress and then ratified by thirty-five states.

Protection. It is imaginable that, one day, a Supreme Court with a different composition might take a slightly broader view of congressional enforcement power under the Fourteenth Amendment. In fact, the Court has arguably expanded the Commerce Clause in cases decided after *Morrison*, so an expansion of Fourteenth Amendment Section Five power is plausible.

Of the three legal reforms that the ERA is imagined to require, one of them—strict scrutiny for sex classifications—may introduce barriers to the ERA movement’s political agenda. In recent years, strict scrutiny for racial classifications has enabled courts to dismantle or limit race-based affirmative action and other efforts by public institutions to achieve racial integration or diversity. Laws and policies that take race into account—even to achieve diversity—are suspect and subject to rigorous justification, leading to the demise of many worthwhile experiments in achieving racial balance and integration in public schools. ERA proponents point out the underrepresentation of women in leadership positions, but strict scrutiny would actually make it harder than it is today under intermediate scrutiny to adopt policies that consciously promote gender balance or women in leadership. For instance, the recent laws enacted in European countries that require gender parity on corporate boards of directors would be suspect under strict scrutiny and highly unlikely to survive. Strict scrutiny would not only invalidate gender quotas, but would also make it easier to challenge and end other gender-conscious programs designed to reduce women’s unique disadvantages and injuries.

Consider, for instance, the decision by a California court to apply strict scrutiny to gender classifications under its state equal protection clause. Note that it did not need a sex-based ERA to apply strict scrutiny to sex; it just used state equal protection. More importantly, applying strict scrutiny to sex meant invalidating the policy of providing state funding to battered women’s shelters that only admitted women victims of domestic violence and their children. In the litigation, male plaintiffs, including one who claimed to be beaten by his wife and was denied access to a battered women’s shelter, brought suit. It is not obvious that a commitment to gender equality should bar women-only domestic

52. See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that Congress could regulate the local intrastate cultivation and use of marijuana under the Commerce Clause).

53. See, e.g., *Fisher v. University of Texas at Austin (Fisher I)*, 133 S. Ct. 2411 (2013); *Fisher v. University of Texas at Austin (Fisher II)*, 136 S. Ct. 2198 (2016). *Fisher II* reinforced strict scrutiny as the standard to apply to use of racial classifications in university admissions. Four Justices joined the opinion holding the University of Texas’s race-conscious affirmative action policy lawful, whereas three dissenting Justices would have reversed the Fifth Circuit’s decision upholding the policy. In the absence of five Justices voting to reverse the lower court’s decision, the race-conscious policy survived strict scrutiny in this case. See also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). For a critique of the American use of heightened scrutiny for race- or sex-based quotas, see generally Julie C. Suk, *Quotas and Consequences: A Transnational Re-evaluation*, in *PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW* 228 (Deborah Hellman & Sophia Moreau eds., 2013).

54. See *supra* text accompanying notes 27-29.

55. See *infra* text accompanying notes 147-148.

violence shelters. One can see how male victims of domestic violence should have access to safe spaces, but one can also see how, given the unique psychological issues faced by battered women, men's presence might undermine their sense of safety. Strict scrutiny would hamper public policy experimentation to address these complex problems in a nuanced fashion, as it has in the context of policy responses to racial injustice and inequality. The strict scrutiny desired by 1970s ERA activists was formulated before strict scrutiny became an anti-affirmative action tool, and it may be less desirable today.

The new text of the ERA, introduced in 2013, appears to be a closer fit to the ERA movement's political agenda. This is in part due to the significant substantive textual differences between the new text and the Equal Protection Clause. But more importantly, the new ERA text, because it is new, can have meanings and interpretations that are liberated from the meanings associated with the legislative history of the 1972 congressional adoption and ratification by thirty-five states. Whatever goals were desired in 1972 by the ERA's framers, or compromised in the ratification process through 1982 to the present, would not determine the meaning of a new ERA. The new text 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. 57

Professor Catharine MacKinnon has pointed out the legal benefits of the new text. 58 The new ERA bill is more expansive than the 1972 text in that the first sentence declares that women have equal rights with no mention of abridgment by a state actor. The second sentence prohibits abridgment by a state actor. But because the first sentence generally declares the right, it is like the Thirteenth Amendment's declaration, "Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." 59 The Supreme Court has not imposed a state action requirement in interpreting the scope of Thirteenth Amendment rights, particularly in its jurisprudence interpreting the scope of Congress's authority to regulate private conduct to enforce the ban on slavery. 60 A sentence declaring rights separately from the

59. U.S. CONST. amend. XIII.
60. See George Rutherglen, State Action, Private Action, and the Thirteenth Amendment, 94 VA. L. REV. 1367, 1367 (2008) ("Unlike its close cousin, the Fourteenth Amendment, the Thirteenth Amendment restrains not only government actors, but also private individuals. Private forms of 'involuntary servitude' violate the self-executing provisions of the Amendment, and private attempts to
sentence prohibiting abridgment by state action opens up the possibility of enforcing the right against private actors, and expanding the scope of legislative enforcement power to reach more broadly across private conduct than does legislative enforcement power under Section Five of the Fourteenth Amendment.\textsuperscript{61}

The new version also introduces concurrent state power to enforce the federal ERA within a federal constitutional amendment. There is no other similar grant of enforcement power in the Constitution currently in force.\textsuperscript{62} Nonetheless, this clause could carry significance if a conflict were to arise between state legislative efforts to promote gender equality (for example, gender quotas in state political party committees\textsuperscript{63} or special accommodations for pregnant workers) and a federal judicial construction of the Equal Protection Clause scrutinizing such sex classifications. A federal constitutional amendment authorizing the state to enforce sex equality would cast the state statute as an enforcement of federal constitutional law against a federal constitutional challenge emanating from a different provision. I shall return to the question of state enforcement of post-industrial gender equality in Part IV.

The new ERA text provides a better legal apparatus for the policy goal of reducing post-industrial gender inequality. By firmly declaring women’s equal rights separately from the sentence prohibiting their abridgment on account of sex by the state, the new text shares features in common with several constitutions around the world, in which clauses prohibiting sex discrimination are independent from clauses guaranteeing women’s equality. In some constitutional democracies, these clauses are enforced in constitutional litigation, or otherwise viewed as normative legal sources that nudge legislative action. The new ERA text lends itself to a dialogue with sex equality amendments in other constitutions, particularly those that emerged in response to post-industrial gender inequalities and supported policy agendas similar to those at the center of today’s American ERA movement.

\textsuperscript{61} See discussion of United States v. Morrison, supra text accompanying notes 23 to 24 and 51 to 52.

\textsuperscript{62} The Eighteenth Amendment, which prohibited the manufacture, sale, or transportation of intoxicating liquors within the United States, included Section 2, which provided that “Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.” U.S. CONST. amend. XVIII (repealed by U.S. CONST. amend. XXI (1933)). After its repeal, no other constitutional right or declaration involves this dual delegation.

\textsuperscript{63} See infra Section IV.B.4.
II. SEX EQUALITY IN GLOBAL CONSTITUTIONALISM

A. Sex Equality Provisions and Global Gender Gap Rankings

Since ERA proponents frequently argue that the United States is virtually alone in the world in its failure to constitutionalize sex equality, some attention to foreign constitutions' sex equality provisions and the status of women in those societies is informative. The World Economic Forum (WEF)'s annual Global Gender Gap rankings measure the gender gap in 144 countries by various indicators relevant to post-industrial gender inequality: women's economic participation rates, men's and women's wages for comparable work, representation of women in political institutions, and women's health and education levels. Year after year, Norway consistently ranks in the top three for closing the gender gap, but Norway's constitution makes no mention of sex or gender equality. So we can't conclude that constitutionalizing sex equality by text is necessary to reduce gender gaps. At the other end of the spectrum, Chad ranks 140th, very close to the bottom of the WEF's Global Gender Gap Rankings. However, the constitution of Chad declares: "Chadians of both sexes have the same rights and same duties. They are equal before the law." So it is also wrong to conclude that constitutionalizing sex equality by text is sufficient to achieve gender-equal outcomes. Constitutional sex equality provisions are neither necessary nor sufficient to reducing gender gaps.

So, what is the point of global constitutional inquiry? Recent efforts to assess the comparative performance of constitutional clauses in a scientific manner raise questions about whether generalizable normative insights can be drawn from the effects of constitutions across such different national, cultural, economic, and political contexts. My purpose here is somewhat different. I collect and categorize snapshots of the textual clauses in constitutions that explicitly speak to gender equality or inequality, and then provide a deeply textured portrait of the evolving meaning of constitutional sex equality in legal and political discourse. I focus on the examples that could best illuminate the issues that most concern American ERA proponents today. How have the recent constitutional changes abroad been linked in legal reasoning to these problems? If any transformative moves have been made outside of the United States, can such measures be usefully translated for the American constitutional trajectory? I focus on the constitutional regimes that have taken their gender equality clauses seriously, and thoughtfully worked through their evolution in debates at the moment of adoption, through jurisprudence interpreting the clauses, and revision

65. CHAD CONST. art. 13. All foreign constitutions hereinafter quoted and cited in English are available from the Constitute Project at https://www.constituteproject.org/.
66. See, e.g., ASSESSING CONSTITUTIONAL PERFORMANCE (Tom Ginsburg & Aziz Huq eds., 2016).
through later constitutional amendments. The approach here is translation, not transplantation; engagement, not immersion. There are obvious differences in historical and cultural context between the United States and other constitutional orders, including, very importantly, foreign constitutions' conscious commitment to positive rights, including social and economic rights. Nonetheless, engaging law that we cannot possibly transplant can be useful in helping us to deepen and refine our understanding of what is desirable, which, in turn, can shift the way we inhabit and engage what is possible within our own constitutional boundaries. Furthermore, our ERA was first proposed almost a century ago, and then came closest to adoption almost a half-century ago, at a moment when the post-industrial shift in traditional gender roles was in an earlier stage. More recent constitutional activity in similar post-industrial democracies can serve as a sounding board for constitutional modernization in the United States.

The United States ranks forty-fifth out of 144 countries in 2016. As noted in Part I, the American ERA activists tend to be primarily concerned with gender gaps that can be described as post-industrial, which makes high-income countries most relevant for comparison. In the WEF's ranking of fifty high-income countries, the United States ranks twenty-sixth. I examined the sex equality-related provisions of the high-income countries that ranked higher than the United States in the WEF 2016 gender equality index: Iceland, Finland, Norway, Sweden, Ireland, Slovenia, New Zealand, Switzerland, Germany, the Netherlands, France, Latvia, Denmark, United Kingdom, Estonia, Belgium, Lithuania, Barbados, Spain, Portugal, Luxembourg, Canada, Bahamas, Poland, and Trinidad and Tobago. In examining the constitutions of these countries, many of which are members of the European Union, I identified three types of constitutional provisions that address sex or gender equality or inequality.

The first is a guarantee of equality without discrimination on various grounds. These guarantees are roughly equivalent to the U.S. Constitution's Equal Protection Clause, but I noted those equality or nondiscrimination guarantees that explicitly name sex or gender as a prohibited ground of distinction or discrimination. The second type of provision guarantees equality using language other than antidiscrimination. These are essentially substantive equality clauses, but substantive equality is defined differently across different constitutions. Some use the term "equal access by men and women," others "factual equality" or "equal treatment" or "equal rights." Some, but not all, of these provisions were amendments that were added in the last three decades to authorize positive measures to reduce gender inequality, such as gender quotas for decisionmaking positions. The third type of provision is a special protection for mothers. From the U.S. perspective, these provisions might not register as equality provisions, since American legal feminists historically fought to

eradicate such protections. At the same time, current ERA activists have suggested that the ERA would enable pregnant worker accommodations. Thus, the constitutional provisions in other countries most relevant to this problem must be examined. Indeed, in many countries, the protection of mothers—through paid maternity leave, pregnancy accommodations, protections from termination of employment during pregnancy, and childcare rights—plays a significant role in enabling women’s access to employment. It is worth noting, from a gender equality perspective, those countries which have constitutionalized the special protection of mothers.

Table 1. WEF 25 High-Income Countries with Narrowest Gender Gaps: Textual Provisions in Constitutions

<table>
<thead>
<tr>
<th>Country</th>
<th>Sex Equality or Substantive Equality for Women</th>
<th>Maternity or Pregnancy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Iceland</td>
<td>Art. 65</td>
<td>No</td>
</tr>
<tr>
<td>Finland</td>
<td>Ch. 2, § 6</td>
<td>Ch. 2, § 6</td>
</tr>
<tr>
<td>Norway</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Sweden</td>
<td>Ch. 2, Part 4, art. 13</td>
<td>Ch. 1, art. 2</td>
</tr>
<tr>
<td>Ireland</td>
<td>No</td>
<td>Art. 45.2.i</td>
</tr>
<tr>
<td>Slovenia</td>
<td>Art. 14</td>
<td>No</td>
</tr>
<tr>
<td>New Zealand</td>
<td>Art. 21.1(a)</td>
<td>No</td>
</tr>
<tr>
<td>Switzerland</td>
<td>Art. 8.1 &amp; 8.2</td>
<td>Art. 8.3 &amp; 8.4</td>
</tr>
<tr>
<td>Germany</td>
<td>Art. 3.2 &amp; 3.3</td>
<td>Art. 3.2</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Art. 1</td>
<td>No</td>
</tr>
<tr>
<td>France</td>
<td>Preamble, § 3 (1946) Art. 1</td>
<td>Preamble § 11 (1946)</td>
</tr>
<tr>
<td>Latvia</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Denmark</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>United</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Kingdom</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Estonia</td>
<td>Art. 12</td>
<td>No</td>
</tr>
<tr>
<td>Belgium</td>
<td>Art. 10</td>
<td>Art. 11bis</td>
</tr>
<tr>
<td>Lithuania</td>
<td>Art. 29</td>
<td>No</td>
</tr>
<tr>
<td>Barbados</td>
<td>Ch. III, art. I</td>
<td>No</td>
</tr>
<tr>
<td>Spain</td>
<td>§ 14</td>
<td>No</td>
</tr>
<tr>
<td>Portugal</td>
<td>Art. 13.2</td>
<td>Art. 9h</td>
</tr>
</tbody>
</table>

A paradigmatic example of a general equal protection clause that prohibits sex discrimination along with many other prohibited grounds, can be found in the Section 6 of the Finnish constitution: “Everyone is equal before the law. No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person.” Another model is the stand-alone guarantee of equal rights for men and women (and not for other groups or categories), which is assumed to prohibit discrimination on grounds of sex. In France, for example, the 1946 Preamble’s guarantee to women of “equal rights to those of men in all spheres” has been understood to prohibit discrimination based on sex.

C. Substantive Equality

The line between these non-discrimination provisions, on the one hand, and substantive equality provisions, on the other, is not always clear. Many constitutions simply guarantee equality, or equal rights, or equal treatment to men and women, which can be interpreted as merely a prohibition of sex discrimination or as a guarantee of substantive equality. This ambiguity is significant from the U.S. perspective because the new 2013 House version of the ERA states that “women shall have equal rights in the United States . . . ,” followed by the promise that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.” In Iceland, which ranks first in the Global Gender Gap Rankings this year, Article 65 of the constitution provides: “Everyone shall be equal before the law and enjoy human rights irrespective of sex, religion, opinion, national origin, race,
colour, property, birth or other status. Men and women shall enjoy equal rights in all respects." 73 Similarly, the Belgian constitution guarantees "equality between women and men." 74 Article 1 of the French constitution notably does not prohibit sex distinctions; it guarantees "the equality of all citizens before the law, without distinction of origin, race, or religion." 75 The French Preamble of 1946 states, "The law guarantees women equal rights to those of men in all spheres," 76 and it has been read not only to prohibit sex discrimination, but also to justify legislative efforts to combat women’s exclusion. 77 Similarly, the German constitution says, "Men and women shall have equal rights." 78 The constitution of Luxembourg says, "Women and men are equal in rights and duties," 79 and the Netherlands’ constitution frames the right in terms of equal treatment: "All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted." 80 Some constitutional courts have read these equality guarantees as merely embodying a formal equality ban on sex discrimination, whereas others have read them as expressing an aspiration to substantive equality.

Nonetheless, some of these constitutions provide further clarification of the meaning of these equality guarantees by additionally addressing substantive equality. Germany provides a notable example, with an amendment that was debated and adopted in the process of German reunification in 1994. Before 1994, Articles 3(2) and 3(3) stated, "Men and women shall have equal rights," and "No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland, and origin, faith, or religious or political opinions." 81 Then, in 1994, a sentence was inserted in Article 3(2) that reads, "The state shall promote the actual implementation of equal rights for men and women and take steps to eliminate disadvantages that now exist." 82

Similarly, consider Finland’s provision, dating to 1995:

Everyone is equal before the law.

73. STJÖRNARSKRÁ LÝBVELDISINS ÍSLANDS [CONSTITUTION] art. 65 (Ice.).
74. 1994 CONST. art. 10 (Belg.).
75. 1958 CONST. art. 1 (Fr.).
76. 1958 CONST. 1946 Preamble (Fr.). The Preamble to the 1946 Constitution was preserved and became part of the 1958 Constitution.
77. See MICHEL DE VILLIERS & THIERRY S. RENOUX, CODE CONSTITUTIONNEL 352 (2014) (providing an annotated constitution with commentary).
78. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [Basic Law], art. 3(2), May 23, 1949 (Ger.).
79. 1868 CONST. art. 11 (amended 2006) (Luxembourg).
80. GW. [CONSTITUTION] art. 6 (Noth.).
81. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [Basic Law], art. 3, May 23, 1949 (Ger.).
82. GRUNDGESETZ [GG] [BASIC LAW], art. 3, https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0024 (Ger.).
No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person. 

Equality of the sexes is promoted in societal activity and working life, especially in the determination of pay and other terms of employment, as provided in more detail by an Act.83

Another interesting example is found in the Portuguese constitution. Article 9 lists “[f]undamental tasks of the state,” which include “promot[ing] equality between men and women.”84

Many of these amendments directing the state to implement “real equality,” “factual equality,” or “equal access” between men and women were adopted in the 1990s and early 2000s.85 Some amendments were explicit attempts to resolve constitutional conflicts about the compatibility of legislation mandating gender balance in political institutions with pre-existing constitutional guarantees of equality. International and supranational norms played a significant role in bringing about these changes. Finland’s sex equality promotion clauses appeared during constitutional reforms to facilitate Finland’s accession to the European Union. In addition, the Beijing Declaration and Platform for Action emerging from the United Nations World Conference on Women in 1995 included the strategic objective of governments taking measures to ensure women’s equal access and full participation in power structures and decisionmaking.86 In addition, the European Commission had encouraged member states since the 1980s to adopt policies to ensure women’s equal representation in decisionmaking positions,87 but those adopted by some member states were challenged or struck down based on national constitutional guarantees of equality.

In France, a 1999 amendment added language to Article 3 addressing suffrage, stating: “The law shall promote equal access by men and women to the electoral mandate and to elected positions.”88 In 2008, the constitution was amended again, deleting the Article 3 provision and adding language to Article

83. SUOMEN PERUSTUSLAKI [CONSTITUTION], § 6 (Fin.).
84. 1976 CONST. art. 9 (Port.).
85. I provide more details regarding the conflicts in France that gave rise to such amendments in 1999 and 2008 in Part III, infra.
86. U.N. Fourth World Conference on Women, Beijing Declaration and Platform for Action, strategic objective G.1, ¶ 190.
87. See First Programme of Action by the Commission of 14 December 1981, for 1982-85, Communication to the Council, bull. Suppl. 2/86, 9, No. 19, p. 5.
1 to expand the scope of the state’s duty to reduce gender gaps. Article 1 now reads:

France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organised on a decentralised basis.

Statutes shall promote equal access by women and men to elected offices and posts as well as to positions of professional and social responsibility. 89

Similar provisions explicitly authorizing measures to promote equal access by men or women or to alleviate the disadvantage of women are found in the constitutions of Belgium, 90 Greece, 91 Hungary, 92 Italy, 93 Malta, 94 Portugal, 95 Romania, 96 Slovenia, 97 Sweden, 98 Canada, 99 and South Africa 100. Most of these constitutional clauses authorizing (and possibly requiring) positive action are amendments that were adopted since the 1990s.

D. Maternity Protection

Finally, a good number of constitutions have provisions guaranteeing the special protection of mothers. Some of the articles that impose the duty to protect mothers also include children, the elderly, and/or the disabled. I regard these provisions as “special” protections for mothers, even if these other categories of persons are included, when the protection is reserved specifically for “mothers” rather than gender-neutral “parents” or “mothers and fathers.” In Germany, this protection appears in Article 6, which establishes the constitutional status of the family in general. It is worth quoting in full:

Article 6 [Marriage and the family; children born outside of marriage]

89. 1958 CONST. art. 1 (Fr.) (amended 2008).
90. 1994 CONST. art. 11bis (Belg.) (amended 2002).
92. 2011 MAGYARORSZAG ALAPTORVENEY [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTORVÉNY, art. XV. The sentence on promoting the achievement of equality of opportunity does not mention gender or women, but it immediately follows the section that guarantees women and men equal rights. Id.
94. 1964 CONST. arts. 14, 45.11 (Malta) (amended 2003).
95. 1976 CONST. art. 109 (Port.) (amended 1997).
96. 1991 CONST. art. 16.3 (Rom.) (amended 2003).
97. 1991 CONST. art. 43 (Slovn.) (amended 2004).
98. Regeringsformer [RF] [CONSTITUTION] 1:2 (Swed.).
100. 1996 S. AFR. CONST. art. 9.2, 174 (S. Afr.).
(1) Marriage and the family shall enjoy the special protection of the state.

(2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.

(3) Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect.

(4) Every mother shall be entitled to the protection and care of the community.

(5) Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage.

The right of mothers to the special protection of the state is embedded in an amendment that also imposes a duty on the part of the state to give special protection to marriage, family, and children. In Germany, the protection of motherhood and the protection for children born outside of marriage originated in the Weimar Constitution of 1919, and were written again into the 1949 West German Basic Law in their present form. In the French constitution, Paragraph 11 of the 1946 Preamble articulates the special protection of mothers in the context of pronouncing the Nation’s duty towards its most vulnerable members. Paragraph 11 reads:

[The nation] shall guarantee to all, notably to children, mothers and elderly workers, protection of their health, material security, rest and leisure. All people who, by virtue of their age, physical or mental condition, or economic situation, are incapable of working, shall have to the right to receive suitable means of existence from society.

The guarantee of special protection for mothers, often articulated in the context of protections for children, marriage, the family, the elderly, or the disabled, are very common in the constitutions of the formerly communist Eastern European countries. Bulgaria, Croatia, the Czech Republic, Hungary, Bulgaria, 103 Croatia, 104 the Czech Republic, 105 Hungary, 106

102. 1958 CONST. preamble ¶ 11 (Fr.).
103. CONST. art. 47(2) (Bulg.).
104. CONST. art. 65 (Croat.).
105. Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], Charter of Fundamental Rights and Basic Freedoms, ch. 4, art. 29(1), 32(2).
106. MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNYE, art. XIX.
Lithuania,\textsuperscript{107} Poland,\textsuperscript{108} and Slovakia\textsuperscript{109} all have such provisions. But explicit constitutional protection of mothers or pregnant women can be found in the constitutions of Italy,\textsuperscript{110} Ireland,\textsuperscript{111} and Greece\textsuperscript{112} as well.

Many European constitutions have provisions that guarantee formal equality and non-discrimination, and further provisions that separately address some form of substantive equality between men and women. The maternity protection clause is also very common. As Part III will illustrate, these clauses evolved to encompass a vision of women’s constitutional equality that responds to the concerns of the ERA revival. Belgium, Finland, Italy, Portugal, Greece, Germany, and France have added sex equality amendments to their constitutions since the 1990s. These amendments legitimize and encourage government initiatives to promote women’s participation in political and economic life. In some jurisdictions, these amendments have also catalyzed reforms intended to reduce women’s disadvantages and burdens stemming from motherhood and caregiving.

III. FROM ANTIDISCRIMINATION TO ACTUAL EQUALITY: TWO JURISDICTIONS WITH RECENT AMENDMENTS

I now present a more focused, textured portrait of the evolution of constitutional sex equality and the trajectory of sex equality amendments in two jurisdictions, Germany and France. The focus on Germany and France might be criticized as comparativism of the cherry-picking variety. But cherry-picking is sometimes appropriate, depending on one’s purpose. When one’s purpose is not to identify a global consensus on sex equality, but rather to study thoughtful approaches to a set of legal problems, focusing on well-theorized examples (“cherries”) is what one must do.\textsuperscript{113} Warnings against comparing apples to oranges justify similar caution when comparing cherries to apples or oranges. Looking to Germany and France does not entail the proposition that what has worked in these places will work in the United States. The purpose of looking beyond our borders is to engage real-world examples of post-industrial gender constitutionalism as an imagination-broadening exercise. Germany and France

\textsuperscript{107} CONST. art. 39 (Lith.). This provision entitles working mothers to “paid leave before and after childbirth as well as favourable working conditions and other concessions.”

\textsuperscript{108} CONST. art. 71 (Pol.) (“A mother, before and after birth, shall have the right to special assistance from public authorities, to the extent specified by statute.”).

\textsuperscript{109} CONST. art. 41(2) (Slovk.) (“Pregnant women shall be entitled to special treatment, terms of employment, and working conditions.”).

\textsuperscript{110} Costituzione [Const.] art. 37 (It.) (“Working conditions must allow women to fulfil their essential role in the family and ensure the appropriate protection for the mother and child.”).

\textsuperscript{111} Constitution of Ireland 1937 art. 41(2)(2) (“The State shall, therefore, endeavor to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties at home.”).

\textsuperscript{112} 1975 SYNTAGMA [SYN.] [CONSTITUTION] 21(1) (Greece).

\textsuperscript{113} See discussion supra text accompanying notes 64 to 67.
are good examples because they both shared some (but not all) things in common with the United States regarding the legal status of women in constitutional law in the 1970s and 1980s. In addition, they are both examples of jurisdictions which have developed a constitutional discourse around some of the gender inequalities focused on by today's American ERA activists, such as pay inequity, the persistence of traditional gender roles in the family, and the underrepresentation of women in positions of power. Germany and France have both moved away from the 1970s and 1980s concerns with scrutinizing sex classifications in the law towards a vision of sex equality as a principle that government must make real. In Germany, the maternity protection clause is construed together with the non-discrimination and substantive equality clauses. In France, sex equality is becoming a legitimizing constitutional principle rather than a judicially enforceable fundamental right. While both of these jurisprudential moves may at first glance seem to weaken women’s rights to equality, I shall highlight their advantages. The shift from strict scrutiny towards a critical appreciation of motherhood's effects on women's economic and political participation, and the shift from rights to principles, have laid a constitutional foundation for public policies that enable men to do more caregiving, accommodate pregnancy, and increase women’s representation in decisionmaking positions.

A. Germany

1. The 1950s: Antidiscrimination and Traditional Gender Roles

Article 3(2) of the German constitution has stated that “men and women shall have equal rights” since 1949.114 There is an additional section in Article 3(3), also adopted in 1949, which prohibits discrimination on the basis of sex as well as other characteristics: “No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland, and origin, faith, or religious or political opinions.” Germany’s 1949 constitution had founding mothers as well as founding fathers. They worried that the non-discrimination guarantee in Article 3(3) would be inadequate.115 Article 3(2) emerged as a result of a campaign by feminists. Elisabeth Selbert, a member of the Social Democratic Party and one of the four women who served on the Parliamentary Council for the drafting and adoption of the new Basic Law, played a pivotal role in the adoption of Article 3(2).116 Selbert believed that Article 3(2) was intended

114. For the period from 1949 to German reunification in 1994, my references to the German constitution or Federal Constitutional Court are intended to refer to the West German constitution and court.


to guarantee equality by recognizing differences, notwithstanding the language of Article 3(3) which appeared to prohibit all differences in treatment based on sex. Nonetheless, the Federal Constitutional Court long treated Article 3(2) ("equal rights") and Article 3(3) ("nondiscrimination") as having the same legal effect and meaning.

From the early 1950s, the Federal Constitutional Court read both Articles 3(2) and 3(3) as merely prohibiting unjustified differential treatment of women and men. In its jurisprudence, it permitted some forms of sex-based differential treatment, invoking biological and functional differences that made men and women differently situated. In 1953, for instance, the Federal Constitutional Court pointed to maternity as a biological difference that justified women's special treatment, which was bolstered by Article 6(1) of the Constitution, the clause protecting marriage and the family. Using this logic, in 1956, the Federal Constitutional Court upheld a labor code provision limiting the working hours of women.

Invoking the same principle, the Constitutional Court in 1957 held that penal provisions against male homosexuality did not violate the equality and non-discrimination guarantees in Article 3(2) and 3(3), in an opinion that catalogued a wide array of expert and scientific opinions on the different social threats posed by male and female homosexuality. The cases of the 1950s construed the Article 3(2) equality of rights guarantee as doing no more than prohibiting discrimination, and the Article 3(3) antidiscrimination guarantee as permitting different treatment pursuant to review similar to American rational basis review. Nonetheless, even under this regime, the Federal Constitutional Court declared in 1959 that men and women were equal in marriage, and struck down Civil Code provisions that accorded more weight to fathers than to mothers in the exercise of parental authority over minor children in the event of disagreements between the parents.

2. Heightened Scrutiny for Sex Distinctions from the 1970s to the 1990s

Continuing in this vein, in the 1960s and 1970s, the German Federal Constitutional Court more frequently rejected statutes that treated men and women differently. The sex equality jurisprudence of Article 3 evolved similarly to that of the U.S. Supreme Court's Equal Protection sex cases. For instance, in

---


117. Baer, supra note 116, at 70.
118. See Colneric, supra note 115, at 231.
119. BVERFGE 3, 225 (1953), ¶ 42.
121. BVERFGE 6, 389 (1957).
122. BVERFGE 10, 59 (1959).
1974, the Constitutional Court, invoking Article 3(2), invalidated a statutory provision that had granted German citizenship to the illegitimate child of a German father and foreign mother, but withheld citizenship from the illegitimate child of a German mother and foreign father, except when the child would be otherwise stateless. In 1977, the court departed from the notion that "functional" differences between men and women, including women's traditional caregiving role, could justify sex-based differences in treatment. During this period, the court applied heightened scrutiny to statutory sex distinctions, and rejected justifications for differential treatment that perpetuated the traditional sex roles that had led to women's inequality. This line of cases culminated in the 1991 decision on married names, in which the Federal Constitutional Court struck down a Civil Code provision that treated the husband's birth name as the default name to be taken as a married couple's family name in the event that the spouses failed to make a specific declaration of their chosen married name. The court held that this provision was incompatible with the "equality of rights" guarantee in Article 3(2).

The Court also began to work out the relationship between the gender equality and non-discrimination guarantees in Article 3 and the special protection of mothers in Article 6(4). In 1979, the Federal Constitutional Court invoked Article 6(4) to invalidate a provision of the Maternity Protection Law for insufficiently protecting a pregnant employee from dismissal. The statute generally prohibited the dismissal of pregnant employees and made such dismissals void only if the employer knew of the pregnancy or was informed of it within two weeks of the pregnant worker's dismissal. A terminated female employee had informed her employer immediately after she found out that she was pregnant (but more than two weeks after the dismissal), in an effort to invalidate her dismissal. In this case, the Court seems to view pregnancy as a disadvantage that the employer must accommodate pursuant to the maternity protection clause. The maternity protection clause obligates the state to protect pregnant workers by accommodating them, beyond merely prohibiting discrimination against the pregnant woman.

In the late 1980s, the Federal Constitutional Court suggested that the "equal rights" guaranteed in Article 3(2) went beyond prohibiting discrimination as articulated in Article 3(3). In 1987, a male complainant challenged a social security statute that granted women the right to old-age pensions from the age of 60, whereas men had to wait until the age of 65 to access their pensions. The constitutional complaint was rejected, and the differential treatment was upheld.

123. BVERFGE 37, 217 (1974).
125. See Jaeger, supra note 116.
127. BVERFGE 52, 357 (1979).
on the grounds that "social considerations," namely the "double burden" sustained by working women as a result of their traditional caregiving role, justified the differential treatment. There was no discrimination on grounds of sex under Article 3(2) or 3(3) in the event of a measure aiming to compensate disadvantages associated with the double burden. In 1991, in the context of German reunification, a law abolishing various civil service positions in the former East Germany was held unconstitutional on the grounds that it failed to sufficiently protect pregnant employees from dismissal and was therefore contrary to Article 6(4). In a jurisprudential context where the duty to protect mothers and pregnant workers is enforced and recognized, it goes without saying that at least some special legal protections for pregnant women and mothers can be adopted without running afoul of equality guarantees.

At the same time, the Court continued to scrutinize sex classifications, and it decided a landmark case in 1992 applying heightened scrutiny to a sex classification, parallel to the U.S. Supreme Court's landmark decision in United States v. Virginia. There, the German Constitutional Court struck down a statute prohibiting women's nighttime employment. The law had been defended as a protection of women, who were assumed to be more susceptible to harm by night work due to women's daytime responsibilities for child-rearing. In striking down the ban, the Court explained that it was not merely the sex classification that rendered the law unconstitutional under Article 3(3), but that the operation of the law undermined women's factual equality, which must be protected under Article 3(2):

Insofar as investigations show that women are more seriously harmed by night work, this conclusion is generally traced to the fact that they are also burdened with housework and child rearing. . . . Women who carry out these duties in addition to night work outside the home . . . obviously suffer the adverse consequences of nocturnal employment to an enhanced degree. . . . But the present ban on night work for all female labourers cannot be supported on this ground, for the additional burden of housework and child rearing is not a sufficiently gender specific characteristic.

In addition to recognizing the changing roles of men and women in relation to housework and child rearing, the Court was also concerned with the effects of the ban on night work on women's economic opportunities. The Court framed

128. BVerfGE 74, 163 (1987). The decision focuses on Article 3(2), and highlights not only women's double burden, but also other disadvantages faced by women in employment.
131. Id.
women's access to employment as a primary concern of Article 3(2)'s guarantee of equal rights:

The infringement of the discrimination ban of Article 3(3) is not justified by the equal opportunity command of Article 3(2). The prohibition of night work . . . does not promote the goals of this provision. It is true that it protects a number of women . . . from nocturnal employment that is hazardous to their health. But this protection is coupled with significant disadvantages: Women are thereby prejudiced in their search for jobs. They may not accept work that must be done even in part at night. In some sectors this has led to a clear reduction in the training and employment of women. In addition, women labourers are not free to dispose as they choose of their own working time. One result of all this may be that women will continue to be more burdened than men by child rearing and housework in addition to work outside the home, and that the traditional division of labour between the sexes may be further entrenched. To this extent the prohibition of night work impedes the elimination of the social disadvantages suffered by women. 132

Thus, what emerges from the night work case is an approach that permits the differential treatment of men and women under Article 3(3) when that differential treatment furthers the goals of equal rights as articulated in Article 3(2). The Court noted that the sentence “Men and women shall have equal rights” “is designed not only to do away with legal norms that base advantages or disadvantages on sex but also to bring about equal opportunity for men and women in the future. It is aimed at the equalization of living conditions.” 133 It was “a constitutional mandate to foster equal standing of men and women . . . that extends to social reality.” 134

3. The “Actual Implementation of Equal Rights”: Amendment, Affirmative Action, and Disparate Impact

The night work case was part of a growing legal and political discourse concerning the legitimacy of affirmative action for women, including gender quotas in the civil service. The issue became salient in the context of German reunification, in part because women in East Germany had been employed in higher proportions than women in West Germany. In any case, as reflected in the language of the night work case, many advocates of women's rights believed that Article 3(2) went beyond Article 3(3) by imposing an affirmative duty on the state to promote women's equal standing as a matter of social reality. If this

132. Id.
133. Id.
134. Id. For a discussion of how this case read actual implementation of equal rights into Article 3(2), even before the 1994 amendment, see Peters, supra note 124, at 161.
meant that the state had a duty to promote women’s advancement to achieve their factual equality, some believed that this created a justiciable right to affirmative action for women. At the very least, Article 3(2) appears to permit measures to achieve factual equality. However, others continued to assert that Article 3(2) did not go beyond Article 3(3), such that Article 3(3)’s prohibition of discrimination was a mere restatement of what “equal rights” in Article 3(2) required. Strictly construed, a prohibition of different treatment on the basis of sex would not permit measures to promote equality if they distributed privileges or burdens on the basis of sex.

The opportunity to clarify this debate emerged in the context of negotiating German reunification in the early 1990s. Article 5 of the 1990 Treaty on Reunification addressed future amendments to the Constitution. It recommended that the legislative bodies of the United Germany consider constitutional amendments on various subjects, including “considerations on introducing state objectives into the Basic Law.”\textsuperscript{135} Article 31 of the Unification Treaty, on “Family and Women,” declared, “It shall be the task of the all-German legislator to develop further the legislation on equal rights for men and women.”\textsuperscript{136} It continued: “In view of different legal and institutional starting positions with regard to the employment of mothers and fathers, it shall be the task of the all-German legislator to shape the legal situation in such a way as to allow reconciliation of family and occupational life.”\textsuperscript{137} The Joint Commission on Constitutional Reform proposed an amendment that would nudge the legislator to adopt public policies towards these goals. That amendment became the second sentence of Article 3(2): “The State shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.”\textsuperscript{138}

In the late 1990s, the Federal Constitutional Court for the reunified Germany also recognized the disparate impact theory. The Court recognized disparate impact as a theory of discrimination under Article 3(3) of the Basic Law. It cited the European Court of Justice’s indirect discrimination jurisprudence. Under review was a pension scheme for Hamburg civil service employees that excluded part-time workers who worked less than half of normal working hours. The German Constitutional Court noted that Article 3(3) prohibited discrimination on grounds of sex, and determined that sex discrimination can be present “when

\textsuperscript{135} Einigungsvertrag [Unification Treaty], Aug. 31, 1990, BGBl II, 885, 889 at art. 5 (Ger.).
\textsuperscript{136} Id. at art. 31(1).
\textsuperscript{137} Id. at art. 31(2).
\textsuperscript{138} GRUNDGESETZ [GG] at art. 3(2). Nonetheless, conflicts about the permissibility of gender quotas continued through references and litigation before the European Court of Justice. The European Court initially invalidated a civil service gender quota adopted in the German Land of Bremen, but later upheld preferences for the underrepresented sex as long as the candidate was equally qualified and the rejected male candidate had an opportunity to show that special circumstances tilted the balance in his favor. See Kalanke v. Freie Hansestadt Bremen, 1995 E.C.R. I-03051; Marschall v. Land Nordrhein-Westfalen, 1997 E.C.R. I-06363; Badeck v. Hessen, 2000 E.C.R. I-01875.
a gender neutral regime mainly affects women and this is due to natural or social differences between the sexes.\textsuperscript{139} The Court then found that the statistical evidence did not show that the percentage of women in the group of under-half-time employees was greater than that in the more-than-half-time employees. Nonetheless, the Court then resorted to the general equality guarantee in article 3(1), which guarantees equality to all persons without reference to sex or other protected characteristics. Hamburg's pension scheme treated unequally two classes of persons without sufficient justification, and therefore violated Article 3(1).

In 2006, the Federal Constitutional Court brought together the maternity protection guarantee of Article 6(4) with the duty to reduce existing disadvantages of Article 3(2), diminishing the formal guarantee of equality before the law in Article 3(1). The 2006 decision held that mothers' constitutional entitlement to protection of the state was violated when their time on mandatory maternity leave was not taken into account in calculating the qualifying period for their statutory unemployment insurance.\textsuperscript{140} In Germany, the maternity leave statute requires pregnant women to take maternity leave for six weeks before and eight weeks after childbirth, during which they receive maternity pay with contributions from both the employer and the state.\textsuperscript{141} However, this time was not treated as time worked for purposes of calculating unemployment insurance eligibility. The Constitutional Court noted that this framework violated the equality guarantee of Article 3(2) and 3(3). Because mandatory maternity leave only affects women, "Article 3(2) of the Basic Law imposes on the legislature an obligation to pass provisions that put women during the prohibition of employment in the same position as if there were no prohibition of employment."\textsuperscript{142}

4. The Constitutional Rights Norm of Equal Rights: A Focus on Equal Parenting

The second sentence of Article 3(2) regarding the "actual implementation" of equal rights articulates what Robert Alexy calls a "constitutional rights..."
An Equal Rights Amendment for the Twenty-First Century

The equality of rights between men and women is a goal that the government is directed by the Constitution to realize, and a principle that can limit the exercise of other enforceable rights. Individuals do not enforce an entitlement to actual implementation of equality through the constitutional complaints procedure, but the Constitutional Court can rely on the clause to limit the scope of other constitutional rights that constitutional complainants can invoke. Additional examples of government goals that function this way in German constitutional enforcement include European integration, environmental protection, and the principle of the social state. The constitutional principle of "actual implementation of equal rights" thus clearly articulates a compelling state interest, in American parlance, which can then be weighed when individuals assert other enforceable constitutional entitlements, such as their right to equal treatment under Article 3(1) and their right not to be favored or disfavored on account of sex under Article 3(2).

Thus, the primary enforcer of the constitutional right to "actual implementation of equal rights" is the legislature. In 1999, a Cabinet Resolution invoked the state aim established in Article 3(2) to declare equality between men and women to be a universal guiding principle for its actions. In 2001, the legislature adopted the Federal Equality Law on the Equality of Men and Women in Federal Administration and Courts. In departments where women are underrepresented, women with equal qualifications must be given preferential consideration for training, jobs, and promotions, taking individual circumstances into account. The statute also established rights to part-time work and tele-work to promote the compatibility of work and family life. It requires gender equality plans within administrative units, including a stipulation that when a unit is downsizing, its proportion of women must be maintained. More recently, the German Parliament also adopted a law imposing gender quotas on corporate boards of directors in March 2015. Germany joins Norway, France, the

143. ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 362 (Julian Rivers trans., 2002).
144. See PETERS, supra note 124, at 162 (citing BVERFGE 85, 191, 209 (1992)).
Netherlands, Italy, Belgium, and Spain in adopting some form of gender balance rule for corporate boards.\textsuperscript{148}

As gender quotas aimed to increase women’s participation in the economic sphere, other new statutes aimed to increase men’s participation in the family caregiving sphere. The 1994 amendment has been the basis for recent Constitutional Court decisions upholding these statutes against constitutional challenges. The Federal Parental Benefit and Parental Leave Law\textsuperscript{149} adopted various measures consciously intended to encourage fathers to take parental leave so that men and women would share in caregiving more equally. The law entitles new parents to twelve months of paid parental leave, which can be taken by one parent or shared by the two. If the two parents share the leave, an additional two months of paid leave become available.\textsuperscript{150} In Germany, a parental benefit is available upon birth of a child, regardless of whether the parent worked before the birth of a child. Before the 2006 reform, the benefit was calculated on a sliding scale basis, with higher benefits for lower-income families. Under the 2006 reform, the amount of the monthly allowance is calculated based on the salary the parent taking the parental leave earned before the birth of the child.\textsuperscript{151} A parent who did not work before the leave receives the minimum amount, but a parent who is taking time off work gets a higher benefit according to salary.\textsuperscript{152} The purpose is to incentivize the higher-wage parent—typically the father—to take parental leave.

Another statutory intervention to encourage women’s labor market participation was the creation of a legally enforceable entitlement, as of 2013, to a public daycare placement for any child over the age of twelve months.\textsuperscript{153} The political discourse surrounding public daycare also invoked Germany’s low birth rates. The political agenda explicitly aimed at reconciling work-family conflict in order to respond to the fertility crisis of “Shrinking Germany.” As part of this campaign, Chancellor Angela Merkel also promoted the lengthening of the school day to enable more women to work full-time. Overall, legislative activity to enforce the 1994 sex equality amendment has included affirmative action to increase women’s presence in the public and economic spheres, and measures to increase men’s presence in the family and private spheres.

The Federal Constitutional Court has explicitly linked policies that encourage care of children by fathers and by public institutions to

\textsuperscript{148} For accounts of corporate board gender quota laws, see Aaron Dhir, Challenging Boardroom Homogeneity (2015); Julie C. Suk, Gender Parity and State Legitimacy: From Public Office to Corporate Boards, 10 INT’L J. CONST. L. 449 (2012).

\textsuperscript{149} Gesetz zum Eltern geld und zur Elternzeit (Bundeselterngeld- und Elternzeitgesetz – BEEG), Dec. 5, 2006, BGBL. I, at 2748.

\textsuperscript{150} Id. § 4.

\textsuperscript{151} BEEG, supra note 149, § 2, ¶ 7.

\textsuperscript{152} Id. § 2, ¶ 5.

\textsuperscript{153} Sozialgesetzbuch [SGB VIII] [Social Code VIII], § 24 (Ger.), https://www.gesetze-im-internet.de/sgb_8/.
constitutional duty to promote actual sex equality. In a pair of cases in 2011, individual women complainants brought constitutional challenges against some features of the 2006 parental leave reform, claiming that the law violated their constitutional rights to equal treatment and family autonomy. In the first case, a woman claimed that calculating the parental benefit based on the previous salary of the parent taking leave amounted to an unjustified unequal treatment before the law in violation of both Articles 3(1) and 3(2).\footnote{154} The legal theory sounds in disparate impact: Since a neutrally formulated rule (benefit based on salary of leave-taking parent) effectively lowers the benefit for women, in light of women’s greater likelihood of drawing a lower salary or no salary, the benefit scheme is discriminatory. The Constitutional Court rejected her claim, viewing the policy as incentivizing men to do more caregiving in order to reduce women’s disadvantages in the economic sphere and thus found no violation of 3(1) or 3(2).

In the next case challenging the 2006 Parental Benefit and Parental Leave statute,\footnote{155} another mother challenged the policy of extending the length of leave only if both parents take leave. She wanted to take the full fourteen months, and argued that the 2006 law violated the constitutional protection of marriage and the family because it conditioned the availability of the additional two months on the father taking some leave. She argued that the baby, who was born pre-term, needed special care that only she as the mother could provide. A lower court had held that the state violated the married couple’s constitutional right to decide for themselves how to allocate care within the family in its efforts to incentivize paternity leave. The Federal Constitutional Court rejected her claim, noting that the state had a duty under Article 3(2) to implement actual equality for men and women. The legislature could thus combat traditional gender roles in the family. Because men were subject to social pressure based on traditional gender roles against taking paternity leave, the policy was upheld as a vindication of the legislature’s duty.\footnote{156}

Finally, the Federal Constitutional Court struck down a provision of the 2013 amendment to the Parental Benefit and Parental Leave Law, which provided a childcare allowance of € 150 per month for any parent who took care of their child at home from the ages of 15 to 36 months. That year, another change in law created a legally enforceable entitlement of children to a placement in a public daycare or preschool from the age of 12 months. The Federal Constitutional Court held that, in light of the legally enforceable right to public daycare, the federal government was not constitutionally competent to provide a childcare allowance. The state of Hamburg, in challenging the federal childcare allowance, noted that 94% of parents claiming the care allowance in lieu of public daycare

\footnotesize{\textit{154.} BVerfG, \textsuperscript{1} BvR 2712/09, June 6, 2011, http://www.bverfg.de/e/rik20110606_1bvr271209.html. \\
155. Gesetz § 24 Abs. 2 Satz 1 SGB VIII (Ger.). \\
156. BVerfG, \textsuperscript{1} BvL 15/11, Aug. 19, 2011, http://www.bverfg.de/e/ik20110819_1bvl001511.html.}
were women, and argued that the childcare allowance was contrary to Article 3(2) because it incentivized women to stay home to raise children. The Court rejected the childcare allowance based on the constitutional provisions delineating federal power, but it is noteworthy that the litigants characterized the outcome that prevailed as an implementation of the state’s constitutional duty to promote gender-equal parenting.

In recent cases on parental benefits, leave, and childcare, the litigants unsuccessfully raised constitutional rights claims to parental autonomy. Under Article 6(1) of the German Basic Law, marriage and the family are entitled to the special protection of the state. The litigants claimed that this entitled parents to decide for their family whether the father should take any parental leave, and whether the mother should stay home instead of working and sending their baby to daycare. Such family privacy claims resonate with the American jurisprudence of Due Process. Nonetheless, the family privacy claims were unsuccessful because they had to be balanced against the constitutional rights norm of “actual implementation of equality for women and men” in Article 3(2). Since families are given financial incentives to choose options that involve female labor market participation and male caregiving, but without being coerced to do so, the Constitutional Court saw the Article 6(1) entitlement as minimally compromised and outweighed by the legislature’s duty in Article 3(2).

B. France

The French constitution, like the German, contains all three features that function to reduce gender inequalities: nondiscrimination, authorization of special measures to promote sex equality, and protection of mothers. The 1946 Preamble guarantees equality in broad terms to men and women, and this has been understood to embody an anti-sex-discrimination norm. France, like Germany, amended its constitution in the 1990s to authorize measures like gender quotas to address women’s underrepresentation. The French constitution also contains a postwar clause that articulates a duty on the part of the state to

---

158. Grundgesetz [GG] [BASIC LAW], art. 6(1) (Ger.).
159. E.g., Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925). With regard to maternity leave, the U.S. Supreme Court held mandatory maternity leave to violate Due Process, because “freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.” Bd. of Educ. of Cleveland v. LaFleur, 414 U.S. 632, 639 (1974).
161. 1958 CONST. 1946 Preamble (Fr.).
162. See, e.g., Conseil constitutionnel [CC] [Constitutional Council] decision No. 81-133DC, Dec. 30, 1981 (Fr.).
An Equal Rights Amendment for the Twenty-First Century

protect mothers. Unlike the German Constitutional Court, the French Constitutional Council has decided very few cases interpreting these constitutional provisions with regard to sex equality, because individual and post-hoc constitutional review were not available until the constitutional amendment of 2008. That amendment coincided with an additional gender equality amendment, which rewrote Article 1 to include the paragraph that authorizes gender quotas: “The law shall promote equal access by men and women to the elected offices and posts as well as to positions of professional and social responsibility.”

1. Formal Constitutional Equality in 1982

In France, the constitutional amendments of 1999 and 2008 removed doubt about the compatibility of gender-conscious interventions with other constitutional guarantees of equality and non-discrimination. It is worth rehearsing the history of these two amendments to understand why they were thought to be necessary. The French constitution, in addition to the specific mentions of equality between men and women in the 1946 Preamble and recent amendments, contains other guarantees of equality. Article 6 of the Declaration of the Rights of Man, a provision which is frequently invoked before the Constitutional Council, provides:

The Law is the expression of the general will. All citizens have the right to take part, personally or through their representatives, in its making. It must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes, shall be equally eligible to all high offices, public positions and employments, according to their ability, and without other distinction than that of their virtues and talents.

Because Article 6 states that the law must be the same for all, whether it protects or punishes, and makes all citizens equally eligible for public positions, the Constitutional Council invoked it, along with other provisions on the indivisibility of sovereignty, to strike down a gender quota law in 1982. The repudiated law had prohibited political parties from running more than seventy-five percent of candidates of one gender in municipal elections.

---

163. 1958 CONST. 1946 Preamble ¶ 11.
165. 1789 DECLARATION OF THE RIGHTS OF MAN art. 6.
166. Conseil Constitutionnel [CC] [Constitutional Council] decision No. 82-146 DC, Nov. 18, 1982.
167. Id.
2. Feminist Mobilization: From Antidiscrimination to Parity Democracy

Following the 1982 decision by the Constitutional Council, feminists mobilized and created a strong public discourse challenging the underrepresentation of women in Parliament. 168 Whereas the proponents of the 1982 gender quota framed the law as a remedy for discrimination against female politicians, the new discourse that developed in the late 1980s and throughout the 1990s shifted the emphasis from discrimination to democracy. Article 1 of the Declaration of the Rights of Man provides: “Men are born free and equal in rights. Social distinctions may be based only on considerations of the common good.” 169 The sex distinctions necessarily employed by a legislated gender quota began to be framed as a social distinction that was premised on the common good of a democratic republic that represents all of humanity. The new discourse of parity envisioned humankind as consisting of two complementary halves—male and female. A democracy lacking in parity between men and women would fail to correspond to this natural and universal fact, and would thereby lack legitimacy. The absence of democratic legitimacy is an obvious problem for state institutions of governance, particularly the legislature, whose legitimacy clearly depends on its ability to represent its constituents.

The 1999 amendment to the French constitution was an attempt to transform the meaning of constitutional equality arrived at by the Constitutional Council in 1982. Thus, it focused on the issue of gender representation in elected office. The 1999 amendment authorized statutes to promote equal access by men and women to the electoral mandate and elected offices. 170 The following year, legislation was introduced to require gender parity in parties’ selection of candidates. The law prohibited a difference greater than one in the number of female and male candidates. 171 This gender quota was also challenged by the political opposition in 2000 on the grounds that a hard quota exceeded the legislature’s authority to promote equal access to elected offices. This time, the Constitutional Council upheld the new quota, acknowledging that the 1999 Amendment permitted the legislature to adopt strong measures, even those that departed from universalism,

168. A major book articulating the goals of this movement was FRANÇOISE GASPARD, CLAUDE SERVAN-SCHREIBER & ANNE LEGALL, AU POUVOIR, CITOYENNES! LIBERTÉ, ÉGALITÉ, PARITÉ (1989); see also SYLVIANE AGACINSKI, PARITÉ DE SES XÉS (Lisa Walsh trans., 1999); JOAN SCOTT, PARITÉ! (2002); Eric Millard, Constituting Women: The French Ways, in THE GENDER OF CONSTITUTIONAL JURISPRUDENCE 122 (Beverly Baines & Ruth Rubio-Marin eds., 2005).
169. 1789 DECLARATION OF THE RIGHTS OF MAN art. 1.
to render effective the constitutionally prescribed norm of equal access by women and men to the electoral mandate and elected office.\textsuperscript{172}

Nonetheless, when the legislature adopted a law that imposed gender quotas on corporate boards of directors in 2006,\textsuperscript{173} the Constitutional Council invalidated it, reading the 1999 amendment as addressing equal access by men and women only to the electoral domain, and not to other decisionmaking powers.\textsuperscript{174} It was in reaction to the 2006 Constitutional Council decision that the more comprehensive amendment of 2008 was proposed,\textsuperscript{175} authorizing the legislature to promote equal access by women and men to positions of professional and social responsibility, in addition to elected offices. Perhaps of greater importance, albeit largely symbolic, is the placement of this constitutional provision in Article 1 of the constitution, which declares the most fundamental values by which the republic is constituted. Indeed, paragraph 1 of Article 1 states: “France shall be an indivisible, secular, democratic and social republic. It shall ensure equality before the law, without distinction of origin, race, or religion. It shall respect all beliefs. It shall be organized on a decentralized basis.”\textsuperscript{176} The second paragraph then states: “Statutes shall promote equal access by women and men to elective offices and posts as well as to professional and social positions.”\textsuperscript{177}

3. Legislating “Real Equality”

This 2008 amendment set off a flurry of legislative activity over the last few years to promote gender equality. Almost immediately, a law requiring gender quotas on corporate boards of directors was reintroduced,\textsuperscript{178} very similar to the one that was struck down in 2006.\textsuperscript{179} The new statute, adopted in 2011, provided that, by 2017, the proportion of board members of each sex could not be less than

\begin{itemize}
  \item \textsuperscript{172} Conseil Constitutionnel [CC] [Constitutional Council] decision No. 2000-429, May 30, 2000, ¶ 7.
  \item \textsuperscript{173} Projet de loi relatif à l’égalité salariale entre les femmes et les hommes, adopté, dans les conditions prévues à l’article 45, alinéa 3, de la Constitution par l’Assemblée nationale le 23 février 2006, http://www.assemblee-nationale.fr/12/dossiers/egalite_salariale_femmes_hommes.asp.
  \item \textsuperscript{174} Conseil Constitutionnel [CC] [Constitutional Council] decision No. 2006-533DC, Mar. 16, 2006.
  \item \textsuperscript{176} 1958 CONST. art. I, ¶ 1 (amended 2008).
  \item \textsuperscript{177} Id.
  \item \textsuperscript{178} Loi 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d’administration et de surveillance et à l’égalité professionnelle (1), [Law 2011-103 of January 27, 2011 on the balanced representation of women and men on administrative and supervisory boards and on professional equality], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 28, 2011, p. 1680.
  \item \textsuperscript{179} See Projet de loi relatif à l’égalité salariale entre les femmes et les hommes, supra note 173.
\end{itemize}
40%. Several statutes and regulations that imposed gender quotas in many other decisionmaking bodies followed. For example, a 2012 law provided that various civil service governing bodies could not be less than 40% of each sex. A 2013 statute reforming higher education provided that certain committees within higher education institutions had to achieve parity between women and men in composition. Also in 2013, the existing parity rules in regional and municipal elections were strengthened, requiring political parties’ candidate lists to strictly alternate male-female in a wider range of elections.

In 2014, the French legislature adopted a comprehensive gender equality statute, asserting a mandate emanating from the 2008 constitutional amendment. The statute, on “Real Equality Between Women and Men,” included an expansion of abortion rights, measures to reduce the gender pay gap, reform of parental leave to incentivize equal caregiving by fathers and mothers, aid to victims of violence against women, and gender balance rules in new institutional settings where they had not previously applied. A Senate report introducing the legislation begins by pointing to the constitutional promise of sex equality in Article 3 of the 1946 Preamble. This provision, in addition to the 2008 amendment and several EU directives, are cited as sources of a legislative mandate to adopt a comprehensive approach to gender equality in all the many different domains of social, political, and economic life in which sex inequality is produced. The most significant reforms in this statute, on “professional equality between women and men,” address the disadvantaging effects of women’s disproportionate share of work within families and households on women’s careers. Thus, there are many new provisions, largely inspired by

185. Etude d’impact, Projet de loi pour l’égalité entre les femmes et les hommes, NOR: DFEX1313602L/Bleue-1 (July 1, 2013), at I.1.1 (justifying the bill that was eventually adopted in 2014 as an implementation of the 2008 constitutional amendment).
186. See id. at 5, 15.
187. Id. at 15.
188. Loi 2014-873, supra note 184, tit. I.
policies that have been successful in Scandinavian countries and now in Germany, which lengthen paternity leaves and incentivize fathers to take them. Many provisions of the statute, grouped in Title V, impose gender parity rules in new domains, such as professional sports organizations, and strengthen mechanisms of enforcing existing political party quotas.\textsuperscript{189}

The statute includes an abortion reform, which is presented as a measure to promote equality between women and men in professional life. Article 24, in Title I of the statute, amends the abortion law within the Code of Public Health. The Public Health Code had, since 1973, permitted abortion on demand within the first trimester, as long as the pregnant woman certified that the pregnancy put her in “a situation of distress.”\textsuperscript{190} The reform at Article 24 abolishes the distress-certification requirement in first trimester abortions, and authorizes abortions in the first trimester for any woman “who does not want to continue a pregnancy.”\textsuperscript{191}

Title II, on “the fight against insecurity,” contains, inter alia, special pension benefits for single working parents and financial support for nannies employed by low-income families.\textsuperscript{192} Title III aids victims of violence as well as victims of “attacks on dignity and image in communications based on sex.”\textsuperscript{193} Title IV, “on equality between women and men in their relations with the administration,” entitles each person to be addressed by administrative authorities by his or her “family name,” which, under French civil law, is a person’s last name at birth.\textsuperscript{194}

4. Not a Fundamental Right: Parity as Principle

In April 2015, the French Constitutional Council issued an important ruling construing “equal access by men and women” in the 2008 amendment to Article 1. The Constitutional Council declared that “equal access by women and men to professional and social positions” articulated a constitutional goal to be realized by the legislature, and did not create individually justiciable rights. The Constitutional Council articulated this view in the course of ruling on a constitutional complaint brought by opponents of a statutory gender quota that had been added to the Education Code in 2013, requiring gender balance on

\textsuperscript{189} Id., tit. V.
\textsuperscript{190} C. SANTÉ PUBLIQUE, art. L 2212-1 (2013).
\textsuperscript{191} With regard to abortion funding, it should be noted that a 2012 statute authorized 100% reimbursement by the state for all legally permitted abortions. The same statute entitles young people age 15 to 18 to free contraception. See Loi 2012-1404 du 17 décembre 2012 de financement de la sécurité sociale pour 2013 [Law 2012-1404 of December 17, 2012 on Social Security Funding for 2013], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 18, 2012, p. 19821, at art. 50, 52.
\textsuperscript{192} See Loi 2014-873, supra note 184, tit. II.
\textsuperscript{193} Id., tit. III.
\textsuperscript{194} See id., tit. IV art. 59. This provision prohibits communications from public institutions from addressing any person by a married name (“nom d’usage”) unless the concerned person herself uses the married name in written communications.
certain university committees. Individual suits challenging the constitutionality of quotas, brought by persons claiming to be injured by quotas, are a new phenomenon. Due to constitutional reforms of 2008 that occurred simultaneously with the aforementioned gender parity amendment, any individual litigant or criminal defendant may now claim that the application of a statute in his or her case is unconstitutional by utilizing a process called "question prioritaire de constitutionnalité" (QPC). 195

The first QPC action challenging the constitutionality of a gender quota was brought against a minor provision of the Education Code, adopted in 2013, which requires certain university governance committees to be gender-balanced. An organization of university presidents challenged the provision, invoking the equality guaranteed by Article 6 of the Declaration of the Rights of Man, as well as other constitutional principles. The Constitutional Council upheld the gender quota, 196 holding that it was permitted pursuant to Article 1's command that "[s]tatutes shall promote equal access by women and men to . . . positions of professional . . . responsibility." 197

The 2013 statute on higher education had only imposed gender parity rules on some, but not all, university governance committees. The statute had generally restructured university governance to consist of several different committees. One of the committees was of a "limited" or ad hoc nature, to be constituted to deliberate on the careers of non-professor researchers (essentially postdoctoral lecturers). For committees formed for this purpose, the statute required "double parity"—an equal number of professors and lecturers, and an equal number of men and women.

The Constitutional Council, in upholding the parity rule, noted that Article 6 of the Declaration of the Rights of Man established a principle of equality that was not opposed to legislation that treated different situations differently, nor to derogations of equality for the common good, provided that the resulting differences of treatment would have a direct correspondence to the purpose of the law that established them. The Constitutional Council was, indeed, repeating language that is found in almost all of its decisions about Article 6. Then, the Constitutional Council identified the purpose of the law as "promoting the equal access of women and men to positions of professional responsibility" with which the parity rule had a direct relationship.

But the more interesting part of the Constitutional Council's decision consisted of remarks obliquely directed at the intervenors in the QPC proceedings. Although interventions are rare in QPC proceedings to date, the Constitutional Council had authorized an intervention in this action by fifteen

196. Conseil Constitutionnel [CC] [Constitutional Council] decision No. 2015-465QPC, Apr. 24, 2015 (Fr.).
197. See id. ¶ 13.
academic researchers, some professors and other lecturers, who were members of REGINE, a research group on law and gender. REGINE’s brief to the Constitutional Council argued that the 2008 amendment putting equal access by women and men to leadership positions in Article 1 of the constitution had established gender parity as a “foundational rule.” What this meant was that (1) Article 1 had to be read as a blanket authorization to Parliament to adopt measures favoring equal access by women and men, essentially validating gender quotas in all domains of social and professional life, and (2) the legislature had an obligation to promote equal access by women and men in university governance committees.

On the second point, the intervenors argued that, if anything, the statute was unconstitutional because it did not go far enough in promoting gender parity. The statute only imposed gender parity on committees limited to deliberating on the careers of lecturers, and not on committees deliberating on the careers of professors. The intervenors recited the Constitutional Council’s longstanding equality jurisprudence, which permits different treatment of different situations, as long as the difference of treatment is justified by the law’s purpose. Here, the difference of treatment between professors and lecturers could not be justified by the purpose of the law, given that their situations were identical and that the purpose of the law was to promote equal access by women and men to professional positions.

Without much explanation, the Constitutional Council rejected the intervenors’ argument. The Constitutional Council simply noted that the law can justifiably treat two committees differently when they are differently situated. Since one committee dealt with lecturers’ careers, and the other dealt with professors’ careers, there was no equality problem in having different rules for each committee. In effect, the Constitutional Court was rejecting the intervenors’ attempt to invoke the 2008 “equal access” amendment to render a statute unconstitutional for its failure to impose more gender parity rules than it had. The Constitutional Council took the opportunity to declare Article 1 to be a constitutional principle, rather than an individual constitutional right that could be enforced pursuant to the QPC procedure, saying: “this provision did not create a right or liberty that the constitution guarantees; such that its misapprehension therefore cannot be invoked to support a preliminary question of constitutionality.” Thus, the recent constitutionalization of gender equality is a foundational republican principle or goal, and not an individual right.

198. REGINE is an acronym for Recherches et Etudes sur le Genre et les Inegalites dans les Normes en Europe. Consisting largely of feminist law professors, the group is based at the Universite de Paris Ouest Nanterre. See REGINE, http://regine.u-paris10.fr.
199. REGINE Brief at 4-5, Conseil Constitutionnel decision No. 2015-465 QPC, Apr. 24, 2015 (on file with author).
This statement is mysterious and unnecessary to the Constitutional Council’s decision to uphold the quota. After all, the QPC claimants themselves were not invoking Article 1 as the source of the rights they alleged to be violated; they were relying on Article 6 of the Declaration of the Rights of Man. The intervenors invoked Article 1’s parity provision, but they were intervenors, not claimants. More importantly, the intervenors, too, premised their constitutional rights claim primarily on Article 6, not on Article 1. They claimed that, contrary to Article 6 of the Declaration, the statute had treated similarly situated persons (professors and researchers) differently by not imposing parity on committees dealing with professors, without justification. Their legal argument never encompassed the claim that the parity amendment in Article 1 entitled them to parity in all possible situations.

Thus, the Constitutional Council’s statement—that parity is not a fundamental right—is superfluous, perhaps a warning to future claimants not to challenge statutes for failing to impose gender balance rules if Article 1 is their only constitutional source. By rejecting the intervenors’ Article 6 argument, the Constitutional Council is implicitly holding that Article 6 should not be invoked as a vehicle for invalidating the legislature’s interpretation of Article 1. One implication is that future QPC attempts to rely on Article 6, not only by feminists demanding more gender quotas but also by opponents of gender quotas demanding a narrower reading of Article 1, will not be admissible. What this suggests is that the French constitutionalization of gender parity is primarily an enumeration of legislative power and priorities. A powerful transformation has occurred, in reconceptualizing gender parity as a condition to be attained so that the constitutional order of a democratic republic can flourish, rather than an individual right. This idea can inform the way American feminists imagine the political and legal function of Equal Rights Amendments in state and federal constitutions.

IV. BRINGING GLOBAL CONSTITUTIONALISM HOME

A. Completing the Revolution in Social Reproduction

In the three decades since the ERA’s demise in the United States, constitutional orders outside of the United States have updated and refined the meaning of constitutional sex equality in ways that respond directly to the ultimate goals of today’s ERA proponents. American ERA revivalists believe that the ERA will strengthen the tools of antidiscrimination doctrine to disrupt the persistence of the gendered division of labor within the family, pay inequity, women’s underrepresentation in leadership positions, and the failure to accommodate pregnancy in the workplace. Yet, the prescribed legal apparatus for the ERA is ill-matched to the remaining manifestations of women’s
disadvantage. Strict scrutiny would make the law more gender-neutral and remove stereotypes from the law, but the absence of official stereotypes does not end gendered norms and cultural practices. Even in legal regimes that make paid parental leave available on gender-neutral terms to both mothers and fathers, uptake by mothers is significantly higher than uptake by fathers. This is why Sweden introduced incentives to encourage fathers to take leave, which Germany copied. Even when fathers take some leave, they take less than mothers.

To address these problems, carefully designed and well-funded public policies are needed: paid parental leave designed to be attractive to men, paycheck fairness rules that explicitly prohibit the setting of wages based on gender-unequal factors like previous salary, affordable high-quality childcare and afterschool programs, and norms of diversity and gender balance in major institutions of power, to name a few. An updated constitutional sex equality amendment could help engender or protect these institutional supports for gender-equal families and economies. As presently conceptualized on the federal level and practiced on the state level, the legal framework of the ERA primarily refines and strengthens the tools of antidiscrimination law, such as doctrines of strict scrutiny and disparate impact. The de facto ERA and state jurisprudence have imposed heightened scrutiny on sex classifications, and federal statutes and some state ERAs have applied disparate impact theory. An ERA thus conceived would be primarily symbolic, and function legally as a fine-tuner, not a transformer. It is hard to gather up the steam to amend the Constitution for such subtle gains. On the other hand, it is hard to imagine getting the consensus required under Article V to amend the Constitution for more drastic changes.

But as the European experience illustrates, a constitutional sex equality amendment can be more than a fine-tuner, and less than a revolution. Consider the concerns of the ERA revival together with the work of legal feminists over the last two decades, the rising social movement of mothers’ organizations, and the proliferation of state laws addressing work-family conflict in the past decade. They focus on the same problems addressed by European gender constitutionalism since the 1990s. By lining up these piecemeal and multifaceted developments in the United States with the projects of constitutional sex equality amendments in Germany and France, we can begin to imagine a new role for the ERA.

European gender constitutionalism from the 1990s to the present is best understood as the completion of a quiet revolution that has been occurring in the

201. In Finland, for example, fathers take less than 9% of the total of all parental leave, even though the leaves are available to both genders. In addition, Finland offers a “daddy month,” a paternity allowance available to fathers for 25 days to take leave concurrently while the mother is on parental leave. As of 2012, only 32% of fathers took the extra “daddy month.” See EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS, PROMOTING UPTAKE OF PARENTAL AND PATERNITY LEAVE AMONG FATHERS IN THE EUROPEAN UNION 2-3 (2015).

202. See supra text accompanying notes 16 to 24.
economies of wealthy democracies since the late twentieth century. These economies now depend on women’s participation in the labor market, which destabilizes women’s role as full-time caregivers within the family and leaves a gap in the society’s presumed arrangements for raising the next generation of citizens. Enlightenment constitutions assumed that women would be excluded from suffrage and from full economic citizenship so that they could devote themselves to the important task of reproducing (both biologically and socially) the next generation of constitutional subjects. But today, average American middle-class families cannot afford housing, education, healthcare, and other basic costs unless both parents work. Such societies require new arrangements by which the next generation gets raised and households get maintained. These arrangements constitute what I refer to as the infrastructure of social reproduction, and every society constituted by a constitution needs to have one in order to ensure its continued existence.

Past economies that did not depend on women’s participation in the labor market depended on women at home raising children. That was the infrastructure of social reproduction silently embedded in eighteenth- and nineteenth-century constitutions. Alexis de Tocqueville, observing the early American republic, noted, “Almost all men in democracies are engaged in public or professional life; and on the other hand the limited income obliges a wife to confine herself to the house in order to watch in person, and very closely, over the details of the domestic economy.” Women’s constitutional exclusion from suffrage and civil rights is therefore logically connected to the economy’s reliance on women’s devotion to the tasks of social reproduction—the raising of the next generation of full constitutional citizens. Known as the “separate spheres” tradition, this infrastructure of social reproduction was not explicitly described in constitutions before the late twentieth century, but its place in the legal order was affirmed in judicial decisions interpreting those constitutions. In the United States, Justice Bradley’s now-infamous concurrence in Bradwell v. State justified women’s exclusion from “adopting a distinct and independent career from that of [their] husband[s]” as consistent with Equal Protection and Due Process, because “the domestic sphere” and “the family institution” belonged to

203. Sociologist Gosta Esping-Andersón has shown that the revolution in women’s roles is incomplete in the sense that women have increased their participation in market work without a proportionate decrease in their share of family caregiving and household work. See GOSTA ESPING-ANDERSON, THE INCOMPLETE REVOLUTION: ADAPTING TO WOMEN’S NEW ROLES 19-54 (2009).


205. Elizabeth Warren and Amelia Warren Tyagi noted in 2003 that the average American middle-class family can no longer buy a home unless both parents work. Although the average two-income family earns more now than did the single-breadwinner family with a stay-at-home mom a generation ago, the costs of housing, education, healthcare, and other basic costs of raising children require both paychecks. WARREN & WARREN TYAGI, supra note 35, at 8.

206. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 207 (Henry Reeve trans., 1994).
the "domain and functions of womanhood." In Germany, even after the Constitution guaranteed equal rights to women, the Constitutional Court upheld a law limiting women's working hours because of women's functional difference from men as primary caretakers.

The German Constitutional Court's sex equality jurisprudence then moved on to dismantling sex classifications that reinforced women's traditional roles in the family. The de facto ERA in the United States, driven by the 1970s legal feminist agenda of ridding the law of sex stereotypes about women's roles as dependents and caregivers in the family, operated similarly. But more recently, the German interpretation of constitutional sex equality is moving beyond dismantling the old infrastructure towards articulating and supporting a new one. The legislature invoked the 1994 sex equality amendment when it legislated gender quotas in the civil service, and the Constitutional Court invoked it to uphold paternity leave incentives against allegations of unconstitutional equal rights violations. In France, social movements successfully achieved constitutional amendments that made gender parity a fundamental principle of the republic, which led to the legislative adoption of a comprehensive "real equality" agenda, strengthening abortion rights, implementing gender quotas for a wide range of decisionmaking positions, and creating incentives for fathers to take paternity leave. The French Constitutional Council has also relied on gender equality as a fundamental republican principle and as a shield against individual constitutional rights claims challenging the sex classifications in gender quotas. These new amendments have made sex equality into a constitutional goal rather than an enforceable individual right against discrimination. This enables the legislature to build the new infrastructure of social reproduction, which courts can defend against attacks by individuals attempting to vindicate formal equality rights.

B. The American Infrastructure of Social Reproduction in the States

Twenty-first-century post-industrial societies need updated institutional arrangements for raising the next generation of citizens. To operate efficiently and to enable society to flourish, our institutions must fit the lives of the people they serve. Today, citizens of all genders participate equally in democratic governance and market work. If a society consisting of such citizens is also committed to reproducing and raising future generations, new institutional arrangements are needed. The new infrastructure of social reproduction has at least four essential components that are being pursued piecemeal in the United States, largely in the states and municipalities. They include the accommodation of pregnancy in the workplace, paid parental leave, education designed for the

208. BVERFGE 3, 225 (1953), ¶ 42; see discussion supra Section III.A.1.
children of two breadwinners, and employment designed for coequal parents. These components need to be put together and buttressed. Like roads, pipes, and public transportation, the education and care of children can be conceptualized as an infrastructure on which the economy and social life of a constitutional order depends.

1. Pregnancy Accommodation

Women’s unequal economic status stems in part from their unwanted separation from work during pregnancy. In European countries, strong protections for pregnant workers include prohibitions on dismissal, even for cause, accommodation of job tasks, and mandatory maternity leave shortly before and after childbirth.209 In the United States, the federal Pregnancy Discrimination Act simply prohibits discrimination against pregnant workers; it does not require employers to accommodate pregnancy unless the employer accommodates other similarly disabling conditions.210

To overcome the limits of federal pregnancy discrimination law, states and localities are imposing more robust duties on employers. Due to the inadequacies of the federal antidiscrimination approach to the employment disadvantages of pregnancy, fifteen states have adopted laws requiring the reasonable accommodation of pregnancy: Alaska,211 California,212 Connecticut,213 Delaware,214 Hawaii,215 Illinois,216 Louisiana,217 Maryland,218 Minnesota,219 Nebraska,220 New Jersey,221 New York,222 North Dakota,223 Rhode Island,224 Texas,225 and West Virginia.226 In addition, local governments, including the

209. These requirements are stipulated by a European directive on the safety and health of pregnant workers. See Council Directive 92/85, art. 5, 8, 10, 1992 O.J. (L 348) 1, 2 (EC).

210. Despite the decision in favor of the plaintiff to allow her past the summary judgment stage, the Supreme Court’s decision in Young v. United Parcel Service affirms this understanding of the Pregnancy Discrimination Act. Young v. United Parcel Servs., Inc., 135 S. Ct. 1338, 1350 (2015).

213. CONN. GEN. STAT. §§ 46a-60(a)(7), 46a-51 (2011).
216. 775 ILL. COMP. STAT 5/2-101, 102 (2014).
220. NEB. REV. STAT. §§ 48-1107.01(2), 48-1107.02 (2015).
221. N.J. STAT. § 10:5-12(s) (2013).
223. N.D. CENT. CODE § 14-02.4-03(2) (2015).
225. The Texas statute applies to county and municipal employers. TEX. LOC. GOV’T CODE ANN. § 180.004 (2016).
District of Columbia, Philadelphia, New York City, and Providence have also enacted reasonable accommodation laws for pregnant workers. Most of these statutes were passed in the last five years. Of the states that have pregnant worker fairness statutes, every single one has either ratified the federal ERA or adopted a state ERA. Notably, eight of these states (including Pennsylvania, where Philadelphia has adopted a pregnant worker statute) have ratified the federal ERA and adopted a state constitutional ERA.

2. Paid Parental Leave

Paid parental leave for both mothers and fathers is an essential component of the infrastructure of care that is necessary to support women and men’s equal participation in economic and political life. The federal Family and Medical Leave Act (FMLA) guarantees unpaid leave for employees of large employers. Only twelve percent of private sector workers have access to paid family leave through their employer.

States have taken the lead in legislating paid parental leave. California led the way in 2002. New Jersey followed in 2008 and Rhode Island in 2013. All three states that have legislated and implemented paid parental leave are states which have ratified the federal ERA and adopted state ERAs. Washington (which ratified the federal ERA and has a state ERA) also adopted a paid parental leave statute in 2007, but the program has yet to be implemented. New York State passed legislation in April 2016 adopting twelve-week paid family leave benefits, which will go into effect in 2018. Local governments are also adopting paid leave policies: The mayor of New York City recently signed an executive order requiring nonunion employers to provide six weeks of paid parental leave at 100 percent pay. In April 2016, San Francisco also enacted six weeks of fully paid parental leave, which will eventually cover all employees.
working for more than 180 days for an employer with more than twenty employees.\textsuperscript{239}

3. Childcare and Education for Children of Breadwinners

The third important component of the infrastructure of social reproduction, which must be coordinated with paid parental leave, is an education system designed for children of two parents of any gender who are both full participants in economic and political citizenship. Would that education system look anything like the one we inherited from the era of separate spheres? For example, would formal education, provided by the public school system, begin at the age of five or six? To some degree, an education system designed for the children of two breadwinners depends on other aspects of the infrastructure, such as paid parental leave.

In the United States, Congress passed the Comprehensive Child Development Act in 1971,\textsuperscript{240} which would have created nationally funded, locally administered, comprehensive childcare centers providing quality education, nutrition, and medical services, open to all on a sliding-scale fee basis. Four months before Congress passed the ERA, President Nixon vetoed the childcare bill,\textsuperscript{241} arguing that it would diminish the role of families in raising children, and channeling the same sentiments that enabled the Stop-ERA movement to succeed. Almost half a century later, President Obama called for universal pre-kindergarten in his 2013 State of the Union Address.\textsuperscript{242} Meanwhile, states have been creating the right to pre-kindergarten education, with strong bipartisan support.\textsuperscript{243} Forty-five states provide some funding for preschool.\textsuperscript{244} Florida, for example, amended its constitution in 2002 to entitle every four-year-old to be offered a voluntary pre-K program.\textsuperscript{245} Georgia and Oklahoma also aim to offer universal pre-K for all four-year-olds.\textsuperscript{246} In other states, publicly funded preschool does not serve all eligible children and typically limits enrollment to


\textsuperscript{243} EDUCATION COMMISSION OF THE STATES, \textit{50-STATE REVIEW} 1 (Jan. 2016), http://www.ecs.org/ec-content/uploads/01252016_Pre-K_Funding_report_revised_02022016.pdf (noting that 32 states increased state funding for pre-K programs in 2015-16, of which 22 states had Republican governors and 10 states had Democratic governors).

\textsuperscript{244} Id.

\textsuperscript{245} FLA. CONST. art. IX, § 1.

\textsuperscript{246} See Mike Bostock, Shan Carter & Kevin Quealy, \textit{State-Financed Preschool Access in the U.S.}, N.Y. TIMES (Feb. 13, 2013), http://www.nytimes.com/2013/02/14/education/early-education-far-short-of-goal-in-obama-speech.html. Florida and Oklahoma have the highest percentages of four-year-olds enrolled in state preschool programs, at 76% and 73% respectively.
low-income children.\textsuperscript{247} Note that none of three leading states on universal pre-K have ratified the federal ERA, and two of them lack a state ERA. This illustrates the extent to which support for childcare and early education is unmoored from the women’s equality agenda. Once equal rights for women are understood to engender a modern infrastructure of social reproduction, the dynamics of national consensus might shift.

4. Structuring Work for Coequal Parents and Caregivers

There is also an after-school childcare gap for school-age children when both parents work full-time. A school day that ends at 3:00 p.m. made sense in the old infrastructure, which assumed that the non-working mother would be available to care for children between the end of the school day and the end of the standard workday. A workday that ends a few hours after school ends is also part of the old infrastructure of social reproduction, which assumed that one parent need not work a standard workday. The relationship between the length of the school day and the length of the workday needs to be rethought to equalize men’s and women’s shares of market work and caregiving.

This brings us to the fourth component of the infrastructure of social reproduction: a system of employment designed for workers who are also co-parenting equally. If employment policy assumed that the typical worker is raising children without depending on a partner to provide as much unpaid caregiving support as needed, how would jobs, including schedules and wages, be structured?\textsuperscript{248} One’s answer to this question depends in part on how the other components of the infrastructure, such as education, would be designed. If the school day is lengthened, the current norm of 9:00-5:00 jobs need not change. However, if the school day remains roughly the same, different employment arrangements such as flex-time, comp time, and job sharing would be necessary for two breadwinners to also fulfill their family responsibilities.

Workplace flexibility laws are emerging at the state and local level in the United States. In 2013, Vermont adopted a law that entitles employees to request a flexible working arrangement, and requires the employer to discuss and consider such requests at least twice a year. Although the law does not require the employer to grant requests when reasonable, it requires the employer to

\textsuperscript{247} See Sara Mead, The Building Blocks of Success: Clearing up common misconceptions about state pre-K programs can lead to better outcomes for our kids, U.S. NEWS & WORLD REPORT (Jun. 15, 2015), http://www.usnews.com/opinion/knowledge-bank/2015/06/26/setting-the-record-straight-on-state-pre-k-programs.

\textsuperscript{248} Joan Williams argues that the ideal worker norm, including the nine-to-five workday, is designed around masculine norms. See JOAN WILLIAMS, UNBENDING GENDER: WHY WORK AND FAMILY CONFLICT AND WHAT TO DO ABOUT IT 64-100 (2000). Vicki Schultz and Allison Hoffman argue that a reduced workweek would alleviate work-family conflict without exacerbating the gendered division of labor in the workplace and in family caregiving. See Vicki Schultz & Allison Hoffman, The Need for a Reduced Workweek in the United States, in PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY (Judith Fudge & Rosemary Owen eds., 2006).
discuss the request in good faith, and provides the employer with factors the employer may consider. San Francisco adopted a law with very similar terms and requirements. It protects employees from retaliation for requesting flexible work arrangements.

The achievement of gender balance in management and decision-making positions could also play a role in structuring the workplace for coequal parents and caregivers. Institutions that achieve gender balance must confront the fact that a critical mass of their participants will be primary or coequal caregivers. When there are a few token women, it is possible for the institution to continue to operate on the assumption that every participant is available full-time, without caregiving responsibilities, and the women most likely to succeed in such institutions are typically not mothers. But once women are in the public sphere in sufficiently large proportions, as German leaders recently recognized, a fertility crisis may ensue if working full-time is incompatible with raising a family. Thus, the social order must devise an alternative infrastructure of social reproduction, and there are many models and approaches from which to choose. Gender-balanced leadership catalyzes the process by which the alternative employment regime emerges.

Laws requiring gender balance in any institutional setting are also more likely to emerge and be upheld at the state level. Indeed, some fourteen states in the United States have statutes that require gender balance on the state, county, or city committees of major political parties: Florida, Kansas, Louisiana, Massachusetts, Michigan, Missouri, Montana, New Jersey, Oregon, South Carolina, Tennessee, Texas, Washington, West Virginia, Wisconsin, and Wyoming. All but two of these states (Missouri and South Carolina) have either ratified the federal ERA or adopted a state ERA or both. While these statutes only apply to political party committees, they suggest the legal possibility in the states of legislating gender balance.

These statutes were first adopted in the period before and after the adoption and ratification of the woman’s suffrage amendment to the U.S. Constitution.

251.

251. I have developed this theory in more detail in Julie C. Suk, Work-Family Conflict and the Pipeline to Power, 2012 MICH. ST. L. REV. 1797, 1805.
253. See infra Table 3.
254. See KRISTI ANDERSEN, AFTER SUFFRAGE: WOMEN IN PARTISAN AND ELECTORAL POLITICS BEFORE THE NEW DEAL 77-109 (1996); JO FREEMAN, A ROOM AT A TIME: HOW WOMEN ENTERED PARTY POLITICS 110 (2000); Marguerite J. Fisher, Women in the Political Parties, in 251 ANNALS OF THE
While some state courts struck down these equal representation provisions on various federal constitutional grounds,\textsuperscript{255} including Equal Protection and even the Nineteenth Amendment itself,\textsuperscript{256} some state courts have upheld them on either the same grounds or state constitutional grounds.\textsuperscript{257}

One state case, \textit{Marchioro v. Chaney}, illustrates how a state ERA can form the normative foundation of state legislation to achieve gender equality.\textsuperscript{258} The Washington Supreme Court upheld its statutory gender quota on state political party committees, providing a long and detailed discussion of the quota’s relationship to the state’s ERA. Both male and female members of the Democratic Party challenged this statute on various federal and state constitutional grounds.\textsuperscript{259} They argued, inter alia, that the 50-50 sex division led to exclusions based on sex and thus violated Washington State’s Equal Rights Amendment. The Washington Supreme Court rejected their claims, and suggested instead that the constitutional amendment encouraged the government to promote “actual” equality for women. The court held that Washington’s pre-ERA approach of applying heightened scrutiny to sex classifications had been “swept away” by the ERA.\textsuperscript{260} The ERA did not make the government “powerless to take measures designed to assure women actual as well as theoretical equality of rights.”\textsuperscript{261} The court then concluded, “This is precisely the purpose of this legislation.”\textsuperscript{262} Thus, in addition to finding that the statute did not violate the ERA, it also suggested that the statute vindicated the ERA’s underlying purpose:

What has been done to assure women actual as well as theoretical equality of these rights? The legislature has found that in the conduct of the offices of state committees there shall be an absolute equality of rights between the sexes. An equal number of both sexes must be elected to the committee and as chairman and vice chairman of the state committee. Neither sex may predominate. Neither may discriminate or be discriminated against. There is an equality of numbers and an equality of rights to be in office and to control the affairs of the state committee. The ironic result of plaintiffs’ theory would be to abolish a

\textsuperscript{256} E.g., In re Cavellier, 159 Misc. 212 (N.Y. 1936).
\textsuperscript{257} E.g., State ex rel. Christian D. Tompras v. Board of Election Commissioners of St. Louis County, 136 S.W.3d 65, 67 (Mo. Banc. 2004); Gallant v. LaFrance, 101 R.I. 299 (1966); Marchioro v. Chaney, 90 Wash. 2d 298 (1978).
\textsuperscript{258} \textit{Marchioro}, 90 Wash. 2d at 309 (“We have found no case or any literature which suggests mandated equality by statute would violate the equal rights amendment.”).
\textsuperscript{259} See id.
\textsuperscript{260} Id. at 305.
\textsuperscript{261} Id. at 306.
\textsuperscript{262} Id.
statute which mandates equality by invoking a provision of the constitution passed to guarantee equality.\textsuperscript{263}

As this paragraph makes clear, two decades before the French feminists of the 1990s fully developed their vision of equality as gender parity, the Washington Supreme Court envisioned "absolute equality" and "equality of numbers," particularly in leadership positions for a major political party, as central to the vision of equality of rights guaranteed by the ERA. It went on to distinguish a rule requiring an equal number of men and women from "special exemptions or exceptions because of sex, e.g. 'protective' labor legislation applicable to women only."\textsuperscript{264} Such rules were problematic because they were "exclusionary statutes which apply to one sex only,"\textsuperscript{265} unlike the gender quota at issue here.

The Washington Supreme Court also noted that, while sixteen states at the time had state ERAs, only the state of Washington used the phrase "equality of rights and responsibility."\textsuperscript{266} The Court continued, "we must presume the legislature and the people did not intend the phrase to be mere surplusage but that it was to have meaning."\textsuperscript{267} The gender quota ensured that men and women exercised equal responsibility on state political party committees. By focusing on responsibility rather than rights, the legitimacy of the statute is tied up with its creating an opportunity for equal representation in a democratic process, which must coexist with litigants' equal rights to compete for a position. The Washington Supreme Court's construction of the ERA resonates, as we shall see, with German and French constitutional interpretations of sex equality clauses as legitimizing principles rather than enforceable rights.

\textbf{C. The Significance of Constitutional Commitment}

State laws imposing gender representation rules for political party committees are an example of state legislative activity undertaken to enforce and realize the potential of the federal Nineteenth Amendment. They proliferated around the time that the first ERA was introduced in 1923, on the heels of the Nineteenth Amendment. Today, American states are adopting policies appropriate to post-industrial economies, which depend on people of all genders to perform market work and raise children at the same time. These emerging policies are not framed in terms of constitutional equality for women. But they should be.

\textsuperscript{263} Id.
\textsuperscript{264} Id. at 307.
\textsuperscript{265} Id.
\textsuperscript{266} Id. at 307 (citing WASH. CONST. art. XXXI, § 1 (1972)).
\textsuperscript{267} Id. at 307-08.
Many of the states that are leading the way do have ERAs in their state constitutions. While thirty-five states ratified the federal ERA, twenty-three states now have ERAs in their state constitutions.

Table 2. Federal ERA Ratifications and State Constitutional ERA, State by State.

<table>
<thead>
<tr>
<th>State</th>
<th>Ratified ERA?</th>
<th>State ERA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Alaska</td>
<td>Yes</td>
<td>Art I, § 3 (1972)</td>
</tr>
<tr>
<td>Arizona</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Arkansas</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>California</td>
<td>Yes</td>
<td>Art. I, § 8 (1879)</td>
</tr>
<tr>
<td>Colorado</td>
<td>Yes</td>
<td>Art. II, § 29 (1973)</td>
</tr>
<tr>
<td>Delaware</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Georgia</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Yes</td>
<td>Art. I, § 3 (1978)</td>
</tr>
<tr>
<td>Idaho</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Illinois</td>
<td>No</td>
<td>Art. I, § 18 (1971)</td>
</tr>
<tr>
<td>Indiana</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Kansas</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Louisiana</td>
<td>No</td>
<td>Art, I §§ 3, 12 (1974)</td>
</tr>
<tr>
<td>Maine</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Maryland</td>
<td>Yes</td>
<td>Decl. Rts. Art. 46</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Yes</td>
<td>Pt. 1, Art. 1 (1976)</td>
</tr>
<tr>
<td>Michigan</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Mississippi</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Missouri</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Montana</td>
<td>Yes</td>
<td>Art. 2, § 4 (1972)</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Nevada</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>Yes</td>
<td>Pt. 1, Art. 2 (1974)</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Yes</td>
<td>Art. 1, ¶ 1, Art. X, ¶ 4 (1947)</td>
</tr>
<tr>
<td>State</td>
<td>Yes/No</td>
<td>Constitutional Reference</td>
</tr>
<tr>
<td>--------------------</td>
<td>--------</td>
<td>--------------------------</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Yes</td>
<td>Art. 2, § 18 (1973)</td>
</tr>
<tr>
<td>New York</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>North Carolina</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>North Dakota</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Ohio</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Oregon</td>
<td>Yes</td>
<td>Art. 1, § 46 (2014)</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Yes</td>
<td>Art. 1, § 28 (1971)</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Yes</td>
<td>Art. 1, § 2 (1986)</td>
</tr>
<tr>
<td>South Carolina</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>South Dakota</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Texas</td>
<td>Yes</td>
<td>Art. 1, § 3 (1972)</td>
</tr>
<tr>
<td>Utah</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Vermont</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Virginia</td>
<td>No</td>
<td>Art. I, § 11 (1971)</td>
</tr>
<tr>
<td>Washington</td>
<td>Yes</td>
<td>Art. XXXI, § 1 (1972)</td>
</tr>
<tr>
<td>West Virginia</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Wyoming</td>
<td>Yes</td>
<td>Art. I, §§ 2, 3 (1890)</td>
</tr>
</tbody>
</table>

Injecting a story of constitutionalism into states’ efforts to reduce post-industrial gender inequality can reframe these policies as a deliberately designed framework rather than the convergence of contingent political interests at a particular moment. Constitutionalizing a commitment to eradicating women’s sex-based disadvantages can connect the dots in the newly emerging social reproduction paradigm. As a practical matter, it is clear that some degree of institutional coordination is required among the different elements of the infrastructure. The length of paid parental leave depends on the age at which public childcare becomes available, and the extent and desirability of flexible work arrangements also depend on the length of the school day. Understanding these components as comprising a constitutional infrastructure for social reproduction might prevent courts from striking down individual components based on the constitutional rights claims of individual complainants.

The potential for such challenges is illustrated by the German parental leave cases. The 1994 amendment on the actual implementation of equality between women and men enabled the Constitutional Court to defend the measures intended to incentivize fathers to take parental leave against individual litigants’ constitutional disparate impact and family autonomy claims. Even if we do not adopt such strong interventions in the United States as a matter of policy, the
Equal Protection claims of men and women adversely affected by the policy should not be a barrier to doing so. We can easily see how application of strict scrutiny or disparate impact antidiscrimination constructions of ERAs would strengthen challenges to paternity leave incentives or gender balance initiatives. If the law nudges fathers to do more caregiving through different legal consequences for mothers and fathers taking leave, it would be unfortunate if ERAs made such incentives harder rather than easier. Moving ERAs away from antidiscrimination and towards the infrastructure of social reproduction would avoid this situation.

If we rethink an ERA as a directive to create an infrastructure of social reproduction that is compatible with all genders participating equally in both the private and public spheres, state constitutional law is a good place to start. State constitutional law is more amenable to the infrastructure of social reproduction for several reasons. First, as a practical matter, the states are already leading in adopting pregnancy accommodations, paid parental leave, universal preschool, workplace flexibility, and gender quotas. Second, the infrastructure of social reproduction involves positive rights, such as paid parental leave and early childhood education. Our state constitutions have a tradition of positive rights, such as the right to education, which is missing from the federal Constitution.

If we rethink an ERA as a directive to create an infrastructure of social reproduction that is compatible with all genders participating equally in both the private and public spheres, state constitutional law is a good place to start. State constitutional law is more amenable to the infrastructure of social reproduction for several reasons. First, as a practical matter, the states are already leading in adopting pregnancy accommodations, paid parental leave, universal preschool, workplace flexibility, and gender quotas. Second, the infrastructure of social reproduction involves positive rights, such as paid parental leave and early childhood education. Our state constitutions have a tradition of positive rights, such as the right to education, which is missing from the federal Constitution.

In both Germany and France, it is clear that the recent amendments conceptualize “actual implementation” of equality between men and women as a normative principle or goal rather than an enforceable right held by individuals. As such, the equality amendments are enablers rather than constrainers of state action. By authorizing and legitimizing state action to pursue “actual implementation of equal rights” or “equal access,” the function of these amendments is to clarify the relationship of gender equality policies to other constitutional values. The German parental leave cases illustrate how the


269. “[C]onstitutional rights norms do not simply contain defensive rights of the individual against the state, but at the same time they embody an objective order of values, which applies to all areas of law as a basic constitutional decision, and which provides guidelines and impulses for the legislature, administration, and the judiciary.” Alexy, supra note 143, at 352 (citing BVerfGE 39, 1 (41)).
amendment provides a concrete constitutional command that must be balanced against the individual claim of equal treatment and family autonomy. The legislature, rather than courts, has primary responsibility for enforcing the constitution.\textsuperscript{270} Translated into U.S. Equal Protection analysis, the German constitutional text and construction of “actual implementation of equal rights” forms what American courts could embrace as the compelling state interest, which would overcome the individual rights violation presumed to occur through the use of sex classifications or generalizations about the likely behavior of men and women. The jurisprudence of many European courts, including the German Constitutional Court and the European Court of Human Rights, has developed a proportionality analysis in balancing constitutional principles against constitutional rights.\textsuperscript{271} On this understanding of the ERA, the amendment’s primary contribution to existing law would be to limit the scope of individual rights claims, especially those premised on equal protection, rather than to enlarge them. To mobilize the institutional coordination required to build a gender-equal infrastructure of social reproduction, it will be necessary to limit individual rights claims against sex-based affirmative action and state attempts to reshape the roles of men and women in the family. As the European examples illustrate, public policy schemes that actually incentivize gender role reversals at home and at work sometimes require parental leave policies designed with fathers’ likely behavior in mind and workplace policies designed with mothers’ likely behavior in mind. This may best be done in gender-neutral terms, but in some cases, gender-conscious policy might be more effective. The Constitution should not prohibit the latter possibility, and a twenty-first-century ERA would provide a doctrinal framework by which the rights claim to gender neutrality could be balanced against the goal of restructuring social reproduction for a world of gender equality. This conception would expand legislative authority under the ERA to respond to ERA proponents’ critique of existing Fourteenth Amendment Section Five jurisprudence.

The Oregon and Washington ERAs explicitly authorize the state legislatures to enforce the guarantee of equal rights. State legislatures contemplating legislation on pregnant worker fairness, paid parental leave, childcare, workplace flexibility, or gender balance should present such initiatives as enforcements of constitutional equality. Recall that the new ERA text authorizes Congress and

\textsuperscript{270} Legislative enforcement of the constitution also occurs in the United States, although it is less formally recognized. See \textsc{Mark Tushnet, \textit{Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law} 111-39 (2008); Robert C. Post & Reva B. Siegel, \textit{Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act}, 112 \textsc{Yale L.J.} 1943, 1980-2020 (2003); Lawrence Sager, \textit{Fair Measure: The Legal Status of Underenforced Constitutional Norms}, 91 \textsc{Harv. L. Rev.} 1212 (1978).}

the states to enforce the federal ERA. If all of the state efforts to build a new infrastructure of social reproduction are explicitly understood to enforce state or federal constitutional equal rights, the ERA can play an important role in overcoming individual antidiscrimination challenges to equality policy.

D. Towards a New Constitutional Consensus

Even before the ERA was officially pronounced dead, Betty Friedan wrote in *The Second Stage* that the family should be the new feminist frontier. She called for a renewed focus on remaking the private and public arrangements that worked against full lives with children for both men and women. Ruth Bader Ginsburg’s 1970s advocacy, which shaped Equal Protection sex discrimination jurisprudence, was largely driven by her view that women’s entry into the public sphere would have to be supported by men’s increased role in the home. Proponents of a reintroduced ERA in the mid-1980s also embraced policies beyond non-discrimination that would help women achieve real equality, including childcare. Legal feminists began to innovate within antidiscrimination law to remedy disadvantages experienced by mothers in the workplace. Since the 1990s, courts have increasingly recognized employers’ adverse actions against mothers as sex discrimination, and, in 2007, the EEOC issued guidelines detailing the circumstances under which discrimination against caregivers constituted sex discrimination. When men or women were adversely treated at work because of their caregiving responsibilities, the EEOC guidelines established that such actions were premised on gender stereotypes. Title VII plaintiffs who allege “family responsibilities discrimination” tend to be more successful than other employment discrimination plaintiffs.

273. See id. at 3-30.
276. CHADWICK v. WELLPOINT, 561 F.3d 38, 46-47 (1st Cir. 2009); BACK v. HASTINGS ON HUDSON UNION FREE SCH. DIST., 365 F.3d 107, 122 (2d Cir. 2004); SANTIAGO-ROMAS v. CENTENNIAL P.R. WIRELESS CORP., 217 F.3d 46, 55 (1st Cir. 2000); SHEEHAN v. DOLTEN CORP., 173 F.3d 1039, 1044-45 (7th Cir. 1999).
277. See also U.S. EQUAL EMP. OPPORTUNITY COMM’N, EMPLOYER BEST PRACTICES FOR WORKERS WITH CAREGIVING RESPONSIBILITIES (2009).
The politics that defeated the ERA in the 1970s and early 1980s have shifted considerably in the last thirty years. In that era, Phyllis Schlafly convinced many women, mainly homemakers, that their roles as mothers and caregivers would be demeaned as a result of a constitutional agenda that encouraged women to participate more actively in the economic sphere. Today, the economic reality has shifted, such that most women, including mothers, cannot afford to refrain from participation in the economic sphere in advanced democracies. Most mothers with school-age children are in the workforce. Families depend on the incomes of both parents to meet their basic needs. There are more two-paycheck households in the twenty-first century than there were male-breadwinner households in 1970. The rise of single-parent families also makes it more common that a full-time worker is not supported by a full-time homemaker.

Today, mothers’ groups are advocating for public policies that would protect motherhood, but they do so from the premise that most mothers must work. Many of these groups focus on policies that would make it easier to combine family caregiving and market work. These organizations include Moms Rising, Mothers of Preschoolers (MOPS), Mothers & More, Mocha Moms, and Momentum. These groups advocate for maternity and paternity leave, flexible work arrangements, education and childcare, fair wages, universal healthcare, toxin-free environments, paid sick days, gun control, healthy school foods, and immigration fairness. These mothers might have been attracted to Phyllis Schlafly’s STOP ERA campaign in the 1970s, as Schlafly claimed that the right to raise one’s children was “the most precious and important right of all.” In organizing homemakers against the ERA, Schlafly aroused fears that the legal guarantee of women’s equality would lead to a denigration of women’s role in family caregiving, as well as its eventual abandonment. Today, women’s
participation in the workplace is not merely a choice made for the luxurious goals of women’s self-fulfillment, but a necessity for twenty-first-century families raising children. As the Motherhood Manifesto puts it, “We have a twenty-first-century economy stuck with an outdated industrial-era family support structure.”

Anne-Marie Slaughter sparked a national conversation after her 2012 article, *Why Women Still Can’t Have It All*, confessed that the pull of motherhood led her to quit a high-powered job at the State Department.

New bipartisan political coalitions are forming around each component of the infrastructure of social reproduction. There is bipartisan support for pregnant workers’ accommodations. In *UPS v. Young*, a coalition of conservative pro-life groups filed an amicus brief in favor of Peggy Young, arguing that the failure to accommodate pregnant women in the workplace encouraged pregnant women to seek abortions. Republican legislators are also now cosponsors of the Pregnant Worker Fairness Act in Congress. Forty-five states—more states than required for a constitutional amendment—now offer some form of public preschool. The states with the highest levels of support and participation (Florida, Georgia, and Oklahoma) did not ratify the ERA in the 1970s and 1980s. But a new framing of constitutional sex equality as the infrastructure for social reproduction that supports mothers and children can alter the political coalitions in the states.

**CONCLUSION**

If we begin to view global sex equality constitutionalism as establishing a sustainable twenty-first-century framework for social reproduction, and state work-family life policies as having constitutional significance, a new paradigm of constitutional sex equality can emerge. The new paradigm would not focus on enabling individuals to transcend the constraints of gender as a category. Nor would it be about advancing women. The new paradigm would simply recognize the need to bring our political, economic and social institutions up-to-date with how twenty-first-century people of all genders live, work, and raise the next generation.

As currently construed, the de facto ERA of equal protection sex equality jurisprudence liberates women and men from confining stereotypes. American constitutional sex equality is now primarily concerned with appreciating the freely chosen traits of individuals. Because gender categories interfere with this goal, our existing law of gender equality is hostile to gender quotas, even while feminists acknowledge the value of greater gender balance in powerful institutions. Similarly, it is becoming increasingly central to our law of gender

---

288. BLADES & ROWE-FINKBEINER, supra note 286, at 76.


equality that no individual person be treated unequally because of his or her chosen gender identity. Thus, lately, our gender equality talk focuses on bathrooms and the importance of not excluding transgender individuals from the bathroom that serves persons sharing their chosen gender identities.

This individual freedom-based account of gender equality is not wrong; it is morally compelling and should remain the focus of Equal Protection and antidiscrimination law. But this understanding is different from (though usually compatible with) the purpose and paradigm of gender equality that should form the basis of a new constitutional amendment. To add something that we don’t already have, and that all Americans need, a new ERA should take social reproduction, rather than the problem of individual freedom from discrimination, as its core concern. The primary purpose of guaranteeing real sex equality is to ensure that the next generation of citizens can be raised without depending on an obsolete social arrangement that no longer works: the male breadwinner-female caregiver family. A twenty-first-century ERA could serve as the foundation for collective efforts to complete the revolution in the way Americans work, reproduce, and raise the next generation in the post-industrial age. These efforts need not take the form of gender quotas or generous maternity protections, as they have in Europe. But whatever the focus is for the new social reproduction infrastructure that is largely emerging in the states, courts could rely on a federal or state ERA to uphold the infrastructure if challenged by individuals complaining of discrimination or due process liberty violations. Imagining a new ERA operating in this way can transform our assumptions of what our Constitution can and should do.
THE ANTI-STEREOTYPING PRINCIPLE IN CONSTITUTIONAL SEX DISCRIMINATION LAW

Cary Franklin*

This Article argues that the anti-stereotyping theory undergirding the foundational sex-based equal protection cases of the 1970s, most of which were brought by male plaintiffs, has powerful implications for current controversies in sex discrimination law which have long been obscured by the dominant narrative about these cases. For decades, scholars have criticized Ruth Bader Ginsburg for challenging the constitutionality of sex-based state action in cases featuring male plaintiffs. They have argued that the predominance of male plaintiffs caused the Court to adopt a narrow, formalistic conception of equality incapable of rectifying the subordination of women. This Article offers a new account of the theory of equal protection animating Ginsburg’s campaign. It argues that her decision to press the claims of male plaintiffs was grounded not in a commitment to eradicating sex classifications from the law, but in a far richer theory of equal protection involving constitutional limitations on the state’s power to enforce sex-role stereotypes. This “anti-stereotyping” theory drew on the arguments of transnational movements for sex equality that emerged in the 1960s, including the movement to combat sex-role enforcement in Sweden and the women’s and gay liberation movements in the United States. The Burger Court incorporated the anti-stereotyping principle into sex-based equal protection law in the 1970s, but the significance of this doctrinal shift has long been overlooked, in part because the Court initially applied the new doctrine only in a limited set of domains. In recent years, the Court has extended anti-stereotyping doctrine beyond the provisional limitations established in the 1970s and in ways that are deeply relevant to questions at the frontiers of equal protection law today.

Introduction ................................................. 84
I. The Emergence of Anti-stereotyping Theory in the 1970s .................................................. 91
   A. The Philosophical Origins of the Sex-Role Critique ................................................. 92
   B. Women’s Rights and “The Emancipation of Man” in Sweden ........................................ 97
   C. The “Revolt Against Sex-Role Structure” in the United States ................................... 105
      1. Women and Men .................................. 106

* Copyright © 2009 by Cary Franklin, Irving S. Ribicoff Fellow, Yale Law School. J.D., Yale Law School, 2005; D.Phil., University of Oxford, 2003; B.A., Yale University, 1998. For helpful comments on earlier drafts of this article, I am grateful to Bruce Ackerman, Susan Appleton, Katharine Bartlett, Nancy Cott, Joseph Fishkin, Owen Fiss, Katerina Linos, Serena Mayeri, Martha Minow, Robert Post, Neil Siegel, and, especially, Reva Siegel. Thanks are also due to the Milton Fund at Harvard University for its generous support of this project and the American Society for Legal History for recognizing this paper with the Kathryn T. Preyer Scholars Award.
INTRODUCTION

In 1970, Ruth Bader Ginsburg, soon to be head of the ACLU’s Women’s Rights Project (WRP), had a novel idea: She decided to challenge the constitutionality of sex-based state action by bringing cases with male plaintiffs. Prior to 1970, only women had brought sex discrimination claims under the Fourteenth Amendment. By the time Ginsburg’s decade-long litigation campaign ended, men far outnumbered women among the ranks of constitutional sex discrimination plaintiffs to appear before the Supreme Court—a ratio that holds true to this day.

Conventional wisdom dictates that Ginsburg’s decision to represent male sex discrimination plaintiffs was “a strategic choice.”1 Her aim was to rid the law of formal sex classifications and, for this purpose, plaintiffs of either sex would do. On this account, male plaintiffs were “a useful tool.”2 They enabled Ginsburg and her colleagues at the WRP to address “what was primarily a women’s issue”3 by focusing on small but concrete harms to men. Indeed, it is a commonplace in legal scholarship that “Ginsburg was especially eager to argue cases brought by men [because] she thought judges might look more favorably on claims made by people of their own gender.”4

---

2 Id. at 39.
3 Id. at 55.
4 Judith Baer, Advocate on the Court: Ruth Bader Ginsburg and the Limits of Formal Equality, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 216, 219 (Earl M. Maltz ed., 2003); see also Cole, supra note 1, at 94 (asserting that “the use of male
When Ginsburg's litigation campaign ended at the start of the 1980s, sex discrimination no longer fell outside the scope of the Fourteenth Amendment. The Court had extended heightened scrutiny to sex-based state action and eradicated most formal sex classifications from federal and state law. Despite these successes, however, many legal feminists in the 1980s judged their predecessors—and particularly Ginsburg—harshly. They argued that the conception of equality animating the WRP's campaign was formalistic\(^5\) and “empty at [its] core,”\(^6\) and that ridding the law of overt sex classifications had done little to rectify women’s secondary status in the American legal system.\(^7\) Critics cited Ginsburg's decision to represent male plaintiffs as evidence that she was satisfied with formal equality and failed to appreciate the inability of a “sex-blind” doctrine to disrupt persistent cycles of discrimination in a society whose ground rules were created by and for men.\(^8\) If Ginsburg had targeted substantive inequalities between the sexes, critics charged, her campaign might have yielded a sex-based equal protection doctrine more attentive to women’s subordination. Her decision to press the claims of male plaintiffs, however, foreclosed any possibility that the Court would adopt such an

plaintiffs provides several advantages for women's rights groups,” including the fact that male judges may “be more likely to perceive a harm to one of their own gender”); Debra Ratterman, Liberating Feminist Jurisprudence, OFF OUR BACKS, Jan. 1990, at 12, 12 (1990) (reviewing Ruth Bader Ginsburg & Barbara Flagg, Some Reflections on the Feminist Legal Thought of the 1970s, 1989 U. CHI. LEGAL F. 9) (“Apparently, male plaintiffs were used in an effort to get male judges to 'empathize' with the oppressed.”); Morrison Torrey, Thirty Years, 22 WOMEN'S RTS. L. REP. 147, 149 (2001) (asserting that the WRP's decision to “recruit[ ] male plaintiffs to fight sex discriminatory laws” was “premised upon a belief that the male-dominated judiciary would be more sympathetic, or at least empathetic, to plaintiffs who looked like them”); Jennifer Yatskis Dukart, Comment, Geduldig Reborn: Hibbs as a Success (?) of Justice Ruth Bader Ginsburg's Sex-Discrimination Strategy, 93 CAL. L. REV. 541, 558, 574-75 (2005) (arguing that “the Ginsburg strategy of using male plaintiffs to redress sex discrimination” was designed to capitalize on the fact that “[n]ot only are male judges more likely to help ... an ingroup member, they are also likely to show more concern and empathy for that person”).

\(^5\) See, e.g., Mary E. Becker, Prince Charming: Abstract Equality, 1987 SUP. CT. REV. 201, 201 & n.1; Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 YALE L.J. 1281, 1286-97 (1991) (“[T]he early feminist legal view was, implicitly, that if equality meant being the same as men ... women would be the same as men. ... The essentially assimilationist approach fundamental to this legal equality doctrine ... was adopted in sex cases wholesale ... .”).

\(^6\) Mary Becker, Patriarchy and Inequality: Towards a Substantive Feminism, 1999 U. CHI. LEGAL F. 21, 22.

\(^7\) See, e.g., CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 4 (1987) (arguing that “[p]articularly in its upper reaches, much of what has passed for feminism in law has been the attempt to get for men what little has been reserved for women”); Baer, supra note 4, at 231 (“[S]o far men have been the primary beneficiaries of the new sexual equality doctrine. Ruth Ginsburg has given no indication that this outcome troubles her.”).

\(^8\) See, e.g., Baer, supra note 4, at 231-33.
approach: These claims obscured "women's experience of second-class citizenship," and were aimed only at vindicating the narrow principle that the government may not classify on the basis of sex. Thus, many concluded, "the problems that have arisen under the Supreme Court’s . . . approach [to sex discrimination] are the direct result of men successfully arguing that they were discriminated against . . . ."10

This Article takes a fresh look at the foundational sex-based equal protection cases of the 1970s and the theory of equal protection that motivated Ginsburg to bring these cases on behalf of male plaintiffs. It argues that the dominant historical narrative, which identifies formal equality as the philosophical ideal at the core of the WRP's campaign, masks a richer set of claims regarding the constitutional limits on the state's power to enforce sex-role stereotypes. These claims helped to shape the Court's sex-based equal protection jurisprudence in ways that have powerful implications for current controversies involving the rights of women and sexual minorities, including disputes over workplace equality, the regulation of pregnant women and mothers, the exclusion of women from combat and the draft, and same-sex marriage. Yet the richness of these claims has largely been obscured in canonical accounts of the history of constitutional sex discrimination law.

Consider the stories we tell about the male plaintiffs who brought many of the foundational sex discrimination cases. Conventional wisdom suggests that the WRP's reliance on male plaintiffs was a strategic and ultimately conservative choice designed to elicit sympathy and fellow feeling from male Justices. But this is not what happened. The first time a male plaintiff appeared before the Court in a sex-based equal protection case—as half of a married couple—the suggestion that he might be a victim of sex discrimination was treated as a joke.11 In subsequent cases, when it became clear that the WRP was serious about establishing the right of men to be free from sex dis-
crimination, the laughter turned to confusion and disbelief, and, in some cases, to anger and disgust. On one occasion, Ginsburg even ran into standing problems because the lawyers, judges, and law clerks involved in the case found it nearly impossible to believe that her client—who was challenging the constitutionality of a statute limiting “mother’s benefits” to women—genuinely desired to stay home and care for his infant son.

To understand why “[t]he fact that many of the cases Ruth Bader Ginsburg brought to the Court had male plaintiffs . . . did not make the Court’s job any easier,” it is useful to consider who these plaintiffs were. One of them, the first male plaintiff Ginsburg represented, was a lifelong bachelor and primary caregiver to his elderly and ailing mother. Another was a stay-at-home father. Several were married to women who contributed substantially to their support. Most of them, in one way or another, rejected or failed to satisfy masculine gender norms circa 1975. If Ginsburg’s aim had been to “capitalize[] on sex-based ingroup biases,” selecting gender-bending men as plaintiffs would not have been a wise strategy.

Ginsburg was well aware of this. The groundbreaking sex discrimination casebook she published in 1974 opened with a note explaining that men and women both encounter discrimination when they deviate from “assigned roles,” but that “the very assurance of [male] dominance marks out for even greater social disapproval men whose unconventional interests and abilities lead them to choose different lifestyles.” In 1975, in a series of lectures on “Gender and the

12 See infra text accompanying notes 284–88.
13 See Transcript of Oral Argument at 60, Wiesenfeld v. Sec’y of Health, Educ. & Welfare, 367 F. Supp. 981 (D.N.J. 1973) (No. 268-73) (on file with the Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 10, Folder: Weinberger v. Wiesenfeld 1973) (“[T]hey say that men, of course, will work. Mr. Wiesenfeld will, of course, continue working, says the defendant, although we will debate that.”); Memorandum from Richard Blumenthal, Law Clerk, to Justice Harry A. Blackmun 8 (Dec. 23, 1974) (on file with the Library of Congress, Manuscript Division, Harry A. Blackmun Papers, Box 203, Folder 6, Weinberger v. Wiesenfeld) (advising the Justice that “[a] question should be raised at oral argument as to whether appellee is continuing to receive these benefits, or whether he has [returned to work]”).
15 Moritz v. Comm’r, 469 F.2d 466, 467 (10th Cir. 1972).
17 See, e.g., id. at 639 (noting that the plaintiff’s wife’s earnings were “substantially larger” than his and provided the “couple’s principle source of support”); Frontiero v. Richardson, 411 U.S. 677, 680 & n.4 (1973) (noting that the male plaintiff was a full-time college student with no earned income).
18 Dukart, supra note 4, at 569.
Constitution," Ginsburg observed that even people who are "generally sympathetic to the elimination of impediments to equal opportunity for women find the notion of a central home and family role for men disquieting. The idea evokes a feeling of strangeness and the resistance that often attends the unfamiliar." When the Justices ruled in favor of the plaintiff who sought "mother's benefits" in order to stay home with his infant son, a member of the ACLU's national board lauded Ginsburg for "a great job well done, particularly in light of the fact that there wasn't a male baby sitter among . . . them." Nobody at the ACLU in the 1970s was under the impression that the male plaintiff cases were being argued before a "home crowd."

If Ginsburg knew male sex discrimination plaintiffs would strike the Justices as odd, why did she choose to represent them? This Article argues that Ginsburg pressed the claims of male plaintiffs in order to promote a new theory of equal protection founded on an anti-stereotyping principle. This anti-stereotyping theory dictated that the state could not act in ways that reflected or reinforced traditional conceptions of men's and women's roles. It was not simply anti-classificationist: It permitted the state to classify on the basis of sex in instances where doing so served to dissipate sex-role stereotypes. Nor was it strictly anti-subordinationist: Because discrimination against women had traditionally been viewed as a benefit to them, Ginsburg was concerned that an anti-subordination principle would provide courts with too little guidance about which forms of regulation warrant constitutional concern. The anti-stereotyping approach was designed to provide such guidance; its aim was to direct courts' attention to the particular institutions and social practices that perpetuate inequality in the context of sex.

Part I seeks to recover the philosophical and historical origins of the anti-stereotyping principle. The longstanding assumption that the WRP's campaign rested on a narrow, formalistic conception of equality has obscured the rich array of sources on which Ginsburg drew to develop her theory of equal protection. This Part shows that Ginsburg derived the anti-stereotyping principle in part from the phi-

---

philosophy of John Stuart Mill and the policy innovations of Sweden, which began in the early 1960s to wage an ambitious, decades-long campaign against sex-role enforcement. What is most surprising about these sources, from the perspective of canonical accounts of Ginsburg's campaign, is the extent of the changes "Mill and the Swedes" believed would be necessary to implement the anti-stereotyping principle. These thinkers viewed combating sex stereotyping as a project that would require extensive legal and social reform.

This perception was shared by progressive social movements that began to challenge sex discrimination in the United States in the late 1960s and early 1970s. Ginsburg was not the only sex equality advocate on this side of the Atlantic who began to deploy anti-stereotyping arguments in this period. The women's and gay and lesbian liberation movements launched an attack in these years on "the sex-role structure"—the set of institutions and social practices through which men and women were compelled to conform to traditional sex and family roles. These movements developed a powerful critique of sex stereotyping that emphasized its role in perpetuating the oppression of women and sexual minorities. The dominant historical narrative, which teaches that Ginsburg espoused an essentially hollow conception of equality, obscures the continuity between the WRP's anti-stereotyping arguments and those of related social movements in the 1970s. In so doing, it renders invisible the historical dimensions of the WRP's campaign most relevant to questions at the cutting edge of sex-based equal protection law today.

Part II examines how Ginsburg translated philosophical and social movement claims about sex stereotyping into constitutional arguments. Unlike the more radical critics of "the sex-role structure," the WRP aimed not to eradicate sex roles but to stop the state from enforcing them. In the early 1970s, in a series of cases involving male caregivers and pregnant workers, the WRP began to challenge laws that reflected a "'separate-spheres' mentality" and reinforced the "breadwinner-homemaker dichotomy."25 By the mid-1970s, the Court itself had begun to reason about sex discrimination from an anti-


stereotyping perspective. It recognized—particularly in male plaintiff cases we tend to overlook today—that laws that steer men out of traditionally female roles effectively require women to assume those roles, and it interpreted the Equal Protection Clause as a bar to such "role-typing." 26

At the time, this turn toward anti-stereotyping did not seem like a monumental change in the law. The Burger Court declined to apply the anti-stereotyping principle in domains where it had identified "real" differences between the sexes, so in practical terms, the doctrine was limited. It failed to reach pregnancy, abortion, rape, and sexuality—areas where sex-role stereotyping was often strongest. The rise of the New Right in the late 1970s made it politically difficult for legal feminists to challenge these limitations. Leaders in the New Right condemned Ginsburg and her colleagues as radical and out-of-step with "normal" Americans; with the fate of the Equal Rights Amendment (ERA) uncertain, legal feminists were wary of embracing the wide-ranging implications of the anti-stereotyping principle. Despite these limitations, however, anti-stereotyping had become a key mediating principle in sex-based equal protection law. Over time, this principle would significantly reshape constitutional doctrine.

Part III examines the contours of constitutional sex discrimination doctrine today. It begins by considering recent innovations in the Court's application of the anti-stereotyping principle. In 1996, in United States v. Virginia, 27 the Court suggested that the salient question in equal protection law is not whether men and women are biologically different, but whether the state is acting in ways that translate such differences into social inequalities and gender-differentiated sex and family roles. 28 It suggested, in other words, that even in cases involving "real" differences, the Constitution prohibits sex-based state action that reflects or reinforces traditional conceptions of men's and women's roles. The Court's most recent sex-based equal protection case, Nevada Department of Human Resources v. Hibbs, 29 applied this new approach in the domains of pregnancy and motherhood, recognizing for the first time that the state's regulation of pregnant women and mothers can entrench sex-role stereotypes in

28 Id. at 533–34 (asserting that "'[p]hysical differences' between men and women . . . are enduring," but that the constitutional landscape in which those differences are regulated has changed; today, sex classifications may be used to combat the separate spheres tradition, but may not be used, as they were in the past, to perpetuate this tradition).
ways that violate equal protection. These holdings extended anti-stereotyping doctrine beyond some of the most significant limitations established by the Burger Court. This Part ends by considering the implications of these doctrinal developments for questions involving women in the military, reproductive rights, and same-sex marriage—questions sex-based equal protection law has thus far failed to reach. It shows that recovering the history and tracing the evolution of the anti-stereotyping principle can provide new insight into issues at the frontiers of equal protection law today.

I
THE EMERGENCE OF ANTI-Stereotyping Theory in the 1970s

Ruth Bader Ginsburg wrote her first sex discrimination brief in the fall of 1970. Her client was Charles Moritz, a sexagenarian book editor and life-long bachelor who lived with and cared for his ailing mother in Denver, Colorado. Moritz’s troubles began when he took a deduction on his 1968 federal income tax return for expenses related to his mother’s care. Although he was otherwise qualified for the deduction, which was intended to ease the financial burden on family caregivers, the IRS determined that Moritz was ineligible on the basis of his sex. When Ginsburg learned of Moritz’s predicament, she volunteered to represent him pro bono, judging his case “as neat a craft as one could find to test sex-based discrimination against the Constitution.”30 Her goal was to bring Moritz v. Commissioner of Internal Revenue to the Supreme Court, where she hoped to persuade the Justices, for the first time in American history, to invalidate a law that discriminated on the basis of sex under the Equal Protection Clause.

Moritz had obvious virtues as a test case. The issue was discrete, the discrimination overt. Less obvious was why Ginsburg should have sought to challenge the constitutionality of sex-based state action in a case with a male plaintiff. Recognizing that the sex of her client might surprise the court, Ginsburg noted the oddity in her brief. She acknowledged that “instances of discrimination against women dominate the rapidly developing case law in this area.”31 She aimed to


31 Brief for Petitioner-Appellant at 20, Moritz v. Comm’r, 469 F.2d 466 (10th Cir. 1971) (No. 71-1127) (on file with the Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 5, Folder: Moritz v. Comm’r [1971]).
show, however, that Moritz's claim was neither an aberration nor a stunt but the leading edge of a new conception of sex discrimination. Her brief in *Moritz* formulated for the first time the approach to equal protection that would guide the WRP's work for the next decade: namely, that "the constitutional sword necessarily has two edges" and that "[f]air and equal treatment for women means fair and equal treatment for members of both sexes."32

Conventional wisdom dictates that in making this argument, Ginsburg was promoting a narrow, anti-classificationist approach to sex-based equal protection law. This Part shows that the assumption that Ginsburg's campaign was animated by a thin conception of equality has obscured the much richer theory of equal protection that actually underwrote her decision to represent male plaintiffs. Her use of male plaintiffs was inspired not by "the thin abstract 'likes alike, unalikes unalike' of Aristotelian logic,"33 but by the thicker and more contemporary anti-stereotyping logic of John Stuart Mill. Anti-stereotyping theory had become popular among a number of movements for sex equality in the 1960s and 1970s. It emerged first in Sweden, where it fueled a remarkably influential campaign against sex-role enforcement, and subsequently in the United States, where it was adopted by the women's and gay and lesbian liberation movements. Through these sources, it made its way into the brief that Ginsburg wrote on behalf of Charles Moritz. This Part traces the history of anti-stereotyping theory from its philosophical origins in the nineteenth century to its elaboration by sex equality advocates in the 1970s in order to illuminate the powerful conception of equal protection that funded the WRP's work in the Burger Court era.

A. The Philosophical Origins of the Sex-Role Critique

Like many feminists in the early 1970s, Ruth Bader Ginsburg was an avid reader of John Stuart Mill. When Ginsburg finished writing her groundbreaking brief in *Moritz*, she circulated it to a colleague with a note explaining that she had decided to test the constitutionality of sex-based state action in a case featuring a male caregiver because she "believe[d], with Mill and the Swedes, that the principle must work both ways!"34 This section explains what Mill meant when he argued that the sex equality principle "must work both ways" and

---

32 *Id.*
why this understanding of equality became such an animating force in the struggle against sex discrimination a century later.

Few works have been as influential in American feminist thought as Mill’s 1869 essay, *The Subjection of Women*. The leaders of the women’s suffrage movement—Elizabeth Cady Stanton, Susan B. Anthony, and Carrie Chapman Catt—were ardent proponents of Mill’s work. In 1869, Stanton invited Mill to attend the convention of the Equal Rights Association in New York, and when he delivered the first speech in Parliament advocating the enfranchisement of women, she and Anthony reprinted it as a tract for American audiences.35 In the years before the First World War, at the apex of the campaign for women’s suffrage, Catt helped to publish a new edition of *The Subjection of Women*.36

Five decades after women in the United States won the right to vote, Mill’s essay became one of the critical texts in the second wave of the women’s movement. In 1970, sociologist Alice Rossi, a founding member of the National Organization for Women (NOW), edited a collected volume of essays on sex equality written by Mill and his partner Harriet Taylor,37 which helped to inaugurate a resurgence of interest in *The Subjection of Women* among feminist philosophers and political theorists.38 That same year, Ruth Bader Ginsburg embarked on her historic litigation campaign, which drew on Mill’s work to explain why discrimination on the basis of sex violated the Constitution’s equal protection guarantee.39 Mill also figured prominently in the work of more radical feminists. In 1970, Kate Millett—a

---


member of the New York Radical Women—published Sexual Politics, a best-selling and hugely influential examination of sexism in Western literature, philosophy, and psychology, in which the egalitarian spirit of Mill’s essay served as an important counterpoint to the patriarchal tenor of other “great books.”

Pat Mainardi, a member of the radical feminist Redstockings, opened her wry and widely-read 1970 essay, The Politics of Housework, with a quote from The Subjection of Women. Jill Johnston, author of Lesbian Nation, a groundbreaking lesbian feminist manifesto of the early 1970s, cited Mill in her work.

The Subjection of Women appealed to feminists at the start of the 1970s for the same reason it appalled Mill’s contemporaries. When the essay was published in 1869, “the reaction in the reviews was disastrous; [Mill] was denounced as mad or immoral, often as both.” Although Mill was a prominent political radical, well known for his outspoken support for unpopular causes, it was not the policy proposals in his essay that his detractors decried as indecent, even foul. It was something else, “something . . . unpleasant in the direction of indecorum” in Mill’s “prolonged and minute discussions about the relations between men and women” that disgusted his critics, some of whom found it difficult even to acknowledge his arguments.

At the root of this critical ire lay Mill’s contention that “certainly most, and probably all, of the existing differences of character and intellect between men and women were due to the very different attitudes of society toward members of the two sexes from their earliest infancy.” When Mill wrote The Subjection of Women, the notion that men and women were naturally very different, and that men were innately superior to women, was widely accepted. (A few years after the publication of Mill’s essay, Justice Bradley opined in Bradwell v. Illinois that “nature herself[ ] has always recognized a wide difference in the respective spheres and destinies of man and woman” and that “[t]he natural and proper timidity and delicacy which belongs to the

---


MILLETT, supra note 40, at 92.


Mill’s commentary on the sexes was so disagreeable to the eminent Victorian jurist James Fitzjames Stephen that he found it necessary to “pass over what Mr. Mill says on this subject with a mere general expression of dissent from nearly every word he says.” I’d.

OKIN, supra note 38, at 216.
female sex evidently unfit it for many of the occupations of civil life."\(^{47}\) Mill's essay attacked this conventional wisdom with a simple question: If women are naturally inclined toward wife-and-motherhood, why is "the whole of the present constitution of society"\(^ {48}\) aimed at compelling them to adopt these roles?

The greater part of The Subjection of Women is devoted to showing that "[w]hat is now called the nature of women is an eminently artificial thing—the result of forced repression in some directions, unnatural stimulation in others."\(^ {49}\) Mill compared the development of "women's nature" to that of a tree, half of which was subjected to the artificial atmosphere of a hothouse: The shoots bathed in light and heat "sprout luxuriantly," while those "left outside in the wintry air, with ice purposely heaped all round them," wither and die of neglect.\(^ {50}\) When men see this malformed tree, Mill argued, they fail to "recognise their own work" and "indolently believe that the tree grows of itself in the way they have made it grow, and that it would die if one half of it were not kept in a vapour bath and the other half in the snow."\(^ {51}\)

Because "women's nature" was the product of artificial cultivation, Mill claimed that it was just as foolish to praise women for their virtues as it was to blame them for their shortcomings. There was no "more signal instance of the blindness with which the world, including the herd of studious men, ignore and pass over all the influences of social circumstances," he wrote, "than their silly depreciation of the intellectual, and silly panegyrics on the moral, nature of women."\(^ {52}\)

Women cultivated moral virtues because they were prized for such virtues as it was to blame them for their shortcomings. There was no "more signal instance of the blindness with which the world, including the herd of studious men, ignore and pass over all the influences of social circumstances," he wrote, "than their silly depreciation of the intellectual, and silly panegyrics on the moral, nature of women."\(^ {52}\)

Because "women's nature" was the product of artificial cultivation, Mill claimed that it was just as foolish to praise women for their virtues as it was to blame them for their shortcomings. There was no "more signal instance of the blindness with which the world, including the herd of studious men, ignore and pass over all the influences of social circumstances," he wrote, "than their silly depreciation of the intellectual, and silly panegyrics on the moral, nature of women."\(^ {52}\)

Because "women's nature" was the product of artificial cultivation, Mill claimed that it was just as foolish to praise women for their virtues as it was to blame them for their shortcomings. There was no "more signal instance of the blindness with which the world, including the herd of studious men, ignore and pass over all the influences of social circumstances," he wrote, "than their silly depreciation of the intellectual, and silly panegyrics on the moral, nature of women."\(^ {52}\)

Because "women's nature" was the product of artificial cultivation, Mill claimed that it was just as foolish to praise women for their virtues as it was to blame them for their shortcomings. There was no "more signal instance of the blindness with which the world, including the herd of studious men, ignore and pass over all the influences of social circumstances," he wrote, "than their silly depreciation of the intellectual, and silly panegyrics on the moral, nature of women."\(^ {52}\)

Because "women's nature" was the product of artificial cultivation, Mill claimed that it was just as foolish to praise women for their virtues as it was to blame them for their shortcomings. There was no "more signal instance of the blindness with which the world, including the herd of studious men, ignore and pass over all the influences of social circumstances," he wrote, "than their silly depreciation of the intellectual, and silly panegyrics on the moral, nature of women."\(^ {52}\)

Because "women's nature" was the product of artificial cultivation, Mill claimed that it was just as foolish to praise women for their virtues as it was to blame them for their shortcomings. There was no "more signal instance of the blindness with which the world, including the herd of studious men, ignore and pass over all the influences of social circumstances," he wrote, "than their silly depreciation of the intellectual, and silly panegyrics on the moral, nature of women."\(^ {52}\)

Because "women's nature" was the product of artificial cultivation, Mill claimed that it was just as foolish to praise women for their virtues as it was to blame them for their shortcomings. There was no "more signal instance of the blindness with which the world, including the herd of studious men, ignore and pass over all the influences of social circumstances," he wrote, "than their silly depreciation of the intellectual, and silly panegyrics on the moral, nature of women."\(^ {52}\)

Because "women's nature" was the product of artificial cultivation, Mill claimed that it was just as foolish to praise women for their virtues as it was to blame them for their shortcomings. There was no "more signal instance of the blindness with which the world, including the herd of studious men, ignore and pass over all the influences of social circumstances," he wrote, "than their silly depreciation of the intellectual, and silly panegyrics on the moral, nature of women."\(^ {52}\)

Because "women's nature" was the product of artificial cultivation, Mill claimed that it was just as foolish to praise women for their virtues as it was to blame them for their shortcomings. There was no "more signal instance of the blindness with which the world, including the herd of studious men, ignore and pass over all the influences of social circumstances," he wrote, "than their silly depreciation of the intellectual, and silly panegyrics on the moral, nature of women."\(^ {52}\)

Because "women's nature" was the product of artificial cultivation, Mill claimed that it was just as foolish to praise women for their virtues as it was to blame them for their shortcomings. There was no "more signal instance of the blindness with which the world, including the herd of studious men, ignore and pass over all the influences of social circumstances," he wrote, "than their silly depreciation of the intellectual, and silly panegyrics on the moral, nature of women."\(^ {52}\)

Because "women's nature" was the product of artificial cultivation, Mill claimed that it was just as foolish to praise women for their virtues as it was to blame them for their shortcomings. There was no "more signal instance of the blindness with which the world, including the herd of studious men, ignore and pass over all the influences of social circumstances," he wrote, "than their silly depreciation of the intellectual, and silly panegyrics on the moral, nature of women."\(^ {52}\)

Because "women's nature" was the product of artificial cultivation, Mill claimed that it was just as foolish to praise women for their virtues as it was to blame them for their shortcomings. There was no "more signal instance of the blindness with which the world, including the herd of studious men, ignore and pass over all the influences of social circumstances," he wrote, "than their silly depreciation of the intellectual, and silly panegyrics on the moral, nature of women."\(^ {52}\)

Because "women's nature" was the product of artificial cultivation, Mill claimed that it was just as foolish to praise women for their virtues as it was to blame them for their shortcomings. There was no "more signal instance of the blindness with which the world, including the herd of studious men, ignore and pass over all the influences of social circumstances," he wrote, "than their silly depreciation of the intellectual, and silly panegyrics on the moral, nature of women."\(^ {52}\)

Because "women's nature" was the product of artificial cultivation, Mill claimed that it was just as foolish to praise women for their virtues as it was to blame them for their shortcomings. There was no "more signal instance of the blindness with which the world, including the herd of studious men, ignore and pass over all the influences of social circumstances," he wrote, "than their silly depreciation of the intellectual, and silly panegyrics on the moral, nature of women."\(^ {52}\)

Because "women's nature" was the product of artificial cultivation, Mill claimed that it was just as foolish to praise women for their virtues as it was to blame them for their shortcomings. There was no "more signal instance of the blindness with which the world, including the herd of studious men, ignore and pass over all the influences of social circumstances," he wrote, "than their silly depreciation of the intellectual, and silly panegyrics on the moral, nature of women."\(^ {52}\)

Because "women's nature" was the product of artificial cultivation, Mill claimed that it was just as foolish to praise women for their virtues as it was to blame them for their shortcomings. There was no "more signal instance of the blindness with which the world, including the herd of studious men, ignore and pass over all the influences of social circumstances," he wrote, "than their silly depreciation of the intellectual, and silly panegyrics on the moral, nature of women."\(^ {52}\)
because they had relatively few opportunities to do so.\footnote{MILL, supra note 48, at 82–83.} There was nothing natural in any of this, Mill asserted: All of the traits associated with women—good and bad—resulted from the laws and customs that shaped their character.

This was radical, certainly, but perhaps the most radical aspect of Mill’s writing on sex equality was that it debunked not only the myth of women’s nature but the myth of men’s nature as well. Mill argued that manliness too was a product of social and economic circumstances. “It is considered meritorious in a man to be independent: to be sufficient to himself; not to be in a constant state of pupillage”;\footnote{MILL, supra note 53, at 526.} so men strive to become breadwinners. “A man is despised, if he be not courageous,”\footnote{Id.} so men take up arms and strike out for new lands. In men, no less than in women, Mill argued, the tree grows in the way we have made it grow.

In neither case did the differential treatment of the sexes conduce to society’s wellbeing. “Think what it is to a boy to grow up to manhood in the belief that . . . by the mere fact of being born a male he is by right the superior of all and every one of an entire half of the human race,” Mill entreated his readers.\footnote{MILL, supra note 48, at 86.} “Is it imagined that all this does not pervert the whole manner of existence of the man, both as an individual and as a social being?”\footnote{Id. at 87} Inequalities in marriage, employment, and education steered men and women into separate spheres and prevented them from developing the full range of human capacities. Women suffered terribly as a result of these inequalities. But Mill asserted that sex-based inequality injured men too because it created a society far less democratic, far less productive, and far less happy than it might have been.\footnote{Id. at 84–89.} The solution to this problem, he argued, was to reform the “institutions by which the accident of sex is made the groundwork of an inequality of legal rights, and a forced dissimilarity of social functions,”\footnote{JOHN STUART MILL, Principles of Political Economy, in 3 COLLECTED WORKS OF JOHN STUART MILL 765 (Univ. of Toronto Press 1965) (1848).} and to liberate individuals from the laws, customs, and attitudes that compel them to behave as “men” and “women.”

Martha Nussbaum calls Mill “the first great radical feminist in the Western philosophical tradition.”\footnote{Martha C. Nussbaum, Professor of Law & Ethics, Univ. of Chi. Law Sch., Mill’s Feminism: Liberal, Radical and Queer, Keynote Lecture at the Mill Bicentennial Confer-} His suggestion that culture, not
nature, defines the sexes predated the work of Judith Butler, Anne Fausto-Sterling, and other contemporary gender theorists by more than a century. Ultimately, however, Mill was less interested in demonstrating that all sex differences are socially constructed than he was in "deny[ing] that anyone knows, or can know, the nature of the two sexes, as long as they have only been seen in their present relation to one another." For Mill, this epistemological doubt gave rise to two conclusions. First, existing inequalities between men and women cannot be justified by reference to “natural differences.” Second, the aim of a liberal society should be to eradicate all of the legal and social forces that press individuals into particular molds and onto particular paths on the basis of their sex.

Part II will examine how Ginsburg used these insights to develop a legal theory of why and when sex-based state action violates the Fourteenth Amendment. First, however, this Part seeks to explain in greater detail why male plaintiffs played such a central role in the litigation campaign waged by the WRP in the early 1970s. Although Mill recognized that sex discrimination shaped men's lives, The Subjection of Women did not envisage the bachelor caregivers, stay-at-home fathers, and male nurses who populated the ranks of constitutional sex discrimination plaintiffs in the Burger Court era. Ginsburg's theory of equal protection incorporated Mill's ideas, but the prevalence of men among the WRP's sex discrimination clients was the product of more contemporary influences.

B. Women's Rights and “The Emancipation of Man” in Sweden

Ginsburg has frequently noted that her “eyes were first opened to the prospect [of a campaign for sex equality] in Scandinavia in the early 1960's, particularly in Sweden, where the contemporary women's movement started earlier than it did in the United States.” Ginsburg's interest in Sweden began in 1961, when she accepted a
position researching Swedish law for Columbia Law School’s Project on International Procedure.\textsuperscript{65} In the course of her work, she learned Swedish, lived intermittently in Sweden, and became an expert on Swedish law.\textsuperscript{66} Between 1963 and 1970, she published over a dozen books and articles on the Swedish legal system,\textsuperscript{67} including the definitive \textit{Civil Procedure in Sweden},\textsuperscript{68} and incorporated Swedish law into the comparative law course she taught at Rutgers Law School.\textsuperscript{69}

Ginsburg’s immersion in Swedish law and culture in the 1960s would have a profound impact on her subsequent career as a legal feminist and Supreme Court litigator. The year she began to study Swedish law, 1961, marked a major turning point in Sweden’s approach to women’s rights. Prior to the 1960s, the primary goal of Swedish feminists and the Social Democratic government had been to help women combine their role in the family with their role in the paid labor market.\textsuperscript{70} In 1961, Sweden’s approach to sex equality took “a new and unusual turn.”\textsuperscript{71} The catalyst for this change was the publication of an article entitled \textit{The Conditional Emancipation of Women} by a young journalist named Eva Moberg.\textsuperscript{72} Moberg asserted that “[b]oth men and women have one principal role, that of being people,” and

\begin{itemize}
  \item \textsuperscript{65} Herma Hill Kay, \textit{Ruth Bader Ginsburg, Professor of Law}, 104 \textit{COLUM. L. REV.} 2, 10–11 (2004).
  \item \textsuperscript{68} \textit{Ruth Bader Ginsburg & Anders Bruzelius, Civil Procedure in Sweden} (1965).
  \item \textsuperscript{69} Kay, \textit{supra} note 65, at 10–11.
  \item \textsuperscript{70} Prominent Social Democrat Alva Myrdal and sociologist Viola Klein outlined this agenda in the 1956 bestseller, \textit{Women’s Two Roles: Home and Work}. Myrdal and Klein argued that women should not be forced to “forgo the pleasures of one sphere in order to enjoy the satisfactions of the other,” and that with increased social services, women could play two roles and thereby benefit themselves and their country. Alva Myrdal & Viola Klein, \textit{Women’s Two Roles: Home and Work} (2d ed. 1968).
  \item \textsuperscript{71} Alva Myrdal, \textit{Foreword to The Changing Roles of Men and Women} 9 (Edmund Dahlström ed., Gunilla Anderman & Steven Anderman trans., Gerald Duckworth & Co. 1967) (1962).
  \item \textsuperscript{72} Hilda Scott, \textit{Sweden’s “Right To Be Human”: Sex-Role Equality: The Goal and the Reality} 5 (1982). Moberg was a journalist and the editor of \textit{Herta}, the
that women would never achieve equality as long as they were expected to pursue two roles while men pursued only one.\textsuperscript{73} The “fulfillment of the goals of feminism requires a radical change of the habits of living, attitudes and values of the average man,” Moberg argued.\textsuperscript{74} It was not enough to open the public sphere to women; the home would also have to be opened to men, and they would have to “meet the women half-way.”\textsuperscript{75}

Moberg’s argument “spread like wildfire”\textsuperscript{76} in academic and policy circles and sparked “an intensive public debate about gender roles.”\textsuperscript{77} “Publications from the theoretical organ of the powerful blue-collar labor federation to the Swedish equivalent of TV Guide reviewed” her essay, and she “was called upon to defend her ideas in television debates and in the cultural pages of the leading newspapers.”\textsuperscript{78} Ginsburg, who was living in Sweden at the height of this debate,\textsuperscript{79} and who credits Moberg with opening her eyes to the double-edged nature of sex discrimination, recalls the controversy this way:

The gist of [Moberg’s article] was why should a woman have two jobs and the man only have one? And there was much discussion among women about this approach—that it wasn’t enough that he took out the garbage. Some women [said], “Well, I can do everything . . . I don’t need him to do anything around the house,” while others said “[that is unfair] and, besides, it will be much healthier for children to grow up with two caring parents, not just one.” So I began to think of it.\textsuperscript{80}

magazine of Sweden’s oldest women’s organization, the Fredrika Bremer Association. \textit{Id}. at 4–5.

\textsuperscript{73} \textit{Id}. (quoting Moberg).


\textsuperscript{75} \textit{Id}.

\textsuperscript{76} \textit{Id}. at 42.

\textsuperscript{77} \textsc{Linda Haas}, \textsc{Equal Parenthood and Social Policy: A Study of Parental Leave in Sweden} 38 (1992).


\textsuperscript{79} See David Von Drehle, \textit{Conventional Roles Hid a Revolutionary Intellect: Discrimination Helped Spawn a Crusade}, \textsc{Wash. Post}, July 18, 1993, at A1 (reporting that when Ginsburg lived in Stockholm, it seemed to her that “[e]very cocktail party in the country . . . was consumed with talk of” Moberg’s article).

\textsuperscript{80} \textit{Justice Ruth Bader Ginsburg: A “Lady” Who Led the Fight for Gender Equity}, \textsc{Duke L. Mag.}, Spring 2005, at 8 (alterations in original) (quoting Ginsburg), available at http://
Ginsburg was not the only one who began to think of it. In 1962, an influential team of social scientists led by sociologist Edmund Dahlström published a collection of essays entitled *The Changing Roles of Men and Women*, which provided theoretical grounding for Moberg’s argument. Dahlström’s book raised serious questions about the “stereotyped view of sex roles.” It suggested that sex functioned in society not predominantly as a biological class but as “a social screening device separating human needs into feminine or masculine needs, directing boys and girls into different careers, cultivating different interests, clothing them in different colours and calling them different names.”

It posited that “differentiated sex roles” were historically contingent and “represent[ed] the response of family members to the current structure of society, and the nature of current social policies (i.e. labour market, urban and residential planning, tax and wage policies).” Dahlström and his colleagues contended that in order to liberate men and women from “stereotyped notions of what is ‘feminine’ and ‘masculine,’” it would be necessary to change “the institutional framework within which [they] act.” “Formal legal equality alone [would be] an insufficient means to attain this goal”:

Only through structural change could society ensure that “[b]oth men and women have one main role, that of a human being.”

Known as *jämställdhet*, or gender equality, this theory quickly “became the leading ideology of the equality movement” in Sweden.
Advocates of *jämställdhet* argued "that imprisonment in the masculine role is at least as great a problem to men as conformity to a feminine ideal is to women" and "that a debate on liberation and equality must be about how men as well as women are forced to act out socially determined stereotypes." 91 This new approach to sex discrimination prompted significant changes in law and policy. By the end of the 1960s, Sweden had done away with virtually all "woman-protective" labor legislation, generally by extending to male workers protections the law had traditionally reserved to women. 92 It had also begun to expand government grants for day care, 93 to recruit female workers in industries where they were historically underrepresented, 94 and to encourage men to play a more active role in the home. 95

In 1969, when Olof Palme became prime minister, the emancipation of men and women from sex-role prescriptions became an official policy aim of the Swedish government. 96 Palme, the leader of the Social Democratic Party from 1969 until his assassination in 1986, 97 was an ardent proponent of *jämställdhet*. In 1970, on his first visit to the United States as prime minister, he delivered a speech entitled "The Emancipation of Man." 98 It was a manifesto for the Swedish theory of sex equality. Measures designed to emancipate women were not enough, Palme asserted: "[I]n order that women shall be emancipated from their antiquated role the men must also be eman-

91 SCOTT, supra note 72, at 43.
92 HAAS, supra note 77, at 27.
93 Kelman, supra note 78, at 22.
94 SCOTT, supra note 72, at 24–26.
95 See Åsa Lundqvist, *Conceptualising Gender in a Swedish Context*, 11 GENDER & HIST. 583, 587–88 (1999) (discussing policy changes designed to combat sex-role stereotyping). Susan Sontag, who moved to Sweden in 1969 to make her first feature-length film, noted that "[e]quality between the sexes . . . is much more advanced here than in the States. . . . Sweden is probably the only country in Europe or the Americas where I could spend all the months it takes to make a movie without ever once having it called to my attention . . . that I was not a film director but a woman film director." Susan Sontag, *A Letter from Sweden*, RAMPARTS, July 1969, at 32–33; see also Helen M. Hacker, *The Changing Social Roles of Men and Women*, 35 J. MARRIAGE & FAM. 149, 150 (1973) (book review) ("It is in the espousal of shared roles that Swedish thinking seems to be in advance of America.").
96 In 1969, the Social Democrats' party program incorporated a declaration to the effect "that government powers over industry were to be used to eliminate sex discrimination, that labor-market and educational policies must counteract sex-determined choices of occupation, and that expanded services, especially day care and public transport, were essential requirements for an effective equality policy." SCOTT, supra note 72, at 6.
97 EDWARD OLSZEWSKI, SOCIAL DEMOCRATIC MOVEMENT AND IDEOLOGY 223, 225 (2002).
Echoing Dahlström and his colleagues, Palme argued that "the culturally conditioned expectations of an individual on account of sex[] act as a sort of uniform," forcing him or her to conform to sex-role stereotypes. Now that the state's complicity in enforcing these stereotypes had become apparent, he argued, the state had an obligation to liberate men and women from the constraints it had placed on them. Fulfilling this obligation would require not only measures designed to increase the number and power of women in the labor market, but also measures designed to allow men to assume traditionally female roles. In fact, Palme argued, the emancipation of men was the linchpin in the struggle for sex equality, for as long as women's pursuits remained off-limits to men, neither sex would be free from discrimination.

"The Emancipation of Man," more than any other document, encapsulates the theory of equality that animated the landmark sex discrimination cases the WRP brought to the Court in the 1970s. Because the "latter twentieth-century sex-equality movement [was] not peculiar to the United States," Ginsburg believed that it made sense for American courts and litigators to consult legal traditions other than our own in thinking about what equal protection requires. To this end, she included the text of Palme's speech in her 1974 sex discrimination casebook, and frequently cited it in law review articles and lectures. She took key phrases and concepts in her briefs directly from Palme's manifesto. Her landmark brief in

---

99 Id. at 938.
100 Id. at 941.
101 Id. at 940-42.
102 Ginsburg, Transcript, supra note 64, at 4.
103 See, e.g., A Conversation with Justice Ruth Bader Ginsburg, 53 U. KAN. L. REV. 957, 960 (2005) ("[W]hen our Constitution was composed, the brilliant men who wrote it looked abroad, to other systems, other thinkers. I don't think they meant to stop us from getting whatever enlightenment we can by looking beyond our borders."); Ruth Bader Ginsburg & Deborah Jones Merritt, Affirmative Action: An International Human Rights Dialogue, 21 CARDOZO L. REV. 253, 282 (1999) ("In my view, comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups.").
105 Palme's influence is particularly evident in the WRP's discussions of "double-edged discrimination." The phrase, "one-eyed sex-role-thinking," Palme, supra note 98, at 942, which was taken from Palme's speech, appears often in the WRP's briefs. See, e.g., Brief for Appellee at 45, Califano v. Goldfarb, 430 U.S. 199 (1977) (No. 75-699); Brief for
Reed v. Reed drew not only on "The Emancipation of Man" but also on The Changing Roles of Men and Women and the 1968 Report to the United Nations on the Status of Women in Sweden, which she described as "a progress report indicating a pace more rapid than that of the United States."107

Swedish anti-stereotyping ideals went far beyond mandating formal equality. Palme and other Swedish sex equality advocates argued that a broad agenda of legal and social reforms would be necessary to combat sex-role stereotyping. In 1970, the Swedish Parliament implemented a new national school curriculum, which required schools to "work for equality between the sexes—in the family, on the labour market and within the community as a whole"—not simply by offering the same classes to girls and boys, but also "by counteracting traditional attitudes to sex roles and stimulating pupils to discuss and question the differences which exist between men and women in many fields in respect of influence, jobs and wages."108 Curricular reform was followed in 1971 by what was referred to at the time as the "greatest equality reform ever"109: the abolition of joint taxation for married couples.110 Due to Sweden's high marginal tax rates, joint marital taxation functioned as a significant disincentive to women's employment. By shifting to a system in which wives' wages were taxed on an individual basis, rather than at their husbands' higher marginal rates, the state made paid work a more lucrative prospect for married women, increasing numbers of whom entered the labor market in the 1970s.111

107 Brief for Appellant, supra note 39, at 15 n.11, 55 n.52. In its 1968 report to the United Nations, the Swedish Government asserted "that it was not enough to guarantee women their rights. All legislation and all social policy must support a shift from man-the-breadwinner and woman-the-homemaker to a society of independent individuals and of partnerships in which all tasks were shared." SCOTT, supra note 72, at 3 (describing the report).


109 Lundqvist, supra note 95, at 587–88 (internal quotations omitted).


111 See Lundqvist, supra note 95, at 587–88 (describing tax and other reforms of early 1970s Sweden that led to increased numbers of women in the labor market); see also Siv Gustafsson & Roger Jacobsson, Trends in Female Labor Force Participation in Sweden, 3 J. LAB. ECON. S256, S263–65 (Supp. 1985) (demonstrating that increasing a wife's paid work hours from zero to full-time increased one hypothetical family's disposable income by 43 percent in 1967 and by 67 percent in 1973, after the abolition of joint taxation).
In addition to education and tax reform, Sweden implemented sweeping reforms in the realm of work and family. Palme’s government vastly increased the availability of daycare. In 1974, it guaranteed the right to abortion and introduced a parental leave system permitting fathers as well as mothers to take paid leave after the birth of a child, making Sweden the first country in the world to offer paid parental leave to men. To better enable men and women to share roles, the government required recipients of certain government grants to hire roughly equal numbers of male and female employees, allotted special grants to employers who trained employees for sex-atypical jobs, and mandated that schoolchildren visit job sites in fields in which their sex was underrepresented. The Social Democratic party extended its longstanding goal of full male employment to women. Affirmative action programs designed to desegregate the workforce were opened to members of both sexes. The government even began to consider how planning and zoning and public transportation networks could be redesigned to make it easier for both sexes to work outside the home.

Ginsburg followed these developments closely, and it is useful to keep them in mind when considering her decision to represent male plaintiffs. This decision has often been misinterpreted as a simple tactical choice, and one that elevated formal over substantive equality. But the Swedish thinkers who inspired Ginsburg to press the claims of male plaintiffs did not seek to eradicate sex discrimination against men because they were committed to formal equality. Jämställdhet was premised on the belief that the subordination of women would continue as long as men were required to behave in traditionally masculine ways and that the goal of feminism should therefore be to liberate both sexes from prescriptive sex stereotyping. As the next

---


113 See Mary Ann Glendon, Abortion and Divorce in Western Law 22–23 (1987).

114 HAAS, supra note 77, at 14; see also Ginsburg, Status of Women, supra note 105, at 590 n.25 (describing Social Democrats’ parental leave proposal).

115 HAAS, supra note 77, at 27–28; SCOTT, supra note 72, at 25.

116 HAAS, supra note 77, at 26–27.


118 See Palme, supra note 98, at 944 (arguing that expanded services to facilitate household work and public transport systems designed to shorten commute times would “make it easier for both husband and wife to be gainfully employed”).
section shows, this anti-stereotyping philosophy had gained a strong foothold in the United States by the time the WRP began to press the claims of male sex discrimination plaintiffs. It resonated across a wide range of social movements at the start of the 1970s, a period in which many Americans were beginning to question the naturalness of sex roles and to challenge the laws and customs that enforced those roles.

C. The "Revolt Against Sex-Role Structure" in the United States

In the fall of 1974, Ruth Bader Ginsburg delivered a series of lectures entitled "Gender and the Constitution."\(^\text{119}\) She opened her lectures by explaining that she had chosen her title carefully, as her subject was not "[w]omen's rights," but the "[s]ex-role debate."\(^\text{120}\) The aim of sex equality advocates in the 1970s, Ginsburg asserted, was to demonstrate "that distinct roles for men and women coerced or steered by law are antithetical"\(^\text{121}\) to Americans' deepest constitutional commitments, and to persuade the Court "to confront the particular gender discrimination cases presented to it as part of a pervasive design of government-steered sex-role allocation."\(^\text{122}\) Quoting Eva Moberg and Olof Palme, Ginsburg noted that the anti-stereotyping approach was "gaining currency in the United States" as increasing numbers of Americans began to challenge the "support our highest national law has provided for traditional sex-role allocations."\(^\text{123}\)

This section examines the emergence of anti-stereotyping arguments in the campaign against sex discrimination in the United States in the late 1960s and early 1970s. Although these arguments coincided with those of "the Swedes," they had distinctively American roots: The concept of stereotyping was deeply ingrained in American civil

\(^{119}\) Ginsburg, supra note 20.

\(^{120}\) Id. at 1 ("'Women's rights' seemed inappropriate since the issues explored concern men as much as they do women."); see also Ruth Bader Ginsburg, Equal Opportunity Free from Gender-Based Discrimination, Address Before the American Arbitration Association (Feb. 20, 1974) (on file with the Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 12, Folder: Speeches File, Feb.–Mar. 1974) ("'Women's rights' seems to me less clearly descriptive of our concern; that label has been used by advocates of sharp lines between the sexes, as well as by feminists who champion equal opportunity for women and men."); Letter from Ruth Bader Ginsburg, Professor of Law, Columbia Law Sch., to Valerie Andrews Hale & Richard M. Reilly, Am. Arbitration Ass'n (Jan. 29, 1974) (on file with the Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 12, Folder: Speeches File, Feb.–Mar. 1974) ("[A]s ACLU's docket reveals, our concern is the eradication of gender-based discrimination. . . . Focus on women's rights may be too narrow, for many 'men's rights' cases promote equal opportunity for both sexes.").

\(^{121}\) Ginsburg, supra note 20, at 41.

\(^{122}\) Id. at 42.

\(^{123}\) Id. at 1–2.
rights discourse by the time this campaign began. The civil rights movement had long argued that stereotyping perpetuated racial subordination by curtailing the opportunities of racial minorities and helping to justify the rigid racial stratification of American society. By the late 1960s, an interrelated set of social movements—most notably, the women’s movement and the gay and lesbian liberation movements—had begun to argue that stereotyping had analogous and overlapping effects in the context of sex. These movements varied in their tone and in their tactics; they sometimes disagreed about the aims of feminism and they often disagreed about which priorities should take precedence in the struggle against sex-based oppression. They were united, however, in their commitment to ending what they commonly referred to as “the sex-role system.” Armed with new social science, they began to challenge legal and social practices that perpetuated this system. In so doing, these movements helped to construct a popular foundation for the WRP’s claim that the state’s enforcement of sex roles violated the Fourteenth Amendment and that significant legal and social change was necessary to counteract the force of sex stereotyping in American life.

1. Women and Men

The word “stereotyping,” as we understand it today, entered the American vocabulary in the 1920s after the publication of Walter Lippmann’s *Public Opinion*, a groundbreaking analysis of the ways in which media shaped the public mind and influenced the political system. Lippmann argued that “we do not first see, and then define, we define first and then see. In the great blooming, buzzing confusion of the outer world we pick out what our culture has already defined for us” and see what we have picked out through the lens of our cultural stereotypes. This process saves time, Lippmann noted, but it “is not neutral. It is not merely a way of substituting order for the ... confusion of reality.” It is “the projection upon the world of ... our own position and our own rights.” As such, he argued, stereotypes perpetuate the status quo; they are the “fortress of our tradition.” Education and careful attention could help to dismantle this fortress, Lippmann suggested, but those in power prefer to leave the fortress

125 LIPPMANN, supra note 124, at 81.
126 Id. at 96.
127 Id.
128 Id.
intact because behind its defenses they can feel assured of their dominance.

Lippmann’s analysis of stereotyping did not focus exclusively, or even primarily, on race, but the concept of stereotyping would soon become a major theme in American civil rights discourse. Social scientists in the 1940s and 1950s extensively documented the ways in which racial stereotypes influenced whites’ perceptions of racial minorities and helped them to rationalize the pervasive discrimination and gaping race-based inequalities in American society. The civil rights movement incorporated this work into its campaign against Jim Crow, arguing that it was morally wrong, and contrary to the Fourteenth Amendment, for the state to act in ways that reflected and reinforced stereotyped judgments about the relative capacities and proper social roles of black people. Because such judgments—particularly when enforced by the state—deprived racial minorities of valuable opportunities and relegated them to the status of second-class citizens, advocates of racial equality sought the “eradication of the group stereotype from the law.” These advocates argued that “[o]fficial action premised on the group stereotype is not to be tolerated,” and that “[n]o private citizen should be enabled to treasure his own stereotype, and

---


130 See, e.g., Brief of Am. Jewish Cong. as Amicus Curiae at 11–16, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10) (asserting that in the “magical sphere of the white man’s mind . . . the Negro is believed to be stupid, immoral, diseased, lazy, incompetent, and dangerous,” and arguing that segregated schools reinforce, and lend the state’s imprimatur to, these stereotypes (emphasis removed) (quoting Myrdal, supra note 129, at 100)).

131 Louis Lusky, The Stereotype: Hard Core of Racism, 13 Buff. L. Rev. 450, 457 (1964) (emphasis omitted). Anti-stereotyping was, of course, only one strand in civil rights discourse in mid-century America, and the concept of stereotyping itself was deployed in multiple ways. One set of anti-stereotyping concerns focused on the institutions and social structures that perpetuated the subordination of racial minorities. Another set of concerns focused on the damage that racial stereotypes wrought on the black psyche. For an examination of the conservative implications of this latter set of concerns, see Daryl Michael Scott, Contempt and Pity: Social Policy and the Image of the Damaged Black Psyche, 1880–1996 (1997). My aim here is not to provide a comprehensive account of the use of the concept of stereotyping by advocates of racial equality, but simply to note that this concept did not emerge in antidiscrimination law for the first time in the 1970s.
transmit it proudly to his children, on the ground that he is simply following the lead of his government.”

The aim of these anti-stereotyping arguments was not to persuade courts and legislators that race should play no role in the law. As a leading civil rights scholar noted in the early 1960s: “[I]t does not follow [from the premise that the state cannot act on the basis of racial stereotypes] that the state must or should ignore the stereotype’s grip upon millions of Americans. Official color-blindness, in this sense, is not a constitutional imperative.” Advocates who framed the problem in these terms argued that the Fourteenth Amendment barred the state from acting in ways that reinforced racial stereotypes. Taking race into account was acceptable, and sometimes required, in instances where it would disrupt stereotypes and counteract the oppression of racial minorities. Indeed, loosening “the stereotype’s grip upon millions of Americans” would in some cases require substantive, race-conscious reform: “not only the cessation of maltreatment, but aid in recovering from its effects.” Without such intervention, advocates claimed, the practice of racial stereotyping would continue to flourish and the promise of equal citizenship embodied in the Fourteenth Amendment would continue to elude disfavored racial groups.

In the 1960s, lawyers in the civil rights and women’s rights movements began to apply these insights in the domain of sex. Pauli Murray, the chief architect of the “race-sex analogy,” argued—first from her seat on President Kennedy’s Commission on the Status of Women and then in an influential series of law review articles—that

---

132 Id. at 460.
133 Id. at 460-61.
134 For more on the anti-subordinationist underpinnings of the civil rights movement’s equal protection arguments in the decades before and after Brown, see Reva B. Siegel, Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown, 117 HARV. L. REV. 1470 (2004).
135 Lusky, supra note 131, at 460-61. Applying anti-stereotyping principles to the question of school integration, Lusky argued that the salient constitutional question in determining whether to implement a busing plan was not whether it took race into account, but whether it would serve to ratify or dissipate racial stereotypes. In other words: “Will a color-conscious official policy, even though benevolent in purpose and not premised on any judgment as to the attributes of Negroes in general, tend on the whole to preserve the stereotype? Or will the net effect be to hasten its extirpation?” Id. at 461.
136 By identifying ways in which the women’s movement built on concepts used by the civil rights movement, I do not mean to suggest that the meaning and implications of the anti-stereotyping approach remained constant across different contexts. Exploring the differences between anti-stereotyping discourse in the context of race and anti-stereotyping discourse in the context of sex is a project for the future. My point here is that the women’s movement was building on a preexisting foundation when it began, in the late 1960s, to make anti-stereotyping arguments.
women, like racial minorities, had been judged inferior and barred from a great many opportunities on the basis of a characteristic unrelated to their actual or potential capabilities.\textsuperscript{137} Drawing on the work of Swedish social scientist Gunnar Myrdal,\textsuperscript{138} Murray observed that the "myths built up to perpetuate the inferior status of women and of Negroes were almost identical."\textsuperscript{139} Both groups were widely thought to have "inferior endowments in most of those respects which carry prestige, power, and advantages in society," but to be superior in the narrow set of roles to which they had been assigned.\textsuperscript{140} Murray argued that these stereotyped judgments served to cement a social order that delimited opportunity on the basis of race and sex, and relegated women and racial minorities to positions of social and economic inferiority: "As the Negro was awarded his 'place' in society, so there was a 'woman's place.'"\textsuperscript{141} Building on the claims of the civil rights movement, Murray asserted that substantial legal and legislative change would be necessary to enable these subordinated (and overlapping) groups to overcome the web of stereotypes that kept them in their place. "The case for national action"\textsuperscript{142} in the area of sex discrimination was no less compelling than the case for national action to combat race discrimination, she claimed: Because sex stereotypes affected all social classes and all spheres of activity, they were particularly "intransigent" and difficult to combat.\textsuperscript{143}


\textsuperscript{138} Myrdal's AN AMERICAN DILEMMA, supra note 129, offered a comprehensive account of the ways in which racial segregation undermined the promise of American democracy. The second edition of AN AMERICAN DILEMMA, published in 1962, contained an appendix arguing that sex discrimination and race discrimination were "parallel" and equally troubling problems. See 2 GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 1073–78 (1962). Pauli Murray, and later Ruth Bader Ginsburg, drew on Myrdal's work to show that sex-based equal protection arguments were contiguous with those of the civil rights movement and founded on principles deeply rooted in American law. See, e.g., Ginsburg, supra note 20, at 2–3.


\textsuperscript{140} Id. (quoting 2 MYRDAL, supra note 138, at 1077).

\textsuperscript{141} Id. (quoting 2 MYRDAL, supra note 138, at 1077); see also Pauli Murray, The Negro Woman's Stake in the Equal Rights Amendment, 6 HARV. C.R.-C.L. L. REV. 253, 255 (1971) ("Sexual stereotypes have undergirded laws and customs which treat all women as a single class and make distinctions based upon the sole factor of their sex. They disregard the fact that women vary as individuals . . . just as men do.") [hereinafter Murray, Negro Women's Stake].

\textsuperscript{142} Pauli Murray, Economic and Educational Inequality Based on Sex: An Overview, 5 VAL. U. L. REV. 237, 237 (1971).

\textsuperscript{143} Id.
In 1966, Pauli Murray, Betty Friedan, and a number of other sex equality advocates founded NOW, which began to make the case for national action to combat sex discrimination. NOW argued that women, like racial minorities, were deprived of valuable opportunities on the basis of stereotyped judgments about the way they were, or ought to be, and that when the state enforced such judgments, the harm doubled. Not only was stereotyping by the state harmful in and of itself, it “also len[t] governmental support to entrenched customs” and social practices that reinforced women’s secondary status in American society. The civil rights movement had focused its critique on institutions outside the home—schools, workplaces, voting booths, and public accommodations; the women’s movement extended this critique into the home. Feminists in the 1960s argued that the widespread expectation that women would serve “as the center of home and family life” curtailed their educational and economic opportunities and deprived them of rights automatically accorded men, who were assumed to be (and often were) free from significant caregiving responsibilities. NOW asserted that because these mutually reinforcing stereotypes were so deeply ingrained in law and custom, loosening their grip upon millions of Americans would require significant structural reform.

In the summer of 1970, NOW organized the Women’s Strike for Equality, a mass demonstration staged in forty cities across the United States. The strike, which drew tens of thousands of women, was intended to illustrate that “it was not possible to secure equality for women without fundamental changes in family life” and that such changes could not occur without policies designed to alleviate the pressure on women to conform to traditional roles. To this end, the strikers sought “to publicize three core movement claims: (1) free abortion on demand, (2) free 24-hour childcare centers, and (3) equal opportunity in jobs and education.” Reproductive rights and childcare were essential, the movement argued, because equal opportunity would remain elusive as long as women were expected to subordinate all other activities to the care of home and family. The movement

144 Murray, Negro Women’s Stake, supra note 141, at 253.
145 Hoyt v. Florida, 368 U.S. 57, 62 (1961) (upholding a Florida law exempting women from jury service on the ground that they have “special responsibilities” at home).
147 Id. at 1992.
148 Id. at 1989 (internal quotation marks omitted).
149 For this reason, NOW’s 1967 Task Force on the Family urged the repeal of all laws restricting women’s right to abortion and argued that “[i]f women are to participate on an
supported the Comprehensive Child Development Act (CCDA), which was drafted within months of the strike, for the same reason. Passed by both houses of Congress before President Nixon vetoed it, the CCDA appropriated $2 billion for Head Start, day care, and supportive education programs to be provided at no, or low, cost to American families. Testifying on behalf of the Act, representatives of NOW asserted that “widespread availability of child care facilities is essential if women are to have true choice of lifestyles.”

Like advocates of jämställdhet in Sweden, the women’s movement in the United States argued that women would never have true choice of lifestyles if men were not afforded the same choice. NOW’s founding Statement of Purpose, drafted in 1966, rejected “current assumptions that a man must carry the sole burden of supporting himself, his wife, and family, and that . . . marriage, home and family are primarily woman’s world and responsibility—hers, to dominate—his to support.” It advocated instead a “true partnership between the sexes” based on “an equitable sharing of the responsibilities of home and children.”

Within a few years of its founding, NOW had convened a “Task Force on the Masculine Mystique.” The Task Force asserted that neither sex could escape the confines of the sex-role system without “a breakdown in job segregation by sex; workplace and state policies that supported men’s sharing of child care equally with women; [and] changes in education and media to undermine sex role stereotyping.” NOW supported “the emancipation of man” for the same reason it supported subsidized daycare and access to abor-

---


151 NAT'L Org. for Women, Statement of Purpose, reprinted in Feminist Chronicles, supra note 149, at 159, 162.

152 Id. at 162–63.

153 Michael A. Messner, The Limits of “The Male Sex Role”: An Analysis of the Men’s Liberation and Men’s Rights Movements’ Discourse, 12 Gender & Soc. 255, 263 (1998). NOW’s Task Force was only one of a number of men’s groups to challenge the prescriptions of American masculinity in this period. These groups took aim at “the sex-role stereotypes that regard ‘being a man’ and ‘being a woman’ as statuses that must be achieved through proper behavior.” Jack Sawyer, On Male Liberation (1970), in Men and Masculinity 170, 171 (Joseph H. Pleck & Jack Sawyer eds., 1974). Their relationship to the women’s movement was sometimes quite close: Marc Feigen Fasteau, who wrote one of the
tion: All were means of counteracting the structural pressures forcing men and women to adopt traditional roles in the family.

Criticism of the sex-role system took on a sharper edge in the more radical segments of the women’s movement, where activists spoke not of “humanizing” sex roles but of “annihilating” them. Shulamith Firestone, who founded a series of radical feminist groups in this period, argued in her 1970 bestseller *The Dialectic of Sex* that “the end goal of feminist revolution must be . . . not just the elimination of male privilege but of the sex distinction itself.” In a just society, she argued, “genital differences between human beings would no longer matter culturally.” Kate Millett, author of *Sexual Politics*, argued in 1968 that sexual revolution would spell “the end of sex role and sex status,” so that traits would no longer be “categorized into ‘masculine’ and ‘feminine’” and “the sex act [would] cease[ ] to be arbitrarily polarized into male and female, to the exclusion of sexual expression between members of the same sex.” Although not all radical feminists shared Millett’s enthusiasm for bisexuality, her fundamental claims about the pathology of prescriptive sex stereotypes resonated among many. Sex roles are oppressive, radical feminists argued, and the aim of feminism is to liberate “every individual from every aspect of the male-female system.”

The critique of sex-role stereotyping generated by radical and liberal feminists in the late 1960s put considerable pressure on traditional notions of masculinity and femininity. In the 1950s, the dominant view among social scientists was that “the masculine male and feminine female . . . typify mental health” and that healthy psychological development depended on the extent to which a child identified with a parent of the same sex. Scholars, most notably Harvard sociologist Talcott Parsons, touted this theory in academic journals.

earliest and most influential books advocating men’s liberation, was married to Brenda Feigen Fasteau, who co-founded the WRP with Ruth Bader Ginsburg.

154 See, e.g., *The Feminists: A Political Organization To Annihilate Sex Roles*, in RADICAL FEMINISM 368, 368–69 (Anne Koedt, Ellen Levine & Anita Rapone eds., 1973) [hereinafter *The Feminists*] (“Both the male role and the female role must be annihilated.”).


156 *Id.* at 11–12.


158 *The Feminists*, supra note 154, at 370.


160 For more on Talcott Parsons and the “functionalist” view of sex roles, see BARBARA FINLAY, BEFORE THE SECOND WAVE: GENDER IN THE SOCIOLOGICAL TRADITION 215–24, 313–17 (2007).
Most Americans, however, probably encountered it in Dr. Spock's best-selling baby guide, which asserted that the healthy boy identifies with his father, "concentrating on propelling toy trucks, trains, and planes, pretending his tricycle is a car, being a policeman or fireman, making deliveries, [and] building houses and bridges," while the healthy girl identifies with her mother and will embrace "housework and baby (doll) care if these are her mother's occupations."

By the 1970s, social scientists had begun to controvert this view. The Bem Sex-Role Inventory (BSRI), developed by sociologist Sandra Bem, suggested that conformity to sex roles might not be the desideratum of healthy psychological development. The BSRI differed from previous instruments for measuring gender by treating femininity and masculinity as independent dimensions of an individual's personality rather than "as bipolar ends of a single continuum." In a famous series of studies, Bem demonstrated that men and women who evinced both masculine and feminine characteristics had "more flexible sex-role self-concepts" and were better able to adapt to a broader range of environments than those who had developed only one dimension of gender.

Partly as a result of Bem's work, there was "an enthusiastic . . . rebirth of interest" in "[s]ex roles and sex typing" among American social scientists at the start of the 1970s. The decade "witnessed a virtual torrent of sex-role studies." In 1973, the American Sociological Association created a section entitled "Sex Roles" to accommodate the explosion of interest in the topic. In 1975, the journal Sex Roles was founded in response to the increasing demand for original

164 Bem, supra note 162, at 162.
166 John Scanzoni & Greer Litton Fox, Sex Roles, Family and Society: The Seventies and Beyond, 42 J. MARRIAGE &FAM. 743, 743 (1980); see also id. (observing that sex-role research was sparse in the 1960s but that in the 1970s "volume is up and so is importance"). Books on sex roles published in the 1970s are too numerous to count. For a small sample, see Beyond Sex-Role Stereotypes: Readings Toward a Psychology of Androgyny (Alexandra G. Kaplan & Joan P. Bean eds., 1976); Sex Roles and Social Policy: A Complex Social Science Equation (Jean Lipman-Blumen & Jessie Bernard eds., 1979); The Sex-Role System: Psychological and Sociological Perspectives (Jane Chetwynd & Oonagh Hartnett eds., 1978); Shirley Weitz, Sex Roles: Biological, Psychological, and Social Foundations (1977).
167 See Messner, supra note 153, at 258.
research on sex stereotyping and sex-role socialization. 168 A majority of this work focused on women, but some of it focused on men as well. One of the most important masculinity researchers in this period was Mirra Komarovsky, a professor at Barnard and close colleague of Ruth Bader Ginsburg. 169 Komarovsky spent the first several decades of her career documenting the psychological strain sex roles imposed on women. In the 1970s, she turned her attention to men and showed that they too experienced "difficulties in fulfilling what they conceived to be the normatively expected masculine roles." 170 By 1973 (the year the Supreme Court decided a landmark sex discrimination case in favor of a female Air Force officer and her financially dependent husband), 171 even Dr. Spock had begun to reconsider his stance on sex roles. In an article in Redbook, he declared that caring for children was a job for men too, and that the new edition of his guide would underscore this idea by referring to parents using gender-neutral pronouns. 172

2. Gays and Lesbians

In 1973, the same year Dr. Spock reported a change in his thinking about sex and family roles, the American Psychiatric Association (APA) announced a far more significant, but not unrelated, change in its stance on healthy psychological development and adherence to traditional gender norms. In December of that year, the APA issued a statement announcing its decision to eliminate homosexuality from the list of mental illnesses in the Diagnostic and Statistical


169 In the winter of 1980, Ginsburg appeared as a guest lecturer in Komarovsky's class. Ginsburg's notes for the class indicate that she provided "examples of how men can be hurt when they step out of their expected roles" and argued that liberating men and women from traditional sex roles would require "measures to reduce incidence of family violence[,] flexible h[ou]rs for w[or]king parents[,] quality child care[,] and] assistance to [homemakers] attempting to enter or reenter the w[or]kforce." Ruth Bader Ginsburg, Notes for Barnard M. Komarovsky Class (Feb. 13, 1980) (on file with the Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 16, Folder: Writings File, Articles 1979).


172 Benjamin Spock, How My Ideas About Women Have Changed, REDBOOK, NOV. 1973, at 29, 34; see also Muriel R. Schulz, How Serious Is Sex Bias in Language?, 26 C. COMPOSITION & COMM. 163, 165 (1975) (citing Spock's announcement as a reflection of "the fact that men are changing diapers, fixing Pablum, and bandaging cuts today, too").
Manual of Mental Disorders. This change, too, occurred as a result of social movement activism, in this case by the gay and lesbian liberation groups that emerged in full force after the 1969 raid on the Stonewall Inn. Like the women's movement, gay and lesbian groups argued that deviation from traditional gender norms was not pathological—that, in fact, the pathology resided in the laws and social structures that enforced traditional sex roles. Indeed, a primary aim of gay and lesbian liberation in this period was to show that sex with someone of the same sex bore a family resemblance to other sex-role transgressions—including the kind recently deemed acceptable by America's most famous pediatrician—and that true sex equality entailed freedom from sex stereotyping in all its guises.

"Gay liberation is a struggle against sexism," declared one of the first gay manifestos published in the wake of Stonewall. "[S]exism," declared another, is "the founding oppression—the original inequality." This diagnosis echoed throughout the writing of gay, lesbian, and bisexual activists who emerged in large numbers at the start of the 1970s. Heterosexual and homosexual were salient categories, they argued, only because society differentiated so sharply between men and women: "[T]he imprisoning, artificial labels of gay, straight, and bi would be meaningless without the sex roles and 'correct gender

---


176 Third World Gay Revolution & Gay Liberation Front, Gay Revolution and Sex Roles, CHICAGO GAY PRIDE, June 1971, reprinted in OUT OF THE CLOSETS, supra note 24, at 252, 258–59; see also John D’Emilio, Foreword to OUT OF THE CLOSETS, supra note 24, at xi, xix, xx (noting that “gay liberationists . . . saw the battle against sexism as the very heart of their struggle” and that “[a]gain and again, in their articles, their manifestos, and their political fliers, these pioneering radicals turned to the same point: sexism”).

177 By focusing on the anti-sexist arguments made by the gay and lesbian liberation movement in this period, I do not mean to suggest that these were the only arguments the movement made or that all gay activists in the early 1970s subscribed to these arguments. The movement was also deeply concerned with the regulation of sexuality and the enforcement of repressive and hypocritical sexual mores. In addition, “[g]ay liberation groups saw themselves as one component of the decade’s radicalism and regularly addressed the other issues that were mobilizing American youth,” including racism, poverty, war, and global injustice. JOHN D’EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970, at 234 (2d ed. 1998).

202

Reprinted with Permission of New York University School of Law
identification’ . . . that sexism imposes.” If homosexuality was defined as sexual desire for someone of the “wrong” sex, then laws regulating homosexuality were quite literally sexist, in the sense that they discriminated on the basis of sex. But the argument ran deeper than this. Gay and lesbian activists observed that a ‘‘‘real man’ and ‘real woman’ are not so by their chromosomes and genitals, but by their respective degrees of ‘masculinity’ and ‘femininity,’ and by how closely they follow the sex-role script in their relationships with individuals and society.” They noted that people who deviated from this script in any way (female construction workers, effeminate men) were labeled “dyke,” “faggot,” and “queer” in order to signal that they no longer counted as proper men and women. These labels were used to keep people in check, to deter them from “cross[ing] the terrible boundary” delimiting male and female roles.

Lesbian, gay, and bisexual writers often suggested that their expulsion from the ranks of “real” men and women enabled them to see more clearly the injustice of the sex-role system. Martha Shelley, a leader in the Gay Liberation Front, noted in 1970 that the “really important thing about being gay is that you are forced to notice how much sex-role differentiation is pure artifice.” Activists in this period frequently demanded an end to such differentiation. “As gays, we demand an end to the gender programming which starts when we are born (pink for girls, blue for boys),” one manifesto declared.

Another called for “the destruction of the gender caste system.” A central aim of gay liberation, they argued, was the “abolition of sex-role stereotypes.” Like the women’s movement, supporters of gay and lesbian liberation extended their critique into the home, where

---

178 Third World Gay Revolution, supra note 176, at 258; see also RADICALESBIANS, THE WOMAN IDENTIFIED WOMAN (1970), reprinted in OUT OF THE CLOSETS, supra note 24, at 172, 173 (arguing that homosexuality is “a by-product of a particular way of setting up roles . . . on the basis of sex”).

179 Third World Gay Revolution, supra note 176, at 252.

180 RADICALESBIANS, supra note 178, at 173.

181 Shelley, supra note 24, at 33; see also N.A. Diaman, ON SEX ROLES AND EQUALITY, ZYGOTE, Oct. 30, 1970, reprinted in OUT OF THE CLOSETS, supra note 24, at 262, 263 (“As lesbians and male homosexuals, we are put down by straights because we are not real women and real men, but we are certainly one step ahead of straights in realizing how artificial and limiting those categories are.”); Young, supra note 175, at 29 (“Homosexuals committed to struggling against sexism have a better chance than straights of building relationships based on equality because there is less enforcement of roles. We have already broken with gender programming, so we can more easily move toward equality.”).

182 Young, supra note 175, at 29.

183 GAY REVOLUTION PARTY MANIFESTO, reprinted in OUT OF THE CLOSETS, supra note 24, at 342, 343.

traditional role divisions began to funnel boys and girls into separate spheres as soon as they were born. An influential 1971 essay entitled *Gay Revolution and Sex Roles* argued that “[t]he oppression of women and that of gay people are interdependent and spring from the same roots, but take different forms”\(^{185}\): Women are oppressed by how they fit into the traditional family structure; gay people are oppressed because they don’t fit into this structure. Another manifesto, written the same year, argued that the rigid sex roles associated with the traditional family hurt women and sexual minorities alike.\(^{186}\)

It called for “free and safe birth control information and devices on demand” and “free 24-hour child care centers” to liberate women from the strictures of traditional sex and family roles.\(^{187}\)

To many lesbian and bisexual activists, the links between sex equality and gay liberation were obvious. Groups like the Radicalesbians, which were involved in both the women’s movement and the lesbian liberation movement, saw gay rights as coterminous with women’s rights; they argued that “rigid sex roles” and “male supremacy” were interlocking forms of oppression, and that freedom from one required freedom from the other.\(^{188}\) Kate Millett, who was also involved in both movements, asserted that women’s liberation depended on “the end of enforced perverse heterosexuality.”\(^{189}\) Not all men in the gay liberation movement shared this sense of joint mission; there were heated conflicts in this period between lesbians and gay men over sexism and male chauvinism within the movement.\(^{190}\)

Nonetheless, quite a few male writers argued at the start of the 1970s that gay liberation was “premised on the termination of the system of male supremacy.”\(^{191}\) These writers asserted that the gay liberation movement and the women’s rights movement were working toward the same end: “the gay liberation of all people,” by which they meant

---


\(^{187}\) *Id.* at 364.

\(^{188}\) *Radicalesbians*, supra note 178, at 172.

\(^{189}\) Millett, supra note 157, at 367.

\(^{190}\) See *Flora Davis, Moving the Mountain: The Women’s Movement in America Since 1960*, at 270 (1991) (noting that lesbians often encountered sexism in the gay rights movement); D’Emilio, supra note 176, at xxi (discussing conflicts between men and women in the gay liberation movement).

\(^{191}\) Young, supra note 175, at 10; see also D’Emilio, supra note 176, at xxi (noting that even if men in the gay liberation movement did not immediately alter their behavior toward women, many of them did elaborate “a political critique of sexism and male supremacy”); Diaman, supra note 181, at 263 (critiquing sexism and male chauvinism as a source of the oppression of women and gay people).
freedom from sex-role stereotypes and the destruction of sex-based hierarchies.\(^{192}\)

On occasion, women's rights and lesbian rights groups joined together and publicly affirmed their shared commitment to eradicating sex-role stereotyping. In 1970, when *Time* magazine outed Kate Millett as bisexual and suggested this revelation would discredit her and the women's movement more generally, NOW activists held a press conference in which they declared that women and sexual minorities were "struggling towards a common goal."\(^{193}\) At NOW's annual convention in 1971, a large majority of delegates voted in favor of a resolution stating that lesbian "oppression is not only relevant, but an integral part of the women's liberation movement."\(^{194}\) The resolution declared that "the distorted stereotype of the lesbian" impeded the progress of all women.\(^{195}\) This bond was fragile, however, and severely strained by the women's movement's attempts to navigate a political climate hostile to gay rights. In the late 1960s, NOW was fearful of being tarred as a lesbian organization and shied away from discussion of homosexuality.\(^{196}\) In the late 1970s, when the continuity between women's rights and gay rights became a political liability in the battle over the ERA, liberal feminists sought once again to disassociate themselves from their queer allies.\(^{197}\)

The women's movement felt compelled to disassociate itself from gay and lesbian liberation groups in this period in part because their claims were so often identical, or at least highly overlapping. By the late 1960s, feminist and gay and lesbian activists had begun to question the naturalness of sex roles and to challenge the legal and social strictures that enforced those roles. Deploying an interrelated set of arguments, these movements extended the concept of stereotyping—long understood as a mechanism of race discrimination—into the domain of sex. They argued that status hierarchies based on sex were no more reflective of the "natural order" than status hierarchies based on race and that sex-role stereotyping was the primary means by which sex-based hierarchies were perpetuated. Their aim was not to render sex invisible, but to render more visible the ways in which law

\(^{192}\) GAY REVOLUTION PARTY MANIFESTO, supra note 183, at 343--45; see also Young, supra note 175, at 29 ("Gay is good for all of us.").


\(^{194}\) NAT'L ORG. FOR WOMEN, LESBIAN RIGHTS (1971), reprinted in FEMINIST CHRONICLES, supra note 149, at 221, 222.

\(^{195}\) Id. at 221.

\(^{196}\) See DAVIS, supra note 190, at 262--68.

\(^{197}\) For more on these fissures and their effect on the development of sex-based equal protection law, see infra text accompanying notes 304--06.
and custom steered men and women into traditional roles and relegated women and sexual minorities to the status of second-class citizens. Like the civil rights movement, these movements argued that combating prescriptive stereotyping would in some instances require structural reform—not simply equal opportunity in education and employment, but also reproductive rights and childcare, so that women could access such opportunities on equal terms.

The next Part shows how Ruth Bader Ginsburg drew on the anti-stereotyping arguments animating movements for sex equality in the late 1960s and early 1970s in order to challenge the constitutionality of sex-based state action. Ginsburg cited gains made by these movements as evidence of a marked transformation in popular attitudes toward sex discrimination. She argued in the first brief she submitted to the Supreme Court that attitudes toward sex discrimination were “undergoing a . . . metamorphosis in the public mind” akin to earlier changes in public attitudes toward race discrimination and that the function of the Fourteenth Amendment was “to put such broad-ranging concerns into the fundamental law of the land.” As we shall see, however, Ginsburg did not cite these movements simply as evidence of social change. She used their arguments to develop a new theory of equal protection—one that addressed the particular mechanisms and forms of injury associated with sex-based state action.

II
THE DEVELOPMENT OF ANTI-Stereotyping DOCTRINE

When legal feminists in the 1960s and 1970s decided to challenge the constitutionality of sex-based state action, they faced two interlocking problems. First, up to this point, the Court’s conception of discrimination had been forged primarily in the context of race. Over time, the Court had come to understand that the Jim Crow regime had marked racial minorities with a badge of inferiority and deprived them of the equal protection of the laws. Pauli Murray observed in the 1960s that sex discrimination intersected with race discrimination in important ways, leaving black women doubly disempowered. But in many instances, sex discrimination assumed a different shape than race discrimination: Women attended gender-integrated public schools, ate in gender-integrated restaurants, and lived in the same houses and neighborhoods as men. The fact that the subordination of women did not always or even primarily take the form of segregation presented sex equality advocates with a related problem—namely,

---

198 Brief for Appellant, supra note 39, at 17.
199 See, e.g., Murray, Negro Women’s Stake, supra note 141.
that "[m]en holding elected and appointed offices generally consid­
ered themselves good husbands and fathers." 200 They believed their
wives and daughters were well served by the status quo and viewed
the law's "differential treatment of men and women not as malign, but
as operating benignly in women's favor." 201 As recently as 1961, the
Court had upheld a Florida law that exempted women from jury ser­
vice on the ground that it honored their status as wives and mothers
and gave them more time to fulfill their "special responsibilities" at
home. 202

The challenge for legal feminists was to develop a theory of equal
protection that would combat these dual problems. They needed an
approach that would direct courts' attention to the particular institu­
tions and social practices that had perpetuated inequality in the con­
text of sex and counteract the widespread perception that sex
discrimination redounded to women's benefit. Pauli Murray, who first
began to develop the equal protection approach to sex discrimination
in the mid-1960s, used anti-stereotyping arguments to formulate such
an approach. She argued, in a canonical 1965 law review article, that
in bringing claims under the Fourteenth Amendment, women were
not necessarily "seeking identical treatment with men." 203 Rather,
Murray argued, they were seeking "equality of opportunity for educa­
tion, employment, cultural enrichment, and civic participation without
barriers built upon the myth of the stereotyped 'woman.' " 204 This
approach suggested that sex-based state action was a constitutional
problem not in all cases, but only when it perpetuated stereotypes that
forced the sexes into separate spheres.

When Ginsburg decided, at the start of the 1970s, to take up the
effort that Murray had begun, she placed these anti-stereotyping argu­
ments at the center of her campaign. Anti-stereotyping arguments
enabled Ginsburg to foreground the state's enforcement of the male
breadwinner–female caregiver model—a set of practices that was not
visible in the canonical race discrimination cases but had long
entrenched women's secondary status in the American legal system.
The anti-stereotyping principle also provided an antidote to the
"benign" discrimination problem. There was little consensus in the
1960s and 1970s about which institutions and social practices perpetu­
atped women's subordination and which did not. The women's move­
ment itself had been torn over this question for much of the twentieth

200 Ginsburg, supra note 22, at 1442.
201 Id.
203 Murray & Eastwood, supra note 139, at 239.
204 Id.
century; feminists on both sides of the debate sought to combat women’s oppression, but they were deeply divided on the question of whether protective labor legislation hindered or advanced that goal. For this reason, Ginsburg was wary of grounding her theory of equal protection solely in the anti-subordination principle. That principle, in and of itself, could not tell courts which forms of regulation inflicted gender-based harm, and Ginsburg was profoundly skeptical of the Justices’ ability to “know[] [it] when [they] see it.” The anti-stereotyping principle helped to focus attention on the separate spheres ideology through which sex had been “made the groundwork of an inequality of legal right, and a forced dissimilarity of social functions.”

Ginsburg’s aims were not the same as those of the activists who were formulating the most radical critiques of the sex-role system in this period. Ginsburg’s project, in developing a theory of equal protection based on an anti-stereotyping principle, was not to “annihilate sex roles”; she did not seek “the elimination . . . of the sex distinction itself.” She was concerned not with the existence of sex roles, but with the enforcement of those roles by the state. Indeed, she was especially concerned about a particular form of sex-role enforcing state action: that which perpetuated the pervasive and mutually reinforcing stereotype that women are responsible for performing (unpaid) family care, and men are responsible for providing their families with financial support. Some other anti-stereotyping claims, like those involving differential hair-length rules for male and female employees, struck her as relatively “unimpressive.”

Ginsburg’s project also differed from those of other critics of sex stereotyping in the early 1970s in that her project was a distinctly legal one: to crystallize a mediating principle that would give “meaning and content to an ideal embodied in the text” of the Equal Protection Clause. Anti-stereotyping served this purpose. It provided a “guide

---

205 For a detailed account of the deep schism in the women’s movement prior to the 1960s, see Cynthia Harrison, On Account of Sex: The Politics of Women’s Issues, 1945–1968 (1988).
206 Ginsburg, supra note 20, at 15 (paraphrasing Justice Stewart’s famous observation about obscenity in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).
207 Mill, supra note 60.
208 Firestone, supra note 155, at 11.
for decision" that courts and other legal actors could understand and implement. It allowed Ginsburg to focus the Court's attention on a particular category of laws and social practices that had contributed in deep and sustained ways to the oppression of women. It was also sufficiently capacious to cover other forms of sex-role enforcement, as courts' understanding of which laws and social practices constitute sex stereotyping evolved over time. This was a signal advantage of the anti-stereotyping principle, but as we shall see, it was also a liability. Opponents of the women's movement used the potentially far-reaching implications of the anti-stereotyping principle in controversial domains like abortion and same-sex marriage to attack the entire antidiscrimination project in the context of sex.

These conflicts had important effects on the early development of sex-based equal protection doctrine. They helped to generate the much-criticized limits on the reach of this doctrine in the Burger Court era. These limits, however, have obscured the profound change that occurred in this period: Anti-stereotyping became the central mediating principle in sex-based equal protection law. This Part will show how Ginsburg succeeded in persuading the Court to adopt the anti-stereotyping principle and why it remained cabined within such narrow doctrinal parameters in the 1970s.

A. "The Traditional Division Within the Home"

As noted above, Ginsburg wrote her first sex discrimination brief on behalf of Charles Moritz, a lifelong bachelor who took care of his elderly mother but was denied a caregiver's tax deduction on the basis of his sex. When Ginsburg learned of Moritz's predicament in the fall of 1970, she offered to represent him pro bono. Congress's assumption that bachelors lacked family caregiving responsibilities, and the financial penalty it imposed on those who did shoulder such responsibilities, provided a striking illustration of the way in which the government entrenched traditional roles in the family—using carrots and

---

211 Id. at 108.
212 For a vivid account of how Ginsburg discovered Moritz's case, see Martin D. Ginsburg, A Uniquely Distinguished Service, 10 GREEN BAG 2d 173, 174-75 (2007) [hereinafter Ginsburg, Uniquely Distinguished]. At the time, Ginsburg was developing one of the first courses in the United States on sex discrimination law. Her course incorporated frequent "side glances ... at innovations in Sweden" and emphasized "the toll paid by men" as a result of state's enforcement of sex roles. Ruth Ginsburg, Faculty Column, RUTGERS L. SETT. ALUMNI ASS'N NEWSL. (Newark, N.J.), Mar. 1972, at 4 (on file with the Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 16, Folder: Writings File, Articles 1971-1974). Unsurprisingly, Ginsburg concluded that the case of the disfavored male caregiver provided a perfect conduit for translating these ideas into constitutional arguments.
sticks to steer men and women into the male breadwinner–female caregiver paradigm. Ginsburg’s plan, from the moment she learned of the caregiver tax policy, was to bring Moritz’s case to the Supreme Court. 213 She judged it an ideal case, both for challenging the Court’s traditional “woman-protective” stance and for educating the Justices about the institutions and social practices that perpetuate inequality in the context of sex.

While Ginsburg was drafting her brief for the Tenth Circuit in Moritz, the Supreme Court granted certiorari in Reed v. Reed. 214 At issue in Reed was an Idaho law that preferred men to women in the appointment of estate administrators. The plaintiff, Sally Reed, had applied to serve as the administrator of her son’s estate following his suicide; the state granted that right instead to her estranged husband, whose sex automatically entitled him to the position. 215 When Ginsburg read Reed, she realized it would make an excellent companion case to Moritz. The two cases, presented together, could demonstrate how “sex-role pigeonholing” 216 preserved traditional role divisions in the family: Here was the woman barred from making financial decisions on behalf of her child’s estate; here was the man who ran into trouble with the IRS because he acted as primary caregiver to his mother. When Ginsburg discovered that her old friend Melvin Wulf, the legal director of the ACLU, was planning to write the brief in Reed, she sent him three copies of her brief in Moritz, suggesting that her way of framing the equal protection argument “should be useful” for the case that was headed to the Court. 217 Although Moritz featured a male plaintiff, Ginsburg’s brief argued that equality for women would remain a distant goal as long as men were deterred from pursuing traditionally female activities; equal protection thus meant that the state could not prescribe sex roles for either sex. 218 “Bowled over” by her innovative approach, 219 Wulf

213 See Letter from Ruth Bader Ginsburg to Melvin L. Wulf, supra note 30 (informing Wulf of her plan to “take the case to the Tenth Circ[ui]t” and then to “make a valorous try at the Supreme Court”).
215 Id. at 71–73.
218 See Brief for Petitioner-Appellant, supra note 31, at 20 (arguing that “[f]air and equal treatment for women means fair and equal treatment for members of both sexes”).
219 Ginsburg, Uniquely Distinguished, supra note 212, at 175.
invited Ginsburg to help write the brief in *Reed*. That brief—the "grandmother brief"—incorporated and expanded on the ideas she had begun to develop in *Moritz*.

Ginsburg’s brief in *Reed* sought to demonstrate that Idaho’s preference for male administrators was part of a much broader pattern of sex-role enforcement that associated men with the marketplace and women with the home. In sections entitled “Male as head of household” and “Women and the role of motherhood,” she asserted that “[t]he traditional division within the home—father decides, mother nurtures—is reinforced by diverse provisions of state law.”

She noted that as of 1971, the law gave husbands the exclusive right to control family assets and to determine the family’s domicile; it expected wives to adopt their husbands’ names upon marriage; and it permitted girls to marry at a younger age than boys, according the latter “more time to prepare for bigger, better and more useful pursuits.” Criminal law, too, reinforced traditional gender roles through penalties for promiscuity and prostitution that targeted women and girls; and “tax law present[ed] a significant disincentive to the woman who contemplate[d] combining a career with marriage and a family.”

Ginsburg argued that the state enforced traditional sex roles at the intersection of work and family by providing minimal funding for childcare and job training, banning the provision of childcare services to children under the age of two, barring men from acting as childcare providers, and treating women’s unemployment less seriously than men’s.

Taken together, Ginsburg’s briefs in *Moritz* and *Reed* articulated a new constitutional argument: Sex-based state action violates equal protection when it entrenches the traditional role divisions that confine men and women to separate spheres. The Court, however, did not take the two briefs together. The Tenth Circuit foiled Ginsburg’s plan to present the cases to the Court in the same term by lingering for many months before issuing its decision in *Moritz*. *Moritz* was a historic victory; it was the first decision in American history to hold that the Fourteenth Amendment protected men, as well as women, from sex discrimination. Only *Reed*, however, has become part of the canon of constitutional law.

---

221 *Id.*
222 *Id.* at 35–37.
223 *Id.* at 37–40.
224 The Supreme Court issued its decision in *Reed* on November 22, 1971; the Tenth Circuit issued its decision in *Moritz* on the same day, one year later. *Reed* v. *Reed*, 404 U.S. 71 (1971); *Moritz* v. Comm'r, 469 F.2d 466 (10th Cir. 1972).
Recovering Moritz can help us to appreciate more fully the constitutional theory on which the WRP's litigation campaign was founded. Ginsburg offered to represent Charles Moritz because his difficulties with the IRS provided an ideal vehicle for advancing an anti-stereotyping approach to sex-based equal protection law. The state's refusal to extend to bachelors the financial incentives it granted to single women engaged in family care perfectly illustrated the point sex equality advocates had begun to make in this period: Laws and customs that steer men out of the domestic sphere reinforce restrictions on women's participation in the public sphere, and the maintenance of such role divisions perpetuates long-standing inequalities between the sexes. The fact that the government was responsible for the stereotyping in this case enabled Ginsburg to transform popular arguments about the sex-role system into sex-based equal protection arguments. She began, in Moritz, to construct a theory of equal protection that would bar the state from acting in ways that perpetuate the separate spheres tradition.

Ginsburg developed this theory in Reed. Her brief in that case famously built on the work of the civil rights movement, incorporating Pauli Murray's argument that sex discrimination was no less pernicious than, and often took the same form as, race discrimination. But it also deployed anti-stereotyping principles in new ways. The brief linked women's subordination with laws that enforced traditional sex roles—particularly in the domain of marriage, childrearing, and sexuality—and it urged the Court to develop a sex-based equal protection doctrine skeptical of such laws. In the fall of 1971, when Reed came down, it was unclear how much weight the Justices had given these arguments and how far the new constitutional protections against sex discrimination would extend. The Court's opinion was spare, even cryptic; it provided almost no explanation for its groundbreaking holding. It was, nonetheless, a start: the first case in which the Court treated the government's entrenchment of sex roles as a matter of constitutional concern.

B. Sex Roles and Reproductive Rights

After Reed and Moritz, the WRP turned its attention to pregnancy and motherhood—areas in which the nexus between sex-role

225 See, e.g., Brief for Appellant, supra note 39, at 18-19 ("Legal and social proscriptions based upon race and sex have often been identical, and have generally implied the inherent inferiority of the proscribed class to a dominant group.").

226 Ginsburg and her colleagues at the ACLU founded the WRP in early 1972 with the intent of mounting a full-scale campaign challenging the constitutionality of sex-based state action. Ginsburg, supra note 22, at 1441.
stereotyping and the subordination of women was particularly tight. As we saw in Part I, no issue was more central to the women’s movement at the start of the 1970s than the regulation of pregnancy and motherhood. Tens of thousands of women in cities across the nation went on strike in the summer of 1970 to demand structural changes in the legal and social institutions that regulated pregnant women and mothers. In 1972, when the WRP began to litigate reproductive rights cases, Ginsburg observed that some people seem to “believe in equal pay for equal work, but hope that the rest will quietly fade away.” Echoing the strikers, Ginsburg asserted that equal pay for equal work was not enough: Genuine equality would require substantial reform in how the state regulated women’s reproductive lives.

Not long after the Court issued its decision in Reed, Ginsburg began work on a case that perfectly illustrated “the sex equality dimension of laws and regulations regarding pregnancy and childbirth.” The case, Struck v. Secretary of Defense, concerned an Air Force regulation mandating the immediate discharge of any female officer upon a determination that she was pregnant or had given birth to a live child. Ginsburg’s client, Susan Struck, was a Captain in the Air Force who became pregnant while serving in Vietnam. The Air Force encouraged Struck to have an abortion and thereby preserve her job, but she preferred, for religious reasons, to continue her pregnancy and place the child for adoption after it was born. Although Struck used only accumulated leave time to cover the period in which she gave birth, and was ready to return to work shortly thereafter, the Air Force ordered her discharge.

Ginsburg argued that this mandatory discharge policy was “more a manifestation of cultural sex role conditioning than a response to medical fact and necessity.” If Struck had instead broken a limb or developed a drug addiction, the Air Force would have granted her convalescent leave and rehabilitative services, and allowed her to use accumulated leave time to extend her recovery period before returning to active duty. Among medical conditions, pregnancy alone triggered mandatory discharge, even though the physical disability it

---

228 Ginsburg, Status of Women, supra note 105, at 585.
229 Ginsburg, supra note 22, at 1447.
232 Id. at 4–5.
233 Id. at 35 n.28 (quoting Heath v. Westerville Bd. of Educ., 345 F. Supp. 501, 505–06 n.1 (S.D. Ohio 1972) (internal quotation marks omitted)).
entailed was briefer and less serious than numerous other disabilities that routinely afflicted Americans serving in Vietnam. It was not pregnancy, then, but pregnancy discrimination and policies limiting reproductive choice that truly disabled Captain Struck.

Ginsburg argued that the Air Force’s policy toward pregnant women stemmed from its “thinly veil[ed]” preference for the male breadwinner–female caregiver model. The same set of regulations that mandated the discharge of pregnant women and new mothers granted men a generous array of additional benefits (including medical and dental coverage for dependents, increased housing allowances, and deferrals from new assignments) to encourage them to remain in the service when they became fathers. Ginsburg noted that the mandatory discharge policy punished poor women—especially poor single women—by depriving them of essential prenatal care and threatening them with destitution. The policy also adversely affected wealthier women, as it “reinforce[d] societal pressure to relinquish career aspirations for a hearth-centered existence.”

The Court never heard these arguments. At the eleventh hour, the Air Force granted Struck a waiver and the Court remanded to the lower court to consider whether the case was moot. Shortly thereafter, however, pregnancy discrimination reappeared on the Court’s docket in Geduldig v. Aiello, an equal protection challenge to a provision exempting normal pregnancy disability from coverage under California’s otherwise comprehensive disability insurance system. Ginsburg’s amicus brief in Geduldig reprised her arguments in Struck. She argued that California’s decision to insure male workers fully and female workers only partially had the earmarks of [a] self-fulfilling prophecy. If women are treated by the state and their employe[rs] as detached from the work force when pregnancy disables them, . . . it is not surprising that some succumb to the disincentives barring the way to return, and to appellant’s stereotyped vision of women’s place post-childbirth.

As in Struck, Ginsburg’s aim was to persuade the Court that the Fourteenth Amendment precluded the state from discriminating in ways that reinforced traditional conceptions of women’s sex and family roles. Her arguments in Geduldig, however, were confined to

234 Id. at 55.
235 Id. at 55, 67.
236 Brief for the Petitioner, supra note 231, at 36–37.
237 Id. at 37.
240 Brief of ACLU et al. as Amici Curiae at 17, Geduldig, 417 U.S. 484 (No. 73-640).
an amicus brief, and the facts in the case made the prescriptive component of pregnancy discrimination more difficult to see. In *Struck*, the plaintiff was no longer pregnant and was ready and able to work; the Air Force’s refusal to permit her to return to her job dramatically illustrated the law’s role in enforcing traditional expectations regarding women’s place in the home. Although the law in *Gelduldig* played the same role, the fact that the plaintiffs were pregnant, and therefore differently situated than men, confounded the Justices, six of whom concluded that the exclusion of pregnancy from California’s disability insurance system did not warrant special scrutiny because it did not discriminate between men and women, but only between “pregnant women and non pregnant persons.”

This logic controlled the Court’s reasoning about women’s rights for many years to come. Reva Siegel calls it “reasoning from the body.” She and others have long noted that “[t]he Court typically reasons about reproductive regulation in physiological paradigms, as a form of state action that concerns physical facts of sex rather than social questions of gender,” causing it to miss the ways in which regulations respecting “‘real’ physical difference between the sexes . . . can nevertheless be sexually discriminatory.” This form of reasoning reemerged two years after *Gelduldig* in *General Electric Co. v. Gilbert*, which held that pregnancy discrimination did not constitute sex discrimination under Title VII, and several years after that in *Michael M. v. Superior Court*, which upheld a sex discriminatory statutory rape law after identifying some dubious, but ostensibly “real,” differences between men and women in regard to sex and reproduction. The Burger Court also applied this logic in the context of abortion. Although its opinion in *Roe v. Wade* protected women’s right to abortion, it did so as a matter of due process rather than equal protection. *Roe* treated abortion as a purely physiological phenomenon, concentrating on female bodies and fetal bodies instead of inquiring if and when the regulation of pregnant women enforced stereotypes about women’s family roles and deprived them of the decisional autonomy accorded to men.

---

241 *Gelduldig*, 417 U.S. at 496–97 n.20.
243 Id. at 264–65.
244 429 U.S. 125 (1976).
246 Id. at 467, 473 (stating that “males alone can physiologically cause” pregnancy and that the risk of pregnancy acts as a “natural sanction[ ]” only on women’s sexuality (internal quotation marks omitted)).
By the time the cascade of sex-based equal protection cases that began with Reed tapered off in the early 1980s, the Court had yet to acknowledge the sex equality dimension of regulations concerning pregnancy, abortion, rape, and sexuality. The WRP had scored significant victories in cases like Reed and Frontiero v. Richardson, but state action restricting women’s rights in more comprehensive ways remained largely beyond the law’s reach. Moreover, many of the WRP’s victories in the 1970s had come in cases featuring male plaintiffs, and not all of these cases seemed to implicate women’s equality interests in meaningful ways. In 1976, for instance, two years after the Court held that the Equal Protection Clause offered women no protection against pregnancy discrimination, the Court held in Craig v. Boren that it did protect teenage boys in Oklahoma from a law that permitted girls to buy 3.2% beer at a slightly younger age than their male peers.

Surveying these developments in the 1980s, many feminist scholars concluded that the WRP bore substantial blame for what had happened. They argued that the WRP’s campaign was founded on a narrow, formalistic theory of equality and that this is what it had elicited from the Court. This theory of equality may have benefited the WRP’s male clients, but it did little for women, whose apparent “difference” from men rendered the anti-differentiation principle of little use in combating the forms of discrimination that hurt women most. Ginsburg’s harshest critics equated male sex discrimination plaintiffs with the white race discrimination plaintiffs who emerged in the 1970s as part of a conservative backlash against “forced busing,” affirmative action, and other government programs designed to integrate schools and workplaces. These white plaintiffs urged the Court to adopt a “color-blind” or anti-classificationist approach to equal protection, perhaps with the intent, and certainly with the effect, of preserving racial status hierarchies. Ginsburg’s critics argued that the cases she

248 411 U.S. 677 (1973) (holding that a statute which required male but not female spouses of members of the military to prove dependency in order to obtain certain benefits violated the Equal Protection Clause).

249 429 U.S. 190 (1976).

250 See, e.g., Ann Scales, Feminist Legal Method: Not So Scary, 2 UCLA WOMEN’S L.J. 1, 8 (1992) (equating male plaintiffs in sex-based equal protection cases with white plaintiffs in race-based equal protection cases and citing both phenomena as evidence of “interpretative competition,” the process by which dominant social groups attempt to co-opt and forestall progressive legal change).

251 See Siegel, supra note 134, at 1519–32.
litigated on behalf of male plaintiffs yielded analogous results in the domain of sex.\textsuperscript{252}

Much of this criticism was generated at a low point in the contemporary struggle for women’s rights. After a decade of litigation, legal feminists had made little progress in persuading courts that laws regulating pregnancy, abortion, rape, and sexuality implicated the Equal Protection Clause. In 1979, in \textit{Personnel Administrator of Massachusetts v. Feeney},\textsuperscript{253} the Court effectively foreclosed sex-based disparate impact claims under the Fourteenth Amendment, severely limiting the ability of equal protection law to combat state action that discriminated against women without classifying them as such. In 1982, the deadline for ratifying the ERA passed before the requisite number of states had done so, and the long battle for the ERA ended in defeat for the women’s movement. Despite appointing the first woman to the Supreme Court, the Reagan administration was hostile to the movement’s demands and sought to appoint judges who shared its antipathy to the “feminist agenda.” The Moral Majority, which was founded in 1979 and had strong ties to the administration, was waging an increasingly successful “pro-family” campaign, which focused on ending abortion, outlawing homosexuality, and preserving traditional sex roles. In 1981, Republicans in Congress introduced a Family Protection Act,\textsuperscript{254} which, had it passed, would have prohibited federal funding for schools whose curriculum “would tend to denigrate, diminish or deny the role differences between the sexes as they have been historically understood in the United States,” and “denied government benefits, including social security, to anyone who presented homosexuality as an acceptable alternative life style or suggests that it can be an acceptable life style.”\textsuperscript{255}

Against this backdrop, feminists in the 1980s produced a large and important body of scholarship that called attention to the ways in which equal protection law failed to protect women against the most common and entrenched forms of discrimination. They questioned the logic of a doctrine that protected boys’ right to drink watery beer but did nothing to combat the subordination of pregnant women and

\textsuperscript{252} See, e.g., Becker, \textit{supra} note 10, at 251–52 (arguing that as a result of Ginsburg’s legal strategy, “men have been able to use the Fourteenth Amendment to challenge sex-based classifications just as whites, in post-1971 cases, have been able to use the Fourteenth Amendment to challenge racial classifications” (footnote omitted)).

\textsuperscript{253} 442 U.S. 256 (1979).


mothers. They pointed out that some of the arguments legal feminists in the 1970s had adopted from the race discrimination paradigm—most notably, the argument that sex discrimination warrants constitutional concern because sex is an immutable trait—had sharpened the Court’s focus on “real” differences and made it more difficult for women to win protection in domains where they were perceived to be biologically different from men. These scholars constructed new paradigms for thinking about sex equality and articulated new constitutional arguments against sex discrimination, transforming feminist legal theory into a robust field.

What was largely absent from this outpouring of feminist scholarship, however, was a recognition of the history of ideas and social movement activism that informed the WRP’s constitutional vision and paved the way for its campaign. Many scholars in the 1980s concluded that the WRP won from the Court precisely what it sought: a commitment to treat men and women the same when the law deemed them similarly situated. The fact that Ginsburg pressed the claims of male plaintiffs seemed proof of this limited aim. But these criticisms obscured the legal theory underwriting the WRP’s campaign. The WRP often represented male plaintiffs, and it often challenged the constitutionality of formal sex classifications, but its aim was not simply to stop the state from employing such classifications. The WRP targeted formal sex classifications because and only when they prevented both sexes “from pursui[ng] . . . opportunities that would have enabled them to break away from familiar stereotypes.”

256 By highlighting the large body of feminist scholarship that criticized the WRP, I do not mean to suggest that feminists in the 1980s spoke with one voice on this subject; numerous scholars in this period were quite sympathetic to Ginsburg’s approach. See, e.g., Katharine T. Bartlett & Carol B. Stack, Joint Custody, Feminism and the Dependency Dilemma, 2 BERKELEY WOMEN’S L.J. 9 (1986) (arguing that meaningful social change in the domain of sex requires combating the sex-role stereotyping of both men and women, and that the law should reflect and reinforce the notion that men too are responsible for caregiving); Wendy W. Williams, Equality Crisis: Some Reflections on Culture, Courts and Feminism, 14 WOMEN’S RTS. L. REP. 151, 154 (1992) (defending the sex-based equal protection cases of the 1970s on the ground that they repudiated “the old breadwinner-homemaker, master-dependent dichotomy inherent in the separate spheres ideology”); Wendy W. Williams, Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 331 (1984–85) (“The goal of the feminist legal movement that began in the early seventies is not and never was the integration of women into a male world . . . . Rather, the goal has been to break down the legal barriers that restricted each sex to its predefined role and created a hierarchy based on gender.”). For a more contemporary defense of Ginsburg’s approach, see JOAN WILLIAMS, Unbending Gender: Why Family and Work Conflict and What to Do About It 208–32 (2000) (“A closer look at the cases associated with the formal equality position shows that all involve policies that either police men and women into domesticity’s gender roles, or punish those who cross gender boundaries.”).

257 Ginsburg, supra note 25, at 21.
pressing the claims of male plaintiffs, was not to promote sex-blindness—to prevent the state in all instances from taking sex into account—but rather to educate the Court about the workings of the sex-role system. It sought to promote the idea that the best way to implement the Constitution's equal protection guarantee in the context of sex is to protect everyone from laws and social practices that reflect and reinforce traditional conceptions of men's and women's roles.\footnote{Ginsburg has long defended \textit{Craig v. Boren} on these grounds. She argued in her brief and in the press that the classification in \textit{Craig} was unconstitutional because it was "rooted in traditional role-typing (or in gross notions of what girls and boys are made of)." Ruth Bader Ginsburg, Letter to the Editor, \textit{Discriminating Protection}, \textit{New Republic}, Apr. 30, 1977, at 9. The Court's opinion in \textit{Craig} echoed this reasoning; it recognized that the statute reflected "social stereotypes" about men and women and reinforced their differential treatment in society. \textit{See} \textit{Craig v. Boren}, 429 U.S. 190, 202-03 n.14 (1976). Thus, Ginsburg has argued that \textit{Craig} was not a setback for the women's movement but a (tiny) step toward establishing that the Equal Protection Clause prohibits the state from acting in ways that reflect and reinforce sex-role stereotypes.}

Claims of this nature were prevalent among sex equality advocates at the time the WRP launched its campaign. The women's movement and the gay and lesbian liberation movements at the start of the 1970s identified sex-role enforcement as the primary mechanism of sex-based inequality; they argued that equality for all Americans depended on the liberation of members of both sexes from the constraints of traditional sex roles. The WRP did not voice all of the movements' demands (gay rights cases were notably absent from its docket), and it did not persuade the Court to view issues such as pregnancy and sexuality in the movements' terms. It did succeed, however, in introducing the concept of stereotyping into constitutional sex discrimination doctrine. As we shall see in the next section, this was a critical innovation. It did not transform the law overnight, but it laid the groundwork for change in the future.

\textbf{C. The "Most Spectacular of the Court's Gender Discrimination Decisions"}

Ruth Bader Ginsburg has long contended that the "most critical\footnote{Ruth Bader Ginsburg, \textit{Interpretations of the Equal Protection Clause}, 9 Harv. J.L. \\& Pub. Pol'y} 41, 43 (1986); \textit{see also} Ginsburg, \textit{supra} note 25, at 22 (referring to \textit{Wiesenfeld} as "one of the key cases in the evolution of the Supreme Court's current approach"); \textit{An Open Discussion with Justice Ruth Bader Ginsburg}, 36 Conn. L. Rev. 1033, 1037 (2004) (citing \textit{Wiesenfeld} as her "ideal case").\footnote{420 U.S. 636 (1975).} sex discrimination case the Court decided in the 1970s was \textit{Weinberger v. Wiesenfeld}.\footnote{420 U.S. 636 (1975).} Stephen Wiesenfeld came to Ginsburg's attention in the fall of 1972 when he wrote a letter to his local news-
paper protesting sex discrimination in the Social Security system.\textsuperscript{261} Wiesenfeld explained that he and his wife Paula had "assumed reverse roles": She acted as the primary breadwinner, and he was dependent on her earnings.\textsuperscript{262} When his wife died giving birth to their first child, Wiesenfeld applied for "mother's benefits," a form of assistance designed to enable widows to stay home with their children after the death of the family breadwinner.\textsuperscript{263} His application was denied on the basis of sex. Determined to stay home with his baby son, Wiesenfeld wondered if anyone in the women's movement could help him—maybe Gloria Steinem?\textsuperscript{264}

Unbeknownst to Stephen Wiesenfeld, feminists in Congress had been attempting to extend "mother's benefits" to men for years. Martha Griffiths and Bella Abzug had introduced numerous bills addressing the issue but had been unable to push the legislation out of the House Ways and Means Committee.\textsuperscript{265} When Ginsburg learned of Wiesenfeld's troubles, she decided to challenge the constitutionality of the provision under the Equal Protection Clause. Restricting "mother's benefits" to women perfectly illustrated the way in which the government forced men and women to organize their work and family lives along traditional gender lines: It steered women out of the workforce by compensating them less than their male co-workers (as Wiesenfeld noted, his wife "paid maximum dollars into Social Security"\textsuperscript{266} but received none of the benefits), and it steered men out of the home by depriving them of financial support in the event of a female breadwinner's death.

One of the chief obstacles Ginsburg confronted in this case was the incredulity and discomfort Wiesenfeld's desire for "mother's benefits" aroused in the government's lawyers. At the trial court, lawyers for the Secretary of Health, Education and Welfare argued that Ginsburg's client lacked standing to sue because it defied credibility to suggest that a man would choose to stay home with a baby instead of going to work.\textsuperscript{267} At the Supreme Court, Solicitor General Robert


\textsuperscript{262} Wiesenfeld, supra note 261.

\textsuperscript{263} Id.; see also 42 U.S.C. § 402(g) (2006).

\textsuperscript{264} Wiesenfeld, supra note 261.

\textsuperscript{265} Brief for Appellee at 19 n.15, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (No. 73-1892).

\textsuperscript{266} Wiesenfeld, supra note 261.

\textsuperscript{267} See Transcript of Oral Argument, supra note 13, at 28–32, 60.
Bork raised similar questions about the genuineness of Wiesenfeld's desire to act as a "mother." Bork implied that with "three university degrees," Wiesenfeld was perfectly capable of supporting himself and decidedly unlikely to forego career opportunities in order to stay home with a baby. Moreover, Bork hinted that there was a perfectly reasonable explanation for the Wiesenfelds' topsy-turvy arrangement prior to Paula's death: Stephen was financially dependent on his wife during their marriage because "he was pursuing an education." Now that his education was complete, the Solicitor General suggested, the plaintiff would (or should) enter the workforce.

The primary aim of Bork's brief was to persuade the Court that the dispute over "mother's benefits" concerned only Stephen Wiesenfeld and had nothing to do with his wife, "whose entitlement to benefits on her own account [was] not in issue." In part, this strategy reflected a judgment about where the Justices' sympathies would lie. Paula Wiesenfeld was a tragic figure; she died in childbirth after years of supporting her family, and the government was now devaluing her contributions to the labor market, and to her spouse and child, simply because she was a woman. But the government could portray Stephen Wiesenfeld in a less sympathetic light. Maybe he begrudged the state's attempt to help poor widows or maybe he genuinely wanted to stay home and care for a baby—either suggestion impugned his masculinity. The government also had a doctrinal reason for focusing on Stephen. As of 1975, it was not clear whether discrimination against men triggered any special concern under the Equal Protection Clause. Reed and Frontiero vindicated the rights of women; the only other case the WRP had litigated at the Court was Kahn v. Shevin, a sex discrimination case brought and lost by a male plaintiff. Thus, Bork argued that the Court's equal protection jurisprudence permitted discrimination on the basis of sex in cases where it benefited women and that "mother's benefits" clearly did so: They served the "compassionate" purpose "of ameliorating the harsh economic circumstances of women with families who have been deprived of the support of a husband."

---

268 Brief for the Appellant at 4, Wiesenfeld, 420 U.S. 636 (No. 73-1892).
269 Id.
270 Id.
271 Id. at 20.
272 416 U.S. 351, 355 n.8 (1974) (upholding, under rational basis review, a Florida law granting a property tax exemption to widows in part because it helped "to rectify the effects of past discrimination against women" (quoting Frontiero v. Richardson, 411 U.S. 677, 689 n.22 (1973))).
273 Brief for the Appellant, supra note 268, at 11-12.
Ginsburg refuted the government’s contention that the statute in *Wiesenfeld* benefited women.\textsuperscript{274} She argued that restricting “mother’s benefits” to women injured Paula Wiesenfeld, who contributed to the Social Security system on the same terms as male workers but received only a fraction of the benefits, and that it “fortifie[d] the assumption, harmful to women, that labor for pay and attendant benefits is primarily the prerogative of men.”\textsuperscript{275} Ginsburg did not, however, resist the government’s attempts to frame *Wiesenfeld* as a referendum on male sex roles. In fact, she cited Bork’s conjectures about her client as a prime example of how sex stereotyping worked. The Solicitor General asserted in his brief that Stephen Wiesenfeld was financially dependent on his wife during their marriage because he was enrolled in school. In actuality, Wiesenfeld had graduated eighteen months prior to his marriage. Ginsburg observed that the government’s erroneous assumption about why her client had adopted a traditionally feminine role in his marriage “reveal[ed] the tenacity of one-eyed sex-role thinking well into the 1970’s.”\textsuperscript{276} Such thinking was also behind the government’s intimation that her client was too intelligent and well educated to remain at home with a child. Any suggestion that a woman, by virtue of her education, “should choose remunerative employment over personal attention to her newborn child undoubtedly would be dismissed with alacrity,” Ginsburg asserted.\textsuperscript{277} The government’s insinuation that Stephen Wiesenfeld’s time was too valuable to be spent taking care of a baby indicated that it viewed childcare as a fine activity for women but a degrading one for men. Ginsburg argued that such judgments, particularly when enforced by the state, operated to keep both sexes in their place—separate and not equal.

By 1975, Ginsburg had been putting this role-based anti-stereotyping argument to the Court for nearly five years. Her efforts were rewarded in *Wiesenfeld*, which held that the restriction of “mother’s benefits” to women violated the constitutional rights of both sexes.\textsuperscript{278} The Court explained that discrimination “that results in the efforts of female workers . . . producing less protection for their families than is

\begin{footnotesize}
\textsuperscript{274} Ginsburg did not argue, in response to the government’s claims, that sex discrimination was impermissible in all cases. Her claim in *Reed, Frontiero, Kahn*, and *Wiesenfeld* was that sex-based state action violated the Fourteenth Amendment when it enforced the separate spheres dichotomy. Sex-based state action that eroded this dichotomy was not only permissible; it was an essential component of the anti-stereotyping project.

\textsuperscript{275} Brief for Appellee, *supra* note 265, at 25.

\textsuperscript{276} *Id.* at 18 n.11. The expression “one-eyed sex-role thinking” is Olof Palme’s. See *supra* note 106.

\textsuperscript{277} Brief for Appellee, *supra* note 265, at 22.

\textsuperscript{278} 420 U.S. 636 (1975).
\end{footnotesize}
produced by the efforts of men"279 is not a boon to women: The go-

ervernment restricted “mother’s benefits” to women not to compensate

them for discrimination in the labor market, as the Solicitor General

contended, but “because it believed that they should not be required
to work”280—and that men should be. The Court held that the

Fourteenth Amendment prohibited laws motivated by this kind of

stereotyping. It denigrated the efforts of working women like Paula

Wiesenfeld, and it denigrated the domestic contributions of Stephen

Wiesenfeld, who “was dependent upon his wife for his support”281 and

had made the gender-nonconforming choice to stay home with his

son. The Court ruled that the state had no legitimate interest in trying
to force the plaintiff to assume a breadwinning role.282 In fact, the

Court asserted that, in the absence of sex-role enforcement, even men

“in the typical family” might decide they wanted to stay home with

their children and that the Fourteenth Amendment barred the state

from deciding that these men “would, or should be required to,
continue to work.”283

The idea that men might assume the role of mothers, and that the

Constitution protected their right to do so, was mind-boggling to some

of the Justices. When Justice Brennan, who wrote for the Court in

Wiesenfeld, circulated his opinion, Justice Blackmun annotated the

passages about stay-at-home fathers with question marks and exclama-
tion points (Brennan’s suggestion that Stephen Wiesenfeld “may

well have” stayed home with his son even if his wife had lived elicited

a “WOW!”).284 Despite his surprise, however, Blackmun signed on.

Justices Powell, Burger, and Rehnquist did not. Powell and Burger

concurred in the result but wrote separately to argue that the Court

should have treated Wiesenfeld as a simple equal pay case: The statute

was unconstitutional because it deprived working women of benefits

that accrued to working men.285 Powell argued that there was no need

for the Court to condone the plaintiff’s departure from masculine

279 Id. at 645.

280 Id. at 650.

281 Id. at 645.

282 Id. at 651–52.

283 Id.


Wiesenfeld (circulated Mar. 1975) (on file with the Library of Congress, Manuscript

Division, Harry A. Blackmun Papers, Box 203, Folder 6, Weinberger v. Wiesenfeld).

285 Wiesenfeld, 420 U.S. at 654–55 (Powell, J., concurring). In 1975, Rehnquist had not

yet agreed that sex-based state action warranted heightened scrutiny under the Fourteenth

Amendment. He argued, in a separate concurrence, that the statute violated the baby's

constitutional rights because there was no rational basis for conditioning his opportunity to

benefit from the attentions of a stay-at-home parent on the sex of the parent he lost. Id. at

655 (Rehnquist, J., concurring).
gender norms. The statute permitted recipients to earn a small amount of money, so extending "mother's benefits" to men did not necessarily imply that it was acceptable for them to "forgo work and remain at home to care for children." Behind the scenes, Powell admitted that he found the thought of men receiving "mother's benefits" repulsive. He fretted to his law clerk that the Court's decision would induce "a high level of indolence" and swell "the ever increasing welfare rolls" as men quit their jobs in order to laze about at home with their kids.

Despite Powell's reservations, the notion that laws enforcing sex-role stereotypes violated the Equal Protection Clause soon became doctrine. In *Stanton v. Stanton*, heard the same term as *Wiesenfeld*, the Court invalidated a Utah statute that terminated parental obligations to girls at eighteen but required parents to support boys until they turned twenty-one. The state claimed that the law simply reflected the fact that girls leave school and marry at a younger age than boys, but the Court noted that such distinctions were self-serving: "[I]f the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed." Four years later, in *Orr v. Orr*, the Court struck down Alabama's rule that husbands but not wives could be required to pay alimony on the ground that such rules "effectively announc[ed] the State's preference for an allocation of family responsibilities under which the wife plays a dependent role." The Court held that equal protection precluded the state from seeking to "reinforce[ ] . . . that model among [its] citizens." Similarly, in 1982, the Court held that Mississippi's exclusion of men from a state nursing school violated the Fourteenth Amendment because it "lends credibility to the old view that women, not men, should become nurses, and makes the assump-

286 Id. at 654 (Powell, J., concurring) ("It is immaterial whether the surviving parent elects to assume primary child care responsibility rather than work, or whether other arrangements are made for child care.").
287 Id.
290 Id. at 14–15.
292 Id. at 279.
293 Id.
tion that nursing is a field for women a self-fulfilling prophecy.” 294 None of these cases were brought by the WRP. 295 By the late 1970s, anti-stereotyping had become ingrained in the Court’s own understanding of equal protection. 296

The Burger Court failed to extend anti-stereotyping doctrine into the domains of pregnancy, abortion, rape, and sexuality—a failure that caused critics to dismiss *Wiesenfeld* and subsequent victories by male plaintiffs as trivial and largely irrelevant to the struggle for women’s rights. And indeed, it would be many years before the Court applied this principle in a manner more directly responsive to feminist concerns. *Wiesenfeld* and subsequent male plaintiff cases did not, however, simply trace the rudimentary logic of anti-classificationism. The Court reasoned about sex discrimination in *Wiesenfeld* in much the same way Ginsburg had reasoned about sex discrimination in *Struck* and *Geduldig*. It was attentive to the way in which the law enforced sex-role stereotypes, and it concluded that such stereotyping violated the Equal Protection Clause. And not only that, it did so in a case involving motherhood, the paradigmatic site of “real” difference. Although the Court did not immediately apply these insights more broadly, in ways that more directly implicated the regulation of pregnant women and mothers, *Wiesenfeld* took a critical step in that direction. It incorporated into equal protection law an anti-stereotyping logic that raised serious questions about the state’s regulation of sex and family roles.

The Court’s reasoning about sex discrimination in *Wiesenfeld* also raised questions about the regulation of men’s and women’s roles in the domain of sexuality. As we saw in Part I, gay and lesbian activists often argued in the early 1970s that laws regulating same-sex relations

---


295 The WRP’s only involvement in these cases came in the form of an amicus brief in *Orr*. See Brief of ACLU, Amicus Curiae, *Orr*, 440 U.S. 268 (No. 77-1119).

296 Intermediate scrutiny doctrine, which emerged in tandem with the anti-stereotyping principle, dictates that sex-based state action is constitutional only when it “serve[s] important governmental objectives” and is “substantially related to achievement of those objectives.” *Craig v. Boren*, 429 U.S. 190, 197 (1976). The anti-stereotyping principle pervades both stages of this inquiry, shaping what constitutes an important interest and what means qualify as sufficiently narrowly tailored to serve this interest. Since this doctrine was introduced in 1976, the Court has never upheld a sex classification after determining that it reflects or reinforces sex stereotypes. See Mary Anne Case, “The Very Stereotype the Law Condemns”: Constitutional Sex Discrimination Law as a Quest for Perfect Proxies, 85 CORNELL L. REV. 1447, 1449 (2000) (arguing that “the components of the intermediate scrutiny standard . . . have rarely been the moving parts in a Supreme Court sex discrimination decision. Rather, the bulk of the work in these decisions has been done by what readers of the opinions may be tempted to treat as mere decorative rhetorical flourish—the proposition that there are constitutional objections to ‘gross, stereotyped distinctions between the sexes’ . . . .”) (footnote omitted)).
constituted sex discrimination because they enforced sex-role stereotypes. These activists claimed that discrimination against gays and lesbians stemmed from the same source as discrimination against women and gender non-conforming men: a desire to preserve traditional gender roles and an anxiety about the erosion of sex-based status hierarchies. These connections were not lost on the participants in Wiesenfeld. In his correspondence with Ginsburg, Stephen Wiesenfeld jokingly referred to stay-at-home fatherhood as an “alternate lifestyle”\(^{297}\)—a term commonly used to describe homosexuality in the 1970s.\(^{298}\) Justice Powell’s condemnation of stay-at-home fatherhood as a form of “indolence” suggests that he too may have associated Wiesenfeld’s sex-role transgression with homosexuality, although perhaps less consciously and certainly less cheerfully. Prior to the advent of same-sex marriage, male homosexuality was often viewed as a form of immaturity—a failure or a refusal to move beyond the carefree life of the adolescent and assume the marital and breadwinning responsibilities that defined (and confined) adult men. As Barbara Ehrenreich notes: “In psychiatric theory and in popular culture, the image of the irresponsible male blurred into the shadowy figure of the homosexual. Men who failed as breadwinners and husbands were ‘immature,’ while homosexuals were, in psychiatric judgment, ‘aspirants to perpetual adolescence.’”\(^{299}\) Both were viewed as taking the easy way out, shirking the strenuous tasks of marriage and breadwinning in favor of a softer and more decadent (read: feminine) lifestyle.\(^{300}\)

At the time the Court decided Wiesenfeld, one did not need to read between the lines to discover links between homosexuality and other forms of sex-role transgression. A new and increasingly pow-


\(^{298}\) For a contemporaneous analysis suggesting that the Burger Court’s Fourteenth Amendment jurisprudence offered (at least some) protection for “lifestyle” choices, see J. Harvie Wilkinson & G. Edward White, Constitutional Protection for Personal Lifestyles, 62 CORNELL L. REV. 563 (1977). Thanks to Risa Goluboff for this reference.


\(^{300}\) For more on the perceived connection between male homosexuality and the adoption of female sex roles, see, e.g., Abram Kardiner, The Flight from Masculinity, reprinted in THE PROBLEM OF HOMOSEXUALITY IN MODERN SOCIETY 17, 27 (Hendrik M. Ruitenbeek ed., 1963) (arguing that many men retreat to homosexuality because they feel incapable of satisfying the demands of the adult male role); LIONEL OVESEY, HOMOSEXUALITY AND PSEUDOHOMOSEXUALITY 24–28 (1969) (coining the term “pseudohomosexual” to describe men who fail as breadwinners and husbands, and noting that men equate their perceived failures with homosexuality via the following logic: “I am a failure = I am castrated = I am not a man = I am a woman = I am a homosexual”).
erful social movement was energetically forging these links. Unlike the gay and lesbian liberation groups that flourished at the start of the decade, however, this movement argued that discrimination against gays and lesbians was a form of sex discrimination not in an effort to expand gay rights, but in an effort to discredit the women’s movement. At the head of this new movement was Phyllis Schlafly, a conservative lawyer and activist who joined “the sex-role debate” in 1972 in order to galvanize conservative opposition to the ERA, which had recently passed both houses of Congress. Chief among Schlafly’s arguments against the ERA was that it would destroy the American family, in significant part by outlawing discrimination against homosexuals and granting same-sex couples the right to marry. After all, Schlafly asserted, “[i]t is precisely ‘on account of sex’ that a state now denies a marriage license to a man and a man, or to a woman and a woman.”301 If the ERA were to pass, she argued, a “homosexual who wants to be a teacher could argue persuasively that to deny him a school job would be discrimination ‘on account of sex.’ ”302 Schlafly suggested that most Americans would not welcome this prospect: They valued traditional sex roles and believed that the law ought to protect the people who adopted those roles, not the people who deviated from them. Shortly after the Court issued its decision in Wiesenfeld, Schlafly published an editorial in her monthly newsletter arguing that a constitutional prohibition on sex discrimination would offer protection not to normal men and women, but to “the offbeat and the deadbeat male—that is, to the homosexual who wants the same rights as husbands [and] to the husband who wants to escape supporting his wife and children.”303

The women’s movement in the late 1970s responded to these charges much as it had in the late 1960s: It denied them. Leaders in the movement insisted that the campaign to end sex discrimination and combat sex-role stereotyping would have no impact on the regulation of same-sex relations. In 1979, with the threat of defeat closing in on the ERA, Ginsburg herself disavowed the connection between sex equality and gay rights, asserting that the Amendment would not disrupt the heterosexuality of marriage.304 When Schlafly claimed, as she

301 Phyllis Schlafly, The Power of the Positive Woman 90 (1977). For further discussion of conservatives who opposed the ERA on the ground that it would grant same-sex couples the right to marry, see Ruth Bader Ginsburg, Ratification of the Equal Rights Amendment: A Question of Time, 57 Tex. L. Rev. 919, 937 (1979).

302 Schlafly, supra note 301, at 90.


304 Ginsburg, supra note 301, at 937.
often did, that the ERA would also protect the right to abortion because women could not be considered "equal" if they were required to carry pregnancies to term, feminists responded in much the same fashion.\textsuperscript{305} Ginsburg, who had articulated so clearly at the start of the 1970s why protecting women's reproductive rights was essential to their equal stature, argued in the late 1970s that the ERA would not guarantee the right to abortion because the "Court solidly anchored its 1973 rulings in the reproductive choice cases to the due process guarantee, not to an equality idea."\textsuperscript{306}

With the women's movement in retreat, and the New Right ascendant, it is not surprising that anti-stereotyping doctrine did not extend very far beyond cases like \textit{Wiesenfeld} in the 1970s. The WRP and the women's movement more generally—the groups best situated to explain how this principle applied to the regulation of reproductive rights and same-sex relations—were in a defensive crouch, trying to shore up, rather than build on, the gains they had made over the previous decade. Nor is it surprising that many in the next generation of legal feminists should have formed a negative opinion of their predecessors. By the 1980s, the limitations of the Court's sex-based equal protection jurisprudence had become apparent, and the earlier generation of feminists seemed to be embracing, rather than seeking to overcome, those limitations. The WRP's representation of male plaintiffs became a focal point of feminist criticism in this period. From the vantage point of the 1980s, the male plaintiffs who triumphed at the Court in the 1970s looked like a status-quo-affirming, or even reactionary, force in the law.

From the vantage point of the early 1970s, however, gender non-conforming plaintiffs like Charles Moritz and Stephen Wiesenfeld seemed a far more progressive force. When Ginsburg decided to litigate sex discrimination cases on behalf of male plaintiffs, the New Right had not yet appeared on the political horizon, and the widespread applicability of the anti-stereotyping principle seemed like a boon, not a threat, to the campaign for sex equality. At the time, transatlantic social movements were drawing connections between caregiving men, pregnant women, and gays and lesbians, arguing that ending sex discrimination required liberating all these groups from prescriptive sex stereotypes, particularly in cases where those stereotypes were enforced by law. From this perspective, the WRP's founda-


\textsuperscript{306} Ginsburg, \textit{supra} note 301, at 937 (footnote omitted).
tional victories in cases featuring male plaintiffs look less like a doctrinal dead end and more like an opening wedge. Surely this is how Wiesenfeld appeared to Ginsburg in 1975 when she declared it the “[m]ost spectacular of the Court’s gender discrimination decisions.”

III

THE EVOLUTION OF ANTI-Stereotyping DOCTRINE

The Court’s embrace of the anti-stereotyping principle in cases such as Wiesenfeld constituted a substantial theoretical shift in constitutional sex discrimination doctrine. The Court no longer assumed that discrimination against women operated in their favor, and it identified the enforcement of sex stereotypes as a constitutional problem. In practical terms, however, change was limited. The Court issued a series of important decisions precluding the state from enforcing the male breadwinner–female caregiver model, but it did not extend its new anti-stereotyping approach very far beyond the four corners of those decisions. This Part examines three domains—the military, reproductive rights, and same-sex marriage—where the Court initially did not apply the anti-stereotyping principle. In Rostker v. Goldberg, the Court dodged the question of whether the exclusion of women from combat positions in the United States military perpetuates traditional conceptions of men’s and women’s roles. In Roe v. Wade, the Court defined the right to abortion as a matter of due process; it did not ask how regulation in this domain might implicate Fourteenth Amendment equality values. In Baker v. Nelson, the Court dismissed a challenge to a Minnesota statute limiting the right to marry to different-sex couples on the ground that it failed to present a substantial federal question, suggesting that the regulation of same-sex marriage raised no equal protection concerns. It was not beyond the realm of imagining in the 1970s that constitutional equality principles might extend to these domains; indeed, Phyllis Schlafly and her colleagues in the New Right explicitly opposed the ERA on the ground that it would integrate the military, expand reproductive rights, and legalize same-sex marriage. Yet, none of these outcomes materialized in the 1970s. The ERA failed and the Burger

307 Ginsburg, supra note 20, at 14.
310 409 U.S. 810 (1972), dismissing appeal from, 191 N.W.2d 185 (Minn. 1971).
311 See Donald T. Critchlow, Phyllis Schlafly and Grassroots Conservatism: A Woman’s Crusade 212–42 (2005) (detailing the sex-role-based arguments against the ERA).
Court did not apply sex-based equal protection doctrine in any of these domains.

The legal and social landscape surrounding these issues has changed significantly since the Burger Court era. This Part begins by examining two relatively recent cases, United States v. Virginia and Nevada Department of Human Resources v. Hibbs, in which the Court extended sex-based equal protection law beyond the doctrinal limitations established in the 1970s. As we shall see, these cases took a new approach to some of the key doctrinal questions the Court first confronted forty years ago, such as how constitutional sex discrimination law should treat “real” differences, and if or when the law should apply in the contexts of pregnancy and motherhood. This Part concludes by arguing that recent changes in sex-based equal protection doctrine, marked by cases like Virginia and Hibbs, have significant ramifications for contemporary legal questions. Questions that once fell outside the reach of constitutional sex discrimination law are now within its orbit.

A. A New Approach to “Real” Differences

United States v. Virginia involved a challenge to the male-only admissions policy at the Virginia Military Institute (VMI), a state-run military academy that provided its students with an atypical college experience. VMI treated its students like soldiers and trained them using an “adversative method” of education, which involved “[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values.” “Cadets” who completed this program gained access to a powerful network of alumni, which included many of the state’s business and political leaders. When the federal government first challenged the constitutionality of VMI’s single-sex admissions policy in 1990, the state responded by creating an alternative program for women, the Virginia Women’s Institute for Leadership (VWIL). This program was intended to provide an experience equivalent to the one offered at VMI, but because the state deemed the “adversative method” appropriate for males only, VWIL relied on a kinder, gentler, “cooperative method” of education.

---

314 Virginia, 518 U.S. at 519.
315 Id. at 522 (alteration in original) (internal quotation marks omitted).
316 Id. at 520.
317 Id. at 526.
318 Id. at 526–27 (internal quotation marks omitted).
ment persisted in its challenge, Virginia argued that "the actual physiological, psychological, and sociological differences between males and females" made integrating VMI impossible. Admitting women would require the school to abandon the "adversative method" and thereby alter its core mission of producing "'citizen-soldiers,' men prepared for leadership in civilian life and in military service." 320

The Court ruled in favor of the United States. The majority opinion, written by Justice Ginsburg, situated VMI's refusal to admit women in the context of the separate spheres tradition. The Court explained that for much of American history, women had been deprived of the vote, 321 of the right to control their own property, 322 and of equal opportunity in the workplace 323 on the basis of sex-role stereotypes. 324 Sex-segregated education arose out of this tradition; the Court noted that, historically, male-only college admissions policies "reflected widely held views about women's proper place." 325 Indeed, "higher education was considered dangerous for women" in the nineteenth century on the ground that it would interfere with their maternal functions. 326

The Court concluded that VMI's ongoing exclusion of women perpetuated this tradition. It deprived women of "the powerful political and economic ties of the VMI alumni network," 327 which helped graduates ascend to the highest levels of military and civilian leadership. 328 VWIL did not solve this problem: It was underfunded, lacked a comparable alumni network, offered only a very poor simulation of military training, and even deprived women of the opportunity to enroll in advanced math and science courses. 329 The Court observed that the state's justifications for maintaining these sex-segregated pro-

319 Brief for the Cross-Petitioners at 17 n.9, Virginia, 518 U.S. 515 (Nos. 94-1941, 94-2107) (internal quotation marks omitted).
320 Virginia, 518 U.S. at 520; see also Brief for the Cross-Petitioners, supra note 319, at 16 & n.7.
321 Virginia, 518 U.S. at 531.
322 Id. at 532.
323 Id. at 531-32.
324 See, e.g., id. at 543 (citing an 1876 decision holding that women were ineligible to practice law because their primary role was to "train and educate the young").
325 Id. at 536-37.
326 Id. at 536 & n.9 (quoting a nineteenth-century text arguing that "the intellectual race... incapacitates [girls] for the adequate performance of the natural functions of their sex").
327 Id. at 553 (internal quotation marks omitted).
328 Id. at 520 ("VMI has notably succeeded in its mission to produce leaders; among its alumni are military generals, Members of Congress, and business executives.").
329 Id. at 551-53 (noting that the program, having been designed for women, did not "have a math and science focus" (internal quotation marks omitted)).
grams reflected a particularly tenacious set of stereotypes “about the way women are” and the roles they would play in society post-graduation.

This brand of analysis was familiar. But the Court’s treatment of the issue of “real” differences marked a new departure for constitutional sex discrimination doctrine. The Court declared in Virginia that “[p]hysical differences between men and women . . . are enduring.”

What has changed is the constitutional landscape in which the state regulates those differences. “[W]e have come to appreciate,” the Court asserted, that “[i]nherent differences between men and women” are “cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.” Historically, the Court granted lawmakers broad leeway to discriminate on the basis of “real” differences. In Virginia, however, the Court held that even in cases involving “real” differences,

Sex classifications may be used to compensate women for particular economic disabilities [they have] suffered, to promot[e] equal employment opportunity, [and] 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.

The Court reached this conclusion after surveying the foundational sex discrimination cases of the 1970s and concluding that the constitutional problem in all of those cases was “official action that closes a door or denies opportunity to women (or to men).”

This holding signaled an important shift in the Court’s reasoning about “real” differences. In the past, “real” differences served as a check on the reach of anti-stereotyping doctrine. In Virginia, anti-stereotyping doctrine serves as a check on the state’s regulation of

---

330 Id. at 550 (internal quotation marks omitted). VMI just as actively perpetuated stereotypes about the way that men are. For a description of VMI’s commitment “to such old-fashioned concepts as manly ‘honor,’” and an excerpt from “The Code of a Gentleman,” which the school distributed to all students, see id. at 601–03 (Scalia, J., dissenting).

331 Id. at 550 (citing the state’s assertion that VWIL “is planned for women who do not necessarily expect to pursue military careers” (internal quotation marks omitted)).

332 Id. at 533.

333 Id. The Court in Virginia does not specify what these “inherent differences” are, and the fact that the Court places the term in quotation marks indicates at least some uncertainty about the ontological status of these differences. Whatever the status of these differences, however, the Court makes clear that they may not be used to justify sex-based state action that perpetuates the separate spheres tradition.

334 Id. at 533–34 (first and second alterations in original) (citations and internal quotation marks omitted).

335 Id. at 532.
“real” differences. *Virginia* makes clear that anti-stereotyping doctrine governs all instances of sex-based state action, whether or not “real” differences are involved. In fact, the Court’s opinion suggests that equal protection law should be particularly alert to the possibility of sex stereotyping in contexts where “real” differences *are* involved, because these are the contexts in which sex classifications have most often been used to perpetuate sex-based inequality.

This is the purpose for which anti-stereotyping doctrine was designed: to smoke out the particular forms of discrimination that enforce the separate spheres tradition. If the distinction between the anti-classification principle and the anti-stereotyping principle was sometimes hard to see in the 1980s, *Virginia* makes that distinction clear. It invalidated VMI’s sex-role-enforcing classification, but noted that not all sex-based admissions policies necessarily violate equal protection. Quoting an amicus brief by twenty-six private women’s colleges, the Court noted that “it is the mission of some single-sex schools ‘to dissipate, rather than perpetuate, traditional gender classifications.’” Sex classifications that serve this purpose—helping to combat forces pressing men and women into traditional roles—are consistent with the promise of the Fourteenth Amendment.

This anti-stereotyping doctrine may initially have been forged in cases with male plaintiffs, but that does not render it inattentive to the ways in which women have been deprived of equal standing in American society. Indeed, *Virginia* demonstrates in a particularly striking way how the state’s enforcement of sex-role stereotypes has served to cement women’s traditional place in the social order.

**B. Male Caregivers and Pregnant Workers**

Several years after *Virginia*, the Court confronted another sex-based equal protection case that raised questions about the state’s regulation of “real” differences. At issue in *Nguyen v. I.N.S.* was the constitutionality of a statute governing the acquisition of United States citizenship by individuals born outside the United States to one citizen parent and one noncitizen parent who were not married. The statute enabled unmarried citizen mothers to transmit citizenship automatically to such children but required unmarried citizen fathers to take affirmative steps to do so.

---

336 Id. at 534 n.7 (quoting Brief of Twenty-Six Private Women’s Colleges as Amici Curiae in Support of Petitioner at 5, *Virginia*, 518 U.S. 515 (Nos. 94-1941, 94-2107)).
339 Under the statute, citizen fathers may transmit United States citizenship to nonmarital children born abroad only if, prior to child’s eighteenth birthday, they estab-
THE ANTI-Stereotyping Principle

The Court upheld the constitutionality of the statute in a sharply contested five-four decision. The dissenters in *Nguyen* argued that the statute was "paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children." They argued that the statute treats mothers as the "natural guardians" of non-marital children and exempts men—or actively discourages them—from assuming any responsibility for such children by erecting sex-specific barriers between father and child. If the government wanted to ensure that a child born overseas had a "real, practical relationship" with his or her citizen parent before gaining citizenship, the dissenters claimed, it could do so through myriad sex-neutral means, such as requiring regular contact between the child and the citizen parent over a period of time, or simply requiring that the parent demonstrate presence at birth, knowledge of birth, or contact with the child prior to a certain age. The dissenters asserted that the sex-based line Congress opted to draw instead rested on "a stereotype—i.e., the generalization that mothers are significantly more likely than fathers . . . to develop caring relationships with their children." Thus, the dissenters argued, the statute in *Nguyen* violates core equal protection principles: It "relies on the very stereotype the law condemns," and helps to convert that stereotype into "a self-fulfilling prophecy."

The majority in *Nguyen* rejected this argument. It cited the Court's observation in *Virginia* that "[p]hysical differences between men and women . . . are enduring," and concluded that the statute in this case simply reflected those differences (namely, the fact that women are always present at the birth of children and men are not), and did not push men or women into traditional roles. The Court emphasized that, in analyzing the constitutionality of the statute, it was "mindful that the obligation it imposes with respect to the acquisi-

---

341 *Id.* at 88.
342 *Id.* (internal quotation marks omitted).
343 *Id.* at 89 (alteration in original) (internal quotation marks omitted).
344 *Id.* (citations and internal quotation marks omitted).
345 *Id.* at 68 (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).
tion of citizenship by the child of a citizen father is minimal." \(^{347}\) "Congress has not erected inordinate and unnecessary hurdles to the conferral of citizenship on the children of citizen fathers," \(^{348}\) the Court asserted: It has required only that men take one of three very simple steps to acknowledge their paternity, and it has given them an eighteen-year window in which to do so. The Court argued that this was "hardly a substantial burden" \(^{349}\) and thus did not act as a deterrent to fathers who wished to develop relationships with their children. Indeed, Justice Stevens, who provided the crucial fifth vote to uphold the statute in \textit{Nguyen}, argued that the statute actually had an anti-stereotyping effect, because it provided an incentive for unmarried fathers to form ties with their children. \(^{350}\) Stevens argued that by encouraging men to acknowledge their paternity, the statute served to "reduce, rather than aggravate, the disparity between" the sexes when it came to bonding with nonmarital children. \(^{351}\)

The majority and dissenting Justices in \textit{Nguyen} vigorously disagreed about whether, in this instance, imposing requirements on single fathers that do not apply to single mothers perpetuates sex stereotypes. \(^{352}\) More salient from a doctrinal perspective, however, is the fact that they agreed on the basic principles the Court articulated in \textit{Virginia}. Both the majority and the dissent in \textit{Nguyen} agreed that if the statute had reflected or reinforced sex-role stereotypes, it would have been unconstitutional—even in a case such as this, which involved "real" differences. Although the Court in \textit{Nguyen} viewed the sex-based citizenship statute as a simple reflection of biological realities, it did not contend that biological differences trump or obviate anti-stereotyping analysis. Indeed, the Court held that the statute passed constitutional muster only after declaring (repeatedly) that it did not instantiate sex stereotypes. Thus, although the statute in

\(^{347}\) \textit{Id.} at 70.

\(^{348}\) \textit{Id.} at 70–71.

\(^{349}\) \textit{Id.} at 71.

\(^{350}\) Although Justice Stevens did not write the majority opinion in \textit{Nguyen}, he did write in \textit{Miller v. Albright}, 523 U.S. 420, 440 (1998), which addressed the same statute, but failed to resolve the question of its constitutionality. \textit{Id.}


\(^{352}\) The disagreement between the majority and the dissent in \textit{Nguyen} may partly have been a disagreement about the level of scrutiny that should apply in this case. The dissenters in \textit{Nguyen} accused the Court of tacitly relaxing the searching standard of review that generally applies in sex-based equal protection cases. \textit{Nguyen}, 533 U.S. at 74 (O'Connor, J., dissenting) (arguing that the Court applied heightened scrutiny in name only, and actually subjected the statute to rational basis review). This accusation was not unfounded. Justice Stevens suggested in \textit{Miller v. Albright} that a more deferential standard was appropriate when reviewing the constitutionality of this statute because it was an exercise of Congress's immigration and naturalization power, and the majority in \textit{Nguyen} reiterated (but declined to pass judgment on) this suggestion. \textit{Nguyen}, 533 U.S. at 61.
**THE ANTI-Stereotyping Principle**

*Nguyen* met a different fate than the statute in *Virginia*, the Court did not repudiate the doctrinal developments made in the earlier case; in fact, it reiterated the understanding that sex stereotyping by the state is impermissible even in the context of "real" differences.

A few years after *Nguyen*, the Court reinforced this understanding in a landmark case called *Nevada Department of Human Resources v. Hibbs*. Like many of the sex-based equal protection cases of the 1970s, *Hibbs* featured a male caregiver. After his wife was seriously injured in a car accident, William Hibbs sought leave from his job under the Family and Medical Leave Act (FMLA), which permits eligible employees of either sex to take up to twelve weeks per year of unpaid, job-protected leave to care for themselves or specified members of their family. Hibbs's employer, the state of Nevada, disputed his claim to leave and responded to his lawsuit by challenging the constitutionality of the FMLA's leave mandate under Section 5 of the Fourteenth Amendment. Section 5 had long been understood to grant Congress broad power "to enforce, by appropriate legislation" the substantive guarantees contained in Section 1 of the Amendment, but in the mid-1990s, the Court began to curtail this power. It held, in a consequential series of cases, that Congress's enforcement power extended only to legislation remedying or deterring conduct that violated Section 1 as the Court had interpreted it. The problem with the FMLA's substantive guarantee of twelve-weeks' leave was that it seemed to extend well beyond any rights guaranteed by the Court in Section 1. So the question arose: Was providing male and female employees with an entitlement to twelve weeks’ leave was that it seemed to extend well beyond any rights guaranteed by the Court in Section 1. So the question arose: Was providing male and female employees with an entitlement to twelve weeks’ leave was that it seemed to extend well beyond any rights guaranteed by the Court in Section 1.

---

354 *Id.* at 725.
356 *See* Brief for Respondent at *7–8, Hibbs*, 538 U.S. 721 (No. 01-1368), 2002 WL 31655020.
357 U.S. CONST. amend. XIV, § 5.
358 *See* City of Boerne v. Flores, 521 U.S. 507, 519–24 (1997) ("Congress does not enforce a constitutional right by changing what the right is. . . . The power to interpret the Constitution in a case or controversy remains in the Judiciary."); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 638 (1999) (following *Boerne*); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000) ("The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch."); United States v. Morrison, 529 U.S. 598, 619 (2000) ("[A]s broad as the congressional enforcement power is, it is not unlimited." (internal quotation marks omitted)); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001) ("*City of Boerne* also confirmed . . . the long-settled principle that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees.").
weeks of family leave a valid means of “enforcing” the Constitution’s equal protection guarantee?359

The women’s movement had always viewed legislation as a central part of the anti-stereotyping project.360 Ginsburg herself advocated a wide range of affirmative benefits designed to combat the enforcement of “male breadwinner/female child tenderer . . . stereotypes,”361 including publicly-funded childcare,362 Medicaid-funded abortion,363 affirmative action,364 and programs designed to facilitate stay-at-home parents’ re-entry into the workforce.365 When Representative Patricia Schroeder introduced the FMLA in the House in 1985, Ginsburg suggested that “legislation of this sort”366 was precisely what was needed to counteract the sex-role stereotyping that remained pervasive in American society. The FMLA sought to reduce the force of prescriptive stereotypes aimed at both sexes: It “takes the woman at work as the model or motivator, but spreads out to shelter others,”367 helping women (who perform most family care) to remain in the workforce while simultaneously permitting men (who are often barred from taking family leave) to become caregivers. In so doing, Ginsburg argued, the FMLA continued the campaign against sex-role “prescriptions of the kind Sally Reed, Sharron Frontiero, and Stephen Wiesenfeld challenged” in the 1970s.368

359 This question arose in *Hibbs* because Congress can abrogate the states’ Eleventh Amendment immunity from suits by private litigants only when it acts pursuant to its authority under Section 5 of the Fourteenth Amendment. *Hibbs*, 538 U.S. at 726. If Congress’s power to enact the FMLA rested only on the Commerce Clause, private litigants (like William Hibbs) could not enforce the FMLA against states (like Nevada) that had not waived their Eleventh Amendment immunity. *See id.* at 726–27.

360 *See supra* text accompanying notes 146–50.


362 *Ginsburg*, *supra* note 20, at 34–40 (arguing that pressures to conform to traditional sex roles will persist “until child rearing burdens are distributed more evenly among parents, their employers and the tax-paying public”).


364 *Ginsburg*, *supra* note 20, at 28–34 (arguing that affirmative action, “far from compromising the equality principle, is an essential part of a program designed to realize that principle”).

365 *Id.* at 31 (advocating “extended study programs” for people seeking to combine education and childrearing and revised transfer and degree-granting policies to better enable people with family responsibilities to complete their education).

366 *Ginsburg & Flagg, supra* note 4, at 18.

367 *Id.*

368 *Id.* Ginsburg characterized the FMLA as a “logical progression from the 1970s litigation.” *Id.*
When the Court granted certiorari in *Hibbs*, few thought the (other) Justices would view the law in this light. Nevada argued, not without authority, that if Congress had been concerned about discrimination in the administration of family leave benefits, it could have passed a law barring such discrimination. An antidiscrimination remedy of this sort would seem to guarantee men and women equal protection as the Court had traditionally understood that term. Here, Congress had gone considerably further, enacting a substantive entitlement to leave.

The Court, however, viewed the law through an anti-stereotyping lens. It held that in some cases—particularly cases at the “faultline between work and family”—laws guaranteeing formal equality are insufficient to protect men and women from sex discrimination. The Court observed that despite the passage of Title VII and its amendment by the Pregnancy Discrimination Act, “stereotype-based beliefs about the allocation of family duties remain[] firmly rooted,” even “rampant,” in the American workplace. “[P]arental leave for fathers . . . is rare,” and even “[w]here child-care leave policies do exist, men . . . receive notoriously discriminatory treatment in their requests for such leave.” Women frequently encounter the opposite form of discrimination: They are encouraged to take “extended” maternity leave, and the fact that they take the leave, or simply the assumption that they will, is then used to justify sex discrimination in hiring, retention, and promotion. Taking a page from the WRP, the Court concluded that long-standing and “mutually reinforcing stereotypes” about men’s and women’s roles had given rise to “a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’

---


*370* Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, at 738 (“[A] statute . . . that simply mandated gender equality in the administration of leave benefits[] would not have achieved Congress’ remedial object.”).

*371* *Id.* at 730, 732 (internal quotation marks omitted) (quoting *The Parental and Medical Leave Act of 1987: Hearing on S. 249 Before the Subcomm. on Children, Family, Drugs and Alcoholism of the S. Comm. on Labor and Human Resources*, 100th Cong. 170 (1987) (statement of Peggy Montes, Mayor’s Comm’n of Women’s Affairs, City of Chic., Ill.).


*373* *Id.* (brackets in original) (internal quotation marks omitted).

*374* *Id.* at 731 & n.5.
stereotypical views about women's commitment to work and their value as employees."375

In the series of Section 5 cases leading up to Hibbs, the Court had acknowledged that Congress's enforcement power was not "confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment."376 It allowed that Congress could prohibit "a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text,"377 but held that when Congress exercises this broader power, "'[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"378 The Court held in Hibbs that the FMLA satisfied this congruence and proportionality requirement.379 It held, in other words, that the "self-fulfilling cycle of discrimination" wrought by sex-role stereotyping was a constitutional problem of such magnitude that it justified an affirmative grant of twelve weeks leave. Had Congress attempted to combat such discrimination simply by requiring formal equality in the administration of leave benefits, employers would have been able to comply with the law by offering no family leave to employees of either sex. The Court explained that in a society where women are expected to perform the vast majority of family care, such a policy would "exclude far more women than men from the workplace,"380 and thus "do little to combat the stereotypes about the roles of male and female employees that Congress sought to eliminate" when it enacted the FMLA.381

This reasoning is striking on a number of levels. Prior to Hibbs, the Court had never explicitly acknowledged the gap between formal and substantive equality. In Hibbs, the Court recognized what the women's movement had been arguing for decades: If a workplace is designed with men in mind, and its terms and conditions suited only for workers who cannot become pregnant and have limited caregiving responsibilities, then the deck is already stacked against people—primarily women—who do not fit this mold. Hibbs acknowledges that, in light of these background facts, enforcing the Constitution's equal protection guarantee may require more substantive forms of legisla-

---

375 Id. at 736.
377 Id.
378 Id. (alteration in original) (quoting City of Boerne v. Flores, 521 U.S. 507, 520 (1997)).
379 Hibbs, 538 U.S. at 740.
380 Id. at 738.
381 Id. at 734.
tive intervention, even forms of intervention that might be character-
ized as “substantive entitlement program[s].” \(^{382}\)

Equally striking is the Court’s discussion of the relationship
between anti-stereotyping doctrine and “real” difference. As in
**Virginia**, the Court in **Hibbs** affirmed the enduring nature of biolog-
ical sex differences. **Hibbs** focused specifically on pregnancy; it noted
that men and women are differently situated in relation to pregnancy
and that giving birth temporarily disables biological mothers in ways
new fathers do not experience. \(^{383}\) The Court suggested that employers
could lawfully take this difference into account and offer pregnancy
disability leave only to biological mothers. \(^{384}\)

The Court warned, however, that it is important to proceed with
cautions in this area, because pregnancy and motherhood have long
been the epicenter of sex discrimination. It noted, for instance, that
the prevalence of “extended” maternity leaves, not available to
fathers, was “not attributable to any differential physical needs of men
and women, but rather to the pervasive sex-role stereotype that caring
for family members is women’s work.” \(^{385}\) In fact, the Court observed
that throughout American history, “denial or curtailment of women’s
employment opportunities has been traceable directly to the pervasive
presumption that women are mothers first, and workers second,” and
that “[t]his prevailing ideology about women’s roles” has justified sub-
stantial “discrimination against women when they are mothers or
mothers-to-be.” \(^{386}\)

This is the first time the Court has explicitly recog-
nized that discrimination against pregnant women can foster “the
role-typing society has long imposed” \(^{387}\) in ways that violate the Con-
stitution’s equal protection guarantee.

Although **Hibbs** does not explicitly overrule **Geduldig**, it casts
that decision in a decidedly new light, making it clear that the earlier

---

\(^{382}\) Id. at 737 (quoting id. at 754 (Kennedy, J., dissenting)). The Court’s recognition that
structural change and substantive entitlements are sometimes required in order to reshape
workplace norms that reinforce traditional sex roles has prompted legislators in Congress
to propose a number of new laws to combat sex stereotyping. See, e.g., **Family Leave Insur-
leave for family care or personal health reasons); **Family Leave Insurance Act of 2007**, S.
1681, 110th Cong. (2007) (providing up to eight weeks of paid leave under the FMLA);
**Healthy Families Act**, S. 1085, 109th Cong. (2005) (requiring employers to provide
employees with at least seven paid sick days per year in order to combat discrimination
based “on persistent stereotypes about the ‘proper’ roles of both men and women in the

\(^{383}\) See **Hibbs**, 538 U.S. at 731.

\(^{384}\) Id.

\(^{385}\) Id.

\(^{386}\) Id. at 736 (internal quotation marks omitted) (quoting Joint Hearing, supra note 372,
at 100 (statement of the Women’s Legal Defense Fund)).

case does not (or doesn’t any longer) stand for the proposition that pregnancy discrimination is not sex discrimination under the Fourteenth Amendment.\textsuperscript{388} \textit{Hibbs} teaches that pregnancy discrimination can constitute sex discrimination in instances in which it reflects and reinforces traditional conceptions of women’s sex and family roles. This marks a significant shift in the Court’s reasoning about the rights of pregnant women. \textit{Hibbs} echoes the concerns about sex stereotyping expressed in cases like \textit{Wiesenfeld} but amplifies those concerns and extends them outward into new domains like pregnancy, which it recognizes for the first time as a site of pervasive sex-role stereotyping.\textsuperscript{389}

\section*{C. Soldiers and Mothers}

The concluding sections of this Article examine the implications of this expansion of anti-stereotyping doctrine for a number of constitutional questions, including women in the military, reproductive rights, and same-sex marriage. When the Court first confronted these questions several decades ago, it analyzed them in doctrinal registers other than equal protection. My aim here is to show that anti-stereotyping doctrine, as elaborated in \textit{Virginia} and \textit{Hibbs}, now shapes the constitutional space within which the Court decides these questions. Although the Court has adjudicated these questions in the past without reference to sex equality concerns, equal protection law

\begin{flushright}
388 For more on the relationship between \textit{Hibbs} and \textit{Geduldig}, see Reva B. Siegel, \textit{You’ve Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs}, 58 STAN. L. REV. 1871 (2006). Siegel points out that \textit{Geduldig} did not hold that pregnancy discrimination could never constitute sex discrimination for the purposes of equal protection law. \textit{Id.} at 1873. Rather, it held that the fact that women can become pregnant and men cannot does not mean that “every legislative classification concerning pregnancy is a sex-based classification like those considered in \textit{Reed} and \textit{Frontiero}.” \textit{Geduldig v. Aiello}, 417 U.S. 484, 496–97 (1974) (internal citations omitted). Siegel thus argues that \textit{Hibbs} resolves a question \textit{Geduldig} left open (i.e., whether pregnancy discrimination can ever constitute sex discrimination) and that \textit{Hibbs} answers this question by holding that the regulation of pregnancy does constitute sex discrimination when it reinforces sex-role stereotypes. Siegel, \textit{supra}, at 1873.

389 \textit{Hibbs}’s fulsome account of sex-role stereotyping in the context of pregnancy raises questions about the Court’s holding two years earlier in \textit{Nguyen v. I.N.S.}, 533 U.S. 53 (2001). See \textit{supra} text accompanying notes 337–52. The Court in \textit{Nguyen} concluded that a sex-based immigration statute did not reflect or reinforce sex-role stereotypes, in part because the statute simply acknowledged the fact that women, unlike men, will always be present at the birth of their children, and in part because the burden it imposed on fathers seeking to confer citizenship on their children was minimal. \textit{Nguyen}, 533 U.S. at 62–63, 70–71. This determination reflected a relatively laissez-faire approach to sex discrimination in the contexts of pregnancy and caregiving. \textit{Hibbs}, however, suggests that a particularly searching review is necessary in these contexts because sex-role stereotyping has traditionally been strongest here. Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721 (2003).
\end{flushright}

Reprinted with permission of New York University School of Law
has now expanded in ways that render this doctrinal segregation untenable.

1. Women in the Military

It would be difficult to conceive of an activity more antithetical to the traditional conception of women’s role than military service. Historically, eligibility to serve in the military functioned as a defining characteristic of American manhood; like the franchise, it marked one as a full citizen of the United States. Women traditionally counted as citizens in a different way; their contributions to the nation were defined principally in relation to wife- and motherhood. These mutually reinforcing stereotypes about men’s and women’s roles surfaced frequently in the 1970s in the debates over the ERA, which opponents attacked by arguing that it would send women to war. Sam Ervin, a prominent senator from North Carolina, argued that women were needed at home to provide “nurture, care, and training to their children during their early years.” “It is absolutely ridiculous,” he claimed, “to talk about taking a mother away from her children so that she may go out to fight the enemy and leave the father at home to nurse the children.” Representative Emanuel Celler of New York concurred. “Women represent motherhood and creation,” he argued, and must therefore be shielded from the destruction of war.

In the early 1980s, the debate over women’s eligibility for military service reached the Court in the form of *Rostker v. Goldberg*, a sex-based equal protection challenge to the government’s policy of requiring only men to register for the draft. The Court did not ask whether this classification reflected or reinforced sex-role stereotypes; it upheld the constitutionality of women’s exclusion from selective service registration (and by implication, from combat) in a terse opinion deferring to congressional and military judgment. The Court issued its decision in *Rostker* in the shadow of “real” differences doctrine. A few months earlier, in *Michael M.*, the Court had upheld a sex-specific

---

391 S. REP. NO. 92-689 (1972), at 49 (minority views of Mr. Ervin).
395 Id.
statutory rape law—without asking whether it enforced sex stereotypes—on the ground that it reflected physical differences between men and women.\textsuperscript{396} Had the Court examined the statute in \textit{Rostker} more closely, it would likely have concluded that such differences justified women’s exclusion from combat and the draft.

Today, the landscape surrounding questions involving women and the military looks quite different, on the ground and in the law. On the ground, the United States’ entry into two major wars at the start of the twenty-first century has exponentially increased the need for trained soldiers, sex notwithstanding.\textsuperscript{397} Tens of thousands of women have served in the military in Iraq and Afghanistan, and for the first time, they have routinely participated in combat.\textsuperscript{398} Indeed, the military has increasingly treated women as essential to its combat operations.\textsuperscript{399} Official policy still bars women from a range of combat positions, but the military has consistently found ways around these restrictions in order to allow women to serve.\textsuperscript{400} This has greatly expanded women’s integration in the armed services and vastly increased the number of high-ranking women and women in command of all-male units.

This shift in social reality has been accompanied by an equally notable shift in the law. Today, “real” differences do not automatically justify sex-based state action that perpetuates traditional conceptions of men’s and women’s roles, and courts have become correspondingly more skeptical of laws that associate women with home and family and men with the world beyond the domestic sphere. The Court registered deep concern in \textit{Virginia} about the ways in which the exclusion of women from VMI perpetuated the separate spheres tradition and deprived women of access to valuable opportunities for advancement.\textsuperscript{396}

\textsuperscript{397} Steven Lee Myers, \textit{Living and Fighting Alongside Men, and Fitting In}, \textit{N.Y. Times}, Aug. 17, 2009, at A1 (quoting Brig. Gen. Mary A. Legere, director of intelligence for the American war effort in Iraq, explaining that “[w]e’ve needed—needed—the contributions of both our men and women”).
\textsuperscript{398} Lizette Alvarez, \textit{G.I. Jane Stealthily Breaks the Combat Barrier}, \textit{N.Y. Times}, Aug. 16, 2009, at A1 (“Before 2001, America’s military women had rarely seen ground combat. Their jobs kept them mostly away from enemy lines, as military policy dictates. But the Afghanistan and Iraq wars, often fought in marketplaces and alleyways, have changed that. In both countries, women have repeatedly proved their mettle in combat.”).
\textsuperscript{399} \textit{Id.} (quoting a retired lieutenant colonel who helped write the Army’s new counterinsurgency field manual asserting that “[w]e literally could not have fought this war without women”); \textit{id.} (quoting a retired lieutenant colonel who commanded American women in combat stating that the female combat exclusion was eviscerated in Iraq: “Debate it all you want folks, but the military is going to do what the military needs to do. And they are needing to put women in combat”).
\textsuperscript{400} \textit{Id.} (“On paper, for instance, women have been ‘attached’ to a combat unit rather than ‘assigned.’”).
in public life. These concerns are compounded in the context of the United States military, where the exclusion of women has historically been justified as a means of protecting the nation’s mothers and has long deprived women of equal citizenship, equal public benefits, and equal access to the national political arena.\(^{401}\) The evolution of sex-based equal protection doctrine and changed social circumstances have brought the nation to a different place than it was thirty years ago when the Court decided Rostker. These changes have rendered the constitutional questions surrounding women’s exclusion from combat and the draft more acute. In the 1970s, women’s exclusion from combat positions and diminished access to the upper ranks of the armed services was understood to reflect “real” differences between the sexes. Now that women are routinely serving in combat, and “real” differences no longer shield sex classifications from skeptical scrutiny, the military’s official exclusion of women from combat has become more difficult to justify within an equal protection framework.

2. Reproductive Rights

The evolution of anti-stereotyping doctrine and related social changes over the past thirty years have also sharpened constitutional concerns regarding certain aspects of the state’s regulation of reproductive rights. The Burger Court did not analyze laws implicating reproductive rights from an equal protection standpoint. In 1973, Roe cast the regulation of abortion as a matter of due process. Geduldig, decided the next year, widened the gulf between abortion and equal protection by suggesting that the regulation of pregnant women did not implicate constitutional equality values. As a result, concerns about sex-role stereotyping in the context of abortion were largely invisible to the Court in the 1970s.

By the time the Court decided Hibbs, it had become apparent even to Chief Justice Rehnquist, an erstwhile opponent of the anti-stereotyping approach, that the regulation of pregnant women often enforced traditional conceptions of women’s roles.\(^{402}\) Taking on board

---

\(^{401}\) For a thorough investigation of the ways in which women’s exclusion from military service and men’s eligibility for such service have shaped men’s and women’s political and economic citizenship, see Theda Skocpol, Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States (1992).

\(^{402}\) The evolution of the former Chief Justice’s views in constitutional sex discrimination cases provides a vivid illustration of how anti-stereotyping doctrine has expanded over the past three decades. Rehnquist voted against nearly every sex-based equal protection plaintiff who reached the Court in the 1970s. He ended his career on the Court by voting in favor of the integration of VMI and writing Hibbs—the most expansive anti-stereotyping opinion in the Court’s history.
at least some of the arguments of the women's movement, the Court in *Hibbs* identified pregnancy as a site of special concern for anti-stereotyping doctrine, suggesting that laws regulating pregnant women must be scrutinized with particular attention to ensure that they do not reflect or reinforce sex-role stereotypes. In so doing, the Court narrowed the doctrinal gap that opened in the 1970s between equal protection and the regulation of pregnant women.

This change in the relationship between pregnancy and equal protection situates abortion regulation in a new constitutional space—one constrained by the anti-stereotyping principle. Since 1992, the Court has framed its analysis of laws regulating abortion in terms of the undue burden test. Equality concerns have played an implicit role in undue burden analysis: In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the case that announced the undue burden test, the Court invalidated a spousal notification provision (which required married women to produce signed statements attesting to the fact that they had notified their husbands of their intention to obtain an abortion) on the ground that it reflected "a common-law understanding of a woman's role within the family" and granted men a "troubling degree of authority" over their wives. These concerns, however, have remained latent within abortion jurisprudence. For the most part, courts have adjudicated questions involving abortion restrictions without reference to constitutional equality values; when they have smuggled equality concerns into substantive due process analysis, they have done so in an inarticulate and under-theorized manner. But the extension of anti-stereotyping doctrine into the domain of pregnancy means that concerns about sex equality are now part of the doctrinal landscape in which cases involving abortion are decided.

The anti-stereotyping principle has important implications for the constitutional legitimacy of different kinds of justifications the state might offer for restricting the right to abortion. Until recently, the dominant forms of justification for restricting women's right to abortion focused primarily on protecting fetal life. Over the past decade or so, anti-abortion advocates have increasingly abandoned this fetal-protective argument in favor of a "woman-protective" argument that

---

403 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (articulating the undue burden test, which asks whether a law regulating abortion "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus").

404 *Id.* at 897–98.

405 See, e.g., Brief for Appellee at 31, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18) (seeking to demonstrate "how clearly and conclusively modern science—embryology, fetology, genetics, perinatology, all of biology—establishes the humanity of the unborn child").
portrays both the fetus and the woman as victims of abortion providers and the pro-choice movement.406 This argument rests on the premise that a woman’s natural role is to be a mother and that a mother’s interests always coincide with the best interests of her unborn child. For this reason, a woman can never truly consent to an abortion; she can only be coerced into having one. Anti-abortion advocates argue that women who have been victimized in this way are susceptible to “post-abortion syndrome,” a condition marked by grief, depression, isolation, alienation, substance abuse, and increased risk of suicide.407 In 2007, in Gonzales v. Carhart,408 the Supreme Court embraced this reasoning, citing “post-abortion syndrome” as a justification for upholding the Partial-Birth Abortion Ban Act.409 The Court suggested in Carhart that restricting a woman’s right to abortion is beneficial to her because it fosters “the bond of love the mother has for her child,” and protects her from the “severe depression,” “loss of esteem,” “grief,” and “sorrow” that may afflict women who opt, against their very nature, to terminate “the infant life they once created and sustained.”410

This form of reasoning about women and motherhood is deeply suspect in sex-based equal protection law. The Court in Hibbs expressed particular concern about laws that reflect and reinforce the notion that “women are mothers first,”411 and that they have special responsibilities to children that men do not share and that naturally and consistently take precedence over all other commitments in their lives. The conflict between Hibbs’s reasoning about pregnancy and the way the Court reasoned about pregnancy in Carhart was not lost on the four Justices who dissented in the latter case. Justice Ginsburg, writing for the dissenters in Carhart, strongly objected to the suggestion that restricting women’s right to abortion helps them to realize their true nature as mothers and to experience the maternal fulfillment that results from giving birth to and nurturing a child. She and her colleagues argued that “[t]his way of thinking reflects ancient

407 See, e.g., id. at 1663 n.77 (citing amicus briefs submitted by anti-abortion groups discussing the negative psychological effects of abortion).
410 550 U.S. at 159.
notions about women's place in the family and under the Constitution—ideas that have long since been discredited."\textsuperscript{412}

This Article has traced this process of discrediting, showing how the forms of reasoning about pregnancy and motherhood that surfaced in \textit{Carhart} have lost credibility over time as a means of justifying sex-based state action. Historically, courts did not subject laws regulating women's role in reproduction to scrutiny under the Equal Protection Clause because pregnancy was perceived as a "real" difference, the existence of which was understood to obviate any equal protection concerns. \textit{Virginia} and \textit{Hibbs}, however, adopted a new approach to "real" differences. These cases suggest that the biological nature of pregnancy no longer immunizes reproductive regulation from skeptical scrutiny and that this form of regulation should arouse constitutional equality concerns when it reinforces stereotyped conceptions of motherhood and women's role in the family.

The increased sensitivity of equal protection doctrine to the ways in which the regulation of "mothers and mothers-to-be" can reinforce sex-role stereotypes suggests that the doctrine may finally have gained "the critical capacity to discern gender bias in reproductive regulation."\textsuperscript{413} Feminist scholars have been arguing for forty years that the regulation of pregnant women raises equal protection concerns. In 1974, Katharine Bartlett argued that because the most deeply rooted stereotypes about women are related to their childbearing function, "discrimination on the basis of sex-role stereotyping can be eliminated only by subjecting classifications based on pregnancy" to heightened scrutiny.\textsuperscript{414} Catharine MacKinnon argued in the early 1980s that analyzing abortion as a matter of privacy obscures the background conditions of gender inequality in which women become pregnant and perpetuates the state's longstanding disregard for women's status and wellbeing.\textsuperscript{415} In 1984, Sylvia Law argued that "if women are to achieve fully equal status in American society, including a sharing of power traditionally held by men, . . . our understanding of sex equality must encompass a strong constitutional equality guarantee" that applies to laws governing reproductive biology.\textsuperscript{416} Law asserted that the salient constitutional question should not be whether pregnancy is

\textsuperscript{412} \textit{Carhart}, 550 U.S. at 185 (Ginsburg, J., dissenting).

\textsuperscript{413} Siegel, supra note 242, at 264.

\textsuperscript{414} Katharine Bartlett, \textit{Pregnancy and the Constitution: The Uniqueness Trap}, 62 CAL. L. REV. 1532, 1536 (1974); \textit{id.} at 1532 ("Woman's role as childbearer has given rise to many of the most common Western stereotypes about women.").

\textsuperscript{415} \textsc{Catharine A. MacKinnon}, \textit{Privacy v. Equality: Beyond Roe v. Wade}, in \textsc{Feminism Unmodified: Discourses on Life and Law}, supra note 7, at 93, 93-102.

a "real" difference but whether the state regulates pregnancy in a way that "oppresses women or reinforces cultural sex-role stereotypes." 417 Ruth Bader Ginsburg seconded this assertion the following year, arguing that the Court in Roe had "presented an incomplete justification for its action." 418 Ginsburg argued that it was insufficient "to charge it all to women's anatomy—a natural, not man-made, phenomenon." 419: When the state deprives women of control over their own reproductive capacity, it is making a social, not a biological, statement about women's roles and stature in the community. 420 Several years later, Reva Siegel demonstrated that laws restricting abortion have historically reflected stereotyped forms of reasoning about women's role in the family. She noted that the Burger Court's approach to "reproductive regulation [had] obscure[d] the possibility that such regulation may be animated by constitutionally illicit judgments about women." 421

As long as the regulation of pregnant women remained outside the scope of sex-based equal protection doctrine and the question of abortion was sequestered within the substantive due process framework, equality-based arguments for reproductive rights had difficulty gaining a foothold in the law. Now that the Court has begun to revise its approach to "real" differences, however, the terrain has shifted. This fact has not been lost on some of the leaders in the pro-life move-

417 Id. at 1033.
418 Ginsburg, Some Thoughts, supra note 363, at 382. Ginsburg credits Kenneth Karst for making this argument years earlier. See Kenneth L. Karst, The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 HARV. L. REV. 1, 53–59 (1977) (arguing that although the Court had ignored the equality dimension of the abortion question, Roe could be viewed through an equal protection lens as a case about women's "right to control [their] own social roles"). Of course, Ginsburg herself had explored the connection between sex equality and reproductive rights years earlier in her brief in Struck v. Secretary of Defense. See supra text accompanying notes 231–37.

419 Ginsburg, Some Thoughts, supra note 363, at 382.

420 See id. at 382–83. "Society, not anatomy, places a greater stigma on unmarried women who become pregnant than on the men who father their children," Ginsburg argued. "Society expects, but nature does not command, that women take the major responsibility ... for child care and that they will stay with their children, bearing nurture and support burdens alone, when fathers deny paternity or otherwise refuse to provide care or financial support for unwanted offspring." Id. (alteration in original) (internal citations and quotation marks omitted).

421 Siegel, supra note 242, at 264. Siegel has continued to elaborate the constitutional equality argument for protecting women's right to abortion. In recent years, she has written a number of articles demonstrating that sex-role stereotypes continue to fund the passage of abortion laws today. See, e.g., Reva B. Siegel, The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions, 2007 U. ILL. L. REV. 991 (showing that South Dakota's near-total ban on abortion, enacted in 2006 and since repealed, was motivated by a stereotyped conception of women's role as wives and mothers).
ment. James Bopp, Jr., a prominent conservative lawyer and longtime general counsel to the National Right to Life Committee, issued a memorandum in 2007, after the Court decided Carhart, warning anti-abortion activists to proceed with caution.\(^{422}\) Bopp counseled the movement to halt its campaign to ban abortion for fear that a constitutional challenge would prompt the Court to consider the implications of such a ban for women’s equality. He argued:

[I]f the U.S. Supreme Court, as presently constituted, were to actually accept a case challenging the declared constitutional right to abortion, there is the potential danger that the Court might actually make things worse than they presently are. The majority might abandon its current “substantive due process” analysis (i.e., reading “fundamental” rights into the “liberty” guaranteed by the Fourteenth Amendment against infringement without due process) in favor of what Justice Ginsberg [sic] has long advocated—an “equal protection” analysis under the Fourteenth Amendment. In Gonzales v. Carhart, the dissent, written by Justice Ginsberg, in fact did so. If this view gained even a plurality in a prevailing case, this new legal justification for the right to abortion would be a powerful weapon in the hands of pro-abortion lawyers . . . .\(^{423}\)

Rather than seek to ban abortion, Bopp counseled anti-abortion activists to chip away at the right through incremental forms of legislation like “partial-birth abortion” bans and parental involvement laws.\(^{424}\) He argued that these laws were less likely to trigger the Court to make the connection between abortion and women’s equality, whereas an outright ban “would force Justice Kennedy to vote to strike down the law, [and give] Justice Ginsberg the opportunity to rewrite the justification for the right to abortion” in equal protection terms.\(^{425}\)

In the 1970s, when the basic framework for adjudicating abortion cases was constructed, “real” differences doctrine prevented the Court from inquiring if and when the regulation of women’s reproductive lives might reinforce the stereotypes associated with the separate spheres tradition. Today, the Court’s evolving understanding that stereotypes about pregnancy and motherhood implicate equal protection

---


\(^{423}\) Memorandum from James Bopp, Jr. & Richard E. Coleson, supra note 422, at 3 (internal citations omitted).

\(^{424}\) Id. at 3–4.

\(^{425}\) Id.
concerns provides a new vantage point for thinking about the constitutionality of laws limiting women's reproductive rights.

D. Sex-Role Stereotyping and LGBT Rights

2003 was a banner year for the gay rights movement. In June, the Court issued its historic decision in *Lawrence v. Texas*, holding that a statute outlawing same-sex sodomy violated the Fourteenth Amendment.\[426\] *Lawrence* marked the end of a long campaign against laws criminalizing same-sex intimacy. It overruled *Bowers v. Hardwick*\[427\] and provided a foundation for challenging other legal regulations that demean and stigmatize sexual minorities. Laurence Tribe predicted that the decision would "be remembered as the *Brown v. Board of gay and lesbian America,*"\[428\] and it was greeted and understood as such on the day it came down. *Lawrence*, however, was not the only groundbreaking civil rights decision issued in the summer of 2003 that had powerful implications for LGBT rights. Although *Hibbs* was not widely hailed as a victory for the gay rights movement, this section suggests that sex-based equal protection law has a significant role to play in the adjudication of claims involving sexual orientation and gender identity.

As this Article has shown, the anti-stereotyping principle was linked from the start with gay and lesbian rights—in both positive and negative ways. The advocates who led the "revolt against the sex-role structure"\[429\] in the aftermath of the Stonewall riots argued that sex stereotyping played a significant role in the oppression of gays and lesbians and that women and sexual minorities had a shared interest in fighting sex-role enforcement. This point was not lost on opponents of the women's movement. Leaders in the New Right argued that if the Constitution were amended or interpreted to forbid the state from enforcing sex-role stereotypes, the state would be compelled to permit same-sex marriage and to stop discriminating against gays and lesbians more generally.\[430\] These concerns were not borne out in the 1970s; same-sex marriage and other gay rights claims were not credible to courts forty years ago. In 1972, when the Court confronted a same-sex marriage claim for the first and only time in its history, it felt no need to justify the marital sex classification under the Equal Pro-

\[427\] 478 U.S. 186 (1986) (holding that the Fourteenth Amendment offers no protection against laws barring private sexual activity by consenting adults of the same sex).
\[429\] Shelley, *OUT OF THE CLOSETS*, supra note 24, at 32.
\[430\] See supra notes 301–02 and accompanying text.
tection Clause. Thus, throughout the 1970s, tensions between the anti-stereotyping principle articulated in sex-based equal protection cases and the state's ongoing enforcement of sex stereotypes in the context of sexual orientation and gender identity remained latent in the law.

These tensions have come to the surface in recent years as same-sex marriage claims have achieved a new prominence in public discourse and in the American legal system. In the past, it was possible for courts to dismiss gay rights claims as "facetious." It did not seem necessary (or difficult) to justify discrimination against gays and lesbians because their claims were considered beyond the legal pale. Over time, however, the legal and social landscape surrounding gay rights claims has changed dramatically. The Court has recognized that discrimination against gays and lesbians can violate the Fourteenth Amendment. Tens of thousands of same-sex couples are legally married and many more identify themselves as married. These developments have made it necessary for opponents of same-sex marriage to proffer substantial legal reasons for their position and for courts to analyze more carefully the state's justification for retaining the sex classification in marriage. In response to these new demands, both same-sex marriage opponents and courts rejecting same-sex marriage claims have increasingly offered justifications for retaining the sex classification in marriage that are grounded in traditional conceptions of sex and family roles.

Opponents of same-sex marriage made extensive use of sex-role-based arguments in response to the California Supreme Court's 2008 decision granting same-sex couples the right to marry. When California changed the categories on its marriage license from "bride" and "groom" to "Party A" and "Party B," gender "traditionalists" organized a boycott, urging different-sex couples not to obtain such licenses until the documents indicated once again that men and women have distinctive roles in marriage. One heterosexual couple

431 See supra note 310 and accompanying text.
432 Bowers, 478 U.S. at 194.
433 Lawrence v. Texas, 539 U.S. 558 (2003) (invalidating a Texas law barring consensual homosexual sodomy in an opinion grounded in due process and equal protection values); Romer v. Evans, 517 U.S. 620 (1996) (invalidating on equal protection grounds a state constitutional amendment banning antidiscrimination laws and ordinances designed to protect homosexuals or bisexuals).
even sued the state, claiming that their traditional beliefs about sex roles in marriage precluded them from obtaining a gender-neutral license.436 A lawyer for the Pacific Justice Institute, representing the couple, noted that “[t]hose who support (same-sex marriage) say it has no impact on heterosexuals. . . . This debunks that argument.”437 On his account, removing the words “bride” and “groom” from state marriage licenses deprives men and women of the guidance those terms provide and the values they instantiate: When the parties to a marriage are labeled “A” and “B,” it is not clear who is expected to care for the children and who is expected to protect and provide for the family. In response to these and other such protests throughout the state, the California Department of Public Health announced in October 2008 that boxes for “bride” and “groom” would be reinstated on marriage licenses.438 One month later, a majority of the California electorate voted in favor of Proposition 8, which stripped same-sex couples of the right to marry.439

Sex-role-based arguments against same-sex marriage have fared surprisingly well in court. They played a prominent role in Hernandez v. Robles, a 2006 New York Court of Appeals decision upholding that state’s restriction of marriage to different-sex couples.440 The court in Hernandez deemed the restriction constitutional in part because “[i]ntuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like.”441 The court also suggested that stereotyped

437 Garza, supra note 435 (alteration in original) (internal quotation marks omitted); see also Garza, supra note 436 (quoting the organizer of the boycott who asserted that the purpose of the license lawsuit was “to take back traditions that we feel . . . have been taken away from us,” and that licenses with “gender-neutral terms violate the rights of the majority”(internal quotation marks omitted)); Cal Thomas, An End of “We the People,” TULSA WORLD, Oct. 14, 2008, at A13 (“An indication that the objectives of the gay rights movement go far beyond what any two individuals wish to do with each other can be seen in what California has tried to impose on heterosexuals wishing to marry.”).
441 Id. at 7. Intuition may suggest parents of different sexes are best, but research has consistently shown that children living with two parents of the same sex do as well on every measure as children living with two parents of different sexes. “Many leading organizations, including the American Academy of Pediatrics, the American Psychiatric Association, the American Psychological Association, the National Association of Social Workers,
assumptions regarding (heterosexual) men’s inconstancy and lack of commitment to their female partners and children could justify the restriction of marriage to different-sex couples. This line of reasoning, increasingly common in same-sex marriage cases, assumes that the purpose of marriage is to “formally bind[ ] the husband-father to his wife and child, and impos[e] on him the responsibilities of fatherhood,” lest he decide to abandon his dependents. A related line of reasoning suggests that the state may restrict the right to marry to different-sex couples because men and women play “opposite” or

and the Child Welfare League of America, weighed the available research and supported the conclusion that gay and lesbian parents are as effective as heterosexual parents in raising children.” Varnum v. Brien, 763 N.W.2d 862, 874 (Iowa 2009); see also Am. Psychological Ass’n, APA Policy Statement: Resolution on Sexual Orientation, Parents, & Children (2004), available at http://www.apa.org/pi/lgbc/policy/parents.html (noting that “research has shown that . . . the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish”).

442 See Hernandez, 855 N.E.2d at 7 (holding that the legislature could “rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships” because only heterosexual sex can lead to accidental pregnancy and single motherhood). This is a relatively new rationale for denying same-sex couples the right to marry; conservative law professors and think tanks developed the “accidental procreation” argument in the late 1990s. Kerry Abrams & Peter Brooks, Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation, 21 Yale J.L. & Human. 1, 26–29 (2009). This argument was embedded in a set of claims about the importance of preserving traditional gender roles, limiting divorce, and encouraging marital procreation; the purpose of these claims was to promote the idea that procreative sex within marriage is the only acceptable form of sexual expression and that responsible parenting requires the presence of a mother and father in the home because men and women provide children with different lessons and different kinds of love. See, e.g., Lynn D. Wardle, The Potential Impact of Homosexual Parenting on Children, 1977 U. ILL. L. Rev. 833, 857 (arguing that the state has an interest in ensuring children are raised in the context of heterosexual marriage because “there are gender-linked differences in child-rearing skills [and] men and women contribute different (gender-connected) strengths and attributes to their children’s development”).

443 Morrison v. Sadler, 821 N.E.2d 15, 26 (Ind. Ct. App. 2005) (quoting Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 996 (Mass. 2003) (Cordy, J., dissenting)) (internal quotation marks omitted). Gender traditionalists frequently argue that marrying a woman and becoming the head of a household is the primary means through which boys achieve a healthy adult male identity. See, e.g., Steven L. Nock, Marriage in Men’s Lives 61 (1998) (“[T]he core dimensions of adult masculinity include three distinct roles. Men must be (1) married fathers, (2) providers for, and (3) protectors of their wives and children.”); Katherine K. Young & Paul Nathanson, The Future of an Experiment, in Divorcing Marriage: Unveiling the Dangers in Canada’s New Social Experiment 41, 47–48 (Daniel Cere & Douglas Farrow eds., 2004) (arguing that society has an interest in channeling men into heterosexual marriage because the institution helps them to develop a “healthy form of masculine identity”—an identity that is under threat “now that women have entered the public realm” and men can no longer automatically lay claim to the role of “provider and protector”); Lynn D. Wardle, “Multiply and Replenish”: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 Harv. J.L. & Pub. Pol’y 771, 798 (2001) (arguing that if same-sex couples were permitted to marry, “[t]he paternal role, which historically and culturally has been linked with [heterosexual] marriage, would be loosed from its social and moral moorings”).

Reprinted with Permission of New York University School of Law
“complementary” roles in the family.444 This mode of reasoning draws directly on the separate spheres conception of sex, which assumes that women are responsible and specially built for caregiving work while men are more suited to breadwinning and decisionmaking.445

These holdings are in tension with anti-stereotyping precedents extending back to the 1970s. Sex-based equal protection law has been concerned, from its inception, with the enforcement of sex and family roles in marriage. The Court held in Wiesenfeld (and suggested in Reed and Frontiero) that the state had no legitimate interest in encouraging men and women to assume gender-typical roles in marriage. It has reiterated this holding on numerous occasions. It held in Orr v. Orr that Alabama’s requirement that husbands, but not wives, could be required to pay alimony was unconstitutional because it “effectively announc[ed] the State’s preference for an allocation of family responsibilities under which the wife plays a dependent role” and sought to “reinforce[ ]... that model among [its] citizens.”446 It held in Califano v. Westcott that the practice of granting benefits to families with unemployed fathers, but not to families with unemployed mothers, violated equal protection because it was “part of the baggage of sexual stereotypes that presumes the father has the primary responsibility to provide a home and its essentials, while the mother is the center of home and family life.”447 These holdings were


445 For a more comprehensive survey of sex stereotyping in same-sex marriage decisions, see Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence, 30 Harv. J.L. & Gender 461 (2007).


447 443 U.S. 76, 89 (1979) (citations and internal quotation marks omitted) (quoting Orr, 440 U.S. at 283; Stanton v. Stanton, 421 U.S. 7, 10 (1975); and Taylor v. Louisiana, 419 U.S. 522, 534 n.15 (1975)). Other cases have also found assumptions about gender-differentiated family roles insufficient to justify sex classifications. See, e.g., Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (invalidating a Missouri law that automatically granted workers' compensation benefits to widows but required widowers to prove that they were dependent on their wives' earnings or mentally or physically incapacitated); Caban v. Mohammed, 441 U.S. 380 (1979) (invalidating a New York law that permitted unwed
amplified more recently in *Virginia*448 and *Hibbs*, which suggested that even “real” differences (such as women’s ability to become pregnant) cannot justify sex classifications that steer men and women into traditional roles in the family.

The implications of *Hibbs* for LGBT rights were immediately apparent to Phyllis Schlafly. Shortly after *Hibbs* came down, she published a spirited essay entitled *Justice Ginsburg Would Put a Dress on the Lone Ranger*, which characterized *Hibbs* as the “shock[ing]” product of “feminist fantasies about a gender-neutral society.”449 Although Chief Justice Rehnquist wrote the majority opinion in *Hibbs*, Schlafly noted that the opinion used the word “stereotype” nineteen times—a sure sign of “Ginsburg’s influence.”450 In fact, Schlafly suggested that *Hibbs* pushed the radical “equality principle” Ginsburg had been promoting since the 1970s to new extremes.451 This “equality principle” sought to abolish “the concept of ‘breadwinning husband’ and ‘dependent, homemaking wife.’ ”452 Schlafly suggested that someday soon, the Court might find that it also guaranteed the right to same-sex marriage.453

Thus far, this has not happened. Even courts that have decided in favor of plaintiffs in same-sex marriage cases have almost universally avoided the question of whether limiting marriage to “one man, one woman” reflects or reinforces sex-role stereotypes. They have emphasized instead that marriage is a fundamental right and that depriving gays and lesbians of this right perpetuates their secondary status in the

448 Opponents of same-sex marriage have cited the Court’s discussion in *Virginia* of the enduring nature of sex differences, United States v. Virginia, 518 U.S. 515, 553 (1996), as an argument for reserving marriage to “one man, one woman.” They argue that this passage effectively acknowledges that men and women bring different traits and skills to marriage and that “genderless” marriage is a poor substitute for the real thing. See, e.g., Kmiec, supra note 444, at 656 n.6 (arguing that in *Virginia*, “Justice Ginsburg fairly rejects the same-sex claim that the modern individuation of women has resulted in the kind of fluidity of gender roles for men and women that makes the presence of both genders within a family unnecessary” (internal quotation marks omitted)). But the Court’s point in *Virginia* was that “inherent differences” between the sexes, whatever they may be, may not be used to justify sex-based state action that reflects and reinforces the separate spheres tradition—the very tradition opponents of “genderless” marriage seek to preserve.


450 *Id.*

451 *Id.*

452 *Id.*

453 *Id.*
American legal system. These courts typically approach the question of same-sex marriage through an analogy to race. In \textit{Goodridge v. Department of Public Health}, the groundbreaking 2003 marriage decision issued by the Supreme Judicial Court of Massachusetts, the court held that sex-based marriage restrictions, like race-based marriage restrictions, "deprive[ ] individuals of access to an institution of fundamental legal, personal, and social significance—the institution of marriage—because of a single trait: skin color in \textit{Perez} and \textit{Loving}, sexual orientation here." \footnote{798 N.E.2d at 958.}

One of the primary reasons courts have not applied sex-based equal protection principles to the sex classification in marriage is that they do not recognize any connection between discrimination on the basis of sex and discrimination on the basis of sexual orientation. The California Supreme Court, in its groundbreaking 2008 decision, dismissed the notion that sex-based equal protection precedents were relevant to the question of same-sex marriage. The court claimed that those precedents were about "societal and legal discrimination against women (rather than against gay individuals)." \footnote{Id. at 437.} It explained that the sex classification in marriage was not properly defined as discrimination on the basis of sex because the real target of this classification was not men or women, but people who were attracted to members of the same sex. \footnote{Id. at 437–40.} The court reasoned that the classification did not treat men and women differently because it permitted members of both sexes to marry across sex lines. \footnote{Id. at 436.} Thus, although the marital sex classification looks like a sex classification, the court held that "in realistic terms," it "cannot fairly be viewed as embodying the same type of discrimination at issue in" sex-based equal protection cases. \footnote{Id. at 436.}
This reasoning about the sex classification in marriage reflects an impoverished understanding of the principle at the core of constitutional sex discrimination law. The Court extended equal protection law into the domain of sex in the 1970s in response to a mobilized women’s movement. The legal feminists who translated the movement’s demands into constitutional claims argued that the way to implement the nation’s evolving commitment to sex equality was through an anti-stereotyping principle—a principle that precludes the state from acting in ways that reflect or reinforce traditional conceptions of men’s and women’s roles. The fact that male plaintiffs brought and won so many of the foundational sex-based equal protection cases is a testament to the broad contours of this principle: It protects everyone from sex-based state action that enforces sex-role stereotypes. The gay and lesbian liberation movements of the early 1970s helped to popularize the anti-stereotyping approach for precisely this reason.

In the past decade, a few courts have begun to grapple with the implications of the anti-stereotyping principle for LGBT rights in the context of Title VII. In the fall of 2008, a federal district court in Washington, D.C., found that the Library of Congress had violated the rights of a transgendered job applicant when it rescinded an offer of employment after learning of the applicant’s impending male-to-female transition. The court found “that the Library’s hiring decision was infected by sex stereotypes,” and that by refusing to employ the plaintiff “because her appearance and background did not comport with . . . sex stereotypes about how men and women should act and appear,” the Library had unlawfully discriminated on the basis of sex. This ruling echoes an earlier pair of cases in which the Sixth Circuit held that “discrimination against a plaintiff who is transsexual—and therefore fails to act and/or identify with his or her gender”—constitutes sex discrimination, and that “[s]ex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior.”

priori approval of the law short-circuited this inquiry. Moreover, equal protection doctrine does not exempt sex classifications from heightened scrutiny whenever a court suspects those classifications actually target not men and women, but some other group. See, e.g., Nguyen v. I.N.S., 533 U.S. 53, 64–67 (2001) (applying heightened scrutiny to a sex-based immigration statute even though the Court seemed to suspect it was actually aimed at limiting the number of foreign-born children who could claim American citizenship).

461 Id. at 305, 308.
462 Smith v. City of Salem, 378 F.3d 566, 574–75 (6th Cir. 2004); see also Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005) (upholding jury verdict in favor of a transgender plaintiff who argued that he had been discriminated against on the basis of his failure to conform to sex stereotypes). Numerous scholars have written about the under-theorized and often confused relationship between sex, gender, and sexual orientation in
A handful of judges have likewise argued—in concuring and dissenting opinions—that the anti-stereotyping mandate at the core of sex-based equal protection law precludes the state from maintaining the sex classification in marriage. In Baker v. State, Justice Johnson asserted that “the sex-based classification contained in [Vermont’s] marriage laws is... a vestige of sex-role stereotyping that applies to both men and women.”\(^{463}\) She argued that the State’s assertion that it restricts marriage to different-sex couples “to celebrate the ‘complementarity’ [sic] of the sexes and provid[e] male and female role models for children [is] based on broad and vague generalizations about the roles of men and women that reflect outdated sex-role stereotyping.”\(^{464}\) Four years later, Justice Greaney argued in Goodridge that same-sex marriage litigation “requires that we confront ingrained assumptions with respect to historically accepted roles of men and women within the institution of marriage and requires that we reexamine these assumptions.”\(^{465}\) Thus far, however, the issue of sex-role stereotyping has remained on the margins of same-sex marriage jurisprudence.

The California Supreme Court and other courts adjudicating same-sex marriage cases have treated gay litigants’ claims as if they were entirely distinct from sex-based equal protection claims. The fact that discussion of sex-role stereotyping has been almost entirely absent from the public debate over same-sex marriage—even among those who advocate the right of gays and lesbians to marry—has no doubt contributed to this doctrinal disconnect.\(^{466}\) This silence about stereotyping stems at least in part from the widely-held view that same-sex marriage has little to do with sex equality—that “the sex
discrimination argument for homo equality has a transvestic quality, dressing up gay rights in sex equality garb.”467 As this Article has shown, however, anti-stereotyping arguments against the enforcement of sex roles in marriage and the privileging of heterosexual, over homosexual, relationships are as old as constitutional sex discrimination law itself and spring from the same philosophical roots.468

Situating same-sex marriage claims in the context of this broader anti-stereotyping jurisprudence would help to illustrate the constitutional infirmities of the stereotyped justifications courts are increasingly using to uphold the sex classification in marriage. It would also highlight a dimension of these cases that often gets lost even when gay and lesbian plaintiffs win—namely that laws restricting the right to marry to “one man, one woman” reflect and reinforce a thickly gendered conception of sex roles and what it means to be a “husband” or a “wife.” The enforcement of these roles has deprived women and gay men of equal social status, and it has “impeded both men and women from pursuit of the very opportunities that would have enabled them to break away from familiar stereotypes.”469 It has defined not only men’s and women’s roles as spouses but also their roles as citizens, workers, parents, and children. Making these connections visible would help to demonstrate that although equal protection claims challenging the marital sex classification itself are relatively new, they are deeply rooted in an antidiscrimination project in which the Court has been engaged for the past forty years.470

467 William N. Eskridge, Jr., Multivocal Prejudices and Homo Equality, 74 IND. L.J. 1085, 1110 (1999). Eskridge himself agrees with “feminist and lesbian-feminist writers [who] have long maintained [that] antihomosexual attitudes are connected with attitudes sequestering women in traditional gender roles.” Id. His concern is to demonstrate that sex stereotyping is not the whole story: Fear of unregulated sexuality, particularly in relation to gay men, has always played a central role in discrimination against sexual minorities. Id. at 1113–16.

468 See supra text accompanying notes 185–90; see also Sylvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 Wis. L. Rev. 187, 206–12, 220 (describing the philosophical continuities between the claims of the women’s liberation movement and those of the gay liberation movement in the 1970s and arguing that “[t]he assumption and prescription of heterosexuality is one important piece in the mosaic that gives meaning to sexuality and to cultural concepts of gender”).

469 Ginsburg, supra note 25, at 21.

470 Numerous scholars and activists have raised concerns about forms of argument for same-sex marriage that focus primarily on the fundamental importance and normativity of marital relationships; securing the right of same-sex couples to marry on this ground could further stigmatize and punish those who lack access to marriage or opt to arrange their intimate and domestic lives in other ways. See, e.g., Ariela R. Dubler, From McLaughlin v. Florida to Lawrence v. Texas: Sexual Freedom and the Road to Marriage, 106 COLUM. L. REV. 1165, 1187 (2006) (cautioning that viewing Lawrence only as a stepping stone to legalized marriage obscures “the possibility that, for some people, the right to engage in sex outside of marriage might be as significant as the right to enter into a legal marriage”);
CONCLUSION

This Article has offered a new perspective on sex-based equal protection law. As the California Supreme Court’s discussion of the relationship between same-sex marriage and sex equality illustrates, there persists in contemporary legal discourse an idea that the contours of constitutional sex discrimination law were set in the 1970s—that the kinds of sex stereotyping the second wave of the women’s movement challenged are the only kinds of sex stereotyping that constitute sex discrimination under the Equal Protection Clause. The anti-stereotyping principle that became law in those cases was more capacious and more capable of expansion than this conventional wisdom suggests. It has expanded beyond the doctrinal limitations imposed by the Burger Court. It has begun to raise pressing constitutional questions in the contexts of reproductive rights and same-sex marriage. From this perspective, litigants like Charles Moritz and Stephen Wiesenfeld represent not the law’s conservatism, but its cutting edge. Bolstered by an interrelated set of social movements, and in their own queer way, these male plaintiffs inaugurated an anti-stereotyping project whose implications are still being elaborated today.

Katherine M. Franke, The Domesticated Liberty of Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1414 (2004) (noting that “[m]arriage is not a freedom” and expressing concern that the mainstream gay rights movement’s pursuit of marriage may “have created a path dependency that privileges privatized and domesticated rights and legal liabilities, while rendering less viable projects that advance nonnormative notions of kinship, intimacy, and sexuality”). The anti-stereotyping principle makes it possible to formulate arguments for the right to marry that do not rely on the normativity of marriage and that maintain a skeptical stance toward laws regulating intimate relationships in ways that perpetuate traditional conceptions of the family.
FUNDAMENTALLY WRONG ABOUT FUNDAMENTAL RIGHTS

Adam Winkler*

INTRODUCTION

If there is one phrase that every student of constitutional law learns, it is that fundamental rights trigger strict scrutiny. As Justice William Brennan Jr. wrote, "a government practice or statute which restricts 'fundamental rights' or which contains 'suspect classifications' is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available."

According to Justice Clarence Thomas, "strict scrutiny" is the "appropriate standard" for "infringements of fundamental rights." Justice Antonin Scalia has recognized that "strict scrutiny will be applied to the deprivation of whatever sort of right we consider 'fundamental.'"

There is one small problem with this well-worn adage. It is simply not true. Fundamental rights do not trigger strict scrutiny, at least not all of the time. In fact, strict scrutiny—a standard of review that asks if a challenged law is the least restrictive means of achieving compelling government objectives—is actually applied quite rarely in fundamental rights cases. Some fundamental rights trigger intermediate scrutiny, while others are protected only by reasonableness or rational basis review. Other fundamental rights are governed by categorical rules, with no formal "scrutiny" or standard of review whatsoever. In fact, only a small subset of fundamental rights triggers strict scrutiny—and even

* Acting Professor, UCLA School of Law. Thanks to Jim Chen, Allison Danner, Robert Goldstein, and Eugene Volokh for helpful suggestions. Direct comments to winkler@law.ucla.edu. © 2006.

among those strict scrutiny is applied only occasionally. In short, the notion that government restrictions on fundamental rights are subject to strict scrutiny review is fundamentally wrong.

Part of the problem may be that the Supreme Court has never bothered to define with any precision what counts as a "fundamental right." There are at least three possible definitions. First, following footnote four of *United States v. Carolene Products Co.*,\(^4\) we might consider all of the individual rights guaranteed in the first eight amendments in the Bill of Rights to be fundamental. Second, we might alternatively view all of the provisions of the Bill of Rights that have been incorporated to apply against the states to be fundamental; the test for incorporation asks if a right is fundamental to American political institutions and our system of justice. Finally, we might define as fundamental those rights that have been thought of as "preferred rights" because of their role in promoting human dignity or democratic self-government. Any way you slice it, however, not all fundamental rights trigger strict scrutiny.

I consider each of these three definitions of fundamental rights and show that, regardless of the definition used, the old saying about strict scrutiny is descriptively wrong. Laws infringing upon fundamental rights are sometimes subject to strict scrutiny, but often they are not.

I. THE FUNDAMENTAL BILL OF RIGHTS

Like so much of modern American constitutional law, the false notion that laws infringing upon fundamental rights are reviewed under strict scrutiny has roots in footnote four of *Carolene Products*. Justice Harlan Fiske Stone famously wrote, "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."\(^5\) Ever since, constitutional law professors have taught their students that the individual rights guarantees found in the Bill of Rights trigger heightened review, while economic rights (such as those read into the Fourteenth Amendment's due process clause by the *Lochner* Court)\(^6\) receive only rational basis protection. And half of that lesson is true. But

---

4. 304 U.S. 144, 153 n.4 (1938).
5. *Id.*
that half is the part about economic rights, not the part about heightened review for the rights spelled out in the text of the Bill of Rights.

The Court has never purported to apply strict scrutiny in every provision of the Bill of Rights. Of the "first ten amendments" referred to in footnote four, a grand total of two trigger strict scrutiny. Laws invading on First Amendment rights of speech, association, and religious liberty are often subject to strict scrutiny, as are laws that restrict the due process and (invisible) equal protection guarantees of the Fifth Amendment. But strict scrutiny is nowhere to be found in the jurisprudence of the Second Amendment, the Third Amendment, the Fourth Amendment, the Sixth Amendment, the Seventh Amendment, the Eighth Amendment, the Ninth Amendment, or the Tenth Amendment. Two amendments trigger strict scrutiny; eight do not.

Let us look at the Bill of Rights provisions a bit more closely. The Second Amendment protects the right to bear arms—or, more accurately, does not—but in Second Amendment cases the Court will uphold challenged laws so long as they have a "reasonable relationship to the preservation or efficiency of a well-regulated militia." The Court has justified the lack of strict scrutiny here by suggesting that there are rights "far more fundamental" than those protected by the Second Amendment.

The Third Amendment, which protects against the quartering of troops in one's home, has never triggered strict scrutiny (or, for that matter, any other standard). As the Tenth Circuit Court of Appeals recently noted, "Judicial interpretation of the Third Amendment is nearly nonexistent." Should courts one day find reason to consider the Third Amendment, perhaps strict scrutiny will be adopted. To date, however, there has been no opinion in a Third Amendment case using that standard.

Unlike the Third Amendment, the Fourth Amendment, barring unreasonable searches and seizures, has bred voluminous case law. Yet the Court does not apply strict scrutiny to governmental searches and seizures; it applies a reasonableness test. Of course, the reasonableness language comes from the text of the amendment itself. Still, the Court certainly could create

8. See id. at 178.
10. Custer County Action Ass'n v. Garvey, 256 F.3d 1024, 1043 (10th Cir. 2001).
substantive requirements of "reasonableness" that mimic strict scrutiny. For instance, the Court could hold that any search that is more overinclusive than necessary is constitutionally unreasonable, effectively adopting strict scrutiny's fit requirement.\footnote{See Scott E. Sundby, A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry, 72 MINN. L. REV. 383, 436-37 (1988).} But the Court has very clearly declared in recent years that such precision is not required. In 
\textit{Vernonia School District 47J v. Acton}, the Court insisted, "We have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."\footnote{Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 652-53, 663 (1995).} Searches and seizures are thus not strictly scrutinized.

The Sixth Amendment right to counsel is not treated to strict scrutiny protection either. Indeed, in Sixth Amendment cases, we do not find any type of standard evocative of tiered scrutiny. Rather, the Court uses categorical rules to "implement" the right to counsel. For instance, the right is violated if the government refuses to provide a criminal defendant access to counsel after the defendant has asserted the right.\footnote{See Michigan v. Jackson, 475 U.S. 625 (1986).} The courts do not ask what reasons the government had for the denial or whether the denial was narrowly tailored to achieve the government's ends. If the government violates the rule, the denial of counsel is unconstitutional.

Categorical rules such as this could substitute for strict scrutiny if, in practice, they created the same heavy burden on the government to defend the constitutionality of the underlying state action. But in Sixth Amendment doctrine, the burden is on the individual, not the government, to show that he has been denied the right. And the substantive rules themselves—the precise elements or facts that the individual has to prove to win—favor, rather than disfavor, the government. To prove an ineffective assistance of counsel claim, for example, the defendant must show that counsel's performance was patently unreasonable and that the shoddy performance actually harmed the defendant.\footnote{See Strickland v. Washington, 466 U.S. 668, 687 (1984).} This test is exceedingly hard to meet. A strict scrutiny substitute, by contrast, should make the individual's job easy and the government's job hard.

The right to a civil jury trial guaranteed by the Seventh Amendment is governed by categorical rules—such as that which holds that Congress cannot statutorily deny the right to a
jury in a controversy involving private, as compared to public, rights— and, when Justice Thomas writes for the Court, analogy based on historical exegesis. A Westlaw search turns up no Seventh Amendment decisions in which a federal court applied strict scrutiny.

The Eighth Amendment prohibits excessive bail, excessive fines, and cruel and unusual punishments. Laws challenged on Eighth Amendment grounds are adjudicated primarily by categorical rules, most of which strongly favor the government. For example, the bar on cruel and unusual punishments prevents almost nothing short of exile, burning at the stake, or pillorying. (And, with the war on terror in full swing, that short list may soon be even shorter.) In reviewing criminal sentences under the Eighth Amendment, the courts engage in some balancing to ensure proportionality between the offense and the sentence. Quite the opposite of strict scrutiny, however, this balancing is weighted in favor of the government; only grossly disproportionate sentences are invalid.

The Ninth Amendment, as Robert Bork reminded us, is just an "ink blot" with no real meaning in contemporary constitutional law. In the absence of any contemporary controlling Supreme Court case law interpreting this provision, it remains unclear what standard of review would apply in a Ninth Amendment case.

The Tenth Amendment reserves to the states and the people the residual powers not granted to the federal government.

17. Westlaw search: "seventh amendment" /s "strict scrutiny" in the federal courts database, conducted April 17, 2006.
23. There is some contemporary interpretive case law that is not controlling. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 486-99 (1965) (Goldberg, J., concurring) (relying on the Ninth Amendment to protect the fundamental right of marital privacy).
Worse than an ink blot, the Tenth Amendment has been labeled a "truism" that "added nothing to the [Constitution] as originally ratified." Traditionally, Tenth Amendment disputes were not even justiciable, although in recent years the Court has breathed life into the amendment and relied on it to support judicial rulings circumscribing federal power. The Court has held that the amendment reflects an inviolable principle of the constitutional structure under which the federal government must respect the sovereignty of the states. The Court has been explicit that balancing of the interests, such as we might expect with some form of scrutiny, has no place in the Tenth Amendment context.

So, of the ten provisions of the Bill of Rights, the vast majority does not trigger strict scrutiny. Perhaps this is normatively wrong, and courts should apply strict scrutiny to laws invading each of these rights. But descriptively, as a matter of current constitutional doctrine, strict scrutiny is not the standard of review applied to laws invading all the textual provisions of the Bill of Rights. If these are the rights that are properly thought of as "fundamental," then clearly the ancient wisdom about strict scrutiny is incorrect. Strict scrutiny only applies in the doctrines emerging from two of the ten provisions in the Bill of Rights, the First and Fifth Amendments. Even then, as we will see, strict scrutiny is only occasionally the applicable standard.

II. FUNDAMENTAL RIGHTS OF INCORPORATION

A second way to define what rights are "fundamental" is through the doctrine of incorporation. Under the Supreme Court's "selective incorporation" approach, only the most fundamental provisions of the Bill of Rights—those whose denial, in the words of Justice Felix Frankfurter, "shocks the conscience"—are incorporated. In *Duncan v. Louisiana*, the Court held that incorporation is appropriate when "a right is among
those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." In theory, then, incorporated rights are fundamental rights.

All incorporated rights may be fundamental, but not all incorporated rights trigger strict scrutiny. As noted above, there is no strict scrutiny found in Fourth Amendment doctrine, Sixth Amendment doctrine, or in the case law emerging from the incorporated provisions of the Eighth Amendment. Strict scrutiny is only used in the doctrines of two incorporated provisions of the Bill of Rights: the First and Fifth Amendments.

In 1897, the Fifth Amendment became the first provision in the Bill of Rights to be incorporated against the states. Pedigree aside, the Fifth Amendment only requires strict scrutiny some of the time. Strict scrutiny analysis is not used in cases alleging a violation of the Fifth Amendment’s takings clause, which protects private property from being appropriated without compensation by the government. The Court uses a deferential, rational basis-like scrutiny to review the constitutionality of so-called “regulatory takings” under Penn Central Transportation v. New York. A similar type of deferential review is used to determine if a taking meets the textual requirement of “public use.” In “excessive exaction” cases, the Court applies a form of heightened review when the regulation completely annihilates the economic value of the property, but it is not strict scrutiny and the cases are few and far between.

The Fifth Amendment right against self-incrimination does not trigger strict scrutiny either. It is governed by categorical rules, although these have some strict scrutiny-like bite. The government faces an onerous task to show that an exception


31. In practice, most of the Bill of Rights has been incorporated. Unincorporated areas include the Second Amendment, see Presser v. Illinois, 116 U.S. 252 (1886); the Third Amendment, see Erwin Chemerinsky, Constitutional Law: Principles and Policies 383 (1st ed. 1997); the Fifth Amendment’s right to criminal indictment by grand jury, see Hutardo v. California, 110 U.S. 516 (1884); the Seventh Amendment’s right to civil jury trials, see Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211 (1916); and the Eighth Amendment’s prohibition of excessive fines, see Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 276 n.2 (1989).


34. See Kelo v. New London, 125 S. Ct. 2655, 2664 (2005) (“For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”).

should be made from the exclusionary rule barring the use of a defendant’s testimony acquired from a custodial interrogation conducted without adequate *Miranda* warnings. Exceptions are only allowed for compelling reasons, such as public safety or the integrity of the judicial process. Here, we see at least traces of strict scrutiny even if the traditional formulation is not invoked.

The two clear sites of Fifth Amendment strict scrutiny are its guarantees of due process and equal protection—the substance of which are effectively coextensive with the Fourteenth Amendment’s due process and equal protection clauses. These provisions protect the fundamental rights of privacy, to marry, to travel, to vote, and of equal citizenship. Strict scrutiny is usually applied to laws interfering with these rights, but not always.

Consider the right to privacy. Laws burdening a woman’s right to abortion were subject to strict scrutiny review under *Roe v. Wade.* The Court derived that decision’s well-known trimester framework from strict scrutiny analysis. Under that framework, the Court invalidated nearly all pre-viability abortion restrictions, including parental notification laws, informed consent requirements, and 24-hour waiting periods. In *Planned Parenthood v. Casey,* the Court reaffirmed the “central holding” of *Roe,* while at the same time the joint opinion (and later a majority of the Court) discarded the strict scrutiny-based trimester framework in favor of the more lenient “undue burden” test. The right to abortion was not deemed to be somehow less fundamental; indeed, the joint opinion argued that “[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.” Nevertheless, strict scrutiny was no longer applicable. Some commentators have argued that the undue burden standard is more like a form of intermediate scrutiny or even ra-

42. *Casey,* 505 U.S. at 876.
43. Id. at 851.
tional basis review. Alternatively, one might read *Casey* to establish a categorical rule: if the law is determined to be an undue burden it will be invalidated, but otherwise the law will be upheld. In any event, the undue burden test is clearly more tolerant of regulation than traditional strict scrutiny, as indicated by the fact that *Casey* upheld several laws similar to ones that had been invalidated under *Roe*, including parental notification, informed consent, and 24-hour waiting periods.

More recently, the fundamental right to privacy triggered only rational basis review in *Lawrence v. Texas*. The Court did not state unambiguously that the right involved was "fundamental," leaving some confusion. But the underlying right extended from a line of cases, such as *Griswold v. Connecticut* and *Roe*, which clearly did recognize privacy to be a fundamental right. The Court also explained that the "right to liberty under the Due Process Clause gives [the petitioners] the full right to engage in their conduct without intervention of the government," and such substantive due process rights are usually considered fundamental. Despite the importance of the underlying right, the Court only required that that the law be justified by a "legitimate state interest"—the language of the rational basis test. This was perhaps a rational basis with some bite, however, as the Court invalidated the law. Yet it was just as clearly not the strict scrutiny formulation one would expect for a fundamental right. Subsequent to *Lawrence*, the sole federal circuit court decision to date to address the question of *Lawrence*'s standard of review held that it was rational basis review.

The Fifth Amendment's implicit equal protection guarantee does not always require strict scrutiny, either. Intermediate, not strict, scrutiny is applied to sex discrimination. Alienage dis-

---


45. See *Casey*, 505 U.S. at 881–900.

46. 539 U.S. 558 (2003). In dissent, Justice Scalia argued that the majority's standard was rational basis review. See *id.* at 586, 599 (Scalia, J., dissenting).

47. 381 U.S. 479 (1965).


49. *Id.* at 578.

50. *Id.*


crimination leads courts to apply strict scrutiny in some circumstances, but only rational basis review when the discriminatory law is federal (and thus governed by the Fifth, not Fourteenth, Amendment).

In short, even rights fundamental enough to be incorporated do not always trigger strict scrutiny. And even those that do, like the Fifth Amendment (and, as we will see below, the First Amendment), only do so some of the time.

III. FUNDAMENTALLY PREFERRED RIGHTS

A third definition of "fundamental rights" limits them to an even smaller subset of rights: so-called "preferred rights," such as the freedom of speech, the freedom of religion, the right to vote, the right to marry, and the right to privacy. The Court has not made clear precisely why some rights are to be preferred over others, but traditional theories emphasize that some rights are so central to self-government and human dignity as to warrant special judicial protection. According to Laurence Tribe, these rights "touch[] more deeply and permanently on human personality [and] came to be regarded as the constituents of freedom."

We have already seen that one of these "preferred rights," the right to privacy, does not always activate strict scrutiny. The same goes for other preferred rights. For example, as Michael Dorf has shown, the courts often avoid applying strict scrutiny to laws infringing on fundamental rights by claiming that the infringement is only an incidental burden on the right. Although even incidental burdens are, according to Dorf, "real infringements of rights," the courts often apply only a lower level scrutiny—or none at all—absent a "substantial burden." Dorf finds this approach common in speech, religion, and privacy cases. Here, the courts have effectively created a way around strict

56. See id. at 1177; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 770 (2d ed. 1988) (identifying "preferred rights").
57. See, e.g., TRIBE, supra note 56, at 770.
59. Id.
60. See id. at 1199-1200.
scrutiny even for laws burdening our most basic, core individual rights.

Even preferred rights that ordinarily trigger strict scrutiny do not do so when the individual challenger is himself, shall we say, "unpreferred." Convicts, for example, are subject to having their most fundamental rights of speech, to marry, and of privacy denied by prison officials, and courts will only apply a lenient, rational basis-type of review to such policies under *Turner v. Safley.*61 Although insisting that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution" and that "when a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights,"62 *Turner* held that such a regulation will be "valid if it is reasonably related to legitimate penological interests."63 "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."64 Consequently, the fundamental rights of prisoners are not clothed with strict scrutiny protection.

So what if the individual is not an inmate and the burden on a preferred, core right is more than incidental? Strict scrutiny must apply, no? No.

Perhaps the most preferred of all rights is the freedom of speech, the so-called First Freedom. Yet strict scrutiny is not always applied in free speech cases. Traditional speech doctrine distinguishes between regulations that are content-based and those that are content-neutral. The former generally trigger strict scrutiny, but the latter do not. Content-neutral laws that limit the freedom of speech are subject to the much more deferential standard of *United States v. O'Brien,*65 under which laws are regularly upheld.66 Even content-based speech regulations do not always receive strict scrutiny treatment. If the content regulated is commercial speech, the courts apply a form of intermediate review established in *Central Hudson Gas & Electric Corp.*

---

62. Id. at 84 (quotations and citations omitted).
63. Id. at 89.
64. Id.
66. See Dorf, supra note 58, at 1204.
v. Public Service Commission of New York. A similarly less stringent form of review is applied to content-based regulations when the government is acting as an employer (as compared to a sovereign) under the rule of Pickering v. Board of Education.

These First Amendment doctrines have led Ashutosh Bhagwat to characterize intermediate scrutiny as the "test that ate everything" in free speech jurisprudence.

Free exercise of religion—another preferred right found in the First Amendment—does not always trigger strict scrutiny. Although the Warren Court adopted strict scrutiny for free exercise claims in Sherbert v. Verner, the Rehnquist Court overturned that choice of standard in Employment Division v. Smith, which held that strict scrutiny was inappropriate for generally applicable laws burdening religious practice. For claims for exemptions from generally applicable laws, which make up the majority of religious liberty controversies, the Constitution now only requires rational basis review. One might even read Smith to mean that the free exercise clause no longer provides constitutional protection from generally applicable laws. Fortunately for religious adherents, federal statutory law reinstated strict scrutiny for many claims for exemptions. The case law under these statutes, the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act, raise the additional question of what it means to apply "strict scrutiny." Despite the formal use of this standard, courts uphold laws against claims for religious-based exemptions in three of every four cases (74%). Even where courts claim to apply compelling interest analysis, the scrutiny is not always so strict.

Courts may prefer strict scrutiny when adjudicating the constitutionality of laws burdening preferred rights, but that practice

---

75. See Winkler, supra note 72.
is hardly uniform. If the burden is less than substantial or the affected individual is a prison inmate, strict scrutiny is not applied. Moreover, even the most basic First Amendment rights of speech and religious liberty are only given the protection of strict scrutiny in some, not all, cases.

CONCLUSION

There are three ways of defining what rights are "fundamental," but no matter which definition is used, strict scrutiny is not applied to all laws invading the rights included in the definition. Courts employ a host of standards and categorical rules in fundamental rights cases, with strict scrutiny only used from time to time.

In one sense, none of this story about fundamental rights is new to law professors or judges. Constitutional law professors teach the O'Brien and Central Hudson tests year in and year out, and judges apply those less-than-strict standards regularly in the course of their duties. I make no claim to have discovered Xanadu. But the old adage about laws infringing fundamental rights being subject to strict scrutiny remains a favorite of scholars, judges, and law students. And it is flatly wrong.

Perhaps the notion remains popular because it makes a rather complex doctrinal reality quite simple and easy to memorize. Such simplicity, however, comes at considerable cost: year after year, lawyers repeat an equation that does not add up, breeding confusion and misunderstanding about how constitutional law works. It is time the fundamental truth be told: laws infringing upon fundamental rights are subject to strict scrutiny, but only some of those rights, only some of the time, and only when challenged by some people.
THE POLITICAL ECONOMY OF RECOGNITION: AFFIRMATIVE ACTION DISCOURSE AND CONSTITUTIONAL EQUALITY IN GERMANY AND THE U.S.A.

Kendall Thomas*

I. INTRODUCTION

This paper undertakes a comparative exploration of affirmative action discourse in German and American constitutional equality law. The first task for such a project is to acknowledge an important threshold dilemma. The difficulty in question derives not so much from dissimilarities between the technical legal structures of German and American affirmative action policy. The problem stems rather from the different social grounds and groupings on which those legal structures have been erected. Because German "positive action"1 applies only to women, gender and its cultural meanings have constituted the paradigmatic subject of the policy. The legal discussion of positive action has always taken its point of reference from broader political debates about the position of women as a social group in contemporary German society. Indeed, in Germany, positive action discourse is a discourse about the status of and relations between men and women.

Like German positive action policy, U.S. affirmative law has from its inception included women among its beneficiaries. However, the background social vision and cultural meanings that have informed American affirmative action discourse could not be more different. Although affirmative action policy in the U.S. has always applied to women, questions of gender and gender equality have been marginal to the legal discourse that has grown up around the subject. For example, in the twenty years since the first of its many forays into the field, the U.S. Supreme Court has only once squarely considered the legality of gender-based affirmative action programs.2 Even then, the Court did not explicitly address the constitutional dimensions of gender-based affirmative

* Professor, Columbia University Law School. The author gratefully acknowledges the generosity of the Berlin Prize Fellowship of the American Academy in Berlin in supporting the research for this article, and of the Robert Bosch Stiftung in funding the symposium at which this article was presented.

1 In Germany, as in Europe more generally, "positive action" is the preferred designation for policies that in the U.S. are labeled affirmative action. For an exploration of the conceptual meaning of "positive action" and related terms, see Teresa Rees, Mainstreaming Equality in the European Union 26-48 (1998).

action, but confined its discussion to the legitimacy of such programs under Title VII of the Civil Rights Act of 1964.

The relative silence regarding gender-based affirmative action that one finds in U.S. case law can also be seen in the broader political debates of which the Supreme Court's jurisprudence is a part. In the United States, the discussion of affirmative action has revolved almost exclusively around race; conversely, the national conversation about racial equality has increasingly (and rather reductively) focused on affirmative action. To the extent that gender has figured at all in U.S. affirmative action discourse, it has for the most part been trapped in, or refracted through, the interstices of race. The peculiar and persistent prominence of race in American law and politics thus forces a comparative critical analysis of affirmative action discourse in the U.S. and Germany to follow a strategy of inference and indirection.

Accordingly, unlike the discussion of German law which follows it, the account of U.S. affirmative action policy developed here proceeds primarily through an analysis of Supreme Court case law on the constitutionality of race-based affirmative action. After a brief overview of the legal and political context in which U.S. affirmative action was born, I examine the vicissitudes of affirmative action policy in the constitutional jurisprudence of the Supreme Court. Although the relevant decisions have had little or nothing to say about gender as such, a reading of the cases suggests that gender-based affirmative action and contemporary equality doctrine are moving rapidly toward a constitutional collision. The crucial question is whether gender-conscious affirmative action programs will be able to withstand the impact that has so debilitated its race-based counterpart.

My survey of the American constitutional landscape clears the ground for the comparative observations offered in the paper's final section. There I compare and contrast the U.S. judicial discourse on affirmative action with two recent

---

3 An instructive instance can be found in the political skirmishes over Initiative 200, a measure to forbid affirmative action programs in Washington state. In the weeks leading up to the vote, opponents of the proposed initiative organized a campaign focused on the effects it would have on employment and declare educational opportunities for women in the state. The strategy was no doubt motivated in part by survey evidence which showed an 11 percent increase in over-all support for affirmative action among respondents who were queried about gender-based, as opposed to race-based versions of the policy. Supporters of the Washington initiative were soon forced to openly play the race card. John Carlson, a talk show host and leader of the initiative campaign, complained that opponents of the measure "are trying to make this a gender issue, rather than an issue of racial preferences, which is most of what is encompassed by [Proposition] 200." Michelle Ackerman, a spokeswoman for the No!200 campaign, responded that "affirmative action is primarily a gender issue in this state. It is a woman's issue. The primary beneficiaries of affirmative action in this state are white women. So that is what we should be discussing." The public relations strategy devised by the opponents of Initiative 200 was ultimately unsuccessful. The measure won the approval of a majority of Washington voters in November, 1998. Sam Howe Verhovek, In a Battle Over Preferences, Race and Gender are at Odds, N.Y. Times, October 20, 1998, at A1. For press accounts of the referenced survey evidence, see L.A. Times, March 30, 1995, at A1; Atlanta Constitution, August 6, 1995, at 1B (Cited in Adeno Addis, On Human Diversity and the Limits of Toleration, in Ian Shapiro and Will Kymlicka, Ethnicity and Group Rights 112, 147, at note 33 (1997)).
judgments from the Court of Justice of the European Communities. Although it draws on a common conceptual lexicon, from an American perspective, the positive action jurisprudence of the ECJ seems to charting a very different course than the U.S. Supreme Court. This divergence, I argue, cannot be fully explained by the fact that the European Union (EU) positive action cases have focused exclusively on issues of gender equality. I suggest that the unique political dynamics of the European Union have prodded the ECJ closer toward a more substantive conception of constitutional equality. As we shall see, this structural understanding has (for the most part) been resisted in American law. However, given its still tentative character, one may well wonder whether the ECJ will embrace this substantive approach outside the context of gender. Using the current German debates about race, ethnicity and citizenship as an example, the paper ends with a few remarks on the challenges that EU positive action discourse will likely face in the coming years.

II. THE CONSTITUTIONAL “PRE-HISTORY" OF AFFIRMATIVE ACTION IN THE U.S.

The starting point for any critical account of American affirmative action jurisprudence is the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. As Gerald Neuman notes in his contribution to this Symposium, the animating purpose of the Equal Protection Clause was to address the myriad discriminations to which Southern state and local governments subjected their African-American citizens. However, the generality of the language in which the provision was framed quickly led to disputes about its meaning and application. These disputes inevitably made their way to the U.S. Supreme Court. In the decades following its adoption, the Supreme Court increasingly limited the scope of the Equal Protection Clause in a series of doctrinal deformations that culminated in the now infamous decision in Plessy v. Ferguson. Deploying an ambiguous “reasonableness” standard, the Court upheld a Louisiana statute requiring railroad companies to provide “equal but separate accommodations for the white and colored races.” The Plessy Court rejected the argument that state mandated racial segregation on passenger railway trains violated the Equal Protection Clause. In the Court's view, that argument stemmed from two errors. The first alleged error was a failure to distinguish between “civil,” “legal” or “political” equality, which were guaranteed under the Fourteenth Amendment, and “social” equality, which was not. The second was the notion, deemed “fallacious” by the Court, that “the

4 For the sake of concision, I henceforth refer to this institution as the “Court of Justice” or the “ECJ”.
5 The Treaty on European Union [TEU] of 1991 renamed the “European Economic Community” the “European Union.” Although some of the materials to which I refer pre-date the 1991 change, for the sake of consistency, I shall use the more recent designation throughout this discussion.
6 The Equal Protection Clause reads, in pertinent part: “No state shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const., amend. XIV, § 1.
7 Plessy v. Ferguson, 163 U.S. 537 (1896).
enforced separation of the two races stamps the colored race with a badge of inferiority.” For the Plessy Court, so long as it was not “unreasonable” and applied equally as a formal matter across the color line, state compelled racial discrimination with respect to “social” matters could not be said to contravene the constitutional right to equal protection of the laws.

The Court’s interpretation of the Equal Protection Clause drew a stinging rebuke from the sole dissenting justice in Plessy. Justice John Marshall Harlan rejected the notion that the Louisiana law’s equal applicability to “white and colored citizens” in any way satisfied the requirements of equal protection. For Harlan, the challenged law could not be divorced from its social context. The Plessy majority had ignored an incontrovertible social fact: “Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.” Although he agreed that the “white race” could rightly consider itself “to be the dominant race in this country,” Harlan denied that this social dominance could be read into the text of the Fourteenth Amendment. “[I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens.” Harlan insisted that “[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens.” Under the American constitutional order, “all citizens are equal before the law. [ . . . ] The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.”

The Plessy decision marked the Court’s ratification of a national retreat from policies associated with the post-Civil War Reconstruction that had begun several years before. The decision served as a crucial cornerstone around which state and local governments (not only in the South) constructed a comprehensive system of legalized racial segregation. In the years after Plessy, the reach of racial apartheid would extend into almost every area of American life.

The most important doctrinal dimension of Plessy lies its limitation of the equality principle to a rule of formally symmetrical treatment. The most important political dimension of the decision was the Court’s apparent acquiescence in the fact that its acontextual, formalist interpretation of the equal protection principle would permit (if not encourage) the use of law to maintain the radically unequal material conditions to which Black Americans in the South and elsewhere had historically been consigned. For decades to come, the racial state to which the Plessy Court had given judicial legitimacy would remain all but impervious to constitutional attack under the Equal Protection Clause.

The first cracks in the doctrinal edifice the Court had erected in Plessy appeared in the late 1930’s. In a series of cases challenging the constitutionality of racial segregation in public education, the Court put increasing pressure on

---

8 Id., at 551.
9 Id., at 557.
10 Id., at 559.
11 Id., at 559.
the "separate but equal" approach for which *Plessy* had come to stand. The
most famous of these cases was the 1954 decision in *Brown v. Board of
Education of Topeka.*\(^{12}\) In *Brown*, the Supreme Court held that state mandated
segregation was "inherently unequal" in the field of public school education and
thus forbidden under the Equal Protection Clause.

The *Brown* opinion has come to be read as an emphatic rejection of *Plessy.*
That claim, however, requires considerable qualification. As an initial matter, the
*Brown* Court remained curiously silent about the precise standard of
constitutional review under which race-specific laws and policies were to be
evaluated. In its 1944 decision in the *Korematsu* case, the Court had held that
"all legal restrictions which curtail the civil rights of a single racial group are
immediately suspect."\(^{13}\) However, formally speaking, the legal regime of racially
segregated public school education at issue in *Brown* was quite different from
the exclusion orders challenged in *Korematsu.* By its terms, the "separate but
equal" policy that the Court struck down in *Brown* affected all racial groups; the
exclusion orders upheld in *Korematsu* were much narrower in their reach. Since
the *Brown* opinion declined to say whether the Court was adopting the "suspect
classification" theory announced in *Korematsu*, it remained unclear whether the
rule of "reasonableness" deployed in *Plessy* was still the controlling standard of
constitutional review in racial equality law. Further, *Brown* betrayed a stunning
lack of clarity regarding the precise normative theory of the Equal Protection
Clause that underwrote the opinion. Although *Brown* could and would come to
be construed as an endorsement of the "color blindness" principle of Harlan's
dissent in *Plessy*, the actual language of the opinion was much more ambiguous.
In the era of affirmative action, the *Brown* Court's silence regarding these two
aspects of *Plessy* would make its pronouncements on the meaning of
constitutional equality an object of heated dispute.

Moreover, a number of contemporary commentators have noted just how
much of the underlying formalism of the *Plessy* decision the *Brown* Court left
undisturbed.\(^{14}\) At the doctrinal level, *Brown* left little doubt that the "separate
but equal" principle had sustained a mortal blow. At a deeper conceptual level,
however, *Brown* in no way challenged the notion that the guarantee of the
Fourteenth Amendment was essentially a guarantee of formal legal equality.
Nothing in *Brown* provided a constitutional basis for attacking the many and
massive material disparities between public schools in white and black
neighborhoods which could not be directly attributed to race-based

\(^{12}\) *Brown* v. Board of Education of Topeka, 347 U.S. 483 (1954). In the companion case of
*Bolling* v. *Sharpe*, handed down the same day as *Brown*, the Court invalidated the federal
government's maintenance of racially segregated schools in the District of Columbia. *Bolling* v.
*Sharpe*, 347 U.S. 497 (1954). The Court read the Due Process Clause of the Fifth Amendment to
impose limits on the federal government that were substantially the same as those to which the
Equal Protection Clause of the Fourteenth Amendment bound the several states.

\(^{13}\) *Korematsu* v. United States, 323 U.S. 214, 216 (1944).

\(^{14}\) Kimberlé Williams Crenshaw, *Color Blindness, History and the Law*, in *The House That Race
Built* 280, 283-284 (Wahneema Lubiano, ed., 1997); Cheryl I. Harris, *Whiteness as Property*, 106
discrimination in education law, even where these structural inequalities could be linked to "racial effects" in areas such as housing, employment, tax, or labor law: the continuing subordinate social and economic status of African-Americans remained beyond the scope of the Equal Protection Clause. While Brown may have limited the logic of Plessy, it refused to reject Plessy's restriction of the Equal Protection Clause to a guarantee of formal equality. The chief conceptual distinction between the two decisions lies in their differing views regarding the constitutional legitimacy of racial categorization. Where Plessy upheld racial classifications so long as they were equally applied on both sides of the color line, Brown found such classifications invalid even if their formal impact was the same across the racial divide. Put another way, the Plessy Court read the Fourteenth Amendment to permit color-consciousness; the Brown Court appeared to read the Equal Protection Clause to require color-blindness. The crucial point to be noted here is that both decisions construe the concept of equality in simple, rather than more complex terms. In Plessy and Brown, the target of the Fourteenth Amendment was understood to be the formal use of racial classifications, not the subordinate material situation of an identifiable racial group or class.

III. THE POLITICAL GENEALOGY OF AMERICAN AFFIRMATIVE ACTION LAW

Within a few short decades, the rule of racial non-recognition announced in Brown would become the chief battleground in a fierce ideological war over the meanings of constitutional equality, especially with respect to affirmative action. The origins and early evolution of affirmative action policy in the U.S. are myriad and complex. A detailed chronicle of affirmative action is beyond the scope of this paper. For our purposes, it is enough to note the key historical episodes in the policy's elaboration during the 1960's and 1970's, which emerged in response to the ongoing campaign by black Americans and their allies to force the national government to move more quickly along the road of racial progress.

At the national level, the inaugural moment in this history was the 1961 Executive Order signed by President John F. Kennedy. Kennedy's order created the President's Committee on Equal Employment Opportunity (PCEEO), a largely ineffective body whose special mandate was to supervise government contractors in order to ensure that they did not discriminate on the basis of race. The Kennedy Order empowered the PCEEO to take "affirmative action" to prevent the use of race, creed, color, or national origin from entering into the hiring process. Although this language was at base no more than a synonym for color blindness, the important point to be noted here was that it marked the entrance of affirmative action into the lexicon of civil rights discourse.

---

A second key moment in the early history of affirmative action is President Lyndon B. Johnson's 1965 Executive Order, which established the Office of Federal Contract Compliance (OFCC). Like Kennedy's order, the Johnson Order required that "affirmative action" be taken to promote equal racial opportunities in the field of government contracting. In a series of "special area plans" that were designed to enforce compliance with construction contracts, the OFCC required firms to actively recruit, hire and train applicants from racial minorities. During the Johnson presidency, the notion of affirmative action would gradually evolve into a race-conscious, numbers-oriented policy approach.

Even more important than his Executive Order, however, was Johnson's role in orchestrating the passage by Congress of federal legislation opening up labor markets, public accommodations, and voting rights to racial minorities. The centerpiece of this unprecedented legislation was Title VII of the Civil Rights Act of 1964, which forbade employers "to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin." To ensure compliance with Title VII, Congress created the Equal Employment Opportunity Commission (EEOC), which would become the most powerful enforcement agency in the field of civil rights law. Although its enabling legislation specifically prohibited "preferential treatment to any individual or group," in time the EEOC would become frustrated with the limitations of the color-blindness model on which Title VII was based. Those frustrations eventually came to be shared by the federal judiciary. At the EEOC's urging, federal courts gradually began to expand the reach of Title VII by using judicial power not merely to guarantee formal equality of opportunity, but to achieve objective material results. The shift toward this explicitly race-conscious interpretation of Title VII stemmed not so much from a philosophical aversion to the ideal of color blindness as from a pragmatic realization that the language of the legislation still made it possible for employers to engage in racially discriminatory practices that plaintiffs would find it difficult to prove. Affirmative action thus came to be seen as the only realistic response to the inadequacies of the color blindness approach. As the Seventh Circuit Court of Appeals stated in one case, "[w]e believe that [race-conscious] numerical objectives may be the only feasible mechanism for defining with any clarity the obligation of . . . [employers] to move employment practices in the direction of true neutrality." Although neither the EEOC nor the courts had developed anything resembling a coherent theory of the relationship between race-specific affirmative action and the equality principle, the gradual consolidation of a pragmatic consensus regarding the limits of color-blindness represented an important step in the interpretation of Title VII, and in the early history of affirmative action policy.

---

16 Title VII of the Civil Rights Act of 1964, Section 701 et seq., as amended, 42 U.S.C. Section 2003 et seq. Interestingly, the Civil Rights Act was enacted pursuant to Congress' power, under the Commerce Clause of the Federal Constitution, to regulate commerce among the several states. U.S. Const., art. I, § 8, cl. 3.

17 Southern Illinois Builders Ass'n v. Ogilvie, 471 F.2nd 680, 686 (7th Cir. 1972).
The third and most decisive moment in the formulation of contemporary affirmative action policy was made by President Richard M. Nixon. As one commentator has noted, Nixon "did more than any other president to promote and institutionalize affirmative action." It is now generally agreed that Nixon's support of affirmative action stemmed from mixed motives—he saw affirmative action as a wedge with which to drive white Southern and working class Democrats into the arms of the Republican Party. Nonetheless, the fact that race-based affirmative action received its most progressive and explicit formulation by a Republican President did much to secure its ideological legitimacy as a tool for achieving racial equality.

IV. RACE-BASED AFFIRMATIVE ACTION IN THE U.S. SUPREME COURT

By the time the Supreme Court first squarely addressed affirmative action's constitutional dimensions in 1978, it had been adopted in various forms at both the national and state levels. Affirmative action law and policy very quickly grew beyond an initial focus on employment practices and public work contracts to include a number of other areas. Indeed, the Court's first full consideration of affirmative action involved the use of the policy in public university admissions. In Regents of the University of California v. Bakke, the Court heard an appeal in a case challenging a program aimed at increasing the enrollment of minority students at the University of California Davis medical school. Under the program, sixteen of the school's seats were reserved each year for members of racial minority groups who were deemed to have suffered economic or educational deprivation. Alan Bakke, a white applicant who had been denied admission to the medical school, filed suit challenging the legality of the Davis admissions policy on constitutional and statutory grounds.

As one study of the subject has noted, the Bakke decision provides an exemplary instance of the "divisiveness and fragmentation" that has marked the Supreme Court's interventions in affirmative action policy. In the years since Brown, the Supreme Court's racial equality jurisprudence had become a complexly plaited strand of divergent precedents. By the time it took up the issue raised in Bakke, the Court's decisions could be read to support at least three different and conflicting interpretations of the Equal Protection Clause. The first interpreted the Constitution to embody a categorical requirement of color blindness. The second took the view that race-conscious classifications may be justified only upon a showing that they will advance compelling government

---


interests, such as the granting of relief to specific victims of demonstrated racial discrimination. The third position held that the Equal Protection Clause does not forbid the use of racial categories which aim to eliminate the continuing current effects of past discrimination. 22 In the words of one commentator, "the first position would seem to bar all racial preferences; the second, to confine them to purely compensatory situations; while the third one would seem to sanction a much broader use of preferential treatment at least in part justified by distributive concerns." 23 In practice, each of these views has entailed radically competing constructions of the constitutional text and rival standards of constitutional review. More fundamentally, each embodies deeply antagonistic understandings of the equality principle itself.

In Bakke, four members of the Court thought that the UC Davis program violated Title VI of the 1964 Civil Rights Act and would therefore have avoided the question of its constitutionality, since the case could be disposed of on narrower statutory grounds. This group of justices was outvoted by the other five members of the Court, who took the view that affirmative action is constitutional in certain circumstances. However, the Bakke majority could not agree on what those circumstances were, or on the appropriate standard of review by which their constitutionality might be assessed. Four of the Justices who voted to uphold the UC affirmative action program would have applied an "intermediate" level of scrutiny to the Davis admission policy. 24 Significantly, this standard had found its first and fullest expression in the Court's gender discrimination jurisprudence. 25 As its name suggests, "intermediate scrutiny" may be situated somewhere between the deferential "rational basis" standard applied in challenges to "ordinary" (typically economic) legislation and the more exacting "strict scrutiny" test that the Court had by then deemed appropriate for race-specific statutes which disadvantage racial minorities. As Justice Brennan wrote in justifying his choice of evaluative standard:

[Because] of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to justify such a classification an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program. 26

Brennan argued that, in this instance, the use of racial classifications to remedy prior discrimination satisfied the requirements of intermediate scrutiny. On

---

23 Rosenfeld, supra note 21, at 143.
24 24 Bakke, 438 U.S., at 359; but see id., at 361-62 (suggesting strict scrutiny is proper review standard).
26 Bakke, 438 U.S. at 361.
Brennan's account, the Davis medical school's consideration of the race of student applicants was directed toward a "benign" purpose of removing "the disparate racial impact . . . [produced by] past discrimination." Brennan further noted that no evidence had been adduced that the Davis admissions program stigmatized any group or individual. Accordingly, Justice Brennan and the three of his colleagues who joined his opinion found no violation of the Equal Protection Clause.

The third and controlling vote in *Bakke* was that of Justice Louis Powell, who announced the judgment of the Court. Unlike the other members of the *Bakke* majority, Justice Powell took the position that all racial classifications—including those employed to benefit racial minorities—were suspect and thus subject to a uniform standard of heightened or "strict" scrutiny. "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." Powell conceded that the University of California had a "legitimate and substantial" interest in addressing the present effects of prior discrimination. Nevertheless, he maintained that the Davis program was constitutionally flawed, since it had not been based on any judicial, administrative or legislative findings of prior discrimination. For Justice Powell, although the medical school's interest in securing a diverse student body warranted some consideration of race in the admissions process, that interest could not justify the split system under which white applicants were denied a chance to compete for certain seats. Accordingly, Justice Powell agreed with the four of his colleagues who believed that the existing admissions plan was illegal. Unlike those justices, however, Powell squarely based this conclusion not on statutory, but on Fourteenth Amendment constitutional grounds. On the other hand, Powell joined with Justice Brennan and his colleagues in refusing to enjoin categorically all use of racial classifications. Powell proposed an alternative to the Davis program that would permit a university to view an applicant's race as a "plus," so long as the consideration of race did not effectively "insulate the individual from comparison with all other candidates for the available seats." ²⁹

Beneath the doctrinal disagreements in *Bakke* lay a more fundamental dispute about the socio-cultural meanings of constitutional equality. The divergent understandings the Court brought to the case found their most revealing expression in the conceptual foundations on which the Justices staked out their positions on the relevant doctrinal issues. In the course of explaining their positions, each of the Justices who wrote in *Bakke* thought it necessary to offer the nation a brief seminar on the racial history of the United States. The lessons they drew from that past, however, differed markedly in accent and emphasis.

Consider in this connection the historical accounts that structure the opinions of Justices Powell and Brennan. Justice Powell conceded that, as an historical matter, the "one pervading purpose" behind the Fourteenth Amendment was

²⁷ Id., at 369.
²⁸ Id., at 291.
²⁹ Id., at 317.
"the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from those who had formerly exercised dominion over him." Nonetheless, the fact that the Framers of the Equal Protection Clause "conceived of its primary function as bridging the vast distance between members of the Negro race and the white 'majority'" was, for Powell, far from dispositive in the case at hand. To secure this claim, Powell recurs once more to history. On Powell's historical account:

During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities. Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a 'majority' composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared characteristic was a willingness to disadvantage other groups. As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination.

As a rhetorical matter, Powell's conflation of the very different and divergent histories of "racial" and "national" difference in the United States is crucially linked to the doctrinal framework that leads him to reject the UC Davis program on constitutional grounds. For Justice Powell, the entrenched subordination of African slaves and their descendants is essentially no different from the "prejudices" directed at other "minority groups." In this reading of the history of disadvantage in the United States, the very "concepts of 'majority' and 'minority' necessarily reflect temporary arrangements and political judgments." To be sure, Justice Powell does concede (in a footnote) that "[n]o one denies the regrettable fact that there has been societal discrimination in this country against various racial and ethnic groups." In Powell's view, however, this history of "societal discrimination" does not justify "the artificial line of a 'two-class' theory" that would draw a doctrinal distinction between "benign" and "invidious" racial classifications. Powell also rejected the notion that this "two-class theory" (so-called) could legitimately be deployed to "evaluate the extent of the prejudice and consequent harm suffered by various minority groups" in order to determine "which groups . . . merit 'heightened judicial solicitude' and which [do] not." If the meaning of the Equal Protection Clause is not to be hitched to "the ebb and flow of political forces," the standard of judicial review in the Court's racial equality jurisprudence must "remain constant." Moreover, "justice" for "innocent persons" such as Allan Bakke

---

30 Id., at 291 (quoting The Slaughter-House Cases, 16 Wall. 36, 71 (1873)).
31 Id., at 293.
32 Id., at 292.
33 Id., at 295.
34 Id., at 296 n. 36.
35 Id., at 295.
36 Id., at 296.
37 Id., at 296-297.
38 Id., at 298.
39 Id., at 299.
40 Id., at 298.
demands a similar constancy in the interpretation of the equality principle itself. As Justice Powell put it, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."\(^{42}\)

In explaining his approach to the case, Justice Brennan offered a markedly different account of the relevant history, and its constitutional implications. Brennan prefaced his discussion of the issues with the reminder that although

[our Nation was founded on the principle that 'all men are created equal[,]']. . . . candor requires acknowledgment that the Framers of our Constitution . . . openly compromised this principle of equality with its antithesis: slavery. The consequences of this compromise are well known and have aptly been called our 'American Dilemma' . . . . [I]t is well to recount how recent the time has been, if it has yet come, when the promise of our principles has flowered into the actuality of equal opportunity for all regardless of race and color.\(^{43}\)

Justice Brennan then connected that historical background with the doctrinal question before the Court:

Claims that law must be 'color-blind' or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot—and . . . need not . . . let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens.\(^{44}\)

Because "officially sanctioned discrimination is not a thing of the past,"\(^ {45}\) argued Brennan, the Court did not distort the meaning of the Equal Protection Clause in permitting race-conscious policies whose purpose was "not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice . . . ."\(^ {46}\) For Brennan, this interpretation of the Fourteenth Amendment fully comported with the Court's own precedents. The notion, "summed up by the shorthand phrase '[o]ur Constitution is color-blind,'" that race is always and everywhere constitutionally irrelevant, insisted Brennan, "has never been adopted by this Court as the proper meaning of the Equal Protection Clause."\(^ {47}\) The crucial question was whether the Fourteenth Amendment required all race-based classifications to be assessed under the same strict standard. Brennan thought not, particularly when, as in Bakke, the constitutional challenge to the use of racial categories had been brought by a member of a group that lacked any of the "traditional indicia of suspectness" that would warrant heightened scrutiny. As a social group, white Americans are not "saddled with

\(^{41}\) Id., at 298.
\(^{42}\) Id., at 289-290.
\(^{43}\) Id., at 327.
\(^{44}\) Id., at 327.
\(^{45}\) Id., at 327.
\(^{46}\) Id., at 325.
\(^{47}\) Id., at 355.
such disabilities, or subjected to such a history of powerful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Accordingly, the more permissive standard of intermediate scrutiny could be appropriately applied to the Davis admissions program.

By failing to produce a majority opinion in Bakke, the Court further clouded an already opaque doctrinal landscape. Despite their rhetorical exertions, neither flank of the Court fully came to grips with the fundamental problem presented in Bakke. That problem is the root tension between affirmative action in any form, on one hand, and the idea of "anti-discrimination," on the other. By the time the Court took up Bakke, the normative postulate of anti-discrimination had arguably become the mediating principle in judicial interpretation of the Equal Protection Clause. Indeed, it would not be too much to say that the Court's jurisprudence could be read as asserting something like a conceptual connection between equality and anti-discrimination. Over time, the sheer taken-for-grantedness of the contingent, but firmly entrenched connection between these two ideas has become a kind of "common sense" in the Court's approach to race-based affirmative action.

What is the source of the Court's increasingly fierce attachment to the anti-discrimination principle? The animating injunction that informs the anti-discrimination model of equal protection is the notion that "likes must be treated alike." This axiom of equal treatment carries a certain aesthetic attraction and a basic notional simplicity. As a number of commentators have noted, the antidiscrimination norm is both easily formalized and formally realized. After all, as we have seen, the formal conception of equality has a long pedigree in racial equality law. In my view, however, the aesthetic and intellectual enchantments of formalism offer at best a partial account for Court's growing impatience with race-based affirmative action. Whatever its local validity, the formalist account cannot explain why the idea of race-consciousness has increasingly provoked an hostility of a deeper, more ideological kind.

To see why this is so, we may complete this part of our discussion by turning to some of the Court's more recent affirmative action jurisprudence. Since Bakke, the Supreme Court has addressed the legitimacy of affirmative action in over a dozen decisions. The crucial turning point in this area of racial equality jurisprudence was the Court's decision in City of Richmond v. J.A. Croson Co.\textsuperscript{51} Croson involved a challenge to a program in Richmond, Virginia that required prime contractors on city public works contracts to subcontract at least thirty percent of the dollar amount of each contract to one or more "Minority Business Enterprises." The Supreme Court held that the city ordinance under which the program had been adopted violated the Equal Protection Clause. For the first
time, the Court settled on a unitary standard—the "strict scrutiny" principle—for assessing the constitutionality of race-based affirmative action.

In defending the constitutionality of its public works contracts policies, the Richmond city government had offered evidence that minority-owned businesses in the city had received virtually no city construction contracts, that they rarely held memberships in the network of trade associations through which city contracts were informally brokered, and that the local construction industry had practiced persistent and pervasive discrimination against blacks and other racial minorities. Moreover, as Justice Marshall noted in his dissent from the Court's judgment, the challenged ordinance had been adopted by a city that was the "former capital of the [Southern] Confederacy," whose "disgraceful history of public and private racial discrimination" had been "richly documented" in litigation challenging invidious racial discrimination in housing, public education, and electoral politics.

At one level, Croson marked the triumph of the formal method in the Court's affirmative action jurisprudence. In her opinion for the Croson majority, Justice O'Connor did not deny the "sorry history of both private and public discrimination" in the United States. She nonetheless declared that Richmond's attempt to confront the consequences of that historical legacy for its own construction industry was foreclosed by Equal Protection Clause. On the Court's account, the practices whose effects the city had sought to address could not be traced to any "direct evidence of race discrimination on the part of the city in letting contracts, or [to] any evidence that the city's prime contractors had discriminated against minority owned sub-contractors." Rather, the Richmond plan was a policy response to a more generalized species of "[s]ocietal discrimination" in the national construction industry as a whole. The very magnitude of these discriminatory practices rendered them too "amorphous a basis" for a race-specific affirmative action plan such as the Richmond ordinance. For the Croson majority, the national dimensions of racial discrimination in the American construction industry did not permit affirmative action by local governments to address the structural effects of that discrimination in their own backyards. According to Justice O'Connor, only Congress was technically empowered under the Fourteenth Amendment to address the effects of past and continuing "societal" discrimination. In a curious twist of judicial logic, the sword that allows the U.S. Congress to address the national consequences of racial wrongs became a constitutional shield against similar legislative action on the part of the state and municipal governments that were closest to the problem.

52 Id., at 528.
53 Id., at 529.
54 Id., at 499.
55 Id., at 480.
56 Id., at 497 (quoting Wygant v. Jackson Board of Education, 476 U.S. 267, 276 (1986)).
57 Id., at 497 (quoting Wygant, 476 U.S. 267, 276 (1986)).
58 Section 5 of the Fourteenth Amendment authorizes the U.S. Congress "to enforce, by appropriate legislation, the provisions of this article." U.S. Const., amend. XIV, § 5.
As a constitutional matter, this distinction between particularized "individual" discrimination and more generalized "societal" discrimination is not required either by the text or the structure of the Fourteenth Amendment. What, then, is the basis of the *Croson* Court's obdurate refusal to consider "societal" and "individual" discrimination in the same constitutional light? I have argued that, standing alone, the aesthetic and intellectual allure of formalism provides an inadequate account of Court's adherence to the anti-discrimination model of constitutional equality. Much the same may be said of the federalism-based justification the Court offers for the divergent treatment of "societal" and "individual" discrimination. To my mind, the *Croson* opinion's stated fealty to the principles of federalism only partially explains its different approaches to these two forms of discrimination. The decision to invalidate the Richmond program has more to do with the political ideology of abstract individualism than it does with the political forms of federal and state governmental power.

How is this claim to be understood? Recall that in *Bakke*, Justice Powell introduces a theme that is sounded in all the Court's subsequent affirmative action decisions. A proper interpretation of the Fourteenth Amendment, Powell asserts, must begin with a recognition that the equal protection to which that text refers is a matter of *individual* rights:

> The guarantees of the Fourteenth Amendment extend to all persons . . . . It is settled beyond question that 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.*

As we have seen, however, Justice Powell was eventually forced to concede what he so deeply wanted to deny—that equal protection analysis cannot avoid reference to the realities of group life in American society.

The ideological rhetoric of abstract individualism is accorded a similar prominence in the *Croson* decision. For example, at one point in the Court's opinion, Justice O'Connor argues that perhaps the chief defect in the challenged Richmond plan is the degree to which it denies "certain citizens" the opportunity to compete for a reserved percentage of public contracts solely based on their race: "To whatever racial group these citizens belong, their 'personal rights' to be treated with equal dignity and respect are implicated by a

---

59 Indeed, some six years later, Justice O'Connor would effectively deny that Congress had any more authority to address "society-wide [racial] discrimination" than state or local governments. See Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 515 U.S. 200 (1995).

60 See Paul Brest, Foreword: In Defense of the Anti-Discrimination Principle, 90 Harv. L. Rev. 1, 49-50 (1976). For a brief intellectual history of the idea, see Steven Lukes, *Individualism* 73-78 (1973). A concise account of the "abstract individual model" is offered in John Skrentny, supra note 15 at 26-28. In what follows, I deploy an analytic distinction between the "formal" and the "abstract individual" model of equality. However, like the cultural common sense on which it draws, the Court's equality jurisprudence in fact often combines (and even collapses) these distinctions. Nonetheless, for heuristic purposes, the differentiation of the two models is analytically useful, so long as one remains mindful that they are rarely so cleanly separable in affirmative action discourse.


62 See discussion supra at 10-11.
rigid rule erecting race as the sole criterion in an aspect of public decision making." 63 Kimberlé Williams Crenshaw has rightly criticized Justice O'Connor's reductive dismissal of race as a meaningful constitutional fact. The Croson Court "decided that race would be narrowly construed to basically represent simply skin color—devoid of any historical, political, or economic value." 64 O'Connor then throws this "deracinated" notion of race in the chromatic dustbin. Like hair or eye color, skin color becomes an incidental aspect of the "real" subject of constitutional rights: the abstract, anonymous individual. And yet, like Justice Powell's Bakke, the Croson opinion is finally unable to sustain the normative claim that race is an empty, inconsequential category in constitutional analysis. When Justice O'Connor sets out to explain why the city's reliance on evidence of statistical disparities in the construction industry is constitutionally irrelevant, she does so in social terms that betray her individualistic ethos. "There are," she writes, "numerous explanations for [the] dearth of minority participation in Richmond's construction sector], including past discrimination as well as both black and white career and entrepreneurial choices." 65 Indeed, O'Connor speculates "[b]lacks may be disproportionately attracted to industries other than construction." 66 Note the discursive strategy in play here. In a move that is precisely the antithesis of the individualism to which she purports to be committed, Justice O'Connor attributes the absence of "certain citizens" in the construction industry to a shared preference ("disproportionate attraction" to non-construction work). That preference, however, is not just an aggregation of individual choices, but an expression of collective agency. In its zeal to defend the singular conception of the individual and that individual's "personal rights," the Croson opinion mobilizes the very discourse of racial group identity ("blacks") and racial group decisionmaking ("black and white career and entrepreneurial choices") that a strict adherence to methodological individualism would rule out of bounds. In short, Justice O'Connor uses a race-conscious, collectivist claim to secure the case against such claims.

I have not focused on these moments of performative contradiction in the social vision of Bakke and Croson for their own sake. I have done so rather because they seem to me to illustrate the limitations of the anti-discrimination principle as a general grammar for thinking about constitutional equality. To my mind, the anti-discrimination principle provides too crude a framework for understanding what is at stake in affirmative action. More precisely, the abstract individualism of the anti-discrimination model misapprehends the decidedly social purpose, meaning and effects of the practices affirmative action policy is designed to address. While the exercise of racial and gender power unquestionably targets individuals, its ultimate object is the subordination of entire social groups. Like the subordinating practices to which it fashions a

---

63 Croson, 488 U.S., at 493.
64 Crenshaw, supra note 14, at 284.
65 Croson, 488 U.S., at 503.
66 Id.
programmatic response, affirmative action embraces a "group-grounded" perspective toward the idea of equality. To borrow and adapt the words of one commentator, there at least two distinct respects in which the mediating principle of anti-subordination provides an indispensable social perspective on the problem of inequality. First, affirmative action "focuses on society's role in creating subordination." Second, it attends to the ways "this subordination affects, or has affected groups of people." Put another way, affirmative action starts from the proposition that "[i]t is more invidious for women or blacks to be treated worse than white men than for men or whites to be treated worse than blacks or women . . . because of the differing histories and contexts of subordination faced by these groups."

I hope by now to have shown that the current contours of American affirmative action jurisprudence reflect the continuing grip in which the dogma of abstract individualism has held the social imagination of the U.S. Supreme Court. In matters of race, an evident indifference to the concrete social dimensions of inequality has rendered the Court unwilling or unable to take the group-sensitive perspective seriously. Significantly, it was a Supreme Court decision on gender-based affirmative action which suggested—at least for a time—that the group-sensitive perspective on constitutional equality might force its rivals to yield some ground. It is to that decision I next turn.

V. THE GENDER OF AMERICAN AFFIRMATIVE ACTION LAW

The first and only case in which the Supreme Court has devoted exclusive attention to the legality of affirmative action on behalf of women was its decision in Johnson v. Transportation Agency, Santa Clara County, California. The issue before the Court in Johnson was the legitimacy of gender preferences

67 Since I do not wish to be misunderstood, let me make it clear here that the "group-grounded" model of equality I sketch and support here is not an argument for "group rights" as such. Strictly speaking, what I am calling the "group-grounded" model of equality makes no claim about rights at all. Rather, that model provides an analytic framework or an orienting structure for thinking about equality which is distinguishable from the task of rights specification as such. Thus, while the vision of affirmative action I describe here most decidedly endorses a "macro" or "societal" perspective on the equality principle, it does not and need not reject the proposition that the rights guaranteed by the Fourteenth Amendment belongs to the individual. The argument differs from the abstract individual model of equality in insisting that the rights of individuals under a regime of affirmative action may (and inevitably must) be determined with reference to groups. On this point see Ronald Fiscus, The Constitutional Logic of Affirmative Action 57-61 (1992). If the goal of affirmative action is to put race- and gender-based subordination "out of business," then its conception of individual rights ought not be "abstracted" from the positional realities of group life. The concept-figure of putting race and gender "out of business" appears in From Redistribution to Recognition?: Dilemmas of Justice, in a 'Postsocialist' Age, in Nancy Fraser, Justice Interruptus: Critical Reflections on the "Postsocialist" Condition 11, 20-22 (1997).


69 Id.

70 Id.

under Title VII of the Civil Rights Act of 1964, as amended. The challenged plan had been voluntarily adopted by the Santa Clara County Transportation Agency, a public employer. The plan aimed, in part, to increase the number of women promoted to positions within traditionally sex-segregated jobs in which women had historically been significantly under-represented. The plaintiff, Paul Johnson, claimed that he had been denied promotion to a road dispatcher position with the county solely on the basis of his sex, in violation of Title VII.

The Supreme Court disagreed. The Court's opinion, written by Justice Brennan, held that the Transportation Agency had not violated the statute in taking the sex of a competing female applicant for the position into account. On Justice Brennan's reasoning, the consideration of gender in order to rectify a "'manifest imbalance'" that reflected the under representation of women in "'traditionally segregated job categories'" was not unlawful "sex discrimination" within the meaning of Title VII.

Since no constitutional issue was raised or litigated in the trial court, the Johnson Court confined itself to interpretation of the relevant statute. Although Title VII analysis of affirmative action differs markedly from the affirmative action analysis in the constitutional context, the two bodies of law both rely substantially on a common conceptual vocabulary. The Court's interpretation of the statute thus holds important implications for an understanding of the constitutional dimensions of gender-based affirmative action.

In this connection, several aspects of the Court's opinion in Johnson merit mention. First, and most notably, the Court's opinion says almost nothing on the question of whether affirmative action plans directed at women should be assessed any differently than race-based affirmative action policy. It should be noted, too, that the Johnson Court did not deem it necessary to come to grips with the proposition that affirmative action law is an inappropriate tool for dealing with generalized "societal" discrimination. Although Justice Brennan asserts that women are confronted with "strong social pressures" not to pursue employment prospects in certain types of jobs, he does not directly respond to a central claim made by the dissenting members of the Court. This was the contention that the affirmative action program sustained in Johnson was not designed to remedy "identified discrimination" on the part of Santa Clara County, but was instead an impermissible response to the limitations which "societal attitudes" have imposed on women's entry into certain sectors of the labor market.

72 The agency's affirmative action plan was not limited to sex. By its terms, the Santa Clara County plan also targeted "minorities" and "handicapped persons." Johnson, 480 U.S at 620.

73 Id., at 631 (quoting Steelworkers v. Weber, 443 U.S. 193, 197 (1979)).

74 For a similar argument see Rosenfeld, supra note 21 at 197.

75 Johnson, 480 U.S. at 634, n. 12 (Quoting Johnson v. Santa Clara, 748 F.2d 1308, 1313 (9th Cir. 1984)).

76 See, e.g., id., at 664 (Scalia, J., dissenting)("'The most significant proposition of law established by today's decision is that racial or sexual discrimination is permitted under Title VII when it is intended to overcome the effect, not of the employer's own discrimination, but of societal attitudes that have limited the entry of certain races, or of a particular sex, into certain jobs.'").
In short, Johnson accorded legitimacy to affirmative action programs undertaken solely to redress the disadvantages that "society-wide" discrimination has historically imposed on women. Under Johnson, employers were not obliged to show that their affirmative action policies were based on their own past discrimination. Further, the decision appeared to accept the adoption of "goals" (if not set "quotas") that would gradually remedy the gender "imbalance" or "underpresentation" of women in jobs to which they have historically had little or no access. The Johnson Court thus endorses the notion that the equality norm embodied in Title VII does not completely foreclose the affirmative pursuit of gender equity in the workplace. Taken together, these twin aspects of the Johnson opinion gesture toward a group-sensitive model of gender equality.

However, at least one element of Johnson stands in arguable tension with the account of the decision I have developed here. At one point in the opinion, Justice Brennan categorically dismisses the notion that Paul Johnson was an "innocent victim" of the County's affirmative action policy. On Justice Brennan's account, Mr. Johnson could not claim an "absolute entitlement" to the promotion whose denial had occasioned his complaint: "Denial of the promotion," wrote Justice Brennan, "unsettled no legitimate, firmly rooted expectation on the part of the petitioner." 77 At the same time, the Johnson opinion expressly disavowed any suggestion that the Court was allowing Santa Clara County to "unnecessarily [trammel] the rights of male employees or [create] an absolute bar to their advancement." 78 One of the components of the Santa Clara County plan that apparently predisposed the Court to uphold it was the fact that it did not set aside employment opportunities for women, or prevent men from competing for each announced position: "[T]he Agency Plan requires women to compete with all other qualified applicants. No persons are automatically excluded from consideration; all are able to have their qualifications weighed against those of other applicants." 79 Another positive feature of the affirmative action plan in Johnson, from the Court's perspective, was the fact that though the plaintiff in that litigation gained nothing, he also lost nothing. Brennan took pains to note that "while [Johnson] in this case was denied a promotion, he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions." 80

The Court's emphasis on these features of the Santa Clara County affirmative action program suggests that one of the reasons the challenged plan passed judicial muster lay in the fact that it did not totally abandon either the formal or the abstract individual models of equality. Consider in this connection what the Johnson Court did not say. The Court expressed no concern about the possibility

77 Johnson, 480 U.S., at 638. For an extended discussion and critique of the "innocent persons argument" against affirmative action see Fiscus, supra note 67, at 37-50.
78 Johnson, 480 U.S., at 637-638.
79 Id., at 638 (emphasis supplied).
80 Id., at 638.
that the right of male employees to individual consideration might in the end have little practical impact on the county's hiring and promotion process. It seemed to be enough for the Johnson Court that the Santa Clara plan accorded some minimal degree of formal recognition to the interests of individual male workers. I do not mean to suggest that the Johnson opinion's view of the formal and abstract individual models of equality is in no way indistinguishable from the rest of the Court's affirmative action jurisprudence. Such a claim would be overdrawn. I want rather to underscore the felt necessity in Johnson to stay inside the normative boundaries of the anti-discrimination principle with which these two models are associated.

This aspect of Johnson finds its most symptomatic expression in the Court's incomplete and conflicting theories of affirmative action. In announcing the Court's judgment, Justice Brennan uses two different terms to describe the challenged affirmative action program. On the one hand, Justice Brennan repeatedly characterizes the Santa Clara plan with reference to the concept, or, more precisely, the metaphor of representation. The purpose of the policy, he asserts, was to remedy a problem of "underrepresentation" in the county's workforce. In this model of affirmative action, the issue before the Johnson Court is whether Title VII permits the "factor" of "sex" to be "[taken] into account" in considering a (sexually) "representative" individual job candidate. The legality of gender-based affirmative action essentially presents a question about the validity of "sex-consciousness" with respect to the discrete, time-bound act of employee selection. The "underrepresentation" paradigm of the Johnson opinion accordingly focuses on the gender identity of the individual worker or the legitimacy of gender differentiation.

The second concept-metaphor Justice Brennan uses to characterize the challenged plan is that of "balance." The goal of Santa Clara policy, Brennan argues, was to rectify an "imbalance" in the country's workforce. In this second model of affirmative action, the precise terms in which the Court casts the question before it do not change. The issue is still whether "sex" may be considered in employment decisionmaking. One can nonetheless detect a subtle but significant shift in the social vision that subtends the Court's answer to that question. Consider in this connection the Johnson opinion's exhaustive recitation of statistics about the gender demographics of the Santa Clara County work

---

81 See, e.g., id., at 622 (the goal of the plan was to increase the opportunities for women in job categories in which they were "poorly represented"); id., at 634 (the plan was adopted "for the purpose of remedying underrepresentation" by women in skilled craft jobs); id., at 636 (women were "egregiously underrepresented in the Skilled Craft job category."); id., at 648 (describing the plan as a "moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force.").

82 See, e.g., id., at 626 (the Santa Clara plan was adopted "to address a conspicuous imbalance in the Agency's work force."); id., at 634 (the challenged plan "sought to remedy [the] imbalances" in the job assignments of men and women"); id., at 637 ("given the obvious imbalance" between male and female employees in the skilled craft sector of the county labor force it was "plainly not unreasonable" to consider sex in the decision not to hire Johnson); id., at 639 (the county plan "was intended to attain a balanced work force, not to maintain one").
force. The statistical narratives the Court offers aim to establish something much more meaningful than mere “underrepresentation.” Justice Brennan’s account of these background statistics stops just short of suggesting a more disturbing record of sexual exclusion and segregation. Like the representational paradigm, the analytic metaphor of “imbalance” is never theoretically developed. Nevertheless, one might describe the different social visions that inform the two concepts in the following terms. The “under-representation” model focuses on agency-sensitive issues such as gender differentiation and the gender identity of workers: its central normative interest is the legitimacy of gender recognition. The “imbalance” approach accents structure-sensitive questions such as gender marginalization and the gendered division of work: its focal normative concern is the legitimacy of gender redistribution. The “under-representation” model thus emphasizes the means or “sex-conscious” techniques that gender-based affirmative action uses. By contrast, the “imbalance” model stresses the ends those means or techniques aim to achieve.

The Johnson Court treats the “representation” and “balance” paradigms as though they were simply two expressions of a single idea. I have aimed to show why the two models in fact carry different connotations, which gesture toward two divergent theoretical understandings of the social meaning of affirmative action. In my view, the Johnson Court’s combined and uneven use of the “underrepresentation” and “imbalance” approaches reflects a deeper indecisiveness about the political vision of affirmative action. Does gender-based affirmative action aim to achieve substantive equality between men and women? Does the anti-discrimination principle help or hinder the realization of that substantive goal? Is the goal of sex-based affirmative action the recognition of women as a socio-cultural group, or is it instead the redistribution of political-economic goals across the “gender-line”? Because it had lacked a structural conception of gender inequality, these were questions the Supreme Court could not answer, or think to ask.

83 See, e.g., id., at 621 (detailing the percentages of Santa Clara County’s female transportation employees who were “concentrated” in EEOC job categories traditionally held by women); id., at 634 (stating the precise numbers of women in various job classifications at the transportation agency).

84 See, e.g., id., at 634 (Noting the agency’s finding that women were not only concentrated in traditionally female jobs, but “represented a lower percentage in other job classifications than would be expected if such traditional segregation had not occurred”)(emphasis supplied). In an earlier passage, Justice Brennan recounts (by way of a footnote and without comment) a number of instances in which the woman who received the disputed job promotion, Diane Joyce, was a target of conduct that arguably amounted to unlawful discrimination. Id., at 624 n. 5.

85 Indeed, the Court does not even once mention the term “equality.” The closest the Johnson opinion comes to such a reference is in a quotation from the Santa Clara Transportation Agency’s affirmative action plan on the inability of the “mere prohibition of discriminatory practices” to attain “an equitable representation of minorities, women and handicapped persons.” Id., at 620.

86 As Nancy Fraser has noted, the pursuit of gender equality, rightly understood, entails demands for both socio-cultural recognition and political-economic redistribution. See Fraser, supra note 67, at 19-20.
In the years since the *Johnson* decision, "the roof seemed to fall in on affirmative action in the high court."\(^{87}\) The state of affairs in the U.S. thus diverges markedly from Europe, where the development of positive action jurisprudence is still in its foundational stages. Despite their different genealogies, however, the points of contact between U.S. affirmative action law and the European law of positive action reveal a striking doctrinal resemblance. Nonetheless, the very different political dynamics of European constitutional law may soon push ECJ positive action discourse into terrain that U.S. equality jurisprudence has thus far feared to tread.

VI. GENDER-BASED AFFIRMATIVE ACTION IN GERMAN (AND EUROPEAN) LAW

Before discussing the ECJ's positive action decisions, I should situate that Court's jurisprudence within its relevant legal context. From an American legal perspective, three preliminary observations may be briefly made here. The first point, with which I began my discussion, involves the scope of positive action. In Germany, as in Europe generally, positive action policy is confined to women.\(^{88}\) The second precursory point has to do with the sources of German gender equality law.\(^{89}\) In national constitutional terms, the gender equality norm was first articulated in the 1949 Basic Law (*Grundgesetz*) of the Federal Republic of Germany. The Basic Law of 1949 contained two provisions regarding sex equality. The first of these was Article 3(3), which prohibits discrimination on various grounds, including sex.\(^{90}\) Article 3(2) of the Basic Law declared that "[m]en and women shall have equal rights."\(^{91}\) Although it precedes Article 3(3), this provision was in fact adopted after Article 3(3), in response to a campaign which mobilized thousands of German women to demand gender-specific protection under the Basic Law.\(^{92}\) The post-reunification revision of the Basic Law included a rewriting of Art. 3(2). In addition to its recognition of the equal rights of men and women, the provision now charges the state to "[promote] the actual enforcement of equality rights for women and men and [work] to remove existing disadvantages."\(^{93}\)

For purposes of this discussion, however, the most important legal source of German gender equality norms is the transnational law of the European Union. This brings me to a third and final preliminary point. Although the positive action programs at issue in the ECJ decisions I discuss involved statutes adopted

---

\(^{87}\) Urofsky, supra note 71, at 172. It thus bears noting that *Johnson* would most probably fail to capture a majority of votes from the current members of the Supreme Court.

\(^{88}\) See explanation supra note 1.

\(^{89}\) A comprehensive survey of the relevant law is Ninon Colneric, Making Equality Law More Effective: Lessons from the German Experience, 3 Cardozo Women's L.J. 229 (1996).

\(^{90}\) "No one may be prejudiced or favored because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions." Art. 3(3) GG.

\(^{91}\) Art. 3(2) GG.


\(^{93}\) Art. 3(2) GG, as amended.
at the state or Länder level of the German federal system, the permissibility of these programs was ultimately a question of European Union law.\(^\text{94}\) That is, the controlling constitutional norms for assessing policies such as Germany’s positive action law are those contained in the “constitution” of the European Union. To be sure, no single written document “proclaims itself [to be] the ‘Constitution’ of the EC or EU.”\(^\text{95}\) Nonetheless, it is now generally agreed that the Treaty on European Union\(^\text{96}\) and interpretations of that Treaty in the Court of Justice of the European Communities\(^\text{97}\) represent a constitutional charter for the original European Communities, and of the European Union they have become.\(^\text{98}\)

Two recent examples of the interplay between European law and German positive action policy are the ECJ’s decisions in Kalanke v. Freie- und Hansestadt Bremen\(^\text{99}\) and Marschall v. Land Nordrhein-Westfalen.\(^\text{100}\)

The first ruling by the ECJ regarding the validity of gender-based positive action under EU law came in the 1995 Kalanke decision. The positive action policy in question had been adopted by the Freie Hansestadt Bremen, Germany.\(^\text{101}\) Under the Bremen Land Law on Equal Treatment (Landesgleichstellungsgesetz), women candidates received priority over men in competition for jobs in which they had traditionally been underrepresented. The complainant, Eckhard Kalanke, had been denied promotion to a management position.

---

\(^{94}\) Article 177(2) of the EEC Treaty establishes a referral mechanism whereby courts and tribunals of member-states of the European Union may seek “preliminary decisions” in cases involving EC law. Strictly speaking, a “preliminary decision” by the ECJ is not a disposition of the case referred to it. Rather, a “preliminary decision” is only an authoritative judicial interpretation of the relevant European law, whose application in the particular case is left to the national court or tribunal from which the referral came. For a concise explanation of the “preliminary decision” mechanism, see Leonard Jason-Lloyd and Sukhwinder Bajwa, The Legal Framework of the European Union 33-34 (1997).


\(^{97}\) See Sauter, supra note 96, at 31.

\(^{98}\) For a useful if skeptical intellectual history of the “constitutionalization” of European law and the emergence of European constitutionalism see J.H.H. Weiler and Joel P. Trachtman, European Constitutionalism and Its Discontents, 17 J. Intl. L. Bus. 354 (1996); For a discussion of the “Europeanization effect” on the jurisdiction of German Federal Constitutional Court, see Klaus H. Goetz, The Federal Constitutional Court, in 2 Developments in German Politics 96 (Gordon Smith et al. eds., 1996).


\(^{100}\) Marschall v. Land Nordrhein-Westfalen, Case C-409/95, 1997 E.C.R. I-6363.

\(^{101}\) The Bremen statute provided, inter alia, that “[i]n the case of an assignment of an activity in a higher pay, remuneration and salary bracket, women who make qualifications equal to those of their male co-applicants shall be given priority [in those sectors where] they are under-represented.” Landesgleichstellungsgesetz [LGIG], Bremisches Gesetzblatt [Brem. Gbl.], S.433. (Law on equal treatment of men and women in the public service of the Land of Bremen). Kalanke, 1995 E.C.R. I-3051, at para. 3.
post in the Bremen Parks Department in favor of a female colleague. After losing an administrative challenge, Kalanke brought suit in the Bremen city and state labor courts. Kalanke contended that he had been unlawfully discriminated against on the basis of sex, in violation of provisions contained in the German Civil Code, the Bremen state constitution, and Articles 3(2) and 3(3) of the German Basic Law.

The case reached the ECJ by way of the German Federal Labor Court (Bundesarbeitsgericht), to which Kalanke had appealed after his case was dismissed by both lower German courts. The Federal Labor Court sought a preliminary ruling from the ECJ on whether the Bremen state positive action policy was covered by Sections 2(1) and 2(4) of the European Council's 1976 Equal Treatment Directive, which is part of the EU's social policy program. Article 2(1) states that "... the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly." However, Article 2(4) of the Equal Treatment Directive authorizes member-states to adopt and enforce "... measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities." The precise question in Kalanke was whether the Bremen positive action program contravened the Article 2(1) prohibition on "discrimination ... on grounds of sex," or was instead a permissible effort under Article 2(4) to "[remove] existing inequalities which affect women's opportunities."


103 For more detailed histories and analyses of Article 119 (the new Article 141) of the EC Treaty, on which the Equal Treatment Directive and other elements of EU social policy are based, see Evelyn Ellis, EC Sex Equality Law (1998); Women and the European Labour Markets (Anneke van Doorne-Huiskes et al. eds., 1995). The version of Article 119 that was in force at the time of the Kalanke and Marschall decisions read: "Each Member State shall ensure . . . and subsequently maintain the applications of the principle that men and women should receive equal pay for equal work." The 1997 Amsterdam Treaty amended Article 119 to read: "Each Member State shall ensure that the principle of equal pay for equal work or work of equal value is applied." By its terms, Article 119 embodies only a norm of equal pay. However, the ECJ has long construed the Article to impose a more general principle of equal treatment. This more liberal construction has also been reflected in the social policy directives of the European Council. With the 1997 revision of the TEU, this broader understanding of the equality concept is now expressly recognized as a fundamental principle of EU constitutional law. In addition to the mentioned amendment, the Amsterdam Treaty added a new provision to Article 119. This provision imposes an obligation on the European Council to "adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value." The new Article 141 thus now includes aspects of equal treatment other than equal pay. They also make it clear that the Council's authority to enact secondary legislation is not limited to prohibitions on sex discrimination, but extends as well to measures that seek to insure equality of opportunity, such as those permitted under Article 2(4) of the Equal Treatment Directive.


105 Id., at para. 17.
In his Opinion to the Court, Advocate General Tesauro argued that the Bremen policy fell outside the scope of the measures contemplated by Article 2(4).\textsuperscript{106} For Tesauro, the fatal flaw in the Bremen plan was that it accorded “absolute and unconditional priority” to women applicants for jobs in those sectors of the public labor force in which they were underrepresented. The Advocate-General contended that this aspect of the challenged gender preference was a derogation from Mr. Kalanke’s “individual right” not to be discriminated against on the basis of his sex.\textsuperscript{107} Accordingly, the state of Bremen’s positive action program could not be reconciled with the principles of sex equality to which Germany and other EU member states were bound by the provisions of the Equal Treatment Directive.

In defending this interpretation of the Equal Treatment Directive, Tesauro began by offering “a few observations on the idea of positive action.”\textsuperscript{108}

Positive, or affirmative, action stems from the requirement to eliminate the existing obstacles affecting particular categories or groups of persons who are disadvantaged at work as a result. Positive action is, in particular, \textit{a means of achieving equal opportunities} for minority or, in any event, disadvantaged groups, which generally takes place through the granting of preferential treatment to the groups in question. In taking the group as such into consideration, positive action marks a transition from the individual vision to the collective vision of equality.\textsuperscript{109}

The Advocate General’s Opinion draws a distinction among three “models” of positive action. The first model, on his account, does not aim to remove “discrimination in the legal sense,” but strives rather to address the “condition of disadvantage which characterises women’s presence on the employment market.”\textsuperscript{110} This is the most modest form of positive action, and entails such measures as gender-specific outreach, vocational guidance and training. The second strives to accommodate women who must balance professional and family responsibilities, and to promote a better division of those responsibilities between the sexes. This second form of positive action is reflected in policies regarding flexible working hours, child-care, women who have returned to the workplace after a long absence, or tax and social security policies that take family responsibilities of workers into account.

Tesauro argues that the purpose of these two forms of positive action is to achieve equal opportunities, and “in the final analysis”\textsuperscript{111} to attain “substantive

\begin{footnotes}
\item[106] Opinion of Advocate General Tesauro, Kalanke v. Freie Hansestadt Bremen, Case C-450/93, 1995 E.C.R. I-3051, at para. 29. From an American perspective, one of the more intriguing features of ECJ decisionmaking is the prominent role accorded to its panel of Advocates General. Although Opinions by Advocates General are not binding on the Court, they are deemed to be extremely persuasive. The Advocate General’s Opinion is frequently the basis for the Court’s own interpretations of EU law, and thus helps illuminate the reasoning behind the ECJ’s characteristically terse opinions. See Janet Dine et al., Procedure and the European Court 4 (1991).
\item[108] Id., at para. 8.
\item[109] Id. (emphasis in original)(footnotes omitted).
\item[110] Id., at para. 9.
\item[111] Id.
\end{footnotes}
equality."\(^{112}\) However, he notes that neither of these versions of positive action expects or pursues an immediate "quantitative increase in female employment."\(^{113}\) They thus differ radically from the third positive action model, whose central feature is the adoption of "systems of quotas and goals."\(^{114}\) Tesauro is openly critical of this model of positive action, which in his view has come "to be regarded as a panacea for eliminating existing inequalities in the reality of social life."\(^{115}\)

The measure consisting of the imposition of quotas has come up for much discussion, in particular from the point of view of its constitutionality: whilst it is true that it is an instrument which is certainly suitable for bringing about a quantitative increase in female employment, it is also true that it is the one which most affects the principle of equality as between individuals, a principle which is safeguarded in most of the member states legal systems.\(^{116}\)

Although he notes that the Bremen state positive action program adopted a system of so-called "soft" as opposed to "strict" quotas, Tesauro nonetheless finds it "only too obvious" that "in this case there is discrimination on grounds of sex."\(^{117}\)

The Advocate General's Opinion makes several comparative references to U.S. affirmative action discourse, all by way of footnoted commentary. Taken together, they offer a revealing glimpse of the social vision that stands behind his approach to the legal issues raised in *Kalanke*. In one of these references, Tesauro writes that the "collective vision of equality" endorsed by positive action draws on a "concept of the group" which "does not find unequivocal favor."\(^{118}\) The Advocate General describes a "tendency" (he declines to say among whom) "to assert that preferential treatment in favor of certain groups will end up increasing the feeling of inferiority vis-à-vis the majority," which "[triggers] a definitive marginalization of those in whose favor it is done within rigid social cages."\(^{119}\) Tesauro goes on to note (again without specific

\(^{112}\) Id.

\(^{113}\) Id.

\(^{114}\) Id.

\(^{115}\) Id. The Advocate General's typology of affirmative action has not gone unchallenged. As Evelyn Ellis as pointed out, "it is by no means clear that this type of positive action is to be differentiated from all other types in its attempt to remedy historical discrimination; this is surely also the motive for some actions falling into the first two categories, for example, the provision of training for jobs for which women were formerly not trained." Ellis, supra note 103, at 250.

\(^{116}\) Id.

\(^{117}\) Id., at para. 10. For a trenchant critique of Tesauro's descriptive and normative accounts of the forms of positive action, see Ellis, supra note 103, at 250-53.

\(^{118}\) Id., at para. 8, n. 9. Although he does not specifically say so, the sense of the passage in question suggests that Tesauro is describing his understanding of U.S. affirmative action discourse. As a grammatical matter, his account of the critiques of affirmative action policy are all pitched in a curiously passive voice, as in the remark that the "system of quotas and goals" (note the failure to distinguish the two) "has come to be regarded as a panacea for eliminating existing inequalities in the reality of social life." Id., at para. 9 (emphasis supplied). However, the overall tone of the Advocate General's Opinion leaves little doubt that the characterized criticisms of U.S. affirmative action policy are not far from his own.

\(^{119}\) Id., at para. 8, n. 9.
attributed) that "another accusation leveled against preferential treatment in favor of disadvantaged groups" has to do with its adverse efficiency effects on the "social commitment" of the "best" workers. The Advocate General concludes by observing "[i]n Europe, positive action has begun to take hold or, at any event, to become the object of attention at the very time when affirmative action seems to be [in] a state of crisis in its country of origin."  

Advocate General Tesauro's remarks do not pretend to speak to the precise legal question the Court was asked to address in Kalanke. That, however, does not seem to be their objective. The thrust of Tesauro's comparative observations on the "state of crisis" which has seized U.S. affirmative action discourse is rather more ideological. Put bluntly, it would seem that the goal here is to raise the specter of multiculturalism, which has received a decidedly hostile reception in European circles. Tesauro's pointed evocation of the "dialectical battles" that are raging within U.S. sexual (and racial) politics seems odd when one considers the energy he expends downplaying the significance of the program challenged in Kalanke. As we have seen, Tesauro's general account of the nature of positive action is interwoven with a series of claims regarding the different conceptions of equality that ground the "group rights" model of positive action and the "individual rights" paradigm which (on his view) informs the Equal Treatment Directive. At the beginning of his Opinion, Tesauro explains that the individual rights model draws on the concept of "formal" equality, which strives for "equal treatment as between individuals as belonging to different groups." By contrast, the group rights paradigm endorses a concept of "substantive" equality, which seeks "equal treatment between groups."  

However, as Tesauro expounds on these drawn distinctions, each term undergoes a destabilizing semantic shift. The Advocate General concedes that Article 2(4) permits EU member states "to implement positive actions," but insists that such policies are authorized "only to the extent to which those actions are designed to promote and achieve equal opportunities for men and women, in particular by removing the existing inequalities which affect women's opportunities in the field of employment."  

Three parallel rhetorical moves should be noted here. One crucial manoeuver in this part of the argument focuses on the idea of "equal opportunities." In an

---

120 Id., at para. 8, n. 9. It is not clear here whether "the best" to whom Tesauro is referring are individuals who belong to the group targeted by positive action policy, or those who are members of the group(s) to whom "preferential treatment" is denied.

121 Id., at para. 8, n. 9. In the course of his remarks on the American experience, Advocate General Tesauro cites a number U.S. Supreme Court affirmative action decisions. Interestingly, Johnson is not one of them them, even though it has the most obvious relevance to the questions raised in Kalanke.

122 See, for example, Kendall Thomas, Warnung vor der Sackgasse, Der Tagesspiegel November 6, 1998, S.1; William A. Barbieri, Jr., Ethics of Citizenship: Immigration and Group Rights in Germany 50-56 (1998).


124 Id., at para. 7.

125 Id.

126 Id., at para. 13.
earlier section of his opinion, Tesauro explicitly links the “equality as opportunity” paradigm to positive action.\(^{127}\) However, as the discussion proceeds, the Advocate General proceeds to deny the posited connection between the two concepts. “Equal opportunities,” he writes, “can only mean putting people in a position to attain equal results . . . .”\(^{128}\) Having so stipulated, Tesauro then makes the following astonishing assertion. This is the second decisive move. “The very fact that two candidates of different sex have equivalent qualifications implies the fact by definition that the two candidates have had and continue to have equal opportunities: they are therefore on an equal footing at the starting block.”\(^{129}\) To grant women the preferential treatment they receive in a “tie-breaker” situation (of which Kalanke is an example) is thus a violation of the norm of equal opportunity (since equally qualified male and female competitors are already at the same “starting block”). The Advocate General acknowledges that “equality as regards starting points alone will not in itself guarantee equal results.”\(^{130}\) He also concedes that “tie-breaker” or “decisional” quotas attempt to correct for the distorting effects on employer decisionmaking of a “social structure which penalizes women” notwithstanding their “merits” or “individual efforts.”\(^{131}\) Tesauro nonetheless maintains that “tie-breaker” quotas do not come within the scope of the Equal Treatment Directive. Why? Because—this is the third and decisive move—such quotas ultimately have nothing to do real, “substantive equality” of opportunity at all. Rather, “tie-breaker” positive action programs seek to achieve “formal, numerical equality” of result. This “formal” conception of equality, the Advocate General tells us, “may solve [sic] some consciences” but it is in fact “illusory and devoid of all substance.”\(^{132}\)

By the end of his Opinion, Advocate General Tesauro’s analysis has become hopelessly entangled in its own conceptual scheme. The meanings of “formal equality” and “substantive equality” have been reversed: “real equality” has been detached from the concept of group rights, and aligned instead with the more “fundamental principle” of individual rights.\(^{133}\) The concept of “positive action” has ceased to be “a means of equal opportunity” and become a mere demand for “an equal share of jobs.”\(^{134}\) Indeed, because they fail to address “the economic, social and cultural model which is at the root of the inequalities” between women and men, the Advocate General finally concludes that the “tie-breaker” measures challenged in Kalanke are not very “significant” at all.\(^{135}\) From this perspective, then, the most objectionable

\[^{127}\text{Id., at para. 8.}\]
\[^{128}\text{Id., at para. 13 (emphasis supplied).}\]
\[^{129}\text{Id., at para. 13.}\]
\[^{130}\text{Id., at para. 14.}\]
\[^{131}\text{Id., at para. 14.}\]
\[^{132}\text{Id., at para. 28.}\]
\[^{133}\text{Id., at Para. 27.}\]
\[^{134}\text{Id., at para. 26.}\]
\[^{135}\text{Id., at para. 28.}\]
dimension of the Bremen state positive action program is not the boldness, but the modesty of its underlying social vision.

Given the brevity of its judgment in *Kalanke*, we can only speculate about the extent to which the Court of Justice shared the expressed views of Advocate General Tesauro. One point of agreement, however, was clear: like the Advocate General, the ECJ thought the Bremen positive action program was incompatible with EU law. The Court began its judgment with two observations about Article 2(4) of the Equal Treatment Directive, both of which it had made in previous cases. The first point was that Article 2(4) specifically permitted national measures which, "although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances which may exist in the reality of social life." Put another way, Article 2(4) did not forbid member-states from adopting employment-related policies, "including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men." The second point was that Article 2(4) nonetheless had to be interpreted strictly, since it constituted "a derogation from [the] individual right" to equal treatment guaranteed under Article 2(1) of the Equal Treatment Directive. Using this principle of strict interpretation, the Court of Justice concluded that a national rule which accorded women "absolute and unconditional priority" for job appointment or advancement "go[es] beyond promoting equal opportunities and overstep[s] the limits" of Article 2(4). The *Kalanke* Court went on to reject categorically the proposition that positive action was a device for achieving "equal representation of men and women" in a particular workplace. On the Court's account, this "equal representation" model of equality distorted the meaning of Article 2(4). To the extent the Bremen "rule of priority" sought to directly "substitute" equality of representation for equality of opportunity, it impermissibly confounded the means for achieving gender equality with its ultimate end. In short, while equal representation might well be the eventual result of positive action, it could not be used as an intentional tool to get there.

The one respect in which the Court's judgment differed from that of the Advocate General was in the apparent emphasis it laid on the "absolute and unconditional" character of Bremen's positive action law. This was an element of the Bremen policy that the Advocate General had neither mentioned nor discussed in his Opinion. The *Kalanke* Court failed to indicate precisely whether or why the "absolute and unconditional" aspect of the Bremen law was decisive. As a result, the language of the judgment left open the possibility

---

136 Id., at para. 18.
137 Id., at para. 19.
138 Id., at para. 20.
139 Id., at para. 23.
140 Indeed, it was not at all clear that this was a correct characterization of the Bremen state statute, or, more precisely, of the interpretation the statute had been given in the German national courts. As the ECJ itself notes, in order to render the Bremen law consistent with the sex equality provisions of the German Basic Law, the Federal Labor Court had interpreted the "rule of priority" to permit "exceptions . . . in appropriate cases." *Kalanke*, 1995 E.C.R. I-3051, at para. 9. It thus
that a more qualified and conditional "rule of priority" might well survive a challenge under the equal treatment principle of Article 2(1).

In Germany, the Court's judgment in Kalanke met with a chorus of disapproval, whose echoes could still be heard when the Court of Justice was asked for a preliminary ruling on yet another German positive action policy in Marschall.

Marschall reached the ECJ on a referral from the Administrative Court (Verwaltungsgericht) of Gelsenkirchen, Germany. The case involved a challenge by a teacher named Hellmut Marschall. Mr. Marschall had applied for a teaching position in a public secondary school. The government authority that considered his candidacy informed Mr. Marschall that it intended to appoint a competing female candidate to the post. The decision not to offer the promotion to Mr. Marschall was based on a "rule of priority" contained in the Law of Civil Servants of the Land (Beamten gesetz für das Land Nordrhein-Westfalen). Under the challenged policy:

Where, in the sector of the authority responsible for promotion, there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, unless reasons specific to an individual [male] candidate tilt the balance in his favour.142

The question before the Court of Justice was whether a "rule of priority" that contained an explicit "exceptions clause" was permitted under the terms of Articles 2(1) and 2(4) of the Equal Treatment Directive.

Counsel for the Nordrhein-Westfalen state authorities maintained that the sex-specific "rule of priority" had been adopted to address an entrenched inequality in the public employment sector between women and men. This inequality was said to flow from the fact that employers had historically tended to prefer male candidates over equally qualified female candidates for the same post. The Land maintained that this gender-preference for male candidates could be traced to the use of "traditional" promotion criteria such as age, seniority, and the fact that a male candidate was the head or sole breadwinner of his household. Nordrhein-Westfalen argued that as a practical matter, the effect of these traditional promotion criteria had been to place women in the Land in a position of "disadvantage" across a broad spectrum of the public labor market. Counsel for the Land further noted that the permitted exception to its


142 Marschall, 1997 E.C.R. I-6363, at para. 3.

143 Id., at para. 4.

144 Id.

145 Id.
positive action law allowed "sufficient flexibility" for departures from the "rule of priority" in order "to take into account any reasons which may be specific to individual [male] candidates."\(^\text{146}\) Finally, Nordrhein-Westfalen contended that because the challenged statute did "not guarantee absolute and unconditional priority for women" it came safely "within the limits outlined by the court in Kalanke."\(^\text{147}\)

Concerned no doubt about the consequences the Court's decision might entail for their own positive action policies, the Commission as well as the Spanish, Austrian, Finnish, Swedish and Norwegian governments intervened in Marschall to support the position advanced by Nordrhein-Westfalen. The Finnish, Swedish and Norwegian governments maintained that "the national rule in question promotes access by women to posts of responsibility and thus helps to restore balance to labour markets, which, in their present state, are still broadly partitioned on the basis of gender."\(^\text{148}\) In addition to this argument, the Finnish government observed that past experience in that country had shown that "action limited to providing occupational training and guidance for women or to influencing the sharing of occupational and family responsibilities is not sufficient to put an end to this partitioning of labor markets."\(^\text{149}\)

In his Opinion on the issues raised in Marschall, Advocate General Jacobs urged the ECJ to follow the reasoning of its decision in Kalanke. Jacobs saw no meaningful difference between the Nordrhein-Westfalen program and the Bremen state law. The Advocate General did not dispute the claim that EU members could adopt policies to deal with the problem of "structural discrimination" against female workers.\(^\text{150}\) He nonetheless insisted that under Article 2(4) of the Equal Treatment Directive, member states were authorized only to take measures that would promote "equal opportunity for men and women". Jacobs started from the "axiomatic" principle that "there is no equal opportunity for men and women in an individual case if, where all else is equal, one is appointed or promoted in preference to the other solely by virtue of his or her sex."\(^\text{151}\) The Advocate General took the view that, like the policy in Kalanke, the Nordrhein-Westfalen statute went "beyond the promotion of equal opportunities by seeking to impose instead the desired result of equal representation."\(^\text{152}\) The Advocate General contended that this "imposition" of the "equal representation" model of equality rendered the Nordrhein-Westfalen positive action program "contrary to the principle of equal treatment as enshrined in [Article 2(1)]."\(^\text{153}\)

\(^{146}\) Id., at para. 5.

\(^{147}\) Id., at para. 17.

\(^{148}\) Id., at para. 16. The governments of France and the U.K. intervened to argue against the Nordrhein-Westfalen policy. In their view, the "rule of priority" was indistinguishable from the scheme the Court had found impermissible in Kalanke. Id., at para. 18.

\(^{149}\) Id., at para. 16.

\(^{150}\) Opinion of Advocate General Jacobs, Marschall v. Land Nordrhein-Westfalen, Case C-409/95, 1997 E.C.R. I-6363, at para. 7. This was the first time the term "structural discrimination" had been used in the Court to describe the problem positive action was designed to address.

\(^{151}\) Id., at para. 32.

\(^{152}\) Id.

\(^{153}\) Id.
Advocate General Jacobs argued further that the asserted distinction between the Bremen statute challenged in *Kalanke* and the Nordrhein-Westfalen law was more apparent than real. Jacobs contended that the national rule the Court had invalidated in *Kalanke* "was not in fact absolute and unconditional." The Advocate General pointed to language in the ECJ's own judgment in *Kalanke* noting the German Administrative Court's finding "that the rule had to be interpreted 'with the effect that, even if priority for promotion is to be given in principle to women, exceptions must be made in appropriate cases.' " Jacobs then conceded for argument's sake that an "exceptions clause" might in some circumstances make a given positive action program compatible with the equal treatment principle. Having granted that concession, however, he still denied that the Nordrhein-Westfalen exception would bring the statute within the safe harbor of the Directive. In its arguments to the Court, Nordrhein-Westfalen made much of the fact that its state legislature had deliberately crafted the challenged positive action law "in order to ensure sufficient flexibility and in particular to leave the administration scope for taking into account all sorts of reasons specific" to individual male candidates. The Advocate General noted that the contemplated grounds for departing from the "rule of priority" included "traditional secondary criteria of length of service and 'social reasons' " such as marital status, parental responsibilities, and the like.

The *Land* of North Rhine-Westphalia has indicated that the national rule at issue in this case is intended to displace the application in selection procedures of 'traditional secondary criteria' which it regards—no doubt correctly—as discriminatory. The proviso however appears to envisage that precisely those criteria may none the less be used where it is invoked, with the result that the post will be offered to the male candidate on the basis of criteria which it is accepted are discriminatory. If an absolute rule giving priority to women on the ground of their sex is unlawful, then a conditional rule which either gives priority to women on the ground of their sex or gives priority to men on the basis of admittedly discriminatory criteria must a fortiori be unlawful.

Seizing on the *Land's* admission that decisionmakers would in effect be allowed to continue the very practices the law was designed to counteract, Jacobs maintained that the permitted exception to the "rule of priority" was as much a violation of the equal treatment principle as the rule itself.

The Advocate General's Opinion appeared to clinch the argument that *Kalanke* had effectively settled the issue presented in *Marschall*. Surprisingly, however, the ECJ took the view that unlike the Bremen statute, the Nordrhein-Westfalen positive action policy was compatible with the relevant provisions of the Equal Treatment Directive. The basic terms of the Court's analysis were essentially the same as the preliminary ruling in *Kalanke*. The chief distinction

---

154 Id., at para. 28.
155 Id.
156 Id., at para. 35.
157 Id., at para. 8.
158 Id., at para. 36.
between the two judgments lies in the broader social vision of work and gender that underwrites the discussion of positive action in *Marschall*.

Most notable in this connection is the ECJ's greater willingness to attend to the "lived experience" of women in the workplace.

As the *Land* and several governments have pointed out, it appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding. 159

In *Kalanke*, the Court of Justice had also recognized the impact of "social attitudes, behaviour, and structures" on women's access to work. 160 However, in *Marschall*, these social facts are given greater accent and emphasis. The chief evidence of their influence can be seen in the "realist" elements of the Court's analysis. As in *Kalanke*, the *Marschall* Court notes that the Equal Treatment Directive explicitly authorizes measures which, though "discriminatory in appearance" are "in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life." 161 However, the *Marschall* decision goes farther than *Kalanke* to acknowledge that these "actual instances of inequality which may exist in the real world" may persist even in conditions of formal equality. 162 The *Marschall* Court in effect "pierces the veil" of formal equality it hid behind in *Kalanke*. Drawing on this "realist" understanding of the actual dynamics of gender inequality, the Court pointedly notes that "the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances." 163 It is this "realist" reorientation toward the equality principle which explains the ECJ's conclusion in *Marschall* that measures which "give a specific advantage to women with a view to improving their ability to compete on the labor market and to pursue a career on an equal footing with men" are not necessarily inconsistent with Articles 2(1) and 2(4) of the Equal Treatment Directive. 164 In *Kalanke*, the Court had gone out of its way to dissociate itself from the notion that the formal "equality of opportunity" guaranteed under the Directive might justify the direct pursuit or imposition of substantive "equality of representation." 165 In *Marschall*, the "equal representation" model of equality completely drops out of the Court's discussion of the Equal Treatment Directive. The Court neither affirms nor denies the relevance of the "equal representation"

---

162 Id., at para. 31.
163 Id., at para. 30.
164 Id., at para. 27.
norm: it simply ignores the concept altogether. Given the centrality of the argument against "equal representation" in Kalanke, the Marschall Court’s utter silence on this score is deafening. Put bluntly, it defies credibility to think that the Court of Justice did not know how radically its Marschall analysis diverged from the interpretation of the equality principle on which it had insisted in Kalanke.

In highlighting the more critical stance the Court of Justice seems to take toward the concept of formal equality, I do not mean to suggest that formalism played no role at all in the reasoning of the Marschall decision. To the contrary. One of the most fascinating aspects of the Marschall ruling from an American perspective is its uneasy combination of "realist" and "formalist" interpretations of the equality principle. On the one hand, the Court of Justice seems quite willing to accept the proposition that member states may enact gender-based positive action policies in spite of the Equal Treatment Directive’s command that "there shall be no discrimination whatsoever" on the basis of sex. In doing so, the Marschall Court implicitly endorses the norm of substantive, factual equality it had so emphatically rejected in Kalanke.

On the other hand, the Marschall judgment reflects the Court’s apparent need to declare its continued allegiance to the formalist claims of abstract individualism. The ECJ stressed that it would not countenance positive action programs that (to borrow language from the U.S. Supreme Court opinion in Johnson) “automatically exclude [men] from consideration.” In an effort to find a meaningful distinction between the Nordrhein-Westfalen positive action program and the Bremen state plan it had struck down in its Kalanke, the Court of Justice made much of the fact that the Nordrhein-Westfalen did not guarantee women a preference over equally qualified male candidates. On the Court’s account, the Marschall statute guaranteed all job candidates a formal and “objective assessment which will take account of all criteria specific to the individual.” Moreover, noted the Court, the Nordrhein-Westfalen program expressly permitted departures from the “rule of priority” where “reasons specific to an individual [male] candidate tilt[ed] the balance in his favor.” It

166 The Court’s silence seems all the more strange in light of Advocate General Jacobs’ pointed and repeated references in his opinion to the importance the ECJ had attached to the distinction between “equal opportunity” and “equality of representation” in Kalanke. See, e.g., Marschall, 1997 E.C.R. I-6363, at para. 21 (describing the Kalanke Court’s express disapproval of the idea that Article 2(4) permitted the substitution of equal representation for equal opportunity); id., at para. 25 (discussing the French and U.K. argument that the Nordrhein-Westfalen plan “seeks to impose equality rather than to promote equality” in violation of Kalanke); id., at para. 29 (directly quoting the passage from Kalanke in which the Court explained the difference between the two conceptions of equality); id., at para. 32 (stating his own conclusion that “the effect of the ruling in Kalanke is that any rule which goes beyond the promotion of equal opportunities by seeking to impose instead the desired result of equal representation is similarly outside and scope of Article 2(4) and hence contrary to the principle of equal treatment in Article 2(1) and in the present state of Community law, unlawful”).

167 Johnson, 480 U.S. at 638.


169 Id.
thus differed from the Kalanke plan, which, the Court argued, totally disregarded the rights of individuals. Relying on this legal fiction, the Court side-stepped the Advocate General's contention that this posited distinction between the two plans had no basis in fact. 170 Like the U.S. Supreme Court's similar pronouncements in Johnson, the ECJ's stubborn insistence that the Marschall plan protected the "individual rights" of male candidates seems merely gestural. Like its American counterpart, the European Court of Justice is finally unwilling or unable openly to declare its independence from the formalist constraints of the anti-discrimination principle. It is as though the ECJ could only start the journey "from the individual to the collective vision of equality" 171 by denying that it was moving at all.

VII. THE FUTURE OF EUROPEAN POSITIVE ACTION DISCOURSE

I have argued that the Marschall ruling marks the ECJ's first tentative steps toward a more substantive conception of equality. In traveling the distance from Kalanke to Marschall, the positive action discourse of the Court of Justice has proven to be notably more expansive than that of the U.S. Supreme Court. And yet, the European positive action decisions betray a decided ambivalence toward the claims of substantive equality. As a result, the broader social vision that underlies the ECJ's emergent critique of the anti-discrimination principle remains inchoate and incomplete. The Court's social imagination is "realist" enough to see that in the individual case, "merit" and "individual effort" do not guarantee a woman a "fair chance" in the workplace. That social vision is not yet "realist" enough to fully reckon with the deeper insight that the experience of individual women takes place in a world where the very idea of work is (in the words of one German female civil servant) "over-identified with men." 172 Having glimpsed the degree to which the "actual inequality" at issue in Marschall and Kalanke reflects the larger structural realities of the gendered workplace, the Court of Justice anxiously lowers the formalist screen of the anti-discrimination principle.

Does the Marschall decision mark the outer limits of the ECJ's engagement with the anti-subordination model and its group-grounded vision of equality? As we have seen, EU positive action discourse has thus far confined its consideration of substantive equality to issues of gender. However, recent developments suggest that the future of the substantive equality principle in the ECJ will likely be decided in a very different political context: the domain of race and ethnicity. 173 Toward the end of last year, the newly elected German

171 Id.
173 The European Commission has taken the position that the EC Treaty provides no basis for regulating racial discrimination by or within Member States. Dominic McColdrick, International Relations Law of the European Union 100 (1997) (citing Commission of the European Communities,
government announced its intention to reform the country's citizenship policy. Although the fate of the current proposals remains uncertain, some have already argued that the extension of citizenship to Germany's racial and ethnic minorities will require a concomitant extension of positive action beyond its present gender-based boundaries.\textsuperscript{174}

Racial and ethnic politics in Germany have long been driven by Ausländerfeindlichkeit, an almost visceral antipathy toward non-European foreigners.\textsuperscript{175} Given this state of affairs (which is by no means limited to Germany), the explicit introduction of race and ethnicity into European positive action policy may never find a political constituency in Germany. If it does, however, the Court of Justice will be faced with a hard choice. Will the ECJ forge a more robust conception of substantive equality than one finds in Marschall, or will European positive action discourse retreat even further into the formalist orthodoxies that have come to govern U.S. law? The answer to this question will depend on the Court's willingness to imagine the significance of positive action for a Europe that will soon be as transracial as it is transnational. One can only hope that the Court of Justice will rise to the challenge, since the prospects for multicultural citizenship in Europe may well determine the future legitimacy of the European Union itself.

\textsuperscript{174} See, e.g., Barbieri, supra note 122, at 167.

\textsuperscript{175} Id., at 33.

---

White Paper on European Social Policy—A Way Forward for the Union, COM (94) 333, final (July 1994), at para. 25. The EU's non-action on racial discrimination may be laid to the fact that a number of Member States continue vigorously to oppose any effort by the EU to "Europeanize" the field of race relations law. For a critical account of this "policy vacuum" and its implications for EU women's policy (particularly with respect to women of color) see Hoskyns, supra note 172, at 176-191 (1996).
A NEW E.R.A. OR A NEW ERA? AMENDMENT ADVOCACY AND THE RECONSTITUTION OF FEMINISM

Serena Mayeri

INTRODUCTION........................................................................................................... 1224

I. THREE ACCOUNTS OF ERA II'S PURPOSE AND SIGNIFICANCE ............................. 1229
   A. ERA II as Political Weapon ...................................................................... 1230
   B. ERA II as ERA I, Part II ............................................................................ 1236
   C. ERA II as the Dawn of a New Era ............................................................ 1237

II. REDEFINING "EQUALITY OF RIGHTS UNDER THE LAW"........................................ 1240
   A. The Legal Backdrop: A Decade of Change ............................................ 1240
   B. "Equality in Theory" or "Equality in Fact"?........................................... 1243
   C. "Too Much Baggage for the ERA to Carry": Private Conduct and the State
      Action Requirement .............................................................................. 1270
   E. The Dual Strategy Revisited ...................................................................... 1280

III. THE LEGACIES OF ERA II................................................................................. 1287
   A. "We Have to Have a Vote, Win or Lose": ERA II's Career as a Political
      Weapon .................................................................................................... 1287
   B. ERA II and the Reconstitution of Feminism .............................................. 1291

CONCLUSION.............................................................................................................. 1300

Assistant Professor of Law and History, University of Pennsylvania Law School. Earlier versions of this article benefited from feedback at the Penn/Chicago Legal History Consortium, Penn Law School Faculty Retreat, Columbia Law School Associates-in-Law Workshop, Boston University Law School's Elizabeth Battelle Clark speaker series, Cornell Junior Constitutional Law Scholars Workshop, Southern Methodist University Law School Citizenship Colloquium, the University of Akron School of Law's symposium on women's legal history, and the American Society for Legal History's annual meeting. For helpful comments and conversations, special thanks are also due to Anita Allen, Regina Austin, Mary Frances Berry, Stephen Burbank, Dorothy Sue Cobble, Cary Coglianese, Kristin Collins, Rhonda Copelon, Caroline Mala Corbin, Nancy Cott, Deborah Dinner, Ariela Dubler, Elizabeth Emens, Jill Fisch, Frank Goodman, Sarah Barringer Gordon, Michael Grossberg, Deborah Hellman, Olati Johnson, Laura Kalman, Seth Kreimer, Anne Kringel, Sylvia Law, Howard Lesnick, Bernadette Meyler, Trevor Morrison, Melissa Murray, William Novak, Jide Nzelihe, Rebecca Rix, Cristina Rodriguez, David Rudovsky, Theodore Ruger, Patricia Seith, Reva Siegel, Ilya Somin, Mary Spector, Susan Sturm, Thomas Sugrue, Karen Tani, Rose Cuison Villazor, Amy Wax, Tobias Wolff, and Mary Ziegler. I am also grateful to Alvin Dong and his colleagues in the Biddle Law Library, University of Pennsylvania for their expert research assistance, and to the staff of the Northwestern University Law Review for their editorial prowess.
INTRODUCTION

In March 2007, almost exactly a quarter-century after the first Equal Rights Amendment’s ratification failure, a bipartisan group of lawmakers reintroduced the rechristened but textually identical “Women’s Equality Amendment” in both houses of Congress. Politicians and pundits declared the initiative the first serious attempt to revive the amendment in decades, suggesting that unlike previous quiet, desultory efforts, advocates of equal rights meant business this time.1 The amendment’s reintroduction provoked reactions ranging from enthusiasm to derision to incredulity. Some welcomed the ERA’s revival as an opportunity to revisit unresolved questions of gender equality and justice.2 Opponents bemoaned the amendment as tediously redundant, shockingly radical, or both.3 Still others, including longtime proponents of women’s rights, questioned whether a renewed campaign for a controversial and arguably ill-defined constitutional amendment was the wisest allocation of resources and political capital.4 Commentators debated how an ERA would change existing law, how an increasingly conservative judiciary would interpret its text, and how the amendment effort would alter the political and partisan landscape.5

If these questions evoke a feeling of déjà vu, their eerie familiarity is no coincidence. The question of whether to continue to pursue feminist goals through a constitutional amendment despite the bitter ratification defeat of 1982 arose even before the first ERA’s demise became official. Congressional proponents resolved to reintroduce the ERA in 1983, and both chambers held extensive hearings before and after the House narrowly voted to reject “ERA II.” Early scholarly accounts of the ERA’s rise and fall largely viewed ERA II as a postscript to ERA I, if they discussed it at all. This Article examines ERA II as a distinct phenomenon, with a constitutional and political meaning quite different from that of ERA I.

The debate over ERA II occurred at a pivotal turning point in the history of legal feminism and of constitutional amendment advocacy. In dialogue with their opponents, women’s rights advocates grappled with difficult doctrinal dilemmas largely unaddressed in earlier congressional

---

debates over ERA I. They articulated a vision of "equality of rights under the law" that eschewed "equality in theory"—formal equality—and embraced "equality in fact," which dismantled "neutral" laws and practices that disadvantaged women. With ERA II, the proposed constitutional amendment enjoyed a new career as a partisan political weapon. Ultimately, feminists' ERA II experience convinced the movement's lawyers that amendment advocacy could not accomplish their reconfigured agenda. In reinventing the ERA, feminists took an important step toward transforming the legal aspirations and strategies of the women's movement and the very nature of constitutional change advocacy.

* * *

The Equal Rights Amendment's ratification deadline passed on June 30, 1982, with the amendment failing to win the required three-fourths majority of states. Postmortems from scholars and advocates poured in over the next several years, assessing the reasons for the ERA's defeat. More recently, many scholars have shifted their attention from dissecting the ERA's failure to measuring its stealthy success. Though there is considerable disagreement over how the transformation came about, constitutional law experts agree that feminists ultimately succeeded in achieving many, if not most, of their goals through litigation and legislation, despite the ERA's defeat. Assessing the merits of this claim is tricky, for at least two reasons. First, answering the question of how much of what the ERA would have done that was instead accomplished through other means assumes that we can know what the ERA would have done—how it would have been interpreted by courts; how it would have been implemented by Congress and the Executive Branch; how advocates would have extracted new meanings and new ramifications with regard to issues the amendment's earlier proponents

---

6 See infra Part II.B.
7 See, e.g., Mary Frances Berry, Why ERA Failed (1986); Janet K. Boles, The Politics of the Equal Rights Amendment (1979); Jane J. Mansbridge, Why We Lost the ERA (1986); Donald G. Mathews & Jane Sherron De Hart, Sex, Gender, and the Politics of ERA (1990); Gilbert Y. Steiner, Constitutional Inequality: The Political Fortunes of the Equal Rights Amendment (1985).
9 See, e.g., Ilya Somin, What Effect Would the Equal Rights Amendment Have if Enacted?, Volokh Conspiracy, Apr. 7, 2007, http://volokh.com/posts/1176163135.shtml ("As Northwestern University law professor Andrew Koppelman puts it, Phyllis Schlafly and other opponents [of the ERA] won the battle but lost the war: 'The ERA was defeated, but its rule against sex discrimination was incorporated into constitutional law anyway, by judicial interpretation of the 14th Amendment . . . . ' In fact, says Koppelman, 'it's hard to imagine it making any difference at all.'").
never contemplated; and how the answers to all of these questions would have changed over time. Second, the question of whether feminists gained by other means what they hoped to achieve through an ERA belies the fact that what they hoped to achieve was a moving target.

By the early 1980s, much of what feminists sought from the ERA diverged significantly from the preoccupations of proponents and opponents during the early-1970s creation of ERA I’s legislative history. To some degree, the ERA’s evolving meaning reflected feminists’ successes and failures under existing constitutional provisions. But it also revealed substantial change over time in what feminists hoped to achieve through an amendment: a constitutional response not only to intentional discrimination and laws that explicitly denied women opportunities, but also to the unintentional perpetuation of inequality through laws and policies that appeared neutral on their face—a conception of equality that included the right to affirmative action, remedies for disparate impact discrimination, and broader freedom from discrimination based on pregnancy.

The debate over ERA II provides an excellent case study in the creation of constitutional meaning through amendment advocacy. Even (especially) after a decade of bitter contention over the ERA, the amendment’s meaning—what it would do in the short and long term—was far from clear. Though the text of ERA II exactly replicated that of ERA I, the ratification battle had transformed the contest’s terrain, implicating issues barely contemplated in the original congressional debates. The initial ratification period had not proven conducive to a coordinated, internally consistent, and explicit account of the amendment’s legal ramifications. Instead, proponents often found themselves on the defensive, and decisionmaking was diffuse. In contrast, the reintroduction of the ERA and the emergence of sophisticated opposition to the amendment in Congress forced advocates to reexamine exactly what they wanted from the ERA and to refine their account of its impact on the law. The congressional hearings on ERA II prompted feminists to evaluate how far they had come, to assess how far they wished to go, and to clarify exactly how much of their redefined agenda the ERA could help them achieve.

Today, it is far from obvious how one should interpret ERA II in the larger context of constitutional amendment advocacy. It was even less self-evident in 1982 and 1983, when feminists, their allies, and their opponents surveyed the political and legal landscape in the wake of the defeat of ERA I. Part I of this Article offers three possible accounts of ERA II’s purpose and significance. Part I.A, which examines ERA II as a political weapon, suggests a role for amendment advocacy beyond the creation of constitu-

---

10 The text of the Equal Rights Amendment read as follows: "Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Section 2. 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."
tional meaning. While feminists primarily sought to alter women’s legal and constitutional status, their congressional allies were at least as eager to make political hay of the Reagan Administration’s less than enthusiastic embrace of women’s rights. Even if a successful constitutional amendment remained out of reach, these politicians calculated, forcing opponents to vote “no” on equal rights for women might boost the electoral fortunes of Democrats and moderate Republicans, or at least help to discredit the Rea­gan Administration in advance of its reelection campaign and undermine social conservatives’ apparent hold on the GOP. In the wake of the ERA’s defeat, women’s organizations publicly resolved to devote more energy and resources toward electing candidates who supported the ERA and other feminist positions, and to defeating those who did not. Reintroducing the ERA provided an opportunity to further this goal, highlighting not only how the preceding decade had transformed the amendment’s ideological and partisan valence, but also how the very enterprise of amendment advocacy had evolved into a weapon of political combat.

A second possible account of ERA II was as a relatively seamless continuation of the debate over ERA I. In this account, described in Part I.B, it made sense to stand by the amendment’s original legislative history as developed in the early 1970s, and to stress the abstract principle of equality rather than specific legal ramifications and doctrinal innovations. Despite broad agreement that ERA I fell short of promising the fulfillment of feminists’ substantive goals, for some proponents, particularly veterans of the first ERA campaign, reinventing the amendment’s meaning seemed politically futile and even counterproductive. Soon after the congressional hearings began, though, it became clear that proponents could not avoid probing questions about ERA II’s theoretical and doctrinal particularities. Like it or not, the ERA II hearings compelled feminists to rethink their legal priorities. Despite their ambivalence about the political consequences, feminists seized this opportunity to redefine the amendment’s constitutional meaning.

In the end, feminists created a new constitutional meaning for ERA II in dialogue with their opponents. Like the “de facto ERA” Reva Siegel has identified as the product of give-and-take between friends and foes of the amendment during the ratification period, ERA II as defined by its defenders incorporated some of its opponents’ assumptions as well as its proponents’ aspirations. Unlike during the ratification period, though, when movement strategy was diffuse and decentralized, the process of constructing a legislative history for the new ERA was relatively deliberate and coordinated. This focusing of the collective mind proved both an advantage and a limitation for feminists. On the one hand, they presented a relatively disciplined, united front in favor of positions that would demonstrably have advanced the law beyond its current boundaries. On the other, political considerations still constrained their ability to implement many of the goals.

11 Siegel, supra note 8, at 1324.
to which they privately—and sometimes publicly—aspired, and determined questioning from opponents forced the development of limiting principles to rein in revolutionary doctrinal changes. Proponents’ positions on ERA II’s legal consequences almost invariably occupied a middle ground between feminists’ highest aspirations in 1983 and the meaning of ERA I as articulated in the 1971–72 legislative history.

Part II details the process by which proponents attempted to develop a new legislative history for the ERA. Part II.A briefly describes how the legal landscape of sex equality had changed since congressional passage of ERA I. Part II.B focuses on the controversy over the proper standard of judicial review under the ERA and the debate over how to address inequality that persisted despite the removal of most explicit sex-based classifications from the books. Part II.C looks at the struggle over how ERA II would affect private entities, in light of proponents’ attempts to overcome the structures of an increasingly conservative state action jurisprudence and opponents’ concerns about incursions on the autonomy of private—and especially religious—institions. Part II.D examines the formidable obstacles in the way of feminists’ profound desire to transcend the strategic separation of reproductive rights from the ERA without spelling political doom for both causes. Part II.E addresses the substantive and strategic interactions between ERA II and other vehicles of constitutional change.

The final Part considers the legacies of ERA II. Part III.A revisits the frame of ERA II as political weapon, introduced in Part I.A. Hoping to create momentum for passage—or at least to embarrass conservatives—proponents forced an up-or-down vote on the amendment in the House, which they narrowly lost. ERA supporters faced criticism from both friend and foe for this parliamentary maneuver, but for a brief time it seemed as if the amendment’s secondary role as a partisan battering ram might help Democrats and moderate Republicans to exploit the “gender gap.” Despite a short-lived boost from the first female vice-presidential candidacy, however, the ERA’s career as a political weapon appeared over.

Nevertheless, the ERA II debate left important legacies for legal feminism and for constitutional amendment advocacy, as described in Part III.B. Arguments honed during the hearings became important bases for a new feminist constitutional agenda, particularly in the area of disparate impact analysis. Just as importantly, the ERA II controversy drove home the shortcomings of constitutional amendment as a means of implementing legal feminist goals. And the ERA II debate provides an important set of sources for scholars seeking to understand what changed—and what remained impervious to change—during one of the most crucial decades in the history of American women’s legal status.

As the Article’s conclusion suggests, the story of ERA II develops several themes salient to the literature on constitutional change and social
movement advocacy. Most basically, focusing on the (re)introduction of a proposed constitutional amendment and the campaign for congressional passage highlights the importance of venues other than courts and processes other than litigation to the creation and contestation of constitutional meaning. The ERA II debate also underscores the significance of amendment advocacy even in instances where a proposed Article V amendment is considered and rejected by Congress. In keeping with the emerging literature on constitutional culture and “democratic constitutionalism,” the ERA II story emphasizes the extent to which the creation of constitutional meaning occurs through a dialogic process, forcing combatants to consider and even incorporate the arguments of their opponents into both substantive constitutional interpretation and strategic calculations. The ERA II experience suggests that amendment advocacy may serve as a weapon of partisan political combat, as well as a vehicle for rethinking a social movement’s legal agenda. Finally, ERA II’s role at a transitional moment in the history of legal feminism suggests that what appears to be devastating defeat may simultaneously liberate a movement’s constitutional imagination.

I. THREE ACCOUNTS OF ERA II’S PURPOSE AND SIGNIFICANCE

After a bruising, decade-long ratification battle, the women’s movement had reached a crossroads. Back in 1972, when the ERA first passed Congress, ratification had seemed, if not assured, altogether likely. When House leaders reintroduced the ERA to the 98th Congress in January 1983, feminist leaders knew all too well the magnitude of the obstacles to passage and ratification, and they confronted the prospect of a rematch with considerable ambivalence. But like it or not, Congress was considering the ERA once again. Faced with the alternative of allowing the amendment’s foes to define its meaning, women’s organizations launched a concerted effort to coordinate testimony and advocacy for “ERA II.” But before I examine that effort in detail in Part II, in this Part I explore various possible accounts of what proponents were doing, or believed themselves to be doing, when they launched and executed their campaign for ERA II.

12 For examples of this burgeoning field, see sources cited in Siegel, supra note 8, at 1328 n.13.
13 A voluminous and growing literature critiques “juricentric” accounts of constitutional meaning. My aim in this Article is primarily descriptive: to uncover the rich constitutional contestation that occurs in the attempted creation of one proposed constitutional amendment’s legislative history.
15 Siegel, supra note 8.
16 I have explored elsewhere the mutual influence of constitutional change advocacy and internal social movement dynamics. See Serena Mayeri, Constitutional Choices: Legal Feminism and the Historical Dynamics of Change, 92 CAL. L. REV. 755 (2004).
17 BERRY, supra note 7, at 101.
A. ERA II as Political Weapon

For some ERA proponents, most prominently the amendment's congressional sponsors, ERA II’s primary function was to serve as a political battering ram to attack the Reagan Administration and the conservative wing of the Republican Party. For many feminists, this function, although not their first priority, provided an important secondary benefit. After all, many women's rights leaders realized that the ratification failure could be reversed only through persuading or defeating ERA critics and antiabortion advocates in Congress and the state legislatures. For those with Democratic leanings, Reagan-bashing was comfortable and dovetailed with a general political outlook. For Republican feminists, the President's opposition to the ERA symbolized a larger drift to the social and cultural right that dismayed and demoralized the party's liberals and moderates.

When Congress considered the original ERA in 1971 and 1972, the amendment had no particular partisan pedigree, and even its ideological valence remained ambiguous. Some of the amendment's most ardent supporters had been conservatives like Senator Strom Thurmond, Dixiecrat-turned-Republican from South Carolina, while there was some Democratic opposition to the amendment because of the threat it posed to protective labor legislation. Senator Edward M. Kennedy (D-MA) was still a recent ERA convert in the early 1970s, as were many in the labor movement. The amendment had the nominal support of the Nixon Administration and prominent women in the Administration were avid supporters. Anti-ERA witnesses included Paul Freund, a Harvard law professor with impeccable civil rights credentials.

Political developments over the next dozen years transformed the ERA into a potent symbol of partisan and ideological polarization. The Reagan Administration and the GOP opposed the amendment outright, while Democratic support for the ERA had become an article of faith, at least at the national level. Indeed, debates over gender roles and over the desirability

19 On labor opposition to the ERA during the pre-1970s period, see, for example, DOROTHY SUE COBBLE, THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA (2004); CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945–1968 (1988).
of sex equality were in no small part responsible for an ongoing partisan realignment that placed cultural issues at the center of political discourse and marginalized moderate voices within the Republican Party. Pundits credited the newly powerful and visible “Religious Right” with Reagan’s victory in the 1980 election, and few individuals could take more credit for mobilizing grassroots support for religious conservative political activism—especially among Christian women—than the architect of the STOP ERA movement, Phyllis Schlafly.22

The 1980 election produced another new, much-discussed political phenomenon—the electoral “gender gap.” After decades of voting for Democrats and Republicans in proportions virtually identical to their male counterparts, women were turning away from Reagan and the GOP in unprecedented numbers.23 The gender gap, commentators would later conclude, stemmed not so much from differences of opinion on issues like the ERA and abortion rights, but rather from concerns about Reagan’s aggressive foreign policy, his prioritization of defense over domestic spending, and deep cuts in social programs amidst recession and growing economic inequality. But although later scholarly assessments would undermine the theory that Reagan’s opposition to the ERA contributed significantly to the gender gap, contemporaneous media accounts gave the idea considerable currency.24 Once in office, the Reagan Administration also came under fire from civil rights and women’s groups outraged at the Executive Branch’s failure to vigorously enforce antidiscrimination laws. By 1982, Republican feminists and moderates were openly breaking with the Administration and warning that the party risked permanently losing a crucial voting bloc if it continued to antagonize female voters.25

Women’s organizations like the National Organization for Women (NOW) recognized the gender gap as a political opportunity, or at least a silver lining on the rapidly gathering clouds of conservatism.26 In the years

22 For more on Schlafly, see DONALD CRITCHLOW, A WOMAN’S CRUSADE: PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM (2006); CAROL FELSENTHAL, SWEETHEART OF THE SILENT MAJORITY (1981); MATHEWS & DE HART, supra note 7.

26 Mansbridge gives NOW the lion’s share of the credit for perpetuating the notion that Reagan’s opposition to the ERA caused the gender gap. See Mansbridge, supra note 24, at 166, 171.
before the ERA died its official death, women's groups mounted campaigns to defeat anti-ERA state legislators. In some instances, female candidates, galvanized by the uphill battle for ratification, ran for local and state office on a pro-ERA platform. When ratification failure appeared certain, ERA supporters vowed to reintroduce the amendment and hold legislators accountable for their votes in the 1982 federal and state elections. The national press regularly ran articles emphasizing the electoral gender gap and its increasing importance to feminists' political strategy. Even—perhaps especially—while in its death throes, the ERA proved a lucrative fundraising vehicle for organizations like NOW. Feminist leaders frankly acknowledged that the large sums raised in the final months of the ratification campaign stemmed in large part from women's growing frustration with the Reagan Administration. Feminist leaders argued that "[w]ith the backing of the proved fund-raising capability, the sharp criticisms of Mr. Reagan by women could be easily harnessed to have a major impact on the November elections." Columnist Ellen Goodman predicted in early June:

[E]ven if it fails, the amendment and the activism behind it aren't going to disappear in a puff of smoke . . . . These women have learned how the system works and how it doesn't work. In politics, the slogan is: Don't get mad, get even. In ERA politics, they know how to do both.

To be sure, feminists were divided about the level of energy and resources they should devote to renewing the battle for an ERA, as opposed to pursuing their goals through other means. National Abortion Rights Action League director Nanette Falkenberg said on the eve of the ratification deadline, "There is a real raging debate . . . over whether the emphasis continues to go toward ratifying the ERA or whether the focus of activities should shift to abortion and other issues." At the local level, many ERA activists planned to "shift their energies, for the present, away from a sec-

---

31 Jane Perlez, NOW's Funds Soar Suggesting Extent of Women's Power, N.Y. TIMES, May 20, 1982, at Cl.
32 Id. ("Mrs. Smeal and other feminist leaders believe that the money coming into NOW for the ratification drive is motivated in part by the far higher negative rating women give President Reagan than men give him.").
33 Id.
ond ratification campaign toward other fronts."36 On the other hand, plans to reintroduce the ERA proceeded apace. The New York Times predicted that "there will be an E.R.A. II, not because the male and female supporters of equal rights are diehards or sore losers but because it is necessary."37 Goodman forecasted that feminists would continue to push for an ERA, but that it would take at least another decade to achieve success.38

Over the weeks and months following the first ERA’s expiration, a new approach took shape: feminists would continue to support the amendment, but would devote more of their political resources and energies toward financing candidates who would stand up for feminist positions on all issues, including the ERA, and toward defeating those who opposed the amendment, abortion rights, and other issues of concern to feminists. When ERA supporters officially conceded defeat six days before the ratification deadline, NOW President Eleanor Smeal announced at a news conference that the organization’s primary goal would be to “chang[e] the composition of Congress as well as the state legislatures to include a significantly larger proportion of women and of men who are genuinely feminists.”39 NOW would devote its fundraising and public relations apparatus to electoral politics. Electing more women and sympathetic men, feminists hoped, would both stimulate a new ERA ratification drive and promote better policies in areas such as child care, domestic violence, economic equality, and reproductive rights. Smeal foresaw the creation of “an independent third political force that will represent women’s interests.”40 She announced in August 1982 that the organization would mark the anniversary of the Nineteenth Amendment with a $3 million fundraising drive to back candidates who supported the ERA.41

Many Democrats and some moderate Republicans proved eager to embrace the new ERA. For members with sympathetic constituencies, signing on as a cosponsor was a costless way to curry favor with women’s groups, now a force to be reckoned with in American politics, and served as a welcome means of embarrassing the Reagan Administration. Two weeks after the first ERA’s defeat, more than two hundred senators and representatives reintroduced the amendment, as House Speaker Thomas P. “Tip” O’Neill (D-MA) and Senator Kennedy trumpeted their commitment to equality be-

---

40 Lublin, supra note 35.
fore a crowd of several hundred in front of the Capitol. Moderate Senator Bob Packwood (R-OR) predicted that his party would lose several House seats in the upcoming election and eventually “go out of existence” if the GOP continued to “write off 90 percent of minorities and 50 percent of women.”

Despite some private ambivalence about the wisdom of reintroducing the ERA, feminist lawyers publicly reaffirmed the need for a new amendment. In a lengthy and detailed op-ed published in the Los Angeles Times in mid-July, NOW Legal Defense and Education Fund Legal Director Phyllis Segal called the ERA “essential” and declared, “The question is not ‘whether’ the ERA will become part of the Constitution, but ‘when.’” A supportive editorial ran the next day, opining that “[t]he slate is clean. The backers of the equal rights amendment are starting over. This time around, they must define the issues themselves . . . .” Despite her private misgivings, NOW President Judy Goldsmith enthused, “It’s like the classic experience when you say, ‘[i]f only I could do that over again and do it right.’ We have that chance.”

Of course, feminists and liberal lawmakers were hardly the only potential beneficiaries of the ERA’s political fallout. ERA I had played a significant role in mobilizing a previously underappreciated political constituency—the conservative Christian women who flocked in large

---

43 Id.
45 Editorial, “We Are All Equal, That Is All”, L.A. TIMES, July 19, 1982, at C4. Mixed results in the 1982 elections did not deter those who would link the ERA to the electoral gender gap. Indeed, NOW President Judy Goldsmith attributed NOW’s renewed push for ERA II to feminists’ “extraordinarily successful” efforts in the “Remember in November” campaign, an initiative to remind voters of the positions their legislators had taken on the ERA and encourage them to vote accordingly. Letter from Judy Goldsmith, President, NOW, to NOW Activists (Jan. 1983) (on file with NOW Papers, Schlesinger Library, Harvard University, Box 192, Folder 30). “The groundswell of support [in Congress] for ERA re-introduction is unmistakably a tribute to our political effectiveness and to the emergence of women as a political force that must be reckoned with,” Goldsmith told supporters in January 1983. Id. at 1; see also Memorandum from Mary Jean Collins to Goldsmith, Timmer, Webb, and Chapman, Reintroduction of the ERA 2 (Jan. 3, 1983) (on file with NOW Papers, Schlesinger Library, Radcliffe Institute, Harvard University, Box 197, Folder 7) (“As you know our public position has been cautious on passage this year and to orient our strategy toward the 1984 elections. It appears that momentum is being created in Congress because of the 1984 elections and because Democrats are anxious to retain the support of women . . . . Because of the clear positive support we are responding positively in the press to the reality of reintroduction. The 1982 elections showed we remembered in November and that women’s political power and candidates’ positions on ERA will be an issue in November 1984 and other elections prior to that one.”). As the 98th Congress began its first session that same month, the Los Angeles Times editorialized that the second ERA campaign “may be just as difficult as the first, but this time around the amendment’s backers are organized and have proved they can punish their opponents at the polls.” Editorial, ERA: Those Who Are Wrong, L.A. TIMES, Jan. 5, 1983, at C4.
numbers to Phyllis Schlafly’s STOP ERA movement. Threatened by feminism’s assault on traditional gender roles and promotion of reproductive rights, female workforce participation, and sexual freedom, these women adeptly adopted the tactics of their opponents—political organizing, direct action, lobbying, public speaking, and direct mailing. Schlafly and her followers helped to foster the rise of grassroots conservatism within the Republican Party.\(^47\) Conservative activists publicly professed disgust and disbelief at the amendment’s reintroduction, though they could not resist an additional opportunity to paint their opponents as radicals bent on destroying the traditional family, forcing women into military service, providing abortion on demand, and promoting homosexuality.\(^48\) GOP insiders reported that many Republican senators were loath to be forced to take a position on ERA II.\(^49\)

However, conservatives in Congress were not without a stake in the amendment’s reintroduction. At the very least, Senator Orrin Hatch (R-UT), the chairman of the Judiciary Committee’s Subcommittee on the Constitution, apparently hoped that holding hearings would “make [the ERA] controversial so senators feel the heat.”\(^50\) Indeed, ERA II arguably provided Hatch with an opportunity to lend legitimacy and legal sophistication to an opposition movement often accused of hysteria, duplicity, and willful misunderstanding of the law. If he could interrogate proponents about the specific ramifications of the amendment in a calm, rational manner, their real agenda would be exposed without so much as a single reference to murdered babies or lesbian conspiracies.

Thus, political combat was one frame within which participants in the ERA II debate viewed their support or opposition. Of course, that frame had very different ramifications for different political actors. For liberal politicians, supporting the amendment was a relatively costless way of shoring up support among an increasingly important constituency and, moreover, of embarrassing the Reagan Administration and the right wing of the Republican Party in advance of the 1984 elections. For moderates within the GOP, support for the ERA was a means of asserting independence from a party that increasingly marginalized centrists. For feminist activists, the amendment could serve as a device to smoke out opponents of feminism and subject them to retribution at the polls, or at the very least, to raise

\(^{47}\) See CRITCHLOW, supra note 22.

\(^{48}\) See, e.g., Letter from Jean E. Doyle, National Right to Life Committee (Oct. 27, 1983) (on file with NOW Papers, Schlesinger Library, Radcliffe Institute, Harvard University, Box 191, Folder 1); Letter from Jerry Falwell to Jennie Thompson (Mar. 8, 1983) (on file with NOW Papers, Schlesinger Library, Radcliffe Institute, Harvard University, Box 175, Folder 14). When President Reagan consulted with Schlafly in March 1983 to discuss possible approaches to the ERA, she urged him to focus on other constitutional priorities, like the human life, school prayer, and balanced budget amendments. George Archibald, Hatch to Defy Right on Airing ERA, WASH. TIMES, Apr. 28, 1983, at 3A.

\(^{49}\) Archibald, supra note 48.

\(^{50}\) Id.
money for sympathetic candidates and causes. For conservatives, the ERA's reintroduction was a potentially dangerous distraction, but also an opportunity to showcase their side's legal sophistication and highlight the weaknesses of proponents' arguments.

B. ERA II as ERA I, Part II

Given the temporal continuity of the first ERA ratification campaign and the amendment's immediate reintroduction without textual alteration, it is hardly surprising that many feminists—and the scholars who wrote the first wave of ERA histories—initially saw the campaign for ERA II as merely an extension of the debate over ERA I. References to the inevitability of a decade-long ratification campaign even in the event of successful congressional passage made ERA II seem more like a slightly nightmarish rerun than a carefully updated remake. There was considerable continuity between the two debates in that many of the issues that were front and center with respect to ERA II had arisen during the ERA I ratification campaign, and in that sense were not new. Rather than reassessing the ERA's meaning in great and reflective detail, it made sense to many proponents to stick with their preratification stance—focusing on the principle of equality and referring skeptics to the original 1971–72 legislative history when pressed for details.

A number of factors weighed in favor of a strategy characterizing ERA II in the abstract, as an important symbolic advance that would have significant but not revolutionary effects on women's legal status. If ERA supporters were to succeed in winning congressional passage of the amendment for a second time, it would likely not be through changing legislative minds about the substance of the amendment, but rather by convincing members of Congress that it was in their political interest to support ERA II—or in their political disinterest to oppose it.

Moreover, the ratification struggle had suggested to proponents that the more they could characterize the ERA as a matter of high principle—of equality and justice in the abstract—the better. Public opinion polls indicated that most Americans supported "equality" in these broad terms, but inevitably support softened when specific applications of the equality principle surfaced, or opponents had the opportunity to characterize the amendment's particular projected effects.51

Reliance on equality as an abstract principle also made sense as a long-term strategic matter. Given that courts were growing increasingly conservative in their interpretations of the Equal Protection Clause,52 the ERA might meet a similar fate, at least in the short run. But if feminists could

51 On the ERA and public opinion, see Serena Mayeri et al., Gender Equality, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily & Jack Citrin eds., 2008).
52 See, e.g., cases cited infra notes 73–76.
achieve greater electoral success and more progressive judicial appointments, a general guarantee of equality might be more susceptible to expansive interpretation later on.

Purely pragmatic considerations also supported the characterization of ERA II as a replica of ERA I. Simply put, if ERA I couldn’t win ratification, there was little reason to believe that a more ambitious version of the amendment would—especially in an increasingly conservative political climate. Further, part of the reason for refusing to give up the ERA ghost was a fear that the amendment’s failure would be interpreted as a national rejection of the equality principle. If a large part of the ERA’s continuing relevance was as a symbolic affirmation of sex equality and a rejection of the antifeminism the amendment helped to foment, then seeing ERA II as identical to ERA I made sense.

Finally, admitting that the ERA would have profound effects on the law and on women’s status in American society belied the assurances proponents had grown accustomed to offering—that the amendment would have no effect on abortion, on the rights of homosexual persons, on family structure, and so forth. The “superfluity problem” would not go away—proponents had to proclaim the continuing need for an ERA despite advances under the Equal Protection Clause and through legislation.53 Creating new meanings for ERA II would obviate this problem, but at the possibly fatal price of admitting that proponents wanted more than they had acknowledged seeking.

All of these factors militated in favor of resting ERA II on ERA I’s original legislative history, enshrined in the 1971 Yale Law Journal article coauthored by Thomas Emerson and several feminist law students (the Yale ERA Article).54 In this view, ERA II provided a second bite at the ratification apple and nothing more.

C. ERA II as the Dawn of a New Era

A third way of framing the debate over ERA II was to view it as an opportunity to reassess the feminist legal agenda and to rethink the amendment’s constitutional meaning. This perspective embodied an acute recognition of how much had changed—legally as well as politically—since Congress had first considered the ERA.55 Feminists began strategizing about how to handle these changes almost immediately after the ERA’s reintroduction, but it was the congressional hearings themselves that forced proponents to redefine the specific legal ramifications of their amendment and thereby begin to retool a post-ERA feminist agenda.

53 See Mayeri, supra note 16, at 821; Siegel, supra note 8, at 1403–04.
54 Barbara A. Brown et al., The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 YALE L.J. 871 (1971) [hereinafter Yale ERA Article].
55 I detail these changes infra at Part II.A.
Many feminists were understandably reluctant to wade back into the ERA fight. But once Congress began its hearings, ERA opponents accused the amendment’s supporters of evading the true legal ramifications of the amendment and forced them to provide detailed assessments of the amendment’s projected legal impact. What exactly would the judicial standard of review be under an ERA? Precisely which laws would fail to survive judicial scrutiny? What was the true meaning of “equal rights under the law”? To some degree, ERA proponents had faced these questions during the ratification debates, but the context was new—advocates now had the opportunity to rewrite the ERA’s legislative history in light of a decade of legal and social change. Though they steadfastly maintained that an ERA was just as necessary as it had been ten years earlier, feminists recognized that they faced a transformed legal and political landscape that required them to re-examine the assumptions, elisions, and compromises of the 1970s.

When ERA opponents demanded specific answers to specific questions about the ERA’s legal meaning, feminist organizations were compelled to respond. This process forced feminists—and feminist lawyers in particular—to rethink what they wanted from the amendment, and from congressional consideration of the ERA. The reintroduction of the ERA provided a focal point for feminist lawyers to strategize together—to take a cold, hard look at the legal landscape, assess their options, and infuse the amendment with new legal and political content. After a decade of asking what they could do for the ERA, it was time for feminists to ask what the ERA could do for them.

In attempting to create a new legislative history for the ERA, proponents of the amendment were addressing multiple audiences. Most immediately, they responded to queries from skeptical or even hostile legislators like Senator Orrin Hatch, whose detailed questions were designed to highlight ambiguities that opponents warned were an invitation to judicial interpretation run amok.56 They also addressed pro-ERA legislators, many of whom likely would have preferred to keep the debate at a high level of generality in order to reap maximum political gain and avoid grappling with the difficult doctrinal details.57 A third important audience was internal: feminist lawyers and legal activists frustrated by ERA I’s defeat and by the compromises that the ratification effort had required. Though feminists did not necessarily agree on strategy or tactics, many came to see the creation of a new legislative history as an opportunity, perhaps even an imperative, to reassess their constitutional agenda. By 1982, the Yale ERA Article’s exposition of the amendment’s meaning seemed outdated in its emphasis, if

---

56 This skepticism was nothing new, of course; Phyllis Schlafly and opponents of ERA I had similarly expressed scorn for the notion that legislative history would constrain judicial interpretation of the ERA. See Siegel, supra note 8, at 1394 (“As a literate member of her constitutional culture, Schlafly did not trust legislative history as a constraint on the ERA’s adjudicated meaning . . . .”).

57 See infra Part II.B.1.
not its content. Feminists who wished for a more expansive ERA II—or were forced to clarify the amendment’s meaning by determined questioning from skeptics—could not avoid reconstructing its legislative history.

Finally, the attempted creation of a new legislative history for the amendment ultimately anticipated a judicial audience. The legislative history feminists tried to create for ERA II contemplated that courts, when called upon to interpret the ERA in future cases, would look to the debates and legislative reports they hoped Congress would eventually produce. During the debate over ERA I, the Yale ERA Article was widely viewed as the definitive exposition of the amendment’s projected impact. Although the ERA’s opponents exploited fears that courts would not be constrained by the amendment’s legislative history, most of the disputants assumed that legislative history would play some role in defining the ERA’s scope and application to particular problems. If nothing else, persistent skepticism from opponents about the courts’ likely fidelity to legislative history virtually compelled feminists to provide repeated reassurances that legislative history would matter.

On this third view, then, the reintroduction of the ERA offered feminists more than a second bite at the ratification apple; it offered them a chance to redefine the amendment’s meaning, and feminists seized this opportunity. They engaged in lively debates over how the amendment could improve women’s legal status given the sweeping and multivalent changes of the 1970s. However, as they grappled with the questions presented by pro- and anti-ERA legislators and with strategic disagreements within their own ranks, feminists refined and sometimes scaled back their constitutional aspirations. Thanks to the probing if sometimes disingenuous questions of ERA skeptics and supporters, feminists were compelled to think carefully about doctrinal intricacies they had preferred to leave vague during the ratification period. In the end, the legal meaning of ERA II was the evolving product of a series of compromises. Those compromises reflected external pressures from ERA opponents and legislators, as well as internal disagreements about how much a constitutional amendment could accomplish.

58 As William Eskridge put it, “Both legislative history and constitutional history are strategic: players make statements with an eye on how other people will respond to them. In this century, legislative history has become strategic in another way: players make statements with an eye on how judges will construe their statutes.” William N. Eskridge, Jr., Should the Supreme Court Read The Federalist but Not Statutory Legislative History?, 66 GEO. WASH. L. REV. 1301, 1302-03 (1998).

59 Mansbridge questions the accuracy of this assumption. See Mansbridge, supra note 24, at 250–52.

60 For a contemporaneous account of how the Supreme Court treated legislative history in the context of statutory interpretation in the early 1980s, see Patricia M. Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 IOWA L. REV. 195, 195 (1983) (“The Supreme Court increasingly is using legislative history in construing and applying federal statutes.”). During this period, constitutional scholars and government officials were also engaging in an increasingly heated debate over “originalism” in constitutional interpretation. See LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 132–63 (1996).
and about the role that the ERA should play in women's rights advocacy after the ratification failure.

II. REDEFINING "EQUALITY OF RIGHTS UNDER THE LAW"

This Part recounts how feminists created a new constitutional meaning for the ERA through combative dialogue with their opponents. It quickly became clear that opponents would not allow feminists to promote the ERA as an abstract guarantee of equality, but rather would force them to account for the amendment's concrete effects on law and jurisprudence. Nevertheless, feminists struggled with competing impulses as they contemplated what kind of legislative history to create for ERA II. One possibility was to continue to emphasize equality as an abstract principle, and when pressed for details, stick with the positions taken in the first round of congressional deliberations in 1971 and 1972, the option suggested above by Part I.B. This position did not reflect satisfaction with the original legislative history, but rather a belief that the ERA was not a capacious enough receptacle for feminists' legal and constitutional aspirations. In other words, this was a conservative position not on the merits, but on the strategic questions proponents faced. The competing impulse, suggested by Part I.C, came from a kind of ratification fatigue—a weariness of the endless compromises entailed by amendment advocacy and an eagerness to move beyond the constraints imposed by the debate over ERA I. According to this view, drawing artificial lines between abortion and constitutional sex equality, for example, was counterproductive and ultimately injurious to the causes of reproductive rights and feminism. Focusing on the harm of explicit sex-based classifications made little sense in a world where most of these distinctions had been wiped off the books and yet sex-based inequality persisted. Ultimately, a new constitutional meaning for ERA II emerged out of these warring impulses.

A. The Legal Backdrop: A Decade of Change

Much had changed since the debates over congressional passage of the ERA in 1971 and 1972. At the federal level, feminist lawyers had persuaded the Supreme Court to scrutinize and invalidate many sex discriminatory laws.61 Statutes like Title VII and the Pregnancy Discrimination Act of 1978 provided the basis for lawsuits against private as well as public employers who discriminated on the basis of sex. Title IX forbade many forms of sex discrimination in education. At the state level, an examination of laws and policies that disadvantaged women was well under way, sometimes compelled by state constitutional changes—most prominently, state

---

ERAs. The numbers of women pursuing traditionally male occupations, including law, medicine, and even military service, increased steadily. As scholars of the ERA's failure recognize, these victories made arguing for the amendment more difficult in the latter years of the ratification process. Changes in the law—both statutory and judge-made—between 1972 and 1982 removed many of the sex-based legal distinctions that the ERA originally was designed to vanquish. Political scientist Jane Mansbridge argued just a few years later that by the time the ERA officially expired, the amendment's direct, short-term impact probably would have been limited. The reigning consensus within the legal academy today is that equal protection jurisprudence more or less incorporated ERA I's precepts, and this interpretation earned now-Justice Ruth Bader Ginsburg's blessing in the late 1990s.

To say that by 1982 feminists had achieved through other means much of what the ERA was designed to accomplish is not to assert that feminists were satisfied with the legal changes they had won, however—far from it. In fact, the developments of the 1970s and early 1980s had themselves transformed the meaning of equality for advocates concerned with women's legal status. In the first hearings on the amendment in 1971 and 1972, explicit sex-based classifications that limited women's ability to break out of traditional roles topped women's rights advocates' list of grievances. Now the crucial difference an ERA could make concerned the treatment of sex-neutral laws that disproportionately disadvantaged women. In 1971 and 1972, the Supreme Court had only just begun to reconsider its traditionally deferential rational basis standard for reviewing sex-based classifications; by the early 1980s, the Court had struck down many sex-specific laws and established a more rigorous standard of review: intermediate

---

64 BERRY, supra note 7, at 99–100; MANSBRIDGE, supra note 7, at 45–59.
65 MANSBRIDGE, supra note 7, at 141–43.
66 Siegel, supra note 8, at 1334.
67 See, e.g., Yale ERA Article, supra note 54, at 873 ("Our legal structure will continue to support and command an inferior status for women so long as it permits any differentiation in legal treatment on the basis of sex.").
68 The Yale ERA Article did recognize, in passing, the possibility that sex-neutral "functional" classifications "may in practice fall more heavily on one sex than the other." Id. at 898. After observing that the courts had confronted similar problems in the areas of racial and religious discrimination, the authors suggested that "[p]rotection against indirect, covert or unconscious sex discrimination is essential to supplement the absolute ban on explicit sex classification of the Equal Rights Amendment.... The courts will have to maintain a strict scrutiny of such classifications if the guarantees of the Amendment are to be effectively secured." Id. at 900.
69 See, e.g., cases cited supra note 61.
scrutiny. Whereas the ERA's effect on affirmative action had not been a prominent concern in the early 1970s, heated controversies over race-based remedies and the nebulous constitutional status of sex-based affirmative action increased the issue's salience. Abortion had played only a minor role in the first set of hearings; however, a decade after Roe v. Wade, it was a primary preoccupation of American politics. In the early 1970s, predictions that an ERA would lead to same-sex marriage could be dismissed as absurd; by 1983 they no longer seemed quite so outlandish.

At the same time that they had succeeded in eliminating many of the overtly sex discriminatory laws that had been the original targets of ERA I, feminists' success had certain limitations. Most prominently, the Supreme Court had declared that discrimination based on pregnancy did not necessarily constitute discrimination based on sex in violation of the equal protection guarantee; that the Equal Protection Clause did not require that women and men be treated equally with respect to draft registration or statutory rape laws; that a strong showing of discriminatory intent was necessary to establish an equal protection violation even if a law exerted a dramatically disproportionate impact on women; and that federal and state governments could deny funding for abortion services without running afoul of the Constitution.

As a practical matter, the changes feminists did achieve meant that the overtly sex-based legal distinctions that remained on the books were often the most entrenched and emotion-laden—restrictions on women's participation in military service, including the exclusion of women from the draft and from combat; laws that defined marriage as a union between a man and a woman; and certain forms of sex separation, such as single-sex athletic teams, sex education classes, prisons, dormitories, and restrooms. As historians of the ERA ratification controversy have explicated, these issues played starring roles in the playbooks of ERA opponents. With the most frightening specters of androgyny and sexual license looming, and many—though certainly not all—of the ERA's original targets vanquished, making

---

71 The Yale ERA Article touched briefly on the subject of affirmative action. Presumably concerned that compensatory rationales would be used to uphold laws that differentiated between men and women to women's actual detriment, the authors struck a careful and somewhat cryptic balance between supporting the courts' "power to grant affirmative relief in framing decrees in particular cases," and disavowing an approach that would accord the same degree of deference to "compensatory aid" to women as to racial minorities. See Yale ERA Article, supra note 54, at 903–04.
72 410 U.S. 113 (1973).
a compelling argument that the ERA remained necessary and desirable all but required a fresh account of the ERA's legal impact.

The ratification debates had not been an auspicious time for calm deliberation over the amendment's legal ramifications, however. Debates over ratification became highly symbolic and focused on inflammatory social issues such as the military draft, abortion, the projected demise of the traditional family, and homosexuality. ERA proponents lacked the centralization and organizational discipline of Schlafly's STOP ERA movement. They often found themselves in a defensive posture, compelled to spend much of their time describing what the ERA would not do rather than the positive changes it would bring. When proponents did attempt to invoke the ERA's legislative history to assuage the concerns of skeptics, they were constrained to referring back to the 1971 and 1972 congressional debates, which seemed increasingly distant now that judicial and legislative action had addressed many of the discriminations ERA promoters identified in the first place. Once the ERA had gone down in defeat, though, feminists were at least partially liberated from these constraints. Now they could attempt a deliberate, coordinated reassessment of their legal agenda. In effect, they redefined the ERA to encompass many—though not all—of the goals that had evolved out of the legal and political changes of the 1970s and early 1980s. In the end, though, they could not wholly escape the political constraints that made the first ratification campaign so difficult, particularly once opponents interrogated them about the specific legal and doctrinal ramifications of ERA II.

B. "Equality in Theory" or "Equality in Fact"?

The hallmark of ERA II as constructed by a coalition of feminist lawyers and women's organizations was a definition of discrimination that emphasized the central role played by sex-neutral laws in the perpetuation of

\[\text{\textsuperscript{78} The Yale ERA Article devoted the majority of its attention to the issues that generated the most debate and controversy in 1970–71: the fate of protective labor legislation, changes in domestic relations and criminal law, and the amendment's effect on military service. See Yale ERA Article, supra note 54, at 920–78.} \]

\[\text{\textsuperscript{79} The fact that ERA II's text was identical to that of ERA I could have been a constraint on proponents' ability to create a new legislative history for the measure, but it does not appear to have been perceived as such by most proponents. Opponents sometimes resisted proponents' attempts to recast the amendment. See, e.g., Equal Rights Amendment: Hearings on H.J. Res. 1 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 98th Cong. 798 (1983) [hereinafter House Hearings]. At least one witness, late in the hearings, opined that the "absolute" wording of the amendment would have consequences unintended by proponents and at odds with their objectives. Catherine Zuckert, a political scientist at Carleton College, testified that she was concerned that the ERA would make affirmative action for women unconstitutional and would reaffirm rather than contravene the narrow definition of sex discrimination expressed in cases like Geduldig. See The Impact of the Equal Rights Amendment: Hearings on S.J. Res. 10 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, Part 2, 98th Cong. 102–15 (1984) [hereinafter Senate Hearings, Part II] (testimony of Catherine H. Zuckert).} \]
women’s inferior legal, economic, and social status. In other words, feminists argued that the amendment would allow constitutional disparate impact challenges to laws that did not distinguish between men and women on their face, but that nevertheless had a sex-based disproportionate effect. The emergence of disparate impact analysis in the debate over ERA II underscored both the victories and the limitations of the legal changes that the civil rights and women’s rights movements had secured during the 1970s. The disparate impact question had not been prominent in the first congressional consideration of the ERA in part because overt sex-based classifications were numerous enough that they were the amendment’s primary targets. Further, in the early 1970s the door was still open to an expansive definition of actionable disparate impact under the Equal Protection Clause. Not long after the ERA’s passage, feminists began to challenge veterans’ preference laws using an equal protection theory that minimized the role of discriminatory intent and explicit sex classification. *Washington v. Davis,* in 1976, was the first case in which the Supreme Court defined discriminatory intent as the key element of equal protection violation. Even in the wake of *Davis,* feminists won victories against some of the more extreme veterans’ preference schemes in the lower courts. It was not until *Personnel Administrator v. Feeney,* in 1979, that the Court appeared to virtually foreclose successful sex-based disparate impact challenges under the Equal Protection Clause. Thus, only toward the end of the 1970s did it become clear to feminists that they would have to look outside of the Equal Protection Clause—perhaps to the ERA—to combat disparate impact under the federal Constitution.

By 1983, then, conditions were ripe for feminists to redefine the nature of equality under the ERA. Feminists did not always advertise this transformation, but they did not back away from it either. In contrast to their continued denials that the ERA would implicate abortion funding bans or laws concerning homosexuality, proponents acknowledged—and at times even emphasized—that the new ERA would call facially neutral laws into question. The challenge for feminist lawyers was to define a legal standard sufficiently rigorous to eliminate laws that perpetuated women’s subordinate status but limited enough to assuage concerns that a constitutional assault on facially neutral laws would subject virtually every state and federal legislative act to judicial scrutiny.

1. “At Least Six Different ERAs”: The Standard of Review Controversy.—The standard of review that judges would apply under the ERA became a focus of congressional scrutiny almost as soon as Senate hearings

---

on the amendment began in May 1983. The ERA’s primary Senate sponsor, Paul E. Tsongas (D-MA), was the first to testify before the Senate Judiciary Committee’s Subcommittee on the Constitution, chaired by conservative Senator Orrin Hatch. Tsongas cast his prepared statement in general terms, attempting to allay concerns that the ERA would require the sex-integration of restrooms and prisons, force women into combat positions for which they were unqualified, and coerce homemakers into the workforce on pain of financial ruin. The very first question posed to a witness in the ERA II hearings was Hatch’s query to Tsongas: “What precisely, in your view, is the standard of review that the equal rights amendment would establish for Federal and State legislation that employ sex classifications?” But Tsongas declined to delve deeply into the legal intricacies of the amendment. “There is no one who would argue that we have at this point an exact understanding of where it will lead,” he said at one point in the exchange. When Hatch then asked whether Tsongas agreed that the analysis set out in the Yale ERA Article remained the “definitive statement” on the amendment’s meaning, Tsongas said he had not read the article. Hatch followed up with a litany of specific questions about the ERA’s projected legal impact on everything from abortion funding, to veterans’ preferences, to seniority systems, to single sex schools, to maternity leave, to combat restrictions, to the legality of same-sex marriage. Tsongas dodged them all, emphasizing that all constitutional amendments contained some ambiguities and suggesting that Hatch had not subjected his own proposed human life (antiabortion) amendment to such a rigorous standard of certainty. The exchange grew heated. “You knew damn well that these are specific issues, that no one coming here unprepared could answer,” Tsongas shot back at one point. The Associated Press described Tsongas as “visibly shaken.” Though he continued to accuse Hatch of hypocrisy, Tsongas agreed to submit a detailed list of answers to Hatch’s questions.

Thus, in the first hour of the first hearing, Hatch had both established the agenda for the remaining hearings and created the impression that the amendment’s proponents were long on platitudes and short on specifics. Even some ERA sympathizers were aghast at Tsongas’s apparent inability

---

84 Id. at 22.
85 Id. at 23.
86 Id.
87 Id. at 23–31.
89 Id.
to answer basic questions about the amendment’s meaning. 90 It had become painfully clear that ERA supporters faced a well-informed, legally sophisticated adversary and would be forced to articulate much more specifically the amendment’s constitutional consequences.

Although Hatch’s portrayal of the proponents’ views as ambiguous at best and evasive at worst was somewhat unfair, his professed confusion over the standard of review that would apply under the ERA was not wholly unreasonable. The ERA’s text itself did not specify a standard of review, stating only that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.” The 1971 Yale ERA Article, which the Amendment’s supporters and opponents frequently cited as the most reliable predictor of the ERA’s impact, had set forth an “absolute” standard, subject to three “qualifications,” sometimes referred to colloquially as “exceptions.” If courts followed the Yale Article’s schema, laws that distinguished between individuals on the basis of sex would be absolutely prohibited except (1) where they involved a physical characteristic unique to one sex; 91 (2) where they were necessary to preserve other constitutional rights, such as the right of personal privacy; 92 or (3) where they were part of a genuine affirmative action policy designed to remedy past discrimination. 93 In each of these three exceptional instances, the classificatory law would be subject to strict scrutiny: the requirement that the classification be narrowly tailored to serve a compelling government interest. 94

Frequently, however, during and after the ratification debates, both friends and foes of the ERA characterized the applicable standard of review as analogous to the standard applied to race-based classifications: strict scrutiny. The analogy to race generally, and strict scrutiny in particular, served as a kind of shorthand in part because strict scrutiny was usually, but not always, fatal to the challenged law. Similarly, the Yale ERA Article announced an absolute standard that in fact was subject to certain exceptions. 95

Nevertheless, there were potentially significant substantive and symbolic differences between the absolute standard and a general application of

---

90 See, e.g., Goodman, supra note 46 (describing Tsongas as “shamefully unprepared” for his exchange with Hatch); Editorial, Tsongas and the ERA, BOSTON GLOBE, June 4, 1983, at 14 (criticizing Tsongas for “showing up unprepared”). But see Letter from Paul Tsongas to the Editor, Boston Globe (June 1983) (on file with NOW Papers, Schlesinger Library, Radcliffe Institute, Harvard University, Box 191, Folder 45) (defending his own testimony, including his decisions to defer technical questions to constitutional lawyers and to admit that courts would exert some control over the interpretation of the ERA).

91 Yale ERA Article, supra note 54, at 893–95.

92 Id. at 900–02.

93 Id. at 903–05; see also discussion supra note 71.

94 Yale ERA Article, supra note 54, at 888–909.

95 Id.
strict scrutiny to all sex-based classifications. An absolute standard created a bright-line rule for a certain category of classifications that did not fall under any of the three exceptions. Strict scrutiny at least theoretically left open the possibility that any sex-based classification might be upheld if the government's asserted objective was sufficiently compelling and the means used to achieve that goal were necessary. Moreover, the absolute standard carried particular symbolic weight because proponents perceived it to be even more stringent than the standard applied to race-based classifications, indicating to proponents a laudable seriousness about the gravity of sex discrimination missing from the Supreme Court's intermediate scrutiny formulation.

Opponents framed the absolute standard as epitomizing the ERA's inflexibility and its supporters' fanatical devotion to androgyny. It was bad enough that many proponents asserted that the ERA would treat sex like race—to apply an even higher level of scrutiny added insult to injury. ERA skeptics also chided proponents for failing to specify which standard of review would apply. After Tsongas and the second pro-ERA witness, attorney Marna Tucker, attempted to gloss over the issue, anti-ERA witness Walter Berns of the American Enterprise Institute complained that "[w]hat this [vagueness about the standard of review] implies is that it is not necessary to know what the language means because in due course the courts will tell us what it means." To leave something this important up to the courts, Berns charged, was to "treat[] the Constitution with contempt." The first House hearing on ERA II, several weeks later, revealed continued confusion over the proper standard of review for sex-based classifications. Anti-ERA witness Grover Rees III, a professor at the University of Texas Law School, opined that this ambiguity produced so many different possible interpretations that there were, in effect, "at least six different ERAs." The U.S. Civil Rights Commissioner and Howard University Professor Mary Frances Berry immediately followed Rees and offered a definitive answer.

---

96 As the Yale ERA Article’s authors wrote:

The suspect classification test provides a potential basis for more comprehensive protection against sex discrimination; under its operation, sex-based classifications would be considered “suspect” and subjected to strict judicial scrutiny. But because this doctrine allows the government to justify even a suspect classification by “compelling reasons,” it would permit some classifications based on sex to survive. Thus this standard too would not guarantee an effective system of equality which, as we shall argue, demands the elimination of all such classifications.

Id. at 880–81 (footnote omitted).

97 See, e.g., MATHEWS & DE HART, supra note 7, at 167–68, 220.

98 Senate Hearings, Part I, supra note 83, at 63 (prepared statement of Walter Berns, Resident Scholar, American Enterprise Institute; Professional Lecturer, Georgetown University).

99 Id. As Mary Frances Berry has observed, "An underlying aspect of the committee hearings and the debate on the floor was a deep distrust of the role of federal courts in the American system of government . . . ." BERRY, supra note 7, at 108.

100 House Hearings, supra note 79, at 28–30 (statement of Grover Rees III, Assistant Professor of Law, University of Texas School of Law).
to the standard of review question. In response to a question from Representative Mike DeWine (R-OH), Berry testified that the standard would be analogous to that applied to race-based classifications under the Equal Protection Clause.\textsuperscript{101}

Subsequent hearings in the House picked up on both the parallel to the Fourteenth Amendment and the apparent inconsistencies in proponents’ testimonies about the proper standard of review. Phyllis Schlafly told the House subcommittee on October 20, “To predict what will be the effect of ERA in any area, just ask yourself, ‘how do we handle it in race?’ and you will have the answer.”\textsuperscript{102} During the same hearing, former Representative Charles Wiggins emphasized the importance of conclusively establishing the standard of review, arguing that if Congress did not wish to embrace the decisional law on race-based classifications, it should incorporate specific exceptions into the committee reports and other legislative history.\textsuperscript{103} Representative DeWine expressed frustration with pro-ERA witnesses’ reluctance to clarify definitively the proper standard of review. Many of the witnesses had deferred such questions, leaving them to others with greater expertise in matters of constitutional doctrine. Said DeWine, “I just hope that someday we get some witnesses in here, Mr. Chairman, with all due respect, who will talk about what the interpretation will be by the courts and what the test [will be]. That is the tough question.”\textsuperscript{104}

The chairman of the House Subcommittee on Civil and Constitutional Rights, Representative Don Edwards (D-CA), complied at a hearing one week later, calling as witnesses constitutional scholars Thomas Emerson of Yale and Ann Freedman of Rutgers. Emerson and Freedman were among the five coauthors of the famous Yale ERA Article, and their testimony did serve to clarify ERA proponents’ position on the proper standard of review for sex-based classifications. Emerson eschewed the label “absolute,” noting that it had acquired “pejorative” connotations during the ERA ratification debates.\textsuperscript{105} But Emerson essentially reaffirmed the Yale ERA Article’s general prohibition on facial sex classifications that did not fall under the three exceptions—narrowly drawn affirmative action programs, unique

\textsuperscript{101} Id. at 52 (statement of Mary Frances Berry, Commissioner, U.S. Commission on Civil Rights).
\textsuperscript{102} Id. at 409–10 (statement of Phyllis Schlafly).
\textsuperscript{103} Id. at 384 (statement of Charles Wiggins). In the next House hearing six days later, Columbia Law Professor Henry Paul Monaghan, a professed ERA sympathizer testifying on behalf of the anti-ERA Orthodox Jewish organization Agudath Israel, pointed out that while both the absolute and the strict scrutiny standards “will lead to the same result in the vast majority of cases involving gender-based classifications—namely, invalidation . . . the standards are not in principle identical.” Allowing some explicitly sex-based laws and policies to stand if they served a compelling government interest would, for example, leave more room for gender differentiation in the military and combat settings. Id. at 640–41 (statement of Henry Paul Monaghan, Thomas M. Macioce Professor of Law, Columbia University).
\textsuperscript{104} Id. at 593 (statement of Representative Mike DeWine).
\textsuperscript{105} Id. at 797 (statement of Thomas Emerson).
physical characteristics, and conflicts with other constitutional provisions, such as the right to privacy.106

But what was noteworthy about Emerson's and Freedman's testimony before the House subcommittee was not so much their explanation of the appropriate standard of review for overt sex-based classifications, which in practical terms had arguably become a distinction without a difference.107 Instead, by this point in the hearings it was clear that the most important question about standards of review concerned not legal classifications explicitly based on sex, but rather sex-neutral laws and policies that had a sex-based disproportionate effect.

2. A "Theoretical Dilemma": Disparate Impact Analysis and the New ERA.—Feminist lawyers and activists immediately identified disparate impact as one of the key issues they would need to address as they attempted to shape ERA II's legislative history. "Disparate impact theory" had been one of several areas "for further research" identified in March 1983 at a meeting for representatives of a coalition of feminist groups, including Eleanor Smeal, Judy Goldsmith, Catherine East, Phyllis Segal, and Marsha Levick.108 Segal, an attorney with NOW Legal Defense and Education Fund (LDEF), was charged with writing an initial memo laying out the substantive and strategic issues involved. The threshold question, Segal realized, was whether ERA proponents should attempt to clarify the application of the amendment to sex-neutral laws that had a disproportionately negative sex-based effect, or whether they should remain silent on the subject and leave ERA I's sparse legislative history on the issue to speak for them.109 In her memo, Segal laid out three options: doing nothing; "act[ing]...
halfway by stressing disparate impact problems in describing the need for the ERA, without offering comments on the theoretical application or effect of the ERA in such cases”; and “present[ing] direct argument on this.” 110 Avoiding the issue could backfire, she suggested, by limiting the ERA’s “potential as a legal tool.” Without further legislative history, there was a “serious risk that the Supreme Court will not apply the ERA to disparate impact cases, or will import an intent requirement” from equal protection jurisprudence. 111 Focusing exclusively on facial sex-based classifications also ran the risk of “trivializ[ing] the problems of sex discrimination,” given “the dwindling list of laws that discriminate on their face.” 112 It would be difficult to explain why the Equal Protection Clause did not suffice to address sex discrimination, unless the ERA would go significantly further than the Fourteenth Amendment in resolving disparate impact cases. 113 Putting the argument in more positive terms, Segal predicted that “expanding the impact of the ERA will increase support.” 114

Finally, Segal recognized that avoiding the issue was unrealistic: “Even if proponents don’t focus [on] the issue [of disparate impact], a smart ‘undecided’ legislator, or opponents, will.” 115 As if to prove Segal’s point, Hatch raised the subject in the first Senate hearing on ERA II, asking Mama Tucker whether “disparate impact analysis” would apply to the ERA. 116 Tucker demurred, saying that she had not studied the issue. 117 Feminist lawyers realized they would have to be more forthcoming, but sought to strike a balance between explication and obfuscation. As feminist legal strategists discussed how to respond to the questions raised by Hatch in the first hearing, they established a “format for answering” questions about disparate impact: “1. Ask for specificity in question: what exactly is the questioner asking re: ERA and specific issue raised. 2. Preface answer with description of disparate impact this particular classification/issue has on women.” 118 Proponents would emphasize the discrimination the ERA was meant to eradicate, and only address the legal technicalities of disparate impact analysis if pressed further.

Yale ERA Article, supra note 54, at 900. Segal wrote: “While this article is an important part of the ERA legislative history... I am not aware of this particular passage being discussed.” Memorandum from Phyllis Segal to ERA Legislative History Project, supra, at 6.

110 Memorandum from Phyllis Segal to ERA Legislative History Project, supra note 109, at 9–11.

111 Id. at 10.

112 Id.

113 Id.

114 Id.

115 Id.


117 Id. at 70 (statement of Mama Tucker).

118 Memorandum from Marsha Levick to NOW-NOW LDEF ERA Legislative History Committee, supra note 107, at 1–2.
a. The search for a limiting principle.—As the feminist lawyers constructed their strategy for responding to questions, they began to confront some of the challenges of articulating a theory of disparate impact that would reach the discrimination they wished to vanquish without appearing to be a radical and unworkable judicial intrusion on legislative decision-making. Because the range of laws exerting a sex-based disparate impact seemed potentially infinite, establishing a workable limiting principle was perhaps the most daunting challenge ERA proponents faced in formulating a method of disparate impact analysis.

The starting point for constitutional disparate impact analysis was the Supreme Court’s treatment of such cases under the Equal Protection Clause. A finding of discriminatory intent was the primary limiting principle established by the Court in *Davis* and *Feeney*. Disparate impact alone would not trigger heightened scrutiny absent evidence of discriminatory intent, according to *Davis*. Feminist lawyers had long emphasized that as difficult as it was to prove discriminatory intent in the context of racial discrimination, it was virtually impossible to find such evidence in cases of sex discrimination. Yet the Court had in fact raised the bar even higher for sex-based disparate impact claims in *Feeney*. The majority in *Feeney* effectively rejected the more nuanced analysis of *Davis* in favor of a requirement that, for a claim to succeed, the challenged law must have been enacted "because of," not just "in spite of" its adverse impact on women. Even the dissenters in *Feeney* had not moved all that far away from an intent-based inquiry. Justice Marshall wrote for himself and Justice Brennan that Massachusetts’s absolute veterans’ preference "evinces purposeful gender-based discrimination," and applied heightened scrutiny to the policy on that basis. "[T]he critical constitutional inquiry is not whether an illicit consideration was the primary or but-for cause of a decision, but rather whether it had an appreciable role in shaping a given legislative enactment," Marshall opined, finding that among other factors, the "foreseeability" of the drastically adverse impact on women provided sufficient evidence of discriminatory purpose to trigger suspicion.

This "foreseeability" standard thus provided one possible limiting principle that was less drastic than the *Feeney* majority’s analysis. ERA proponents felt, however, that this standard still conceded too much to the preoccupation with intent that characterized the Court’s equal protection analysis. From the start, their objective was to eliminate the intent require-

---

120 I address feminists’ arguments to this effect in the *Feeney* case in greater depth elsewhere. See SERENA MAYERI, REASONING FROM RACE: LEGAL FEMINISM IN THE CIVIL RIGHTS ERA (Harvard Univ. Press, forthcoming).
122 *Id.*
123 *Id.* at 282–83.
ment altogether. Intent was far from irrelevant, feminists stressed, but they sought to ensure that evidence of a discriminatory purpose would be sufficient, rather than necessary, to trigger heightened scrutiny. Segal declared in her March 1983 memo: "While purpose or intent to discriminate would be definitive evidence to invalidate governmental action that has a disparate impact on females (or males), such evidence is not required (as it is in [equal protection] cases). This is the point that has not been articulated before."124 Most laws that had a disparate impact on women were not the product of deliberate malice, feminists argued, but of subtle attitudes and entrenched stereotypes about gender roles that exhibited the same constitutional infirmities as laws that overtly classified men and women. As Segal put it, "many rules that appear ‘neutral’ are designed essentially on worldview assumptions such as male wage worker/female childbearer-rearer role distinctions."125 Legal rules, moreover, often were "built on male norms," but the "process of designing such ‘male-centered’ rules rarely includes—and more rarely provides evidence of—overt discriminatory intent."126

But if feminists were unwilling to include an intent requirement—even in the more relaxed register of “foreseeability”—then they lacked a principle by which to limit the applicability of disparate impact analysis. As Segal recognized, they faced a “theoretical dilemma”: “the measure of when ‘disparate impact’ is sufficient to trigger ERA scrutiny . . . . This may of necessity be an issue left to future interpretation when the ERA is (at long last) implemented.”127 However, ERA skeptics would not let proponents defer such questions indefinitely, particularly once witnesses took advantage of the more ERA-friendly atmosphere of the House hearings to highlight the ERA’s potential to attack disparate impact cases. In the second House hearing, held September 14, 1983, Tish Sommers of the Older Women’s League emphasized how disparate impact analysis could combat sex discriminatory effects of Social Security and ERISA rules, pension schemes, and divorce laws on older women.128 NOW President Judy Goldsmith emphasized the difficulty, if not impossibility, of rooting out sex inequality under a discriminatory intent requirement, and detailed how assumptions about women’s economic dependency worked to their detriment in areas like employment, Social Security, pensions, and insurance rates.129 League of Women Voters President Dorothy Ridings observed that “facially neutral policies” often perpetuated “occupational segregation,” discrimination in education and training, and contributed to the “feminiza-

124 Memorandum from Phyllis Segal to ERA Legislative History Project, supra note 109, at 9.
125 Id. at 7.
126 Id. at 8.
127 Id. at 9. “Any thoughts?” she asked her colleagues. Id.
128 House Hearings, supra note 79, at 153–54 (statement of Tish Sommers).
129 Id. at 253–54 (statement of Judy Goldsmith, President, National Organization for Women).
tion of poverty.”130 She touted the ERA’s requirement of “rigorous scrutiny” of “rules and policies that appear to be gender-neutral but which have had disproportionately negative effects on women.”131 In the question and answer session that followed, Representative DeWine asked Goldsmith to clarify the pro-ERA position: “I think you are telling me, that we are going to look at the result of law . . . at how it applies, in fact. Is that a fair summary of what is involved?” Goldsmith replied, “That is correct . . . .” DeWine responded, “So we would not have to prove intent; we would not look to intent?” Goldsmith’s answer was unequivocal: “Exactly.”132

In the absence of a limiting principle to replace discriminatory intent, opponents could attack disparate impact theory as a boundless enterprise that, taken to its logical conclusion, contained limitless possibilities for undermining the legal and social order. The topic of disparate impact analysis arose most frequently in connection with substantive areas such as military regulations, veterans’ employment preferences, family law, abortion funding, and government benefits programs, especially Social Security. Each of these applications not only called into question entrenched assumptions about gender differences, but also appeared potentially to wreak havoc on the existing system of laws and regulations. Opponents often used hyperbolic language to forecast the ERA’s effects, but they also raised legitimate questions about the outer boundaries of disparate impact theory. Grappling with the objections of critics forced ERA proponents more specifically to define the limits of the disparate impact principle.

In arguing for a disparate impact theory of equal rights unbound to discriminatory intent, feminists first had to assure skeptics that their analysis would not subject every statute that had different impacts upon men and women to constitutional challenge.133 One oft-cited example was the progressive income tax. Since men’s incomes were, as a group, higher than women’s, a progressive income tax disproportionately burdened men in a way that was easily foreseeable, if not inevitable.134

Feminists could have attempted to quantify the degree of disparate impact necessary to trigger special judicial scrutiny. They chose instead a qualitative definition. Rather than suggesting that all laws that disproportionately affected one sex were automatically suspect, proponents adopted a formulation that tied the application of heightened scrutiny to a particular type of disparate impact: that which, in the words of Ann Freedman, was “traceable to and reinforces, or perpetuates, discriminatory pat-

130 Id. at 275–76 (statement of Dorothy Ridings, National President, League of Women Voters).
131 Id.
132 Id. at 311 (statements of Representative DeWine and Judy Goldsmith).
133 See, e.g., Senate Hearings, Part I, supra note 83, at 694 (testimony of Charles Shanor, Professor of Law, Emory Law School).
134 Id.
terns similar to those associated with facial discrimination."135 Because the Court had already tackled many instances of facial discrimination under the Equal Protection Clause, Freedman could draw extensively from the language of the Court’s Fourteenth Amendment jurisprudence in characterizing those “discriminatory patterns.”136 She then explained that the progressive income tax would not be vulnerable under this standard “because the disparate impact of the income tax on men is not the product of habit or stereotypical ways of thinking about the sexes.”137 Freedman took the analysis one step further, attributing significance to the fact that the progressive income tax had redistributive consequences that “ameliorate[d]” sex inequality.138

b. Applying the antihierarchy approach to family law.—This antihierarchical or ameliorative approach to disparate impact analysis reflected feminists’ frustration with a conception of equal rights that appeared ultimately to benefit men. When NOW President Goldsmith described the need for the ERA to incorporate disparate impact analysis, she stressed the failure of equal protection jurisprudence to address sex discrimination’s particular toll on women. “Historically, in light of the Fourteenth Amendment, sex discrimination that disadvantages men is far more likely to be found unconstitutional than sex discrimination harming women,” she told the committee.139 However, the Court’s emphasis on the harmful effects of sex stereotyping on both men and women created a potential tension between an antistereotyping impulse and the antihierarchical principle. Nowhere was this tension more apparent than in the realm of family law.

Visions of babies torn from their mothers’ breasts and homemakers forced to leave their children to go to work at low-wage jobs populated the imaginations of critics of disparate impact theory’s application to family law. Apocalyptic images of family breakdown, already tediously familiar

135 House Hearings, supra note 79, at 787 (statement of Ann Freedman, Associate Professor of Law, Rutgers Law School).
136 Id. at 787–88 (“Many of the misconceptions and stereotypes that produce sex discriminatory neutral rules have been recognized and condemned by the Supreme Court in recent decisions under the equal protection clause invalidating facially discriminatory sex classifications. These include ‘the role typing society has long imposed’ on women, particularly the idea that the ‘female is destined solely for the home and the rearing of the family’ and not ‘for the marketplace and the world of ideas,’ and ‘assumptions that women are the weaker sex or are more likely to be childcarers or dependents’; the invidious relegation of classes of women ‘to inferior legal status without regard to the actual capabilities’ of individual women; the ‘nineteenth century presumption that females are inferior to males’; and the willingness to create gender-based hierarchies that keep women ‘in a stereotypic and predefined place’ and grant men more responsible and remunerative positions.” (footnotes omitted)).
137 Id. at 789.
138 Id. at 789–90.
139 Id. at 259 (testimony of NOW presented by Judy Goldsmith, President). Goldsmith was apparently referring to the 1970s sex discrimination cases brought by male plaintiffs. See, e.g., Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). Her comment may have also reflected the Court’s failure to recognize discrimination against women in cases like Feeney.

1254
from the ERA ratification debates, undoubtedly were overblown. As even Brigham Young University law professor Lynn Wardle, a staunch opponent of the amendment, conceded, the ERA “would accelerate the adoption of many beneficial reforms in existing family laws in order to equalize the general rights and obligations of fathers and mothers and husbands and wives.”

Once the strident rhetoric was stripped away, much of the disagreement between proponents and opponents did concern, as Wardle contended, the desirability of eliminating legal incentives for women to forego careers and pursue traditional roles as mothers and wives. Although Schlafly and others regularly accused feminists of denigrating housewives, feminist lawyers had actually devoted considerable time, energy, and resources to addressing the legal plight of homemakers, particularly at divorce.

Feminists saw homemakers as caught in a no-win situation—a legal framework designed to encourage traditional roles, but that provided little if any protection to the wife in a traditional marriage gone awry. While many antifeminist critiques unfairly impugned feminists’ motives and distorted the extent to which existing law truly protected homemakers, the application of disparate impact analysis to family law nevertheless raised some vexing conceptual problems.

Child custody decisionmaking provides one example of the dilemmas raised by disparate impact theory’s application to family law. By 1983 and 1984, it seemed clear that the ERA would invalidate laws and practices that automatically granted a preference to mothers in child custody decisionmaking. The maternal preference, which sometimes took the form of the “tender years doctrine”—the presumption, given varying degrees of weight, that mothers were the best custodians for young children—was already on its way out in many jurisdictions, and joint custody was becoming increasingly common. Some feminists, like Women’s Legal Defense Fund staff attorney Nancy Polikoff, argued that judicial biases unfairly disadvantaged mothers, not fathers, in custody cases. Polikoff favored a “primary caretaker” standard that would reward the investment of mothers in childrearing.

This primary caretaker standard raised a disparate impact question: it

---

140 Senate Hearings, Part II, supra note 79, at 3 (statement of Lynn Wardle, Professor of Law, J. Reuben Clark Law School, Brigham Young University).

141 Id. (“Many people believe that there are other differences between men and women than just physical differences, that there are emotional differences and psychological differences, differences in the way that they nurture and relate to children, and that those differences ought to be taken into account or at least States ought to be allowed to take those differences into account in establishing family law.”).

142 For a critical account of feminists’ focus on homemakers, see MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY 53–75 (1991).

seemed likely if not certain that facially sex-neutral decision rules that emphasized the best interests of the child or favored the "primary caretaker" would result in more mothers than fathers receiving custody because, as an empirical matter, they were far more involved in caring for children during marriage.\textsuperscript{144}

The implications of the antistereotyping and antihierarchical principles in the custody context were not entirely clear. On the one hand, a father’s claim that custody decisions, even if ostensibly sex-neutral, exerted a sex-based disproportionate impact on men seemed consistent with feminists’ contention that even facially sex-neutral laws stemmed from and reinforced the sex stereotypes that relegated women to the home and accorded men exclusive access to the "marketplace and the world of ideas."\textsuperscript{145} If women’s inferior economic position derived at least in part from their disproportionate responsibility for child-rearing, which in turn aggravated the adverse financial impact of divorce, then a system that effectively favored women’s claims to custody might not only be unfair to men, but might in fact be contrary to women’s interests—particularly if accompanied by weak enforcement of the noncustodial parent’s child support obligations. On the other hand, altering the best interests of the child standard in a manner that would devalue women’s investment in childrearing after the fact seemed clearly detrimental to individual women and, potentially, to children.

Perhaps in part to deflect concerns about the applicability of disparate impact analysis to areas like child custody, feminists tended to emphasize property management and distribution rules as the primary targets of disparate impact analysis in the family law context. In this area, the tension between combating assumptions about the proper roles of men and women while acknowledging the social reality of disparate participation in childrearing and homemaking activities seemed less acute. Feminists stood on somewhat firmer theoretical ground when they asserted that the ERA would undermine property distribution rules that undervalued homemakers’ contributions to the household. Challenging the distribution of financial resources between husbands and wives fit more comfortably with the antihierarchy principle because women were clearly the disadvantaged parties in jurisdictions that maintained title-based property distribution rules or otherwise failed to account for nonmonetary contributions in dividing property at dissolution. Applying disparate impact analysis to these distributive rules also allowed feminists to highlight how the ERA would bolster the position of homemakers. A similar analysis applied to alimony awards.

When Senator Hatch asked NOW LDEF attorney Marsha Levick whether a

\textsuperscript{144} For a contemporaneous empirical analysis of child custody awards, see, for example, Lenore J. Weitzman & Ruth B. Dixon, Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce, 12 U.C. DAVIS L. REV. 471 (1979).

\textsuperscript{145} Stanton v. Stanton, 421 U.S. 7, 14-15 (1975) ("No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.").
jurisdiction that gave a disproportionate number of alimony awards to women would be subject to a disparate impact challenge, she could reply that no, “an increased number of support awards to women in the event that those awards were appropriately extended could not be considered to be discrimination against men. In fact, what they would be doing would be attempting to ameliorate the effects of discrimination against women.”

When anti-ERA activists accused feminists of devaluing homemaking, feminists protested that, in fact, the amendment would give homemakers additional protection both during marriage and at divorce. But, as the child custody example revealed, the tension between compensating women for their contributions to the household and upending legal rules that reinforced traditional gender roles was not easily overcome by a simple application of the antihierarchy principle.

c. Veterans’ preferences, social services, and the ghost of equal protection.—The antihierarchy principle did, at least in theory, limit disparate impact analysis to laws and policies that disadvantaged women. In the case of veterans’ employment preferences, perhaps the most prominent arena in which feminists promoted the disparate impact theory, the burden on women could hardly have been more pronounced. To ERA opponents, however, the veterans’ preference example proved too much because any government program that provided special benefits to veterans inevitably would benefit men almost exclusively. Opponents seized on this issue in the hearings: some suggested that disparate impact analysis would invalidate not only absolute veterans’ preference programs like the one at issue in Feeney, but all preferences for veterans in employment, and would even call into question the validity of veterans’ benefits programs more generally.

Such predictions were, of course, calculated to cause maximal political consternation, but they also raised salient questions about the scope of disparate impact theory. The veterans’ preference issue was a mixed blessing for ERA proponents. Since the only Supreme Court case to address a constitutional sex-based disparate impact claim concerned veterans’ preferences and it was one of several specific targets of ERA II, proponents tended to use the Massachusetts program upheld in Feeney as an example of how disparate impact analysis would apply. Because the lower courts in

146 Senate Hearings, Part II, supra note 79, at 76 (statement of Marsha Levick, Legal Director, NOW Legal Defense and Education Fund). In addition to emphasizing areas in which the “amelioration of discrimination” argument was more straightforward, ERA proponents also referred to cases decided under state ERAs to answer opponents’ charges that the disparate impact standard would wreak havoc on family law in general, and child custody decisionmaking in particular. For instance, when Wardle cited child custody as an example of how disparate impact theory might apply to allow men to challenge custody regimes that resulted in fewer fathers receiving custody, Levick pointed to two Colorado cases in which courts rejected such arguments under the state’s ERA. Id. at 77.

Feeney had engaged in the kind of factfinding that proponents envisioned occurring under the ERA, it provided a handy concrete application of what could often seem like an abstract theory. Further, the “absolute” nature of the Massachusetts preference enabled proponents to distinguish the program from other veterans’ preference schemes less burdensome to women. But the specificity of the Massachusetts example did not succeed in deflecting difficult questions about the reach of the disparate impact theory to other benefits for veterans and to the provision of government benefits and services more generally.

ERA proponents approached disparate impact analysis of government benefit provisions cautiously. For one thing, the issue was entangled with the complicated and politically fraught questions surrounding the exclusion of pregnancy from disability benefit coverage and the denial of Medicaid funding for abortion. For another, feminists were wary of defining actionable disparate impact too narrowly. Still, charges from veterans’ groups that disparate impact analysis ultimately would threaten all kinds of government support for veterans led ERA proponents to distinguish employment preferences from other policies benefiting veterans. NOW LDEF attorney Phyllis Segal began her Senate testimony on veterans’ programs by drawing a distinction between benefits “funded from the public treasury [that] do not impose any direct costs on individuals,” on the one hand, and civil service employment preferences, whose “burden[s] fall[] directly on those individuals who are denied jobs or promotions because they do not have veteran status.”

The flip side of the question—the denial of social services, such as welfare benefits, that disproportionately impacted women—also proved tricky. As University of North Carolina law professor Judith Welch Wegner put it in her Senate testimony, how to view the disparate impact caused by “[d]ecisions to deny certain types or levels of social services” was “perhaps the most troublesome” question facing theorists of disparate impact discrimination. In the end, Wegner fell back on the Supreme Court’s jurisprudence in race cases in an effort to assuage concerns that the ERA would subject legislative funding decisions to endless constitutional scr–

---


149 For more on the abortion controversy, see infra Part II.D.


151 Senate Hearings, Part I, supra note 83, at 765–66 (statement on the impact of the Equal Rights Amendment on veterans programs by Phyllis N. Segal).

152 Id. at 890 (statement of Judith Welch Wegner, Professor, University of North Carolina School of Law).
tiny. She cited decisions like *NAACP v. Medical Center, Inc.*, in which the Third Circuit upheld a medical center's decision to relocate to the suburbs notwithstanding its adverse impact on inner-city minority communities, surmising that courts would "demonstrate sensitivity to legislative resource-allocation decisions" under the ERA as well.\(^{153}\)

**d. Disparate impact and military employment: Title VII as a limiting principle.**—If equal protection jurisprudence helped to limit the reach of disparate impact analysis in the realm of social services cuts, when it came to military employment, feminists imported principles from Title VII cases to assure skeptics that the ERA would not upend military preparedness. In the military context, where the invalidity of explicit sex-based classifications was a hard enough pill to swallow, a disparate impact analysis suggested to some ERA skeptics that the amendment would effectively require women to make up fifty percent of draftees and even combat soldiers. Delaware Law School professor William A. Stanmeyer declared that disparate impact analysis would "require that one-half the eligible married women be drafted, while their husbands stay home, and in many cases take care of the baby."\(^{154}\) Less dramatically and perhaps more credibly, other witnesses predicted that the ERA would precipitate a lowering of physical standards when such standards were found disproportionately to exclude women from certain positions. The effects of such a lowering of standards on military readiness could be devastating, a number of witnesses suggested.\(^{155}\)

These arguments placed ERA proponents in something of a bind. Military service was not, in fact, one of the areas in which disparate impact analysis was most necessary—in the military, explicit sex-based classifications remained prevalent, and their removal would be revolutionary enough. Proponents stressed that their goal was not to lower standards; in fact, they emphasized, judging individuals based upon their actual abilities rather than their sex would actually enhance merit-based decisionmaking. As one internal memo stated the proponents' position, "What ERA would establish is a policy by which men and women are assigned to positions based upon their individual abilities rather than upon a sex-based classification."\(^{156}\)

Military servicewomen testified in the congressional hearings that eradication—

\(^{153}\) Id. at 891 (citing *NAACP v. Medical Center, Inc.*, 657 F.2d 1322 (3d Cir. 1981); *Jennings v. Alexander*, 715 F.2d 1036 (6th Cir. 1983)). Note that these were Title VI and Rehabilitation Act cases, respectively.

\(^{154}\) *House Hearings, supra* note 79, at 653 (testimony of Professor William A. Stanmeyer on the impact of the ERA on the military).

\(^{155}\) See, e.g., id. at 649–64 (testimony of William A. Stanmeyer on the impact of the ERA on the military); id. at 668–70 (statement of Brigadier General Elizabeth P. Hoisington (USA, Ret.)); id. at 671–81 (statement of Mary Lawlor).

\(^{156}\) Memorandum from Ethan Naftalin to Sana Shtasel (June 8, 1983) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, Catherine East Papers, Box 23, Folder 31).
ing explicit sex-based discrimination would enable the armed forces to fulfill their personnel needs more efficiently and effectively, because they could draw from a larger pool of potential service members. ERA proponents wished to make clear that they were not seeking lower standards, but simply bare-bones equal opportunity. They needed, therefore, to place some limit on the reach of disparate impact analysis in the military context. As Women's Equity Action League (WEAL) attorney Jeanne Atkins put it in a preparatory memo to pro-ERA witness and former Undersecretary of the Air Force Antonia Chayes, "[A]s the hearings move along it becomes clearer that the constitutional law must be made clear."\(^{157}\)

The antihierarchical or "amelioration of discrimination" approach was less useful as a limiting principle when it came to the military. Although women's exclusion from the draft and combat could have been interpreted as benign, ERA advocates had long ago decided to frame those exclusions as discriminatory.\(^{158}\) Once explicit sex-based distinctions were removed, presumably facially sex-neutral physical requirements could effectively exclude many if not most women from certain positions. This seemed a classic instance of disparate impact discrimination that perpetuated old sex classifications in the guise of gender neutrality. Because they could not rely on the antihierarchy principle to cabin the reach of disparate impact analysis in the military context, feminists agreed that heightened scrutiny would apply to physical requirements that disproportionately excluded willing women from positions in the service, but argued that the means-ends test itself left room for truly necessary physical standards and requirements.

Strict scrutiny, on this account, would not be fatal in fact but rather would bear a striking resemblance to Title VII's job-relatedness requirement. Jeanne Paquette Atkins, staff attorney at WEAL and project associate at the National Information Center on Women and the Military, told the House subcommittee in October 1983,

\begin{quote}
[T]o the extent that such gender-neutral criteria might disproportionately exclude women from participation, those criteria would be subject to rigorous examination. Congress would be obligated to assure that such standards were indeed job-related, that is, that the qualities measured were necessary to the efficient performance of the military role in question.\(^{159}\)
\end{quote}

Representative Patricia Schroeder (D-CO) attempted to translate Atkins's testimony into a recognizable legal standard: "[W]hat you are saying is that the Equal Rights Amendment does not eliminate job-related qualifications

---

\(^{157}\) Letter from Jeanne Atkins to Antonia Chayes (Sept. 21, 1983) (on file with Sterling Memorial Library, Yale University, Thomas Emerson Papers, Box 23, Folder 344).


\(^{159}\) House Hearings, supra note 79, at 566 (statement of Jeanne Paquette Atkins, Staff Attorney, Women's Equity Action League, and Project Associate, the National Information Center on Women and the Military).
... like under standards set forth in the [Griggs v.] Duke Power case and other cases that have established the law in this area." At a Senate hearing several days later, Chayes indicated in her testimony that ERA proponents were willing to accept that many physical requirements in the military were in fact job-related. Questioned pointedly by Senator Hatch about the cryptic reference to disparate impact in the 1971 Yale ERA Article, which seemed to him to suggest the invalidation of most military physical standards, Chayes replied, "There has been a long history of disparate impact [analysis] since Professor Emerson wrote. I think we have got to accept the consequences of the job relatedness of the requirements. I am prepared to accept it as I think most ERA proponents are." This was a significant concession, given that presumably it would not be difficult to assert the job-relatedness of virtually all physical requirements in the military.

e. The Remedial Dilemma.—The controversial nature of disparate impact analysis did not only concern how disparate impact would be defined or what standard of review would apply. ERA skeptics also pushed proponents to articulate how laws and policies exerting a disparate impact would have to be revised to remedy their discriminatory effects. For instance, in the veterans' preference context, proponents could refer to the Feeney dissent, which left room for less discriminatory alternatives, including less extreme or "absolute" employment preferences for veterans. Moreover, because states other than Massachusetts had veterans' preference programs that ERA proponents claimed would withstand constitutional scrutiny, concrete examples of solutions to the disparate impact problem were available. However, in other areas of the law, less discriminatory alternatives were more elusive, difficult to define, or politically fraught.

The debate over disparate impact's application to Social Security illustrates this problem. ERA proponents' critique of the Social Security system highlighted the ways in which assumptions that men would be family breadwinners and women dependent homemakers—or at most secondary wage-earners—disadvantaged women by perpetuating their dependence upon men, and in some cases, threatening them with destitution in the event of divorce or a husband's premature death. ERA opponents disputed every aspect of feminists' analysis, arguing that, if anything, Social Security rules benefited women more than men. Perhaps the most difficult questions were those about how Congress could bring the Social Security system into

---

160 Id. at 593 (statement of Representative Patricia Schroeder).
162 Proponents did not introduce into the debate the concept of "business necessity," an important component of Title VII disparate impact doctrine.
163 See, e.g., Senate Hearings, Part I, supra note 83, at 811–75. Though the details are complicated, the dispute essentially boiled down to how the witnesses were defining advantage and disadvantage, and which women were the objects of concern. The Social Security system arguably disadvantaged two-earner households as compared to single-earner households, thereby incentivizing homemaking.
compliance with the ERA. Moreover, when pressed for specifics, proponents faced a choice between proposing very controversial solutions—such as a homemaker’s tax or “earnings sharing”—or declining to specify what solution Congress should adopt. For the most part, proponents chose the latter option, insisting that Congress would have discretion to choose whichever less discriminatory alternative legislators thought best.

ERA skeptics were concerned that remedying disparate impact discrimination might require overhauling or bankrupting the Social Security system, but they were even more disturbed by the association between disparate impact and affirmative action, and by extension, “quotas” and other controversial racial policies like “forced busing” and voting rights remedies. These associations made even congressional supporters of the new ERA wary of disparate impact’s political implications. The ERA Legislative History Project’s coordinator Sally Burns wrote to her colleagues in early October 1983, “Pro senators still resist the effects test and keep trying to persuade us that a foreseeable consequences test achieves the same result.” The senators’ lack of responsiveness to feminists’ argument that the “foreseeability” standard did not go far enough led Burns to believe that “they are more concerned with the political objections to the effects test.” She noted, “The senators with whom we have so [far] met predict that effects [analysis] will conjure forced busing and no at large voting districts.” As Burns saw it, feminists were caught in something of a Catch-22: “[A]s a reason to reject the effects test we are faced with racism on the one hand and with the equation that our no intent standard means that we seek a standard higher than race on the other.” As the next section describes, the amendment’s friends and foes battled over the ERA’s relationship to affirmative action on the familiar but fraught terrain of race.

164 Both of these proposals were attempts to resolve what feminists perceived as the Social Security system’s bias against two-earner households. Earnings sharing “would allocate half of a couple’s combined earnings during marriage to each spouse for purposes of calculating Social Security benefits.” Goodwin Liu, Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing, and the Challenge of Reform, 1999 Wis. L. Rev. 1, 3. A homemaker’s tax could presumably have taken a variety of forms, but its purpose was apparently to place a monetary value on homemaking work so that married women working outside the home would not be subject to greater income tax burdens than homemakers.

165 See, e.g., Memorandum from Marsha Levick to NOW-NOW LDEF ERA Legislative History Committee, supra note 107, at 4 (“Would ERA require a homemaker’s tax for Social Security? Without stating specifically what ERA might require, it does seem clear that the disparate effect which our present social security system has on the economic status and rights of women would require some congressional reform of that system.”).

166 Memorandum from Sarah E. Burns, ERA Legislative History Project, to ERA Attorneys 1 (Oct. 4 1983) (on file with Sterling Memorial Library, Yale University, Thomas Emerson Papers, Box 23, Folder 344).

167 Id.

168 Id.

169 Id.
3. "Trying to Have Your Cake and Eat It Too": Affirmative Action.—Just as proponents quickly realized that they would need to tackle the subject of disparate impact discrimination in congressional hearings on ERA II, they understood early on that the amendment’s relationship to affirmative action required clarification. When women’s rights advocates consulted Tom Emerson about their strategy for the new ERA hearings, he emphasized the heightened importance of this issue, which had received little attention during the hearings in 1971 and 1972.\textsuperscript{170} The potential effect of the ERA on affirmative action remained somewhat obscure during the ratification period.\textsuperscript{171} Proponents often avoided questions about affirmative action, and when they did answer them, they frequently vacillated between declaring that the ERA banned all sex classifications regardless of intent, and alluding vaguely to Title VII as a model for analyzing affirmative action under the amendment. At the same time, in litigation under the Equal Protection Clause of the Fourteenth Amendment, feminists were attempting to distinguish between the sorts of “benign” or “protective” classifications that they believed were the product of sex stereotypes and assumptions about women’s and men’s proper roles, and “genuine affirmative action” designed to achieve equality between men and women.\textsuperscript{172} This dilemma persisted in debates over ERA II, as members of Congress sought clarification of proponents’ position on the definition of “equality of rights” under the amendment.

But whereas in the first congressional ERA campaign opponents focused on the amendment’s potential to eviscerate “protective” or “benign” laws, in this second round that objection was far less frequent than its inverse: that the ERA would effectively require affirmative action, or “quotas.” In the first ERA debate, opponents emphasized the amendment’s alleged rigidity—its absolute commitment to equality that made no allowances for benignly intended protections; now they complained that the ERA would mandate not merely equality of opportunity, but equality of results. At the same time that opponents expressed doubt about the clarity of proponents’ distinction between “benign classifications,” which the ERA would prohibit, and permissible “affirmative action,” opponents tacitly acknowledged the difference between them by tolerating the first—even mourning their demise—while opposing the second.

ERA proponents identified affirmative action as one of several areas “for further research” in March 1983 as they prepared for new congressional hearings. In a memorandum to her colleagues, Phyllis Segal made

\textsuperscript{170} Memorandum from Sally Burns, ERA Legislative History Project, to the Attorneys for the ERA and Working Groups for the ERA (July 19, 1983) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, Catherine East Papers, Box 23, Folder 31).

\textsuperscript{171} See Mayeri, supra note 120.

clear that the validity of at least some form of affirmative action under the ERA was beyond question. “Obviously,” she wrote, “applying the ‘absolute prohibition’ concept of scrutiny in such situations would elevate ‘equality in theory’ over ‘equality in fact.’ Where differential treatment is targeted to achieve equality it should survive scrutiny under the ERA.”

She explained that the ERA’s original legislative history, federal equal protection jurisprudence, and state ERA caselaw were all consistent with this view, but that several points needed to be “clarified and stressed” in the second round of hearings. First, Segal wrote, proponents needed to clarify that the definition of affirmative action included efforts “designed to bring about equality (not as compensation, but as agent for change).” This, she emphasized, entailed not just the goal of “more participation” by women, “but also efforts to modify policies that appear neutral but are not. This is the flip side of the disparate impact memo discussion—another way to accomplish a broader view of equality.”

Affirmative action was an important legal tool for remedying not only facial discrimination, but also more subtle forms of bias and structural inequality.

While ERA proponents still faced the old challenge of distinguishing between allegedly compensatory classifications that in fact reinforced stereotypical views of women as dependents and truly remedial policies, changes in the legal and political climate since 1972 also required them to respond to charges that affirmative action for women unfairly discriminated against men and undermined meritocratic ideals. Segal hoped that “reinforcing and clarifying the treatment of affirmative action under the ERA might avoid the protracted reverse discrimination challenges that [were] being litigated in race cases under the [Equal Protection Clause].” She requested “[a]dditional analysis . . . to develop the points which would be helpful in this regard.”

As they had begun to do during the ratification struggle, ERA opponents seized every opportunity to suggest that the amendment would lead down a slippery slope to not merely encouraging, but requiring equal outcomes for men and women, even in contexts where most Americans believed sex differences were, if not immutable, enduring and perhaps even desirable. Opponents immediately grasped the connection between disparate impact analysis and affirmative action, grouping both under the rubric

---

173 Memorandum from Phyllis Segal to ERA Legislative History Project, supra note 109, at 1.
174 Id. at 2–3 (emphasis added).
175 Id. at 3 n.*.
176 While those arguments were beginning to surface in other contexts in the early 1970s, they had not played a significant role in early ERA debates. On growing opposition to affirmative action in the early 1970s, see Nancy MacLean, Freedom Is Not Enough: The Opening of the American Workplace (2006).
177 Memorandum from Phyllis Segal to ERA Legislative History Project, supra note 109, at 3.
178 Id.
of "equal results." They frequently raised the specter of "quotas" as the likely if not inevitable result of the ERA, especially in light of developments in the race context. Professor Wardle warned that the concept of quotas would creep even into family law:

Thirty years ago, when the Supreme Court decided Brown v. Board of Education, no one would have believed you if you had said that in order to achieve racial equality you would set up racial quotas. Thirty years from now we may look back and be saying the same sort of things about sexual equality in family relations, custody, alimony.

The case of United Steelworkers v. Weber was the opponents' favorite example of unintended consequences in this regard. The congressional sponsors of Title VII had not envisioned that the statute would permit affirmative action by employers, yet the Court had validated just such practices in Weber. As Professor Rees put it in one of the later Senate hearings on ERA II, "in the famous example of the Weber case and other cases, the [C]ourt has simply explained away one part of the legislative history . . . ." For the most part, ERA skeptics did not even bother to explain why such developments were undesirable; merely raising the specter of quotas and referring to experience with affirmative action under the Equal Protection Clause and Title VII was, for them, a case of res ipsa loquitur.

While to opponents the race cases served as a cautionary tale of courts run amok, ERA proponents embraced them—but not because the race pre-
cedents provided a particularly expansive template for affirmative action for women. Indeed, to proponents, cases like *Bakke*\(^{184}\) stood for the limits on, rather than the possibilities of, affirmative action. Strict scrutiny was a more stringent standard than that which applied to sex-based classifications, including those arguably designed to promote sex equality. Liberal Justices and advocates frequently argued for applying a lower standard of scrutiny to racial classifications designed to promote equality.\(^{185}\) For feminists, strict scrutiny was a mixed blessing: on the positive side, it might prevent courts from taking at face value claims that “benign” sex classifications were motivated by a desire to ameliorate discrimination; on the negative side, it could curtail efforts at “genuine” affirmative action. Thus when ERA proponents cited race cases as precedent for the ERA’s treatment of affirmative action, they were in fact making something of a concession to opponents at the same time that they were leaving the door open to proactive efforts at achieving equality through sex classifications.

Amendment advocates turned to the race precedents almost automatically when Senator Hatch raised the affirmative action issue in the first hearing on ERA II. In a memorandum to women’s organizations written immediately after the first Senate hearing in May, Marsha Levick recorded the feminist litigators’ responses to Hatch’s questions about the status of a hypothetical ten percent set-aside for women in government contracting. She wrote:

> Presumably, such affirmative sex-conscious “remedies” would be no more or less unconstitutional than the comparable race-conscious programs addressed in *Regents of the University of California v. Bakke*\(^{186}\) and *Fullilove v. Klutznick*:\(^{187}\) if an “institutionally competent actor” makes a finding of past discrimination vis-à-vis that institution, industry, etc., sex-conscious programs could be implemented.\(^{188}\)

The “etc.” in Levick’s sentence masked a key question: whether general, society-wide discrimination was an adequate justification for sex-based affirmative action. The Court had suggested that it was in *Califano v. Webster*,\(^{189}\) but that same question was the subject of sometimes bitter struggle...


\(^{185}\) Indeed, as I explore elsewhere, some feminists argued in the late 1970s that sex equality precedents allowing legislatures to take societal discrimination into account when designing compensatory policies for women provided a good template for race-based affirmative action jurisprudence. *See May-eri, supra* note 172.

\(^{186}\) 438 U.S. 265.

\(^{187}\) 448 U.S. 448 (1980).

\(^{188}\) Memorandum from Marsha Levick to NOW-NOW LDEF ERA Legislative History Committee, *supra* note 107, at 7 (footnotes added).

\(^{189}\) 430 U.S. 313, 317 (1977) (per curiam) (noting that the purpose of the statute in question was “redressing our society’s longstanding disparate treatment of women” (quoting Califano v. Goldfarb, 430 U.S. 199, 209 n.8 (1977)) (internal quotation mark omitted)).
in the context of race.\textsuperscript{190} When making the case to pro-ERA legislators, ERA proponents framed congressional power to enact remedial legislation in more expansive terms:

Where a qualified legislative or executive institution has found as a factual predicate that a \textit{racial} minority has suffered from past societal discrimination, it may pass remedial legislation \ldots . By equating a sexual classification with a racial classification, the ERA would permit such legislation in favor of women.\textsuperscript{191}

As the hearings progressed, it became clear that the analogy to race-based affirmative action was attractive in large part because it undermined opponents' charges that the ERA would mandate "equality of results" in all circumstances. For instance, when opponents warned of the potential for fifty percent quotas for women in the military, proponents could point to the desegregation of the armed forces as belying this concern.\textsuperscript{192} Similarly, in the Senate hearings on the ERA’s impact on the military, Hatch asked pro-ERA witness Chayes whether the ERA would permit or require affirmative action for women. She carefully replied that "where you are dealing with affirmative action issues, where the policies are designed to correct inequities of the past, just as in race cases, they will be very carefully scrutinized by the courts, if, indeed, they ever get to the courts."\textsuperscript{193}

In this sense, the race-based affirmative action precedents served as an additional limiting principle to confine the reach of disparate impact analysis. As we saw earlier, proponents stressed that the application of disparate

\textsuperscript{190} See Mayeri, supra note 172 (describing feminists’ attempts during the 1970s to convince the Court to apply the more lenient standard developed in sex equality cases to race-based affirmative action).

\textsuperscript{191} ERA Q’s and A’s (Kennedy) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, Catherine East Papers, Box 23, Folder 30).

\textsuperscript{192} For example, when Delaware law professor Stanmeyer proclaimed that the ERA would require fifty percent quotas for women in the military, including in combat roles, Columbia law professor Henry Monaghan could allude to the desegregation of the armed forces as belying this concern. \textsuperscript{192} Similarly, in the Senate hearings on the ERA’s impact on the military, Hatch asked pro-ERA witness Chayes whether the ERA would permit or require affirmative action for women. She carefully replied that “where you are dealing with affirmative action issues, where the policies are designed to correct inequities of the past, just as in race cases, they will be very carefully scrutinized by the courts, if, indeed, they ever get to the courts.”

\textsuperscript{193} Senate Hearings, Part I, supra note 83, at 341-42 (testimony of Antonia Handler Chayes). Hatch had asked Chayes about the ramifications of the ERA for a 1975 Court decision upholding a promotion scheme that allowed servicewomen additional time to achieve promotion before the military’s up-or-out policy would apply. See Schlesinger v. Ballard, 419 U.S. 498 (1975). After further back-and-forth, she added, "I do not see any problem with affirmative action. We have dealt, I think, very nicely with these problems in the title VII experience, and also under the equal protection clause." Senate Hearings, Part I, supra note 83, at 342. When Hatch pressed her further on whether the ERA would mandate affirmative action for women in the service academies, Chayes again relied on the race cases, saying, "I do not particularly see vastly greater numbers of women being admitted to service schools, as compensation for past discrimination, particularly after the Bakke case .... " Id. at 352. Though she did not elaborate, Chayes presumably was referring to Bakke's failure to endorse a compensatory rationale for affirmative action in the university context. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 n.34, 307-10 (1978).
impact analysis to the Social Security system would not mandate any par-
ticular remedy, but rather would leave remediation to the discretion of Con-
gress. Similarly, they emphasized that, in the words of Levick’s mem-
andum, “[t]he Equal Rights Amendment must be seen for what it is:
A prohibition against how laws are made, or how they are implemented,
and not a guarantee of affirmative protection requiring particular action by
Congress or State legislatures.”

Proponents also used an affirmative action rationale to limit the “abso-
lute” nature of the prohibition on sex classifications in the context of single-
sex education. They argued that while public single-sex schools and col-
leges would generally be unconstitutional under the ERA, there would be
an exception for all-female institutions designed to overcome the effects of
past discrimination and foster greater equality between women and men.
This position was the product of a compromise among feminists. Some
would have preferred to insert into the ERA’s legislative history an excep-
tion for single-sex colleges generally; others would have eschewed all ex-
ceptions to the coeducational rule. Conveniently, this compromise was
also the standard articulated in the 1982 Supreme Court decision in Mis-
sissippi University for Women v. Hogan, the first high-profile opinion au-
thored by the first female Justice, Reagan-appointee Sandra Day O’Connor.
Hogan, as proponents often reminded their audience, had enshrined just the
distinction they wished to make: “Just as under present law, under the ERA
some schools or programs for women could continue affirmative admis-
sions policies and compensatory aid for women if their single-sex nature is
evaluated as making a positive contribution to overcoming the effects of
discrimination and promoting sex equality.” Again, proponents relied on
equal protection jurisprudence to limit the ERA’s reach on one dimension,
even as they reached beyond the Fourteenth Amendment in defining the
ERA’s meaning on other dimensions.

As the head of a formerly all-female public women’s school, Hunter
College President Donna Shalala seemed the perfect witness to explain the
pro-ERA position on single-sex institutions. “The effect of the Equal

---

194 Memorandum from Marsha Levick to NOW-NOW LDEF ERA Legislative History Committee,
supra note 107, at 1. Opponents warned that these assurances were empty: Harvard government profes-
sor Eliot Cohen, for instance, predicted that even in the absence of a legal mandate for affirmative ac-
tion, political pressure would force such policies on the government, including the military. Senate
Hearings, Part I, supra note 83, at 305 (statement of Eliot A. Cohen, Professor, Department of Govern-
ment, Harvard University).

195 See, e.g., Memorandum from Marsha Levick to NOW-NOW LDEF ERA Legislative History
Committee, supra note 107, at 5 (noting in handwritten text: “Put into legis history ERA not intended to
affect single sex private schools.”).


197 Memorandum from Sally Burns, ERA Legislative History Project, to the Attorneys for the ERA
and Working Groups for the ERA, Re: Answers to Hatch Questions and Meeting with Hill Staff (July
19, 1983) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, Catherine East Pa-
pers, Box 23, Folder 29) (citing Hogan as precedent).
Rights Amendment on education is simple,” she wrote in her prepared testimony. “The choice of whether to discriminate on account of sex in education will no longer be an option. This means that unless educational policies are justified by principles of affirmative action, schools must treat males and females the same.”198 “Simplicity” notwithstanding, Shalala found herself unexpectedly under attack from both sides. Senator Howard Metzenbaum (D-OH), the only pro-ERA senator on hand that day, happened to enter the room while Shalala was explaining the affirmative action exception to the ban on public single-sex colleges. As ERA Legislative History Project coordinator Sally Burns described, “[w]ithout pausing, Metzenbaum took issue with Shalala, stating that he would not favor an ERA that permitted such a thing. He left without asking the helpful questions that he had come to pose.”199 Metzenbaum supported affirmative action generally, but objected to the exception as applied to women’s colleges, and “he [was] not alone.”200 Meanwhile, Shalala was also under fire from Hatch and from Jeremy Rabkin, a government professor from Cornell. Rabkin challenged Shalala on the affirmative action exception as well, noting the absence of such a qualification in the race context:

Neither the Department of Education, the Justice Department, nor any court, so far as I am aware, has ever said, “If you want to be an all-black institution for affirmative action reasons, that is all right, and you can exclude white applicants.” . . . Since racial segregation is not allowed even for affirmative action reasons, I cannot understand what justification there could be for saying, “Well, we will allow it in the case of sex discrimination, because some women think it is good for them.” That seems to me to be trying to have your cake and eat it too.201

In redefining the meaning of “equal rights under the law,” ERA proponents were engaged, simultaneously, in a number of delicate balancing acts. For ERA II to be a worthwhile endeavor, the amendment had to move feminists beyond existing equal protection jurisprudence. By 1983, heightened scrutiny had vanquished many, though not all, explicit sex-based legal distinctions, and the Court had established a very restrictive approach to constitutional disparate impact cases. Without a robust interpretation of the ERA’s applicability to sex-neutral laws, the amendment would not much improve women’s legal status. Nevertheless, political realities dictated that

198 Senate Hearings, Part I, supra note 83, at 129 (statement of Donna E. Shalala, President, Hunter College of the City University of New York).
199 Memorandum from Sarah E. Burns to ERA Attorneys (Oct. 4, 1983) (on file with Sterling Memorial Library, Yale University, Thomas Emerson Papers, Box 23, Folder 344).
200 Id. at 3. Burns continued, “The crisis has blown over and the coalition survives. A meeting with Metzenbaum is planned this week. We may want to consider what acceptable qualifying detail should be submitted with the Shalala testimony to address this point.” Id.
201 Senate Hearings, Part I, supra note 83, at 135 (testimony of Jeremy A. Rabkin, Assistant Professor, Department of Government, and Director, Program on Courts and Public Policy, Cornell University).
proponents must establish some limiting principles to check the reach of disparate impact analysis. Feminists steadfastly resisted pro-ERA legislators’ attempts to endorse a “foreseeable consequences” test, but they did find other ways to limit disparate impact analysis. They assured skeptics that principles from equal protection and Title VII jurisprudence could prevent the ERA from overreaching, even if the need to depart from the Davis-Feeney line of cases remained a central premise of the amendment’s definition of equality. As the next two sections describe, the ERA II hearings led feminists to make similar compromises with respect to other aspects of the amendment’s meaning.

C. “Too Much Baggage for the ERA to Carry”: Private Conduct and the State Action Requirement

Like disparate impact and affirmative action, the ERA’s effect on private conduct was on proponents’ agenda as an issue for further research. However, feminist lawyers disagreed on how expansively they should characterize the ERA’s reach into the “private conduct” of individuals and corporations. Some believed that proponents should minimize the extent to which the ERA would directly or indirectly affect private conduct. They argued for incorporating the Fourteenth Amendment’s state action requirement into the ERA and against expanding the amendment’s reach beyond that authorized by the original legislative history of 1971 and 1972. This more conservative approach bore a strong resemblance to proponents’ position on affirmative action, described in the preceding section, in that it relied on existing jurisprudence to delimit the ERA’s impact. Some proponents even suggested incorporating into the ERA’s legislative history an intent to exempt private single-sex schools from the ERA’s reach. Other feminist lawyers took a more aggressive approach, arguing for an interpretation that would—like the disparate impact analysis described above—extend the ERA’s reach beyond the strictures of existing state action doctrine under the Fourteenth Amendment. As opponents charged that the ERA would authorize or even mandate sweeping incursions into the private sector, broadly defined, the amendment’s defenders ultimately settled upon an intermediate strategy designed to deflect skeptics’ concerns while leaving open possibilities for more expansive interpretations.

As soon as the hearings began, ERA opponents, led by Senator Hatch, focused upon the ERA’s impact on private educational and religious institutions as the principal example of the amendment’s incursions into the private sphere, with the Supreme Court’s recent decision in Bob Jones University v. United States as the central cautionary tale. In Bob Jones, decided just three days before the first hearing on ERA II, the Court had upheld a decision by the Internal Revenue Service to revoke a tax exemption to Bob Jones University, a conservative evangelical institution that prohib-
itted interracial dating among students.\textsuperscript{202} Read expansively, \textit{Bob Jones} did not bode well for private single-sex schools or other entities that differentiated between males and females and relied on federal assistance, either in the form of funding or exemption from taxation. Read narrowly, the decision provided several bases for limiting its impact on such institutions.

Many feminists' initial inclination was not only to read \textit{Bob Jones} expansively, but also to define the ERA as exerting significant impact on private conduct. At a May 1983 meeting immediately following the first Senate hearing, proponents strategized about how to respond to Hatch's questions, which included queries about the effects of the ERA on private and religious schools and other entities. The feminist lawyers concluded that "after \textit{Bob Jones}, it seems that [private single-sex schools] must begin to accept the limits of their continued existence as single-sex schools."\textsuperscript{203} Long-time women's rights advocate and ERA activist Catherine East dissented from this view, suggesting that proponents put in the legislative history a clear indication that the ERA was not intended to apply to private single-sex schools.\textsuperscript{204} Advocates for a more expansive ERA interpretation continued to flesh out their view; in a July 1983 memo, ERA Legislative History Project coordinator Sally Burns recorded their assertion that

\begin{quote}
[t]he reach of the ERA with respect to private education would depend on the extent of state involvement. A private institution whose sex segregation policies could not be justified on the grounds of affirmative action might lose government funds. Similarly, a private tax-exempt institution could lose its tax exemption... if its policies of sex discrimination were found to offend public policy.\textsuperscript{205}
\end{quote}

This reference to public policy was a partial concession to the limits of the \textit{Bob Jones} decision, which was predicated upon the unanimous consensus among the three branches of government regarding the abhorrent nature of race discrimination. However, it emphasized the possibilities of using \textit{Bob Jones} as a precedent for expansive interpretations of the ERA, rather than stressing the decision's limitations.

The debate among feminist lawyers over the ERA's scope continued over the next several months. East described the contending positions in an internal memo in October 1983: "The feminist legal community is attempting to secure legislative history that would require withdrawal of tax exemption not only from private schools but from other single-sex private organizations unless 'sex segregation is one part of a plan of affirmative ac-

\textsuperscript{203} Memorandum from Marsha Levick to NOW-NOW LDEF ERA Legislative History Committee, \textit{supra} note 107, at 5.
\textsuperscript{204} \textit{id.} at 5 (urging in handwritten notes that the ERA is "not intended to affect single sex private schools").
\textsuperscript{205} Memorandum from Sally Burns, ERA Legislative History Project, to the Attorneys for the ERA and Working Groups for the ERA, \textit{supra} note 197.
NORTHWESTERN UNIVERSITY LAW REVIEW

tion to overcome the past effects of discrimination' against women. 206 This approach, she noted, had the support of NOW leaders Eleanor Smeal and Judy Goldsmith. "My view," wrote East, "is that this is too much baggage for the ERA to carry . . . . I would like to see the legislative history clearly indicate that the ERA would apply only where 'State action' as defined in Supreme Court decisions is involved." 207 In suggesting this alternative strategy, East harkened back to the first ERA debates of the early 1970s: "The original ERA was not intended to apply to private schools, girl scouts, boy scouts, women's hospitals, or women's organizations, even if they received some government funding." 208 To ask for more seemed to East strategically unwise, although she expressed wholehearted agreement with her colleagues' substantive goals.

Meanwhile, ERA opponents seized on Bob Jones to highlight the amendment's potential to disrupt not only the educational autonomy of private schools, but also the integrity of churches, seminaries, and other religious institutions. The testimony of Cornell professor Rabkin was perhaps the most damning from the point of view of ERA skeptics: Rabkin contended that the ERA would prohibit direct federal or state funding of single-sex institutions, any federal and state subsidization of equipment for schools that differentiated between the sexes, and all tax exemptions for private institutions that treated men and women differently. 209 Each of these outcomes, Rabkin argued, followed logically from the ERA's constitutionalization of an equivalence between race and sex discrimination. This equivalence, Rabkin submitted, was fundamentally misguided:

Now we have done all this to private schools that persist in racial discrimination precisely to express an unyielding abhorrence to racist practices. The question again is whether we want to oppose all aspects of sexual separation or differentiation with equally uncompromising condemnation, imposing the same financial penalties and the same moral stigma. My own view is that there is something terribly wrong with a constitution that puts the sexual exclusion of a Catholic seminary or a traditional women's college on the same plane with the racial bigotry of a white supremacist 'segregation academy.' 210

Rabkin's implicit acceptance of the Bob Jones decision as correct rendered more credible his objections to extending the principle to cover sex discrimination.

206 Memorandum from Catherine East, ERA—Major Issues 3–4 (Oct. 11, 1983) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, Catherine East Papers, Box 23, Folder 47).
207 Id. at 4.
208 Id. at 3.
209 Senate Hearings, Part I, supra note 83, at 99–100 (statement of Jeremy A. Rabkin, Assistant Professor, Department of Government, and Director, Program on Courts and Public Policy, Cornell University).
210 Id. at 110.
Rabkin’s testimony prompted ERA proponents to refine their position on private organizations and the relationship of the amendment to private conduct generally. In a memorandum circulated to proponents a few weeks after Rabkin’s appearance before the Senate subcommittee, Sally Burns wrote to her compatriots of the need for clarification: “Rabkin drew a picture of sweeping state intervention into the private sphere and it was difficult to make a clear counter-record on his parade of horribles in oral testimony.” Burns’s memo suggested a subtle shift in the feminist lawyers’ approach: now the task was “to have scholarly legal materials on the state action and tax exempt status issues on the record to demonstrate just how unlikely based on past court decisions Rabkin’s predicted sweep is.”

The perceived need to limit the ERA’s reach into the private sphere was driven home by Hatch’s summary of Donna Shalala’s testimony in the same hearing, which starkly portrayed her position as unremittingly hostile to sex differentiation in private as well as public education except where such differentiation furthered affirmative action goals.

In an attempt at damage control, Senator Dennis DeConcini (D-AZ), an ERA supporter, submitted questions to Shalala after the hearing that would enable proponents to clarify the ERA’s relationship to private conduct and existing state action doctrine. Consultation with feminist lawyers Wendy Webster Williams and Ann Freedman produced a written statement from Shalala that “absent additional legislative or executive action, private institutions will rarely be subject to the requirements of the ERA just as private institutions are now rarely subject to the 14th Amendment requirements.”

The feminist lawyers also offered a much narrower reading of Bob Jones than they had previously contemplated: they emphasized that Bob

211 Memorandum from Sarah E. Burns to ERA Attorneys, supra note 199, at 3.
212 Id.
213 Impact of the ERA Upon Private and Parochial Education (circulated by Sen. Hatch) (Oct. 1983) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, Catherine East Papers, Box 23, Folder 31) (“Private Schools—The ERA required the integration of all single-sex private schools and colleges receiving any form of direct or indirect public funds, including tax exemptions, except for those all-women institutions based upon principles of ‘affirmative action.’ (Shalala: ‘I do not know of any institution in the country in which there is not public involvement.’)”).
214 Senate Hearings, Part I, supra note 83, at 169 (statement of Donna E. Shalala, President, Hunter College of the City University of New York, in response to questions of Senator Dennis DeConcini).
215 See Erwin Chemerinsky, Rethinking State Action, 80 NW. U. L. REV. 503, 505 & n.10 (1985) (“There is no doubt that the Burger Court has tightened substantially the state action requirement, showing far less willingness to apply the Constitution’s protections against private conduct.”).
Jones was based on statutory rather than constitutional authority, and that the decision permitted, but did not require, the IRS to withhold tax-exempt status from racially discriminatory private organizations. ERA proponents assured the subcommittees that Congress retained full discretion to grant tax exemptions to private organizations; failure to grant such exemptions could only occur if a robust public policy against sexual differentiation comparable to that against race discrimination were established. In other words, sex-differentiating private entities could rest assured that the ERA would not affect their tax status unless a societal consensus developed that their policies were as abhorrent as racial discrimination. Because opponents were fond of emphasizing that no such consensus yet existed, the danger of sex-differentiating institutions becoming “embittered,” “isolated,” or downright bankrupt as a result of the withdrawal of tax-exempt status was minimal. Proponents also contended that the First Amendment would protect purely religious activities from the ERA’s reach under any circumstances, although the line between religious and secular activities remained notoriously difficult to draw.

In the end, proponents’ position on the ERA’s impact on private entities and its relationship to existing state action doctrine occupied a middle ground between the cautious approach advised by East and the more expansive interpretation advanced by other feminist lawyers. Proponents’ treatment of what was perhaps the most politically hazardous topic of the ERA II hearings, abortion, was also the product of an uneasy compromise among feminist lawyers and other ERA proponents.


The “abortion-ERA connection” had been a centerpiece of Phyllis Schlafly’s STOP ERA campaign. Opponents’ unremitting efforts to derail the amendment on this basis drove many proponents to elide or even deny the connection despite their firm conviction that reproductive freedom and sex equality were inextricably intertwined. During the ERA’s pendency, proponents engaged in a behind-the-scenes campaign of their own to keep feminist litigators from raising sex-based equal protection arguments against abortion restrictions in cases brought under the Fourteenth Amendment. The lawyers who argued Harris v. McRae, the 1980 federal abor-

216 MANSBRIDGE, supra note 7, at 124–25; Siegel, supra note 8, at 1397 (“As countermobilization against ERA and Roe converged, leadership of the women’s movement struggled to defend ERA and Roe by separating them, over time engaging in ever more strenuous efforts of self-censorship.”).
tion funding case, refrained from making a sex-based equal protection argu-
ment, believing that *Geduldig* left them little chance of success. But even before, and especially after, the Court upheld the Hyde Amendment, litigators at the state level could not justify withholding one of their best po-
tential weapons against abortion funding restrictions—state ERAs. As the prospect for the ERA’s ratification grew increasingly dim, maintaining a strict ERA-abortion separation no longer seemed to be worth pragmatism’s price.222

When the ERA was reintroduced in 1983, proponents faced a poten-
tially fateful choice: they could continue to deny that the ERA would have
any impact on abortion rights, or they could acknowledge the relationship
between abortion and sex equality as a constitutional as well as a political
and moral reality. As the hearings and feminists’ internal deliberations
went on, it became clear that neither of these dichotomous alternatives was
politically viable. To be candid about feminists’ hopes for the ERA and
abortion rights would augur certain doom. On the other hand, the way in
which proponents denied or downplayed the “ERA-abortion connec-
tion”—the reasoning they used, the doctrinal arguments upon which they
relied—had significant ramifications not only for the abortion issue, but for
other crucial aspects of the ERA’s new constitutional meaning and for fu-
ture battles over women’s legal status.

Given the abortion issue’s prominence in the ratification struggle, fe-
minsters were well aware that the hearings on ERA II would be a test of their
ability to strike the right balance between candor and circumspection, bold-
ness and caution. Exactly what that balance should be was a matter of con-
siderable dispute, however. Feminists had disagreed over how best to
handle the relationship between the ERA and reproductive rights in the dec-

---

tervention rather than sex discrimination in the federal abortion funding case was . . . made on the basis of ‘what argument was most likely to win . . . . The ERA was not a consideration in how that case was
argued—not at all.’” *MANSBRIDGE, supra note 7*, at 287 n.4.

220 The Hyde Amendment, first passed in 1976, barred the use of federal funds to pay for abortion

221 *MANSBRIDGE, supra note 7*, at 126, 287 n.7 (citing *From the Executive Director’s Desk, DOCKET* (newsletter of the Civil Liberties Union of Massachusetts), Aug. 1980, *reprinted in Senate
Hearings, Part I*, supra note 83, at 657 (submitted for the record)).

222 Siegel, *supra note 8*, at 1399–1400.

223 Opponents popularized the term “ERA-abortion connection” during the ratification debates of the 1970s, and continued to use it in reference to ERA II. *See, e.g., The E.R.A.-Abortion Connection, PHYLLIS SCHLAFLY REP.*, June 1983, § 2, at 1 (on file with the Schlesinger Library, Radcliffe Institute, Harvard University).
ade since Roe v. Wade catapulted the issue onto a national stage, but by and large they suppressed their differences to preserve a unified front. Now the reintroduction of the amendment offered a second bite at the apple. Attorney Rhonda Copelon, who had argued the abortion funding case Harris v. McRae before the Supreme Court, expressed the views of many feminists in a Ms. Magazine article in October 1983: “The separation of abortion from the campaign for the ERA has jeopardized abortion and produced a truncated version of liberation.” Feminists should embrace the ERA-abortion connection, Copelon suggested—if not with pride, then at least with grim determination. Copelon’s analysis—frequently referenced by ERA opponents as evidence of feminists’ true intentions for the ERA—eschewed sharp boundaries between privacy and equality.

As ERA proponents prepared for the hearings in the spring of 1983, they considered a range of approaches to the abortion question. A memo circulated by Marsha Levick to the ERA Legislative History Committee members in April laid out three alternative responses to the question, “Is a woman’s right to voluntarily choose to undergo an abortion enhanced, sustained or diminished by a federal equal rights amendment?” As the boldest option, Levick articulated a vision of the abortion right “as an aspect of the right shared by men and women equally to control their reproductive capacity, and to retain for themselves the right to decide when and under what circumstances they wish to become a parent.” This vision of equality unashamedly linked abortion with both equal rights and privacy, and conceptualized reproductive freedom as a good that should be available to both men and women, rather than characterizing pregnancy as a “unique physical characteristic” subject to a different mode of analysis.

The two other responses Levick outlined sacrificed this expansiveness at the altar of pragmatism. One possibility was to say that the abortion right “is unaffected. A woman’s right to choose to terminate her pregnancy by abortion is a fundamental right which derives from her general right to privacy granted by the Constitution . . . articulated and recognized by Roe v. Wade,” so strict scrutiny should continue to apply to “all laws and regulations impacting on a woman’s right to undergo an abortion.” The final alternative was to treat abortion regulations as laws concerning “unique

226 Memorandum from Marsha Levick to NOW/NOW LDEF ERA Legislative History Committee 1 (Apr. 11, 1983) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, Catherine East Papers, Box 23, Folder 29).
227 Id. at 3.
228 Id. at 1.
physical characteristics,” subject to strict scrutiny under the ERA. On this view, discrimination against women on the basis of their ability to become pregnant clearly constituted sex discrimination, repudiating the Supreme Court’s contrary decision in Geduldig v. Aiello. Levick recognized the need “to make the scope of [the ERA’s] coverage of [pregnancy-based discrimination] clear through legislative history,” because Geduldig had severed the link between pregnancy and sex discrimination under the Equal Protection Clause of the Fourteenth Amendment.

But, as Levick also recognized, it was difficult if not impossible to deny a connection between the ERA and abortion while maintaining that the amendment addressed discrimination based on pregnancy. As Levick put it, “If pregnancy-based discrimination is sex discrimination, it is difficult to substantiate the position that disparate or discriminatory treatment of women wishing to undergo abortion is not sex discrimination since abortion, like pregnancy, can only be experienced by women, and is clearly ‘pregnancy-related.’” Not only would such a position produce logical dissonance, but, Levick argued, it would also compromise an important feminist principle: “To accept that abortion is unlike pregnancy would seem to suggest an acceptance of the right to life position, i.e., abortion is different because it involves another life (fetus) and other interests (spouse/father). This seems to be an untenable position for the women’s movement to endorse, and a major step backwards.”

In order to accomplish these objectives simultaneously, Levick wrote, “a combination of responses #1 and #2 would have to be put forward.”

Easier said than done. As Levick’s memo suggested, feminists’ new definition of the ERA’s legal meaning put the pro-choice ERA advocates between a rock (pregnancy discrimination) and a hard place (disparate impact analysis). Denying the ERA’s impact on abortion rights risked excising pregnancy discrimination from the amendment’s definition of equality: if the ERA required strict scrutiny for laws relating to women’s unique physical characteristics (UPC), then it was difficult to see how the UPC category could include pregnancy but exclude abortion. At the same time, applying disparate impact analysis to laws regulating abortion produced a clear logical result—irrespective of one’s views on the morality of terminating a pregnancy, no one could dispute that restricting abortion, or funding

---

229 Id. at 1–2.
231 Id., supra note 226, at 2.
232 Id.
233 Id.
234 Id.
235 Id.
for abortion, had a disproportionate effect on women. Further, whichever box abortion was in—UPC or disparate impact—strict scrutiny would apply. If the ERA was meant to elevate the level of scrutiny for sex discrimination to the same level as, if not a higher level than, that accorded to race discrimination, it was difficult to see how any restrictions on abortion would be valid under the ERA unless they served a compelling government interest. And pro-choice advocates certainly were loath to concede that the protection of fetal life constituted such a compelling interest.

Abortion had played only a minor role in the pre-\textit{Roe} discussion of the ERA; during the ratification debates the discourse about the relationship between abortion and the ERA was largely heated rhetoric rather than intricate doctrinal parsing. But in the hearings on ERA II, proponents could not evade pointed legal questions from a well-prepared and often sophisticated opposition. In the first Senate hearing, pro-ERA witnesses attempted to skirt these questions. Tsongas responded to Hatch's questions about the amendment's impact on abortion funding with his standard response that the issue would be decided by the courts. Mama Tucker demurred, saying she did not know enough about the issue to answer. Then Hatch called on Representative Henry Hyde (R-IL), author of the law prohibiting Medicaid funding for abortions, to testify about the ERA's impact on the Hyde Amendment's constitutionality. Hyde invoked an analogy that anti-ERA witnesses and legislators would repeat again and again through the hearings: “If sex discrimination were treated like race discrimination, Government refusal to fund abortions would be treated like a refusal to fund medical procedures that affect members of minority races.” Opponents' favorite example was sickle-cell anemia. As Grover Rees argued in the first House hearing, “[A] legislative program that funds other operations’ but not abortion would be constitutionally identical to a program that funded cures for every disease except sickle-cell anemia, to which only blacks are susceptible.” Representative DeWine proceeded to ask nearly every witness who came before the House about the validity of the sickle-cell anemia analogy, which proved difficult to refute. Washington University professor Jules Gerard stated it in a later hearing,

I find it remarkable, since [proponents] talk[] about the potential of ERA to overturn statutes which have a disparate impact on women, for them to conclude that the classical statute which must have a disparate impact on women

\begin{footnotesize}
\begin{itemize}
  \item Proponents' own disparate impact analysis included biology as a constitutionally suspect basis for laws exerting a disproportionately negative effect on women. See Memorandum from Phyllis Segal to ERA Legislative History Project, supra note 109, at 3.
  \item Senate Hearings, Part I, supra note 83, at 24 (testimony of Senator Paul E. Tsongas).
  \item \textit{Id.} at 72 (testimony of Marna S. Tucker, Attorney).
  \item \textit{Id.} at 84 (statement of Representative Henry J. Hyde).
  \item \textit{House Hearings, supra} note 79, at 28 (statement of Grover Rees III, Assistant Professor of Law, University of Texas School of Law).
\end{itemize}
\end{footnotesize}
... would be unaffected. All of a sudden, disparate impact is some irrelevant consideration. I don’t understand their logic. 241

By the second House hearing, it had become clear that witnesses were susceptible to abortion-related questions regardless of their area of expertise. Feminist attorneys carefully briefed the pro-ERA witnesses on how to respond to these questions. The strategy, in essence, was to state that abortion rights were protected by privacy jurisprudence under the Fourteenth Amendment, implying that the ERA was redundant rather than revolutionary while leaving the door open to a legislative history free of unequivocal statements about the ERA’s irrelevance to reproductive rights. Striking this delicate balance—difficult even in theory—proved very nearly impossible in the hearing room. When DeWine asked the witnesses about the ERA’s impact on the Hyde Amendment, long-time women’s rights advocate Bernice Sandler deftly replied that while she was not a legal expert, she wanted to “reiterate . . . that the Supreme Court has not viewed abortion under the Equal Protection Clause as a civil rights issue. They have always viewed it in terms of due process and privacy, and that is where the Court has been coming from all along.” 242 So far, so good, but DeWine pressed further—"Is [the] panel’s opinion . . . that the passage of the ERA would not in any way affect the right to an abortion or any legislation that might follow?"—prompting Tish Sommers of the Older Women’s League and Diana Pearce of Catholic University’s Center for National Policy Review to declare, that the ERA would have “no relationship” to abortion. 243

The feminist lawyers responsible for coordinating proponents’ testimony were dismayed. Burns wrote to her colleagues in early October, “All the September 14 House witnesses were briefed on the abortion answer. Still some went too far and said ‘no relation,’” an understanding subsequently memorialized by House counsel in a summary interpretation to be used by members of Congress in their own testimony. 244 “Obviously,” Burns wrote, “legislative history to that effect is troubling to pro-choice concerns.” 245 Meanwhile, congressional proponents of the amendment regularly labeled the issue a “red herring.” They had a point—as Senator Packwood told Hatch, “[M]y hunch would be if you put the strongest anti-abortion rider on this amendment that you could dream up, it would not change a single antiabortion vote toward the amendment.” 246 But remarks like Representative Charles Schumer’s (D-NY) compounded the problem:

241 Id. at 803 (testimony of Jules Gerard, Professor of Law, Washington University Law School). Schlafly also used this example. See, e.g., The E.R.A.-Abortion Connection, supra note 223, at 1–2.
242 Id. at 164 (testimony of Bernice Sandler, Executive Director, Project on the Status of Women, Association of American Colleges).
243 Id. at 165 (testimony of Tish Sommers, Older Women’s League).
244 Memorandum from Sarah E. Burns to ERA Attorneys, supra note 199, at 2.
245 Id.
246 Senate Hearings, Part I, supra note 83, at 264 (testimony of Senator Bob Packwood).
[A]bortion has nothing to do with discrimination between men and women, period, until the time when a man can have an abortion or become pregnant, and then maybe it will have something to do with it. But until that point we ought to just abandon that argument and throw it out. . . . It is just ridiculous, I have to say that.  

Moreover, proponents continued to argue about how to respond to questions about public funding for abortion. Catherine East recorded in October that Rutgers law professor Ann Freedman “believe[d] the ratification of the ERA [would] not affect Supreme Court decisions on Medicaid funding,” while others, including Marcia Greenberger and Judy Lichtman “[thought] that it [would] (or hope[d] that it [would]) if we don’t have in the legislative history any statement that it won’t have any effect or that ERA had ‘no relation’ to abortion.” Greenberger and Lichtman counseled Freedman “to ‘stonewall’ if Congressman DeWine press[e]d her with questions and not to state her legal reasoning for thinking it [would] have no impact.” East agreed with Freedman, and suggested that in order to ward off the inclusion of an antiabortion rider to the ERA, proponents offer “a clear unequivocal statement in the House Committee report that it is not the intent of the Congress that the ERA have any impact on abortion.” In the final House hearing on ERA II, Freedman and Emerson reiterated the argument that courts would continue to decide abortion cases under the right to privacy, regardless of the ERA’s fate. While feminist lawyers were scrupulously careful not to disavow all connection between the new ERA and abortion, their strategy of circumvention fell far short of many feminists’ aspirations for the ERA.

E. The Dual Strategy Revisited

As ERA I’s official expiration date neared, Senator Slade Gorton, a moderate Republican from Washington State, conferred with the eminent constitutional scholar Gerald Gunther about an alternative strategy for achieving “equality of rights under the law.” Why not legislate the substance of the ERA with a bill designed to achieve the amendment’s aims without submitting to Article V’s requirement of state approval, Gorton wondered? Gunther’s reaction was positive. “I continue to believe that this is a notion worth pursuing,” the Stanford law professor wrote to Gorton in a letter dated July 1, 1982, the day after the ratification deadline. He noted

247 House Hearings, supra note 79, at 237 (testimony of Representative Charles E. Schumer).
248 Memorandum from Catherine East, supra note 206, at 1.
249 Id.
250 Id.
251 Letter from Gerald Gunther, William Nelson Cromwell Professor of Law, Stanford Law School, to Sen. Slade Gorton, (July 1, 1982) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, NOW Papers, Box 191, Folder 9) (indicating that the two men had had a recent telephone conversation).
that such a bill would expand the definition of equality beyond that authorized by the Court’s equal protection jurisprudence, but concluded, “[S]urely you have a sufficiently substantial legal ground to warrant going ahead with a clear constitutional conscience. The politics of it . . . may be another matter, but you are a far better judge of that than I.”

Just as they had spurned well-meaning attempts to substitute a “women’s equal protection clause” for an ERA a dozen years earlier, women’s organizations rejected Gorton’s proposed “Equal Rights Bill.” They understood the bill to be “a well-intentioned effort.” However, after inviting feedback from dozens of groups and individuals concerned with women’s rights, the coalition’s response was decidedly negative. Feminists had many quibbles with the details of the particular bill Gorton drafted, but most of their objections would have applied to virtually any piece of legislation designed to accomplish the ERA’s goals without amending the Constitution. The Gorton bill essentially proposed to extend the Equal Protection Clause’s most robust protections, formerly accorded only against racial discrimination, to women. According to a NOW LDEF memo summarizing the reactions of feminist advocates to the proposal, this approach had several fatal flaws. First, critics noted the obvious fact that as a statute, the provision would be “vulnerable to amendment or repeal.” Second, feminists worried that the Court would not sustain such legislation as a valid exercise of Congress’s power under Section 5 of the Fourteenth Amendment because opponents could persuasively “claim that Congress is seeking to invalidate laws that the Supreme Court, left to its own devices, would uphold.” Third, the advocates worried that any bill seeking to alter judicial interpretation of the Equal Protection Clause would lend legitimacy to the “Human Life bill,” an attempt by antiabortion lawmakers to change the definition of “persons” under the Fourteenth Amendment.

Finally, and perhaps most fatally, the Gorton bill risked perpetuating the very flaws in equal protection jurisprudence that the ERA was meant to transcend. As the memo put it, “The Equal Protection Clause itself carries some very unfortunate baggage,” including the requirement that “men and women must be similarly situated in order for discrimination to exist,” and the fact that “proof of intent has been required even in ‘disparate impact’ cases.” Further, there was “no guarantee that even a command that courts employ ‘strict scrutiny’ will overcome the tendency, particularly of the Su-

---

252 Id.
253 I discuss these efforts in detail in Mayeri, supra note 16.
254 Memorandum from Phyllis Segal & Anne Simon to Feminist Attorneys (July 22, 1982) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, NOW Papers, Box 191, Folder 9).
255 Id. at 1.
256 Id.
257 Id.
258 Id. at 2.
These shortcomings made feminists determined to pursue their goals through constitutional amendment rather than legislation, despite their poignant recognition that passage and ratification was likely to take “another ten years.”

Gorton’s aides tried to assure the women’s coalition that the equal rights bill was designed to “complement a renewed [ERA] ratification effort, not to supplant it.” But just as many feminists had been wary of distracting state ERA campaigns in the final years of ERA I’s ratification battle, they knew they lacked the resources and political capital to fight on multiple fronts in Congress. The coalition decided to oppose the Gorton bill and “put[] all our energies into the Equal Rights Amendment.” This decision hardly put to rest the dilemmas associated with pursuing legal and constitutional change through multiple avenues.

As I have explored elsewhere, in the 1960s, legal feminists surmounted internal divisions within the women’s movement to coalesce around a “dual strategy” for constitutional change. After decades of division over the strategy and substance of achieving constitutional equality for women, legal feminists—led by pragmatic strategists like Pauli Murray and Mary Eastwood—determined to pursue litigation under the Fourteenth Amendment and advocate for an ERA simultaneously. The dual strategy enabled feminists to transcend their longstanding differences over the proper constitutional home for women’s rights, and allowed them to pursue their goals on multiple fronts. But as the ERA ratification debate dragged on for over a decade, the logistical complexities of the dual strategy mounted. Successfully arguing that the Equal Protection Clause guaranteed the very rights feminists sought from an ERA undermined the need for a new amendment, while continuing to press for a new amendment implied that the Fourteenth Amendment was wanting even as litigators argued the opposite in court.

The dilemmas of the dual strategy did not disappear when the states failed to ratify the ERA, but they transmogrified. By 1982, the Court had resolved, for better or for worse, many of the equal protection questions that feminists had litigated during the 1970s—the status of laws that assumed women’s economic dependency, pregnancy discrimination, disparate im-

\[\text{\ldots}\]
impact, the military draft. Cases like *Geduldig*,264 *Feeney*,265 and *Rostker*266 had defined the limits of the Fourteenth Amendment, closing off possibilities that had remained open in the early 1970s. On the other hand, the *Reed-Frontiero* line of cases had established that many laws that classified men and women on the basis of sex would be subjected to heightened scrutiny, and often struck down as perpetuating stereotypical sex roles.267 When the ERA was reintroduced in 1983, feminists had the luxury of knowing how the contours of equal protection jurisprudence had developed, an advantage they lacked in 1972. In areas where equal protection had fallen short—pregnancy discrimination, disparate impact, and military equality among them—feminists did not have to worry as much about how their arguments about the ERA would affect their fortunes in Fourteenth Amendment litigation. Nor, by definition, did they have to fear that progress achieved under the Fourteenth Amendment would undermine their arguments for an ERA.

Some of the old dilemmas of the dual strategy remained, however. Since long before congressional passage of the original ERA, opponents of the amendment—who once upon a time had included many women’s rights advocates—had argued that the Fourteenth Amendment’s Equal Protection Clause could provide the salutary aspects of an ERA without its alleged rigidity. In the debates over ERA II, opponents continued to press this line of argument, with a great deal of additional ammunition. Since the Court’s Fourteenth Amendment jurisprudence had evolved, opponents contended that the only further changes an ERA would bring were, at best, contrary to public opinion, and at worst, disastrous. Anti-ERA witness Grover Rees, for instance, emphasized that any legislative revisions that the amendment would require or inspire were “superfluous, because that can be done under the equal protection clause.”268

---


265 *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979) (holding that the foreseeably disparate impact of state action is insufficient to demonstrate discrimination under the Equal Protection Clause and that the action must be performed “because of,” not merely “in spite of,” its adverse effects upon an identifiable group).

266 *Rostker v. Goldberg*, 453 U.S. 57, 77, 79 (1981) (holding that exempting women from registering under the Military Selective Service Act is constitutional because women and men are not similarly situated since women are excluded from combat positions in the military).

267 See cases cited supra note 61.

268 *House Hearings*, supra note 79, at 33 (statement of Grover Rees III, Assistant Professor of Law, University of Texas School of Law). Said former Representative Charles Wiggins, “I concluded thirteen years ago that...our present constitution, particularly the Fourteenth Amendment, was fully adequate to the legitimate needs of all our people for fair treatment. Nothing has occurred in the interim to alter my conclusion, and indeed recent decisions of the Supreme Court interpreting the Fourteenth Amendment have fortified that conclusion.” *Id.* at 357 (statement of Charles Wiggins). As Reva Siegel has demonstrated, during the ratification debates ERA opponents largely accepted the Court’s reinterpretation of the Equal Protection Clause, characterizing these changes as acceptable, in contrast to the havoc that an ERA would wreak. Siegel, supra note 8, at 1403.
Changes brought about under Title VII further fortified this argument. However, ERA proponents emphasized the continuing disparities between women’s and men’s earnings to justify the ongoing need for an ERA. But, the problem with proponents’ reasoning was that it was difficult to see how an ERA would affect wage inequality in light of existing laws mandating equal pay for equal work.\(^{269}\) As they had been during the ratification campaign, ERA opponents were quick to counter assertions that the amendment would narrow the wage gap by pointing out that unlike Title VII, the ERA would not cover private employers. Rees declared in the first House hearing on ERA II that while proponents often emphasized that the ERA would affect state action only, “we hear that the equal rights amendment is going to solve . . . the 59-cents-on-the-dollar-problem. You cannot have it both ways. Overwhelmingly, the discriminating employers are private employers.”\(^{270}\) Some took the argument a step further, suggesting that if existing antidiscrimination laws had not successfully eliminated the wage gap, then differences between men’s and women’s incomes must be attributable to factors other than discrimination. Statistician Carl Hoffman noted that advocates of the ERA state specifically that an amendment is required in order for women to achieve the same changes as blacks have achieved . . . . The results of much of my work argue rather that the mechanisms causing the differences in income between men and women are of a different type than those that caused the differences between blacks and whites.\(^{271}\)

For instance, “women have been less aggressive in seeking promotions and this is true even in companies that have encouraged them equally,” and women were disproportionately burdened by their family responsibilities, a disparity that the ERA would not touch.\(^{272}\)

While feminist advocates like Donna Shalala and Bernice Sandler argued that the ERA was necessary to “eliminate the gaps in coverage under existing laws,”\(^{273}\) opponents responded that these “gaps” were not the unfortunate result of shortsighted policymaking, but rather of purposeful, sensible line-drawing by judges and legislators. As Professor Rabkin put it, referring to the differences between Title IX’s coverage and the ERA’s mandate, “These are not gaps. They were deliberate decisions to set up the law one way, rather than another way. They are an expression of legislative judgment; they are an expression of concern to be flexible and to be reason-

\(^{269}\) Mansbridge, supra note 7, at 38–40.

\(^{270}\) House Hearings, supra note 79, at 25 (statement of Grover Rees III, Assistant Professor of Law, University of Texas School of Law).

\(^{271}\) Id. at 497–98 (testimony of Carl C. Hoffmann, Ph.D., Hoffmann Research Associates).

\(^{272}\) Id. at 488.

\(^{273}\) Id. at 107 (statement of Bernice Sandler, Executive Director, Project on the Status of Women, Association of American Colleges).
able . . . ."274 Others suggested that the ERA’s other effects imposed too high a price to pay for the amendment’s limited effects on women’s economic equality. Schlafly made this point in particularly colorful terms. She argued that, given the changes precipitated by Title VII, Title IX, and the Equal Protection Clause, the ERA’s sole effect on women’s employment opportunities would be to eliminate the bona fide occupational qualification exception for public jobs. Schlafly declared:

For this, we are asked to constitutionalize taxpayer-funding of abortions and homosexual marriages, allow our daughters to be drafted and sent into combat just like our sons, forfeit veterans’ preference and tax exemption of religious schools, sacrifice traditional rights of wives, abandon our right to have single-sex schools and extra-curricular activities, pay greatly increased insurance premiums, and transfer enormous new powers from the states to the federal courts.275

Neither had the old dilemma that arguing for a new amendment had the potential to undermine favorable judicial interpretations of existing provisions disappeared. For instance, proponents’ assertion that the ERA would provide a firmer basis for congressional legislation designed to prevent or ameliorate sex discrimination risked suggesting that Section 5 of the Fourteenth Amendment did not already authorize such action. But what produced the most troublesome tension between ERA advocacy and other constitutional and statutory provisions were the arguments feminist litigators had advanced under the Equal Protection Clause, Title VII, and the state ERAs with respect to pregnancy discrimination and abortion funding. Feminist lawyers had vigorously pursued an expansive definition of sex discrimination in earlier pregnancy discrimination cases, a definition they now hoped to incorporate into the new ERA. Opponents regularly noted that laws concerning pregnancy—a “unique physical characteristic” just like abortion—very much came within the ambit of sex equality, according to the same ERA proponents who now sought to dissociate the amendment from abortion. Moreover, they regularly emphasized that pro-choice advocates had cited state ERAs to support their contention that state constitutions required public funding of abortions. Opponents’ favorite smoking gun was a 1980 newsletter item from the Civil Liberties Union of Massachusetts:

The state Equal Rights Amendment provides a legal argument that was unavailable to us or anyone at the federal level. . . . Because a strong coalition is being forged between the anti-ERA coalition and the anti-abortion people, it was our hope to be able to save Medicaid payments for medically necessary abortions through the federal court route without having to use the state Equal

274 Senate Hearings, Part I, supra note 83, at 157 (statement of Jeremy A. Rabkin, Assistant Professor, Department of Government, and Director, Program on Courts and Public Policy, Cornell University).

275 House Hearings, supra note 79, at 393 (statement of Phyllis Schlafly, Eagle Forum).
Rights Amendment and possibly fuel the national anti-ERA movement. But the loss in [Harris v. McRae] was the last straw. We now have no recourse but to turn to the State Constitution for the legal hook to save Medicaid funding for abortions.\textsuperscript{276}

Pro-choice advocates in Hawaii, Pennsylvania, and other states had made similar calculations. ERA skeptics not unreasonably wondered why, if feminists argued that the sex equality guaranteed by state ERA encompassed government funding for abortion, the federal ERA would not be impressed into the service of the pro-choice cause.

Proponents' attempts to distance themselves from pro-abortion funding arguments made under state ERAs were also in some tension with their position on gay rights. Whereas feminists hoped to draw attention away from the state ERA experience when it came to abortion, the Washington ERA case \textit{Singer v. Hara}\textsuperscript{277} served as the centerpiece of proponents' case for the federal ERA's inapplicability to matters of sexual preference. Proponents regularly cited \textit{Singer} as proof that the federal ERA would not mandate same-sex marriage or other rights for homosexuals\textsuperscript{278}.

At the same time, feminists did not necessarily want the emerging jurisprudence under state ERAs wholly to define the federal ERA's meaning. State ERAs had produced a variety of results, and not all of them had fulfilled feminist hopes. Nor did feminists wish to leave the impression that state ERAs were sufficient replacements for a federal amendment. Feminist leaders also worried that campaigns for new state ERAs would divert energy and resources away from the federal ERA campaign. After considerable friction with state organizations, leading national women's groups had called for a moratorium on advocacy for new state constitutional amendments in 1980\textsuperscript{279}.

Pursuing legal change on multiple fronts continued to complicate feminists' constitutional amendment advocacy. The old dilemmas of the dual strategy were in some ways muted by caselaw development under the Fourteenth Amendment and by the opportunity, now that the first ERA had gone down to defeat, to redefine the amendment and distinguish its meaning from existing sex equality jurisprudence. But if the old dual strategy di-

\textsuperscript{276} \textit{Mansbridge}, supra note 7, at 126, 287 n.7 (citing \textit{From the Executive Director's Desk, supra note 221); see also \textit{The E.R.A.-Abortion Connection, supra} note 223, at 2.

\textsuperscript{277} 522 P.2d 1187 (Wash. Ct. App. 1974) (rejecting petition to marry from same-sex couple).

\textsuperscript{278} In contrast to their diverse positions on issues like disparate impact, abortion, and private conduct, where more expansive conceptions of equality were on the table, those who worked on the ERA Legislative History Project do not appear to have considered redefining the ERA to cover discrimination against gay and lesbian individuals or to affect prohibitions on same-sex marriage. Presumably they believed that to do so would be political suicide. That, of course, did not stop opponents from predicting the extension of the equality principle to gay rights.

\textsuperscript{279} See Memorandum from Nancy M. Lazerow & Johanna S.R. Mendelson, AAUW, to ERA Committee, Re: ERA Update (Dec. 16, 1982) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, Mary Jean Collins Papers, Box 9, Folder 10).
lemmas had largely, though not completely, receded into the background, new strategic puzzles had emerged. Most prominently, attempts to pin reproductive rights to sex equality under state ERAs, the federal Constitution, and statutory provisions, undermined federal ERA proponents’ efforts to deflect attention from the “abortion-ERA connection.” Feminists, already profoundly ambivalent about the strategic separation of reproductive rights from the ERA, found themselves compelled to compromise once again.

III. THE LEGACIES OF ERA II

In the end, proponents’ strategic compromises proved insufficient to save ERA II. Despite the best efforts of feminists and their congressional allies, ERA II’s potency as a political weapon ultimately proved of limited utility. Nevertheless, the debate over ERA II was of lasting significance to the history of legal feminism. The hearings pushed proponents to hone new doctrinal proposals that balanced feminists’ aspirations with concerns about judicial manageability and practicality. They also drove home the limitations of constitutional amendment advocacy as a means to the ends legal feminists sought. And for scholars, the debates over ERA II provide an invaluable picture of how the legal and political landscape changed and failed to change over one of the most transformative decades in women’s legal history.

A. “We Have to Have a Vote, Win or Lose”: ERA II’s Career as a Political Weapon

NOW and NWPC officials and House leaders agreed in November 1983 that supporters would bring the ERA to a floor vote with a closed rule that would prohibit amendments, forcing members to vote yes or no. “We have to have a vote, win or lose,” declared Judy Goldsmith, as feminists promised to campaign against ERA opponents in the 1984 elections. An L.A. Times editorial warned that “a failure to stand up for equality this time could affect political careers more than standing up for it did in 1972. Women are far more politically active now than they were then.” As Mary Frances Berry recounts, feminist strategists believed the ERA had a chance of passing the House, in which case they could concentrate on winning Senate support. If the amendment failed to pass, or passed the Senate with crippling exemptions, they could make conservative opposition a campaign issue.

---

282 For an account of the floor debates over ERA II, see BERRY, supra note 7, at 103–06.
283 Id. at 102–03.
Forcing the vote and stifling attempts to amend infuriated many Republicans, with Representative Larry Craig (R-ID) chastising Speaker O'Neill, “Shame on you, Mr. Speaker, shame on you.” House Minority Leader Robert Michel (R-IL) complained, “The majority is engaging in an abuse of power that would bring a blush to the cheeks of the most absolute despot of antiquity.” The ERA fell six votes short of the two-thirds majority needed for passage, 278-147. Representative Hamilton Fish (R-NY), a cosponsor of the ERA, said that Democrats’ procedural move was nothing more than “partisan politics in search of a campaign issue.” But Republican feminist Kathy Wilson, chair of the National Women’s Political Caucus, warned, “We now know the truth about our representatives’ commitment to equality, and those who voted against us will soon learn the consequences of the gender gap.” The New York Times quoted a Democratic aide as saying that “his party’s leaders doubted they would win the vote . . . but that with the roster of Republican ‘nays,’ Democratic campaign strategists were ‘licking their chops.” The Times disapproved of this unseemly politicking, opining the next day that the vote against the ERA “had less to do with the substance of the amendment than with exploiting the ‘gender gap’ and targeting E.R.A. opponents for defeat in next year’s elections.” This “cynical gambit,” the editorial writers wagered, “may have done the E.R.A. . . . more harm than good.” ERA champion Representative Patricia Schroeder defended proponents’ decision in a Wall Street Journal op-ed a few weeks later, noting that suspending normal rules of debate had been integral to the passage of other bills, including important civil rights legislation.

Whatever the merits of this last-ditch parliamentary maneuver, it highlighted the role that constitutional amendment advocacy now played for the women’s movement and for partisan politics. Fighting for the ERA had become a potent political weapon in an increasingly polarized and partisan atmosphere. Many of the ERA’s congressional allies apparently saw the amendment primarily in those terms: Senator Tsongas’s avoidance of specifics in the first hearing on ERA II was less a reflection of his lack of preparation and more of a desire to view the amendment in symbolic, political terms. For lawmakers like Tsongas, the ERA was less a bundle of intricate

286 Id.
288 Id.
289 Farrell, supra note 285.
291 Id.

1288
legal doctrines than a referendum on conservative legal and political positions on civil rights. The early House hearings in particular were replete with references by pro-ERA witnesses to the failures of the Reagan Administration to vigorously enforce civil rights laws, with an emphasis on the weakness of the Executive Branch's commitment to women's rights. The Administration's deficiencies in this regard demonstrated the need for a constitutional amendment, proponents argued, because the important business of equality clearly could not be left to the vagaries of bureaucratic whim. When the Administration protested that it truly was committed to women's rights, just not to a constitutional amendment, feminists dismissed its desultory proposals as "band-aid" solutions to a gaping constitutional wound. The President and his allies would pay for their opposition to the ERA, proponents warned again and again. 293

Facing growing criticism from within the Administration as well as without, the White House proposed eliminating sex-biased language from a number of federal laws. But even the head of the DOJ's Civil Rights Division admitted that the changes were mostly "cosmetic." 294 ERA supporters seized on Justice Department attorney Barbara Honegger's high-profile resignation to highlight stark assessments of the Reagan Administration's women's rights record. Honegger professed to have had faith in Reagan's commitment to eradicate sex discriminatory laws as a substitute for supporting the ERA, but, she reported, "not a single law has been changed." 295 Of Reagan, Honegger told the Washington Post, "He doesn't deserve loyalty because he has betrayed us." 296 Editorialists used Honegger's resignation to renew their call for "ERA II." 297 Meanwhile, Democratic presidential candidates tripped over each other in their eagerness to claim their reverence for the amendment and their commitment to its passage. To the chagrin of many moderate ERA proponents, several went so far as to threaten to withhold money for federal programs and projects from states whose legislatures would not ratify. 298

296 Id.
298 Howell Raines, Democrats Line Up on Feminist Issues, N.Y. TIMES, July 11, 1983, at A1 (describing promise of Senators Gary Hart (D-CO) and Alan Cranston (D-CA) to this effect, as well as allusions to such a move by Walter Mondale, the eventual Democratic presidential nominee, and Senator Ernest F. Hollings (D-SC)). For a critical view from a professed ERA supporter, see David S. Broder, Foot-in-Mouth Syndrome Has Democrats Courting Disaster, L.A. TIMES, July 17, 1983, at E5. See also Eleanor Randolph, Mondale Calls Reagan 'Khomeini-Like' in His Women's Rights Policy, L.A. TIMES, Jan. 20, 1984, at B9.
For feminists, scoring political points was clearly a second-best outcome, and the opportunity proved short-lived and ultimately futile. For a time, prospects for a women's renaissance looked somewhat promising. The Los Angeles Times heralded NOW's emergence as a "mainstream force," noting that the organization's annual convention had become an obligatory stop for serious Democratic presidential hopefuls. Feminists rallied around the first female vice-presidential nominee, Geraldine Ferraro, and hoped to abort the Reagan Revolution with a 1984 election victory. Of course, it was not to be, and the Reagan landslide was accompanied by a gain for the President's party of sixteen seats in the House and only minor losses in the Senate. The much-touted gender gap had done feminists little electoral good. Many pundits and politicians were beginning to conclude that the gender gap was less about women's chagrin over the Reagan Administration's failure to support the ERA and abortion rights, and more about women's concern about the ballooning defense budget and draconian spending cuts on social and economic programs. Moderates lamented the conservative takeover of the GOP, epitomized by, among other things, the rejection of a proposal to include support for the ERA in the 1984 Republican platform. Pro-ERA members of Reagan's cabinet, like Transportation Secretary Elizabeth Dole, suspended their ERA advocacy in deference to the President's position. The heady excitement generated by Geraldine


301 Republican feminists shared this hope. See Howell Raines, President Is Assailed by Women's Leader: 2d Term Is Opposed, N.Y. TIMES, July 10, 1983, at 1.

302 Media coverage of the ERA was replete with warnings to the Reagan Administration about the "gender gap" and potential political fall-out among female voters. See, e.g., Editorial, The Gender Gap, L.A. TIMES, July 18, 1983, at C4.

303 For early examples of such assessments, see Robert Shogan, Prosperity, Risk of War Key Issues of 'Gender Gap', L.A. TIMES, Sept. 26, 1983 at B1 ("[T]he policy gender gap does not appear to stem mainly from what are generally considered to be areas of special female concern, such as the right to have an abortion and the equal rights amendment, because support for these issues is stronger among men than among women."). Steven R. Weisman, Facing the 'Gender Gap' with Conflicting Advice, N.Y. TIMES, Aug. 16, 1983, at A20 ("At the White House, there is a feeling that neither abortion nor the proposed [ERA] are factors in Mr. Reagan's problems. But there is also widespread agreement that Administration efforts to deal with women have been fitful at best."). By the time of Reagan's landslide, this had become the conventional wisdom. See, e.g., MaryLouise Oates, Gender Gap: Which Definition Gets Your Vote?, L.A. TIMES, Nov. 2, 1984, at G1 ("The statistics say . . . that there is a gender gap, but that it has little to do with issues of women's rights.").


Ferraro’s vice-presidential candidacy was short-lived.\textsuperscript{306} The brief career of the ERA as political weapon seemed over for good.

However, ERA II arguably epitomized and reinforced a trend toward the introduction and promotion of constitutional amendments primarily for symbolic political purposes, with little or no expectation of ultimate passage and ratification. After the ERA’s defeat, conventional wisdom held that Article V’s prescribed process was no longer a viable path to constitutional change, except perhaps for very specific, technical alterations.\textsuperscript{307} But bids to amend the Constitution hardly ceased; rather, they continued to provide opportunities to make a dramatic statement of dissatisfaction with existing constitutional provisions or their interpretation by courts, to force others to take uncomfortable political stances, and to provide a forum for debating issues of principle without committing to any concrete changes in the law.\textsuperscript{308} Though the ERA’s career seemed over for the time being, the concept of proposed constitutional amendment as political weapon emerged very much alive.

\textbf{B. ERA II and the Reconstitution of Feminism}

By the mid-1980s, most feminists agreed that the ERA’s time had come and gone. Former NOW ERA activist Mary Jean Collins wrote in 1987 that proposals to reintroduce the amendment “ignore[] the lessons of the past and [are] the pursuit of predictable failure . . . . Rather than rushing into a costly and premature effort to change the Constitution, the women’s movement needs to address the hard task of creating a true consensus for equality.”\textsuperscript{309} Catharine MacKinnon’s assessment was much harsher: she questioned not the wisdom of seeking transformative change or doing so through a constitutional amendment, but rather whether the ERA as conceived by most of its supporters would have changed much of anything important. In an impassioned 1987 book review, she castigated feminists for what she characterized as their impoverished conception of sex equality,

\begin{footnotesize}
\begin{enumerate}
\item[308] To varying extents, the “human life,” “balanced budget,” “flag burning,” and “federal marriage” amendments might be crudely so categorized. Recent attempts to revive the ERA arguably also fall under this rubric.
\item[309] Mary Jean Collins, \textit{Book Notes}, 244 NATION 692 (1987) (reviewing \textit{Mansbridge, supra} note 7, and \textit{Berry, supra} note 7).
\end{enumerate}
\end{footnotesize}
nourished by their deliberate underestimation of the inequality and injustice facing women. She lamented their failure to fight for a meaningful constitutional amendment that would move beyond a focus on sex-based legal classifications to attack the root causes of male domination. 310 “[T]he ERA’s legal impact,” MacKinnon asserted, “need not have been confined to being the women’s auxiliary of the equal protection clause.” 311 Whether they believed the quest for ERA I was too ambitious or not ambitious enough, renewing that quest in earnest was on almost no one’s agenda in the aftermath of ERA II’s defeat.

Proponents’ failure to effectively use the ERA for electoral gain and feminists’ despair of the prospects for reintroduction should not obscure the legacies of ERA II as an important turning point in feminist legal history. First, the debates over ERA II provided a forum for feminists to consider what kind of legal and constitutional change they wanted to achieve and pushed them to translate an abstract equality principle into specific doctrine. Second, the ERA II struggle drove home for feminists the limitations of constitutional amendment as a vehicle for achieving their aspirations. Finally, the ERA II episode marked a crucial transition point in feminists’ definition of legal equality. 1983 was hardly the first time that feminists had struggled with the tension between seeking formal equality of treatment and a more substantive version of equal rights under law, but ERA I’s demise provided an opportunity to acknowledge publicly the shortcomings of a focus on the eradication of sex-based legal classifications and to develop a more expansive vision of equality. As such, ERA II was not merely a reiteration of ERA I, not simply a postscript to a failed ratification campaign, but a revealing moment in the evolution of legal feminist thought and strategy.

Of course, feminists had grappled with doctrinal questions concerning the proper constitutional standard of review for laws exerting a disproportionately negative impact on women before 1983. They had faced the question head-on as they challenged veterans’ preference laws, culminating in the unfavorable 1979 Supreme Court decision in *Personnel Administrator v. Feeney*. As we have seen, though, several factors limited their ability fully to theorize constitutional disparate impact in the context of the *Feeney* case. First and foremost, in *Feeney*, feminists were operating within the confines of an equal protection jurisprudence that had enshrined discriminatory intent as the sine qua non for determining when a facially neutral law violated equal protection. Accordingly, the appellee in *Feeney* closely ad-

---

310 Catharine A. MacKinnon, *Unthinking ERA Thinking*, 54 U. CHI. L. REV. 759, 764 (1987) (reviewing MANSBRIDGE, *supra* note 7) (“[T]he continual revisions of the public image of what the ERA ‘would do,’ equivocations designed to win over the opposition by reassurance, did effectively vitiate the potentially explosive organizing effect the ERA might have had on those who had the world to gain from actual sex equality.”).

311 Id. at 765.
hered to the intent requirement, arguing that all circumstantial evidence pointed to a legislative intent to discriminate against women. Feminist organizations took the argument a step further, advocating for what was, in practice, a substantial relaxation of the intent requirement, but they did so in large part on the ground that the veterans’ preference’s disproportionate effect on women was due almost entirely to longstanding de jure discrimination against women by the government—restrictions on women’s participation in the military. Women’s groups argued that a stringent intent requirement made little sense in the context of sex discrimination, where “benign” assumptions about women’s “place” in society, rather than overt hostility, often animated laws with a negative impact on women’s opportunities. But they worked within the Washington v. Davis framework and within the parameters set out by the district court opinion striking down the Massachusetts statute, which, like most cases, did not invite imaginative, expansive theories about constitutional doctrine.

After the Feeney decision dashed feminists’ hopes for a more expansive reading of the Equal Protection Clause, they increasingly turned to the ERA as a repository for their hope that the Constitution would vanquish laws exerting a disparate impact on women. As such, feminists projected that the ERA would, if ratified, attack facially neutral as well as explicitly discriminatory laws. But, as discussed earlier, neither the climate of the ratification battle nor the political costs of specificity invited careful consideration of particular doctrinal ramifications. It was easy for feminists to say they wanted something better than Feeney, but it was more difficult and strategically risky to articulate exactly what. Leftover strategic reluctance persisted in the early ERA II hearings, especially given opponents’ tendency to depict disparate impact analysis as a euphemism for “quotas.” But when opponents probed beneath the surface, proponents were compelled to provide a much more specific account of ERA disparate impact doctrine, as we saw in Part II.

The products of these deliberations had a life beyond the ERA II hearings and embodied the shifting orientation of post-ERA feminist jurisprudence. Phyllis Segal, whose memos had informed congressional testimony about the details of disparate impact doctrine under ERA II, published a more detailed version of her theory in the Buffalo Law Review in 1984.312 Citing Ann Freedman’s ERA II testimony before Congress, Segal considered and rejected proposals to enact a less stringent intent test and instead endorsed the “limiting principle[s]” developed during the hearings.313 Relying on these limiting principles, she situated feminists’ new disparate impact analysis in the context of previous attempts to improve on the Davis/Feeney framework. The renaissance of disparate impact analysis was

313 Id. at 136–37.
not confined to participants in the ERA II campaign. Then-law student Reva Siegel published a note in the Yale Law Journal advocating a disparate impact reading of the Pregnancy Discrimination Act in March 1985.\(^\text{314}\) Without such an analysis, she argued, the PDA would be a weak weapon against sex inequality in the workplace.

The renewed enthusiasm for disparate impact analysis was also evident in an influential article authored by Wendy Williams and Nadine Taub in the same year.\(^\text{315}\) In a widely cited 1982 article, Williams had grappled with the question of how to reconcile sex differences with the equal treatment model of sex equality analysis that dominated 1970s feminist litigation.\(^\text{316}\) The "crisis" she described stemmed from an intense and sometimes bitter dispute among feminists over whether to support legislation that gave pregnant women special benefits not available to other persons temporarily unable to work. In that piece, Williams framed what is often called the "equal treatment versus special treatment" debate in rather stark terms, arguing that "if we can't have it both ways, we need to think carefully about which way we want to have it."\(^\text{317}\) In her view, "for all of its problems, the equality approach is the better one."\(^\text{318}\)

But two years later, Williams and Taub suggested that perhaps feminists need not choose between the Scylla of assimilation/formal equality/individual treatment and the Charybdis of accommodation/real equality/group treatment after all.\(^\text{319}\) Instead, like Segal and Siegel, they suggested revitalizing disparate impact analysis: "In short, our hope is that by stressing the common origin of facial discrimination and neutral rules with disparate impact we can revive a commitment to eliminating real barriers to women's full societal participation."\(^\text{320}\) They also hoped to transcend the conflict between "equal treatment" and "special treatment" feminists by framing the question in terms of effects: employers would be forbidden to create a special category for pregnancy, but any employment policy would be suspect if it had a disparate impact on women. Thus, if a neutral disability benefits policy protected women to a lesser degree than men by, for example, providing disability leave for all employees insufficient to accommodate pregnancy, it would be susceptible to challenge.


\(^{317}\) Id. at 196.

\(^{318}\) Id.

\(^{319}\) The article, Taub & Williams, supra note 315, derived from a conference paper delivered at 1984: Twenty Years After the 1964 Civil Rights Act: What Needs to Be Done to Achieve the Civil Rights Goals of the 1980's, Rutgers University School of Law-Newark, Nov. 16–17, 1984.

\(^{320}\) Taub & Williams, supra note 315, at 839.
Williams and Taub recognized the formidable "practical and political" obstacles in the way of a full-blown assault on laws and policies with a disparate effect on women. This "resistance," they believed, derived from "three related concerns: the absence of a requirement that 'intent' be proved as an element of discrimination, the costs that may result, and the lack of immediately apparent limits on the doctrine's sweep." Thus, though they wished to preserve the *Griggs* concept "intact . . . as a secondary approach," they "would seek to overcome this concern by identifying acceptable limits." The limits they identified were virtually the same limits developed in the course of the ERA II hearings: "At a minimum . . . those neutral rules which are traceable to, build on, reproduce or perpetuate the old notions and hierarchies must be justified by a business necessity." Indeed, Williams and Taub cited the testimony of Segal and Freedman from the 1983 hearings to support their analysis.

Two years later, Ann Freedman and Sylvia Law challenged the argument advanced by political scientist Jane Mansbridge that the ERA, by the time of its demise, would have had little practical effect on the law. On the contrary, they asserted, "The ERA would have had a profoundly important impact on laws and policies that discriminate in fact, but not in words." Whether ERA I would have had such an effect is unknowable, but feminists had certainly done all they could to ensure such a meaning for ERA II. Although they had frequently relied on the Equal Protection Clause for limiting principles in the ERA II hearings, disparate impact analysis was a crucial area in which proponents made clear how the amendment would depart, rather dramatically, from existing equal protection jurisprudence.

If the life of disparate impact analysis illustrates how the ERA II debates helped to redefine the meaning of "equality of rights under the law," the compromises proponents made during the hearings highlight the limitations of the ERA as a means for accomplishing the ends feminists sought. The paradox of the legal feminist position after the demise of ERA I is striking. For the first time in over a decade, feminists were in a position to shed the constraints of the ratification process and reconsider the scope of their aspirations for legal and constitutional change. On the other hand, the defeat of ERA I reflected the increasingly conservative political climate in which feminists operated. The reintroduction of ERA II meant that feminists had the opportunity to create a new legislative history for the amendment, one that reflected their current aspirations. But attempting to achieve these changes through the same constitutional amendment that had proven so controversial even before conservative domination of the Executive

---

321 *Id.* at 838.
322 *Id.* at 841.
323 *Id.*
Branch and the Senate placed severe political constraints on feminists’ attempts to reconfigure and expand the ERA’s meaning. After the disappointments of ERA I and II, feminists could understandably conclude that, as Mary Jean Collins put it in 1987, “constitutional amendments serve to ratify the present rather than paving the way for the future.”

The ERA II experience highlighted the Catch-22 in which feminists found themselves: every victory they won in incorporating their more expansive visions of equality into the amendment’s legislative history would cost them votes, if not in Congress, then in the state legislatures. Feminists were already cognizant that constitutional amendment might not be the best vehicle through which to achieve their goals—hence their ambivalence about the ERA’s reintroduction in the first place. The ERA II experience could only have reinforced those doubts.

Indeed, doubts about the wisdom of seeking change through constitutional amendment went beyond the practical political difficulties of ratification in the absence of consensus; it also entailed significant strategic drawbacks. Keeping the federal ERA in play constrained the arguments feminists felt they could make in litigation under the Fourteenth Amendment and under state ERAs. Whereas the ERA campaign, at its height, had arguably strengthened feminists’ case for constitutional change through judicial reinterpretation of the Equal Protection Clause, continuing to press for the amendment in the face of determined and successful opposition tended to highlight the distance between feminists’ aspirations and the extent of popular agreement. Further, proponents would always be subject to accusations of duplicity so long as they claimed that a clear legislative history would constrain the ERA’s future application when they not-so-secretly hoped that future electoral victories would produce more sympathetic judges who would interpret the ERA’s abstract wording more expansively.

Though it would be easy to overlook them given the more prominent political constraints on the ERA’s meaning, the ERA II debates also revealed certain stubborn substantive limitations that proved less than amenable to reinvention. It was particularly difficult for proponents to dispel the notion, which the amendment’s original legislative history had itself promoted, that the ERA embodied essentially a singular principle of absolute equal treatment. That notion, useful in the early debates over ERA I because of proponents’ desire to rid the law books of explicit sex-based classifications, bred confusion about the impact of the ERA on affirmative action and other policies that did not fall into this category. By the time of ERA II, feminists hoped the amendment would promulgate an antihierarchy principle of sorts in the form of disparate impact analysis. But as the debates over ERA II and the subsequent controversy over pregnancy benefits revealed, feminists struggled to agree on what such an antihierarchy principle

Collins, supra note 309, at 694.
would look like in practice. Seeking change through a constitutional amendment begged not only for internal consensus on what means were best suited to the ends of antisubordination, but also a singular principle that would be applicable across various circumstances and areas of the law.

Indeed, in this respect, feminists had come full circle. Whereas feminist ERA skeptics of the pre-1970s era had bemoaned the ERA’s “rigidity” and lack of “flexibility” because it might endanger protective labor legislation, proponents of ERA I steadfastly insisted on an equality principle of virtually universal applicability. Along these lines, the authors of the 1971 Yale ERA Article wrote, “the interrelated character of a system of legal equality for the sexes makes a rule of universal application imperative. No one exception, resulting in unequal treatment for women, can be confined in its impact to one area alone. Equal rights for women, as for races, is a unity.”

Now some feminists again began to question the feasibility of applying a universal principle to a complicated and diverse array of problems. Some younger feminist scholars, examining the ERA ratification battle from an academic perspective, wondered whether continuing a polarizing struggle was the best way to unite women whose interests were far more harmonious than the rancor of ERA rhetoric would suggest. Deborah Rhode, a young Stanford Law School professor, suggested that the women to whom Schlafly’s movement had appealed were reachable, but that “feminists might do well to pause in the pursuit of an increasingly divisive constitutional symbol and focus on more concrete responses to structural inequities.”

Feminists had also become more cognizant of the limitations of a constitutional amendment that did not reach private action. Even proponents’ wildest imaginations could not transform the ERA into an affirmative duty on the part of the government to take active steps to remedy inequality in the absence of a proven constitutional violation. As proponents acknowledged—and emphasized to skeptics—the ERA was a limitation on state action and a license to legislate, but not an unavoidable imperative to remedy inequality.

More generally, proponents recognized, constitutional adjudication had its limits as a tool for pursuing legal change. Williams said as much in her influential critique of 1970s Supreme Court sex equality jurisprudence: “To say that courts are not and never have been the source of radical social change is an understatement.” Legislation would be the means of achieving feminists’ ultimate goal of redefining the meaning of equality itself. “[T]o the extent that the law of the public world must be reconstructed to reflect the needs and values of both sexes, change must be sought from leg-

326 Yale ERA Article, supra note 54, at 892.
327 Deborah L. Rhode, Equal Rights in Retrospect, 1 LAW & INEQ. 1, 72 (1983).
328 Williams, supra note 316, at 175.
islatures rather than the courts," Williams wrote.329 Section 2 of the ERA provided a basis for such legislation, but as we saw in Part II, ERA proponents had to tread carefully in claiming a role for section 2 beyond that of Section 5 of the Fourteenth Amendment.330 While the Court had decided many Fourteenth Amendment questions unfavorably during ERA I’s pend­ency, the expansive reading of Congress’s Section 5 enforcement power remained largely undisturbed, and feminists certainly did not wish to imply that a narrower reading was appropriate.

At the same time, the Court’s increasingly conservative race jurispru­dence not only made it less advantageous for feminists to analogize the ERA’s impact to the treatment of race discrimination under the Equal Protec­tion Clause, it also threatened—or at least complicated—coalitions be­tween racial justice and feminist organizations. As Freedman and Law recalled in 1987, “[ERA] proponents had no desire to urge that women were entitled to a greater measure of constitutional protection than black people. Rather, most ERA proponents sought common cause between those who struggled against racism and sexism.”331 ERA supporters hoped and believed that “the ERA’s stronger protection against laws that were sexist in impact would have a spillover effect extending stronger protection to blacks injured by laws that were racist in impact. But it was difficult to use the actual words of the ERA to support this pragmatic belief.”332 No doubt it was also politically inexpedient to highlight this “spillover effect,” because it played into the hands of opponents who forecasted dire consequences for the ERA beyond the realm of sex equality.

Significantly, the internal debates among feminists over ERA II’s rela­tionship to abortion and reproductive rights, and the uneasy compromise presented in the hearings, drove home many feminists’ increasing unwillingness to divorce constitutional sex equality from reproductive freedom. Advocates like Rhonda Copelon called explicitly for a reunification of sex equality and abortion rights in 1983. Other prominent feminist lawyers soon followed suit. Sylvia Law’s Rethinking Sex and the Constitution and Ruth Bader Ginsburg’s Some Thoughts on Autonomy and Equality in Re­lation to Roe v. Wade were two of the more prominent published expressions of this view. Ginsburg, by then a judge on the U.S. Court of Appeals for the D.C. Circuit, acknowledged “the view that for political reasons the re­productive autonomy controversy should be isolated from the general de-

329 Id.
330 Proponents had clarified in the ERA I debates that section 2 of the ERA was meant to have more or less exactly the same scope as the Enforcement Clauses of the Fourteenth and Fifteenth Amendments. Each of these provisions gave Congress the power to enforce the substantive sections of the amendment through “appropriate legislation.”
331 Freedman & Law, supra note 324, at 554.
332 Id.
bate on equal rights, responsibilities, and opportunities for women and men,” but ultimately rejected that view.\textsuperscript{333} Law similarly acknowledged that

\textit{[t]o assert that the fourteenth amendment or a state ERA mandates a concept of sex equality that encompasses a woman’s interest in controlling reproductive capacity would inescapably affect the effort to enact a federal ERA. Nevertheless, it is important to explore the political and legal separation of sex equality and reproductive freedom and to evaluate the value of a more integrated approach.}\textsuperscript{334}

Others were less circumspect about suggesting a change of course. In a brief but influential essay written in 1983, MacKinnon offered a searing critique of feminists’ earlier decision to rest the campaign for abortion rights on privacy grounds, rather than on a rationale based in equality or freedom.\textsuperscript{335} By 1991, NOW activist Twiss Butler joined MacKinnon in excoriating the ERA campaign for asking too little of constitutional equality, especially in the context of abortion and pregnancy, and cited the 1983 ERA II hearings as her primary example.\textsuperscript{336} In her own retrospective questioning of feminist strategy, MacKinnon suggested that she had held her tongue while the ERA was still in play, but once the amendment appeared dead once and for all, “[t]here seemed little to lose, even from the truth.”\textsuperscript{337}

Whether one was sympathetic or impatient with feminists’ concessions to the political exigencies of the ERA debates, it was clear that feminists would fight the battles of the 1980s and 1990s on new terrain. Without a constitutional amendment hanging in the balance, feminists were free to draw connections between areas of law formerly considered taboo. Unconstrained by what they now perceived as the strictures of “formal equality,” they explored new frontiers of legal intervention like disparate impact analysis and comparable worth, legislation to enact economic rights for women, and an embrace of reproductive rights and eventually sexual freedom as essential components of sex equality. From the debates over ERA II, femi-

\begin{footnotes}
\item[333] Ginsburg, \textit{supra} note 225, at 386.
\item[334] Law, \textit{supra} note 217, at 987.
\item[336] Twiss Butler, \textit{Abortion Law: ‘Unique Problem for Women’ or Sex Discrimination?}, 4 \textit{Yale J.L. & Feminism} 133 (1991). She wrote:

\begin{quote}
Suppose that [ERA supporters] had responded to the accusation that the ERA would mean abortion on demand by agreeing enthusiastically, adding that the ERA would not only prohibit legal barriers to abortion and public funding of abortion, but would also protect women from such other forms of pregnancy discrimination as forced sterilization of minority women, denial or surcharging of pregnancy coverage on private medical expense and disability income insurance, punitive treatment of maternity leave, and suppression of contraceptive information in public school curricula.
\end{quote}

\textit{Id.} at 138.
\end{footnotes}
nists emerged intent on pursuing not merely "equality in theory," but "equality in fact."

CONCLUSION

The story of ERA II sheds light on themes important both to historians and to scholars of social movements and constitutional change. The ERA II campaign confirms the imperative to look beyond courts and litigation as sites of constitutional conflict. The process whereby proponents of constitutional change attempted to create new legislative history for an already controversial and much-debated amendment provides an intriguing example of the extrajudicial creation of constitutional meaning. It proved to be one in which dialogue with opponents was virtually unavoidable. This dialogic process included not only feminist and antifeminist movement activists, but also congressional combatants—lawmakers with various stakes in the debate over ERA II. In part because the debate took place in the context of congressional consideration of the amendment—rather than, say, in the course of litigation or of a ratification campaign directed at state legislatures—ERA II's trajectory highlighted the potential of proposed amendments to serve as partisan political battering rams.

The debate over ERA II also proved a formative one for the social movement that somewhat reluctantly sponsored its reintroduction, yielding substantive and strategic reassessments on the part of advocates at a transitional moment in the history of legal feminism. Thus the story of ERA II highlights the significance of even failed attempts to amend the Constitution, not only to the extent that they influence judicial reinterpretation of existing constitutional provisions—as the ERA I campaign arguably did—but also in their role as a vehicle for social movement agenda-setting.

From an historical standpoint, the ERA II debates underscore the scope and limitations of the legal and political changes feminists and their opponents achieved between the introduction and passage of ERA I in the early 1970s, and ERA II's ultimate defeat in Congress in 1983 and 1984. An amendment with broad-based bipartisan support had become a partisan weapon deployed by politicians and advocates across the political spectrum. Moreover, because feminists had achieved much of the agenda set out in the original ERA I hearings but still faced a determined and well-organized opposition to their residual goals, by the early 1980s the amendment had acquired new legal meanings. A decade of political struggle over the ERA, reproductive freedom, and civil rights more generally made a new set of issues salient: facially neutral laws exerting a disproportionate impact on women replaced overt sex-classifications as the primary target of feminist legal strategy, while resurgent conservatism placed battles over abortion, state action, homosexuality, and the military at the center of the struggle.

But the ratification debates had proven more conducive to histrionics, innuendo, and outrage than to sustained doctrinal parsing. Feminists were
understandably ambivalent about defending ERA II so soon after ERA I's demise, but recognized that for better or worse, they had to decide exactly what they could ask of the amendment, legally and politically. Opponents asked difficult and probing questions about the amendment's specific legal ramifications, compelling a response from supporters. Proponents' internal debates and the public testimony they produced revealed both creative thinking about doctrinal possibilities and a sense of painfully acquired real-politik. Some of the positions feminists took in the ERA II hearings, such as the development of a more sophisticated disparate impact analysis, laid a promising foundation for future advocacy; others, such as the pained machinations surrounding the relationship between the ERA and reproductive rights, revealed the limitations of amendment advocacy as a means to the ends feminists sought.

The introduction, consideration, and defeat of ERA II marked a pivotal moment in the history of legal feminism. Far more than a mere postscript to the battle over ERA I, the debate over ERA II helped to redefine both the strategy and the substance of the feminist legal agenda. Substantively, the ERA II debate solidified an emerging shift from formal equality to a concern with disparate impact and combating hierarchy. Moreover, the debate forced feminists to grapple with the specific doctrinal dilemmas entailed by this shift. Strategically, ERA II enabled feminists to explore the possibilities of using a proposed constitutional amendment as a partisan political weapon and embodied a new electoral turn in movement politics. Ultimately, ERA II drove home the limitations of constitutional amendment as the means to feminist ends, but the process of constructing a new meaning for the amendment had important and lasting effects on the legal feminism that emerged, reconstituted, from the ashes of defeat.
After Suffrage: The Unfinished Business of Feminist Legal Advocacy

Serena Mayeri

ABSTRACT. This Essay considers post-suffrage women’s citizenship through the eyes of Pauli Murray, a key figure at the intersection of the twentieth-century movements for racial justice and feminism. Murray drew critical lessons from the woman suffrage movement and the Reconstruction-era disintegration of an abolitionist-feminist alliance to craft legal and constitutional strategies that continue to shape equality law and advocacy today. Murray placed African American women at the center of a vision of universal human rights that relied upon interracial and intergenerational alliances and anticipated what scholars later named intersectionality. As Murray foresaw, women of color formed a feminist vanguard in the second half of the twentieth century, pioneering social movements and legal claims that enjoyed significant success. But Murray’s hope that women’s solidarity could overcome ideological divides and the legacy of white supremacy went unfulfilled. As a result, the more expansive visions of racial, sexual, economic, and reproductive justice that intersectional advocacy produced remain the most pressing unfinished business of sex equality today, at the Nineteenth Amendment’s centennial.

INTRODUCTION

The Nineteenth Amendment’s passage and ratification left much business unfinished. For many American women, the Amendment failed to confer suffrage. Poll taxes, literacy tests, white primaries, and the threat of economic reprisals and violence kept African American women and men from vindicating their constitutional right to vote.1 And for American women generally, voting

1. The disenfranchisement of Native Americans as well as some Asian and Latinx Americans persisted, too. See Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States, at xvi, 123-24 (rev. ed. 2018); Maggie Blackhawk, Federal
rights comprised only part of the full enfranchisement suffragists and other advocates for women’s equal citizenship sought.2

Prompted by movements for racial justice, the rights revolution that began in the mid-twentieth century extended voting rights to African American women and men forty-five years after the Nineteenth Amendment; gave people of color some legal tools to pursue equal opportunity in education and employment; opened public accommodations; and allowed for greater civic participation by persons formerly excluded on the basis of race. After the realization of universal adult citizen suffrage in 1965, feminist, antiracist, and economic-justice advocates pressed beyond the vote, seeking to fulfill the broader visions of freedom and equality long bound up with quests for universal suffrage.

This Essay begins by considering post-suffrage women’s citizenship from the vantage point of a central figure at the intersection of the civil-rights and feminist movements of the 1960s and 1970s: Pauli Murray. Murray, whose posthumously published autobiography’s subtitle described her as a “Black activist, feminist, lawyer, priest and poet,” was a largely unsung architect of second-wave feminism’s legal and constitutional strategy.3 Her theories and strategies anticipated elements of what legal scholar Kimberlé Crenshaw later named intersectionality.4 From the woman suffrage movement that culminated in the Nineteenth Amendment’s passage and ratification, Murray drew crucial lessons about


inter racial coalition, universal human rights, and the centrality of “Negro women” to struggles for racial justice and sex equality. Through legal, constitutional, and political strategies that linked racial, gender, and economic justice, Murray and other black feminist leaders built alliances with civil-rights organizations and with predominantly white women’s groups and sought to place African American women—including lawyers, activists, theorists, grassroots organizers, and ordinary citizens—at the center of movement strategy. They fought for jury service and criminal justice, freedom from reproductive control and access to health care, equal employment opportunity, an end to sexual exploitation and violence, welfare rights and living wages, support for mothers’ roles as caregivers and breadwinners, and a vision of sexual and economic citizenship that embraced parents and children regardless of marital or birth status.

However, feminists faced formidable obstacles. The 1965 Moynihan Report encapsulated the dominant consensus among both liberal and conservative policy-makers, which blamed the “Negro family’s” “matriarchal” structure for the “cultural pathology” afflicting impoverished urban black communities and saw the restoration of the patriarchal family as the key to racial progress. Over the following decades, a right-wing resurgence, fueled by movements for racial retrenchment and against feminism, realigned American electoral politics and rendered all three branches of government increasingly inhospitable to progressive aims. Though her vision of a civil-rights-feminist coalition and black female leadership bore fruit, Murray’s hope that southern white women would lend a moderating voice to racial politics went largely unrealized.

Feminists won some significant victories after suffrage, often buoyed by African American women’s pioneering advocacy. Civil-rights and feminist activists formed fragile but important coalitions. Despite these efforts, a century after the Nineteenth Amendment and more than fifty years after suffrage became a reality for adult U.S. citizens, the more expansive visions of racial, sexual, economic, and reproductive justice that flourish at the intersections remain the most urgent unfinished business of sex equality.

I. THE LOST PROMISE OF THE SUFFRAGE MOVEMENT

When Pauli Murray conceived a new strategy to realize the promise of equal citizenship for women in the early 1960s, the woman-suffrage movement provided an inspirational but cautionary tale. The activism that culminated in the passage and ratification of the Nineteenth Amendment began in the crucible of abolitionism. Leading white advocates for woman suffrage, such as Elizabeth Cady Stanton, found their political voices in antislavery agitation, articulating a critique of women's legal, political, and social subordination in documents such as the 1848 Declaration of Sentiments signed at Seneca Falls. Among the proponents of women's enfranchisement were Sojourner Truth and Frederick Douglass, giants in the African American freedom struggle. African American woman suffragist Frances Ellen Watkins Harper called for the inclusion of black women "as part of 'one great privileged nation'" of enfranchised persons. She declared: "We are all bound up in one great bundle of humanity, and society cannot trample on the weakest and feeblest of its members without receiving the curse of its own soul."

But the abolitionist-feminist alliance did not survive Reconstruction. Suffragists lost a hard-fought battle to enfranchise women: the Fourteenth Amendment introduced the word "male" into the Constitution, penalizing states that denied male citizens the vote with a reduction in representation, and the Fifteenth Amendment prohibited abridgement of voting rights based on race but not sex. Over the following decades, some leading white suffragists advocated women's enfranchisement as an antidote to the voting power of black, immigrant, poor, and disabled men and rebuffed African Americans who continued to fight for women's right to vote.

For Murray, the story of a universalist human-rights movement splintering into factions that elevated one claim (black male suffrage) over another (enfranchisement of all women and men) had a familiar ring. Murray had struggled

7. Siegel, supra note 2, at 459–60.
10. Dubois, supra note 8, at 163.
against what she called “Jane Crow” since law school, where she faced prejudice from her male Howard classmates and professors and outright exclusion from Harvard Law School when she applied for a fellowship traditionally awarded to Howard’s top graduate. Murray immediately likened Harvard’s 1944 edict—"members of your sex are not admitted to the University"—to the University of North Carolina’s refusal to consider her application to its graduate program in sociology six years earlier, because of her race. She resolved to fight the “twin immoralities” of Jim and Jane Crow.

In 1962, Murray seized her chance: as a member of the Civil and Political Rights Committee of the President’s Commission on the Status of Women, she wrote a founding document of modern feminist constitutionalism. Advocates for women divided, sometimes bitterly, over the proposed Equal Rights Amendment (ERA), while opponents worried that formal legal equality would vanquish hard-won protective labor legislation for women. Some leaders in the pro-ERA National Woman’s Party (NWP) saw racial-justice movements as competitors, even antagonists. Murray’s memorandum tacitly mended both rifts: she recommended that advocates organize an “NAACP for women” and pursue equal-rights litigation under the Fourteenth Amendment in a strategy modeled on the NAACP Legal Defense Fund’s campaign against racial segregation.

The following year, Murray authored another pivotal memorandum defending a proposed amendment to the 1964 Civil Rights Act prohibiting employment discrimination based on sex. When NWP leaders and some congresswomen declared the provision necessary to protect “white, Christian women of United


14. See MURRAY, supra note 13, at 147-67, 308-16; ROSENBERG, supra note 3, at 339 (quoting Statement of Pauli Murray on the Equal Rights Amendment (S.J. Res. 61) submitted to the Senate Judiciary Committee 5 (Sept. 16, 1970) (Pauli Murray Papers, Box 89, Folder 1542V, on file with the Schlesinger Library, Radcliffe Institute, Harvard University)).

15. Pauli Murray, A Proposal to Reexamine the Applicability of the Fourteenth Amendment to State Laws and Practices Which Discriminate on the Basis of Sex Per Se 10 (Dec. 1, 1962) (President’s Commission on the Status of Women Papers, Doc. II-20, Box 8, Folder 62, on file with the Schlesinger Library, Radcliffe Institute, Harvard University).

16. Id.

After Suffrage

States origin from discrimination and many civil-rights sympathizers warned that the amendment would sink the civil-rights bill, Murray reframed the debate. Without a sex amendment, Murray warned, Title VII would “offer genuine equality of opportunity to only half of the potential Negro work force,” leaving “both Negro and white women” to “share a common fate of discrimination.” Murray’s theory of politics placed “Negro women” at the center of struggles for justice that often pitted “Negroes” against “women” as if these were mutually exclusive categories.

The post-Civil War abolitionist/feminist split over suffrage informed Murray’s approach to law reform and constitutional change, and imbued her efforts to unite racial justice and women’s rights with special urgency. Murray believed that “the rights of women and the rights of Negroes are only different phases of the fundamental and indivisible issue of human rights.” “American history” taught the “costly lesson” that “human rights” could not “be affirmed for one social group and ignored in the case of another without tragic consequences.”

Murray saw the failure to achieve woman suffrage after the Civil War as especially fateful. Not only had many Republicans and male abolitionists betrayed the cause of universal enfranchisement, but African Americans lost valuable potential allies in disenfranchised white southern women; had women won the vote in 1870, Murray suggested, their “political emancipation . . . might well have eased the transition from a slave society to a society of free men and women.” Specifically, “[p]olitical power in the hands of white women . . . could have reduced the fear of ‘Negro domination’” in the defeated South and mitigated post-Reconstruction racial retrenchment. Murray even cited a “sharp drop in lynching” after pass of the Nineteenth Amendment in 1920 to support her contention that white female voters exerted a progressive influence on the politics of race.

Murray invoked universal suffrage’s failure in the 1860s to promote a “natural alli[ance]” between “women” and “disadvantaged minorities” a century

---

19. Id. at 20-21.
20. Id. at 9.
21. Id. She warned, “Whenever political expediency has dictated that the recognition of basic human rights be postponed, the resulting dissension and conflict has been aggravated.” Id.
22. Id.
23. Id.
24. Id. at 11.
later. The “bitter memories” of the Reconstruction-era fracture made (white) women “understandably apprehensive and resentful of any proposed legislation which may appear to grant rights to Negroses at the expense of their own rights,” Murray wrote. Her memo appealed to lawmakers’ “statesmanship” to “prevent a possible injustice” by banning sex discrimination. To skeptical civil-rights and labor leaders, Murray evoked common understandings of how employers—and politicians—pitted vulnerable groups against one another, from enslaved and free (white) workers, to immigrant and native-born laborers, to “Negro strikebreakers” and underpaid women who kept wages low.

Murray’s efforts were at once savvy and sincere: in her work as an advocate for workers, criminal justice, civil rights, and other progressive causes, she had long cultivated close personal friendships and intellectual partnerships with white as well as black women. Murray’s calls for a coalition between white women and people of color spoke to multiple audiences: civil-rights leaders wary of white feminists’ flirtations with segregationists; white women preoccupied with sex equality at the expense of racial justice; black and working-class women skeptical that women’s interests aligned across race and class. By identifying intersecting axes of inequality, Murray sought to persuade those who believed their interests to be divergent that they shared a common cause.

For Murray, the position of “Negro women” provided the most urgent illustration of sexual and racial injustice. Long before scholars spoke of intersectionality, Murray theorized how women of color shouldered uniquely heavy burdens and provided underappreciated leadership in movements for racial justice and

25. Id.
26. Id. at 12.
27. Id. at 13.
28. See, e.g., BELL-SCOTT, supra note 3; SCOTT, supra note 3.
29. Murray had long called on women as a group to exercise their majority voting strength in favor of progressive racial and social policies. See, e.g., Says Yearly Brotherhood Meetings Are Not Enough, ALA. TRIBUNE, Feb. 14, 1947, at 7 (quoting Murray as telling an interracial group that “women’s organizations in particular must participate in programs of social and legislative action” against racial prejudice and discrimination).
30. As Dorothy Roberts explains, “One of the important things about how power operates intersectionally . . . is that it has a way of making people not see the power itself. In other words, the intersectional nature of structures of power has a way of leaving certain people out, marginalizing certain people, but also making people who are disadvantaged by power structures not see how it’s in their interest to fight these structures in coalition with others.” Email from Dorothy Roberts, Prof., University of Pennsylvania Law, to Author (Dec. 7, 2019, 3:12 PM EST) (on file with author) (echoing remarks made at the University of Pennsylvania Law Lecture on Intersectionality and the Law (Oct. 23, 2019), https://perma.cc/9YUR-Z5D9).
AFTER SUFFRAGE

women’s liberation. 31 “[T]he Negro woman,” she wrote, “has less chances of finding a mate, remains single longer and in higher incidence, bears more children, is in the labor market longer, has less education, earns less, is widowed earlier and carries a heavier economic burden as a family head.” 32 Without protection from antidiscrimination laws, black women could not provide necessary support for themselves or their families. To advocates concerned that antidiscrimination laws might demolish sex-specific protective labor legislation, Murray’s focus on African American women who toiled to provide both support and care to their families highlighted the plight they shared with other working-class women. 33

Impelled by the historical memory of the woman-suffrage split, Murray’s activism and writings in the 1960s and early 1970s endeavored to bridge gaps between movements for racial justice and for sex equality. Murray emphasized the centrality of women’s activism to racial-justice movements and protested the exclusion of black women from the speakers’ dais at the 1963 March on Washington, declaring: “The Negro woman can no longer postpone or subordinate the fight against discrimination because of sex to the civil rights struggle but must carry on both fights simultaneously,” because women’s “full participation and leadership” was “necessary to the success of the civil rights revolution.” 34 And she adamantly refused to subordinate or subdivide her complex identities as a “Negro woman” of mixed racial heritage, a civil-rights lawyer, a labor


32. Murray, supra note 17, at 21.


advocate, and a champion of universal human rights. To the reawakening feminist movement she brought the legacy of racial-justice activism, calling for a women’s March on Washington if the EEOC failed to enforce Title VII’s sex discrimination prohibition. When racial, generational, and ideological differences threatened to divide feminists, Murray urged intergenerational and interracial alliances.

II. AFTER SUFFRAGE: THE BLACK FEMINIST VANGUARD

The passage of Title VII, by linking the fates of race- and sex-discrimination law, eventually enabled a fragile but potent coalition between “women and minorities,” civil-rights and feminist movements. Even so, Murray’s vision of equal citizenship for women faced formidable obstacles. Almost a half-century after the Nineteenth Amendment’s ratification and nearly a century after the Fifteenth’s, African American women and men in the south possessed only nominal suffrage rights. The Voting Rights Act of 1965, the culmination of decades of activism, finally delivered on the promise of universal adult suffrage.

But even those who embraced civil rights and voting rights clung to a gendered family political economy that rewarded households headed by a male breadwinner and a female homemaker and caregiver. The 1965 Moynihan Report crystallized this liberal consensus, which held that the first line of defense against a “matriarchal” family structure that bred poverty, “illegitimacy,” and violence was the restoration of African American men to their proper role as heads of households. In short, many civil-rights leaders and policy-makers saw equal opportunity for women as a threat rather than a boon to the cause of racial equality.

35. See, e.g., SUSAN HARTMANN, THE OTHER FEMINISTS: ACTIVISTS IN THE LIBERAL ESTABLISHMENT 190 (1998) (describing Murray’s concern that “a movement ‘confined almost solely to “women’s rights” without strong bonds with other movements toward human rights ... might develop into a head-on collision’ with black liberation initiatives, as had happened after the Civil War when some white feminists had advanced their claim to suffrage ahead of that of black men”).


37. NANCY MACLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE 117-54 (2006); MAYER!, supra note 3, at 41-75; Mayeri, supra note 18, at 769-77.


39. OFFICE OF POLICY PLANNING & RESEARCH, supra note 5.
Murray and other feminists resisted the Moynihan Report’s analysis and advanced their own vision of the relationship between racial progress, sex equality, family structure, and state action. They fought women’s subordination in education, employment, jury service, political participation, and office-holding, as well as in marriage and family life. African American women formed a vanguard of feminist activism and legal advocacy on each of these fronts. Their efforts met with mixed success. Many signature feminist legal victories are rooted in intersectional advocacy. So is much of the unfinished business of sex equality.

A. Intersectional Advocacy in Jury Service, Politics, and Employment

The culmination of black women and men’s activism in the Voting Rights Act of 1965 seemed to secure universal adult citizen suffrage at long last. But voting rights, crucial as they were, did not exhaust demands for full enfranchisement and civic participation. State-level de jure exclusion of (all) women and de facto exclusion of black men from juries had long prevented defendants from receiving fair trials and denied equal citizenship to white women and persons of color. In 1965, Pauli Murray and ACLU stalwart Dorothy Kenyon championed the cause of voting-rights organizer Gardenia White and other black women excluded from the all-white, all-male jury that acquitted the accused murderers of a civil-rights worker. Their efforts to overturn outright bans on women’s jury service succeeded in 1966 when a three-judge federal district court declared Alabama’s law a violation of the Equal Protection Clause. A panel that included Judges Frank M. Johnson, Jr. and Richard Rives, judicial champions of civil rights, accepted Murray’s and Kenyon’s argument that exclusions based on sex, as well as those based on race, contravened the Constitution. The state’s decision not to appeal dashed Murray’s hope for a landmark Supreme Court sex-discrimination ruling on par with Brown. She had hoped that such a decision would spotlight how racial discrimination intersected with the paternalistic assumptions about gender and family roles that stunted women’s participation in public life.

41. Mayeri, supra note 3, at 90-105, 144-85.
43. Id. at 197-99; Mayeri, supra note 3, at 26-29; Rosenberg, supra note 3, at 293-96.
45. Mayeri, supra note 3, at 29.
Lillie Willis’s case illuminated the stakes of jury service for African Americans’ political participation and activism. Willis, head of the local chapter of the Mississippi Freedom Democratic Party, faced charges of perjury and forgery related to her mother’s attempt to register to vote; she had also “been active in seeing that the children of plantation workers and displaced farm hands enrolled in formerly all-white schools in Mississippi.”46 Twenty-eight-year-old Eleanor Holmes Norton, an African American attorney whom Murray had mentored at Yale Law School, helped draft a brief challenging the exclusion of black men and all women from the jury pool in Sharkey County, Mississippi.47 The Willis family paid a steep price for their multi-generational activism. Jennie Joyce Willis, Lillie Willis’s thirteen-year-old daughter, lost her right eye to gunfire when she stepped outside her home on Thanksgiving Day in 1966. Her mother suspected that the bullet was meant for her, though Jennie, too, was a civil-rights activist in her own right, having attempted to register for seventh grade at a local all-white elementary school earlier that fall.48 “My daughter has lost an eye, and I’ve got something to work for—freedom,” Lillie Willis told reporters.49

Murray also saw sex and racial equality in jury service as essential to fairness for black defendants. Murray’s advocacy for Odell Waller, an African American man sentenced to death for the murder of his white employer, helped steer her toward a career in law.50 Just as excluding women, black and white, from suffrage impeded racial progress, so too did all-male juries reduce the chances for African American men and women to receive fair trials. Opening jury service to women generally, Murray hoped, would serve the goal of race- as well as sex-blind criminal justice.51

Murray and other feminists also continued to emphasize how the full enfranchisement of women required much more than the ballot;52 on the fiftieth anniversary of the Nineteenth Amendment, for instance, Murray called for “qualified

47. I use similar language to describe the Willis case in MAYER!, REASONING FROM RACE, supra note 3, at 174-75.
50. See MACK, supra note 3, at 226; MURRAY, supra note 13, at 204-10; ROSENBERG, supra note 3, at 104-05.
51. For more on the intersection of race and sex in jury-service exclusion cases, see generally KERBER, NO CONSTITUTIONAL RIGHTS TO BE LADIES (1998), and MAYER!, supra note 3, at 173-81.
52. Siegel, supra note 7; Siegel, supra note 2.
women” to hold high offices, including the presidency, at least one-third of congressional seats, and a minimum of three or four seats on the Supreme Court.53 Women’s representation in high office fell far short of Murray’s goal: few women, and even fewer women of color, served in Congress in the 1960s and early 1970s.54 But a reinvigorated women’s movement backed a growing contingent of feminist lawmakers who sponsored a raft of legislation designed to enhance women’s legal status.55 Representative Patsy Takemoto Mink (D-HI), the first nonwhite woman elected to Congress, championed the rights of immigrants, people of color, labor-union members, and poor and low-income Americans.56 She sponsored women’s rights legislation, including the Child Care Development Act of 1971 and Title IX of the Education Amendments of 1972.57 The National Women’s Political Caucus, established in 1971, included elected officials such as Representative Shirley Chisholm (D-NY), the Brooklyn-born daughter of Caribbean parents who became the first black woman elected to Congress in 1968 after winning unemployment benefits for domestic workers58 and defeating an English-only literacy test in the New York State Assembly.59 A founding member of the Congressional Black Caucus, Chisholm helped lead the nearly successful effort to pass a universal child-care bill and became the first woman to mount a nationwide campaign for the Democratic presidential nomination, in 1972.60 Mink and Chisholm often partnered with Representative Bella Abzug

57. Id.
59. Literacy Vote Test Is Made, DAILY MESSENGER (Canandaigua, N.Y.), May 19, 1965, at 12.
(D-NY), a labor and civil-rights lawyer who fought hard for the Equal Rights Amendment and introduced some of the first federal gay-rights legislation in 1974.61

Intersectional advocacy also left a lasting mark on employment discrimination law, as women of color frequently pioneered new claims. Many of the earliest sexual-harassment cases, for example, featured African American female plaintiffs who may have seen in men’s abuses of power in the workplace echoes of the exploitation and violence suffered by their forebears under slavery and Jim Crow. Kimberlé Crenshaw later speculated that the “racialization of sexual harassment” may account for Black women’s “disproportionate representation [ation] in these cases. . . . Racism may provide the clarity to see that sexual harassment is . . . an intentional act of sex discrimination.”62 As chair first of the New York City Human Rights Commission and later of the EEOC, Eleanor Holmes Norton became one of the first government officials to champion the recognition and remediation of sexual harassment.63 Anita Hill’s 1991 testimony at Clarence Thomas’s confirmation hearings awakened the nation to the prevalence and wrongfulness of sexual harassment and underscored black women’s long-standing vanguard position in the feminist movement.64

B. Family Status, Economic Citizenship, and Sexuality

Full citizenship, sex-equality advocates emphasized, required what Murray called a “human rights revolution” that touched every aspect of public and private life.65 As the “personal” became “political,” in the parlance of the period, feminists such as Murray and Eleanor Holmes Norton inverted Moynihan’s thinking to argue that the more equal partnerships enjoyed by black couples could serve as models for white families by using their “head start on egalitarian family life” to “pioneer in establishing new male-female relationships around

---


64. Id. at 183.

two careers,” in Norton’s words.66 Women’s full participation in the public spheres of work and politics, and men’s involvement in family care, they insisted, was integral rather than antithetical to racial progress.67

This vision of egalitarian marriage informed Ruth Bader Ginsburg’s 1970s litigation campaign and produced many of the period’s landmark constitutional sex-equality decisions. In the 1973 case Frontiero v. Richardson, the Supreme Court held that the government could not offer military housing and health benefits to all servicemen’s wives by default but require that husbands of service-women prove their dependency to establish eligibility.68 Two years later in Weinberger v. Wiesenfeld, a majority of the Justices accepted Ginsburg’s argument that denying “mother’s insurance benefits” to surviving widowers devalued their deceased wives’ work in support of their families.69 By the end of the decade, husbands and wives had become almost functionally interchangeable spouses in the eyes of the law, though certainly not in the lived realities of American families.70

Less coordinated, less visible, and ultimately less successful were efforts to challenge the legal supremacy of marriage itself.71 Women of color led grassroots efforts to advance racial, gender, and economic justice for poor and low-income nonmarital families, whose numbers grew in the second half of the twentieth century.72 Welfare-rights activists such as Johnnie Tillmon sought to liberate women from a Hobson’s choice between depending on a man, relying on stingy public assistance, or offering backbreaking labor in exchange for low wages and unrelenting poverty.73 Tillmon’s National Welfare Rights Organization demanded the right to a minimum income that would allow women to bear and raise children outside of marriage without submitting to the employer exploitation and punitive state surveillance to which poor single mothers of color were

67. Mayeri, supra note 3, at 41-75.
70. Serena Mayeri, Marriage (In)equality and the Historical Legacies of Feminism, 6 CALIF. L. REV. CIR. 126, 128-29 (2015).
71. Id. at 131-33 (describing these efforts).
73. For the classic articulation of Tillmon’s position, see Johnnie Tillmon, Welfare as a Women’s Issue, Ms., Spring 1972, at 111; see also Premilla Nadasen, Expanding the Boundaries of the Women’s Movement: Black Feminism and the Struggle for Welfare Rights, 28 FEMINIST STUD. 370 (2002).
routinely subjected when they worked in low-wage jobs or applied for government benefits. 74 Mrs. Sylvester Smith challenged Alabama’s “substitute father” law, which denied public assistance to families headed by mothers who pursued intimate relationships outside of marriage. Smith claimed the freedom to engage in nonmarital sex without losing the government benefits that supplemented the meager wages she earned from full-time work as a cook. 75 The women who resisted laws that required poor unmarried mothers to disclose paternity or face fines and imprisonment asserted a right to sexual privacy and to the autonomy to make decisions based on their independent assessment of their children’s best interests. 76

Women who were engaged in challenges to the legal supremacy of marriage sought to redefine responsible citizenship to include single parenthood. 77 Community activists such as Lois Fernandez of Philadelphia lobbied to reform the laws of “illegitimacy,” which stigmatized children and parents and withheld public and private benefits from nonmarital families. 78 Fernandez declared single motherhood a positive lifestyle worthy of respect and admiration; she proudly embraced her decision to parent alone as a voluntary choice. 79 Aspiring educators challenged school districts that refused to hire unmarried parents in the aftermath of racial desegregation. 80 They resisted dominant narratives about promiscuity and profligacy and reframed single mothers as heroic pioneers who pursued education and employment against all odds. 81

These reconstructive projects insisted that marital or birth status should not determine access to government-provided family benefits. Margaret Gonzales, for instance, sought the same Social Security “mother’s insurance benefits” for her children after the death of their nonmarital father that Stephen Wiesenfeld

77. Mayeri, supra note 75.
78. Id. at 392; Mayeri, Marital Supremacy, supra note 76 (describing constitutional challenges to birth-status discrimination in wrongful death recovery, workers’ compensation, inheritance, Social Security benefits, child-support obligations, and derivative citizenship).
79. Id.
81. Id.
won for married fathers. But these efforts were notably less successful than Ginsburg’s quest for formal legal equality for husbands and wives. When plaintiffs in family-status discrimination cases did succeed, it was largely because they persuaded courts that “hapless and innocent children” should not be punished for the “sins” of their parents. The capacious constitutional arguments women advanced—that family-status-based disadvantage discriminated based on race and poverty, subordinated women, denied parental autonomy, and limited sexual and reproductive freedom—fell on deaf judicial ears. Marital supremacy survived, modified to afford some protection to blameless children and to women who could provide for their children without any help from the state.

For those who departed from norms of heterosexuality and gender conformity, the late 1960s and early 1970s provided unprecedented hope for relief from the imposition of oppressive and punitive constraints. Movements for gay rights and liberation, lesbian feminism, and other alternatives to heterosexual nuclear-family life flourished in the open. Pauli Murray’s public persona as a “Negro woman” who wrote poignantly about her mixed-race heritage masked private struggles with sexuality and gender identity throughout much of her earlier life. In the 1940s, Murray felt trapped in a woman’s body; she dressed and passed as a young man, and sought hormonal and other medical treatments to reconcile the conflict between physical and emotional beings. As a young adult, Murray married briefly “in an attempt to be a ‘normal woman,” and suffered intermittently from severe emotional distress. Murray had a series of intense

83. Mayeri, Marital Supremacy, supra note 76, at 1284.
84. See generally id.; Mayeri, supra note 75 (discussing the ineffective nature of these arguments).
88. In a letter to her Aunt Pauline during this period, Murray referred to her “boy-girl self,” and later wrote of her “queerness” in a letter to Helene Hanff. Rosenberg, supra note 3, at 389 n.3.
89. Id. at 2.
love affairs with women that left her alternately exhilarated and bereft. By the
1960s, Murray had found a way to live as a woman, secure in a happy and ful-
filling relationship with Renee Barlow, whom she met while working at the firm
Paul Weiss in the 1950s.90 But the feeling of never quite belonging, of transcend-
ing categories of gender and race, informed Murray's social and legal theoriz-
ing.91 Sex, like race, she insisted, should not limit a person's life opportunities
or dictate their social roles.

Though Murray did not grapple publicly with "homosexuality" or "transsex-
uality" during these years, her conception of sex as largely irrelevant to a person’s
capacities as a worker or citizen resonated with Americans who experienced dis-
crimination because they were gay, lesbian, or transgender. Sonia Pressman
Fuentes, a pioneering feminist lawyer at the EEOC, publicly invited such
claims.92 As the historian Margot Canaday has uncovered, in the early 1970s
these workers filed sex-discrimination claims with the EEOC, and some regional
offices accepted and resolved them.93 This success likely surprises modern read-
ers because growing resistance in the 1970s eroded the gains of advocates for
racial justice, feminism, and gay rights and liberation. The EEOC backed away
from its early receptiveness to gay and lesbian complainants in 1975, declaring
that Title VII did not cover homosexuality;94 the Equal Rights Amendment en-
countered increasingly vocal and effective opposition;95 and a conservative juris-
prudence of race began to overtake earlier victories.96 By the end of the 1970s,
momentum favored retrenchment: movements for racial justice, feminism, and
gay liberation assumed a defensive posture.

90. Id. at 214-15.
91. See MACK, supra note 3, at 233 (describing Murray's concept of "Jane Crow" as "a theory born
from her own struggles with categories that seemed to do violence to Murray's own sense of
self—sometimes black and white, but far more often men and women."); ROSENBERG, supra
note 3, at 3 (describing how Murray came "to see her trouble with 'boundaries,' her sense of
herself as 'queer,' as strengths, qualities that allowed her to understand gender and race not
as fixed categories, but rather as unreasonable classifications").
92. Brief of Historians as Amici Curiae Supporting Employees at 26, Bostock v. Clayton Cty.,
93. Id. at 25-26.
94. Id. at 35-38.
95. MARY FRANCES BERRY, WHY ERA FAILED 82 (1986) ("The movement never realized the depth
of the opposition.").
96. See, e.g., MAYERI, supra note 3, at 76-105.

528
The rise of conservatism and the partisan realignment that built to a crescendo with Ronald Reagan’s 1980 election transformed the political landscape that Murray surveyed in 1964 when she reflected on the legacy of the abolitionist/feminist split over woman suffrage. As President Lyndon Johnson famously remarked hours after signing the Civil Rights Act, the Democrats had “delivered the South to the Republican Party for a long time to come”—though this partisan realignment took decades, rather than the months some white southern lawmakers predicted.97 The impact of the Voting Rights Act on black political participation proved more immediate, as voter registration and office-holding among African Americans burgeoned.98 Murray continued to promote an interracial, cross-class feminism even as more radical, countercultural, and separatist strands of activism flourished in the late 1960s and early 1970s.99 In 1970, she maintained that “a ten percent minority, even if it were one hundred percent organized, cannot bring about a successful transformation of society.”100 Even after black enfranchisement began to change the southern electorate, sheer numbers made white women’s support crucial to any successful struggle for racial justice and universal human rights, in Murray’s view.101 Murray’s ambitions for an interracial feminist coalition enjoyed some success, due in no small part to Title VII and other legislation and litigation—for which her legal theories and strategies laid the groundwork—unifying the fates of race and sex anti-discrimination laws.102 These alliances remained uneasy and subject to renegotiation, as many feminists of color articulated priorities distinct

99. MURRAY, supra note 14, at 397-417.
101. Id.
from mainstream, white-dominated women’s organizations. The reproductive-justice movement reached beyond abortion rights to tackle coercive sterilization, health-care access, and the economic deprivations that prevented poor and low-income Americans from raising their children in safe, flourishing communities. Women of color who fought intimate-partner violence sought community-based approaches and remained skeptical of criminalization and state violence as a solution. Poor and low-income women struggled for access to jobs and better wages and working conditions; pink-collar workers tried to make inroads into blue-collar jobs as professional women sought access to elite employment.

To be sure, women’s interests across race, class, and citizenship status were not always aligned: anemic state support for families, lack of affordable child care, and other structural barriers meant that professional women’s success in the workplace often rested upon the undercompensated labor of poor and immigrant women of color. Women and men who deviated from normative marital heterosexuality faced daunting obstacles to family formation and flourishing.


AFTER SUFFRAGE

and to gainful employment. Internal dissension sometimes overcame the coalition-building impulses that undergirded intersectional advocacy.

Nevertheless, an increasingly conservative political climate bound antiracist and feminist politicians and advocates together against a common adversary. Phyllis Schlafly launched her crusade to defeat the Equal Rights Amendment in service of a longer-term effort to unite conservative Catholics and Protestants behind an antifeminist platform of “traditional family values” and transform the Republican Party. Like Murray, white southerners harbored regrets about the Reconstruction era, but their tragic touchstone was not the failure to win woman suffrage. Rather, they lamented the enfranchisement—and temporary electoral power—of freedmen. The impulse to invoke the inviolability of white womanhood as a bulwark against racial and social change persisted as Jim Crow gave way to the New South.

As it became less acceptable to warn of black enfranchisement’s threat to white supremacy, the dangers posed by secularism, feminism, and homosexuality served similar political ends. The antifeminist values that Schlafly embodied found a receptive audience not only with conservative white men but also with many white Christian women, especially but not only in regions with a Confederate cultural heritage. The STOP ERA movement Schlafly led connected “forced busing” with unisex bathrooms, compulsory employment and military service for women, welfare queens and delinquent children, and abortion and gay rights as the cultural apocalypse liberalism invited. In the late 1970s and early 1980s, the fusion of social and economic conservatism in the Republican

---


113. Id. at 13-14.

114. BERRY, supra note 95, at 70-120; JANE J. MANSBRIDGE, WHY WE LOST THE ERA 90-117 (1986); DONALD G. MATHEWS & JANIS SHERRON DE HART, SEX, GENDER, AND THE POLITICS OF ERA: A STATE AND THE NATION (1990); Siegel, supra note 111, at 1378-403.
Party opened a partisan “gender gap,” in which the Democratic Party increasingly won a disproportionate share of women’s votes, while the GOP attracted the majority of male voters.

By the early twenty-first century, the “gender gap” had only widened. But media attention to gender alone obscured how race, region, religiosity, and marital status inflected Americans’ voting behavior. The 2016 election laid bare trends decades in the making: that the majority of white women voted for Donald Trump did not surprise keen observers of electoral politics. In some regions and among some demographic groups, the gender gap barely registered. Southern white women had long voted for Republicans in numbers nearly equal to their male counterparts. The partisan gap between African American women and men proved similarly slight. And for all the focus on the gender gap, racially polarized voting, especially in the South, rendered “women” and “men” virtually meaningless as electoral categories. Marital status and education, too, cleaved (white) female voters. Married white women, especially those without a college degree, leaned Republican, while their unmarried and college-educated counterparts voted for Democrats. These outcomes were the result not merely of tactics pursued by Nixon, Reagan, and the conservative electoral strategists of the 1970s. Rather, today’s electoral landscape derives from a concerted effort lasting over half a century. This “Long Southern Strategy” invoked threats to traditional gender roles, heterosexual hegemony, and conservative evangelical Christianity, along with white supremacy, to transform American politics.

While Murray’s vision of white-southern-female progressivism faltered in practice, her conviction that women of color would provide pivotal leadership for an American human-rights revolution found a lasting legacy. Social movements such as #MeToo, the Movement for Black Lives, #SayHerName, the sanctuary-cities and immigrant ‘rights movements, revitalized voter-protection efforts, ongoing reproductive-justice activism, prison and foster-care

---

115. As Melissa Harris-Perry wrote in November 2016, “The truth is this: There is race gap of enormous proportions and a gender gap of very slim margins in this country. Presidential elections are primarily determined by the proportional turnout of the relevant racial groups, which increasingly map onto partisan and geographic identities in ways that make electoral vote counts a fairly simple task. Gender politics is a secondary game, not the main show.” Melissa Harris-Perry, 24 Books, Essays, and Other Texts to Read Because You’re Still Having Trouble Processing the Election, ELLE (Nov. 29, 2016), https://www.elle.com/culture/career-politics/a441063/election-reflection-syllabus [https://perma.cc/Q9L6-ZUTN].

116. MAXWELL & SHIELDS, supra note 112, at 1-35.

117. Frances Ellen Watkins Harper’s 1869 speech at an American Equal Rights Association meeting proved prescient: “I do not believe that giving the woman the ballot is immediately going to cure all the ills of life. I do not believe that white women are dew-drops just exhaled from the skies. I think that like men they may be divided into three classes, the good, the bad, and the indifferent.” Jones, supra note 6.
abolitionism, criminal-justice reform, low-wage and domestic workers’ organizing, to name a few, all continue this tradition. Murray created some of the first courses in Black and Women’s Studies at Brandeis in the late 1960s while supporting law reform and litigation on behalf of women’s rights. Today, scholar-activists continue to bring intersectional perspectives to enrich discourse and support grassroots efforts to uncover and combat injustice that transcend identity categories and recognize the inseparability of structural systems of oppression. Activists now strive openly, as Murray never felt she could, for safety and justice for people with diverse sexual orientations and gender identities.

In 1973, after the death of her life partner, Murray gave up her hard-won, tenured academic appointment at Brandeis to enter seminary and fulfill her

---


120. ROSENBERG, supra note 3, at 6 (“Although a pioneering leader in both the civil rights and feminist movements, Murray insisted to the end of her life that nontraditional gender identity and sexual orientation were private matters that should be protected as part of the campaign for human rights, not used for the purposes of separate organizing efforts.”).
religious calling. Ordained in 1977 as the first African American female Episcopal priest, Murray developed a black feminist-liberationist theology that affirmed the inviolability and universality of human rights. Today, too, the politics of hatred and division that rend the fabric of American political life inspire the renewal of models of leadership that foster alliances and seek to alert citizens—and aspiring citizens—to their common interests and values. A century after the Nineteenth Amendment and more than a half-century after suffrage, intersectional advocacy that bridges islands of identity and ideology flourishes in the words and deeds of Murray’s inheritors. “Hope,” Murray wrote in a poem published in 1970, “is a song in a weary throat.” Her words ring just as true fifty years later, as the unfinished business of equality and justice demands urgent action now more than ever.

Professor of Law and History at the University of Pennsylvania Law School. Professor Mayeri is the author of Reasoning from Race: Feminism, Law, and the Civil Rights Revolution (2011), and is at work on a book project examining challenges to marriage’s legal primacy since 1960. Special thanks to Megan Mumford and the staff of the Yale Law Journal for the opportunity to contribute to this Collection, and for expert editorial assistance.

122. Azaransky, supra note 3, at 86–87; Murray, supra note 13, at 417–35; Rosenberg, supra note 3, at 354–79.
123. Azaransky, supra note 3, at 97; Pinn, supra note 65, at xx, xxxvi.
RACE-ING ROE: REPRODUCTIVE JUSTICE, RACIAL JUSTICE, AND THE BATTLE FOR ROE V. WADE

Melissa Murray

CONTENTS

INTRODUCTION .......................................................................................................................... 2027

I. RACE AND REPRODUCTION BEFORE AND AFTER ROE .......................................... 2031
   A. Race-ing Reproduction: From Slavery to the Birth Control Movement .......... 2033
      1. Slavery and Reproduction ........................................................................... 2033
      2. The Racial Politics of Abortion Criminalization ........................................ 2034
      3. The Racial Politics of the Eugenics Movement .......................................... 2036
      4. Race, Eugenics, and the Birth Control Movement .................................... 2038
      5. Racial Opposition to the Birth Control Movement .................................... 2040
   B. Race and Abortion Before Roe v. Wade ...................................................... 2041
      1. Black Genocide and Reproductive Rights .............................................. 2041
      2. Reproductive Rights and Race, Gender, and Class Equality ................... 2045
   C. Race and Abortion After Roe v. Wade ...................................................... 2049
   D. Reproductive Justice and Racial Justice in the Abortion Debate ............... 2055
   E. Race, Disability, and Reproductive Justice ................................................... 2059

II. ABORTION, DISABILITY, AND ANTIDISCRIMINATION ................................................ 2062

III. RACE-ING ROE .................................................................................................................. 2071
   A. Stare Decisis and Abortion .............................................................................. 2073
   B. Race and Precedent ....................................................................................... 2076
   C. Ramos v. Louisiana ........................................................................................ 2080
   D. Ramos, Box, and Roe .................................................................................... 2083

IV. RACE IN THE BALANCE ................................................................................................. 2088
   A. Undermining Reproductive Justice ............................................................. 2089
   B. Undermining Racial Justice ......................................................................... 2094

CONCLUSION ............................................................................................................................... 2101
RACE-ING ROE: REPRODUCTIVE JUSTICE, RACIAL JUSTICE, AND THE BATTLE FOR ROE V. WADE

Melissa Murray*

Amidst a raft of major Supreme Court decisions, a relatively quiet concurrence has planted the seeds for what may precipitate a major transformation in American constitutional law. Writing for himself in Box v. Planned Parenthood, Justice Thomas chided the Court for declining to review a decision invalidating an Indiana law that prohibited abortions undertaken "solely because of the child's race, sex, diagnosis of Down syndrome, disability, or related characteristics." Arguing that the challenged law was merely Indiana's modest attempt to prevent "abortion from becoming a tool of modern-day eugenics," Justice Thomas proceeded to elaborate a misleading history in which he associated abortion with eugenics, racism, and a broader campaign to improve the human race by limiting Black reproduction.

While many decried his selective and inaccurate invocation of the history of eugenics, Justice Thomas's ambitions for the concurrence likely went beyond the historical record. Indeed, in drafting the concurrence, Justice Thomas may have been less concerned with history than with the future — and specifically the future of abortion rights and the jurisprudence of race. As this Article explains, the concurrence's misleading association of abortion and eugenics may well serve two purposes. First, it justifies trait-selection laws, an increasingly popular type of abortion restriction, on the ground that such measures serve the state's interest in eliminating various forms of discrimination. But more importantly, and less obviously, by associating abortion with eugenic racism, the concurrence lays a foundation for discrediting — and overruling — Roe v. Wade on the alleged ground that the abortion right is rooted in, and tainted by, an effort to selectively target Black reproduction.

Under the principle of stare decisis, a past decision, like Roe v. Wade, cannot be overruled simply because a majority of the current Court disagrees with it. Instead, a "special justification" is required. Justice Thomas's association of abortion with eugenics constructs the case that racial injustice is the "special justification" that warrants overruling Roe. In this regard, the Box concurrence builds on past decisions, like Brown

* Frederick I. and Grace Stokes Professor of Law, New York University School of Law. For helpful suggestions and feedback, I'm grateful to Susan Frelich Appleton, Rabia Belt, Devon Carbado, Guy-Uriel Charles, Erwin Chemerinsky, Katherine Franke, José Edwin Argeuta Funes, Michele Goodwin, Stephen Lee, Leah Litman, Serena Mayeri, Caitlin Millat, Joy Milligan, Janelia Morgan, Erin Murphy, Douglas NeJaime, Shaun Ossei-Owusu, Alice Ristoph, Rachel Rebouché, Judge Carlton Reeves, Laura Rosenbury, Bertrall Ross, Deborah Tuerkheimer, Carol Sanger, Reva Siegel, Fred Smith, Karen Tani, and Kendall Thomas. I presented this paper at Columbia Law School's Barbara Aronstein Black Lectures on Women and Law. I am grateful for the helpful feedback I received there, as well as the comments received at the Family Law Scholars and Teachers Conference, the Lutie A. Lytle Black Women Law Faculty Workshop, and faculty workshops at Rutgers, George Washington University, the University of Colorado, the University of Pennsylvania, UC Irvine, Northwestern, Temple, Stanford, Berkeley, the University of Florida, NYU, and Vanderbilt. Alon Handler and Hilarie Meyers provided outstanding research assistance. All errors are my own.
If undertaken, the Box concurrence’s latent strategy will be devastating to abortion rights, but as this Article explains, its deleterious impact goes beyond eviscerating Roe v. Wade. Under the concurrence’s logic, race may serve dual purposes in shaping the Court’s jurisprudence. As an initial matter, race — and the prospect of redressing racial injustice — furnishes the Court with a potent justification for reconsidering settled precedent. But it also provides the Court with an opportunity to articulate new law that affirms and entrenches the Court’s preferred conception of race and racial harm. In this regard, the Box concurrence is not merely an invitation to recast abortion as an issue of racial injustice; it is an invitation to entirely re-conceptualize the meaning of race, racial injury, and racism.

INTRODUCTION

In May 2019, the Supreme Court issued a per curiam decision in Box v. Planned Parenthood of Indiana and Kentucky, Inc., a challenge to two Indiana abortion restrictions — one that “makes it illegal for an abortion provider to perform an abortion in Indiana when the provider knows that the mother is seeking the abortion solely because of the child’s race, sex, diagnosis of Down syndrome, disability, or related characteristics,” and one that prescribed particular protocols for the disposal of fetal remains.

The Court’s disposition of the two challenges was not necessarily noteworthy. It granted certiorari in the challenge to the fetal disposal restriction, while denying certiorari as to the challenge to the trait-selection prohibition. What was noteworthy, however, was that one member of the Court, Justice Thomas, wrote separately to share his
views regarding the constitutionality of the Indiana trait-selection statute. As Justice Thomas explained, the law, and others like it, promoted the state’s “compelling interest in preventing abortion from becoming a tool of modern-day eugenics.”

To this end, Justice Thomas proceeded to elaborate a misleading and incomplete history in which he associated abortion with eugenics and the rise of the modern birth control movement. Thus, while he concurred in the Court’s judgment to deny certiorari, conceding that “further percolation” may assist the Court’s future review of such laws, he nonetheless maintained that the day was coming when the Court would “need to confront the constitutionality of laws like Indiana’s.”

To be sure, no other member of the Court joined Justice Thomas’s concurrence. And many commentators and scholars decried his selective and misleading invocation of the history of eugenics. But in drafting his concurrence, it seems Justice Thomas was not concerned with

---

5 Id. at 1783 (Thomas, J., concurring).
7 Box, 139 S. Ct. at 1783.
9 Id.
10 See, e.g., Mary Ziegler, Essay, Bad Effects: The Misuses of History in Box v. Planned Parenthood, 105 CORNELL L. REV ONLINE 165, 196–202 (2020) (critiquing the historical arguments in Justice Thomas’s Box concurrence and arguing that “it is wrong to equate the population-control and abortion-rights movement — or to argue that eugenacists dominated the movement for population control,” id. at 200); Samuel R. Bagenstos, Disability and Reproductive Justice, 14 HARV. L. & POL’Y REV. 273, 276 (2020) (“When Justice Thomas and others seek to weaponize disability rights against abortion, they distort or disregard the full history of eugenics.”); Adam Cohen, Clarence Thomas Knows Nothing of My Work, THE ATLANTIC (May 29, 2019), https://theatlantic.com/ideas/archive/2019/05/clarence-thomas-used-my-book-argue-against-abortion/590455 [https://perma.cc/8835-64ZU] (explaining that “Thomas used the history of eugenics misleadingly, and in ways that could dangerously distort the debate over abortion”); Rosenberg, supra note 8 (“The Washington Post spoke to seven scholars of the eugenics movement; all of them said that Thomas’s use of this history was deeply flawed.”); Joanna L. Grossman & Lawrence M.
setting straight the historical record. Instead, his ambitions for this concurrence likely were focused on issues closer to the Court’s present docket.

This Article contextualizes Justice Thomas’s Box concurrence and elaborates the way in which his opinion may, in tandem with other recent decisions, provide a roadmap for upholding trait-selection abortion restrictions, overruling Roe v. Wade, and reconceptualizing the Court’s understanding of racial injury. As the Article explains, the Box concurrence trades, perhaps ironically, on the success of the reproductive justice movement, which has surfaced the myriad ways in which race, class, and other forms of marginalization shape women’s experiences with, and the state’s efforts to regulate, reproduction. But rather than surfacing race as a means of promoting greater reproductive autonomy and access in service of Roe v. Wade, as the reproductive justice movement does, the Box concurrence integrates racial injustice into the history of abortion for the purpose of destabilizing abortion rights.

Although Roe has been widely critiqued over the years, it has never been formally overruled. The doctrine of stare decisis, which demands fidelity to past decisions on the same, or similar, issues, has been the chief impediment to overruling Roe. Under the Supreme Court’s stare decisis jurisprudence, a past decision cannot be overruled simply because a majority of the current Court disagrees with it. Instead, a “special justification” is required to overrule. Thus, in order to over-


15 Id.
ride the demands of precedent and dislodge *Roe*, which has been repeatedly reaffirmed by the Court, some "special justification" must be proffered. Under the logic of the *Box* concurrence, that special justification is race. In this way, Justice Thomas's *Box* concurrence constructs a narrative that associates abortion with eugenics and racial injustice, such that when the Court next confronts *Roe*, it may, as it famously did in *Brown v. Board of Education*, circumvent the demands of stare decisis and overrule its most controversial precedent in the name of racial justice.

Accordingly, where other efforts to discredit *Roe* have failed, Justice Thomas's *Box* concurrence plants the seeds for a potentially more successful strategy. Rather than insisting that *Roe* is wrongly decided, those intent on overruling it need only argue that the *Roe* Court failed to fully appreciate the racial dynamics and underpinnings of abortion. In this regard, the *Box* concurrence provides a roadmap to lower courts and abortion opponents to challenge *Roe* on the grounds that the abortion right allegedly is rooted in racial injustice and results in disproportionate impacts on minority groups.

If this strategy is successful, it will have implications that reverberate beyond *Roe* and abortion rights. By the concurrence's logic, race may serve dual purposes in shaping the Court's jurisprudence. As an initial matter, race — and the prospect of redressing racial injustice — furnishes the Court with a potent justification for reconsidering contested precedents. But it also provides the Court with an opportunity to articulate new precedents that may affirm and entrench the Court's preferred conception of race and racial harm. This is particularly meaningful when one considers that the Court's race jurisprudence is replete with contested narratives about the nature of race and racial liability. In this regard, the *Box* concurrence is not merely an invitation to recast abortion as an issue of racial injustice; it is an invitation to entirely re-conceptualize the meaning of race, racial injury, and racism.

This Article proceeds in four Parts. Part I lays a contextual foundation for a critique of the *Box* concurrence by providing a full and nuanced account of the role that race has played on both sides of the abortion debate. As it explains, from slavery to the present, race has been inextricably intertwined in discussions of reproductive rights. With this in mind, this Part counters the thin historical account that Justice Thomas provides in the *Box* concurrence with a more robust and nuanced discussion of the history of abortion criminalization, the birth control movement, and the association of reproductive rights with Black genocide. In charting the intersection of race and reproductive rights, this Part considers the emergence of the reproductive justice movement.

---

16 See Murray, *supra* note 13, at 310.
17 *Halliburton*, 573 U.S. at 266.
and the co-optation of reproductive justice themes by those opposed to abortion rights. It concludes by locating the *Box* concurrence and its racialized critique of abortion within this trajectory.

Part II focuses on the *Box* concurrence's immediate goal — providing a defense of trait-selection abortion restrictions. By characterizing abortion as a “tool of modern-day eugenics,” 19 the concurrence augments the existing defense of trait-selection laws as antidiscrimination measures that do not trigger the heightened constitutional scrutiny that generally attends restrictions on the abortion right, or, more troublingly, that fall outside of the scope of traditional abortion jurisprudence.

Parts III and IV pivot to the heart of the argument — that the aspirations for the *Box* concurrence are not limited to simply defending trait-selection laws. Instead, the racialized critique of abortion rights lays a foundation for discrediting — and eventually overruling — *Roe v. Wade*. As Part III explains, the effort to overrule *Roe v. Wade* and the abortion right has been stymied by the force of stare decisis. 20 However, in the Court's history, the prospect of correcting racial wrongs has served as a predicate for reconsidering — and overruling — past precedents. To support this claim, this Part considers *Brown v. Board of Education* and *Loving v. Virginia*, 21 in which the Court overruled two earlier precedents in the interest of promoting racial equality. To underscore that the interest in overruling in order to correct racial wrongs is not confined to the Court's past, this Part also discusses *Ramos v. Louisiana*, 22 a case from the most recent Supreme Court term, in which the Court overruled a 1972 precedent in part because the earlier decision was inattentive to the challenged policy's “racist origins.” 23 Part IV considers the broader implications of this strategy for issues of reproductive justice and racial justice. The Article then briefly concludes.

I. RACE AND REPRODUCTION BEFORE AND AFTER ROE

In May 2019, the Court issued its decision in *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, a challenge to two Indiana laws regulating abortion. The first law, Indiana’s Sex Selective and Disability Abortion Ban, 24 prohibited abortions performed solely on the

---

20 See *Murray*, supra note 13, at 310.
21 388 U.S. 1 (1967).
22 140 S. Ct. 1390 (2020).
23 *Id.* at 1405.
basis of the fetus’s sex, race, or disabilities, while the second law required abortion providers to use funereal methods for disposing of fetal remains. The Court denied certiorari as to the first law, while upholding the second without requiring full briefing and argument.

Although he concurred in the Court’s judgment, Justice Thomas wrote separately to express his views of the issues presented. There, Justice Thomas chided the Court for declining to review the Sex Selective and Disability Abortion Ban. As he explained, the challenged trait-selection law was a modest attempt to prevent abortion “from becoming a tool of modern-day eugenics.” In making this claim, Justice Thomas invoked a selective history of reproductive rights. As he explained, the modern birth control movement “developed alongside the American eugenics movement, which was preoccupied with both “inhibiting reproduction of the unfit” and preventing the white race from being “overtaken by inferior races.” And although Justice Thomas eventually conceded that the movement to legalize contraception was distinct from the movement to legalize abortion, he nonetheless maintained that the arguments lodged in favor of birth control “apply with even greater force to abortion, making it significantly more effective as a tool of eugenics.”

Throughout the opinion, Justice Thomas invoked Margaret Sanger, the founder of what is now known as Planned Parenthood and the modern birth control movement. Sanger, Justice Thomas recounted, was an unrepentant eugenicist whose interest in eugenics often tilted toward the elimination of the “unfit,” a group that often included nonwhites. As examples of this, Justice Thomas cited Sanger’s campaign for birth control in communities of color, including Harlem, New York; her work

25 Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1781 (2019) (Thomas, J., concurring); see Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep’t of Health, 888 F.3d 300, 303 (7th Cir. 2018) (citing IND. CODE §§ 16-34-4 (2016)), vacated in part, 727 F. App'x 208 (7th Cir. 2018) (mem.), reinstated by 917 F.3d 532 (7th Cir. 2018).
26 Box, 139 S. Ct. at 1781 (citing IND. CODE §§ 16-41-16, 16-34-3 (2016)).
27 Id. at 1782.
28 Id. at 1782–93 (Thomas, J., concurring).
29 See id. at 1792–93 (“Although the Court declines to wade into these issues today, we cannot avoid them forever.” Id. at 1793.).
30 See id. at 1783.
31 Id.
32 Id. at 1784.
33 Id. at 1785.
34 Id. at 1784.
35 See id. at 1783–89.
36 Id. at 1787 (quoting Margaret Sanger, Birth Control and Racial Betterment, BIRTH CONTROL REV., Feb. 1919, at 11, 11).
37 See id. at 1788.
in the “Negro Project,” which sought to popularize the use of birth control among Southern Blacks; and her coauthorship of a report titled “Birth Control and the Negro,” which identified Blacks as “the great problem of the South”—“the group with ‘the greatest economic, health, and social problems.’”

This Part maintains that the history of race, eugenics, and reproductive rights upon which Justice Thomas relied is selective and incomplete. As a corrective, this Part furnishes a more accurate and complete historical account of the intersection of race and reproduction. As section I.A explains, throughout the nineteenth and early twentieth centuries, racialized arguments appeared on all sides of the debate over whether and how to regulate abortion, birth control, and reproduction. Section I.B pivots to consider the ways in which race figured in arguments for and against abortion before Roe v. Wade. Section I.C considers the post-Roe landscape, including the emergence of the reproductive justice movement. Section I.D focuses on the emergence of arguments sounding reproductive justice themes into advocacy on both sides of the abortion debate. Finally, section I.E returns to Box and the role of race, in tandem with gender and disability, in legislative efforts to restrict abortion access.

A. Race-ing Reproduction: From Slavery to the Birth Control Movement

I. Slavery and Reproduction. — Any historical account of the intersection of race and reproduction in the United States must begin with the experience of enslavement. Article I, section 9, clause 1 of the Constitution provides that “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight.” Although the clause does not specifically invoke the term “slave,” it was understood to be a compromise between the Southern states, which depended on slavery for their economies, and...
those states that had abolished slavery or were considering abolition.\footnote{Gordon Lloyd & Jenny S. Martinez, The Slave Trade Clause, NAT’L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/761 [https://perma.cc/GHG6-JVHN].} By its terms, the clause prohibited the federal government from limiting the importation of "persons" — understood to refer to enslaved persons — until twenty years after the Constitution’s ratification in 1788.\footnote{Id.} In anticipation of the 1808 deadline, Congress enacted in 1807, and President Jefferson signed into law, a statute prohibiting the importation of slaves as of January 1, 1808.\footnote{Act of Mar. 2, 1807, ch.22, 2 Stat. 426.}

I raise this constitutional history because of its impact on the institution of slavery, and by extension, reproduction. Prior to 1808, slaveholders could rely on the international slave trade as a means of expanding the enslaved labor force. After 1808, however, any expansion of the labor force would depend on the reproduction of those who were already enslaved.\footnote{DOROTHY ROBERTS, KILLING THE BLACK BODY 24 (Vintage Books 2d ed. 2017).} As Professor Dorothy Roberts explains: "[t]he ban on importing slaves after 1808 and the steady inflation in their price made enslaved women’s childbearing even more valuable."\footnote{Id.} This changed economic reality, coupled with the lived experience of enslaved persons, who had no expectation of or legal entitlement to family integrity, cultivated conflicting interests with regard to reproduction.\footnote{See id. at 26 (noting that enslaved women could reduce the likelihood of being sold and separated from their families by having more children); cf. id. at 46–47 (noting evidence of abstinence, contraceptive use, and abortion among enslaved women to rebel against forced reproduction).}

Slave owners had economic interests in the reproduction of enslaved persons and the reproductive capacities of enslaved women. For enslaved persons, however, the absence of sexual autonomy and knowledge that their children were not their own and could be sold away from them resulted in efforts to control reproduction. Although ascertaining the causes of infertility and miscarriage was often difficult, many slave owners suspected that their slaves deliberately tried to prevent or terminate pregnancies.\footnote{Id. at 47.} In an academic paper read before the Rutherford County Medical Society in 1860, Dr. John T. Morgan of Murfreesboro, Tennessee, recounted the various techniques that enslaved women used "to effect an abortion or to derange menstruation."\footnote{Id. at 47.} During this period, abortion was not legally proscribed if undertaken before quickening, the point at which fetal movement could be perceived, "typically late in the fourth month or early in the fifth month of..."
gestation." Nevertheless, because the use of contraception and abortion to control reproduction had profound implications for property interests, slave owners sought to deter and punish efforts to prevent or terminate pregnancies.

2. The Racial Politics of Abortion Criminalization. — Emancipation and the postbellum shift to a wage labor economy brought renewed interest in race, reproduction, and abortion. As Professor Reva Siegel has documented, following the Civil War, “states began to enact legislative restrictions on abortion,” the cumulative effect of which “was to prohibit abortion from conception.” In addition to criminalizing abortion, states “also adopted legislation barring the distribution of abortifacients and contraceptives, as well as the circulation of advertisements or information about them.”

This criminalization campaign was spearheaded largely by physicians, who associated contraception and abortion with the lay “folk medicine” of homeopaths and midwives, many of whom were Black and Indigenous women. Eager to professionalize medical practice and the nascent field of obstetrics and gynecology, the physicians sought to drive out these “irregular” practitioners who had traditionally handled the business of pregnancy and birth. To be sure, physicians did not frame their appeal to criminalize abortion in the language of professional self-interest. Instead, they maintained that abortion, and the midwives and homeopaths who practiced it, was dangerous and unsafe. Further, abortion diverted women from their “natural” inclination toward wifehood and motherhood, posing physiological harm to women while also imperiling marriage and the family.

In framing abortion as a vehicle of social disorder, the physicians did not limit themselves to the practice’s impact on motherhood and the family. Abortion, they argued, posed broader demographic concerns

---

50 Id. at 282.
51 Id.
52 Id.
54 See, e.g., Nicola Beisel & Tamara Kay, *Abortion, Race, and Gender in Nineteenth-Century America*, 69 AM. SOCIO. REV. 498, 506 (2004) (noting that “physicians opposed both contraception and abortion because they violated the natural purpose of sexuality and women’s natural role as mothers”).
55 See Goodwin, supra note 53.
56 Beisel & Kay, supra note 55, at 506.
that would have a profound impact on American society.\textsuperscript{58} As the physicians noted, in the nineteenth century, the birthrate among white, native-born women had fallen dramatically.\textsuperscript{59} At the same time, the birthrate among the immigrant and nonwhite populations had risen, fueling concerns that the nation was on the precipice of a massive demographic reordering.\textsuperscript{60}

Fearful that these demographic changes would radically alter the nation’s character (and reduce the political power of native-born whites), the predecessors of the pro-life movement pushed to criminalize abortion as a means of deterring native-born white women from terminating pregnancies and allowing the white birth rate to be overwhelmed by immigrant and nonwhite births.\textsuperscript{61} Siegel and Duncan Hosie have put it more succinctly: the interest in regulating, and indeed criminalizing, abortion was hand in glove with the effort to ensure that America remained a white nation.\textsuperscript{62}

\textit{3. The Racial Politics of the Eugenics Movement.} — The criminalization of abortion and concerns about demographic change coincided with the growing interest in eugenics throughout the United States.\textsuperscript{63} The origins of the eugenics movement have been traced to Sir Francis Galton, an English scientist whose interest in the science of heredity was piqued by Charles Darwin’s theory of natural selection, which posited that over time, the weakest species, unable to adapt and compete against hardier species, would become extinct.\textsuperscript{64} Darwin’s theories were not confined to the animal kingdom. Galton and his ilk argued that the theory of natural selection could be translated and applied to human-kind as well. Noting that “[w]hat Nature does blindly, slowly, and ruthlessly, man may do providently, quickly, and kindly,”\textsuperscript{65} Galton sought to replace the natural evolution of the species with “affirmative state intervention” aimed at promoting the very best of humankind.\textsuperscript{66}

\begin{itemize}
\item \textsuperscript{58} Id. at 504.
\item \textsuperscript{59} Id. at 502 ("[T]he total fertility rate for whites fell dramatically, from seven children in 1800 to 3.6 in 1900.” (citation omitted)). While many white European immigrants obtained citizenship as “free white persons” in the eighteenth century, by the nineteenth century, they were increasingly looked down upon as inferior by native-born Anglo-Saxons. Id. at 501 (observing that the social and political categorization of “white” has varied throughout American history).
\item \textsuperscript{60} See Siegel, supra note 49, at 285 & n.87, 297–300.
\item \textsuperscript{61} Id. at 298 & nn.140–41.
\item \textsuperscript{63} ROBERTS, supra note 44, at 59.
\item \textsuperscript{64} Id.
\item \textsuperscript{65} Id.
\item \textsuperscript{66} Id. (quoting FRANCIS GALTON, EUGENICS: ITS DEFINITION, SCOPE AND AIDS 50 (1905)).
\end{itemize}
Eugenics — taken from the Greek root meaning “good in stock” — was “the science of improving stock” by giving “the more suitable races or strains of blood a better chance of prevailing speedily over the less suitable than they otherwise would have had.” Because character and intelligence were viewed as heritable qualities, the eugenics movement argued that society should encourage the procreation of those of superior lineage, while discouraging procreation among — and public support for — those of inferior lineage.

Unsurprisingly, Galton’s eugenic theories were underwritten by a deep-seated belief in genetic distinctions between the races. Eugenic theory posited that the human species was divided into different races, each with its own distinctive features and characteristics. As Galton explained: “The Mongolians, Jews, Negroes, Gipsies [sic], and American Indians severally propagate their kinds; and each kind differs in character and intellect, as well as in colour and shape, from the other four.” Notably, Blacks were distinctive in their “strong impulsive passions” and “remarkable domesticity.” Further, they were “endowed with such constitutional vigour, and [were] so prolific, that [their] race [was] irrepressible.” At a time when white Americans were gripped by fears that immigrants and nonwhites were reproducing faster than native-born whites, it is not surprising that eugenic theories, with all their implications for reproduction, took root and flourished in the United States.

By the early twentieth century, the American legal landscape was dotted with laws that reflected both anxiety about demographic change and a eugenic interest in regulating reproduction. A number of states enacted laws permitting the sterilization of the “feebleminded” and “habitual” criminals. Others enacted laws criminalizing miscegenation and interracial marriage in order to prevent the “mongrelization” of the

---

68 ROBERTS, supra note 44, at 59 (quoting GALTON, supra note 67, at 24–25).
69 Id. at 59–60.
70 Id. at 60.
71 Id.; see also Sonia M. Suter, A Brave New World of Designer Babies?, 22 BERKELEY TECH. L.J. 897, 904 (2007) (noting that eugenicists of the 1920s “conflated national and racial identity and believed that race determined behavior”).
72 ROBERTS, supra note 44, at 60 (quoting Francis Galton, Hereditary Talent and Character, 12 MACMILLAN’S MAG. 318, 320 (1865)).
73 Id. (quoting Galton, supra note 72, at 321).
74 Id. (quoting Galton, supra note 72, at 321).
75 Id. at 69–70; see also Suter, supra note 71, at 906 (noting that states also restricted marriage of the “feebleminded”).
76 ROBERTS, supra note 44, at 200.
At the federal level, eugenics left an indelible imprint on the nation’s immigration laws and policies. The interest in eugenic lawmaking reflected both a desire to prevent socially undesirable populations from procreating and the desire to ensure the genetic selection of the “fittest" of the race.

4. Race, Eugenics, and the Birth Control Movement. — As the eugenics movement gained force in the United States in the early twentieth century, another social movement was also ascendant. Early feminists had long raised calls for “voluntary motherhood" — that is, the ability, given the real dangers that childbirth posed, to allow women to better control when and how they became pregnant. As noted above, white women’s efforts to limit childbirth gave rise, at least in part, to the cultural climate that fueled the criminalization of abortion and contraception. By the early twentieth century, however, some women reformers were redoubling their efforts to secure access to the means by which they could control reproduction and plan their families.

Although a number of women were involved in the campaign to expand access to birth control, Margaret Sanger emerged as one of the most stalwart voices in the birth control movement. In 1921, for the purpose of expanding access to contraception and family planning guidance to middle-class women, she founded the American Birth Control League, which would become the Planned Parenthood Federation of America. Sanger’s early efforts to promote contraceptive access were

77 See id. at 268; see also Matthew J. Lindsay, Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860–1920, 23 LAW & SOC. INQUIRY 541, 546 & n.7 (1998).
78 See Robert J. Cynkar, Buck v. Bell: “Felt Necessities" v. Fundamental Values?, 81 COLUM. L. REV. 1418, 1432 (1981) (discussing the influence of eugenic thinking in immigration law and policy); Suter, supra note 71, at 907 (noting that eugenic principles were "central to the passage of the Immigration Restriction Act of 1924, which set quotas limiting the immigration of ‘biologically inferior’ ethnic groups into the United States and favored the entrance of Northern Europeans").
80 Beisel & Kay, supra note 55, at 510–11 (observing that “voluntary motherhood," id. at 510, arose as a response to marital rape, and a desire for early feminists to “guard rather than undermine the sanctity of motherhood," id. at 510–11).
81 Id. at 507 (noting that physicians advocating for antiabortion laws tried to generate widespread horror over abortion among native-born white women and the consequences of declining birthrates for “native-born" social and political power).
82 See id. at 515 ("Despite physicians’ successful efforts to get anti-abortion statutes passed, the available historical evidence suggests that women did, indeed, continue to make decisions about reproduction. In spite of statutes banning use of abortion and contraception, the United States completed its first demographic transition in the early twentieth century.” (citation omitted)).
rooted in feminist themes like voluntary motherhood, but they also included calls for contraception as a means of ensuring women’s sexual gratification, which cost her crucial support among some quarters of the women’s rights movement. Early twentieth century feminists often extolled the moral superiority of motherhood as the foundation of their claims for women’s equality. Sanger’s call for contraception and sexual gratification was at odds with the women’s movement’s emphasis on maternal virtue, chastity, and temperance.

Unable to secure the support of some sectors of the women’s movement, Sanger sought to reframe the campaign for birth control to appeal to a wider audience. In this regard, Sanger’s efforts to link the birth control movement to eugenics served a number of purposes. As an initial matter, it imbued the birth control movement with a successful national movement that carried with it the veneer of reputable scientific authority. As importantly, eugenics offered the birth control movement another lens through which to articulate the interest in wider access to contraception. With eugenics as a frame, Sanger and the birth control movement could emphasize contraception not only as conducive to women’s health and autonomy, but also as a means of promoting the national welfare.

Contemporary scholars have been forthright about Sanger’s ties to eugenics and its troubling racial implications. But they have also made clear that Sanger’s interests were focused on expanding access to contraception, rather than facilitating abortion, which she viewed as unsafe and dangerous. As Sanger herself explained, among women, family planning “is being practised; it has long been practised and it will

85 See ROBERTS, supra note 44, at 72.
86 Hagar Kotef, On Abstractness: First Wave Liberal Feminism and the Construction of the Abstract Woman, 35 FEMINIST STUD. 445, 489–500 (2009) (“Even the most liberal among First Wave feminists were concerned with domesticity, republican motherhood, religiosity, and moral virtues (often at the same time as they asserted full equality.”); see also CAROLE R. MCCANN, BIRTH CONTROL POLITICS IN THE UNITED STATES, 1916–1945, at 38 (1994) (explaining that suffragists told Sanger “to abandon birth control, or at least tone down her tactics”).
88 Roberts, supra note 87, at 200; MCCANN, supra note 86, at 100.
89 ROBERTS, supra note 44, at 72.
90 See, e.g., MCCANN, supra note 86, at 130–34; ROBERTS, supra note 44, at 79–81.
91 MCCANN, supra note 86, at 9 (“Confronted with death from illegal abortions, Sanger suddenly recognized that it was unconscionable for women to be forced to choose between avoiding sex altogether or risking their lives simply because the government prohibited them from having

426
always be practised.” The more pressing question, in Sanger’s view, was “whether [family planning] is to be attained by normal, scientific Birth Control methods or by the abnormal, often dangerous, surgical operation.”

As importantly, scholars have noted that increased access to birth control was not simply thrust upon the Black community in an unwelcome attempt to reduce the Black birthrate, as Justice Thomas’s history suggests. As Roberts explains, “Black women were interested in spacing their children and Black leaders understood the importance of family-planning services to the health of the Black community,” which was plagued by high rates of maternal and infant mortality. The Black press routinely provided frank information about birth control, including advertisements for contraceptive douches, pessaries, and suppositories. Indeed, in a 1932 article in Birth Control Review, George S. Schuyler wryly observed: “If anyone should doubt the desire on the part of Negro women and men to limit their families, it is only necessary to note the large scale of ‘preventative devices’ sold in every drug store in the various Black Belts . . .” Even W.E.B. Du Bois publicly endorsed birth control as a means of vesting Black women with the ability to choose “motherhood at [their] own discretion.”

5. Racial Opposition to the Birth Control Movement. — Not everyone in the Black community understood access to contraception as a means of liberation and autonomy. Marcus Garvey, who led the Pan-African movement of the 1930s, condemned contraception as “race suicide.” In 1934, the Universal Negro Improvement Association, with


93 Id.

94 ROBERTS, supra note 44, at 82–84.

95 Id. at 83 (alteration in original) (quoting George S. Schuyler, Quantity or Quality, 16 BIRTH CONTROL REV. 165, 166 (1932)).


97 See Dorothy Roberts, Black Women and the Pill, 32 FAM. PLAN. PERSPS. 92, 93 (2000); see also ROBERTS, supra note 44, at 84; Jill C. Morrison, Resuscitating the Black Body: Reproductive Justice as Resistance to the State’s Property Interest in Black Women’s Reproductive Capacity, 31
which Garvey was associated, passed a resolution condemning birth control as an attempt “to interfere with the course of Nature and with the purpose of the God in whom we believe.” In a 1940 guest editorial in the *New York Amsterdam News*, Philip Francis insisted that “[t]he Negro needs more and better babies to overwhelm the white world, in war, in peace and in prosperity.” With this in mind, Francis urged fellow members of the Black community to usher “our women back to the home” so that they might “breed us the men and women who will really inherit the earth.”

## B. Race and Abortion Before Roe v. Wade

### 1. Black Genocide and Reproductive Rights

A generation later, the strains of Black natalism that undergirded Garvey’s Pan-African movement were reflected in the nascent Black Power movement and its opposition to contraception and abortion. During the 1960s, changing sexual mores, concerns about state intervention in private life, and anxiety about unchecked population growth fueled efforts to liberalize—or repeal entirely—criminal bans on contraception and abortion. Despite these dynamics, Black nationalist groups resisted efforts to expand birth control and abortion in the Black community, and their opposition sounded in the register of racial genocide. Both the Black Panthers and Nation of Islam opposed birth control and abortion, albeit for different reasons.

Like Marcus Garvey a generation earlier, the Panthers initially decried abortion and contraception as a form of deracination that deprived the community of a generation of potential soldiers in the crusade for Black freedom. By contrast, the Nation of Islam’s opposition to reproductive rights was rooted in religious principles and a notion of

---


100 Id. (quoting Francis, supra note 99, at 8).


102 See NELSON, supra note 101, at 102.
racial uplift that was linked to the patriarchal family. For both groups, however, Black reproduction was necessary not only to erase the losses of slavery and Jim Crow, but also to populate a strong Black community that could resist — and indeed, overwhelm and dominate — the white power structure.

Critically, the narrative of racial genocide gained traction — even outside of Black nationalist circles. In a 1972 article in the *American Journal of Public Health*, researchers William Darity and Castellano Turner reported that a significant number of Blacks were wary of family planning programs, particularly if they were administered and operated by non-Blacks. Further, at least part of the skepticism of family planning programs was animated by an association between family planning and racial genocide.

Even more traditional African American groups, like the National Association for the Advancement of Colored People (NAACP), began to reevaluate their positions on reproductive rights during this period. In the 1920s and 1930s, the NAACP, under the leadership of W.E.B. Du Bois, had supported birth control as a means of racial betterment. By the 1960s and 1970s, however, the organization’s stance on birth control was informed by the distrust of government and mainstream institutions that pervaded Black political discourse. In particular, some local affiliates of the NAACP questioned the proliferation of government-subsidized Planned Parenthood birth control clinics in predominantly Black neighborhoods, noting that such clinics typically did not include Black community members in their administration and operating staffs and limited their services to the provision of contraception and abortion. Black women’s reproductive needs, these local NAACP affiliates argued, were not limited to contraception and abortion, but instead included a wider range of services aimed at facilitating family planning.

103 Id. at 96-98. That said, not all members of the Nation were implacably opposed to family planning. According to Professor Robert Weisbord, in a 1962 interview with Black field consultants for Planned Parenthood, Malcolm X seemed to favor family planning measures "for health and economic reasons." Weisbord, supra note 101, at 99.


105 Id.

106 See Roberts, supra note 44, at 99.

107 See supra p. 2040.

108 Roberts, supra note 44, at 99; Caron, supra note 101, at 546-47. But see Weisbord, supra note 101, at 585 (noting that the national leadership of the NAACP "believe[d] in family planning as a social value and reject[ed] the notion . . . that this is a form of genocide").


Although the Black Panthers rejected abortion and contraception as tools of Black genocide, other civil rights groups pointed to other developments as they articulated their objections to, and skepticism of, state efforts to control Black reproduction. In a 1964 pamphlet entitled *Genocide in Mississippi*, the Student Nonviolent Coordinating Committee (SNCC) argued that forced sterilization of Black women throughout the South was a species of state-facilitated genocide that should be rooted out and condemned. Critically, unlike the Panthers and the Nation, SNCC saw forced sterilization, as opposed to abortion and contraception, as the more pernicious threat to the Black community. Indeed, as the broader group condemned the forced sterilization of Black women as genocide, some members of SNCC also emphasized — and advocated for — Black women’s freedom and autonomy to use birth control voluntarily. As SNCC explained, the distinction between genocidal sterilization and autonomous contraceptive use hinged on Black women’s freedom to choose for themselves, rather than having the state’s will imposed upon them.

In a similar vein, other voices in the Black community explicitly countered Black nationalist opposition to abortion and reproductive rights. Martin Luther King, Jr., registered his support of family planning measures aimed at the Black community. Having served on a committee for a Planned Parenthood study on contraception, King, who received Planned Parenthood’s Margaret Sanger Award in Human Rights in 1966, maintained that “easy access to the means to develop a family related in size to [the] community environment and to the income potential [each individual] can command” could be a “profoundly important ingredient” for the Black community’s economic security and stability. Like King, other Black leaders saw a connection between family planning and the broader civil rights movement, lending support to efforts to expand access to family planning resources within the Black community.

---

112 See Frances Beale, *Double Jeopardy: To Be Black and Female*, in *The Black Woman* 90, 98 (Toni Cade ed., 1970) (“The lack of availability of safe birth-control methods, the forced sterilization practices, and the inability to obtain legal abortions are all symptoms of a decadent society that jeopardizes the health of Black women . . . .”).
113 See Nelson, *supra* note 101, at 91 (noting that a SNCC representative wrote “[t]hose black militants who stand up and tell women, ‘Produce black babies!’ are telling black women to be slaves” (quoting Julius Lester, *From the Other Side of the Tracks*, THE GUARDIAN (New York), Aug. 17, 1968)).
115 *Id.* (discussing the work of Walter R. Chivers, Jerome Holland, and Bayard Rustin, among others, on behalf of family planning).
Black women were especially vociferous in their desire for, and defense of, broader access to contraception and abortion. A 1973 study found that, “despite obvious fears of genocide among young black men, there was ‘considerable evidence that black women . . . are even more positively inclined toward family planning than white women.” To this end, the *Chicago Defender*, arguably the country’s most prominent Black newspaper, featured a weekly column, “Letters to Leontyne,” in which Leontyne Hunt, a Black woman, responded to family planning questions from women readers. Many of the letters were explicit in their request for broader access to contraception and family planning resources within the Black community.

Calls for broader access to family planning resources were often animated by the deleterious impact of abortion criminalization on Black women. Acknowledging “the experiences of several young women [she] knew,” who “had suffered permanent injuries at the hands of illegal abortionists,” Congressman Shirley Chisholm, who served as the honorary president of the National Abortion Rights Action League (NARAL), worked to increase the number of family planning clinics in Black neighborhoods, repudiating the Black genocide argument as “male rhetoric, for male ears” that “falls flat to female listeners and to thoughtful male ones.”

Like Chisholm, other Black women directly challenged the account of contraception and abortion as genocidal. Professor Angela Davis acknowledged the rhetoric of Black genocide but directed those claims at forced sterilization, as opposed to birth control and abortion.
Cade did not oppose the Black Power movement’s interest in birthing a new generation of revolutionaries.\(^ {123}\) That said, she disagreed vehemently with “the irresponsible, poorly thought-out call to . . . every Sister at large to abandon the pill that gives her certain decision power, a power that for a great many of us is all we know, given the setup in this country and in our culture.”\(^ {124}\) In debating whether family planning constituted Black genocide or female liberation, Cade made clear that the issue was not simply about the decision to have a child, but rather the broader social conditions in which Black children were raised. In her view, insisting on Black women’s reproduction without dealing with the social and material conditions — food insecurity, poverty, inadequate housing, and state violence — in which Black women often raised their children missed the mark.\(^ {125}\)

Florynce Kennedy, who was no stranger to the Black Power movement, having cut her teeth as a litigator defending H. Rap Brown and the Black Panthers,\(^ {126}\) was outspoken in her defense of reproductive rights. A bridge between the Black Power and women’s liberation movements, Kennedy repeatedly challenged the Black nationalist view that having a large family was both a revolutionary act and Black women’s principal responsibility in the struggle for Black liberation.\(^ {127}\) Countering this masculinist vision, Kennedy argued that “if [B]lack women were to be truly ‘revolutionary’ and play varied and significant roles in the Black Freedom movement, ‘some of us might want to travel light.’”\(^ {128}\) Indeed, in their book, *Abortion Rap*, Kennedy and her co-author Diane Schulder devoted an entire chapter to debunking the claim that legalizing abortion and contraception was a genocidal plot to de-racinate Black people.\(^ {129}\) They countered the Black nationalist argument against abortion by arguing that Black women needed and desired access to safe and legal birth control.\(^ {130}\) Powerfully deploying examples of the Black women who died or suffered from botched abortions and unwanted pregnancies, Kennedy and Schulder argued that these deaths should be viewed — and condemned — as a form of genocide.\(^ {131}\)


\(^{124}\) Id. at 164.

\(^{125}\) See id. at 167–68.


\(^{128}\) Id.

\(^{129}\) Id. at 175–77.

\(^{130}\) Id.

\(^{131}\) Id. at 170.
2. Reproductive Rights and Race, Gender, and Class Equality. — While others did not frame support for abortion legalization in terms that expressly countered claims of Black genocide, their arguments explicitly and implicitly centered the impact of abortion restrictions on marginalized groups, including communities of color. Echoing Kennedy and Schulder’s invocation of the Black women who had suffered botched and illegal abortions, public health advocates argued that abortion criminalization posed health concerns, particularly in poor communities.\(^{132}\) As they explained, regardless of criminalization, and with limited access to birth control, women would continue to seek abortions.\(^{133}\) In this regard, the impact of laws that prohibited abortion except where necessary to save the mother’s life fell disproportionately on poor women, many of whom were women of color.\(^{134}\) Wealthy, well-connected women could circumvent the law either by leaving the country to seek legal abortion care, or finding a psychiatrist who could attest to the woman’s likely suicide if leave for a “therapeutic” abortion was not granted.\(^{135}\) Those without the financial wherewithal to do so were left with the prospect of continuing a pregnancy or risking their lives in a “back-alley” abortion. As one public health official noted, the difference between a lawful “therapeutic” abortion and an illegal abortion was merely "$300 and knowing the right person."\(^{136}\)

In addition to concerns about public health, appeals for greater control of population growth were also marshaled in support of more liberal abortion policies. And these arguments also implicitly touched on issues of race. Unlike the eugenics-fueled interest in controlling the demographic growth of “the unfit,” 1960s population-based arguments in favor of abortion were more environmental and ecological, focusing instead on the universal threat that population growth posed to the planet

---

132 See Mary Steichen Calderone, Illegal Abortion as a Public Health Problem, 50 AM. J. PUB. HEALTH 948, 951 (1960).

133 See id. at 950.

134 See id. at 951; see also LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973, at 205 (1997) (noting studies from the time period that show that most therapeutic abortions performed in hospitals were performed on white patients with private health insurance).


136 Id. (quoting Calderone, supra note 132, at 949). In this regard, public health arguments in favor of abortion liberalization echoed earlier arguments in favor of repealing criminal bans on contraception: despite criminalization, those with means — and access to private physicians — were able to obtain contraception. Criminal prohibitions on contraception effectively limited the operation of public birth control clinics upon which the poor relied for family planning information and assistance. See Cary Franklin, The New Class Blindness, 128 YALE L.J. 2, 22-24 (2018) (discussing contraceptive bans’ impact on public birth control clinics); Melissa Murray, Sexual Liberty and Criminal Law Reform: The Story of Griswold v. Connecticut, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES 11, 12 (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019).
and its inhabitants.\textsuperscript{137} Founded in 1968, the organization Zero Population Growth argued that "no responsible family should have more than two children" and that "[all] methods of birth control, including legalized abortion, should be freely available."\textsuperscript{138} Likewise, the bestselling book \textit{The Population Bomb} warned of the consequences of overpopulation to the developing world — and to the poor and marginalized living in more developed countries, like the United States.\textsuperscript{139}

Broader concerns about sexual freedom, government intrusion into intimate life, and sex equality also framed the 1960s effort to repeal and liberalize criminal abortion laws — and in doing so, implicitly acknowledged the differential impact of morals legislation on marginalized communities.\textsuperscript{140} The changing sexual mores of the 1960s called into question a range of moral offenses that criminalized the consensual, nonmarital sexual activity of adults, as well as measures, like contraception and abortion, that might facilitate sex outside of marriage.\textsuperscript{141} Many argued that the enforcement of morals offenses was necessarily selective, allowing the state to more actively police the intimate lives of minorities and other marginalized groups.\textsuperscript{142} It also sanctioned state intervention into the most intimate aspects of private life, including the "marital bedroom."\textsuperscript{143} Indeed, concern about state intervention into the private recesses of intimate life underwrote the Court’s invalidation of laws criminalizing the use of contraception by married couples and single people.

Although the Court relied on the logic of privacy to strike down criminal restrictions on contraception,\textsuperscript{144} privacy was not the only legal frame available to house constitutional protections for access to contraception. Early challenges to contraceptive bans noted that such laws placed heavier burdens on women than men,\textsuperscript{145} while other challenges emphasized privacy as a necessary precondition for structuring intimate

\textsuperscript{137} Greenhouse & Siegel, \textit{supra} note 135, at 2038.
\textsuperscript{138} \textit{Id.} (alteration in original) (quoting Zero Population Growth, Brochure, \textit{reprinted in LINDA GREENHOUSE \\& REVA B. SIEGEL, BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING} 55, 57 (2010)).
\textsuperscript{141} See \textit{id.} at 1048, 1068.
\textsuperscript{142} See \textit{id.} at 1059.
\textsuperscript{143} \textit{Id.} at 1064 (quoting \textit{Griswold v. Connecticut}, 381 U.S. 479, 485 (1965)).
life along more gender-egalitarian lines. In the same vein, challenges to abortion restrictions also emphasized both freedom from unnecessary government regulation and sex equality. Although the women's movement was not active in the earliest efforts to reform abortion laws, in time, feminists came to understand the interest in repealing and reforming abortion regulation as consistent with their aims to secure equal pay, equal access to higher education, opportunity in the workplace, and other policies, including access to childcare, that were necessary for women's equal citizenship.

As feminists integrated abortion into their public discourse around sex equality, calls for sex equality were central to feminist legal challenges to abortion bans. In contrast to early abortion challenges, which were framed in terms of the professional obligations and rights of physicians, feminists challenging nineteenth-century abortion bans in the 1970s explicitly framed their claims in terms of liberty, women's equality, and sexual freedom. Consider *Hall v. Lefkowitz*, in which a team of feminist lawyers that included Florynce Kennedy challenged New York's abortion ban as an affront to women's rights. In so doing, these feminist lawyers explicitly rooted their objections to abortion bans in women's lived experiences, salting their briefs and courtroom arguments with testimony from women who experienced illegal abortions, lack of contraceptive access, adoption, or forced motherhood. In *Abele v. Markle*, a challenge to Connecticut's abortion ban, feminist lawyers led by Catherine Roraback emphasized both the gendered impact of the law, and its impact on poor women and women of color. As they explained, women experienced motherhood differently based on their race and class, meaning that laws that criminalized abortion disadvantaged women but were doubly burdensome for those women who could not "afford to travel to London or Puerto Rico for abortions."

This is all to say that, in the period before *Roe v. Wade* was decided, the discourse surrounding abortion rights was diverse and multifaceted, reflecting concerns about the environment, the breadth of criminal regulation, sex equality, racial and class injustice, and intersectional claims that implicated both race and sex discrimination.

---


147 *Greenhouse & Siegel, supra* note 135, at 2042.

148 See *id.* at 2044.


150 See *id.* at 1031.


153 *Id.*
Not all of these frames, however, were reflected in the Court's decision in \textit{Roe v. Wade}, which was rooted in the right to privacy. In this regard, \textit{Roe's} embrace of privacy was as much a question of timing as it was a substantive choice. \textit{Abramowicz v. Lefkowitz}, with its claims of sex and class equality, was mooted when the New York legislature repealed the challenged law.\footnote{Reva B. Siegel, \textit{Roe's Roots: The Women's Rights Claims that Engendered Roe}, 99 B.U. L. Rev. 1875, 1886 n.49 (2010) (explaining that the opinion dismissing \textit{Abramowitz} and its companion suits as moot was issued on July 1, 1970, but it was not published in any official court reporter).} Likewise, \textit{Abele v. Markle} was pending before the Supreme Court when the Court issued its decision in \textit{Roe}.\footnote{Id. at 1894 (noting that the appeal of \textit{Abele} "was intercepted by the \textit{Roe} decision itself").}

Because \textit{Roe} reached the Court first, the equality-based claims and frames that had infused other abortion challenges did not make their way into the Court's understanding of abortion rights. And critically, unlike the feminist lawyers who litigated \textit{Abele} and \textit{Lefkowitz}, the \textit{Roe} lawyers, Linda Coffee and Sarah Weddington, did not frame their arguments in terms of sex equality or race and class inequality, choosing instead to root their claims in the privacy logic that had undergirded the Court's earlier contraception decisions.\footnote{As scholars have argued, \textit{Roe's} framing of the abortion right was not the only available framing. Other challenges to abortion bans surfaced other constitutional lenses, including sex equality and class privilege, that, as much as privacy, could have provided doctrinal roots for the abortion right. See, e.g., Siegel, supra note 154, at 1886–94 (discussing the \textit{Abele} and \textit{Lefkowitz} cases).} In this regard, the Court's decision in \textit{Roe} reflected a narrower framing of the abortion debate, emphasizing the role of physicians, the scope of state police power, and, above all, privacy.\footnote{See \textit{Roe v. Wade}, 410 U.S. 113, 153 (1973).}

\section*{C. Race and Abortion After \textit{Roe v. Wade}}

The Court's decision in \textit{Roe} rooted the abortion right in the logic of constitutional privacy, and in so doing, foreclosed the other doctrinal frames that had circulated in abortion litigation and discourse in the decade that preceded \textit{Roe}. As importantly, this section explains, the Court's narrow framing shaped the response to, and defense of, the abortion right in the decades that followed.\footnote{See id. at 1897.}

In announcing a woman's right to choose an abortion in consultation with her physician, \textit{Roe} rested on a series of assumptions. First, it assumed a certain degree of affluence and access — women choosing an abortion ostensibly had access to medical care, and as such, made their
decisions in consultation with medical professionals. 159 Relatedly, Roe framed abortion as the “choice” of whether or not to have a child, irrespective of the background conditions that might inform or shape such choices. 160 It offered no quarter to those women whose reproductive “choices” were shadowed by economic insecurity, the absence of safe and affordable childcare, and racial and gender injustice. 161 Nor did Roe venture beyond the issue of terminating a pregnancy to consider the conditions necessary to exercise the “choice” to bear and raise a child to adulthood. 162

But it was not only that Roe framed the issue of reproductive freedom narrowly around abortion and avoiding a pregnancy; it also resolved the conflict by resorting to the constitutional discourse of negative rights. 163 Roe offered women the right to make the decision to have an abortion free from undue state interference and regulation. 164 But it did not offer, and later cases would emphatically reject, 165 positive constitutional entitlements that would facilitate women’s exercise of the abortion right. 166 Moreover, as scholars like Professor Robin West have argued, regardless of their content, “rights and rights rhetoric . . . tend to protect preexisting property entitlements . . . by discrediting precisely the democratic, popular, majoritarian, and political deliberation and reform it would take to upend them.” 167 To the extent that rights yield progressive gains, they should also be understood as “risking some degree of entrenchment of current distributions of power that favor a wealthy minority against majoritarian redistribution.” 168 As troublingly,

---

159 Roe, 410 U.S. at 166 (calling abortion “primarily, a medical decision” such that “basic responsibility for it must rest with the physician”).

160 Id. at 141, 153.

161 See Rebecca L. Rausch, Reframing Roe: Property over Privacy, 27 BERKELEY J. GENDER L. & JUST. 28, 31 (2012) (noting that the right announced in Roe “might provide the right woman with reproductive choice . . . but for the wrong woman — one with limited resources — the so-called ‘choice’ becomes nonexistent”); Michele Goodwin & Erwin Chemerinsky, Pregnancy, Poverty, and the State, 127 YALE L.J. 1270, 1330 (2018) (reviewing Khiara M. Bridges, The Poverty of Privacy Rights (2017)) (discussing how Roe helped provide “a wide range of reproductive choices” to wealthy women but “little solace to . . . poor women” seeking abortion access).


163 See Rausch, supra note 161, at 31 (noting “the right to privacy . . . is relegated to the land of negative rights”).

164 Roe, 410 U.S. at 163.


166 Rachel Rebouché, The Limits of Reproductive Rights in Improving Women’s Health, 63 ALA. L. REV. 1, 24 (2011) (“Roe has not been a ready platform for thinking about abortion in terms of women’s right to health care.”).


168 Id.
“rights” center the work of courts, and in so doing, “feed[] a distrust of the machinations of public deliberation — including processes of government, of democracy, and collective action — the use of which is essential to any sort of genuinely progressive political movement against private injustice.”

The legal challenges launched in Roe’s wake reflected these assumptions and the narrow logic of privacy. Harris v. McRae is illustrative. In Harris, the Court considered a challenge to the Hyde Amendment, an appropriations rider that prohibited the use of federal funds, including Medicaid funding, for abortion services, except in cases of rape, incest, or where necessary to save the woman’s life. As many recognized, the Hyde Amendment was legislated, in part, to blunt Roe’s impact by preventing women who relied on Medicaid and public assistance from accessing abortion. Predictably, the Hyde Amendment’s force was keenly felt by poor women and women of color. Indeed, drawing connections between economic oppression, reproductive control, and women’s subordination, the Committee for Abortion Rights and Against Sterilization Abuse (CARASA) argued that the restriction was not simply aimed at preventing poor women and women of color from accessing abortion, but rather was part of an antinatalist effort to force poor women and women of color to submit to sterilization.

Although groups like CARASA articulated the connections between race, class, and sex at issue in Harris v. McRae, the Court’s disposition of the case was shaped by the negative rights framing that had prevailed in Roe. As the Court explained, “[t]he Hyde Amendment ... places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest.” On this logic, although the Constitution recognized a right to abortion, the state was under no obligation to

---

169 Id. at 1414.
170 448 U.S. 297.
172 Harris, 448 U.S. at 302.
173 See id. at 343 (Marshall, J., dissenting).
174 See Brief Amici Curiae of the Association of Legal Aid Attorneys, et al., at 15, Harris, 448 U.S. 297 (No. 79-1268). CARASA was not alone in its association of the Hyde Amendment and sterilization abuse. Activist and scholar Angela Davis observed that while Hyde “effectively divested” poor and minority women of “the right to legal abortions,” “surgical sterilizations, funded by the Department of Health, Education and Welfare, remained free on demand,” prompting “more and more poor women ... to opt for permanent infertility.” ANGELA DAVIS, Racism, Birth Control and Reproductive Rights, in WOMEN, RACE, AND CLASS 202, 206 (1983).
175 Harris, 448 U.S. at 315.
facilitate — or in this case, subsidize — an individual’s exercise of the right. 176

One member of the Court, however, recognized the race and class implications of the majority’s decision. In a vehement dissent, Justice Thurgood Marshall, the first Black justice to sit on the Court, noted that “[t]he class burdened by the Hyde Amendment consists of indigent women, a substantial proportion of whom are members of minority races.” 177 Further, because “nonwhite women obtain abortions at nearly double the rate of whites” and “the burden of the Hyde Amendment falls exclusively on financially destitute women,” 178 Justice Marshall believed the Court’s review of the Hyde Amendment demanded “more searching judicial inquiry.” 179

Although a majority of the Harris Court was unwilling to draw connections between abortion and race, those opposed to abortion used the language of race and racial injustice as a weapon to beat back abortion rights. In the wake of Roe v. Wade, abortion opponents sought to underscore the view that Roe was improperly decided by analogizing abortion to slavery and Roe to Dred Scott v. Sandford. 180 J.C. Willke, a co-author of the pro-life Handbook on Abortion, 181 rooted the analogy in the concepts of personhood and sectional conflict. 182 As he explained, just as Dred Scott had concluded that African Americans were non-citizens — non-persons for constitutional purposes 183 — so too had Roe consigned the unborn to the constitutional status of non-persons. 184 Moreover, in its attempt to “finally settle a very vexing and controversial social issue,” Roe, like Dred Scott before it, had only fanned the flames of the conflict. 185 As backlash to Roe v. Wade mounted, a range of prominent leaders, including President Ronald Reagan and Justice Scalia, explicitly linked Roe and abortion to Dred Scott and slavery. 186

176 Id. at 316 (“[I]t simply does not follow that a woman’s freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.”).
177 Id. at 343–44 (Marshall, J., dissenting).
178 Id.
179 Id. at 343–44 (quoting United States v. Carotene Products Co., 304 U.S. 144, 153 n.4 (1938)).
180 60 U.S. (19 How.) 393 (1857); J.C. WILLKE, ABORTION AND SLAVERY: HISTORY REPEATS IX (1984) (“The abortion-slavery analogy is one that has been drawn by right-to-life leaders since the decision, granting mothers the right to abort, was handed down in 1973 by the U.S. Supreme Court in its Roe vs. Wade and Doe vs. Bolton rulings.”).
181 DR. & MRS. J.C. WILLKE, HANDBOOK ON ABORTION (1971).
182 See WILLKE, supra note 180, at 11–15.
183 Id. at 12.
184 Id. at 13.
185 Id. at 14.
The Right’s efforts to weaponize race in their arguments against abortion rights contrasted sharply with the tactics of the reproductive rights movement, which was roundly criticized for focusing their advocacy on defending Roe, while being inattentive to the scourge of forced sterilization and the impact of funding restrictions on poor women and women of color. Frustrated by Roe v. Wade’s limited framing of abortion and abortion rights, and the reproductive rights movement’s weak response to the Hyde Amendment and forced sterilization, feminists of color began to articulate a new, intersectional approach to reproductive rights that explicitly centered concerns about race, class, and discrimination.

Combining the terms “reproductive rights” and “social justice,” the reproductive justice movement emerged in the 1990s as a counterpoint to the reproductive rights framework that Roe and its progeny engendered. Rooted in the work of groups like the Committee to End Sterilization Abuse (CESA), the Committee for Abortion Rights and Against Sterilization Abuse (CARASA), and the Combahee River Collective, the reproductive justice movement eschewed traditional feminism to take an explicitly intersectional approach, centering the experiences of women of color, the poor, queer communities, and the disabled. Moreover, it purposefully looked beyond abortion to condemn sterilization abuse and other forms of state-imposed reproductive control. To this end, reproductive justice advocates continue today to emphasize a tripartite framework that focuses on (1) reproductive health, by advocating for the provision of more robust health services to historically underserved communities; (2) reproductive rights, by emphasizing increased access to contraception and abortion; and (3) reproductive justice, by calling attention to the social, political, and economic systemic inequalities that impact women’s reproductive health and their ability to control their reproductive lives.
In this regard, the contours of a reproductive justice framework are purposely broad, "encompassing the various ways law shapes the decision ‘whether to bear or beget a child’ and the conditions under which families are created and sustained." The reproductive justice framework “highlights the intersecting relations of race, class, sexuality, and sex that shape the regulation of reproduction." In this regard, it is attentive to “the many ways law shapes the choice to have, as well as to avoid having, children.” In so doing, reproductive justice goes beyond “contraception and abortion — the traditional subject matter of ‘reproductive rights’” — to consider a broad range of issues that impact reproductive freedom, including sterilization, assisted reproductive technology, access to childcare, pregnancy discrimination, community safety, food and housing insecurity, the criminalization of pregnancy, and access to reproductive health care. Indeed, as one prominent reproductive justice group, Forward Together, puts it:

[Reproductive justice is the complete physical, mental, spiritual, political, economic, and social well-being of women and girls, and will be achieved when women and girls have the economic, social and political power and resources to make healthy decisions about our bodies, sexuality and reproduction for ourselves, our families and our communities in all areas of our lives.]

By deliberately centering marginalized groups and expanding the lens to include a range of issues that impact reproductive freedom, the reproductive justice movement recuperated many of the themes that had framed pro-choice advocacy in the decade before Roe v. Wade and has become an important and influential presence in debates over reproductive rights and healthcare. And indeed, although reproductive justice was explicitly contemplated as a counterweight to the reproductive rights movement’s emphasis on abortion and contraception, and its association with traditional feminism, it has nonetheless been embraced by traditional abortion rights groups. More intriguingly, as abortion

---


193 Id.

194 Id.

195 See id.


197 See Rebouche, supra note 191, at 18–19 (highlighting the “important role” reproductive justice has played in reproductive rights advocacy).

rights groups have embraced reproductive justice, their antiabortion opponents, perhaps to capitalize on the growing interest in reproductive justice, have continued to marshal racialized arguments in their opposition to abortion rights.

D. Reproductive Justice and Racial Justice in the Abortion Debate

In the white paper *What is Reproductive Justice?*, Loretta Ross, a leader of SisterSong Women of Color Reproductive Health Collective and an architect of the reproductive justice movement, noted that “[o]ne of the key problems addressed by Reproductive Justice is the isolation of abortion from other social justice issues that concern communities of color.” All too often, abortion rights were framed as issues of “choice,” without regard to the way in which, depending on one’s circumstances, the notion of “choice” could be severely constrained. As she explained, it was essential to understand abortion rights in concert with other issues that impacted communities of color, including “issues of economic justice, the environment, immigrants’ rights, disability rights, discrimination based on race and sexual orientation, and a host of other community-centered concerns.” All of these issues, whether individually or in concert, “directly affect an individual woman’s decision-making process.”

The critique hit home. By the early 2000s, both Planned Parenthood and the NARAL expanded their reform agendas beyond abortion to include access to contraception and health care. By 2010, the changes were even more profound, as mainstream reproductive rights groups began to embrace the vernacular and logic of the reproductive justice movement in earnest. In 2004, the National Organization for Women’s (NOW) national conference featured programming that explicitly focused on reproductive justice. By 2016, NOW’s platform had

200 See id.
201 Id.
202 Id.
205 Id. Some have argued that these changes were merely cosmetic and did not result in leadership changes and representation in the ranks of these traditional reproductive rights groups. See
a decidedly reproductive justice cast, as the organization “demand[ed] access not only to abortion but also ‘birth control, pre-natal care, maternity leave, child care and other crucial health and family services.’” 206

In the same vein, Planned Parenthood also retooled its messaging. Recognizing that the term “pro-choice” failed to capture a range of issues that mattered to women of reproductive age, the venerable reproductive rights organization sidelined choice-focused messaging in favor of arguments that spoke to a broader range of issues, including pay equity, access to health care, and increased access to contraception. 207 As Professor Mary Ziegler notes, the rhetorical shift allowed “more in-depth discussion of reproductive justice.” 208

Critically, the reproductive justice movement’s influence was not only felt in broadening the range of issues that traditional reproductive rights groups addressed. It was also evident in the discussion of a bread-and-butter concern for reproductive rights advocates: abortion rights themselves. Once criticized as inattentive to the threat of the Hyde Amendment, by the 2000s, traditional abortion rights groups had begun highlighting Hyde’s impact on marginalized communities. 209

And in their court-centered advocacy efforts, reproductive rights groups also began to deploy methods and messaging infused with reproductive justice themes. For example, in the Court’s most recent abortion case, June Medical Services v. Russo, 210 both the petitioner’s brief and related amicus briefs explicitly invoked reproductive justice themes, 211

---

206 Ziegler, supra note 204, at 142 (quoting Reproductive Justice Is Every Woman’s Right, NAT’L ORG. FOR WOMEN, http://now.org/resource/reproductive-justice-is-every-womans-right [https://perma.cc/WF43-K2AH]).


208 Ziegler, supra note 204, at 142.


210 140 S. Ct. 2103 (2020).

highlighting the impact of the challenged abortion restriction on marginalized communities throughout Louisiana and the state’s disinterest in securing women’s health beyond restricting abortion access.\footnote{See generally, e.g., Brief for Amici Curiae for Organizations and Individuals Dedicated to the Fight for Reproductive Justice — Women with a Vision, et al. — in Support of Petitioners, \textit{supra} note 211; Brief for Petitioners, \textit{supra} note 211; Brief of African American Pro-Life Organizations as Amici Curiae in Support of Rebekah Gee, \textit{June Med. Servs.}, 140 S. Ct. 2103 (Nos. 18-1323, 18-1450) (advocating women’s health solely through the lens of restrictions on abortion providers); Brief in Opposition, \textit{June Med. Servs.}, 140 S. Ct. 2103 (No. 18-1323).} In a nod to reproductive justice’s effort to center the narratives of those affected by reproductive policies, a brief filed in \textit{Whole Woman’s Health v. Hellerstedt},\footnote{\textit{Supra} note 213} a 2016 challenge to a Texas abortion restriction, simply reproduced statements from women lawyers who maintained that their ability to obtain an abortion had shaped their careers and economic lives.\footnote{See generally Brief for Janice MacAvoy, et al. as Amicus Curiae in Support of Petitioners, \textit{Whole Woman’s Health}, 136 S. Ct. 2292 (No. 15-274); see also Brief for Michele Coleman Mayes, et al. as Amici Curiae Supporting Petitioners, \textit{June Med. Servs.}, 140 S. Ct. 2103 (Nos. 18-1333, 18-1450), 2019 WL 6650222. This strategy echoed Florynce Kennedy’s story-centered strategy in \textit{Hall v. Lefkowitz}. See \textit{Supra} p. 2048.}

But critically, as the traditional reproductive rights groups came to frame their defense of abortion rights in terms that drew on reproductive justice discourses, in time, their antiabortion opponents parried with their own vision of reproductive justice that traded heavily on tropes of racial equity and recalled earlier Black nationalist claims associating reproductive rights with genocide.

Created by Life Dynamics, a predominantly white antiabortion activist group, the 2009 documentary \textit{Maafa 21: Black Genocide in 21st Century America} linked abortion to an elaborate (alleged) conspiracy to eliminate “surplus” Black labor after emancipation.\footnote{\textit{Maafa 21: Black Genocide in 21st Century America} at 4:00-13:50 (Life Dynamics 2009), https://www.maafa21.com/watch [https://perma.cc/9QED-E4DV].} The Radiance Foundation, an antiabortion group, placed billboards in predominately Black neighborhoods asserting, “Black children are an endangered species.”\footnote{See \textit{Roberts}, \textit{supra} note 44, at xiv–xv; Morrison, \textit{supra} note 97, at 41 (citing Radiance Found., \textit{Black Children Are an Endangered Species, Too Many Aborted} (Feb. 4, 2010), http://toomanyaborted.com/black-children-are-an-endangered-species [https://perma.cc/X8S5X-99Z8]) (noting that the Radiance Foundation’s billboards were placed in “predominately Black areas”).} Life Always, another prominent pro-life group, also orchestrated a billboard campaign in minority neighborhoods that proclaims “The Most Dangerous Place for an African American is in the Womb.”\footnote{\textit{Roberts}, \textit{supra} note 44, at xiv; Morrison, \textit{supra} note 97, at 41 (citing “The Most Dangerous Place for an African-American Is in the Womb”: Black Politician Criticises Anti-abortion Billboard,} And recent calls for Black Lives Matter have been met with
claims from antiabortion groups that "unborn Black lives matter." Indeed, Reverend Clenard Childress, the creator of BlackGenocide.org and the president of Life Education and Resource Network (LEARN), a prominent Black antiabortion organization, has suggested that the Black Lives Matter movement cannot advocate in favor of Black uplift so long as it continues to partner with abortion rights groups like Planned Parenthood. As these advocacy groups explain, they are calling attention to the disproportionate rate of abortions among Black women, and countering the broader message of reproductive rights and reproductive justice groups that abortion rights serve Black women’s autonomy and the interests of the Black community.

This is all to say that, even as Roe and its progeny avoided explicit discussion of race and racial inequality in favor of privacy, questions of race and racial injustice continue to be surfaced in contemporary reproductive rights advocacy and messaging. In response to the reproductive justice movement’s critiques of reproductive rights, and its call to center the claims and needs of marginalized communities, traditional reproductive rights groups have adjusted their rhetoric and methods to better integrate issues of race and class. But critically, the successful integration of reproductive justice themes into abortion advocacy has prompted a similar response from those opposed to abortion rights. Importantly, the antiabortion movement’s use of racialized rhetoric and narratives reprises the themes of Black genocide that once undergirded Black nationalist thought. But it also reflects, to some degree, the reproductive justice movement’s success in centering race and class in the public and

---


legal discourse around abortion and reproductive rights. Put differently, while the antiabortion community's racialized rhetoric is informed by the complicated history of race and reproduction, it also reflects a desire to shift the social meaning of abortion by making claims about abortion that sound in the register of racial justice. And critically, as the next section explains, this selective vision of reproductive justice has underwritten a new category of abortion restrictions: trait-selection laws.

E. Race, Disability, and Reproductive Justice

Just as the reproductive justice movement successfully surfaced race and class as dynamics that shape state regulation of reproduction and reproductive decisionmaking, it has also highlighted disability's role in these discussions. To be sure, questions of disability, as much as race, are imprinted in America's experience with reproductive regulation. Indeed, as Justice Thomas noted in his concurrence in *Box*, one of the Court's most infamous decisions is 1927's *Buck v. Bell*, in which Justice Oliver Wendell Holmes upheld the sterilization of "feeble minded" Carrie Buck on the ground that "three generations of imbeciles are enough." Although *Buck v. Bell* has been discredited, it has never been formally overruled. Indeed, to this day, many states have maintained policies that limit and constrain the reproductive choices of individuals with disabilities.

Although the reproductive justice movement has sought to highlight the role that disability has played in regulating and constraining reproductive decisionmaking, it is also worth noting how disability has worked in tandem with race in shaping the reproductive landscape. Again, the country's experience with eugenics is illustrative. The eugenicist commitment to advancing the fittest of the human race focused

---

221 274 U.S. 200 (1927).
222 Id. at 205.
223 Id. at 207.
225 Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 807 (arguing against the traditional and paternalistic model of sterilization law as applied to the mentally disabled); Maura McIntyre, Note, *Buck v. Bell and Beyond: A Revised Standard to Evaluate the Best Interests of the Mentally Disabled in the Sterilization Context*, 2007 U. ILL. L. REV. 1303, 1303 (detailing the inconsistent and unjust sterilization approval procedures used throughout the United States and proposing a "revised best interest" standard).
on both maintaining racial purity and eliminating traits deemed undesirable, including mental and physical disabilities. On this account, we might understand *Buck v. Bell* as not only a case about the state’s antipathy for the cognitively disabled, but also about its investment in racial purity and betterment. As scholar Adam Cohen has argued, Virginia’s sterilization of Carrie Buck was informed by the young woman’s unfortunate economic and family circumstances as much as her alleged “feeble-mindedness.”

As Cohen notes, at the time of her institutionalization, Carrie Buck was poor, unmarried, and pregnant — hardly representative of the best of the white race. Given her circumstances, it was unsurprising that Dr. Albert Priddy, a student of eugenic theory and the director of the Virginia Colony of Epileptics, where Buck was institutionalized, categorized her as part of “the shiftless, ignorant, and worthless class of antisocial whites of the South” who posed, as much as people of color, a threat to the purity of the white race.

Critically, race and disability are not just intertwined in the history of eugenics. They have become linked in contemporary discourses about abortion rights. In advocating for greater reproductive choice, reproductive rights advocates have described:

Disability in the context of a termination decision for a wanted pregnancy as a “tragedy” and a “defect” — using the language of pain, suffering, and devastation. The focus is on the potential suffering a child with a disability will allegedly experience and inevitably bring on parents and other siblings. The fetus with a disability that is survivable postpartum is often considered damaged.

By contrast, those opposed to abortion rights counter by pointing to the empowering and affirming experience that many have had parenting a child with disabilities. According to some abortion opponents, “abortion advocates . . . argue for the right to abort children who might grow up with a disability, as if disease or handicap somehow strips a

---


227 *Id.* at 19; see also Bridges, * supra* note 79, at 465 (noting that Carrie Buck’s race, coupled with her poverty and unchastity, made her vulnerable to eugenic sterilization “because the eugenics movement was always about protecting the white race from degeneration”).


229 *Id.*, supra note 226, at 58 (“Southern eugenicists were particularly concerned with the lowest economic class, people often disparagingly referred to as ‘poor white trash,’ who were seen as repositories of the worst of the white race’s germplasm.”).


231 *Id.*
person of their right to live and relegates them to a life of misery."\footnote{232}{Id. (quoting Common Abortion Fallacies: Poverty, Rape, Disability, and “Unwantedness” Do Not Morally Justify Abortion., ABORT73 (July 21, 2020), https://www.abort73.com/abortion/common objections [https://perma.cc/4UDP-7LJC]).}

The National Right to Life Committee makes the point more explicitly: “Aborting a child with a disability or illness is the height of prejudice.”\footnote{233}{National Right to Life (@nrlc), TWITTER (Sept. 27, 2019, 3:00 PM), https://twitter.com/nrlc/status/117565918934423715 [https://perma.cc/K38B-MYCK].}

To combat what they view as prejudice against the disabled unborn, antiabortion groups have yoked concerns with discrimination on the basis of disability to concerns about race and sex discrimination. Abortion legislation that prohibits abortion for the purpose of “trait selection” has proliferated across the country, including at the federal level.\footnote{234}{See, e.g., Prenatal Nondiscrimination Act (PRENDA) of 2016, H.R. 4924, 114th Cong. (2016); Morrison, supra note 97, at 46 n.69 (describing legislative efforts to ban abortion based on race); Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly, GUTTMACHER INST. (Feb. 1, 2021), https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly [https://perma.cc/4XUD-M35N] (outlining state and federal trait-selection abortion legislation in various cases).}

These trait-selection laws prohibit the exercise of the abortion right if undertaken for the purpose of sex or race selection or to avoid bearing a child with a disability. In defending such laws, antiabortion groups have framed their claims explicitly in terms of discrimination and inequality. The Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act (“PRENDA”),\footnote{235}{Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011, H.R. 3541, 112th Cong. (2011); Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2009, H.R. 1822, 111th Cong. (2009). For a deeper discussion of PRENDA and its impact on the proliferation of state-level trait-selection laws, see Rachel Rebouché, Testing Sex, 49 U. RICH. L. REV. 519, 521 (2015).} a proposed federal trait-selection law, is illustrative of this impulse. Not only was the federal bill named for Susan B. Anthony and Frederick Douglass, two towering figures in the struggle for gender and racial equality, according to its sponsors, its criminalization of race- and sex-selective abortions was intended to address race and gender discrimination within certain racial communities.\footnote{236}{See Ashland Johnson, Sinking to a New Low: The Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011 — Part I, NAT‘L WOMEN’S L. CTR. (Dec. 21, 2011), https://nwlc.org/blog/sinking-new-low-susan-b-anthony-and-frederick-douglass-prenatal-nondiscrimination-act-2011-part-1 [https://perma.cc/S8NA-GPHX].}

Specifically, PRENDA sought to address the disproportionately high rate of abortions among Black women, as well as the use of abortion for “son-selection” in certain Asian communities.\footnote{237}{See id.}

Although PRENDA failed at the federal level, its logic lives on — and indeed, has thrived — in state-level trait-selection laws. Such laws prohibit abortion for race, sex, and disability selection and are framed as efforts to eliminate discrimination on the basis of race, sex, and dis
ability. Specifically, those who propose and defend these trait-selection laws emphasize disproportionately high abortion rates among minority communities and the need for antidiscrimination protections for the unborn.\textsuperscript{238}

The \textit{Box} concurrence taps into these anxieties about trait selection, discrimination, and abortion. But, as the preceding sections make clear, the history of race and abortion is more nuanced and complicated than Justice Thomas's thin account in the \textit{Box} concurrence suggests. Race and reproduction were inextricably intertwined in the political economy of slavery, and in the postbellum period, again intersected to inform, often in conflicting ways, the criminalization of abortion and contraception and the rise of the eugenics movement. Likewise, in the twentieth century, claims of racial justice and injustice have informed efforts to both expand and contract abortion rights. In this regard, the history that Justice Thomas relies on in the \textit{Box} concurrence is at once selective and indeterminate.

But crafting a complete and accurate history of abortion regulation likely was not Justice Thomas's goal in linking abortion, race, and eugenics. Indeed, in framing his skepticism of abortion in the register of eugenics and racial injustice, Justice Thomas likely had a more straightforward outcome in mind. By drawing a straight line between abortion and eugenics, Justice Thomas cast abortion as a potential tool for deracination, while firmly rooting abortion (and contraception) in a past tainted by the stain of racism. As the following Parts explain, in so doing, Justice Thomas's racialized account of abortion rights underwrites both a short-term strategy to uphold trait-selection laws and a long-term strategy for challenging — and perhaps, overruling — \textit{Roe v. Wade}.

\section*{II. Abortion, Disability, and Antidiscrimination}

It is worth remembering that Justice Thomas's concurrence in \textit{Box} was a response to the Court's refusal to take up a challenge to Indiana's trait-selection law. In this regard, we might understand the concurrence as expressing Justice Thomas's views as to the constitutionality of this

\textsuperscript{238} E.g., Brief Amicus Curiae of Pro-Life Legal Defense Fund et al. in Support of Petitioners at 5–16, \textit{Box} v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780 (2019) (No. 18-483) (arguing \textit{Box} provided an opportunity to reevaluate abortion rights grounded in eugenics); Brief Amici Curiae of Ethics and Religious Liberty Commission of the Southern Baptist Convention et al. in Support of the Petitioners at 7–8 & n.8, \textit{Box}, 139 S. Ct. 1780 (No. 18-483) (discussing racial discrimination in abortion and the rate of abortions among non-Hispanic Black women); Brief of the Restoration Project et al. as Amici Curiae in Support of Petitioners at 5–9, \textit{Box}, 139 S. Ct. 1780 (No. 18-483) (arguing that "[m]inority babies in America are at far greater risk from abortion than white babies" and that "[i]n parts of this country, black babies are more likely to be aborted than they are to be born alive").
type of abortion restriction. On this point, Justice Thomas is incredibly transparent. His concurrence operates as both a defense of trait-selection laws, and as a roadmap for upholding such laws in the lower federal courts.

By suggesting that abortion could become a "tool of modern-day eugenics," the concurrence augments the existing defense of trait-selection laws as antidiscrimination measures that do not trigger the heightened constitutional scrutiny that generally attends restrictions on the abortion right. And importantly, when framed as antidiscrimination measures, rather than as efforts to promote maternal health or the potentiality of life, abortion restrictions may be more likely to be upheld as legitimate exercises of state authority. Under the Court’s abortion jurisprudence — specifically, Planned Parenthood of Southeastern Pennsylvania v. Casey — to withstand constitutional scrutiny, an abortion restriction may not be an undue burden. That is, it cannot have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion." Accordingly, if trait-selection abortion restrictions are framed as antidiscrimination measures, states need only show that the challenged law’s antidiscrimination gains exceed the burdens on abortion access.

Moreover, using the racialized critique of abortion to characterize trait-selection laws as antidiscrimination measures may be a means of sidelining Casey’s substantial-obstacle analysis entirely. The procedural history of Box provides a glimpse of this line of reasoning. An earlier three-judge panel of the Seventh Circuit invalidated the challenged Indiana trait-selection law on the ground that the law was an "absolute prohibition[] on abortions prior to viability which the Supreme Court has clearly held cannot be imposed by the State." However, in an opinion dissenting from the Seventh Circuit’s denial of a rehearing en banc, Judge Easterbrook was “skeptical” of this view “because Casey did not consider the validity of an anti-eugenics law.” To illustrate his concerns, Judge Easterbrook offered an analogy: Traditionally, the common law permitted employers to terminate an employee “for any or

---

239 Box, 139 S. Ct. at 1783 (Thomas, J., concurring).
240 See id.
242 Id. at 874 (plurality opinion).
243 Id. at 877.
244 See id. at 878.
246 Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of Ind. State Dep’t of Health, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting from the denial of rehearing en banc) (emphasis added). Then-Judge, now Justice, Barrett joined Judge Easterbrook’s dissent. Id.
no reason." However, "by the late twentieth century courts regularly created exceptions when the discharge was based on race, sex, or disability." On this account, Casey provided no guidance as to "whether a parallel 'except' clause is permissible for abortions."

Further, Judge Easterbrook noted, the legal challenge that resulted in the Court's decision in Casey focused narrowly on a single question — whether "a woman is entitled to decide whether to bear a child." The Indiana trait-selection law encompassed an entirely different issue — as Judge Easterbrook maintained, "there is a difference between 'I don't want a child' and 'I want a child, but only a male.'" The question of whether abortion may be used "to promote eugenic goals" was completely outside of the scope of "the statutes Casey considered." As such, it was an open question as to whether Casey was applicable to the challenged trait-selection law.

Viewed in tandem with Judge Easterbrook's dissent, the Box concurrence's potential becomes clearer. On the one hand, the association of abortion with eugenics may serve as a thumb on the scale, imbuing the state's efforts to limit abortion access with the patina of antiracism and antidiscrimination. On the other hand, the association may be proffered for the purpose of putting trait-selection laws beyond the scope of the Court's extant abortion jurisprudence entirely. In either respect, casting abortion restrictions as efforts to combat racism and discrimination may blunt the force of Roe and Casey as limits on the state's authority to regulate abortion.

Meaningfully, this short-term strategy has gained traction as a defense for trait-selection statutes in the lower federal courts. For example, in Preterm-Cleveland v. Himes, a challenge to a law prohibiting abortion if undertaken because of Down syndrome, the State of Ohio defended the law by adverting to its "strong interest in preventing discrimination." As such, it continued, the constitutional balance of interests was different "from what they were in Roe and Casey," in which the state's interests had been confined to maternal health and the

247 Id.
248 Id.
249 Id.
250 Id.
251 Id.
252 Id.
253 940 F.3d 318 (6th Cir.), vacated, 944 F.3d 630 (6th Cir. 2019).
254 Id. at 320-21.
255 Brief of Defendants-Appellants Lance Himes, Kim G. Rothermel & Bruce R. Saferin at 33, Preterm-Cleveland, 940 F.3d 318 (No. 18-3329).
256 Id. at 43.
potentiality of life. 257 Because "[t]he Supreme Court has never considered" whether a state's interest in "prohibiting discrimination" could override a woman's right to choose an abortion, it remained an open question whether the State's interest in prohibiting trait discrimination might outweigh a woman's right to terminate her pregnancy. 258

The State's arguments were ultimately unavailing with the district court and a three-judge panel of the Sixth Circuit, both of which enjoined the law on the ground that it constituted a previability ban on abortion, in violation of Roe and Casey. 259 However, Judge Batchelder dissented from the Sixth Circuit majority, and in doing so, subscribed fully to the logic of the Box concurrence. 260 As she explained, the challenged Ohio law, like the Indiana law at issue in Box, "promote[d] a State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics." 261 Because the Court's abortion jurisprudence "did not decide whether the Constitution requires States to allow eugenic abortions," 262 the State's interest in preventing discrimination against those with Down syndrome required the court to "review laws like [the challenged law] under an undue-burden analysis, which is fact-intensive and must consider the State's interests and the benefits of the law, not just the potential burden it places on women seeking an abortion." 263 Because "[n]either the district court nor the majority . . . ma[de] a genuine attempt to meet that demand," Judge Batchelder branded their decisions "insupportable and incorrect." 264

Similarly, in Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Parson, 265 a district court wrestled with whether the State's interest in prohibiting discrimination could override the abortion right. 266 The court concluded that the "anti-discrimination" provision seemed dangerously close to an impermissible previability abortion ban. 267 Nevertheless, it noted that while "[t]he Supreme Court

257 Id. at 40–42.
258 Id. at 43–44. On this point, the State also noted that "Roe . . . rejected both the notion that the 'woman's right [was] absolute' and the notion that it gave her the option to obtain an abortion 'for whatever reason she alone chooses.'" Id. at 43 (alteration in original) (emphasis omitted) (quoting Roe v. Wade, 410 U.S. 113, 153 (1973)).
259 Preterm-Cleveland v. Himes, 294 F. Supp. 3d 746, 749 (S.D. Ohio 2018), aff'd, 940 F.3d 318 (6th Cir.), vacated, 944 F.3d 630 (6th Cir. 2019); see Preterm-Cleveland, 940 F.3d at 323–25 (analyzing the law under Roe and Casey).
260 Preterm-Cleveland, 940 F.3d at 325–28 (Batchelder, J., dissenting).
261 Id. at 325 (quoting Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring)).
262 Id. at 326 (quoting Box, 139 S. Ct. at 1792 (Thomas, J., concurring)).
263 Id.
264 Id.
266 See id. at 634–35.
267 Id. at 634; see id. at 635–36.
has not dealt with the merits of this question," Justice Thomas has "demonstrated great interest in the ultimate question of a State's authority . . . to prevent 'abortion from becoming a tool of modern-day eugenics.'"268

The State of Arkansas also underscored the unresolved status of trait-selection laws in its briefs in Little Rock Family Planning Services v. Rutledge,269 a challenge to a state statute banning abortions performed solely on the basis of a Down syndrome diagnosis.270 In its trial court brief, the State touted its interest in prohibiting discrimination on the basis of disability, and cited Justice Thomas's Box concurrence to support the view that such trait-selective abortions were "eugenical."271 And in its appeal to the Eighth Circuit, Arkansas echoed Judge Easterbrook's skepticism, again citing Justice Thomas in Box to support the view that the constitutionality of trait-selection laws "'remains an open question' because Casey 'did not decide whether the Constitution requires States to allow eugenic abortions.'"272

In deciding the case, the Eighth Circuit concluded that "it is 'inconsistent to hold that a woman's right of privacy to terminate a pregnancy exists if . . . the State can eliminate this privacy right if [she] wants to terminate her pregnancy for a particular purpose.'"273 But even as the court struck down the challenged trait-selection law, it noted that "the Supreme Court may of course decide to revisit how Casey should apply to purpose-based bans on pre-viability abortions."274 In a separate concurrence, Judge Shepherd went further, citing the Box concurrence and concluding that "'[Casey's] viability standard does not and cannot contemplate abortions based on an unwanted immutable characteristic of the unborn child.'"275

This is all to say that in a very short period of time, the Box concurrence has been repeatedly marshalled into service to defend the state's

---

268 Id. at 634 (quoting Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring)).
270 Id. at 1220.
271 Response in Opposition to Plaintiffs' Motion for a Preliminary Injunction or Temporary Restraining Order at 29-30, Rutledge, 397 F. Supp. 3d 1213 (No. 19-cv-00449).
272 Brief of Defendants-Appellants at 29-30, Little Rock Fam. Plan. Servs. v. Rutledge, 984 F.3d 682 (8th Cir. 2021) (No. 19-2690) (quoting Box, 139 S. Ct. at 1782 (Thomas, J., concurring)).
273 Rutledge, 984 F.3d at 690 (alteration in original) (quoting Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health, 888 F.3d 300, 307 (7th Cir. 2018), rev'd in part on other grounds sub nom. Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780 (2019) (per curiam)).
274 Id.
275 Id. at 693 (Shepherd, J., concurring).
interest in restricting abortion for the purpose of prohibiting discrimination. 276 And in so doing, as these cases make clear, the concurrence’s racialized critique of abortion has been highlighted to show that, in the context of banning a narrow group of abortions, antidiscrimination concerns may themselves serve as a compelling state interest that may well be sufficient to override — or severely limit — a woman’s constitutional right to an abortion. Alternatively, the fact that trait-selection laws are framed as antidiscrimination measures may place them beyond Casey’s purview. In this regard, in the short-term, the racialized critique of abortion as eugenical has underwritten a strategy to undermine the limits on state regulation that Roe and Casey impose.

But critically, in the cases discussed above, the challenged statutes differed from the trait-selection law challenged in Box. In Box, the Indiana law at issue prohibited abortion if undertaken for purposes of race and sex selection or because of a disability or fetal abnormality. 277 By contrast, the laws challenged in Himes and Rutledge were narrower, prohibiting abortion if undertaken because of a diagnosis of fetal abnormality (Down Syndrome, in particular). 278 While the Box concurrence mentions the prospect of discrimination on the basis of disability, it is primarily preoccupied with the prospect of racially eugenic abortions. 279 What explains this disjunction?

As discussed above, concerns about race and disability have been imbricated in our history and in the state’s efforts to regulate reproduction. With this history in mind, it is perhaps unsurprising that contemporary pro-life discourse that frames abortion as an attempt to completely eliminate certain disabilities mirrors the contemporary pro-life discourse that associates abortion with efforts to regulate and limit Black reproduction. In both circumstances the common thread is abortion’s potential as a tool of genocide that reflects discriminatory animus against particular groups. 280 And just as the contemporary account of

---

276 The fact that this racialized narrative has found such a receptive audience in the lower federal courts may speak to Justice Thomas’s broad influence. Not only is Justice Thomas regarded as the Court’s most stalwart conservative voice, but also many of his former clerks now populate the ranks of the federal district and circuit courts. See John Kruzel, Trump’s Supreme Court List Reveals Influence of Clarence Thomas, THE HILL (Sept. 13, 2020, 6:00 AM), https://thehill.com/regulation/court-battles/516109-trumps-supreme-court-list-reveals-influence-of-clarence-thomas [https://perma.cc/J2RR-AC6Z].

277 Box, 139 S. Ct. at 1782.


279 See Box, 139 S. Ct. at 1783–88 (Thomas, J., concurring).

abortion as racial genocide builds on the reproductive justice movement’s focus on the racialized impact of abortion restrictions, trait-selection laws draw on the reproductive justice movement’s efforts to surface the ways in which disability functions as an axis of discrimination and oppression.

Cynically, one might argue that in framing its opposition to abortion in terms of race, sex, and disability discrimination, the pro-life movement is not only using antidiscrimination norms opportunistically, it is doing so in a way that divides the coalition of pro-choice advocates and activists. As Professors Sujatha Jesudason and Julia Epstein observe in the context of disability, “reproductive rights proponents can portray disability as a tragic state that justifies abortion — even for wanted pregnancies,” while “anti-choice advocates proclaim their value for all life, including individuals with and without disabilities.”\footnote{Jesudason & Epstein, supra note 230, at 541.} As Jesudason and Epstein note, this results in a paradox in which “disability rights advocates, generally a group that finds itself in the progressive political camp,” are “on the same side as anti-choice advocates who are more usually associated with conservative political positions.”\footnote{Id.}

A similar cognitive dissonance arises in the context of race- and sex-selection bans, which put the social justice community’s predisposition toward abortion rights in conflict with laws that ostensibly prevent discrimination on the basis of race and sex. In this regard, in the same way that reproductive justice sought to build coalitions between various social justice communities in order to strengthen the demand for reproductive freedom, its methods and vernacular have been co-opted in ways that may actually divide this coalition.

Justice Thomas’s association of abortion with eugenics doubles down on the effort to splinter the various constituents of the reproductive rights coalition. But critically, this is not the first time that Justice Thomas has deployed racialized narratives in ways that challenge or disrupt longstanding social justice alliances. His dissent in \textit{Kelo v. City of New London}\footnote{545 U.S. 469 (2005).} and his concurrence in \textit{McDonald v. City of Chicago}\footnote{561 U.S. 742 (2010).} are instructive on this point. In \textit{Kelo}, a narrow majority of the Court upheld a private redevelopment scheme as a permissible “public use” under the Takings Clause of the Fifth Amendment.\footnote{545 U.S. at 472–73, 475, 485, 490.} As the majority explained, the redevelopment scheme was a permissible public use because it served the citizens of New London, Connecticut, by revitalizing a near-blighted neighborhood with new businesses, housing, and

\begin{thebibliography}{9}
\footnotesize
\bibitem{} Jesudason & Epstein, \textit{supra} note 230, at 541.
\bibitem{} \textit{Id.}
\bibitem{} 545 U.S. 469 (2005).
\bibitem{} 561 U.S. 742 (2010).
\bibitem{} 545 U.S. at 472–73, 475, 485, 490.
\end{thebibliography}
employment opportunities. In a lone dissent, Justice Thomas offered a counterpoint to this rosy urban progress narrative in which he linked the Court’s public use jurisprudence to 1950s and 1960s urban renewal projects that "destroyed predominantly minority communities" and displaced Blacks and other marginalized groups.

Similarly, in *McDonald v. City of Chicago*, Justice Thomas wrote separately to introduce a racialized account of the Second Amendment. The issue in *McDonald* was whether the Second Amendment right to bear arms was incorporated as to the states. The Court held that it was through the Due Process Clause of the Fourteenth Amendment. Justice Thomas joined in the judgment, but he wrote separately to express his own view that the Privileges or Immunities Clause of the Fourteenth Amendment was the better doctrinal home for incorporation. In so doing, he specifically repudiated the logic of *United States v. Cruikshank*, an 1876 case in which the Supreme Court held that, despite the ratification of the Fourteenth Amendment, the Bill of Rights, including Second Amendment protections for the right to keep and bear arms, did not apply to private actors or to state governments. Meaningfully, *Cruikshank* arose from the infamous Colfax Massacre of 1873, in which an armed mob of white militiamen slaughtered dozens of newly freed Blacks, many of whom were unarmed.

In his *McDonald* concurrence, Justice Thomas drew a straight line connecting *Cruikshank* and its failure to protect the individual’s right to bear arms to the terror that Blacks experienced in the South during the waning days of Reconstruction and Redemption. As Justice Thomas explained, *Cruikshank*, which made clear that the right to bear arms was not a privilege or immunity of national citizenship, "enabled private forces, often with the assistance of local governments, to subjugate the newly freed slaves and their descendants through a wave of private violence designed to drive blacks from the voting booth and force them into peonage, an effective return to slavery." Because "[t]he use of firearms for self-defense was often the only way black citizens could

---

286 Id. at 472, 483.
287 Id. at 522 (Thomas, J., dissenting).
288 561 U.S. at 750.
289 Id.
290 Id. at 758 (plurality opinion) ("For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause.").
291 Id. at 805–11 (Thomas, J., concurring in part and concurring in the judgment).
292 92 U.S. 542 (1876).
293 *McDonald*, 561 U.S. at 808–29 (Thomas, J., concurring in part and concurring in the judgment); see *Cruikshank*, 92 U.S. at 552–53.
294 *McDonald*, 561 U.S. at 757 (majority opinion).
295 Id. at 855–56 (Thomas, J., concurring in part and concurring in the judgment).
296 Id.
protect themselves from mob violence,"297 freedmen were uniquely vulnerable to this campaign of intimidation and terror in the postbellum era and well into the twentieth century.298

To further underscore Cruikshank's brutal impact on freed Blacks, Justice Thomas's concurrence detailed the violent lynchings and deaths of numerous Black men, including Emmett Till,299 the boy whose brutal Mississippi lynching inspired civil rights activism in the 1950s.300 The point was plain: Till, like other victims of lynching and other forms of racial violence, was unarmed. To the extent that some African Americans were able to stand up to white violence, doing so depended largely on their ability to bear arms. As Justice Thomas explains: "the use of firearms allowed targets of mob violence to survive."301

Much has been made of Justice Thomas's preoccupation with issues of race in these cases and others.302 In referencing these cases, I do not wish to engage in the psychologizing that often attends discussions of Justice Thomas's use of race.303 Instead, I mean only to suggest that the racialized narratives that Justice Thomas offers in both Kelo and McDonald may hint at his aspirations for the racialized critique of abortion that he introduces in Box.

In Kelo, Justice Thomas complicates the view that economic redevelopment benefits the entire community by showing that marginalized groups within the community will likely bear the brunt of urban renewal. With a similar logic, his account of racial genocide in Box counters the stock reproductive rights narrative that expanding abortion rights is good for women and their families, including women of color. In a similar vein, in McDonald, Justice Thomas goes further, showing that the weight of judicial decisionmaking is borne disproportionately by certain groups while simultaneously countering the progressive view that gun control laws redound to the benefit of minority communities.

297 Id. at 857.
298 See id. at 856–57.
299 Id. at 857 ("Emmit [sic] Till, for example, was killed in 1955 for allegedly whistling at a white woman.").
301 McDonald, 561 U.S. at 858 (Thomas, J., concurring in part and concurring in the judgment).
As importantly, taken together, Justice Thomas’s concurrences in *McDonald* and *Box* lay the foundation for a crucial comparison between gun rights and abortion rights. His racialized account of the Second Amendment underscores that the Constitution's enumerated protections for gun rights are essential to the uplift and survival of the Black community. By contrast, his racialized account of abortion underscores that the unenumerated right to abortion serves an entirely different purpose — to decimate and eliminate the Black community.

With this in mind, Justice Thomas's likely ambitions for his racialized critique of abortion rights come into sharper focus. As the following Part argues, the most devastating aspect of the association of abortion with eugenics and racism is not in its short-term benefits for upholding trait-selection laws, but, perhaps less obviously, in its long-term implications for the abortion right writ large. In linking the abortion right to eugenics and racism, Justice Thomas’s racialized critique of abortion provides a potent justification — race — for circumventing the demands of stare decisis and overruling *Roe*. On this logic, it is not *Roe*'s roots in an ephemeral notion of liberty or an unenumerated right to privacy that render it a constitutional apostasy. Rather, it is *Roe*'s links to inequality — and more specifically, racial inequality — that ultimately furnish the necessary predicate for revisiting and, indeed, overruling it.

III. RACE-ING ROE

This Part elaborates the argument sketched in Part II: namely, that in drawing on both reproductive justice and racial justice themes, Justice Thomas’s *Box* concurrence lays a foundation for undermining, and eventually overruling, *Roe v. Wade*. This Part develops the claim in the following ways. First, section III.A explains the role that stare decisis has played in both entrenching *Roe* and simultaneously fueling the effort to overrule it. As section III.B explains, because of stare decisis, *Roe* cannot be overruled simply because some majority of the Court thinks it improper; instead, a special justification is required. By the *Box* concurrence's logic, in the case of *Roe*, that special justification may be race. With that in mind, this section explains that although the Court professes fidelity to precedent, it has on a number of occasions overruled past precedent for the purpose of redressing racial harm.

And, as section III.C asserts, not only is there a broader history of the Court overruling past precedents in order to remedy racial harms,

there is a quite recent history of it doing so. In the most recent term, the Court, in *Ramos v. Louisiana*, overruled a 1972 precedent in part because the earlier Court failed to appreciate the racialized context undergirding the challenged policy. In tandem with the *Box* concurrence, this same logic may serve as a roadmap for challenging *Roe* on the ground that the *Roe* Court failed to properly appreciate the racial context of abortion.

### A. Stare Decisis and Abortion

In 1973, the Court, in *Roe v. Wade*, recognized a constitutional right to choose an abortion. In the half-century since *Roe*, the Court repeatedly has confronted the question of whether or not *Roe* was properly decided and whether it should be overruled. In these disputes, the doctrine of stare decisis served to beat back assaults on *Roe* and the abortion right.

Latin for “let the decision stand,” stare decisis maintains that the Court cannot simply overrule past decisions because it believes they are wrong. Doing so would compromise the predictability and order of the judicial system, while exposing the Court to claims of illegitimacy and partisanship. In this regard, throughout the 1980s, the Court, citing stare decisis, rejected repeated invitations to overrule *Roe*. Although some members of the Court insisted that *Roe* was wrongly

---

305 140 S. Ct. 1390 (2020).
306 Id. at 1408.
307 E.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 926–27 (1992) (Blackmun, J., concurring in part, dissenting in part (writing that the Court “correctly” applied principles of privacy rights in *Roe v. Wade*); id. at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (“We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases.” (citation omitted)); id. at 999 (Scalia, J., concurring in the judgment in part and dissenting in part) (“[T]he Justices should do what is legally right by asking two questions: (1) Was *Roe* correctly decided? (2) Has *Roe* succeeded in producing a settled body of law? If the answer to both questions is no, *Roe* should undoubtedly be overruled.”)).
308 E.g., id. at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); id. at 999 (Scalia, J., concurring in the judgment in part and dissenting in part).
309 See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.”); see also Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 Tex. L. Rev. 1843, 1845 (2013) (noting the “overarching tension . . . between the law’s being ‘settled’ and its being ‘settled right’” (quoting *Burnet*, 285 U.S. at 406 (Brandeis, J., dissenting))).
310 See *Bush v. Vera*, 517 U.S. 952, 985 (1996) (“Our legitimacy requires, above all, that we adhere to *stare decisis*, especially in such sensitive political contexts as the present, where partisan controversy abounds.”).
decided and should be overruled,\textsuperscript{312} a majority of the Court, nodding to stare decisis, declined to do so on the ground that it would undermine the predictability and legitimacy of the Court’s pronouncements.\textsuperscript{313}

In 1992, the Court again faced a frontal challenge to \textit{Roe} in \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}.\textsuperscript{314} Again, instead of overruling \textit{Roe}, a plurality of the \textit{Casey} Court, citing concerns for stare decisis, explicitly reaffirmed what it deemed to be \textit{Roe}’s “essential holding,” recognizing a woman’s right to choose an abortion.\textsuperscript{315} Meaningfully, however, \textit{Casey} also affirmed the state’s interest in regulating abortion in order to promote women’s health and the “potentiality of life,”\textsuperscript{316} and discarded the strict scrutiny standard of review prescribed in \textit{Roe} in favor of the more permissive “undue burden” standard.\textsuperscript{317} As discussed earlier, this new, more permissive standard now governs judicial review of abortion restrictions.\textsuperscript{318} For this reason, as many have argued, \textit{Casey} was a Pyrrhic victory for abortion rights — one that left \textit{Roe} standing, but gutted its substantive protections for abortion rights.\textsuperscript{319} In truth, \textit{Casey} was a boon to abortion opponents, providing a more permissive standard of review for abortion restrictions and granting states broad license to restrict and regulate abortion rights.\textsuperscript{320} In this regard, \textit{Casey} was both a formal victory for abortion rights (retaining \textit{Roe}) and

\textsuperscript{312} See, e.g., \textit{Webster}, 492 U.S. at 532 (Scalia, J., concurring in part and concurring in the judgment) (calling on the Court to “more explicitly” overrule \textit{Roe}); \textit{Thornburgh}, 476 U.S. at 788 (White, J., dissenting) (“In my view, the time has come to recognize that \textit{Roe v. Wade} . . . ‘departs from a proper understanding’ of the Constitution and to overrule it.” (alteration in original) (quoting \textit{Garcia v. San Antonio Metro. Transit Auth.}, 459 U.S. 528, 557 (1985))).

\textsuperscript{313} \textit{Webster}, 492 U.S. at 559-60 (Blackmun, J., concurring in part and dissenting in part) (“By refusing to explain or to justify its proposed revolutionary revision in the law of abortion, and by refusing to abide not only by our precedents, but also by our canons for reconsidering those precedents, the plurality invites charges of cowardice and illegitimacy to [the Court’s] door.”); \textit{City of Akron}, 462 U.S. at 420 (“We respect [the principle of stare decisis] today, and reaffirm \textit{Roe}.”).

\textsuperscript{314} 505 U.S. 833 (1992).

\textsuperscript{315} \textit{Id.} at 845-46 (“The essential holding of \textit{Roe v. Wade} should be retained and once again reaffirmed.” \textit{Id.} at 846.).

\textsuperscript{316} \textit{Id.} at 871 (plurality opinion) (quoting \textit{Roe v. Wade}, 410 U.S. 113, 162 (1973) (alteration in original)).

\textsuperscript{317} \textit{Id.} at 876.

\textsuperscript{318} See \textit{June Med. Servs. L.L.C. v. Russo}, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring in the judgment) (recognizing that the abortion restriction in question should be evaluated under \textit{Casey}’s undue burden standard).


a practical victory for abortion opponents (restricting the abortion right).\textsuperscript{321}

And critically, \textit{Casey} was crucially important for the Court’s jurisprudence about stare decisis and precedent itself. In rejecting the invitation to overrule \textit{Roe}, the \textit{Casey} plurality opinion made clear that the decision to overrule a prior decision is not one undertaken lightly.\textsuperscript{322} Instead, when a court “reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.”\textsuperscript{323} Among the considerations specifically articulated in \textit{Casey} are whether (1) the precedent in question “has proven to be intolerable simply in defying practical workability;” (2) “the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation;” (3) “related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine;” or (4) “facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.”\textsuperscript{324} In recent years, the Court has adopted a kind of shorthand for these considerations, concluding that where one or more of these factors is present, a decision is “egregiously wrong” and may be overruled.\textsuperscript{325}

In this way, even as \textit{Casey} declined to overrule \textit{Roe}, it nonetheless made clear why, for abortion opponents, merely stripping \textit{Roe} of its substance was cold comfort, indeed. For the antiabortion movement, whatever gains \textit{Casey} offered were overshadowed by the fact that \textit{Roe} survived. And indeed, it survived in the face of a constitutional inquiry that refused to denounce its reasoning as erroneous, emphasizing instead its entrenchment as a right that many had come to rely upon.\textsuperscript{326} In this regard, in reaffirming \textit{Roe}, \textit{Casey} further entrenched the view that the

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{321} Nina Martin, \textit{The Supreme Court Decision that Made a Mess of Abortion Rights}, MOTHER JONES (Feb. 29, 2016), https://www.motherjones.com/politics/2016/02/supreme-court-decision-mess-abortion-rights [https://perma.cc/R449-7UFR] (calling \textit{Casey} “a clouded victory for abortion rights,” because “[e]ven as [\textit{Casey}] upheld the right to abortion, the plurality opinion took [\textit{Roe}] apart”); Linda J. Wharton & Kathryn Kolbert, \textit{Preserving Roe v. Wade . . . When You Win Only Half the Loaf}, 24 STAN. L. & POL’Y REV. 143, 144–45 (2013) (characterizing \textit{Casey} as a “partial victory” that “secured \textit{Roe}’s formal status, but w[as] unable to forestall a plethora of burdensome abortion restrictions that increasingly threaten to make abortion services unavailable to America’s most vulnerable women”).
  \item \textsuperscript{322} \textit{Casey}, 505 U.S. at 854.
  \item \textsuperscript{323} Id.
  \item \textsuperscript{324} Id. at 854–55 (internal citations omitted).
  \item \textsuperscript{325} Ramos v. Louisiana, 140 S. Ct. 1390, 1412, 1414–15 (2020) (Kavanaugh, J., concurring in part).
  \item \textsuperscript{326} \textit{Casey}, 505 U.S. at 856.
\end{itemize}
\end{footnotesize}
Constitution properly recognizes and protects a right to choose an abortion. But even as Casey afforded states broader latitude to restrict abortion rights, it also engendered other difficulties. After all, stare decisis does more than demand respect for precedent as settled law: it lends a "veneer of respectability" to the underlying precedent that suggests that the precedent is correct. On this account, in the wake of Casey, "stare decisis is both the reason why Roe cannot be overturned and the reason why it must be." To be sure, abortion opponents have, despite the Court's repeated reaffirmance of Roe, maintained the hope that the Court will, one day, cast aside stare decisis and formally discard Roe. Indeed, it is the prospect of cultivating the conditions under which the Court might overrule Roe that inspires presidential candidates to vow to appoint only pro-life justices who will overrule Roe v. Wade. But critically, as Casey makes clear, even with the desired personnel changes on the Court, the pressure to observe the strictures of stare decisis are considerable — particularly in the hyper-politicized context of abortion rights. On this account, to overrule Roe, it is not enough simply to cobble together a majority of five who believe Roe was wrongly decided. Stare decisis demands more than the conviction that an earlier Court got it wrong. As Casey and the other precedents on precedent make clear, more is required — indeed, a special justification is needed to circumvent stare decisis and trigger reconsideration of an earlier decision.

As the following section explains, one such special justification that may compel a break with precedent is an interest in correcting racial injustice. Indeed, the foundation for using race and concerns about racial justice as a predicate for reconsidering a past decision has already been laid in the Court's jurisprudence.

327 The statements of those in the antiabortion movement make clear these concerns that leaving Roe undisturbed as a formal matter lends credence to the view that abortion is a constitutionally protected right. The United States Conference of Catholic Bishops notes on its website that many Americans view Roe "as being immutable, permanent, "settled law" — "elevated . . . to the stature of 'freedom of speech,' 'trial by jury' and other bedrock American principles." Susan E. Wills, Ten Legal Reasons to Reject Roe, U.S. CONF. OF CATH. BISHOPS, http://www.usccb.org/issues-and-action/human-life-and-dignity/abortion/ten-legal-reasons-to-reject-roe.cfm [https://perma.cc/R339-VJW3].
329 Murray, supra note 13, at 310.
330 Id. at 310.
331 Id. at 308.
333 Murray, supra note 13, at 310.
B. Race and Precedent

Critically, the Box concurrence was not Justice Thomas's only notable separate writing in October Term 2018. In *Gamble v. United States*, 334 the Court declined to overrule the separate sovereigns exception to the Fifth Amendment's prohibition against double jeopardy. 335 Justice Thomas wrote separately "to address the proper role of the doctrine of *stare decisis*." As Justice Thomas explained, the Court's prioritization of settled over right in its consideration of precedent elevates and entrenches "demonstrably erroneous decisions." 337 In a constitutional democracy where the judicial role is confined to interpreting the law, Justice Thomas wrote, slavish adherence to a precedent that is "demonstrably incorrect . . . is tantamount to *making law*, and adhering to it both disregards the supremacy of the Constitution and perpetuates a usurpation of the legislative power." 338 According to Justice Thomas: "[w]hen faced with a demonstrably erroneous precedent," federal courts are duty-bound to "not follow it." 339

It is no secret that the "muscular vision of *stare decisis*" that Justice Thomas articulates in *Gamble* takes aim at *Roe* and its progeny, 340 which Justice Thomas repeatedly has denounced as having "no basis in the Constitution." 341 Still, he could not garner another supporter for his view — the *Gamble* majority remained faithful to traditional *stare decisis* principles, insisting that any "departure from precedent 'demands special justification.'" 342

---

335 Id. at 1963–64.
336 Id. at 1981 (Thomas, J., concurring).
337 Id.
338 Id. at 1984.
339 Id.
341 Gonzales v. Carhart, 550 U.S. 124, 169 (2007) (Thomas, J., concurring). Indeed, in his concurrence in *Gamble*, Justice Thomas specifically identified as "the most egregious example of [an] illegitimate use of *stare decisis*" the Court's substantive due process jurisprudence, which includes (although it is not limited to) its abortion jurisprudence. *Gamble*, 139 S. Ct. at 1988–89 (Thomas, J., concurring).
So, what might constitute a “special justification” sufficient to warrant breaking with the past and overruling an earlier precedent — especially one like Roe that has been repeatedly reaffirmed? If past is prologue, then an interest in remedying racial discrimination and racial harms might indeed suffice to justify a departure from stare decisis. The Court’s history bears this out.

Consider Brown v. Board of Education, where the Court unanimously overruled Plessy v. Ferguson and declared the principle of “separate but equal” unconstitutional. In overruling Plessy, which had been upheld in prior challenges, the Court focused on factors that the Plessy Court had not — and indeed, could not — appreciate when it rendered its decision to bless de jure segregation. As the Brown Court explained, neither the Plessy Court nor the framers of the Fourteenth Amendment could have appreciated the importance of public education in a democratic society. By 1954, however, public education had become “perhaps the most important function of state and local governments,” as it was “required in the performance of our most basic public responsibilities” and was regarded as “the very foundation of good citizenship.” But more importantly, the Plessy Court had not fully grappled with the way that state-sanctioned segregation “generate[d] a feeling of inferiority ... that may affect [black children’s] hearts and minds in a way unlikely ever to be undone.” While the deleterious impact of segregation was “amply supported by modern authority,” such knowledge was potentially unavailable “at the time of Plessy v. Ferguson.” Put differently, the Plessy Court had deliberated in a blind, unconscious of the future import of public school and the psychological weight of segregation. In overruling Plessy, Brown was a means of considering — and indeed, remedying — the racial injuries that the Plessy Court had overlooked.

---

344 163 U.S. 537 (1896).
346 See id. at 491–92 (collecting cases).
347 See id. at 489–90.
348 Id. at 493.
349 Id. at 494.
350 Id.
351 Id.
Brown’s overruling of Plessy is not the only instance of a later Court accounting for race and racism in ways that earlier Courts had not. McLaughlin v. Florida352 and Loving v. Virginia struck down criminal prohibitions on interracial relationships, and in the process, repudiated Pace v. Alabama, an 1883 decision in which the Court declared Alabama’s antimiscegenation laws constitutional on the ground that they applied with equal force to Blacks and whites.354 When the McLaughlin Court took up the challenge to Florida’s ban on interracial cohabitation, it acknowledged that Pace, with its “equal application” theory, was “controlling authority.” Nevertheless, the McLaughlin Court struck down the challenged law, noting that Pace’s “narrow view of the Equal Protection Clause [had been] swept away” in favor of a “strong policy [that] renders racial classifications ‘constitutionally suspect.’”

Three years later, in Loving, the Court applied its concern with Pace’s flawed reasoning to the question of interracial marriage. As Florida had done in McLaughlin, Virginia defended the challenged laws by reference to Pace, arguing that so long as the prohibition and penalties on interracial marriage applied equally to Blacks and whites, they were constitutionally sound. In rejecting this view, the Loving Court built upon McLaughlin, noting that because the Fourteenth Amendment’s “clear and central purpose ... was to eliminate all official state sources of invidious racial discrimination,” the necessary question was not whether the prohibition applied equally to all races, but rather whether the interracial marriage ban constituted “arbitrary and invidious discrimination.” The Loving Court underscored its break with Pace by noting that “[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”

The Court’s repudiation of earlier decisions because of concerns about race and racism is not limited to the decisions of the Civil Rights Era. As recently as 2018, the Court famously discarded a precedent, not
because the earlier Court did not appreciate the racial impact of its decision, but rather, because it did.\textsuperscript{363} Issued in the heat of World War II, and after the bombing of Pearl Harbor, \textit{Korematsu v. United States}\textsuperscript{364} upheld an executive order requiring the internment of Japanese nationals and American citizens of Japanese descent.\textsuperscript{365} There was no doubt that the \textit{Korematsu} Court understood the racial impact of its decision. It explicitly acknowledged that the challenged executive order classified on the basis of race, triggering strict scrutiny,\textsuperscript{366} and all three dissenters specifically identified the order’s obvious racism and xenophobia as the basis for their objections.\textsuperscript{367}

Although its racism had been roundly criticized for years,\textsuperscript{368} \textit{Korematsu} remained good law -\textsuperscript{369} until the Court’s disposition of \textit{Trump v. Hawaii}\textsuperscript{370} in 2018.\textsuperscript{371} There, the Court considered the constitutionality of the “Travel Ban,” an executive order limiting admission to the United States of nationals from certain Muslim-majority countries.\textsuperscript{372} The Court upheld the executive order,\textsuperscript{373} dismissing claims that the President’s statements in advance of the executive order evinced discriminatory animus toward Muslims.\textsuperscript{374} However, amidst claims from dissenting Justice Sotomayor that the majority’s reasoning recalled “that of \textit{Korematsu v. United States},”\textsuperscript{375} the majority took the unusual step of “express[ing] what is already obvious: \textit{Korematsu} was gravely wrong the day it was decided, has been overruled in the court of history, and — to be clear — ‘has no place in law under the Constitution.’”\textsuperscript{376}

Taken together, these cases make clear that, modernly, an interest in correcting racial wrongs has shaped the Court’s thinking about stare decisis — and indeed, has on occasion provided the special justification necessary for the Court to depart from precedent. Of course, some might
argue that these cases are exemplary because they involved facial racial classifications. But, as the section that follows makes clear, facial racial classifications are not necessary for race to form a basis for reconsidering — and overruling — an earlier precedent.

C. Ramos v. Louisiana

As the previous section argues, some of the Court’s most celebrated departures from stare decisis have involved race and racism. More particularly, many of these departures were explicitly contemplated as efforts to remedy the impact of race and racism in judicial decisionmaking. Some might argue that the interest in overruling as a means of addressing racial injustices has been limited to certain cases — and certain periods — in the Court’s history, and that this phenomenon is unlikely to continue in the future. However, in its most recent term, the Court overruled an earlier decision in part because it had failed to properly consider racial harm in its disposition of the case.

Ramos v. Louisiana involved a challenge to Louisiana’s policy of allowing criminal convictions to proceed from nonunanimous jury verdicts. At issue in Ramos was whether the Fourteenth Amendment fully incorporates against the states the Sixth Amendment’s requirement for a unanimous jury verdict in order to convict. Meaningfully, the Supreme Court had confronted the same question before in a set of earlier cases, Apodaca v. Oregon and Johnson v. Louisiana, decided in 1972. Consolidated for review, the twin appeals produced “a tangle of seven separate opinions." Four Justices agreed that the Sixth Amendment right to a jury trial, while incorporated against the states under the Fourteenth Amendment, did not require unanimous jury verdicts. Justice Powell concurred with the judgments in both Apodaca and Johnson, writing separately to note that while the Sixth Amendment required unanimous juries in federal criminal cases, this feature of federal criminal practice was not incorporated as to the states. Although Justice Powell agreed with the four dissenting Justices that “unanimous jury decisions ... are constitutionally required in federal prosecutions," he alone on the Apodaca Court advanced a theory of dual-track incorporation under which “a single right can mean two different

---

377 140 S. Ct. 1390, 1394 (2020).
378 Id. at 1394–95.
381 Brief for Petitioner at 6–7, Ramos, 140 S. Ct. 1390 (No. 18-5924).
382 See Apodaca, 406 U.S. at 406.
383 Johnson, 406 U.S. at 373 (Powell, J., concurring in Johnson and concurring in the judgment in Apodaca).
384 Id. at 383 (Douglas, J., dissenting); see Apodaca, 406 U.S. at 414–15 (Stewart, J., dissenting).
things depending on whether it is being invoked against the federal or a state government.\textsuperscript{385} Taken together, \textit{Apodaca} and \textit{Johnson} stood for the proposition that the Sixth Amendment guarantees a right to a unanimous jury, but that such a right does not extend to defendants in state trials.\textsuperscript{386}

With this jurisprudential history in mind, it was not surprising that, at oral argument, the Justices and the litigants were preoccupied with the question of stare decisis, and more particularly, the circumstances under which the Court might depart from a set of past decisions that were almost fifty years old and had been reaffirmed in subsequent challenges.\textsuperscript{387} Indeed, when the Court announced its decision in \textit{Ramos}, the question of stare decisis was center stage, with a majority of six Justices overruling \textit{Apodaca} (and, by extension, \textit{Johnson}) on the ground that Louisiana’s rule permitting nonunanimous jury convictions was inconsistent with the logic and history of the Sixth Amendment.\textsuperscript{388}

In so doing, the \textit{Ramos} majority declared \textit{Apodaca} “gravely mistaken” — so much so that “no Member of the Court today defends either [the plurality opinion or Justice Powell’s separate concurrence endorsing dual-track incorporation] as rightly decided.”\textsuperscript{389} But meaningfully, the \textit{Ramos} majority went beyond simply recasting \textit{Apodaca} as an improperly reasoned Sixth Amendment “outlier.”\textsuperscript{390} Race, the \textit{Ramos} majority insisted, also shaped its consideration of \textit{Apodaca’s} precedential value.

As the \textit{Ramos} majority explained, the interest in permitting nonunanimous jury verdicts was inextricably intertwined with a desire to “establish the supremacy of the white race.”\textsuperscript{391} When Louisiana drafted its postbellum constitution in 1898, an interest in maintaining white supremacy underlaid the proceedings, “and the resulting document included many of the trappings of the Jim Crow era: a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements.”\textsuperscript{392} The nonunanimous jury rule was of a piece with these efforts. Recognizing that any attempt to explicitly bar Blacks from jury service would draw “unwanted national attention”\textsuperscript{393} and would be

\textsuperscript{385} \textit{Ramos}, 140 S. Ct. at 1398.
\textsuperscript{386} \textit{Id.} at 1397–98.
\textsuperscript{387} Indeed, at oral argument, Justice Alito observed, “last term, the majority was lectured pretty sternly in a couple of dissents about the importance of stare decisis and about the impropriety of overruling established rules.” Transcript of Oral Argument at 7–8, \textit{Ramos}, 140 S. Ct. 1390 (No. 18-5924).
\textsuperscript{388} \textit{Ramos}, 140 S. Ct. at 1408 (plurality opinion).
\textsuperscript{389} \textit{Id.} at 1405.
\textsuperscript{390} \textit{Id.} at 1406.
\textsuperscript{391} \textit{Id.} at 1394 (citations omitted).
\textsuperscript{392} \textit{Id.} (citations omitted).
\textsuperscript{393} \textit{Id.}
struck down under the Fourteenth Amendment.\textsuperscript{394} Louisiana instead "sought to undermine African-American participation on juries" by "sculpt\[ing\] a ‘facially race-neutral’ rule" that would "ensure that African-American juror service would be meaningless."\textsuperscript{395} Adopted in the 1930s, the Oregon jury rule did not share the same Jim Crow provenance as Louisiana’s, but as the majority noted, its origins could be "similarly traced to the rise of the Ku Klux Klan and efforts to dilute ‘the influence of racial, ethnic, and religious minorities on Oregon juries.’"\textsuperscript{396}

To be sure, the fact of “clear” racist origins of the nonunanimous jury rule, by itself, might have been insufficient to overrule \textit{Apodaca}. However, taken in tandem with \textit{Apodaca}’s status as a Sixth Amendment “outlier,” race tipped the balance. Writing for the \textit{Ramos} majority, Justice Gorsuch explained that \textit{Apodaca}’s precedential value was diminished by the “implacable fact that the plurality spent almost no time grappling with the historical meaning of the Sixth Amendment’s jury trial right, this Court’s long-repeated statements that it demands unanimity, or the racist origins of Louisiana’s and Oregon’s laws.”\textsuperscript{397}

In their concurrences, Justices Sotomayor and Kavanaugh struck similar notes. Conceding that “overruling precedent must be rare,”\textsuperscript{398} Justice Sotomayor nonetheless determined that overruling \textit{Apodaca} was "not only warranted, but compelled"\textsuperscript{399} by the significant “interests at stake”\textsuperscript{400} for the criminal defendants challenging their convictions and because \textit{Apodaca}’s “functionalist”\textsuperscript{401} logic was out of step with Sixth Amendment doctrine.\textsuperscript{402}

But in addition to these practical and doctrinal concerns, Justice Sotomayor was adamant that “the racially biased origins of the Louisiana and Oregon laws uniquely matter here.”\textsuperscript{403} To be sure, “many laws and policies in this country have had some history of racial animus,” but what set \textit{Apodaca} and its entrenchment of the nonunanimous jury rule apart, in her view, was that “the States’ legislatures never truly

\textsuperscript{394} See \textit{Strauder v. West Virginia}, 100 U.S. 323, 310 (1880) (holding discrimination in jury selection on the basis of race violated the Equal Protection Clause).


\textsuperscript{396} Id. (quoting \textit{State v. Williams}, No. 15-CR-58698, at 16 (Cir. Ct. Or., Dec. 15, 2016)).

\textsuperscript{397} Id. at 1405 (emphasis added).

\textsuperscript{398} Id. at 1410 (Sotomayor, J., concurring in part).

\textsuperscript{399} Id. at 1408.

\textsuperscript{400} Id.

\textsuperscript{401} Id. at 1409.

\textsuperscript{402} Id. at 1410.

\textsuperscript{403} Id. at 1408.
grappled with the laws' sordid history in reenacting them.404 The failure of the state legislatures — and the Apodaca Court — to do so meant that it fell to the Ramos Court to ensure that Apodaca was "fully — and rightly — relegated to the dustbin of history."405

Justice Kavanaugh, concurring in part, also acknowledged the presumption in favor of affirming Apodaca. Still, he noted, "the doctrine of stare decisis does not dictate, and no one seriously maintains, that the Court should never overrule erroneous precedent."406 Indeed, Justice Kavanaugh identified a "lengthy and extraordinary list of landmark cases that overruled precedent,"407 including Brown v. Board of Education, "the single most important and greatest decision in this Court's history."408 But if "special justification" or "strong grounds" counseled in favor of overruling precedent, then what "constitute[d] a 'special justification' or 'strong grounds'" in the instant case?409

Like Justice Sotomayor, Justice Kavanaugh noted Apodaca's disjunction with Sixth Amendment doctrine.410 But as importantly, he emphasized the nonunanimous jury rule's racialized origins. The rule, he argued, was "one pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans, especially in voting and jury service."411 This history, in tandem with the rule's contemporary impact "as an engine of discrimination against black defendants, victims, and jurors," "strongly support[ed] overruling Apodaca."412 On "the question whether to overrule," Justice Kavanaugh's views were clear: Apodaca's failure to account for "the Jim Crow origins and racially discriminatory effects (and the perception thereof) of non-unanimous juries in Louisiana and Oregon should matter and should count heavily in favor of overruling."413

D. Ramos, Box, and Roe

The connections between the Court's disposition of Ramos and Roe are not obvious. After all, Ramos was a criminal procedure case that focused on the incorporation of the Bill of Rights' guarantees against state governments. It is a world away from Roe, privacy, and the right

404 Id. at 1410 (citing United States v. Fordice, 505 U.S. 717, 729 (1992) (observing that "policies that are 'traceable' to a State's de jure racial segregation and that still 'have discriminatory effects' offend the Equal Protection Clause").
405 Id.
406 Id. at 1412 (Kavanaugh, J., concurring in part).
407 Id.
408 Id.
409 Id. at 1414.
410 Id. at 1416.
411 Id. at 1417.
412 Id. at 1417–18.
413 Id. at 1418.
to choose an abortion. But, as this section maintains, the Box concurrence provides the connective tissue that renders the relationship between these two disparate cases more legible. And in so doing, it explicates the Box concurrence’s roadmap for challenging, and even overruling, *Roe v. Wade*.

For years, those opposed to abortion have argued that *Roe* lacks a foundation in constitutional text,414 was improperly reasoned,415 and has proven unworkable over time.416 Despite these efforts, *Roe* has survived.417 But Justice Thomas’s racialized critique of abortion furnishes new justifications for reconsidering — and overruling — this embattled decision. Specifically, it provides new factual circumstances steeped in race and racial animus that may suffice to render *Roe* “a remnant of abandoned doctrine.”418 Justice Thomas’s effort to graft the history of Margaret Sanger, the birth control movement, and eugenics to abortion may be selective and indeterminate, but it may prove incredibly effective.419


417 In the Court’s most recent abortion-related decision, it confirmed that *Casey* remained good law — and relied on “the most central principle of *Roe* . . . a woman’s right to terminate her pregnancy before viability.” June Med. Servs., 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment) (plurality opinion) (quoting *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 871 (1992) (plurality opinion)).

418 *Casey*, 505 U.S. at 855 (majority opinion).

Justice Thomas’s racialized critique of abortion rights has already been incorporated into amicus briefs, and reproduced in judicial opinions, in the lower federal courts. It is not difficult to see how this racialized narrative might make its way to the Supreme Court in the near future. Over the last fifty years, there has been a considerable uptick in the number of amicus filings before the Court. And critically, the Court has been quite receptive to the prospect of amicus briefs that furnish additional factual grounds on which to base a decision. But despite the proliferation of amicus briefs before the Court, there is no mechanism in place to verify the facts put forth by amici. These concerns may be especially acute in circumstances, like those in Box, where the case proceeds to the Court as part of the shadow docket and is resolved without oral argument, eliminating an opportunity for questioning and discussion of new information.

Under these conditions, it is entirely likely that the racialized critique of abortion rights will be presented to the Court via amicus briefs, and when this happens, there will be no institutional apparatus to question or challenge its contested historical foundations. Indeed, the narrative is sure to find a hospitable ear with Justice Thomas — the Justice who may be best positioned to command deference from his colleagues on issues of race and racism, particularly in circumstances where the

\[420\] See supra notes 253–272 and accompanying text.


\[422\] Larsen, supra note 421, at 1777 (“Supreme Court Justices, like the rest of us, seem to be craving more factual information, and the amicus briefs are stepping in to fill the void.”). The influence of amicus facts can be seen in Gonzales v. Carhart, 550 U.S. 124 (2007), a 2007 challenge to the federal Partial-Birth Abortion Ban. In his opinion for the majority, Justice Kennedy cited an amicus brief to support the claim that some women later regret their abortions. Id. at 159.

\[423\] Larsen, supra note 421, at 1784–86 (discussing circumstances in which the Court’s use of brief-based assertions later proved to be contested).

\[424\] As the only Black member of the Court, and a conservative to boot, Justice Thomas’s views may have particular weight with his colleagues on issues of race. As Professor Guy-Uriel Charles explains, as a Black man who has experienced racism, Justice Thomas “possesses epistemic authority and commands epistemic deference” from his colleagues. Guy-Uriel E. Charles, Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Crits?, 93 GEO. L.J. 575, 611 (2005). “He alone on the Court is positioned to explain, on the basis of what he knows to be true and what he has experienced as a person of color, the distinctive harm caused by [racism].” Id. And because he is a conservative, his views are unlikely to be dismissed as “political correctness.” Id. Likewise, the addition of Justice Barrett to the Court may serve a similar function. When the question of Roe — or abortion more generally — comes before the Court, Justice Barrett will likely be skeptical. See Adam Liptak, Barrett’s Record: A Conservative Who Would Push the Supreme Court to the Right, N.Y. TIMES (Nov. 2, 2020), https://www.nytimes.com/article/amy-barrett-views-issues.html [https://perma.cc/S2V3-A8Z3] (“One area in which almost no one expects surprises [from Justice Barrett] is abortion. . . . Groups opposing abortion have championed [her] nomination. And her academic and judicial writings have been skeptical of broad interpretations of abortion rights.”). But because she is a woman, her skepticism of abortion as a means of promoting women’s equality and autonomy will likely be imbued with a kind of epistemic authority that may resonate — if not
facts are disputed or indeterminate. In this regard, if the racialized narrative of abortion rights is left unchallenged, it will decisively frame abortion before the Court as part of a long-standing eugenic effort to eliminate marginalized groups, including racial minorities. As importantly, by highlighting the disproportionate abortion rates in minority communities, this narrative suggests that the racialized impact of abortion’s alleged eugenicist origins continues to be felt to this day.

To be sure, the argument toward which this racialized narrative gestures is not that \textit{Roe} is analogous to \textit{Plessy} or \textit{Korematsu} — cases that involved laws that were explicitly racist on their face and in their application. Rather, the logic of the narrative is that what renders \textit{Roe} “egregiously wrong” is the same neglect that the \textit{Ramos} Court identified in the \textit{Apodaca} Court’s deliberations. By failing to “grapple[]” with the racist roots of the Louisiana and Oregon nonunanimous jury rules, the \textit{Apodaca} Court allowed the residue of this past racism to seep into the present day.\textsuperscript{425} Accordingly, in failing to appreciate both abortion’s racially tainted origins and its current impact on racial minorities, \textit{Roe} was — and is — egregiously wrong.

Critically, it is unclear whether concerns about race, by themselves, would be enough to render \textit{Roe} ripe for overruling. On this point, \textit{Ramos} again is instructive. There, concerns about racism were layered atop concerns about \textit{Apodaca}’s incoherence with Sixth Amendment doctrine and the jury right more generally.\textsuperscript{426} In this regard, race was not the reason for overruling \textit{Apodaca}, but rather the tipping point militating in favor of overruling.\textsuperscript{427} In the same way, race need not — and indeed, given the contested nature of Justice Thomas’s narrative,

with her colleagues, then with facets of the public. \textit{See}, e.g., Ramesh Ponnuru, Opinion, \textit{In the Wings: Anthony Kennedy’s Replacement Should Be Amy Barrett}, CHI. TRIB. (June 29, 2018, 2:45 PM), https://www.chicagotribune.com/opinion/commentary/ct-perspec-vetting-supreme-court-replacement-kennedy-amy-barrett-0702-story.html [https://perma.cc/XG4Y-ZVXC] (arguing, in the context of Justice Kennedy’s retirement, for Judge Barrett’s appointment to the Court on the ground that “[i]f \textit{Roe} v. \textit{Wade} is ever overturned . . . it would be better if it were not done by only male justices, with every female justice in dissent”); \textit{see also} Elizabeth Dias & Adam Liptak, \textit{To Conservatives, Barrett Has “Perfect Combination” of Attributes for Supreme Court}, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/09/20/us/politics/supreme-court-barrett.html [https://perma.cc/8QKE-4Y6K] (quoting Marjorie Dannenfelser, the president of the Susan B. Anthony List, an antiabortion political group, as saying “[Judge Barrett] is the perfect combination of brilliant jurist and a woman who brings the argument to the court that is potentially the contrary to the views of the sitting women justices”). In a similar vein, Justice Barrett, who is the mother of two Black children and a child with Down syndrome, may also be vested with a degree of authority on the question of trait-selection abortion restrictions functioning as antidiscrimination measures. \textit{See} Dias & Liptak, supra ("Judge Barrett and her husband, Jesse Barrett . . . have seven children, all under 20, including two adopted from Haiti and a young son with Down syndrome . . . .").

\textsuperscript{425} \textit{See} Ramos v. Louisiana, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring in part).

\textsuperscript{426} \textit{Id.} at 1394–95 (majority opinion).

\textsuperscript{427} \textit{See id.} at 1417–18 (Kavanaugh, J., concurring).
cannot — be the reason for overruling Roe. But it can, in tandem with concerns about unenumerated rights and the workability of abortion doctrine, serve as the crucial element — the tipping point — that shifts the balance toward overruling. 428

Recent legal challenges make clear that this existential threat to abortion rights is not hypothetical. In June Medical Services, the Court’s most recent abortion challenge, in which it considered the constitutionality of a Louisiana admitting privileges law, this racialized critique of abortion and the association of abortion with eugenics surfaced in the briefs of several amici. 429 Critically, the law challenged in June Medical Services was wholly distinct from the Indiana trait-selection law challenged in Box; nevertheless, several amici referenced the Box concurrence to underscore the notion that abortion has — and has been deployed to exercise its — eugenic potential against marginalized groups. For example, in its brief supporting Louisiana, the Pro-Life Legal Defense Fund described Roe v. Wade as a “tragic ruling [that] has led directly to the death of over 60 million unborn babies — of which in one recent year, 36 percent would have been born to black women.” 430

On this account, Roe had “accomplish[ed] what the Eugenics Movement only could have dreamed of achieving about as it pushed for abortion rights.” 431 Likewise, an amicus brief submitted by African American Pro-Life Organizations adverted to statistics purporting to show “an enormous national racial disparity in abortion rates,” arguing that the “disproportionate abortion rate approaches what some civil rights leaders have called ‘race suicide.’” 432 More ominously, the Foundation for Moral Law explicitly connected abortion to race discrimination, noting that because “abortion in the United States arose from the eugenics movement,” the practice was an “inherent equal protection violation.” 433


430 Brief Amicus Curiae of Pro-Life Legal Defense Fund et al. in Support of Rebekah Gee, supra note 429, at 31.

431 Id. at 31–32.


433 Brief of Amicus Curiae Foundation for Moral Law in Support of Rebekah Gee, supra note 429, at 21 n.9.
Of course, it is entirely possible that the Court will not rely on the racialized critique of abortion to overrule or discredit *Roe v. Wade*. Even if that is the case, the association between abortion and racism may nonetheless be taken for granted and accepted as part of the discourse of abortion rights. Consider, for example, *Gonzales v. Carhart*, in which the Court upheld the Partial-Birth Abortion Act. Critically, in concluding that the challenged law passed constitutional muster, Justice Kennedy credited an unsupported assertion that "some women come to regret their choice to abort the infant life they once created and sustained." Although the Court was criticized for "invoking an antiabortion shibboleth for which it concededly has no reliable evidence," its uncritical acceptance of "post-abortion syndrome" shaped the constitutional culture of abortion rights. In the wake of the Court's decision in *Carhart*, woman-protective arguments proliferated — both in antiabortion discourse and in mainstream press coverage of the abortion debate. In this regard, even if the racialized narrative of the *Box* concurrence is not taken up directly, it may nonetheless have a decisive impact on constitutional culture and meaning, cementing the association between abortion and race in our understanding of abortion rights.

**IV. RACE IN THE BALANCE**

As the preceding Parts have made clear, Justice Thomas's *Box* concurrence is not merely a call for the Court "to confront the constitutionality of [trait-selection] laws." It is also a roadmap for opportunistically using race — and an interest in racial justice — to circumvent the strictures of stare decisis and overrule *Roe v. Wade* once and for all. Obviously, this strategy would be devastating to abortion rights, but as this Part makes clear, its deleterious impact goes beyond eviscerating *Roe*. As section IV.A explains, Justice Thomas's effort to inject race into the Court's abortion jurisprudence is both opportunistic and at odds

436 550 U.S. at 150.
437 Id. at 183 (Ginsburg, J., dissenting).
439 Siegel, supra note 428, at 1648-49.
with reproductive justice efforts to center communities of color and the systemic inequities that constrain reproductive decisionmaking. Section IV.B maintains that the Box concurrence’s negative impact is not solely limited to issues of reproductive rights and reproductive justice, but has broader implications for the Court’s race jurisprudence, as well.

A. Undermining Reproductive Justice

Although Justice Thomas never references the reproductive justice movement in the Box concurrence, we might understand his opinion as trading on the reproductive justice movement’s successful effort to expand the terms of the abortion debate to focus more specifically on the needs of communities of color. Just as the reproductive justice movement extended the boundaries of the abortion debate beyond gender and feminism, thus transforming the central understanding of what reproductive rights are, Justice Thomas seeks to change the social — and constitutional — meaning of abortion, transforming it from an issue of privacy and sex equality to one of racial equality.

But in opportunistically co-opting the reproductive justice movement’s interest in the intersection of race and abortion rights, the Box concurrence’s racialized critique of abortion rights actually undermines the goals and interests of reproductive justice. For example, a central pillar of the reproductive justice movement is the understanding that disability, class, race, sexual orientation, and gender identity shape the ability to exercise “choice.” Although the association of eugenics and abortion injects a racial dynamic into the abortion debate, this racialized account of abortion is inattentive to both the structural dynamics that shape Black people’s reproductive choices and the prospect of abortion as an act of individual autonomy. Put simply, Justice Thomas invokes a particular historicized and disputed racial narrative while ignoring the functional ways that race has impacted — and continues to impact — reproductive autonomy.

As discussed earlier, in painting reproductive rights as tools of deracination, Justice Thomas invokes history selectively, overlooking the way in which the denial of reproductive rights — and, specifically, efforts to

442 To be sure, I do not mean to say that in discussing race, Justice Thomas has always behaved opportunistically. As a Justice, he has evinced considerable interest in exploring racial inequities — perhaps more so than any other Justice in the Court’s conservative wing. Rather, this Article surfaces the ways in which abortion opponents have begun to — and will likely continue to — co-opt principles of racial equity in the abortion debate, relying on arguments set forth in large part by Justice Thomas.


444 See ROBERTS, supra note 44, at xv (discussing the “structural causes of racial disparities in abortion rates — poverty, lack of access to contraception, and inadequate sex education”).
restrict abortion — were also used to bolster white supremacy and suppress communities of color. But it is not just that Justice Thomas's critique occludes a more comprehensive history of abortion, it is that it promotes a masculinist vision of abortion, and in so doing, evinces a palpable distrust of Black women and their reproductive choices. By charting a straight line between birth control, abortion, and eugenics, Justice Thomas echoes the claims of male Black nationalist figures, who viewed Black reproduction as Black women’s specific contribution to the political project of the Black Power movement. More troublingly, in resuscitating masculinist narratives of Black reproduction and genocide, Justice Thomas not only ignores the voices of the Black women who registered their objections to these claims, but also crafts, whether consciously or not, a damning indictment of Black women who would terminate their pregnancies (or make use of contraception). On his telling, Black women who consider — or obtain — an abortion are co-conspirators with eugenicists (here, Margaret Sanger, a white woman) in orchestrating the Black community’s destruction. That is, in the name of individual rights and choice, Black women who avail themselves of abortion have blithely (and selfishly) invited the (white) eugenicist into the part of the Black community that is absolutely vital to its future: the womb.

Of course, what is missing from this account of Black women as unwitting (or complicit) agents of deracination is an account of their own autonomy and attention to the structural impediments that communities of color face in reproductive decisionmaking — the kinds of concerns that animated the reproductive justice movement in the first place. Though Justice Thomas cites disproportionate abortion rates within the Black community, his concurrence is utterly inattentive to the factors that may drive a decision to terminate a pregnancy. As reproductive justice advocates make clear, for many people of color, the

---

445 Murray, supra note 302.
446 See supra pp. 2041–42.
447 See supra pp. 2041–42. Critically, the way in which Justice Thomas dismisses — or ignores — the views of Black women challenging the Black nationalist account of racial genocide and paints Black women as accomplices in deracination recalls his 1991 confirmation hearings. There, in the face of Professor Anita Hill’s sexual harassment claims, his supporters presented then-Judge Thomas as the embattled standard-bearer of the Black community, while depicting Professor Hill as a treacherous Black woman intent on tearing down a Black man, and with him, the Black community’s hopes. For a more robust discussion of these dynamics, see Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241, 1298 (1991).
448 See supra pp. 2041–42.
449 See supra pp. 2041–42.
decision to terminate a pregnancy is shot through with concerns about economic and financial insecurity, limited employment options, diminution of educational opportunities and lack of access to health care and affordable quality childcare. However, any mention of these considerations is absent from Justice Thomas’s racialized critique of abortion rights. Also in this absence is a neglect of any account of Black women’s autonomy in seeking an abortion — the very voices once raised from within the Black community to counter the narrative of Black genocide. Instead, on Justice Thomas’s telling, Black women are reduced to being either the victims of eugenics or active participants in a eugenic conspiracy.

As importantly, the injection of race into the abortion narrative for the purposes of upholding trait-selection laws or providing a new justification for overruling Roe seems particularly opportunistic when juxtaposed against the Court’s inability to articulate in its jurisprudence the racialized dimensions of abortion rights. Recall the earlier discussion of Harris v. McRae, in which the Court considered the constitutionality of the Hyde Amendment. In upholding the Hyde Amendment, the Harris Court concluded that regardless of the right articulated in Roe, “it simply does not follow that a woman’s freedom

452 See Rausch, supra note 161, at 31; Goodwin & Chemerinsky, supra note 161, at 1330. To be sure, these concerns are not limited to those in the reproductive justice movement. Katrina Jackson, the state representative who introduced and sponsored the Louisiana admitting privileges restriction challenged in June Medical Services v. Russo, maintains that opposition to abortion can coexist with redistributivist calls for a more robust social safety net. See Laurenza Brown, Pro-life Democrat Katrina Jackson Marches for Life, Writes Louisiana Legislation, NAT’L CATH. REG. (Jan. 23, 2020), https://www.ncregister.com/news/pro-life-democrat-katrina-jackson-marches-for-life-writes-louisiana-legislation [https://perma.cc/8E4E-TEMV] (reporting Representative Jackson’s claim that “[p]ro-lifers and those who are pro-abortion . . . might not ever agree on the sanctity of life, but we can agree on the woman receiving proper health care during her pregnancy; and around this country and in the state of Louisiana we’re having to address the high [maternal] mortality rate that has been developing” (second alteration in original)). Characterizing herself as a “whole life Democrat,” Representative Jackson, who is a Black woman, insists that her concern with supporting Black life “from the womb to the tomb” is reflected in her opposition to abortion and efforts to improve maternal health and access to health care among minorities in Louisiana. See Valerie Richardson, “Whole Life Democrats” Seek to Redefine Party’s Stance on Abortion, WASH. TIMES (June 6, 2019), https://www.washingtontimes.com/news/2019/jun/6/katrina-jackson-whole-life-democrat-abortion-posit [https://perma.cc/2C72-4JUK].


454 At present, the Hyde Amendment continues to limit the use of Medicaid funds for abortion services. See Hyde Amendment, supra note 209. But importantly, its impact is felt even beyond the realm of public insurance. See Khiara M. Bridges, Elision and Erasure: Race, Class, and Gender in Harris v. McRae, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES, supra note 136, at 117, 134. Under the Affordable Care Act (ACA), “individuals with incomes that exceed Medicaid limits, but do not exceed 400 percent of the federal poverty level, receive federal subsidies that they can use to purchase private health insurance on health insurance exchanges.” Id. However, under the ACA, “these federal subsidies cannot be used to purchase insurance coverage for abortion services.” Id. In this regard, “the Hyde Amendment now reaches beyond the realm of public insurance, affecting more than just the poor.” Id.
of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.455

As many commentators, including those in the reproductive justice community, have noted, *Harris* has had a profound impact on abortion access for women who are Medicaid recipients, a group that is disproportionately women of color.456 Unable to secure abortions, these women, it has been argued, could be coerced into sterilization as a condition of receiving public assistance.457 Indeed, in an amicus brief filed in *Harris*, New York City Legal Aid attorneys highlighted the incongruity of the federal government withholding financial support for abortion while underwriting "sterilization abuse among Puerto Rican, Native American, Black, and Mexican American women and among welfare recipients."458 "The disparity of funding between abortion and sterilization," they argued, "ha[d] the effect of compelling poor and minority women to be sterilized in violation of their constitutional rights."459

Despite these efforts, the Court’s opinion in *Harris v. McRae* made no mention of race or the disproportionate impact of the Hyde Amendment on poor women of color. Meaningfully, these views have also been absent in the Court’s most recent abortion decisions. In *Whole Woman’s Health v. Hellerstedt* and *June Medical Services*, advocates and amici underscored the view that the burdens of abortion restrictions are borne disproportionately by low-income women of color.460 But even as the Court struck down the challenged laws in both cases and reaffirmed the abortion right, as in *Harris v. McRae*, it made no mention

---

455 Harris v. McRae, 448 U.S. 297, 316 (1980).
459 Id. at 17.
of the disproportionate impact of abortion regulations on these marginalized groups.461

As advocates and scholars have long noted, the impact of abortion regulations depends in large part on the social conditions in which women live.462 For some women, laws that impose waiting periods and additional medical procedures or that limit access to a handful of providers may have little impact on the ability to obtain an abortion.463 These women are equipped with the resources — health insurance, flexible work schedules, ready transportation, childcare — to be able to withstand the limitations that such restrictions impose.464 For other women, however, the social conditions in which they live mean that abortion restrictions will have a more profound impact on their lives.465 In this way, abortion restrictions are often especially burdensome for poor women.466 And because race and socioeconomic status are often related — particularly in those regions of the country where abortion restrictions are more extensive — the burden on poor women will also result in a burden on women of color, rendering abortion inaccessible to these groups.467

In focusing on the links between racism and abortion as a means of overturning Roe, while simultaneously overlooking the systemic and institutional constraints that shape abortion decisionmaking, the racialized critique of abortion rights surrenders an important opportunity to settle some of the conflict that abortion engenders. As Professor Robin West has argued:

By putting legal abortion in its place — that is, putting it in the context of a reproductive justice agenda pursued in the legislative arena — pro-choice advocates might find common cause with pro-life movements that responsibly seek greater justice for pregnant women who choose to carry their pregnancies to term, working families, and struggling mothers.468

Put differently, in laying a path toward overruling Roe, the injection of race that Justice Thomas proposes in Box only exacerbates contestation around abortion rights. By contrast, the use of race as a part of a broader reproductive justice framework might instead offer a way to bridge the distance between abortion rights advocates and abortion opponents.

463 See Cohen, supra note 462, at 4.
464 See id. at 4–5.
465 Id.
466 Id.
467 Id.
468 West, supra note 167, at 1427.
This is all to say that Justice Thomas's effort to introduce race into the Court's discourse about abortion regulation and rights is incomplete, instrumental, and problematic. Although the Box concurrence, with its indeterminate historical record, attempts to surface the racial dynamics of abortion, it fails to account for the systemic inequities that shape Black women's reproductive choices and paints Black women as either unwitting victims or eager eugenicists who callously prioritize their own needs above those of the Black community. Further, the effort to account for race in abortion discourse seems opportunistic given the Court's long-standing record of sequestering its discussions of abortion from discussions of race and inequality.

B. Undermining Racial Justice

As the previous section explained, the Box concurrence's opportunistic use of race to challenge Roe is not only devastating to reproductive rights, but also undermines the reproductive justice movement's effort to call attention to the racialized impacts of abortion regulation. But critically, the concurrence's deleterious consequences extend beyond reproductive rights and justice. As this section maintains, the Box concurrence's use of race also undermines the broader project of racial justice.

As an initial matter, Justice Thomas's invocation of race in Box is inconsistent with his views of race in other constitutional and statutory contexts. As some scholars have noted, Justice Thomas's views on race reflect his — and indeed, other Justices' — interest in "color-blind constitutionalism." Rooted in the first Justice Harlan's dissent in Plessy v. Ferguson, "color-blind constitutionalism" maintains that race is almost never a legitimate ground for legal or political distinctions between groups. On this view, any law that draws distinctions on the basis of race, whether for benign or nefarious purposes, is presumptively unconstitutional. Accordingly, under a theory of colorblind constitutionalism, etc.
ism, the race-based classifications that undergirded Jim Crow are unconstitutional, but so too are the race-based affirmative action measures designed to remedy past discrimination.473

The Court’s affirmative action cases provide a helpful illustration. In a series of cases challenging the use of race-based affirmative action programs in employment and university admissions, the Court was repeatedly asked to consider whether “benign” race-conscious policies were constitutionally distinct from the race-based classifications that characterized Jim Crow and “separate but equal.”474 As some argued, because affirmative action programs were intended to remedy past racial injustices in higher education and employment, they should not be subjected to strict scrutiny, as other racial classifications were.475 Others, however, maintained that because it was difficult to discern whether a race-conscious measure was intended to help or harm, all racial classifications should be subjected to the same punishing standard: strict scrutiny.476

In Regents of the University of California v. Bakke,477 Justice Powell cast the deciding vote to uphold the use of race in medical school admissions, but in so doing, he also made clear that strict scrutiny, as op-

473 Id. at 204 n.8.
474 United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 167–68 (1977) (concluding, in the context of a state’s use of affirmative action principles to enhance minority voting representation in particular districts, that there was not unconstitutional discrimination); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305–08 (1978) (considering the appropriate standard of review for race-conscious measures that are intended to ameliorate the effects of discrimination); Fullilove v. Klutznick, 448 U.S. 448, 472–73 (1980) (considering, in the context of a federal legislative program, the appropriate standard of review for race-conscious measures that are intended to remedy the effects of discrimination); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (concluding that strict scrutiny is the appropriate standard of review for race-conscious programs aimed at ameliorating past discrimination); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995) (concluding that strict scrutiny is the appropriate standard of review for race-conscious measures); Johnson v. California, 543 U.S. 499, 512–13 (2005) (holding that colorblind reasoning requires strict scrutiny of the practice of segregating prisoners).
475 Schmidt, supra note 469, at 214.
476 See, e.g., Adarand Constructors, 515 U.S. at 226; J.A. Croson Co., 488 U.S. at 493 (“Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by ensuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.”); Jed Rubenfeld, Essay, Affirmative Action, 107 YALE L.J. 427, 428 (1997) (“One powerful function of strict scrutiny has always been that of ‘smoking out’ invidious purposes masquerading behind putatively legitimate public policy.”); see also Case Comment, Civil Rights — Do “Skepticism,” “Consistency,” and “Congruence” Foreshadow a Color-Blind Future? Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995), 69 TEMP. L. REV. 1521, 1527–31, 1534 (1996) (discussing cases in which the Court considered the appropriate level of scrutiny for remedial race-based classifications).
477 438 U.S. 265.
posed to a less stringent standard, was the appropriate standard of review. In City of Richmond v. J.A. Croson Co., the Court confirmed strict scrutiny as the appropriate standard of review for all race-based classifications — even those aimed at remedying past discrimination. In this regard, the racial context and interests that undergird affirmative action programs are of no moment — as the Court has concluded, and Justice Thomas has agreed, the remedial motives behind affirmative action programs are irrelevant and, indeed, "inherently unknowable." Distrusting its ability to parse the state’s intentions in order to distinguish between benign measures and those meant to further racial subordination, the Court has subjected all affirmative action programs to the most punishing standard of constitutional scrutiny.

But if context and intent are meaningless in the context of affirmative action claims, then, perhaps perversely, they are all too meaningful in the context of disparate impact claims. For purposes of equal protection doctrine, the Court has concluded that where a facially neutral law disproportionately impacts a protected group, there is no constitutional injury unless discriminatory intent can be established. But proving intent in the disparate impact context is a nearly impossible endeavor. As Professor Ian Haney-López explains, in its current incarnation, the disparate impact intent doctrine goes beyond simply demanding evidence of discriminatory intent — it requires “that plaintiffs prove a state of mind akin to malice on the part of an identified state actor.” Such a requirement is “so exacting that, since this test was announced in 1979, it has never been met — not even once.” On this account, if a facially neutral examination results in the elimination of minorities from the pool of those eligible to be considered for employment, in the absence of evidence that the exam was administered for the purpose of excluding minorities, there is no constitutional injury.

Taken together, the Court’s disparate impact and affirmative action jurisprudence reflects broad skepticism of efforts to redress racial injustices. More importantly, it reflects an approach to racial liability that is utterly at odds with the spirit of the Box concurrence. In Box, much of

478 Ian Haney-López, Intentional Blindness, 87 N.Y.U. L. REV. 1779, 1826 n.202 (2012) (“Though Powell cast the decisive vote upholding the challenged program, he did so only after holding that strict scrutiny should apply. Making this victory even more costly, Powell went on to hold that the government’s sole cognizable interest lay in increasing diversity in the classroom.”).
479 488 U.S. 469.
480 See id. at 494 (plurality opinion); id. at 520 (Scalia, J., concurring in the judgment).
481 See Haney-López, supra note 478, at 1783, 1832.
482 Id. at 1783.
483 See id.
484 Id.
485 Id.
486 Id. at 1806.
Justice Thomas’s evidence of abortion’s “eugenic potential” flows from the disproportionate incidence of abortion within the Black community. Yet, in other contexts — capital punishment, employment — the disparate impact of race-neutral laws on racial minorities, by itself, is insufficient to establish an equal protection violation. Justice Thomas underscored this point just four years prior to Box in Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc. There, Justice Thomas maintained that “[a]lthough presently observed racial imbalance might result from past [discrimination], racial imbalance can also result from any number of innocent private decisions.”

And perhaps perversely, in a footnote in the Box concurrence, Justice Thomas reiterated this view, staunchly asserting that “[b]oth eugenics and disparate-impact liability rely on the simplistic and often faulty assumption that ‘some one particular factor is the key or dominant factor behind differences in outcomes.’”

But, curiously, even as he cautioned against “automatically presum[ing] that any institution with a neutral practice that happens to produce a racial disparity is guilty of discrimination,” Justice Thomas had no trouble associating disproportionately high rates of abortion in the Black community with eugenics and the desire to limit Black reproduction. This type of cognitive dissonance highlights the flaws in Justice Thomas’s selective invocation of racial inequity: he rejects the notion that racism is to blame for racially imbalanced outcomes even as he, in the context of abortion, defends it as the most likely cause of racial imbalance.

But it is not just that Justice Thomas’s interest in making eugenics part of the racial context of abortion is opportunistic and inconsistent; it is that the understanding of race that undergirds Justice Thomas’s Box concurrence reinforces a particular vision of racism and racial injury and liability that the Court, in recent years, has prioritized. Recall the earlier discussions of Ramos v. Louisiana and Trump v. Hawaii.

---

487 See id. at 1806, 1846.
491 Id. (quoting Inclusive Cmty. Inc., 135 S. Ct. at 2530 (Thomas, J., dissenting)).
492 Id. at 1791.
where the Court abandoned two earlier decisions in part because of concerns about racism.\(^{493}\) Critically, in these two cases, it was not simply that the Court used race and racism as a justification for departing from precedent, but rather that, in doing so, the Court reaffirmed a particular understanding of the kinds of racial injuries that are constitutionally cognizable.

In *Trump v. Hawaii*, the Court consigned *Korematsu* to constitutional law’s anticanon;\(^{494}\) however, in doing so, it also underscored color-blind constitutionalism’s view that only discrete acts of intentional discrimination constitute racial injuries redressable under the Constitution.\(^{495}\) Specifically, *Trump v. Hawaii* repudiated *Korematsu’s* intentional discrimination against those of Japanese descent,\(^{496}\) while simultaneously rejecting the notion that President Trump’s inflammatory statements about Muslims — statements made just months before the issuance of the challenged travel ban — could serve as evidence that the ensuing prohibitions on Muslims entering the country reflected discriminatory animus.\(^{497}\) On this telling, the Court acknowledged that *Korematsu* reflected a clear intent to discriminate, but concluded that the challenged travel ban — the Administration’s third version of the prohibition\(^{498}\) — was entirely disconnected, both temporally and in terms of purpose, from the President’s earlier statements and thus was “facially neutral.”\(^{499}\)

In this way, in *Trump v. Hawaii*, race served as a “special justification” that warranted repudiating *Korematsu*. However, even as the Court disavowed *Korematsu*, it also articulated a new conception of racial injury — one in which a cognizable injury exists only upon a showing of racist intent that is clearly and closely connected to the challenged policy. The invocation of race to reconsider an earlier decision also furnished the Court with an opportunity to lay down a new precedent — one that entrenched this crabbed understanding of racial injury and racial liability.

Likewise, in *Ramos*, race served as a vehicle for reconsidering and overruling *Apodaca*. But, unlike *Trump v. Hawaii*, where the Court determined that there was no nexus between the President’s anti-Muslim statements and the challenged executive order, the Court in *Ramos* saw a clear connection between Louisiana’s postbellum interest

---

\(^{493}\) See supra pp. 2079–83.


\(^{495}\) Id.

\(^{496}\) Id.

\(^{497}\) See id. at 2417–18, 2420–23.

\(^{498}\) See id. at 2403–04.

\(^{499}\) See id. at 2418.
in preserving white supremacy and the nonunanimous jury rule.\textsuperscript{500} In this regard, \textit{Ramos} echoed \textit{Brown}'s rejection of \textit{Plessy} and separate but equal. Put differently, the racialized harm to be remedied in \textit{Ramos} was obvious, long-standing, and expressly stated in the legislative record. It was a clear-cut case of discriminatory intent that was obviously connected to the challenged policy. And in recognizing this history as problematic,\textsuperscript{501} the \textit{Ramos} Court reinforced the notion that the racial injuries are constitutionally cognizable when they rest on obvious expressions of discriminatory intent. In \textit{Ramos}, as in \textit{Trump v. Hawaii}, the effort to redress a racial injustice brings with it the opportunity to reiterate and embed an understanding of racial injury and liability that is limited to discrete acts of intentionally discriminatory conduct.

All of this is deeply concerning — for \textit{Roe} and the future of abortion rights \textit{and} for the Court's prior precedents on race and racial discrimination. The \textit{Box} concurrence makes clear that there is play in the joints as to what constitutes racial harm and racial liability. In this regard, the \textit{Box} concurrence offers the Court different ways to use race to shape its jurisprudence. First, and most obviously, race can be used as a trigger for overriding stare decisis and reconsidering past precedents. Second, in serving as the trigger that prompts the reconsideration of past precedent, race can provide the Court with an opportunity to reconceptualize the nature of the injury at the heart of the case in question. On this telling, the invocation of race to reconsider \textit{Roe} also will transform the social meaning of abortion from an exercise of individual autonomy to a collective racial injury. Finally, and perhaps most profoundly, by providing an opportunity to reconsider past precedent, race may also serve as the vehicle by which the Court may articulate new precedents — precedents that will guide and inform its understanding of race and racial injury going forward.

This last insight is especially important in understanding the \textit{Box} concurrence's relevance not only to the future of the Court's reproductive rights jurisprudence, but to its race jurisprudence as well. \textit{Roe v. Wade} is not the only contested precedent in the Court's jurisprudence. Indeed, across the Court's race jurisprudence, narratives about what race is and what constitutes a race-based injury are abundant — and more importantly, continually contested, even across established precedents. For example, in \textit{Shaw v. Reno},\textsuperscript{502} the Court emphasized an understanding of race as fixed and biological.\textsuperscript{503} By contrast, in \textit{Hernandez

\textsuperscript{500} \textit{Ramos} v. \textit{Louisiana}, 140 S. Ct. 1390, 1394 (2020).
\textsuperscript{501} See id. at 1401.
\textsuperscript{502} 509 U.S. 630 (1993).
\textsuperscript{503} See id. at 647.
v. Texas, 504 it presented race as a social construction. 505 In McCleskey v. Kemp, 506 the majority and the dissents bitterly debated the scope and nature of judicial inquiry into racial discrimination. 507 Likewise, in Grutter v. Bollinger, 508 the majority posited a vision of society in which racial progress was in process and ongoing. 509 Shelby County v. Holder, 510 by contrast, depicted American society as one in which the project of racial progress was largely complete. 511

As these examples suggest, throughout the Court’s jurisprudence, the question of whether and how to think about race is — and remains — bitterly contested. 512 This means that under the logic of the Box concurrence, the use of race as a justification for revisiting and overruling a prior decision may also yield an opening for the Court to reinforce a particular conception of race and racism that is internal to — and contested within — the Court’s race jurisprudence itself.

Critically, the Box concurrence’s racialized critique of abortion already evinces a particular conception of racism and racial harm. By its terms, it equates racism and racial injury with eugenics and genocide. It would be an understatement to say that there are few accounts of racism more egregious than the genocidal use of eugenics. Racialized eugenics underwrote the Holocaust, in which countless Jews were dispossessed of their property, imprisoned, and killed. 513 If eugenics is the marker by which we measure constitutionally cognizable racial injuries, then the bar is very high indeed. On this account, using eugenics as an exemplar of racial injury moves the needle from Jim Crow and de jure segregation — already deeply problematic episodes of racism — toward something even more extreme.

Highlighting the fact of more egregious forms of racism and racial injury — beyond Jim Crow and segregation — is not, by itself, objectionable. We should recognize racialized eugenics as a constitutionally cognizable injury where and when it occurs. The difficulty, though, is a question of constitutional meaning. In ratcheting up what it means to

---

505 See id. at 478.
507 See id. at 321–300; id. at 321–22, 325–35 (Brennan, J., dissenting); id. at 349–61 (Blackmun, J., dissenting).
509 Id. at 343.
511 Id. at 547–48.
experience racism and racial injury, we necessarily minimize the constitutional meaning and value we assign to other, less obviously egregious, forms of racism and racial harm. Again, the trajectory of constitutional colorblindness is instructive. Under the theory of constitutional colorblindness, evidence of disparate impact, absent a showing of discriminatory intent, is insufficient to trigger more searching equal protection review. In a world where the exemplar of discriminatory intent is the racialized use of eugenics, claims of disparate impact may be pushed even further to the periphery. Put differently, in equating racism and racial injury with the horrors of eugenics and genocide, the Box concurrence’s racialized narrative underscores the view that the only kinds of racial injuries for which the Constitution offers redress are the exceptionally evil, intentional incidences of clear racial animus. Garden variety, “second-generation” discrimination slips beneath the surface — insufficiently egregious and thus constitutionally uncognizable.

With this in mind, the Box concurrence’s association of race, abortion, and eugenics is incredibly consequential on a number of fronts. As the foregoing discussion makes clear, it is not merely an invitation to recast abortion as an issue of racial injustice; it is also an invitation to entirely reconceptualize the meaning of race and racism.

**CONCLUSION**

On July 21, 2020, Planned Parenthood of Greater New York (PPGNY) announced its plans to remove Margaret Sanger’s name from its Manhattan Health Center as part of its “public commitment to reckon with its founder’s harmful connections to the eugenics movement.” The change, which grew out of a three-year reproductive justice–framed dialogue between the group and 300 community members, was “a necessary and overdue step to reckon with our legacy and acknowledge Planned Parenthood’s contributions to historical reproductive harm within communities of color.”

Critically, PPGNY’s announcement came just a year after Justice Thomas’s Box concurrence interposed the issues of eugenics and racial selection into the abortion debate, and three weeks after the Court announced *June Medical Services v. Russo*, its most recent abortion decision, where it adverted to stare decisis to strike down a Louisiana admitting privileges law.

---

514 See Haney-López, supra note 478, at 1784.
517 Id.
The connections between PPGNY’s announcement, the *Box* concurrence, and *June Medical Services* are not immediately obvious. But, as this Article maintains, under the logic of the *Box* concurrence, one can draw a straight line from Margaret Sanger and eugenics to the “special justification” necessary to set aside stare decisis and reconsider a past precedent like *Roe v. Wade*. In this regard, the *Box* concurrence’s conflation of abortion, eugenics, and racial injury has harnessed the narrative and logic of reproductive justice and deployed it for its own ends.

But to be sure, the dismantling of abortion and reproductive rights is not the only likely casualty of the *Box* concurrence and its narrative of racial injury. If race furnishes an opportunity for the Court to consider an earlier decision afresh, then it also furnishes an opportunity to generate new precedents that articulate and embed a specific conception of race and racial harm. In this regard, the *Box* concurrence contains not only the germ of a new campaign to topple *Roe v. Wade*, but the means by which the Court may continue to sow the seeds of a more parsimonious vision of racial justice.
WHY RESTRICT ABORTION? EXPANDING THE FRAME ON JUNE MEDICAL

As the Supreme Court prepares to roll back protections for the abortion right, this Article analyzes the logic of pro-life constitutionalism in June Medical Services L.L.C. v. Russo.¹

I expand the frame on June Medical to examine the logic of women-protective health-justified restrictions on abortion.² Do these laws protect women or the unborn—and how? By considering the history of the law at issue in June Medical and locating it in broader policy context, we can see how legislators who restricted abortion to protect women’s health equated women’s health with motherhood; they supported laws that push women into motherhood while declining to enact laws that provide for the health of pregnant women and the children they might bear.³

¹ 140 S. Ct. 2103 (2020).
² See infra Section II.B.
³ See infra Section II.C.

Reva B. Siegel is Nicholas de B. Katzenbach Professor of Law, Yale University.

Author’s note: For comments on the manuscript, I owe thanks to Cary Franklin, Linda Greenhouse, Melissa Murray, Douglas NeJaime, David Strauss, Geoffrey Stone, Julie Suk, and Bridget Fahey and participants in the University of Chicago Law School Constitutional Law Workshop. I am especially grateful to Duncan Hosie and Chelsea Thompson, as well as to Joshua Feinzig, Jordan Jefferson, Spurthi Jonnalagadda, Zain Lakhani, and Akanksha Shah, for research assistance and conversation about the article.
pro-life law shows us sex-role stereotyping in action, and demonstrates the intersectional injuries it can inflict.

From this vantage point, we can see that judges who refuse to scrutinize pro-life law making—on the grounds that it would involve judges in politics—help legitimate the claims about protecting women’s health that supposedly justify the abortion restrictions, while revising the meaning of the Constitution’s liberty and equality guarantees. Reading the doctrinal debate in *June Medical* in this context identifies open and hidden efforts to roll back protections for the abortion right—and suggests how the Supreme Court that President Donald Trump helped fashion values women, health, life, truth, and democracy.

At the root of the conflict in *June Medical* is a question we might ask in many contexts. What does it mean to be pro-life? During a 2020 campaign debate, Senator Kamala Harris warned voters that “Donald Trump is in court right now trying to get rid of the Affordable Care Act” “in the midst of a public health pandemic when over 210,000 people have died and 7 million people probably have what will be . . . a preexisting condition because [they] contracted the virus. . . .” Vice President Mike Pence countered this attack on his administration’s health care policies by emphasizing its appointment of judges who oppose abortion: “I couldn’t be more proud to serve as vice president to a president who stands without apology for the sanctity of human life. I’m pro-life,” a claim he substantiated by appeal to the administration’s last Supreme Court nomination, “For our part, I would never presume how Judge Amy Coney Barrett would rule on the Supreme Court of the United States, but we’ll continue to stand strong for the right to life.”

Neither Harris nor Pence connected judgments about abortion and healthcare during the pandemic, but many others have. It is becoming increasingly common to probe commitments in the abortion debate by asking whether they extend to other contexts. Conservatives who oppose mask and shutdown orders have advanced their freedom claims in the abortion rights context by arguing that

---

4 See infra Sections III.A, III.B.


6 Id.
lifers are inconsistent in their commitment to liberty. Representative Marjorie Taylor Greene attacked the House’s mask rule by tweeting “my body, my choice,” just as chants, signs, and T-shirts at shutdown protests have echoed the abortion rights slogan. Claims about inconsistency run both ways. Critics of the Trump administration’s public health response to the pandemic have regularly challenged its claim to be “pro-life.” (Try searching “pro-life pandemic.”)

We understand Pence’s claim that he is “pro-life” and his pride in serving “as vice president to a president who stands without apology for the sanctity of human life” one way when we analyze abortion in a single-issue frame—and in another we expand the frame to compare the Administration’s policy choices about abortion with its other policy choices about life and health. Expanding the frame and comparing the policy choices of pro-life advocates inside and outside the abortion debate can clarify beliefs and values espoused in the


abortion debate, as I have argued in a study of the policy choices of pro-life states.\textsuperscript{10}

By expanding the frame on \textit{June Medical Services L.L.C. v. Russo},\textsuperscript{11} this Article analyzes the Supreme Court’s emerging approach to restrictions on abortion that claim to be woman-protective and health-justified. These laws, called by critics Targeted Regulations on Abortion Providers (TRAP laws), impose on abortion providers burdensome health and safety regulations not imposed on other medical practices of similar or even greater risk.\textsuperscript{12} Health-justified abortion restrictions defy simple characterization, as the laws on their face restrict abortion to protect women rather than the unborn. To analyze the constitutional questions these abortion restrictions pose, I begin inside Supreme Court case law; I then expand the frame to consider the law at issue in \textit{June Medical} in larger historical and policy context, and I then bring this external perspective to bear on the Justices’ reasoning in the case. By examining the judgments about women and health driving passage of the law in \textit{June Medical}, we can better assess the practice of constitutionalism that would immunize this exercise of state power from judicial review.

With the Supreme Court’s composition transformed by pro-life appointments, the Court seems poised to change its approach to reviewing abortion restrictions, and this change in composition plays a prominent role in \textit{June Medical} itself.\textsuperscript{13} In 2016 in \textit{Whole Woman’s Health v. Hellerstedt},\textsuperscript{14} the Supreme Court found a Texas law requiring abortion providers to have admitting privileges at a hospital within 30 miles to be an undue burden under \textit{Planned Parenthood v. Casey},\textsuperscript{15} reasoning that the law’s health benefits were negligible in comparison to the burdens on access the law imposed by closing many of the state’s

\begin{footnotesize}
\textsuperscript{10} See Reva B. Siegel, \textit{ProChoiceLife: Asking Who Protects Life and How—and Why It Matters in Law and Politics}, 93 Ind. L.J. 207, 207 (2018) (“If we expand the frame and analyze restrictions on abortion as one of many ways government can protect new life, we observe facts that escape notice when we debate abortion in isolation.”); \textit{id}. at 209 (“[M]any prolife jurisdictions lead in policies that restrict women’s reproductive choices and lag in policies that support women’s reproductive choices. Comparing state policies in this way makes clear that the means a state employs to protect new life reflects views about sex and property, as well as life.”).

\textsuperscript{11} 140 S. Ct. 2103 (2020).

\textsuperscript{12} See \textit{infra} notes 133–35 and accompanying text.

\textsuperscript{13} \textit{See infra} Section I.A.

\textsuperscript{14} 136 S. Ct. 2292 (2016). \textit{See infra} Section I.A.

\textsuperscript{15} 505 U.S. 833, 877 (1992).
\end{footnotesize}
clinics. In 2020 in June Medical, decided after Justice Kennedy retired, the four justices who voted to strike down the Texas law in Whole Woman’s Health voted to strike down the Louisiana law modeled on it under the same standard. Chief Justice Roberts, who dissented in Whole Woman’s Health, concurred in striking down the Louisiana law on grounds of stare decisis, but then joined the June Medical dissenters in attacking the plurality’s “balancing” standard as requiring judges to make “legislative” judgments faithless to Casey.

As this claim suggests, the fight over balancing is a fight about whether a Supreme Court transformed by pro-life appointments will dilute the protections Casey provides for decisions about abortion. The standard that conservatives attacked, which directs judges to compare the benefits of a health-justified abortion restriction to the law’s burdens in closing clinics, is one way of determining the purpose of health laws—TRAP laws—that impose burdensome restrictions on abortion.

Why would legislatures adopt these indirect means of restricting access to abortion, and why would judges insulate legislative subterfuge from scrutiny? To answer these questions, I expand the frame and examine the debate over health-justified restrictions on abortion in wider historical and social context.

To examine the roots and logic of the admitting privileges restrictions at issue in Whole Woman’s Health and June Medical, I return to the 1990s, a time when the nation was coming to understand women as constitutional rights holders differently than at the time of Roe. I show how emergent understandings of women as equal citizens shaped the ways the Supreme Court revised the law governing abortion in Casey and the ways the antiabortion movement struggled to restrict abortion in Casey’s wake. Appropriating feminist frames, the antiabortion movement called this new generation of health-justified abortion restrictions pro-woman, pro-life laws. As movement sources show, pro-woman, pro-life laws restrict abortion to protect a pregnant woman’s health and to protect unborn life, reasoning from the traditional sex-role-based assumption that becoming a mother promotes

---

16 Whole Woman’s Health, 136 S. Ct. at 2311, 2313 (noting that the Texas law did not “advance[] Texas’ legitimate interest in protecting women’s health” and “led to the closure of half of Texas’ clinics, or thereof”).

17 See infra Sections I.B, III.B.

18 Roe v. Wade, 410 U.S. 113 (1973). See infra Sections II.A, II.B.
a woman’s “health.”\textsuperscript{19} This historical perspective on the \textit{June Medical} case makes clear why the admitting privileges statute and other health-justified restrictions on abortion implicate both the liberty and equality guarantees of federal and state constitutions.

I then analyze the traditional sex-role-based judgments the admitting privileges law enforced from a second vantage point. I expand the frame and examine how Louisiana protected women’s health inside and outside the abortion context. At the same time as advocates for the admitting privileges statute spoke of the importance of protecting women’s health and protecting life, the state enforced policies contributing to the state’s exceedingly high maternal mortality and infant mortality rates.\textsuperscript{20} We can read this disjuncture in policies as evidence that role-based judgments are in play and as an illustration of the harms these judgments can inflict, especially when directed against poor women of color.

Pro-life advocates who act from concern about intentional life-taking without a commitment to support life more generally may be prepared to impose costs on those they see as caregivers that the advocates are not prepared to impose on others or on the community as a whole. As we will see, pro-life advocacy of this kind is suspiciously selective, more concerned with control than care, and susceptible to status-based judgments when aimed at poor women and women of color. Not surprisingly, people and jurisdictions can express pro-life commitments for different reasons, and not all are simple expressions of care.

In short, expanding the frame allows us to be more discriminating in evaluating claims about protecting women and protecting life in the abortion debate. Expanding the frame on Louisiana’s pro-woman pro-life law teaches us what sex-role stereotyping looks like in a wider range of contexts and demonstrates the intersectional injuries it can inflict.

It is only after examining the logic of the pro-woman, pro-life law at issue in \textit{June Medical} that we can fully appreciate the doctrinal debate in the case. Examining \textit{June Medical} in wider historical and policy context, we can see how the Justices who denounce balancing as legislative rather than judicial are directing judges to defer to state

\textsuperscript{19} See infra Sections II.B (examining national movement), II.C.1 (examining legislative record in Louisiana).

\textsuperscript{20} See infra Section II.C.2.
claims about health. This adds the courts’ imprimatur to modern forms of protectionism that inflict physical and dignitary injuries on poor women. The Justices who denounce balancing as legislative rather than judicial are engaged in a political project at the very moment they claim to be avoiding entanglement in politics.\(^{21}\) Far from promoting democracy, judicial review of this kind undermines democracy by preventing robust debate over the constitutional, political, and human stakes of the questions raised by public power of this kind.

As we expand the frame on *June Medical*, we see courts, the very institutions we rely on to warrant facts amidst claims of fake news, promoting the confusion of facts and values in the abortion debate. Excavating the story of *June Medical* in the midst of debate about the 2020 election and the greatest pandemic in a century, I found that the distinction between background and foreground too often disappeared, as claims about truth, lies, democracy, life, and health ricocheted between them. In this story, the Roberts Court too often acts as the Trump Court in the ways it protects life.

Part I shows how President Trump’s promise to nominate pro-life judges shaped the Supreme Court that decided *June Medical*, its membership continuing to evolve as President Trump replaced Justice Ruth Bader Ginsburg with Justice Amy Coney Barrett in the midst of the 2020 election. Part II expands the frame and situates the doctrinal debate in *June Medical* in historical and policy contexts. Part III returns to the terrain of doctrine and analyzes the Court’s debate over balancing with attention to the kinds of pro-life lawmaking that federal judges will scrutinize or legitimate.

I close Part III by considering how the abortion question stands as Justice Barrett takes Justice Ginsburg’s seat. Justice Barrett has already cast a vote in *Food and Drug Administration v. American College of Obstetricians.*\(^{22}\) She was silent as the conservative majority allowed the federal government to enforce a TRAP regulation requiring women to travel to access medication abortion in the midst of the pandemic,\(^{23}\) prompting Justices Sotomayor and Kagan to conclude their dissent in the words of Justice Ginsburg.\(^{24}\) As an advocate and a Justice, Ginsburg understood the Constitution’s guarantees of liberty and equality

---

\(^{21}\) *See infra* Sections III.A, III.B.

\(^{22}\) 141 S. Ct. 578 (2021) (mem.).

\(^{23}\) *See infra* Section III.C.1; text accompanying notes 313–27.

\(^{24}\) *See infra* text accompanying note 327.
to limit the ways that government can regulate pregnant women. By considering the limits on coercion that Justice Ginsburg long defended, we can begin to appreciate how the abortion decisions of Justice Barrett and other conservative Justices may change the meaning of constitutional principles and the forms of constitutional protection generations of Americans have looked to the Court to enforce.25

Courts do not always have the last word. As I show, frame expansion is now a regular part of the abortion debate and may enable the public to probe the logic of abortion restrictions when federal courts no longer will. The Conclusion reflects on the ways this debate about the meaning of pro-life law has exploded in the era of the pandemic.

I. The Question in June Medical

Change in abortion law is imminent. After promising “I am pro-life, and I will be appointing pro-life judges” who will return broad power over abortion law to the states,26 President Trump seated three justices on the Supreme Court with the goal of weakening, or eliminating, a half century of law that protects women’s liberty to decide whether to continue a pregnancy—a constitutional guarantee first announced in Roe and reaffirmed in 1992 in Casey. Through appointments battles that were each distinctively tumultuous, Justice Gorsuch took Justice Scalia’s seat, Justice Kavanaugh took Justice Kennedy’s seat, and Justice Amy Coney Barrett took Justice Ginsburg’s seat.27

21 See infra Sections III.C.2, III.C.3.


27 See Amelia Thomson-DeVeaux, Laura Bronner & Anna Wiederkehr, What the Supreme Court’s Unusually Big Jump to the Right Might Look Like, FiveThirtyEight (Sept. 22, 2020),
June Medical is a symptom of these shifts in the Supreme Court’s composition. I first consider the question in *June Medical* as a question about the way a court functions through changes in its composition and then consider how the dispute over legal standards in the case is tied to the evolving shape of the abortion conflict.

**A. Which Court? How Trump’s Appointments Change the Court’s Mind**

The question in *June Medical* was whether an abortion restriction the Court declared unconstitutional in 2016 in *Whole Woman’s Health* would remain unconstitutional after President Trump replaced Justice Kennedy, who voted with the majority in *Whole Woman’s Health*, with Justice Kavanaugh. 28 To determine whether the restriction imposed an undue burden having the purpose or effect of creating a substantial obstacle to abortion access under *Casey*, 29 the Court ruled in *Whole Woman’s Health* that a judge should compare the benefits of the law to the burdens on access its enforcement posed. 30 In 2020, in *June Medical*, the four justices who voted to strike down the Texas admitting privileges law evaluated the Louisiana law under the same standard; Chief Justice Roberts, who dissented in *Whole Woman’s Health*, concurred in striking down the Louisiana law on grounds of stare decisis but then joined the dissenters in attacking the plurality’s “balancing” standard as requiring judges to make “legislative” judgments faithless to *Casey*. 31 “Nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts,” Roberts objected. 32

Debate about whether Chief Justice Roberts had changed the law had barely begun when President Trump seized the opportunity of

---

28 Sheryl Gay Stolberg, *Kavanaugh Is Sworn in After Close Confirmation Vote in Senate*, N.Y. Times (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html. This was not the first time a change in the Supreme Court’s composition led to a change in abortion law. See Geoffrey Stone, *Sex and the Constitution* 427 (2017) (discussing how shifts in the Court’s composition led to the Court’s decision in Gonzales v. Carhart, 550 U.S. 124 (2007)).


30 See infra Section I.B.

31 See infra Sections I.B, III.B.

Justice Ruth Bader Ginsburg’s passing to appoint, in the midst of mail-in and early voting for the presidential election, Justice Amy Coney Barrett. Vice President Pence pointed to Barrett as proof that his administration “stand[s] strong for the right to life.” Barrett had signed published statements making clear her strong opposition to abortion and “the Supreme Court’s infamous Roe v. Wade decision” and calling “for the unborn to be protected in law,” she had questioned the power of stare decisis to bind the Court, and she had voted to uphold abortion restrictions during her brief tenure on the Seventh Circuit.

Several courts had already ruled that Chief Justice Roberts’s opinion had modified the Whole Woman’s Health framework even before the nomination of Justice Barrett emboldened others to call for yet more dramatic changes in the Court’s approach to health-justified restrictions on abortion. Only hours after Republicans on the Senate Judiciary Committee voted to approve Barrett’s nomination to the Supreme Court, the Mississippi attorney general filed a supplemental brief urging the Court to review a Fifth Circuit decision striking down the state’s 15-week health-justified abortion ban, “a case that directly challenges Roe v. Wade and has the potential to reverse the landmark 1973 decision.” The supplemental brief

---


34 Comm’n on Presidential Debates, supra note 5.


36 See Hopkins v. Jegley, 968 F.3d 912 (8th Cir. 2020); EMW Women’s Surg. Ctr. v. Friedlander, 978 F.3d 418 (6th Cir. 2020); see also infra Section III.B. But see Whole Woman’s Health v. Paxton, 972 F.3d 649 (5th Cir. 2020).

pointed to the division of authority on how to read *June Medical* as raising the question “[w]hether the validity of a pre-viability law that protects women’s health, the dignity of unborn children, and the integrity of the medical profession and society should be analyzed under *Casey*’s ‘undue burden’ standard or *Hellerstedt*’s balancing of benefits and burdens.”

B. BALANCING? THE QUESTION POSED BY WOMAN-PROTECTIVE ABORTION RESTRICTIONS

To understand the dispute in and about *June Medical*—that is, to understand why conservatives on and off the Court have attacked “*Hellerstedt*’s balancing of benefits and burdens”—one has to ask a simple question: why restrict abortion? There is a stock answer to this question, so conventional in the abortion debate it passes without notice: states restrict abortion out of concern for unborn life. But observe that states justified their admitting privilege laws in *Whole Woman’s Health* and *June Medical* on the grounds that the laws protected women’s health, not unborn life or its potentiality. It is now common for states to defend burdensome and clinic-closing restrictions on abortion as health and safety laws that protect women rather than the unborn. Is the claim to protect women’s health

---


39 Id.

40 See *Roe v. Wade*, 410 U.S. 113, 159 (1973) (“It is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman’s privacy is no longer sole and any right of privacy she possesses must be measured accordingly.”).

41 See Brief for Respondents at 31, Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15–274) (“Nothing close to clear proof of an unconstitutional purpose exists. . . . [Texas’] HB2 was enacted to ‘increase the health and safety’ of abortion patients and provide them with ‘the highest standard of health care.’” (citation omitted)); Brief in Opposition at 9, *June Med. Servs. L.L.C.* v. Russo, 140 S. Ct. 2103 (2020) (No. 18–1323) (asserting “that [Louisiana] Act 620’s hospital admitting-privileges requirement would address serious safety concerns relating to the lack of any meaningful credentialing review of doctors who provide abortions in Louisiana”).

credible? Why would it matter if, instead, the state sought to protect potential life, given that this purpose is generally thought to be benign, or even sacred?2

This is the question lurking beneath the debate over doctrinal standards in June Medical. Writing for the June Medical plurality, Justice Breyer explained that the standard of review the Court employed in Whole Woman’s Health derived from the Court’s prior decisions in Casey and Gonzales v. Carhart:43

In Whole Woman’s Health, we quoted Casey in explaining that “‘a statute which, while furthering [a] valid state interest has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.’” [Whole Woman’s Health] at 2309 (quoting Casey). We added that “‘[Un]necessary health regulations’ impose an unconstitutional ‘undue burden’ if they have ‘the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion.’” [Whole Woman’s Health] at 2309 (quoting Casey).44

To enforce Casey’s standard, the plurality explained, Whole Woman’s Health directed courts to “consider the burdens a law imposes on abortion access together with the benefits those laws confer,” and emphasized that courts “‘retain[n] an independent constitutional duty to review factual findings where constitutional rights are at stake.’”45

Why does Whole Woman’s Health (1) direct judges to enforce Casey’s standard by considering the burdens and benefits of a health regulation and (2) reaffirm Carhart’s direction that the courts “‘retain[n] an independent constitutional duty to review factual findings where constitutional rights are at stake’”?46

Much of this law is concerned with probing purpose.46 Is a legislature using a health regulation to obstruct access to abortion in ways that Casey proscribes?47 The framework Whole Woman’s Health adopted for enforcing Casey’s undue burden standard enables a judge to determine, as Casey requires, whether a legislature enacted a health

---

43 Id. (quoting Whole Woman’s Health, 136 S. Ct. at 2310, 2324 (quoting Gonzales, 550 U.S at 165)).
46 See infra Section III.A.
47 See infra Section II.A.
regulation with the purpose or effect of imposing a substantial obstacle to abortion without entering into potentially protracted and inflammatory disputes about characterizing the purposes of legislatures that restrict abortion access.\footnote{For an example of such an exchange, see infra text accompanying notes 377–79 (reporting heated exchange in the Fifth Circuit between Judge Carlton Reeves and Judge James Ho).}

For empowering judges to enforce \textit{Casey’s} undue burden standard by means that avoided impugning a legislature’s purpose, Justice Breyer was attacked by Justice Thomas, who claimed in his \textit{Whole Woman’s Health} dissent that “the majority’s free-form balancing test is contrary to \textit{Casey}”\footnote{\textit{Whole Woman’s Health}, 136 S. Ct. at 2324 (Thomas, J., dissenting).} and asserted that the “Court should abandon the pretense that anything other than policy preferences underlies its balancing of constitutional rights and interests in any given case.”\footnote{\textit{Id.} at 2328. Justice Thomas also proffered a reading of the abortion cases as governed by rational basis review, but then attacked the tiers of scrutiny as a judicial graft at odds with the original understanding. \textit{Id.} at 2323–31 (“A law either infringes a constitutional right, or not; there is no room for the judiciary to invent tolerable degrees of encroachment.”).} Chief Justice Roberts joined other conservatives in a dissent arguing that claim preclusion barred the Court’s consideration of the case.\footnote{\textit{Id.} at 2330 (Alito, J., dissenting).}

In \textit{June Medical}, Chief Justice Roberts voted to strike down Louisiana’s admitting privileges law on the ground that the Court should treat the Texas and Louisiana laws alike\footnote{\textit{Ju ne Med. Servs. L.L.C. v. Russo}, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring) (“The legal doctrine of stare decisis requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore Louisiana’s law cannot stand under our precedents.”).} but then incorporated into his concurring opinion a critique of the \textit{Whole Woman’s Health} decision drawn from Justice Thomas’s dissent in that case.\footnote{\textit{Cf. supra} text accompanying notes 49–50.} Chief Justice Roberts invoked stare decisis as a reason for enforcing precedent and as a reason for criticizing, and potentially revising, precedent: “\textit{Stare decisis} principles also determine how we handle a decision that itself departed from the cases that came before it. In those instances, ‘[r]emaining true to an ‘intrinsically sounder’ doctrine established in prior cases better serves the values of \textit{stare decisis} than would following’ the recent departure.”\footnote{\textit{June Med. Servs.}, 140 S. Ct. at 2134–35 (quoting \textit{Adarand Constructors, Inc. v. Peña}, 515 U.S. 200, 231 (1995) (plurality opinion)).} In Justice Roberts’s view, stare decisis did not
require “adherence to the latest decision,’” but might be used as an instrument of its revision.\textsuperscript{56}

Chief Justice Roberts employed his opinion proclaiming the importance of standing by Whole Woman’s Health to attack the decision’s direction to judges who are enforcing Casey’s undue burden standard to compare the burdens and benefits of a health-justified restriction on abortion:

[C]ourts applying a balancing test would be asked in essence to weigh the State’s interests in “protecting the potentiality of human life” and the health of the woman, on the one hand, against the woman’s liberty interest in defining her “own concept of existence, of meaning, of the universe, and of the mystery of human life” on the other. [Casey] at 851. . . . Pretending that we could pull that off would require us to act as legislators, not judges, and would result in nothing other than an “unanalyzed exercise of judicial will” in the guise of a “neutral utilitarian calculus.”\textsuperscript{57}

In this remarkable passage, Chief Justice Roberts employed his opinion explaining the importance of the Court standing by its decision in Whole Woman’s Health to argue that the direction Whole Woman’s Health provided judges to consider burdens and benefits of a health-justified abortion restriction was not rooted in Casey and was beyond a court’s competence because it was legislative rather than judicial in nature. The passage criticizing Whole Woman’s Health for lack of fidelity to Casey itself mocked Casey\textsuperscript{58} and raised questions about the scope of courts’ authority to enforce constitutional law protecting women’s decisions about abortion. Was the Chief Justice following Whole Woman’s Health and Casey—or instead rewriting

\textsuperscript{56} Id. at 2135 (“Stare decisis is pragmatic and contextual, not ‘a mechanical formula of adherence to the latest decision.’” (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940))). See Melissa Murray, Comment, The Symbiosis of Abortion and Precedent, 134 Harv. L. Rev. 308, 325 (2020) (arguing that “Chief Justice Roberts’s respect for precedent depended entirely on identifying those aspects of past decisions that he wished to follow and those that he did not”).

\textsuperscript{57} This is not unprecedented in the Court’s abortion cases, as Melissa Murray has observed. See Murray, supra note 55, at 327 (“In this politically pitched context, the Court has developed an approach to precedent that at once has generated important, and often incremental, doctrinal changes and simultaneously preserved the appearance of fealty to its past decisions. In these cases, the Court has distinguished and cabined earlier decisions, forging a line of jurisprudence that entrenches the abortion right while sharply limiting its scope.”). For a close reading of the ways that Chief Justice Roberts’ concurrence in June Medical sought to revise Casey, see infra text accompanying notes 247–53 and Section III.B.

\textsuperscript{58} June Med. Servs., 140 S. Ct. at 2135–36 (citations partially omitted).

\textsuperscript{} See infra text accompanying notes 249–51.
them? Commentators in the wake of the decision immediately divided about its meaning and portents.⁵⁹

Even if changes in the composition of the Court have undermined Chief Justice Roberts’s power to control the direction of its abortion decisions, it remains important to answer the questions he raised about law governing woman-protective abortion restrictions. His opinion channeled conservative objections to law governing health-justified restrictions on abortion under Casey and subsequent decisions and so promises to play a role in coming cases, given the many statutes restricting abortion in the name of protecting women’s health that will be reviewed in federal and state courts.⁶⁰

Is there a constitutional problem if health-justified restrictions on abortion in fact reflect concern about the unborn rather than women?⁶¹ Is there a constitutional problem if laws restricting abortion reflect concerns about women as they claim to—but the claims about women’s health instead express views about women’s roles?⁶² Are all reasons for restricting abortion equally benign, or are some constitutionally suspect?

II. Casey: Liberty, Equality, and the Turn to Health-Justified Abortion Restrictions

To surface the constitutional conflict lurking beneath arguments over balancing, I look back at the path from Casey to the

---


⁶⁰ See infra Sections III.A, III.B.

⁶¹ See O. Carter Sneed, The Way Forward After June Medical, FIRST THINGS (July 4, 2020), https://www.firstthings.com/web-exclusives/2020/07/the-way-forward-after-june-medical (reviewing June Medical and observing “[w]e have no choice but to continue to fight for the lives and dignity of these most vulnerable members of the human family”).

⁶² See id. (reviewing June Medical and observing “there is powerful evidence available that women have not, in fact, structured their lives around the freedom to choose abortion, nor does their flourishing depend on it”).
admitting privileges cases. This retrospective serves at least two purposes. It revisits the Court’s decision to narrow and to reaffirm the abortion right in *Casey*, identifying the constitutional reasons the Court adopted the undue burden standard. And it reconstructs how, in the years after *Casey*, arguments against abortion increasingly focused on protecting women.

I show how in the 1990s, abortion jurisprudence and antiabortion advocacy in fact evolved together in response to an emergent understanding of women as equal rights-holders in the American constitutional order. This account suggests why, in the years after *Casey*, a movement calling itself “pro-life” increasingly came to call itself “pro-woman” and to advocate women’s-health-justified restrictions on abortion, and how *Casey* speaks to this body of law.

One can see the Court and the antiabortion movement grappling with the same currents in Americans’ understanding of abortion twenty years after *Roe*. But one can also read in these developments the antiabortion movement’s self-conscious efforts to reshape its arguments and tactics in response to the *Casey* decision in an effort to narrow and evade *Casey*’s constraints in a world where appearing to respect women’s rights and welfare matters.

After showing why health-justified restrictions on abortion spread in the years after *Casey*, I demonstrate how these national developments shape the passage and defense of the Louisiana law at issue in *June Medical*. Tracing the development of the laws the Court reviewed in *Whole Woman’s Health* and *June Medical* shows the many ways that pro-woman, pro-life laws violate *Casey* and the understanding of the Constitution’s liberty and equality guarantees it vindicates. This encounter with pro-woman, pro-life law vividly demonstrates the constitutional, political, and human stakes of the fight over “balancing,” which we will return to in Part III.

A. UNDUE BURDEN: THE CONSTITUTIONAL VALUES

THE CASEY PRINCIPLE VINDICATES

In 1992, the Supreme Court was widely expected to reverse its decision protecting women’s decisions about abortion; instead, the Court’s decision in *Casey* reaffirmed and narrowed *Roe*. The framework the Court adopted in *Casey* was responsive to contending

---

movement claims about the importance of protecting unborn life and about the importance of protecting women’s decisions about abortion.\footnote{Greenhouse & Siegel, supra note 42, at 1436.}

Unlike Roe, Casey allowed states to restrict abortion in the interest of protecting potential life before viability,\footnote{Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873 (1992) (criticizing Roe as it “undervalues the State’s interest in the potential life within the woman” in practice).} but only so long as government protected potential life by means of persuading women, not obstructing or coercing them. This is the core principle that the undue burden standard enforces—why the undue burden standard is concerned with substantial obstacles to the exercise of free choice. The joint opinion defined an “undue burden” as “a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”\footnote{Id. at 877.} It explained: “A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it.”\footnote{Id. See also id. (“Some guiding principles should emerge. What is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose.”).}

Before viability, any constraints on a woman’s access to abortion must be designed to “inform” and not “hinder” a woman’s free choice—to persuade, not interfere, obstruct, or coerce. The principle that government could “inform, not hinder” a woman’s choice meant that government could impose some regulatory burdens in the effort to dissuade a woman from ending a pregnancy but only insofar as the law’s purpose was to persuade.\footnote{Id. at 878 (“[T]he State may take measures to ensure that the woman’s choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.”); see also Greenhouse & Siegel, supra note 42, at 1439–40.}

The joint opinion extended the same framework to health-justified restrictions on abortion: “As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on

\addcontentsline{toc}{section}{Notes}
\footnotetext{Greenhouse & Siegel, supra note 42, at 1435 & n.34.}
\footnotetext{Greenhouse & Siegel, supra note 42, at 1436.}
\footnotetext{Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873 (1992) (criticizing Roe as it “undervalues the State’s interest in the potential life within the woman” in practice).}
\footnotetext{Id. at 877.}
\footnotetext{Id. See also id. (“Some guiding principles should emerge. What is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose.”).}
\footnotetext{Id. at 878 (“[T]he State may take measures to ensure that the woman’s choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.”); see also Greenhouse & Siegel, supra note 42, at 1439–40.
the right.”69 The joint opinion defined Casey’s undue burden standard through a principle designed to preserve constitutional protections for liberty—for women’s right to choose—at the heart of Roe.70

Yet the Court’s understanding of liberty had evolved. Two decades after Roe, Casey informed constitutional protections for women’s right to choose with an understanding of women’s equal citizenship that was only emergent at the time of Roe.71 The Court handed down Roe just before the Court extended equal protection to sex discrimination in Frontiero v. Richardson72 and at a time when Justice Blackmun and his brethren on an all-male bench had difficulty understanding the sex-role stereotyping women faced when pregnant.73 (The year after Roe, Blackmun voted against a pregnancy discrimination claim in Geduldig v. Aiello.)74 Two decades later in Casey, Justice Blackmun, responding to advocates’ arguments,75 recognized that restrictions on abortion enforce traditional sex roles and so “also implicate constitutional guarantees of gender equality.”76

69 Casey, 505 U.S. at 878.
70 See Roe v. Wade, 410 U.S. 113, 153 (1973) (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).
71 Before Roe, advocates had argued that abortion restrictions enforced sex, class, and race inequalities; the Burger Court was moved to recognize women as rights holders, but not to ground the abortion right in the Equal Protection Clause. See Linda Greenhouse & Reva B. Siegel, The Unfinished Story of Roe, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES 53, 56–57, 63–65, 68–69 (Melissa Murray, Kate Shaw & Reva B. Siegel eds., 2019). But women’s rights challenges to abortion statutes plainly shaped the Court’s reasoning in Roe, so that over multiple drafts of the opinion the Court came to recognize that “women’s interest in retaining control over the decision whether to become a mother is of constitutional magnitude.” Reva B. Siegel, Roe’s Roots: The Women’s Rights Claims that Engendered Roe, 90 BOST. UNIV. L. REV. 1875, 1894 (2010); see id. at 1894–96 (showing how impact litigation influenced the Court’s understanding of the right).
75 See Mayeri, supra note 63, at 150–52.
76 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 928–29 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“The State does not compensate women for their services [bearing and caring for children]; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the “natural” status and incidents of motherhood—appears to rest upon a conception of women’s role that has triggered the protection of the Equal Protection Clause.”) (citations omitted).
Just as Blackmun presented the abortion right as protecting women against state action enforcing sex roles, the joint opinion described the liberty interest in Roe as protecting women against state action enforcing traditional conceptions of “the woman’s role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.”

In explaining how women relied on the right Roe protected—“[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives”—and in applying the undue burden standard to a law requiring women to give their spouses notice before they could end a pregnancy, the joint opinion protected women’s liberty on the premise that women are equal citizens who are entitled to protection from the forms of role-based coercion long employed to enforce and justify limits on their civic participation. The joint opinion expressed “constitutional limitations on abortion laws in the language of its equal protection sex discrimination opinions, illuminating liberty concerns at the heart of the sex equality cases in the very act of recognizing equality concerns at the root of its liberty cases.”

But the most fundamental expression of these sex-equality commitments is Casey’s core principle: government can protect potential life by persuading and enlisting women but not coercing and instrumentalizing women as means to protect the unborn. Casey allowed “government to protect potential life by means that recognize and preserve women’s dignity. . . . If government wants to protect unborn life, it has to respectfully enlist women in this project and cannot simply commandeer women’s lives for these purposes.”

---

77 Id. at 852 (plurality opinion).
78 Id. at 835.
79 See id. at 887–98; id. at 898 (“The husband’s interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife.”).
80 Greenhouse & Siegel, supra note 42, at 1440–41 (discussing the sex-equality values the joint opinion invokes in holding that a spousal notice requirement is an undue burden).
82 Greenhouse & Siegel, supra note 42, at 1437; see id. at 1439–42 (observing that the different applications of the undue burden framework illustrate that the government must employ “modes of persuasion that are consistent with the dignity of women”). Constraints on
In short, by the time the Court narrowed and reaffirmed Roe in 
Casey, the Court had come to reason about state action regulating 
the conduct of pregnant women through the lens of the antistereotyping 
and antisuordination values of its equal protection cases, expressed 
so powerfully by Justice Ginsburg only a few years later in United 
States v. Virginia and Chief Justice Rehnquist in Nevada Department 
of Human Resources v. Hibbs. 

B. WOMEN AS MOTHERS, WOMEN AS EQUALS: CASEY AND THE SPREAD 
OF WOMAN-PROTECTIVE ANTIABORTION ARGUMENT

Casey was a bitter disappointment for Americans United for Life 
(AUL), a key organization in developing strategies to erode political 
and legal support for Roe. The organization hoped to legislate and 
litigate Roe’s reversal; instead, Casey entrenched Roe and explained 
the abortion right as protecting women’s liberty as equal citizens. 
Several months later, the nation elected Bill Clinton, its first strongly pro-
choice president. 

Violent attacks on abortion clinics and providers, 
which had escalated during the 1980s, “ticked up dramatically in the 
1990s” with a series of high-profile murders of clinic doctors, em-
ployees, and security personnel.

the instrumentalization of women explain the joint opinion’s requirement that government 
persuade by “the giving of truthful, nonmisleading” information. Id. at 1439 (quoting Casey, 
505 U.S. at 882).

83 518 U.S. 515, 533–34 (1996); see also Siegel, supra note 73, 203–06 (discussing how 
Virginia reaffirms a heightened scrutiny standard for sex-based state action and addresses laws 
regulating pregnancy as containing sex-based classifications subject to heightened scrutiny).

84 538 U.S. 721, 736 (2003); see also Siegel, supra note 73, 206–09 (tracing evolution in Court’s 
understanding of pregnancy discrimination). For nearly a half century, Justice Ginsburg un-
derstood the Constitution’s equality and liberty guarantees to constrain laws regulating preg-
nancy, a view she espoused as an advocate and on the bench. See infra Section III.C.2.

85 See Mayeri, supra note 63, at 139; supra Section II.A.

86 See Gerald N. Rosenberg, The Real World of Constitutional Rights: The Supreme Court and the 
Implementation of the Abortion Decisions, in Principles and Practice of American Politics: 
Classic and Contemporary Readings 174–75, 185 (Samuel Kernell & Steven S. Smith eds., 
5th ed. 2013) (describing President Clinton as “the first pro-choice president since Roe,” 
recounting the numerous policies he implemented immediately after his election, and con-
trasting his positions on abortion to his predecessors).

87 See Kimberly Hutcherson, A Brief History of Anti-Abortion Violence, CNN (Dec. 1, 2015, 
Jacobson & Heather Royer, Aftershocks: The Impact of Clinic Violence on Abortion Services, Am. 
ECON. J.: APPLIED ECON., Jan. 2011, at 189, 220 (“In the 1980s and 1990s, radical anti-abortion 
activists unleashed a storm of violent attacks against abortion clinics and providers. Clinic 
arsons, bombings and even staff murders became widely-publicized tools in the anti-abortion 
effort to limit access to abortion services.”).
Many in the antiabortion movement viewed these developments as exposing the limits of arguments that focused on saving babies and attacking women and doctors who put them at risk.88 These confrontational and often violent tactics radiated hostility to women at a time when the nation professed commitment to the idea that women are equals whose dignity and welfare the law is obliged to respect.

After Casey, a growing number of antiabortion leaders began to respond to the views of women that shaped abortion rights jurisprudence in the decision. These antiabortion advocates shifted their arguments to focus on women and began to incorporate abortion rights frames into their attacks on abortion. A response of this kind is not uncommon in the midst of fierce conflict.89 Casey recognized that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” 90 Seeking to respond to Casey—and to appropriate the political authority of feminism—antiabortion advocates increasingly began to argue that women’s liberty, equality, and health required banning abortion.91

The antiabortion movement was responding to domestic and transnational expressions of women’s equality. Harvard professor Mary Ann Glendon headed a Vatican delegation opposing abortion at the 1995 Beijing Women’s Conference, reasoning on egalitarian grounds in an effort not to isolate the Vatican at the conference; Glendon’s “appointment had been quietly urged by the Clinton Administration,” the first time that a woman was named to head an official Vatican delegation.”92 As Glendon recounted Pope John Paul II’s stance: “Not only

89 Id. at 1650 (“The quest to persuade disciplines insurgent claims about the Constitution’s meaning, and may lead advocates to express convictions in terms persuasive to others, to internalize elements of counterarguments and to engage in other implicit forms of convergence and compromise.”).
91 See Reva B. Siegel, Dignity and the Politics of Protection: Abortion Restrictions under Casey/Carhart, 117 Yale L.J. 1694, 1724 (2008) (showing how the antiabortion movement developed arguments designed “to appropriate feminism’s political authority and express antiabortion argument in the language of women’s rights and freedom of choice”).
did the pope align himself with women’s quest for freedom, he adopted much of the language of the women’s movement, even calling for a ‘new feminism’ in Evangelium Vitae.”93 The Church opposed recognition of sexual and reproductive rights at the 1995 Beijing Women’s Conference, while the Pope affirmed: “there is an urgent need to achieve real equality in every area.”94

Leaders of the American antiabortion movement had already begun to employ woman-protective arguments to address audiences that increasingly expected expressions of respect for women’s rights and welfare. In the aftermath of Casey and of President Clinton’s election, advocates decided to foreground woman-protective arguments in an effort to persuade members of the public who supported abortion rights to support abortion restrictions and to explain to legislators and judges prepared to enforce abortion rights why they could nonetheless impose abortion restrictions on women.

1. Woman-protective antiabortion argument in politics. Woman-focused arguments for rejecting abortion had long circulated among women working at the antiabortion movement’s crisis pregnancy centers,95 and during the setbacks of the 1990s, the movement’s male leadership began to draw upon these women-focused arguments for strategic reasons, to answer public concerns that the antiabortion movement cared only about babies and little about the women who bore and raised them.96

---

93 Mary Ann Glendon, The Pope’s New Feminism, Crisis Mag. (Mar. 1, 1997), https://www.crisismagazine.com/1997/the-popes-new-feminism; see also New Feminism, World Heritage Encyclopedia, http://www.self.gutenberg.org/articles/eng/New_feminism (“New feminism is a philosophy which emphasizes a belief in an integral complementarity of men and women, rather than the superiority of men over women or women over men. New feminism, as a form of difference feminism, supports the idea that men and women have different strengths, perspectives, and roles, while advocating for the equal worth and dignity of both sexes. Among its basic concepts are that the most important differences are those that are biological rather than cultural.”).


95 Siegel, supra note 88, at 1658–60.

96 Id. at 1668–81.
Jack Willke—who in the 1970s developed antiabortion arguments that spread world-wide featuring pictures of the fetus in utero—bluntly recounted the findings that led him to embrace woman-protective antiabortion arguments in the 1990s. As he recalled, in the 1990s, abortion rights advocates “changed the question. No longer was our nation arguing about killing babies. The focus, through their efforts, had shifted off the humanity of the unborn child to one of women’s rights. They developed the effective phrase of ‘Who Decides?’”

Willke did market research and changed the focus of his arguments:

We did the market research and came up with some surprising findings. . . . We found out that the basic problem in the minds of the general public was that, by their own evaluation, most were undecided on this issue. They felt that pro-life people were not compassionate to women and that we were only “fetus lovers” who abandoned the mother after the birth. They felt that we were violent, that we burned down clinics and shot abortionists. We were viewed as religious zealots who were not too well educated. Clearly, their image of us was one that had been fabricated and delivered to them in the print and broadcast media by a liberal press. After considerable research, we found out that the answer to their “choice” argument was a relatively simple straightforward one. We had to convince the public that we were compassionate to women. Accordingly, we test marketed variations of this theme. Thus was born the slogan “Love Them Both,” and, in fact, the third edition of our Question and Answer book has been so titled, specifically for that reason.

Willke reasoned that if the movement hoped to persuade Americans to support candidates, policies, and jurists to change the law of abortion, it would have to use arguments from the movement’s crisis pregnancy centers: “We’ve got to go out and sing from the housetops about what we’re doing—how compassionate we are to women, how we are helping women—not just babies, but also women.”

---

99 Id. at 1670–71.
Willke was joined by other advocates of the woman-protective turn. David Reardon, a leader in developing empirical claims about abortion regret, put the point simply: “While committed pro-lifers may be more comfortable with traditional ‘defend the baby’ arguments, we must recognize that many in our society are too morally immature to understand this argument. They must be led to it. And the best way to lead them to it is by first helping them to see that abortion does not help women, but only makes their lives worse.”

Reardon claimed to show by empirical method that the interests of women and the unborn do not conflict. “By finding this evidence and sharing it with others, we bear witness to the protective good of God’s law in a way which even unbelievers must respect.” His claim of “no conflict” was a claim about sex roles—a religious and moral belief that a mother’s interests are defined by the needs of her child:

One cannot help a child without helping the mother; one cannot hurt a child without hurting the mother.

This intimate connection between a mother and her children is part of our created order. Therefore, protecting the unborn is a natural byproduct of protecting mothers. This is necessarily true. After all, in God’s ordering of creation, it is only the mother who can nurture her unborn child. All the rest of us can do is to nurture the mother.

This, then, must be the centerpiece of our pro-woman/pro-life agenda. The best interests of the child and the mother are always joined—even if the mother does not initially realize it, and even if she needs a tremendous amount of love and help to see it.

Reardon expressed these religious and moral beliefs about abortion in the language of public health. In a 1995 article called “Is the

\[\text{References}\]


102 Id. at 1674.

103 Id. (quoting David C. Reardon, Making Abortion Rare: A Healing Strategy for a Divided Nation 11 (1996)).

104 Id. at 1675 (quoting David Reardon, supra note 101).

105 See, e.g., Interview by Zenit News Agency with Dr. David C. Reardon, Director of the Elliot Inst., in Springfield, Ill. (May 12, 2003), https://www.afterabortion.org/vault/Zenit_News_PoorChoice_Interview.pdf (“Abortion is not evil primarily because it harms women. Instead, it is precisely because of its evil as a direct attack on the good of life that we can know it will ultimately harm women. While the research we are doing is necessary to document abortion’s harm, good moral reasoning helps us to anticipate the results.”).
Post-abortion Strategy a Moral Strategy?" he called his method "Teaching Morality By Teaching Science" and described his method as "an alternative way of evangelizing." On this view, emphasizing abortion’s risks to women in the form of trauma, sterility, and breast cancer would reduce the ambivalence of voters who were otherwise reticent to criminalize abortion out of concern that it would harm women.

In addition to arguing that access to abortion threatened women’s health, Reardon also argued that access to abortion threatened women’s freedom. Women were coerced into abortions that traumatized them. In his 1993 article, Pro-Woman/Prolife Initiative, Reardon explained that candidates could “project themselves as both pro-woman and pro-life . . . by emphasizing one’s knowledge of the dangers of abortion and the threat of women being coerced into unwanted abortions by others,” and pointing out that “[t]his approach breaks down the myth that pro-lifers care only about the unborn while ‘pro-choicers’ care about women.”

In 1996, Reardon republished many of these arguments in a book taking its title from President Clinton’s arguments for abortion rights, Making Abortion Rare: A Healing Strategy for a Divided Nation. If

---


107 Id. Reardon continues:

Whenever we cannot convince others to acknowledge a moral truth for the love of God, our second best option is to appeal to their self interests. If an act is indeed against God’s moral law, it will be found to be injurious to our happiness. Thus, if our faith is true, we would expect to find compelling evidence which demonstrates that acts such as abortion, fornication, and pornography, lead in the end not to happiness and freedom, but to sorrow and enslavement. By finding this evidence, and sharing it with others, we bear witness to the protective good of God’s law in a way which even unbelievers must respect.

Id.

108 See Siegel, supra note 88, at 1673.

109 See Siegel, supra note 91, at 1722–23 (quoting Reardon in 1994 giving similar advice to pro-life candidates about making coercion claims).


111 David C. Reardon, Making Abortion Rare: A Healing Strategy for a Divided Nation, supra note 103 at viii (1996) (“This book is about fundamentally redefining the abortion debate, redrawing the lines of battle to reemphasize our commitment to being both pro-woman and pro-life.”); see also id. at xii (reasoning from the standpoint of “we, the Church”).
Americans believed that abortion rights protected women’s freedom, health and welfare. Willke, Reardon, and others would win over a resisting public by proving that banning abortion would protect women’s freedom, health, and welfare. The appeal to traditional roles in the language of feminism was powerful, taking persuasive authority from each. Leaders of the antiabortion movement began to attack abortion in abortion-rights frames, arguing that laws pushing pregnant women into motherhood protected women’s health and freedom.

2. Woman-protective antiabortion argument in law. In the years after Casey, as antiabortion advocates in growing numbers embraced the arguments that abortion hurts women, Americans United for Life (AUL) set to work translating these new frames into a legislative and litigation strategy. In the wake of Casey, both AUL and the National Right to Life Committee elevated women to leadership positions to emphasize the organizations’ woman-protectionist aims. AUL lawyers focused on the importance of rebutting Casey’s assertion that “the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” The organization’s records show that at an April 1993 board meeting, its new leader, Paige Comstock Cunningham, “announced ‘a major shift in the rhetoric of AUL.’ ‘We must help people understand that abortion hurts women too’”. and the organization’s director of public affairs urged that “only by focusing on ‘the harm abortion does to the woman’ could activists ‘start changing hearts and minds.’”

AUL leaders embraced arguments already circulating in the movement, but with an important difference. Lawyers would employ the claims about women funding woman-protective antiabortion arguments not simply to move public opinion but to enact laws and legitimate the use of state power against women and the doctors who sought to assist them. Lawyers began to deploy the movement’s

113 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 835 (1992); see Mary Ziegler, Abortion and the Law in America: Roe v. Wade to the Present 143 (2020) (discussing AUL lawyers and James Bopp, lawyer for the National Right to Life Committee, responding to Casey’s claims about women’s reliance interests in the immediate aftermath of the decision).
114 See Ziegler, supra note 113, at 144.
115 Id. at 144–45 (quoting Myrna Gutierrez).
116 In this account, I offer a brief review of AUL’s use of the abortion-hurts-women to enact and defend legislation. For another example of influential woman-protective lawyering from
sex-role-based arguments—the pro-woman claim that the interests of mother and child never conflict, that what is good for children is good for women—to justify legislation restricting abortion rights and to defend the laws’ constitutionality.

In 2001, *Mother Jones* published an article entitled *The Quiet War on Abortion* that showcased AUL’s work advocating for health-justified abortion restrictions in the years after *Casey*.117 By then, AUL had thoroughly embraced the tactical shift to emphasize woman-focused antiabortion arguments. AUL lawyers could draft laws restricting abortion that claimed to protect women’s psychological and physical health and advocate for these public health measures through empirical claims that sounded credible and persuasive because they expressed religious and moral beliefs about women’s traditional roles.

An AUL lawyer named Dorinda Bordlee (who would go on to play a central role in *June Medical*) explained the organization’s new tactic for restricting abortion in the wake of *Casey*:

> The *Casey* decision started abortion opponents rethinking their tactics. Since direct assaults on *Roe* wouldn’t fly, “there had to be a shift in strategy by regulation on the outskirts of abortion,” says Dorinda Bordlee, staff counsel for Americans United for Life. That’s when leaders developed a new approach: Couch the issue in terms of women’s health. By claiming that abortions take place in dirty facilities and cause such illnesses as depression and breast cancer, right-to-lifers realized they could subtly move the focus of the debate. “For 25 years, the pro-life movement focused on the baby, and the abortion-rights movement focused on the woman,” says Bordlee. “The baby and the woman were pitted against each other. What we have realized is that the woman and the child have a sacred bond that should not be divided. What’s good for the child is good for the mother. So now we’re advocating legislation that is good for the woman.”118

In 2003, Clark Forsythe, then president of AUL, explained the movement’s new legal tactic for restricting abortion to readers of the conservative Catholic journal *First Things*, emphasizing that those opposed to abortion need to “appeal to those who are currently

---


118 Id.
undecided or conflicted on the issue.”119 “If Americans come to realize that abortion harms women as well as the unborn, it will not be seen as ‘necessary,’ and the ‘necessary evil’ may be converted into evil pure and simple.”120

In 2004, Denise Burke and Dorinda Bordlee, both then staff counsel at AUL, contributed to a volume edited by Erika Bachiochi entitled The Cost of Choice: Women Evaluate the Impact of Abortion121 designed to present a feminist framing of the argument that abortion harms women. The editor and all the contributors were women.122 The volume included chapters by women law professors (including Mary Ann Glendon), doctors, lawyers, and the president of Feminists for Life; it profiled women’s rights advocates who opposed abortion alongside chapters that recount the alleged psychological and physical health harms abortion inflicts on women, such as the “Abortion-Breast Cancer Link,”123 and a chapter by Burke on AUL’s new campaign attacking abortion clinics as “the True ‘Back Alley.’”124

The volume presented purportedly empirical evidence of abortion’s harms—numerous chapters cite the work of David Reardon, John Thorp, Vincent Rue, and other movement authorities125—without educating readers about the findings of the many psychologists, psychiatrists, and government oncologists who have refuted these

---

120 Id.
122 Id. at 139–42.
124 Denise M. Burke, Abortion Clinic Regulation: Combating the True “Back Alley,” in Cost of Choice, supra note 121, at 122.
125 For information on the credentials of David Reardon and other movement authorities cited in the book and offered as expert witnesses in support of woman-protective abortion restrictions, see Pam Chamberlain, Politicized Science: How Anti-Abortion Myths Feed the Christian Right Agenda, Public Eye (June 4, 2006), https://www.politicalresearch.org/2006/06/04/politicized-sciencehow-anti-abortion-myths-feed-the-christian-right-agenda; and False Witnesses—David Reardon, Rewire News Group, https://rewirenewsgroup.com/false-witnesses/#david-reardon. Vincent Rue has been judicially chastised for organizing and ghost-writing expert testimony on the health justification for admitting privileges laws, see Greenhouse & Siegel, supra note 42, at 1458–60, and Judge Richard Posner pointed out evident problems with the testimony of John Thorp in Wisconsin’s case, see infra note 261.
abortion-harms-women claims in studies accumulating in the years before the volume’s publication and since.\textsuperscript{126}

Current research confirms findings that were already reported at the time of the \textit{Cost of Choice} book but omitted from or minimized in it. The American College of Obstetricians and Gynecologists reports that “[n]umerous studies have found no link between abortion and psychological trauma”\textsuperscript{127} and that claims of a “purportedly heightened risk of mental health issues or substance abuse resulting from an abortion” are “unsubstantiated.”\textsuperscript{128} A recent study compared the health and wellbeing of women who had abortions with those who were turned away because they were past a clinic’s gestational limit for care and carried the pregnancy to term. The study tracked nearly 1,000 women over five years and nearly 8,000 interviews and found “no evidence that abortion causes negative mental health or well-being outcomes.”\textsuperscript{129} The interviews showed how ending a pregnancy helped women negotiate financial, family, relationship, career, and health difficulties, as well as the ways that women who sought an abortion and were turned away coped with motherhood.\textsuperscript{130}

Unsurprisingly, AUL was not interested in publicizing the facts found by these scientists and social scientists. Over the ensuing decade, AUL developed models that translated the abortion-harms-women frame into legislation that would encumber or shut down the provision of abortion under the rubric of health and safety regulation, including the passage of admitting privileges laws in numerous states; the organization’s annual publication, which provides model legislation, began publishing a whole section of model bills under the


\textsuperscript{128} Id.


\textsuperscript{130} Id. at 3–5 (summarizing findings); see also Joshua Lang, \textit{What Happens to Women Who Are Denied Abortions?}, N.Y. Times Mag. (June 12, 2013), https://www.nytimes.com/2013/06/16/magazine/study-women-denied_abortions.html.
heading “Women’s Protection Project.”131 The woman-protective arguments for banning abortion employed contested factual claims to advance a normative understanding of women’s roles and family relationships.

Denise Burke, Vice President of Legal Affairs at AUL, explained the premises of the “health and safety” laws AUL promoted for state adoption through the Women’s Protection Project, including the Texas admitting privileges law the Supreme Court was about to review in Whole Woman’s Health. As she described the premises of the health and safety laws that AUL promoted, “the unique focus of [AUL’s] mother-child strategy” was that it “recognizes that abortion harms both mother and child and demonstrates that the interests of women and their unborn children are inextricably intertwined. Simply, protecting and defending unborn babies also protects and defends women.”132

Health-justified TRAP laws impose on abortion providers burdensome health and safety regulations not imposed on other medical practices of similar or even greater risk.133 TRAP laws are not dissuasive in form; they do not contemplate dialogue with a pregnant woman but instead are directed at medical professionals and healthcare delivery systems, typically raising the cost of practice, sometimes prohibitively. The laws present as ordinary health and safety regulations but for the extraordinary burdens they place on abortion providers and their tendency to target or single out abortion providers for forms of

---

131 Americans United for Life, Defending Life 280 (2015) [hereinafter Defending Life]; see id. at 16 (“Among the laws enacted over the last four years are abortion facility regulations and admitting privilege requirements which AUL has championed for more than a decade.”); id. at 23 (discussing admitting privileges legislation enacted by 15 states); see also Erica Hellerstein, Inside the Highly Sophisticated Group That’s Quietly Making It Much Harder to Get an Abortion, ThinkProgress (Dec. 2, 2014, 3:11 PM), https://archive.thinkprogress.org/inside-the-highly-sophisticated-group-thats-quietly-making-it-much-harder-to-get-an-abortion-9db723232471 (describing AUL role in passage of admitting privileges legislation); Janet Reitman, The Stealth War on Abortion, Rolling Stone (Jan. 15, 2014, 2:00 PM), https://www.rollingstone.com/politics/politics-news/the-stealth-war-on-abortion-102195/ (tracing the shift to woman-protective arguments and the AUL’s central role in translating abortion-hurts-women into TRAP legislation, describing the organization as “chiefly responsible for the most recent and highly successful under-the-radar strategy”).


regulation not imposed on other procedures of equal or greater risk. TRAP laws have focused on the licensing of clinics and clinicians and the regulation of telemedicine, admitting privileges, prescriptions for off-label drugs, and abortion clinic zoning.134 As the laws spread, judges began to raise concerns about differential treatment of abortion providers as an indicator of the laws’ potentially constitutionally suspect character.135

AUL is proud of the TRAP laws the organization worked to develop, enact, and defend. Its leadership openly discusses the organization’s goals, as the interviews considered above suggest, at times discussing the laws’ purpose to hinder women’s access to abortion. An interviewer pointed out to Dan McConchie, then the group’s vice president of government affairs, that AUL was promoting policies, like admitting privilege requirements, that meant “abortion clinics have become fewer and further between, and some women are forced to make two appointments in order to get the procedure.” McConchie replied that “[s]tates can’t outlaw abortion” but “[t]hat does not mean there’s a constitutional right to abortion being convenient.”136 In 2012,

134 For information on TRAP laws currently in effect, see Targeted Regulation of Abortion Providers (TRAP) Laws, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers (last updated Feb. 1, 2021) (reporting that 23 states have passed laws regulating abortion providers that “go beyond what is necessary to ensure patients’ safety”).

135 Greenhouse & Siegel, supra 42, at 1446 & n.96 (citing cases); see also Bonnie S. Jones et al., State Law Approaches to Facility Regulation of Abortion and Other Office Interventions, 108 Am. J. Pub. Health 486 (2018) (finding that while nineteen states had regulated abortion and other office-based surgeries, fourteen had only singled out abortion for regulation).


then-president Charmaine Yoest described the organization’s aim in enacting state legislation: “As we’re moving forward at the state level, we end up hollowing out Roe even without the Supreme Court. That’s really where our strategy is so solid.”\(^{137}\)

Admitting privileges laws proved especially effective in shutting down clinics;\(^{138}\) and their dramatic impact drew public notice. In 2013, after the AUL-modeled bill at issue in *Whole Woman’s Health* was introduced in the Texas House, then-Lieutenant Governor David Dewhurst tweeted a photo of a map that showed all of the abortion clinics that would close as a result of the bill, announcing: “We fought to pass SB5 thru the Senate last night, & this is why!”; then, as if to qualify his admission of the state’s clinic-closing purpose, the Lieutenant Governor immediately tweeted “I am unapologetically pro-life AND a strong supporter of protecting women’s health. #SB5 does both.”\(^{139}\) The AUL-championed bill was openly discussed as clinic-closing by legislators and abortion-ending by then Governor Rick Perry (who thanked AUL for its assistance in drafting it).\(^{140}\) In 2013, in calling for the enactment of Texas’s admitting privileges law, “Governor Perry himself declared that his goal was to ‘make abortion, at any stage, a thing of the past,’ and that until we live in an ‘ideal world . . . without abortion,’ Texas’s aim should be to ‘continue to pass laws to ensure that abortions are as rare as possible.’”\(^{141}\)

---

the fact that SB 25 repeals a number of provisions [regulating abortion] that currently protect women’s health . . . ”).

\(^{137}\) Emily Bazelon, *Charmaine Yoest’s Cheerful War on Abortion*, N.Y. TIMES MAG. (Nov. 2, 2012), https://www.nytimes.com/2012/11/04/magazine/charmaine-yoests-cheerful-war-on-abortion.html; see also Burke, *supra* note 132 (describing states like New York and California at the bottom of AUL’s Life List as “[b]elieving women must have unfettered access to abortion clinics” and “content to place women at the mercy of an increasingly suspect abortion industry”).

\(^{138}\) Greenhouse & Siegel, *supra* note 42, at 1449–50 (describing the shutdown of clinics in Mississippi, Texas, Wisconsin, Alabama and Louisiana after the enactment of admitting-privileges laws).

\(^{139}\) Id. at 1451–52.


Opponents of the admitting privileges law argued “that if pro-life lawmakers were truly motivated by a desire to safeguard women’s health, they would not single out abortion with unnecessary and even counter-productive regulation, but would instead direct their attention to the abysmal state of women’s health and healthcare in Texas,”\textsuperscript{142} emphasizing that “for all its purported concern about women’s health, the Texas legislature had done little to address these statistics, and in fact had made matters worse.”\textsuperscript{143} None of these arguments moved the law’s supporters and the state enacted the admitting privileges statute—which closed many of the state’s abortion clinics—for the claimed reason of protecting women’s health.

C. LOUISIANA RESTRICTS ABORTION TO PROTECT WOMEN’S HEALTH

While the Texas admitting privileges law was challenged in federal courts, an admitting privileges law substantially the same as the Texas law was introduced in Louisiana.\textsuperscript{144} Rather than recapitulating debate over the statute in judicial decisions, I add to that record by demonstrating the many ties between the Louisiana statute and the history of woman-protective abortion restrictions we have just considered. I show that, for its supporters, Louisiana’s admitting privileges law was a pro-woman, pro-life law of the kind the antiabortion movement began advocating in the aftermath of \textit{Casey}. I then explore the understandings of its supporters with the questions prompted by these movement commitments in view.

I demonstrate that Louisiana officials discussed the TRAP law as a health and safety regulation during legislative debate but that once the official record closed, the law’s supporters began openly to describe the admitting privileges law as a pro-woman and pro-life law or simply described the law’s purpose as protecting unborn life.\textsuperscript{145}

\textsuperscript{142} Franklin, \textit{supra} note 140, at 234; see also id. at 233 (describing opponents pointing out that the Texas law singled out the practice of abortion for regulation not provided to many other outpatient procedures when complications from abortion practice were lower by far than for dental work).

\textsuperscript{143} Id. at 234. For an account of Texas’s health care policy choices in the era that it was enacting and defending the admitting privileges law invalidated in \textit{Whole Woman’s Health}, see Siegel, \textit{supra} note 10, at 214–15.

\textsuperscript{144} Chief Justice Roberts observed that “the two laws are nearly identical.” June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2139 (2020) (Roberts, C.J., concurring).

\textsuperscript{145} See \textit{infra} Section II.C.1.
With an appreciation of the kind of beliefs about women associated with support for pro-woman, pro-life health laws, I then examine what supporters of Louisiana’s admitting privileges law meant when they described the law as protecting women’s health. In Louisiana, as in Texas, opponents of the admitting privileges law compared the state’s interest in protecting women’s health in the abortion context with its lack of interest in protecting women’s health outside the abortion context. While at least one pro-life advocate advocated to improve healthcare for pregnant women, most focused on protecting women’s health by restricting abortion.

Expanding the frame, I show that at the same time the state restricted abortion through an admitting privileges statute asserted to protect women and the unborn, the state enforced policies contributing to the state’s exceedingly high maternal mortality and infant mortality rates. Expanding the frame on the abortion debate shows how role-based judgments shaped laws protecting women’s health and demonstrates the physical as well as dignitary harm such judgments can inflict, especially when focused, as they were in Louisiana, on poor women of color. Analyzed from this vantage point, Louisiana’s pro-woman, pro-life law raises questions of liberty, equality, and life that the Justices never discuss in June Medical.

1. The law’s aims: protecting women or the unborn? Louisiana was a poster child for pro-life advocates at the time it enacted the Unsafe Abortion Protection Act—and for many years beforehand. AUL, modeled on and affiliated with the American Legislative Exchange Council (ALEC), ranks states for their antiabortion advocacy in its annual publication Defending Life, which disseminates model anti-abortion legislation and profiles the accomplishments and shortcomings of every state for its success in enacting abortion laws. Between 2010 and 2014, AUL ranked Louisiana first of all fifty states. After passage of the admitting privileges law in 2014, AUL would award first ranking to Louisiana again, selecting the state’s governor,

---

146 See infra Section II.C.2
147 See infra Section II.C.2. For discussion of this debate in Texas, see supra text accompanying notes 142–43.
149 See Defending Life, supra note 131. For one account of AUL’s relation to ALEC, see Franklin, supra note 140, at 229–30.
Bobby Jindal, to introduce the 2015 edition of Defending Life\(^{150}\)—valuable publicity for Jindal’s campaign for the Republican Party presidential nomination launched that same year.\(^{151}\) In his short bid for the presidency, Jindal cited these antiabortion ratings frequently as one of his chief qualifications for the presidency.\(^{152}\)

As the state’s AUL ranking suggests, AUL was as influential in Louisiana as it was in Texas.\(^{153}\) In Louisiana, the admitting privilege law was introduced with the assistance of Dorinda Bordlee, then counsel at the Bioethics Defense Fund. Previously, as counsel at AUL, Bordlee helped develop the organization’s woman-protective restrictions on abortion, a strategy which in 2001 she described as based on the role-based belief that “[w]hat’s good for the child is good for the mother.”\(^{154}\) To bring to Louisiana the admitting privileges law that was so successful in closing clinics in Texas, Bordlee drafted the Louisiana admitting privileges law using Texas language and worked with State Representative Katrina Jackson, sponsor of the Louisiana law, to introduce it.\(^{155}\)

\(^{150}\) See Defending Life, supra note 131, at vii (featuring preface by Louisiana’s governor Bobby Jindal); id. at 16 (reporting that Louisiana “has topped the Life List since 2010”); id. at 40 (2015 state rankings); see also Bill Barrow, Bobby Jindal Touts Louisiana as ‘Most Pro-Life’ State, Associated Press (Nov. 2, 2016), https://www.postandcourier.com/politics/bobby-jindal-touts-louisiana-as-most-pro-life-state/article_8a17aca0-6f67-5ecd-b12a-2d7312159d6e.html (describing Governor Jindal’s claims that Louisiana was America’s most pro-life state); Jindal Signs Hoffman’s, Jackson’s Pro-Life Bills, Ouachita Citizen (June 18, 2014), https://www.hannapub .com/ouachitacitizen/news/local_state_headlines/jindal-signs-hoffmann-s-jackson-s-pro-life -bills/article_5a7800d2-6f97-11e6-89f6-001a4bcf6878.html (same).


\(^{152}\) See, e.g., Maya Kliger, Jindal Touts Conservative Record, Bashes Obama, Des Moines Reg. (Aug. 8, 2015, 10:08 PM), https://www.desmoinesregister.com/story/news/elections/presidential /caucus/2015/08/08/bobby-jindal-mason-city-iowa-falls/31562689 (documenting Jindal’s campaign stops in Iowa and his claims “that his state has been rated the most ‘pro-life’ state in the country”).

\(^{153}\) See supra note 140 and accompanying text. Bordlee’s ties with AUL continued. She filed an amicus brief defending the Texas law in the Supreme Court in Whole Woman’s Health, which she wrote with Denise Burke of AUL. Bordlee and Burke have AUL ties. See supra notes 121–24 and accompanying text (describing Bordlee and Burke contributing to the Cost of Choice volume).

\(^{154}\) See supra text accompanying notes 117–18, 121–26.

\(^{155}\) Peter J. Finney, State Rep. Katrina Jackson Is Pro-Life, Pro-Woman, Clarion Herald (June 3, 2014), https://clarionherald.org/news/state-rep-katrina-jackson-is-pro-life-pro-woman (noting that Bordlee crafted the bill, met with Jackson before the start of the legislative session to discuss it, and asked Jackson to be the lead sponsor); Sarah Zagorski, HB 388 Passes Overwhelmingly in Louisiana Senate, LA. Right to Life (May 14, 2014), http://archive.constant contact.com/fs191/1101796400807/archive/1117365764539.html (describing Bordlee as the
In 2014, as the Texas bill was being litigated in the lower courts, Representative Jackson introduced HB 388 as a woman-protective bill, a “commonsense”\(^{156}\) health measure that “was not denying anyone an abortion.”\(^{157}\) Opponents of the bill offered extensive evidence that the bill was medically unnecessary\(^{158}\) and would close three out of five existing outpatient clinics,\(^{159}\) mirroring the effects of Texas’s admitting privileges law.\(^{160}\) The bill’s proponents scarcely reacted.

To ensure that the Texas example was not overlooked, before the Senate committee hearing began, Dorinda Bordlee emailed Representative Jackson a story about the admitting privilege law’s success in closing clinics in Texas.\(^{161}\) Bordlee began the email by stating, “La HB 388 follows this model”; the remainder of the email consisted of a story explaining how a state could use even unconstitutional statutes to get around courts and close clinics.\(^{162}\) The story Bordlee emailed Jackson

---


\(^{157}\) DX 119, supra note 156, at 9 (transcribing testimony of Rep. Katrina Jackson) (“It’s not denying anyone contraceptives. It’s not denying anyone an abortion. It’s not denying anyone the choice on whether or not to have one.”).

\(^{158}\) Id. at 15–16 (transcribing the testimony of Ellie Schilling, describing the heightened requirements that HB 388 creates for abortion providers). The district court subsequently found that “admitting privileges do not improve health outcomes in the event of complications” and therefore HB 388/Act 620 “is not medically necessary and fails to actually further women’s health and safety.” June Med. Servs. L.L.C. v. Kliebert, 250 F. Supp. 3d 27 at 87 (M.D. La. 2017).

\(^{159}\) DX 119, supra note 156, at 13. After an extensive factual inquiry, the district court vindicated this claim; it found that, if implemented, HB 388/Act 620 would “result in a drastic reduction in the number and geographic distribution of abortion providers, reducing the number of clinics to one, or at most two, and leaving only one, or at most two, physicians providing abortions in the entire state.” June Med. Servs., 250 F. Supp. 3d 27 at 87.

\(^{160}\) Legislators heard testimony that “the same bill” in Texas led to the closure of “all the clinics. . . . The Rio Grande Valley has been left with no abortion clinics.” DX 119, supra note 156, at 28.


---

was entitled “Texas is Permanently Shutting Abortion Clinics and the Supreme Court Can’t Do Anything About It.”¹⁶³ The report pointed out that when Governor Perry “signed a sweeping anti-abortion law in 2013, he did so knowing the measure faced an uncertain future” and could “land in the hands of the Supreme Court.” But “back in the Lone Star State, the final judicial score won’t much matter” because “[t]he law has already had tremendous success in closing abortion clinics and restricting abortion access in Texas. And those successes appear all but certain to stick—with or without the Supreme Court’s approval of the law that created them.”¹⁶⁴

Yet the Louisiana legislature didn’t talk about shutting down abortion clinics as officials did in Texas.¹⁶⁵ Before passage of the law, Louisiana legislators mostly stayed on message and talked about the admitting privileges law as protecting women’s health, even as officials in Texas were openly defending that state’s admitting privileges law as both woman protective and fetal-protective in the Fifth Circuit.¹⁶⁶

Supporters did not always stay on message. Even before passage of the Louisiana admitting privileges law, the district court found that Governor Jindal and the state’s health director were characterizing the law as protecting unborn life.¹⁶⁷ In public statements, Governor Jindal boasted about his state’s AUL rankings¹⁶⁸ and observed that the admitting privileges law “will build upon all we have done the past six years to protect the unborn.”¹⁶⁹ In heated exchanges with witnesses


¹⁶⁴ Id. The AUL statute functioned as the story predicted. The Texas law forced over half of the state’s abortion clinics to close, “and only a few have reopened. Texans in some metropolitan areas must travel as far as 300 miles one way for the procedure” and the state “now has 10 cities of more than 50,000 without an abortion clinic within 100 miles.” Sophie Novack, Texas Has the Most Cities More than 100 Miles from an Abortion Clinic, Study Finds, Tex. Observer (May 15, 2018, 5:03 PM), https://www.texasobserver.org/texas-most-cities-more-than-100-miles-from-abortion-clinic.

¹⁶⁵ See DX 119, supra note 156. On Texas, see supra notes 139–40 and accompanying text.

¹⁶⁶ Greenhouse & Siegel, supra note 42, 1452 n.117 & 1470 n.203.


¹⁶⁸ Id. (“In a press release regarding Act 620 released on March 7, 2014, Jindal declared his position that Act 620 was a reform that would ‘build upon the work . . . done to make Louisiana the most pro-life state in the nation.”).

¹⁶⁹ Id.
who argued that the law would harm women, legislative sponsors of
the law briefly shifted off the ground of women’s health and instead
emphasized the law’s importance in protecting the unborn.\footnote{See infra notes 191–99 and accompanying text.}

But after the admitting privileges law was enacted, its proponents
were much more forthright in discussing its purpose in protecting
unborn life. Governor Jindal said he was “proud” to support legisla-
tion that “will help us continue to protect women and the life of the
unborn in our state.”\footnote{Emily Lane, Bobby Jindal Signs Anti-Abortion Bill Thursday Likely to Close Clinics in Baton
His successor, Governor John Bel Edwards, who as a legislator voted in support of the legislation, defended the law
as protecting “the dignity and sanctity of life.”\footnote{Gov. Edwards’ Statement on U.S. Supreme Court’s Ruling on Louisiana’s Abortion Law, Office
of the Governor (Feb. 8, 2019), https://www.gov.louisiana.gov/index.cfm/newsroom/detail/1794 (“As a pro-life Catholic, I will always advocate for laws that protect the dignity and sanctity of life. I voted for the bill in 2014. I urge the Supreme Court to act quickly in this matter, so Louisiana may move forward.”).}

Landry used the expression “pro-woman and pro-life law” (or simi-
larly “pro-life and pro-woman law”) when discussing the law,\footnote{Maria Clark, Louisiana Reacts to Supreme Court Abortion Access Decision, TIMES-PICAYUNE (July 22, 2019, 2:13 PM), https://www.nola.com/entertainment_life/health_fitness/article_467c2c8c-46b4-55f7-9059-c19e6671243.html.}
while his campaign website boasted that “our pro-life Attorney General, Jeff
Landry, is working to protect the unborn . . . [by] [d]efending Louisi-
ana’s landmark admitting privileges law.”\footnote{See, e.g., Adam Liptak, Supreme Court Blocks Louisiana Abortion Law, N.Y. TIMES (Mar. 4,

After the admitting privileges law was enacted, the law’s sponsor,
Rep. Katrina Jackson, also began talking about it as protecting both
women and the unborn. In a message Jackson provided for members
of Louisiana Right to Life in the summer of 2014, Jackson, a
Democrat, wrote that HB 388 represented “[u]nity for [l]ife.”\textsuperscript{176} “God has created each of us, and He has called me to be true to my calling as a Christian and stand for life in the Legislature,” she wrote.\textsuperscript{177} By passing the law, she argued, “[w]e have overcome the lines that divide us to protect life.”\textsuperscript{178} Countering then-president of Planned Parenthood Cecile Richards’s claim that the bill was enacted “at the expense of women’s health and safety,”\textsuperscript{179} Jackson argued that the bill was “drafted by women, authored by women, supported by women, and voted for by women.”\textsuperscript{180} Dorinda Bordlee also discussed the Louisiana law as protecting women and the unborn. After the Supreme Court declared the admitting privileges law unconstitutional, Bordlee described it as concerned with “the health and safety of women” and “legislation that is both pro-woman and pro-life.”\textsuperscript{181}

2. \textit{Pro-woman? the meaning of “health.”} We have evidence about what “pro-woman and pro-life” means to Dorinda Bordlee. She has coined the term “holistic feminism” to describe her views.\textsuperscript{182} Under the banner “Holistic Feminism: Abortion Harms Women & Children,”

\begin{itemize}
  \item Id.
  \item Jackson, supra note 176; see also Kurt Jensen, \textit{Pro-Lifers Hopeful For Outcome of Court’s First Abortion Case in Four Years, Am. Mag.} (Mar. 4, 2020), https://www.americamagazine.org/politics-society/2020/03/04/pro-lifers-hopeful-outcome-supreme-courts-first-abortion-case-four(describing Jackson as explaining at the time of oral argument in the Supreme Court that the Louisiana law showed “love for the women, for the unborn child, and for those we pass every day who unfortunately may make this decision (to have an abortion”).
  \item Holistic Feminism: Abortion Harms Women & Children, \textit{Bioethics Defense Fund}, http://bdfund.org/stories/holistic-feminism-abortion-harms-women-children (“Holistic Feminism is a term coined by Dorinda Bordlee to discuss the reality of how abortion exploits women as sexual objects, and robs men of a meaningful life of loving care and respect for his family.”).
\end{itemize}
the website of the Bioethics Defense Fund announces: “‘Holistic Feminism’ is a term that BDF uses to describe policy strategies that integrate the interests of the woman, the unborn child, and the often ignored interests and duties of men who can easily rely on abortion to shirk their legal and moral duties of child support and fatherly guidance’”—echoing sex-role-based views about abortion (“What’s good for the child is good for the mother”) that Bordlee expressed at AUL. Bordlee has employed woman-protective arguments to justify a variety of restrictions on access to contraception and abortion.

But what did “pro-woman and pro-life” mean to Jindal, Jackson, Landry, and others who led the way in drafting, enacting, and defending Louisiana’s admitting privilege law?

In Louisiana, Texas, and across the nation, the coupling of “pro-woman and pro-life” openly announced a law’s fetal-protective aims. But what did advocates mean by calling a law “pro-woman and pro-life”? The history we have examined shows that leaders of the anti-abortion movement claimed concern about women because it was a useful way of moving resisting voters and judges to restrict abortion—which the antiabortion movement sought in order to protect unborn life.

Were claims about women’s health a ploy to protect unborn life in a way the public and judges willing to dilute Casey would accept? We can assume that there were differences among them. Undoubtedly, over

———

185 Id.

184 See supra text accompanying note 118.


We cannot measure the influence of these briefs, which are read by the public and by judges, even when they do not cite them for support. But see Gilardi v. U.S. Dep’t of Health & Hum. Servs., 733 F. 3d 1208, 1221 (D.C. Cir. 2013) (quoting Brief Amici Curiae of Breast Cancer Prevention Institute) (referencing an amicus written by Bordlee to justify a claim about the “increased risk for breast, cervical, and liver cancers” and “debatable science” of contraceptives).

186 See supra Section II.B.
time, many who enacted and defended TRAP laws came to act on a sincere belief that a law pushing a resisting woman into becoming a mother was better for the pregnant woman herself. “Love them both,” as Jack Willke came to argue, after market-testing the frame.\textsuperscript{187} But better in what sense?

It is not sufficient to ask whether advocates manipulated their audiences into enacting woman-protective restrictions on abortion in order to protect unborn life or whether, instead, they sincerely believed that imposing health-justified restrictions on abortion was better for women. If the drive to limit women’s access to abortion was based on a sincere belief about women’s welfare, what kind of a belief about women was it?

On the face of it, advocating for “pro-woman and pro-life” laws because they are good for women is advocating on the basis of a sex-role-based belief that, as Dorinda Bordlee (and others) emphasized, “the woman and the child have a sacred bond that should not be divided. What’s good for the child is good for the mother. So now we’re advocating legislation that is good for the woman.”\textsuperscript{188} On this sex-role-based view, there is no conflict of interests between women and the unborn life they bear because, as Bordlee explained, what is good for the child is good for the mother. A state can restrict abortion to protect the unborn and it is good for women’s health because what is good for children is good for women’s health. The descriptive claim is also a normative claim about sex roles that are “good” for women.

The record, in Louisiana and elsewhere, shows that this belief, even when “sincere,”\textsuperscript{189} was not a concern about women’s health as we understand the term “health” outside the abortion context. It is not normal to adopt health and safety standards for the practice of medicine that eliminate risk by means that shut down the regulated practice—and then to act as if the standard’s elimination of medical practitioners is of no consequence to patients’ health and safety.\textsuperscript{190} In

\textsuperscript{187} See supra text accompanying note 99 (discussing polling that led him to change his argument for protecting unborn life).

\textsuperscript{188} See supra text accompanying note 118. For similar views expressed by Denise Burke in 2016, see supra note 132.

\textsuperscript{189} See Ziegler, supra note 113, at 145 (observing that “[m]any pro-lifers sincerely believed that abortion harmed women”). For women working in the movement’s crisis pregnancy centers expressing these beliefs, see Siegel, supra note 88, at 1654–55.

\textsuperscript{190} See supra Section II.C.1.
the ordinary case, further investigation and a likely adjustment of course is warranted; it might even be ethically required. But the supporters of the admitting privileges law appeared utterly unconcerned that the health and safety regulations they advocated would have nearly eliminated the practice of abortion in the state.

Evidence that officials advocating for admitting privileges restrictions on abortion were talking about women’s health in a special, coded, sex-role-based way concerned with the wrongs of a woman ending a pregnancy—and not otherwise concerned with women’s physical wellbeing—appears in the legislative debate over the admitting privileges law and outside of the debate.

In Louisiana, as in Texas, opponents of the admitting privileges law described in concrete detail the health harms the law could inflict on women in the state.¹⁹¹ Not only would a law shutting down abortion providers push women into having later, more dangerous abortions; it would restrict women’s access to the contraception that the clinics provided and it would push resisting women into bearing children under unsafe conditions, often without adequate healthcare.¹⁹² Louisiana was among the most dangerous places to give birth in the nation, and, at the time the legislature enacted the clinic-closing admitting privileges law, there was a shortage of medical care for pregnant women in the state. Alice Chapman, the head of Tulane University’s Medical Students for Choice, emphasized that “Louisiana ranks 44th in the nation for maternal mortality, 49th for infant mortality, and has only one OB/GYN for every 13,136 women.”¹⁹³

The bill’s proponents brushed off warnings about the health injuries the admitting privileges law could inflict by pushing women into late or unlawful abortions—or by pushing women without access to medical care or health insurance into pregnancy. On several occasions, legislators leading debate over the admitting privileges law rebutted accounts of the health harms the law would inflict on women by reverting, fleetingly, to life-justified arguments for restricting abortion.

¹⁹¹ For Texas, see supra text accompanying notes 142–43. For one example in Louisiana, see DX 119, supra note 156, at 18–20 (transcribing the statement of Alice Chapman, Tulane University Medical Students for Choice).

¹⁹² Id. During the State Senate hearing, a witness urged the importance of addressing high rates of unintended pregnancy to bring down abortion rates. DX 119, supra note 156, at 64–66 (transcribing the statement of Autumn Fawn Gandolfi).

¹⁹³ DX 119, supra note 156, at 19.
In the most vivid of these exchanges, Representative Katrina Jackson, sponsor of the admitting privileges law, disparaged Alice Chapman and dismissed her concerns about the ways the law would injure women by announcing that abortion was genocide—a view she has elsewhere explained at greater length. Jackson did not speak for all African Americans in the state. Alfreda Tillman Bester, general counsel for the Louisiana State Conference of the NAACP, testified that the Louisiana state conference of the NAACP had voted to oppose the bill. Bestor gave impassioned testimony opposing the legislation as a threat to poor women’s lives, health, and freedom.

194 DX 119, supra note 156, at 20 (“I’ve heard it thrown around by the young ladies that were at the table today that this protects mostly minority women. . . I’m not sure if you are aware, but the one number genie right now in the African-American community . . . is because most of our babies are dying in the womb from abortions. Did you know that?”); see also id. (“But were you aware that more African-Americans die from abortions than any other illness? . . . I don’t want people advocating erroneously for African-American women. . . . If we protect one facet of African-Americans, we protect all of them.”). In other settings, Rep. Jackson speaks directly about these views, and is publicized by the antiabortion movement as holding them. Announcing that Rep. Jackson was chosen as a speaker at the 2020 March for Life (with the theme of “Life Empowers: Pro-Life is Pro-Woman”), Live Action quoted Rep. Jackson explaining her position on abortion: “I think it (abortion) mitigates our race’s voting power, it hurts our race’s power in the census. I really consider it to be modern-day genocide.” Anne Marie Williams, 2020 March for Life to Showcase How Being Pro-Life Is Pro-Woman, LiveACTION (Dec. 13, 2019, 2:52 PM), https://www.liveaction.org/news/march-for-life-pro-life-pro-woman; see also Anna Reynolds, Black Female Democratic Lawmaker Says Abortion Is “Modern-Day Genocide,” LIVEACTION (June 6, 2019, 12:51 PM), https://www.liveaction.org/news/black-female-democrat-abortion-genocide.

LiveAction reports Representative Jackson’s views selectively and does not discuss her beliefs as a “whole-life Democrat.” See Lauretta Brown, Pro-Life Democrat Katrina Jackson Marches for Life, Writes Louisiana Legislation, Nat’l Catholic Register (Jan. 21, 2020), https://www.ncregister.com/news/pro-life-democrat-katrina-jackson-marches-for-life-writes-louisiana-legislation (reporting State Sen. Jackson identifying as a “whole-life Democrat” which she defines as “ensuring protection of human life from the time of conception to the time of death, which means we not only advocate for the birth of the child but we also advocate for that child to have a true chance at what we call the American Dream regardless of its parents’ socioeconomic status, regardless of where they’re from, regardless of their background”); id. (reporting Rep. Jackson asserting that “[p]ro-lifers and those who are pro-abortion . . . might not ever agree on the sanctity of life, but we can agree on the woman receiving proper health care during her pregnancy; and around this country and in the state of Louisiana we’re having to address the high [maternal] mortality rate that has been developing”). Representative Jackson supported Medicaid expansion in Louisiana, as other supporters of the state’s admitting privileges law did not. See infra text accompanying notes 201–05.

stating that “[s]ince this law went into effect in Texas, women have died because they self-induced and did not have access to clinics or hospitals that provided them with restorative care.” Representative Frank Hoffman, chair of the House Health and Welfare Committee, dismissed her testimony, countering: “I just want to make one point. You said women die in Texas. A person dies every day there’s an abortion too.”

As Hoffman waved off the passionate testimony of two other opposition witnesses with the repeated retort that “someone dies,” the third witness objected and emphasized that restricting abortion throughout Louisiana meant that women would die and urged the legislators to pursue their goal through policies that would actually reduce abortions and actually protect the lives and health of women. Bruce Parker, a community organizer with Louisiana Progress Action, emphasized that abortion restrictions would not in fact stop abortions but would lead to injuries and loss of life; he then identified the very different kinds of laws that Louisiana would have to enact to actually reduce abortion and protect life and health in the state:

Restricting access to safe legal abortion does not mean fewer abortions, it means more unsafe abortions, more women having abortions later in their pregnancies, and more women’s death[s]. Most women who have abortions are poor. Most are already mothers. If we want to be serious about wanting fewer abortions in Louisiana, that means giving women and girls access to reproductive healthcare so they can prevent unplanned pregnancies.

It means guaranteeing that jobs pay a living wage and that women can access affordable child care, support policies that will actually decrease abortion in Louisiana and improve the lives of women and children, such as comprehensive sex ed, Medicaid expansion, raising the minimum wage, and expanding early childhood education.

196 DX 119, supra note 156, at 26–27 (“This bill, in my opinion, reeks of interposition and nullification. We have a constitution in this nation. . . . And for this legislature to impose its religious opinions on women of this state is an absolute immorality, in my opinion.”). While directly linking deaths to the passage of Texas’s HB 2 is difficult, one study found that after HB 2 passed in 2011, deaths relating to pregnancy complications doubled in Texas. Marian F. MacDorman et al., Recent Increases in the U.S. Maternal Mortality Rate, 128 Obstetrics & Gynecology 447, 447, 454 (2016). Another study reported that 2 percent of Texas women report attempting to self-induce abortion, with 18 percent of those attempts occurring between the years of 2010–2015. Daniel Grossman et al., Knowledge, Opinion, and Experience Related to Abortion Self-Induction in Texas, 34 CONTRACEPTION 360 (2015).

197 DX 119, supra note 156, at 27.

198 Id. at 29; see also id. at 25 (transcribing Chairman Hoffman’s one-sentence reply to Dr. Alexis Lee, an opposition witness who discussed the dangers of pregnancy and giving birth).
If we are voting for this bill today because you believe it will save women’s lives, I look forward to seeing you vote for those bills as well. You say you want to decrease the number of abortions, then do so.\footnote{Id. at 29 (transcribing the statement of Bruce Parker with Louisiana Progress Action). For another especially fierce expression of this argument, see id. at 27 (transcribing the statement of Carrie Wooten with Louisiana Progress Action) (arguing that “[b]y shutting three of our five abortion service providers in the state, you are forcing women into desperate situations, and they will act accordingly,” predicting that “[l]ow-income women will suffer the most, women who are already mothers, women who work full-time at terribly low-wage jobs” and arguing that all who vote for legislation would be complicit in the desperation, illness and death enforcing the clinic-closing law would cause).}

Where opponents reasoned about reducing abortion and protecting women’s life and health as requiring coordinated policy choices, the bill’s supporters steadfastly refused to discuss protection for women’s lives and health in the broader policy context and enacted the admitting privileges law without addressing any of the concerns about the harms the law would inflict or discussing plans to mitigate them.

The silence of pro-life legislators aligned with their state’s policy choices. At the time it enacted the admitting privileges law, Louisiana excelled in enacting abortion restrictions, enough for AUL annually to crown the state the most pro-life in the nation. But, outside the abortion context, the state did not have nearly the same appetite for promoting healthcare.

In a state where approximately 70 percent of women gave birth with the funding provided by the Medicaid program, Governor Jindal was in the news for cutting state budget contributions to Medicaid and lowering reimbursement to doctors and hospitals. (In 2011, an obstetrician reported being reimbursed by Louisiana Medicaid at 42 percent of the rate she was reimbursed from private insurance.)\footnote{See Robert Pear, Cuts Leave Patients with Medicaid Cards, but No Specialist to See, N.Y. Times (Apr. 1, 2011), https://www.nytimes.com/2011/04/02/health/policy/02medicaid.html?searchResultPosition=2 (describing cuts to Louisiana’s Medicaid program).}

In 2013, the year before Louisiana enacted its clinic-closing admitting privileges law, Governor Jindal made headlines for refusing to expand Medicaid, with some reports estimating that about 400,000 people in the state had incomes at 138 percent of the federal poverty level—or $26,952 for a family of three—which would have made them eligible for the health care coverage that the state refused.\footnote{Laura Maggi, Sen. Landrieu Blasts Gov. Jindal, Says He’s Spurning Federal Aid to Further Ambitions, TIMES-PICAYUNE (Feb. 27, 2013, 4:14 AM), https://www.nola.com/entertainment_life/health_fitness/article_3cb1a179-7317-5356-8775-fecf85fda484.html#incart_m-rpt-2.}
(Representative Katrina Jackson, a Democrat, co-authored the defeated Medicaid expansion bill.202)

In his statement justifying the state’s refusal to accept federal healthcare for these families, Governor Jindal did not talk about his interest in protecting life and in protecting women’s health. Instead, Jindal’s statement refusing to accept federal support to expand Medicaid distinguished among citizens as more and less worthy of public assistance, denigrating the dependent and praising the virtues of limited government: “[W]e should design our policies so that more people are pulling the cart than riding in the cart. . . . We should measure success by reducing the number of people on public assistance. But the Left has been very clear—their goal is to transform all healthcare in America into government-run health care. . . . It seems that our federal government measures progress by how many Americans it can put onto public assistance programs.”203

The state’s decision to block Medicaid expansion harmed all low-income Louisianans, but the consequences were especially severe for pregnant people. According to Health Affairs, state Medicaid expansions have closed devastating coverage gaps for low-income women before, during, and after pregnancy.204 Newborn children benefited enormously too, as Medicaid expansions were linked to higher rates of continuous perinatal care.205

Not only did Louisiana restrict access to abortion in 2014 while refusing money from the federal government that would have provided healthcare to hundreds of thousands of uninsured people in the state; the state restricted access to abortion without helping women avoid unwanted pregnancies. At a time when the state had one of the highest birth rates to teens between the ages of fifteen and nineteen,206

202 Sheila V. Kuman, Louisiana Health Committee Rejects Medicaid Expansion Bill, TIMES-PICAYUNE (Apr. 25, 2013, 5:30 AM), https://www.nola.com/news/politics/article_c00eb45f-fbee-5797-9c1a-bfdd7e574709.html (“Monroe Democrat Rep. Katrina Jackson, one of the six co-authors of the bill, said the expansion could bring over 400,000 currently uninsured residents onto the Medicaid rolls, while saving the state money.”).


205 Id.

206 See Kate Richardson, Should Sex Education Be Required in Louisiana Public Schools: Voices from the Listening Post, VIA-NOLA-VIE (Aug. 22, 2019), https://www.vianolavie.org/2019/08/22
the state allowed schools to offer abstinence-focused sex education for students above the sixth grade but otherwise lacked a standardized sex education curriculum.207 In 2014, the legislature refused to redress the “the state’s high rates of teenage pregnancies . . . by implementing ‘age appropriate’ sex education standards in public elementary and secondary schools.”208

During the same session that the legislature enacted the admitting privileges law restricting access to abortion, the legislature declined to enact a bill that modestly expanded required coverage of developmentally appropriate sexual education in public schools.209 Accurate sexual education including information about contraception has been shown to reduce teen pregnancy rates and reduce abortion.210 Yet Governor Jindal and groups including the Louisiana Conference of Catholic Bishops and the Louisiana Family Forum opposed even this measure on the grounds “that parents should maintain exclusive control of their children’s exposure to sex education.”211 Jindal once again opposed government involvement: “These are

207 See La. Stat. Ann. § 17:281 (asserting that any public school “may, but is not required to, offer instruction in subject matter designated as ‘sex education,’” and asserting that the major emphasis of such a course “shall be to encourage sexual abstinence between unmarried persons”). For a look at Louisiana’s choices in comparative perspective today, see Sex and HIV Education, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education (last updated Feb. 1, 2021) (graphing policy choices of all 50 states).


209 Id.

210 See Leah H. Keller & Laura D. Lindberg, Expanding the Scope of Sex Education and the Teen Pregnancy Prevention Program: A Work in Progress, GUTTMACHER INST. (Feb. 27, 2020), https://www.guttmacher.org/article/2020/02/expanding-scope-sex-education-and-teen-pregnancy-prevention-program-work-progress (reporting that “evidence has long demonstrated that declining adolescent pregnancy rates are being driven by improved contraceptive use—not declines in sex (with no evidence that abstinence-only programs actually contribute to such declines)).

211 See Ashtari, supra note 208. The sex ed bill asserted “abstinence is the most reliable way to prevent pregnancy” and directed that “no part of sex education instruction shall in any way advocate or support abortion.” Id.
decisions that are best made by parents and local communities, not state government.”

But Louisiana did update its sex-ed laws during the same session it enacted the admitting privileges law. Governor Jindal signed into law a bill that Dorinda Bordlee helped draft prohibiting Planned Parenthood from having any role in sexual education. (In opposing passage of the law, one witness warned against abstinence-only curricula, pointing out that in Mississippi, the curriculum “called on students to unwrap a piece of chocolate, pass it around class and observe how dirty it became.”)

Questioning the values these legislative choices expressed, the director of Planned Parenthood in Louisiana located the state’s 2014 abortion restrictions in the larger policy context: “When given an opportunity to expand Medicaid, ensure equal pay, increase access to health education and raise the minimum wage, the legislators refused to support Louisiana families.” She asked: “If we don’t provide access to health care or education to prevent pregnancy, how does eliminating access to abortion care make sense?”

Those professing to restrict abortion in the interest of protecting women’s health claimed concern about women’s health of a kind that transcends the abortion context. Yet during the legislative hearings, those who called for passage of the admitting privileges statute as a health and safety, pro-woman, and pro-life law were unwilling to address, and even sought to silence, witnesses who raised questions

---

212 Id.

213 See Emily Lane, Bill Bans Planned Parenthood, Other Abortion Providers from Instructing Schools on Sex Education, TIMES-PICAYUNE (Apr. 10, 2014, 12:18 AM), https://www.nola.com/news/politics/article_ad7e8c9a-2897-52fe-bd6e-9452870370fe.html (reporting that Rep. Frank Hoffman sponsored House Bill 306 prohibiting employees or representatives of providers from involvement in instruction or distribution of information in schools); Sarah Zagorski, Governor Jindal Signs Bills to Protect Women and Children from Louisiana’s Abortion Industry, LA RIGHT TO LIFE (June 12, 2014), http://archive.constantcontact.com/fs191/1101796400807/archive/1117626538741.html (identifying Bordlee “as principal architect of both bills” and quoting Bordlee detailing women’s involvement and characterizing H.B. 388 as “by women and for women”).

214 See Lane, supra note 213 (citing recent article). The article linked to a report of a Mississippi class providing sex ed by circulating chocolate among children. See Alana Semuels, Sex Education Stumbles in Mississippi, L.A. TIMES (Apr. 2, 2014, 6:53 PM), https://www.latimes.com/nation/la-na-ms-teen-pregnancy-20140403-story.html (“They’re using the Peppermint Pattie to show that a girl is no longer clean or valuable after she’s had sex—that she’s been used,’ said Barnard, who works in public health. ‘That shouldn’t be the lesson we send kids about sex.’”).

about the health risks the legislature was imposing on women by enacting a law that would dramatically restrict opportunities to end a pregnancy. They did not discuss the health needs of citizens the state was pushing into motherhood as we ordinarily understand the meaning of “health.”

If we consider the circumstances of pregnant women in Louisiana, we can better understand the different conceptions of women’s health circulating in the legislative debate. Evaluating the public health data provides perspective on statements about women’s health and safety expressed by supporters and opponents of Louisiana’s admitting privilege law and sheds light on the values, priorities, and policy choices of a state that AUL long deemed the most pro-life in the nation.217

The United States has the highest rate of maternal deaths in the developed world, and the rate of pregnancy-related death is especially acute among black women.218 And, five years after passage of its admitting privileges law, Louisiana’s maternal mortality rate is among the highest in the nation.219

216 See supra text accompanying notes 191–202.
218 Nina Martin & Renee Montagne, U.S. Has the Worst Rate of Maternal Deaths in the Developed World, NPR (May 17, 2017, 10:28 AM), https://www.npr.org/2017/05/12/528098789/u-s-has-the-worst-rate-of-maternal-deaths-in-the-developed-world (reporting that the rate is rising in the U.S. as it declines elsewhere and observing that, in the U.S., funding is targeted at saving infants rather than focusing on the health of pregnant and post-partum women); see also Nicholas J. Kasza et al., Global, Regional, and National Levels of Maternal Mortality, 1990–2015: A Systematic Analysis for the Global Burden of Disease Study 2015, 388 LANCET 1775 (2016) (showing increasing maternal mortality in the US compared to similar countries); Pooja Mehta et al., Racial Inequities in Preventable Pregnancy-Related Deaths in Louisiana, 2011–2016, 135 OBSTETRICS & GYNECOLOGY 276, 277, 279 (2020) (“Non-Hispanic black women are three to four times as likely as non-Hispanic white women to experience a pregnancy-related death nationally.”). Khira Bridges has recently reviewed the literature on the sources of racial disparities in maternal mortality. See Khira M. Bridges, Racial Disparities in Maternal Mortality, 95 N.Y.U. L. REV. 1229, 1248–67 (2020).
219 See Laura Ungar & Caroline Simon, Which States Have the Worst Maternal Mortality?, USA TODAY (Nov. 1, 2018), https://www.usatoday.com/list/news/investigations/maternal-mortality-by-state/?t=6a2a48-0b79-40c2-a44d-8111879a8336 (ranking Louisiana first out of forty-six states with available data); Emily Woodruff, What Contributes to Louisiana’s High Maternal Mortality Rate? The Distance to Care, Research Says, NOLA.COM (Oct. 20, 2020, 10:45 PM), https://www.nola.com/news/healthcare_hospitals/article_c3cf355e-131f-11eb-851a-6b04db7e8d0.html (“Louisiana has among the highest rate of death for pregnant women in the U.S.”). But see Marian F. MacDorman & Eugene Declercq, The Failure of United States Maternal Mortality Reporting and Its Impact on Women’s Lives, 45 BIRTH 105 (2018) (reporting that because of inconsistencies in reporting and coding state data, the United States has only intermittently published data on
These health outcomes are not simply the expression of poverty. They are the expression of policy. A recent study identified as an important cause of Louisiana’s high maternal mortality the absence of prenatal care in the state.\textsuperscript{220} Over a third of the state’s parishes lack “a hospital offering obstetric care, a birth center or any OB/GYNs or certified nurse-midwives.”\textsuperscript{221} More than one in four women in the state need to travel out of their parish for routine appointments, and they may not have the money, the ability to miss work, and the resources to secure child care. According to the study’s findings, “women in these ‘maternity care deserts’ had a threefold higher risk for deaths directly related to the pregnancy, such as severe bleeding or preeclampsia, a dangerous complication involving high blood pressure.”\textsuperscript{222} The risk for pregnancy-associated deaths (deaths of any cause—such as homicide or suicide—up to a year after pregnancy) was dramatically higher as well.\textsuperscript{223}

maternal mortality, and, citing Texas as an example, observing that this failure to report has allowed escalations in maternal mortality to go unnoticed and unremedied); Nina Martin, \textit{Lost Mothers: The New U.S. Maternal Mortality Rate Fails to Capture Many Deaths}, ProPublica (Feb. 13, 2020, 12:40 PM), https://www.propublica.org/article/the-new-us-maternal-mortality-rate-fails-to-capture-many-deaths.

\textsuperscript{220} Low Medicaid reimbursement rates aggravate shortages, with the impact falling on the poorest, who are unable to find coverage for which they may be eligible, or unable to access a doctor until late in pregnancy. On the ways that low Medicaid reimbursement rates aggravate shortages, see Peer, supra note 200; and Elizabeth Renter, \textit{You’ve Got Medicaid – Why Can’t You See the Doctor?}, U.S. News & World Rep., (May 26, 2015, 9:00 AM), https://health.usnews .com/health-news/health-insurance/articles/2015/05/26/youve-got-medicaid-why-cant-you -see-the-doctor. See also Karen N. Brown, \textit{How Is OB/GYN Medicaid Reimbursement Impacting the Shortage of Doctors?}, Voluson Club: Empowered Women’s Health (Jan. 17, 2019), https:// www.volusonclub.net/empowered-womens-health/how-is-ob-gyn-medicaid-reimbursement -impacting-the-shortage-of-doctors (reporting that “about 31 percent of physicians do not accept Medicaid, largely because its reimbursement is the lowest of all third-party payers. Many patients who have Medicaid have trouble finding a doctor and, therefore, wait longer to see one—which means that they are likely to need more care by the time of their appointment”).

On the ways that Medicaid administration and lack of insurance affect pregnant women, see Julia Belluz & Nina Martin, \textit{The Extraordinary Danger of Being Pregnant and Uninsured in Texas}, Vox (Dec. 19, 2019, 10:08 AM), http://www.vox.com/science-and-health/2019/12/6/20995227 /women-health-care-maternal-mortality-insurance-texas (describing, in a state that refused the Medicaid expansion, the large numbers of uninsured women as well as the brief and late Medicaid coverage provided pregnant women and relating the consequences of these health care deprivations in maternal and infant illness and death).

\textsuperscript{221} Woodruff, supra note 219; see also Maeve Wallace et al., \textit{Maternity Care Deserts and Pregnancy-Associated Mortality in Louisiana}, Women’s Health Issues (Sept. 8, 2020); Elizabeth Dawes Gay, \textit{The Challenges and Solutions to Accessing Maternity Care in Louisiana}, Every Mother Counts (Nov. 30, 2017), https://blog.everymothercounts.org/why-louisiana-49cfe0b487le (“Almost half of Louisiana’s counties do not have a single Ob/Gyn.”).

\textsuperscript{222} Woodruff, supra note 219.

\textsuperscript{223} Id.
Women of color in Louisiana bear the brunt of the state’s policy choices. At a time when Louisiana (repeatedly) decided to restrict access to abortion without significantly improving women’s access to healthcare or to sex education, the “rate of pregnancy-related death among non-Hispanic black women was 4.1 times the rate among non-Hispanic white women,” and “among non-Hispanic black women who experienced pregnancy-related death, 59% . . . of deaths were deemed potentially preventable, compared with 9% . . . among non-Hispanic white women.”  

It should go without saying that these policy investments harm infants. The Department of Health and Human Services found that newborns whose mothers had no prenatal care are almost five times more likely to die than babies born to mothers who had early prenatal care. In 2013, the year the state refused to expand Medicaid, the state ranked among the worst in infant health, one survey finding that “Louisiana performs worse than nearly every other state in the nation on measures of infant mortality, preterm birth, low birth weight, and caesarian sections.” Today, the Centers for Disease Control reports that Louisiana has the second highest infant mortality rate in the nation.

Louisiana’s decision to enact its admitting privileges law, obstructing women’s access to abortion without making significant changes in the state’s provision of Medicaid or sex education, compromised women’s autonomy and women’s health. The decision to enact the admitting privilege statute was not a benign expression of pro-life sentiment. It was an expression of antiabortion animus concerning women as well.

---

224 Mehta et al., supra note 218, at 276.

225 See Office on Women’s Health, U.S. Dep’t of Health & Human Servs., Prenatal Care Fact Sheet, https://www.womenshealth.gov/a-z-topics/prenatal-care (last updated Apr. 1, 2019) (“Babies of mothers who do not get prenatal care are three times more likely to have a low birth weight and five times more likely to die than those born to mothers who do get care.”).


as the unborn that threatened the lives and health of women and the children they might bear.

III. “Pro-Woman,” Health-Justified Restrictions on Abortion in the Courts

Expanding the frame to consider *June Medical* in its larger historical and policy context brings into view the constitutional, political, and human stakes of the doctrinal dispute in the case. Expanding the frame explains why, in concurring, Chief Justice Roberts picked a seemingly technical fight over “balancing.” He was attacking judges who scrutinized the underlying logic of admitting privileges restrictions on abortion—assuming a stance toward the record not wholly unlike the committee chair who dismissed the testimony of opposition witnesses.

Integrating the accounts of *June Medical* in Parts I and II of this Article enables us to appreciate the role judges are playing in the political conflicts we have just examined. At the same time, the examination of doctrine serves the ordinary function of identifying forms of argument on which participants are drawing in the fight over revising and reversing *Casey*. The exercise identifies resources on which willing judges can still draw to scrutinize TRAP laws in the wake of *June Medical* and identifies the next points of conflict for judges seeking to legitimate TRAP laws.

It is no secret that conservative judges are weakening constitutional protections for the abortion right. At times, they shout out opposition to the right *Roe* recognized. But where woman-protective abortion restrictions are concerned, judges often play another less appreciated role.

As opponents of abortion have come to package restrictions on abortion as protections for women, judges who oppose the abortion right embrace standards that insulate these legislative constructions from judicial scrutiny. In this role, judges are not shouting out moral, political, or jurisprudential opposition to the abortion right; they invoke a judge’s commitment to democracy to enable a movement

---

228 See supra Part I.

229 Justice Clarence Thomas has reiterated that he “remain[s] fundamentally opposed to the Court’s abortion jurisprudence.” Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292, 2324 (2016) (Thomas, J., dissenting).
strategy that, as we have seen, in design and implementation avoids forthrightness about its aims.

Leaders of the antiabortion movement have adopted strategies to end abortion incrementally through TRAP laws that legislatures present as health and safety laws protecting women. Judges who make law requiring deference to legislatures not only uphold these restrictions; they insulate them from scrutiny, credit their woman-protective aims and justifications—and declare these modes of reasoning about and regulating women constitutional.230

It is a remarkable project for judges, whose logic seems more political than ethical or jurisprudential. Judges have voiced ethical and jurisprudential objections to Roe since the dissents in that case.231 But more is involved if a judge acts on those objections by upholding abortion restrictions that push resisting women into childbearing for the announced reason of protecting women. It is one thing to reverse Roe and Casey; it is another to pursue that aim through forms of rational basis review that elude the public’s grasp. What view of women, or democracy, does this reflect? These judicial moves invite a different ethical and constitutional dialogue.

Judges reviewing TRAP laws are reviewing laws that depend on indirectness. Legislatures interested in restricting abortion can enact directive counseling mandates or reason-based bans on abortion, but these efforts to dissuade and to discredit do not prevent as many abortions as a woman-protective health and safety regulation of providers can. Yet as Part II suggests, enacting these laws requires obscuring their fetal-protective and abortion-restrictive aims for reasons that are political as well as legal. The incrementalist strategy seeks to decimate the remaining clinic infrastructure without triggering backlash from a public that expects at least nominal consideration of

---

230 Cf. Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (“A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court’s opinion in this case.”).

231 Justice Rehnquist asserted that the Court should have applied rational basis review and objected that the decision revived Lochner. See Roe v. Wade, 410 U.S. 113, 173–74 (1973) (Rehnquist, J., dissenting) (citing Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955) and Lochner v. New York, 198 U.S. 45 (1905)). Justice White, joined by Justice Rehnquist, raised concerns about protecting unborn life and expressed contempt for women who seek abortions: “During the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim, or caprice of the pregnant woman more than the life or potential life of the fetus.” Id. at 221 (White, J., dissenting).
women’s interests and that, by large majorities, opposes overruling Roe and banning abortion. In 2019, a Pew poll reported that 70 percent of Americans oppose overturning Roe v. Wade and 61 percent believe abortion should be legal in all or most cases.232

Does an appreciation of these political constraints inform the reasoning of judges as well as advocates and legislators? Conservative scholars mercilessly criticized Chief Justice Roberts for engaging in political calculations in June Medical and elsewhere; in their view, his tendency to let political calculations shape his judgments sets him apart from judges they view as principled conservatives.233 At the end of a Term Josh Blackman called “Blue June,”234 Varad Mehta and Adrian Vermeule reported that “[c]onservatives . . . thought Roberts’s invocation of precedent [in June Medical] was desperately unconvincing and served only to rationalize what appears to be a fear of signing on to more sweeping, and therefore more controversial, pro-life rulings.”235 Mehta and Vermeule blamed the Chief Justice for “the very politicization of the Supreme Court he sought to prevent” and concluded “Republicans’ determination to install Barrett on the Supreme Court a week before a presidential election can be seen as a sign of conservatives’ distrust of the chief justice . . . a political gambit designed to thwart a master of political gamesmanship.”236

But is Chief Justice Roberts acting more politically than the conservative judges who would uphold woman-protective health-justified abortion restrictions on rational basis review? Once we read the doctrinal debate in June Medical as part of the story of woman-protective health-justified abortion restrictions this article recounts, we can better

---


233 Josh Blackman, Chief Justice Roberts Has Fallen into a “Truly Bottomless Pit from Which There Is Simply No Extracting [Himself],” Reason: Volokh Conspiracy (Dec. 17, 2020, 6:24 PM), https://reason.com/volokh/2020/12/17/chief-justice-roberts-has-fallen-into-a-truly-bottomless-pit-from-which-there-is-simply-no-extracting-itself/?amp__twitter_impression=true (“For Roberts, every decision has to [be] refracted through some bizarre political lens. His jurisprudential lodestar is the Gallup poll.”).


236 Id.
appreciate the interlocking roles that advocates, officials, and judges have played in decimating abortion access over the years.

At the time the Court was to hear *June Medical*, there were six states with only one remaining abortion clinic.\(^{237}\) With enforcement of its admitting privileges law, Louisiana would have joined their ranks, or, as a CBS News story announced, “Louisiana could become the first state not to have legal abortion access since the practice was legalized in 1973.”\(^{238}\) CBS reported that “the author of the law, Representative Katrina Jackson, denied the requirement was intended to shut down abortion access and called the regulation ‘common-sense women’s health care.’”\(^{239}\)

Given the history of Louisiana’s admitting privileges law we have considered, what kind of an answer is this? Is a judge considering a constitutional challenge to the law obliged to answer this question any differently than its legislative sponsor did? Observe that the Supreme Court nearly validated Representative Jackson’s account of the admitting privileges law. In *June Medical*, four of the Court’s conservative justices—including Justice Gorsuch, whom President Trump appointed to replace Justice Scalia, and Justice Kavanaugh, whom President Trump appointed to replace Justice Kennedy—voted to allow Louisiana to enforce the admitting privileges law to protect women’s health and safety. Without Justice Kennedy, the last remaining justice who participated in *Casey* and who voted to strike down the Texas admitting privileges law in *Whole Woman’s Health*, the Supreme Court, reshaped by President Trump’s appointments, was poised to uphold Louisiana’s admitting privileges law as a health and safety law adopted for women’s benefit.

But with the approach of the 2020 election, in which debate over President Trump’s judicial appointments and the decisions of the Court figured,\(^{240}\) Chief Justice Roberts acted to protect the Court,


\(^{239}\) Id. Before a conservative audience, Dorinda Bordlee predicted that a ruling on third-party standing could block eighty percent of abortion cases. See EWTN, *supra* note 181.

\(^{240}\) See *supra* text accompanying notes 5–6 (reporting on argument about Supreme Court decisions and judicial appointments during the Vice-Presidential debate on the eve of the 2020 election); Mehta & Vermeule, *supra* note 235 (“Recently, as Democrats threatened to
institutionally and politically. Asserting that stare decisis required the Court to treat like cases alike, Roberts crossed over to vote with the four justices from the *Whole Woman’s Health* majority in a concurring opinion in which he repeated some, but not all, of the objections asserted by the conservative justices who dissented in *Whole Woman’s Health* and *June Medical*. The “maneuver” avoided openly reversing *Whole Woman’s Health* while voicing objections to the standard the Court adopted in that case, inviting lower courts discretely to narrow constitutional protections for the abortion right without outright overturning them.

In what follows, I integrate the doctrinal dispute in *Whole Woman’s Health* and *June Medical* into the history of TRAP laws we have just examined. Analyzed from this vantage point, we can see that conservative judges attacking balancing are embracing standards that will legitimize the woman-protective health justifications of TRAP laws and weaken the restrictions that *Casey* imposes on them. The standards conservative judges embrace do not preserve the distinction between law and politics; they empower antiabortion advocates, validating their claim that TRAP laws protect women and eroding constitutional protections for the abortion right.

I take as a focal point of this discussion the concurring opinion of Chief Justice Roberts in *June Medical*. On the best view of the law, because Chief Justice Roberts’ concurring opinion in *June Medical* diverged so greatly from the plurality, it did not modify *Whole Woman’s Health*. Yet there is keen interest in Chief Justice Roberts’ opinion

---

241 See infra Section III.B.

242 See Mehta & Vermuel, supra note 235 (noting that “observers on both left and right have concluded that Roberts has engaged in strategic maneuvering: His goal appears to be to preserve what he takes to be the legitimacy of the Supreme Court, by disproving any suspicion that the justices vote ideologically or otherwise engage in political behavior” and calling out his decision in *June Medical* as avoiding “more sweeping, and therefore more controversial, pro-life rulings”).

243 See supra text accompanying note 57 (quoting Chief Justice Roberts in *June Medical*).

244 In Marks v. United States, the Court reasoned that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .’” 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ)). As expounded by an en banc panel of the D.C. Circuit, “the narrowest opinion must represent a common denominator of the Court’s reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.” King v. Palmer, 950 F.2d 771, 781 (D.C. 1991).
precisely because it signals the direction of a Court whose views are expected to evolve with its membership.

By reading the doctrinal debate in *Whole Woman’s Health* and *June Medical* in light of the political history of the TRAP laws we have examined, we can better understand the path along which Chief Justice Roberts would incrementally move the law. The exercise shows the role judges play in constraining or enabling TRAP laws, and it allows us to inventory the constitutional limitations that remain on TRAP laws.

Once we decipher the path Chief Justice Roberts chose in *June Medical*, we can see that even if courts read his concurring opinion as changing the law, a willing judge *still* has authority and doctrinal resources to scrutinize TRAP laws. Mapping the law in this way in turn identifies how the Supreme Court might next move to insulate TRAP laws from these forms of judicial scrutiny.

In short, reconstructing the debate over *Casey* that led to *June Medical* helps us understand not only the past but the future. It identifies choices that any judge—including Justice Barrett—unavoidably confronts in reviewing TRAP laws and other woman-protective abortion restrictions.

### A. THE TRAP STRATEGY AND THE JUDICIAL ROLE

In *June Medical*, Chief Justice Roberts argued that *Whole Woman’s Health* was faithless to *Casey* because it directed judges to enforce the undue burden standard through a balancing test. He made this point

---

Cir. 1991) (en banc). See also United States v. Epps, 707 F.3d 337, 348 (D.C. Cir. 2013) (accord). In *June Medical*, members of the plurality did not support Chief Justice Roberts’s dicta, including the Chief Justice’s criticism of the balancing test. If there is a “common denominator” to be found between the *June Medical* plurality and Chief Justice Roberts’s concurrence, it is that the “five justices who support the judgment” support adherence to *Whole Woman’s Health*. See *June Medical Servs. v. Russo*, 140 S. Ct. 2103, 2133 (2020) (Roberts, C.J., concurring) (“The question today however is not whether *Whole Woman’s Health* was right or wrong, but whether to adhere to it in deciding the present case.”). See also *Ramos v. Louisiana*, 140 S. Ct. 1390, 1402 (2020) (rejecting the “new and dubious proposition” of a single Justice overturning prior precedent as “not the rule . . . for good reason” and noting this potential practice “would do more to destabilize than honor precedent”). For other approaches under *Marks* to read a fractured opinion like *June Medical*, see infra note 302 (discussing case law interpreting *June Medical*); see also Ryan C. Williams, Questioning Marks: Plurality Decisions and Precedential Constraint, 69 Stan. L. Rev. 795, 806–07 (2017).

245 See infra text accompanying notes 304–08.

246 See infra Section III.C.
by invoking Justice Scalia’s attack on balancing tests as endowing judges with discretion that rules, supposedly, do not.\textsuperscript{247}

Of course, it is odd to object to balancing because it introduces discretion into a judge’s determination of an “undue burden.” But the appeal to Scalia clarifies the nature of the objection. Justice Scalia did not author \textit{Casey}; he ferociously dissented from it.\textsuperscript{248} Chief Justice Roberts also attacked balancing by invoking the “mysteries of life” passage in \textit{Casey} that Justice Scalia famously mocked in his \textit{Casey} and in \textit{Lawrence v. Texas} dissents.\textsuperscript{249} These signals at the very least suggest Chief Justice Roberts was establishing authority with those who revere the memory of Justice Scalia. They do not portend an altogether even-handed account of \textit{Casey}.

We can get another perspective on the question whether balancing is faithless to \textit{Casey} by consulting Justice Kennedy. Justice Kennedy, who coauthored \textit{Casey}’s joint opinion, explained in \textit{Gonzales v. Carhart},\textsuperscript{250} an opinion restricting abortion access, that balancing was central to \textit{Casey}’s core holding and the undue burden test that enforced it:

Before viability, a State “may not prohibit any woman from making the ultimate decision to terminate her pregnancy.” It also may not impose upon this right an undue burden, which exists if a regulation’s “purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion for medical reasons.”

\textsuperscript{247} See \textit{June Medical}, 140 S. Ct. 2103, 2135–56 (2020) (Roberts, C.J., concurring) (“Under such tests, ‘equality of treatment is . . . impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.’”) (quoting Antonin Scalia, \textit{The Rule of Law as a Law of Rules}, 56 U. Chi. L. Rev. 1175, 1182 (1989)).

\textsuperscript{248} Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in part and dissenting in part) (arguing that the question is “not whether the power of a woman to abort her unborn child is a ‘liberty’ in the absolute sense. . . . The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not.”). When Justice Scalia balanced, for example, in limiting application of Second Amendment rights, he never drew attention to it. Compare Dist. of Columbia v. Heller, 554 U.S. 570, 634 (“We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.”) \textit{with id.} at 628–33 (limiting Second Amendment rights in favor of the state’s interest in regulating arms in a variety of settings).


before the fetus attains viability.” On the other hand, “[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose.” Casey, in short, struck a balance. The balance was central to its holding.251

As this passage explains, Casey balances when it coordinates a woman’s right to choose with the state’s interest in protecting unborn life through the principle the undue burden standard vindicates: that, prior to viability, government may only protect potential life by informing, not hindering, a woman’s choice.252 This same concern about obstructing women’s choices explains Casey’s holding that “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.”253 Because balancing is central to Casey’s logic, balancing is required—and expressly built into—the standards the joint opinion directed judges to enforce. How would a judge determine whether health regulations are “unnecessary” or impose an “undue burden” without making judgments about weighing, comparing, or balancing of the kind Chief Justice Roberts attacked?

In short, by invoking Justice Scalia, who dissented in Casey, to attack “balancing” as unfaithful to Casey, Chief Justice Roberts was signaling positions in a fight over enforcing Casey that, as we will see, divided the Court in Whole Woman’s Health—a case in which Chief Justice Roberts himself dissented.

If we look back to the first cases evaluating admitting privileges laws, we can see how judges fighting over Casey’s application to TRAP laws came to focus on the so-called “balancing standard” the Chief Justice attacks as faithless to Casey. This brief retrospective on the balancing debate throws into sharp relief competing claims about the judge’s proper role—and inverts the story about law and politics that the Chief Justice tells.

When courts were first called upon to review the constitutionality of laws imposing admitting privilege requirements on abortion providers, they faced a question about whether to call out legislatures as

251 Id. at 146 (quoting Casey, 505 U.S. at 877–79).
252 See supra Section II.A.
253 Casey, 505 U.S. at 878.
purposefully imposing obstacles to women’s abortion access under the guise of protecting women’s health. A purpose to impose a substantial obstacle violates Casey’s undue burden standard—and its underlying “inform, not hinder” principle—but were courts prepared to enforce Casey by determining whether legislators were hiding an unconstitutional purpose to obstruct women’s access to abortion? The balancing standard that Chief Judge Roberts attacked allows judges to draw inferences about whether a legislature was obstructing access to abortion without requiring judges expressly to characterize the government’s purposes.

It was Judge Richard Posner who first developed this approach in a case where the government’s hostility to abortion was only barely concealed. In preliminarily enjoining Wisconsin’s admitting privileges law, Judge Posner pointed out that the state gave doctors one weekend to come into compliance with a law that would have shut down two of the state’s four abortion clinics.254 The state justified the law as protecting women’s health, Judge Posner observed, yet the state introduced no evidence in support of this claim, as Casey required: “The cases that deal with abortion-related statutes sought to be justified on medical grounds require not only evidence (here lacking as we have seen) that the medical grounds are legitimate but also that the statute not impose an ‘undue burden’ on women seeking abortions. The feebler the medical grounds, the likelier the burden, even if slight, to be ‘undue’ in the sense of disproportionate or gratuitous.”255

The comparative standard Posner adopted provided a disciplined way of vindicating Casey’s “inform, not hinder” principle without directly accusing the Wisconsin legislature of misrepresenting its aims or concealing an unconstitutional purpose to deprive women of their constitutional rights.

But in a subsequent decision in Wisconsin’s admitting privileges case, Judge Posner was a great deal more direct. He never used the term “balance” but repeatedly probed the question whether “the statute would have substantially curtailed the availability of abortion in Wisconsin, without conferring an offsetting benefit (or indeed any benefit) on women’s health”256 and he was blunt in explaining why. In

254 Planned Parenthood of Wis., Inc. v. Van Hollen, 738 F.3d 786, 789 (7th Cir. 2013).
255 Id. at 798 (citations omitted).
256 Planned Parenthood of Wis., Inc. v. Schimel, 806 F.3d 908, 916 (7th Cir. 2015).
a passage of his opinion aimed at the nation and the Supreme Court, Judge Posner called attention to the distinction between legitimate moral opposition to abortion and the covert use of state power to obstruct the exercise of constitutional rights:

A great many Americans, including a number of judges, legislators, governors, and civil servants, are passionately opposed to abortion—as they are entitled to be. But persons who have a sophisticated understanding of the law and of the Supreme Court know that convincing the Court to overrule Roe v. Wade and Planned Parenthood of Southeastern Pennsylvania v. Casey is a steep uphill fight, and so some of them proceed indirectly, seeking to discourage abortions by making it more difficult for women to obtain them. They may do this in the name of protecting the health of women who have abortions, yet as in this case the specific measures they support may do little or nothing for health, but rather strew impediments to abortion. This is true of the Texas requirement, upheld by the Fifth Circuit in the Whole Woman’s case now before the Supreme Court...257

Emphasizing the Wisconsin legislature’s failure to provide the doctors adequate notice, Posner pointed to the legislature singling out abortion as evidence of a hidden purpose:

Opponents of abortion reveal their true objectives when they procure legislation limited to a medical procedure—abortion—that rarely produces a medical emergency. A number of other medical procedures are far more dangerous to the patient than abortion, yet their providers are not required to obtain admitting privileges anywhere, let alone within 30 miles of where the procedure is performed.258

The state’s principal witness, Dr. John Thorp,259 submitted a report claiming that abortion was more dangerous than childbirth, which relied on a paper by David Reardon and Priscilla Coleman, which Judge Posner found, failed to control for many relevant factors; Judge Posner credited the study submitted by plaintiff’s expert, which concluded “that the risk of death associated with childbirth is 14 times higher than that associated with abortion.”260 Judge Posner emphasized

---

257 Id. at 920–21.
258 Id. at 920.
259 Dr. Thorp has repeatedly testified on behalf of admitting privileges laws for AUL, despite judges repeatedly questioning the accuracy and credibility of his testimony. See Imani Gandy, When Does an Error Become Lies? The Case of the Missing Decimal Point, REWIRE NEWS GROUP (Apr. 24, 2015, 11:07 AM), https://rewirenewsgroup.com/article/2015/04/24/error-becomes-lie-missing-decimal-point (discussing Thorp’s pattern of inflating abortion complication rates when acting as an expert witness); see also Burke, supra note 132 (quoting Thorp).
260 Schimel, 806 F.3d at 921–22.
that probing facts and determining credibility was critical to determining the state’s purposes.261

In addressing the nation and the Court, Posner emphasized the rule-of-law values at stake in the government misrepresenting its “true objectives” for enacting the admitting privileges law: Neither legitimate ethical convictions nor passionate disagreement could justify using state power to surreptitiously and unlawfully deprive others of constitutional rights.262

Soon the technique of comparing benefits and burdens Posner introduced was adopted by other judges as an important technique (among many, including the singling-out test263) for drawing inferences about cases challenging admitting privileges statutes and other TRAP laws.264

But in 2014, the Fifth Circuit ferociously repudiated this approach in the cases that would become Whole Woman’s Health. In these cases, the Fifth Circuit worked out the elements of a framework for legitimating TRAP laws and avoiding the rule-of-law questions that Judge Posner raised. Looking back at these decisions, we can identify the doctrinal elements of the framework that Chief Justice Roberts incorporated into, and omitted from, his June Medical concurrence.

In reversing a district court finding that the Texas admitting privileges law had no rational relationship to protecting women’s health, Judge Edith Jones advanced a radically transformative account of the Casey-Carhart framework. Note the critical claims about rational basis and judicial factfinding:

261 Id. (concluding that evidence of the law’s benefits was “nonexistent,” since Dr. Thorp “could not substantiate” his claim that the death rate for women who undergo abortions was the same as the maternal mortality rate or cite a single case where admitting privileges would have benefited a woman who experienced complications from an abortion).

262 In a fierce dissent, Judge Manion refused to engage with Judge Posner on these grounds and in a lengthy opinion which followed the Fifth Circuit, he insisted that rational basis governed the case and concluded: “There is no question that Wisconsin’s admitting-privileges requirement furthers the legitimate, rational basis of protecting women’s health and welfare.” Id. at 935 (Manion, J., dissenting).

263 See supra text accompanying notes 133–35 (discussing TRAP laws as singling out abortion for burdensome regulation).

264 See Greenhouse & Siegel, supra note 42, at 1460–63 (discussing cases in the Eleventh and Ninth Circuit employing variants of this test). For discussion of other techniques courts have employed to draw inferences about purposes, see Thomas B. Colby, The Other Half of the Abortion Right, 20 J. Const. L. 1043, 1092–100 (2018) (discussing inferences from face of law, comparison with the regulation of similar practices, bad fit between means and ends, foreseeable effects, legislative history and statements of legislators and others involved in the legislative process, historical background and specific sequence of events leading to enactment, departures from normal lawmaking procedures and discriminatory application).
Nothing in the Supreme Court’s abortion jurisprudence deviates from the essential attributes of the rational basis test, which affirms a vital principle of democratic self-government. It is not the courts’ duty to second guess legislative factfinding, “improve” on, or “cleanse” the legislative process by allowing relitigation of the facts that led to the passage of a law. . . . As the Supreme Court has often stressed, the rational basis test seeks only to determine whether any conceivable rationale exists for an enactment. . . . A law “based on rational speculation unsupported by evidence or empirical data” satisfies rational basis review.265

Judge Jones’s characterization of the Court’s abortion cases as all applying the rational basis test is wildly at odds with Justice Kennedy’s own reading of Casey in Carhart itself.266 Recall that it was the dissenters in Casey, Chief Justice Rehnquist and Justice Scalia, who asserted that the abortion right is an ordinary liberty properly subject to rational basis review of the most deferential kind.267 Judge Jones then rejected Judge Posner’s approach to applying undue burden, attacking his view that it was important for a judge to examine the facts justifying restrictions on abortion: “The first-step in the analysis of an abortion regulation, however, is rational basis review, not empirical basis review.”268

Judge Jennifer Elrod next built the Fifth Circuit rational basis decision into an attack on Judge Posner’s method of conducting the undue burden inquiry.269 She admonished a district court for examining facts bearing on the question whether a health-justified restriction “would actually improve women’s health and safety,” and

---

265 Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 594 (5th Cir. 2014) (citations omitted). In criticizing the trial court’s application of rational basis, Judge Jones cited many rational basis decisions but postponed invoking Lee Optical until a bit deeper into her analysis, where she sought to refute Judge Posner’s singling out analysis. See id. at 596 (“States ‘may select one phase of one field and apply a remedy there, neglecting the others’” (quoting Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483, 489 (1955))).

266 See supra text accompanying note 251.

267 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 966 (1992) (Rehnquist, C.J., dissenting) (“[W]e think that the correct analysis is that set forth by the plurality opinion in Webster. A woman’s interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest.” (citing Lee Optical, 348 U.S. at 491)); id. at 981 (Scalia, J., dissenting) (“I will not swell the United States Reports with repetition of what I have said before; and applying the rational basis test, I would uphold the Pennsylvania statute in its entirety.”).

268 Abbott, 748 F.3d at 596.

269 Whole Woman’s Health v. Lakey, 769 F.3d 285, 304–05 (5th Cir. 2014) (overturning the district-court injunction against the Texas ambulatory surgical center requirement, vacated in part, 135 S. Ct. 399 (2014)).
announced that “[i]n our circuit we do not balance the wisdom or effectiveness of a law against the burdens the law imposes” and “[u]nder our precedent, we have no authority by which to turn rational basis into strict scrutiny under the guise of the undue burden inquiry.”

As Linda Greenhouse and I observed, the Fifth Circuit at times treated “only the question of whether an abortion restriction serves the interests of women’s health as subject to rational-basis review,” but elsewhere “the circuit makes a broader claim: that the entirety of the undue burden framework is a form of rational-basis review.”

Both these claims are in direct conflict with many features of Casey and of Carhart, including Casey’s requirement that “the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it” and Carhart’s direction that “[t]he Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.”

When the challenge to the Texas law reached the Supreme Court, the justices divided between the approaches of the Seventh and Fifth Circuits. By revisiting this divide in Whole Woman’s Health, we can better appreciate how Chief Justice Roberts positioned himself in June Medical.

Writing for the majority in Whole Woman’s Health, Justice Breyer embraced Judge Posner’s approach. Justice Breyer directed judges enforcing Casey to compare the benefits and burdens of an abortion restriction, and he directed judges to follow Carhart and independently review facts on which the law was premised. His opinion for the majority expressly repudiated the Fifth Circuit’s claim that rational basis of the Lee Optical kind was the appropriate standard of review for enforcing a constitutional right. Justice Kennedy joined the majority opinion in full.

---

270 Id. at 297.
271 Greenhouse & Siegel, supra note 42, at 1466–67 (citations omitted).
272 Casey, 505 U.S. at 877.
274 See supra text accompanying notes 44–46.
275 Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292, 2309–10 (2016) (observing Fifth Circuit was “wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue” (citing Williamson v. Lee Optical of Okla., 348 U.S. 483, 491 (1955))).
Justice Ginsburg joined the majority, but then, to clarify the stakes of the dispute, she wrote a brief concurring opinion that forthrightly discussed the relationship between the standard directing judges to compare a law’s benefits and burdens and the majority’s concerns about unconstitutional purpose. In her Whole Woman’s Health concurrence, Justice Ginsburg repeatedly cited Judge Posner’s opinion expressing rule-of-law objections to the surreptitious use of public power to obstruct the exercise of constitutional rights.\textsuperscript{276} She observed that the Texas law singled out abortion, a relatively safe procedure, for burdensome regulation not imposed on other more dangerous procedures: “Many medical procedures, including childbirth, are far more dangerous to patients, yet are not subject to ambulatory-surgical-center or hospital admitting-privileges requirements.”\textsuperscript{277} Reviewing the record, she declared “it is beyond rational belief that H.B. 2 could genuinely protect the health of women, and certain that the law ‘would simply make it more difficult for them to obtain abortions.’”\textsuperscript{278} The state put the health and safety of poor women at risk,\textsuperscript{279} she concluded, quoting Judge Posner’s appeal to the nation, and observing “Targeted Regulation of Abortion Providers laws like H.B. 2 that ‘do little or nothing for health, but rather strew impediments to abortion,’ cannot survive judicial inspection.”\textsuperscript{280}

Remarkably, none of the Justices who dissented in Whole Woman’s Health ever acknowledged, much less addressed, Justice Ginsburg’s claim that the Texas admitting privileges law was obstructing women’s access to abortion. Justice Alito (joined by Chief Justice Roberts and Justice Thomas) focused on claim preclusion, causation, and severability.\textsuperscript{281} Justice Thomas then went on in a separate dissent, aligned with the Fifth Circuit, to eviscerate Casey’s purpose inquiry, arguing that “the majority’s free-form balancing test is contrary to Casey”\textsuperscript{282} and asserting that “the majority overrules another central aspect of

\textsuperscript{276} Id. at 2320–21 (Ginsburg, J., dissenting) (citing four times Planned Parenthood of Wis., Inc. v. Schimel, 806 F.3d 908 (7th Cir. 2015)).

\textsuperscript{277} Id. at 2320.

\textsuperscript{278} Id. at 2321 (citing Schimel, 806 F.3d at 910).

\textsuperscript{279} Id.

\textsuperscript{280} Id. (quoting Schimel, 806 F.3d at 921).

\textsuperscript{281} Id. at 2330 (Alito, J., dissenting).

\textsuperscript{282} Id. at 2324 (Thomas, J., dissenting).
Casey by requiring laws to have more than a rational basis even if they do not substantially impede access to abortion.283

B. CHIEF JUSTICE ROBERTS, RATIONAL BASIS AND THE DRIVE TO TAME CASEY

Reading the various judicial opinions seeking to uphold TRAP laws and reverse Roe and Casey through rational basis review helps locate Chief Justice Roberts’ June Medical opinion on that path. It shows that Chief Justice Roberts aligned himself with the attack on “balancing” under Casey yet held back from embracing the most ambitious of judicial efforts to reverse Roe/Cassey by extension of rational basis review. In June Medical, it was not Chief Justice Roberts, but instead Justice Alito dissenting with Justices Gorsuch, Kavanaugh, and Thomas, who argued that Louisiana’s admitting privileges law should be reviewed under the most deferential rational basis review.

A brief account of Justice Alito’s dissent in June Medical clarifies what is distinctive in Chief Justice Roberts’s position and forecasts claims about the Constitution that shifts in the composition of the Court could soon make law.

Speaking for the conservative justices in dissent, Justice Alito attacked balancing and urged “Whole Woman’s Health should be overruled insofar as it changed the Casey test.”284 Instead of balancing, the dissent insisted, the true Casey test was “whether the challenged Louisiana law places a ‘substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.’”285 By selectively quoting Casey, it was the dissenters who “changed the Casey test,” omitting mention of the purpose prong of the undue burden standard, as well as the “inform, not hinder” principle that the undue burden standard vindicates. These changes in the law would block judicial scrutiny of the health justifications of laws that single out abortion for burdensome regulation. But this was only part of the dissent’s attack on Casey.

283 Id. at 2325. Justice Thomas then attacked the tiers of scrutiny as a judicial graft at odds with the original understanding. Id. at 2329–30 (“A law either infringes a constitutional right, or not; there is no room for the judiciary to invent tolerable degrees of encroachment.”). In Whole Woman’s Health the rational basis claim was also presented to the Court in an amicus brief by written lawyers for AUL and the Bioethics Defense Fund including Denise Burke and Dorinda Bordlee. See Amicus Curiae Brief of More Than 450 Bipartisan and Bicameral State Legislators and Lieutenant Governors in Support of the Respondents and Affirmance of the Fifth Circuit, Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15–274).


285 Id. (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992)).
After arguing for a deferential approach to reviewing purpose, the dissent then argued for a deferential approach to reviewing effects. As part of their argument that clinics have no third-party standing, the dissenters suggested that clinics lack standing to invoke even their selective account of the undue burden standard. Once again, Justice Alito reasoned in ways that seem designed to confuse. Justice Alito suggested that “unless an abortion law has an adverse effect on women, there is no reason why the law should face greater constitutional scrutiny than any other measure that burdens a regulated entity in the name of health or safety.” Justice Alito then misdescribed an exchange in oral argument in order to hypothesize a case of a TRAP law with no burden on women and began to discuss Louisiana’s admitting privileges law as a garden-variety safety measure, emphasizing that many laws “justified as safety measures rest on debatable empirical grounds” and are subject to rational basis review of the kind employed in Williamson v. Lee Optical.

In the fight over abortion rights, a judge’s appeal to Lee Optical seeks Roe’s overruling; a judge’s citation to the rational basis test recalls Chief Justice Rehnquist’s dissents in Roe and, joined by Justice Scalia, in Casey. In calling for Lee Optical-style rational basis review, the June Medical dissenters were relitigating the Court’s decision in Whole Woman’s Health. The Supreme Court explicitly rejected this rational basis—Lee Optical reading of Casey when it reversed the Fifth Circuit in Whole Woman’s Health.

With this account of the dissent in June Medical, we can better appreciate how Chief Justice Roberts positioned himself in the case. We can begin by observing that the Chief Justice did not attack the passage in Whole Woman’s Health that explicitly rejected rational basis as the standard for reviewing laws restricting abortion. Given the

---

286 Id.

287 Compare id. with Transcript of Oral Argument at 18–19, June Medical, 140 S. Ct. 2103 (2020) (No. 18–1232) (transcribing an interaction in which Justice Kavanaugh asks Julie Rikelman about a law that neither benefits nor burdens abortion access and she responds that the hypothetical “may pose a much harder question than this case,” where “the district court . . . found that the burdens of this law would be severe”).


289 See supra note 231.

290 See supra note 267.

291 See supra note 275 and accompanying text.
citation practices of the most hostile judges, it is also noteworthy that in June Medical, Chief Justice Roberts did not invoke Williamson v. Lee Optical-style rational basis review, mandating deference to legislation if a judge can surmise any reason for it.

That said, the Chief Justice did offer resources to judges interested in weakening the Casey framework. In June Medical, the Chief Justice concluded his summary of Casey by quoting “reasonably related” language from the joint opinion: “Laws that do not pose a substantial obstacle to abortion access are permissible, so long as they are ‘reasonably related’ to a legitimate state interest.” This summary of Casey somewhat resembled the diluted Casey standard the June Medical dissenters proposed. Like the dissenters, the Chief Justice selectively quoted Casey to legitimate judicial deference to the health justifications of TRAP laws.

Readers interested in the Chief Justice’s practice of stare decisis (or the making of sausage) should compare his two-word quotation of Casey to the full sentence in its surrounding context. In Casey, the joint opinion held: “Unless it has that effect [i.e. imposing a substantial obstacle] on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.” The “goal” or “legitimate state interest” (Chief Justice Roberts’s term) to which the state measure must be “reasonably related” is “persuad[ing] a pregnant woman to choose childbirth over abortion.” In short, the language of “reasonably related” in the joint opinion does not mandate Lee Optical-style rational basis review of health-justified restrictions on abortion. The very page Chief Justice Roberts quoted ends in the observation: “Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.”

The Chief Justice again employed language out of context when he quoted Carhart to attack balancing as interference with the law-making process:

Nothing about Casey suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts. On the contrary, we have

---

293 See supra text accompanying note 285.
294 Casey, 505 U.S. at 878.
295 Id.
explained that the “traditional rule” that “state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty” is “consistent with Casey.”

In this passage the Chief Justice quoted Carhart without explaining that the “medical and scientific uncertainty” to which Justice Kennedy referred in Carhart was established through independent fact-finding by two courts.

That said, in June Medical the Chief Justice did rely extensively on the findings of the district court. In relying on the facts found by the trial court, the Chief Justice was sending a message about the value of judicial fact-finding, and he went out of his way to criticize the dissenting Justices for failing to respect the valuable fact-finding capacities of trial courts: “Clear error review follows from a candid appraisal of the comparative advantages of trial courts and appellate courts.”

Taking all the pieces together, what does this contextualization of Chief Justice Roberts’s concurring opinion reveal? The Roberts opinion reasoned about Casey without ever mentioning the “inform, not hinder” principle guiding the undue burden test. In that respect, the Roberts opinion embarked on revising Casey’s undue burden test by disconnecting the standard from the principled statement of the constitutional values the standard was designed to serve.

A judge or Justice who is seeking to uphold TRAP laws would find resources to do so in the Chief Justice’s opinion. Little more than a month after the Court handed down June Medical, the Sixth Circuit reviewing a TRAP law requiring abortion providers to have “transfer agreements” with a local hospital decided that the Chief Justice’s concurrence constituted June Medical’s holding under Marks v. United States and so provided the governing standard to follow.

---


297 As Linda Greenhouse and I observed: “The medical uncertainty of which the Court spoke in Carhart was anchored in the factfinding of the two district courts whose judgments were on review,” while by contrast in the Texas litigation, the Fifth Circuit “finds uncertainty by rejecting the factfinding of the district court.” Greenhouse & Siegel, supra note 42, at 1468.

298 June Med. Servs., 140 S. Ct. at 2141 (Roberts, C.J., concurring) (“While we review transcripts for a living, they listen to witnesses for a living. While we largely read briefs for a living, they largely assess the credibility of parties and witnesses for a living.” (quoting Taglieri v. Monasky, 907 F.3d 404, 408 (6th Cir. 2018) (en banc))).

299 430 U.S. at 193.

300 EMW Women’s Surg. Ctr. v. Friedlander, 978 F.3d 418, 433 (6th Cir. 2020).
The Sixth Circuit then read Chief Justice’s concurring opinion as
an invitation to reverse the trial court for following the balancing
standard of Whole Woman’s Health; and, relying on the passages of
Casey and Carhart that the Chief Justice had quoted without dis-
cussion of their context, the Sixth Circuit then read the Chief Justice’s
opinion in June Medical as mandating the highly deferential rational
basis review of Williamson v. Lee Optical, citing the same rational basis
case that the dissenters in Roe, Casey, and June Medical invoked—and
not Chief Justice Roberts.301

In short, the Sixth Circuit employed June Medical as an excuse to
eviscerate abortion rights. The Sixth Circuit invoked the concurring
opinion in June Medical as a cover to espouse views endorsed by the
dissent.

The Sixth Circuit is not following the law. Under the best reading
of the precedent that directs judges about how to enforce divided
decisions, the portions of the Chief Justice’s concurring opinion in
June Medical that criticize Whole Woman’s Health do not alter Whole
Woman’s Health’s authority as law.302 And, crucially, even if a court
decided that the Chief Justice’s concurring opinion in June Medical
modified Whole Woman’s Health, the Chief Justice’s concurring opinion
does not mandate the Sixth Circuit’s approach.

As we saw, in June Medical, the Chief Justice reaffirmed Whole
Woman’s Health while criticizing it. In his concurring opinion, the
Chief Justice attacked balancing and offered a selective account of the
Casey standard. Unsurprisingly, pro-life advocates read the concur-
ring opinion as allowing states to enforce TRAP laws.303 Yet, as we

301 See id. at 437–38 (quoting Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487
(1955)).
302 See supra note 244 and accompanying text (discussing United States v. Marks, 430 U.S.
188, 193 (1977), requiring a court to treat the “position taken by [the Justice or Justices] who
concerned in the judgment[] on the narrowest grounds” as “the holding of the Court”). There
is presently a debate over the application of the Marks rule to June Medical. Compare Hopkins v.
Jegley, 968 F.3d 912, 915 (8th Cir. 2020) (holding that “Chief Justice Roberts’s vote was
necessary in holding unconstitutional Louisiana’s admitting privileges law, so his separate
opinion is controlling”), and EMW Women’s Surg. Ctr. v. Friedlander, 978 F.3d 418 (6th Cir.
2020) (agreeing with the 8th Circuit’s interpretation of June Medical), with Whole Woman’s
Health v. Paxton, 972 F.3d 649, 652 (5th Cir. 2020) (finding that the Chief Justice’s test did not
control under Marks and concluding “June Medical has not disturbed the undue-burden test,
and Whole Woman’s Health remains binding law in this Circuit.” (citations omitted)).
303 See supra Section II.A. After June Medical, Dorinda Bordlee described the “good news” that
the Chief Justice’s opinion returned the law to the undue burden standard “and that is something
that means that our pro-life laws can stand, and the pro-life movement can continue to be
creative in moving forward with policies that help women choose life.” EWTN, World Over –
2020-07-02 – Dorinda Bordlee and Carrie Severino with Raymond Arroyo, YouTube (July 2, 2020),
saw, the Roberts opinion reasoned about *Casey* in ways that are significantly different from the dissenting judges in *June Medical*.

For this reason, even if a court concluded that the Chief Justice’s opinion in *June Medical* modifies *Whole Woman’s Health*, the Chief Justice’s opinion in *June Medical* offers a willing judge authority and resources to review TRAP laws. To recall, the Chief Justice voted to reaffirm *Whole Woman’s Health*; while Chief Justice Roberts criticized balancing, he did not mandate *Lee Optical*–style deference and left more than enough of *Whole Woman’s Health* and *Casey* intact for a judge or Justice who is skeptical about the underlying purpose of a health-justified abortion restriction to probe the law. The judge could cite the *Casey* undue burden standard, which Chief Justice Roberts quotes in *June Medical*, that expressly prohibits laws serving the potential life or women’s health interest that have the *purpose or effect* of imposing a substantial obstacle. The judge could cite *Casey*’s “inform, not hinder” principle, which the Chief Justice did not criticize. The judge could cite the repudiation of *Lee Optical*–style rational-basis deference in *Whole Woman’s Health* and appeal to the Chief Justice’s emphasis on the important fact-finding role of a trial court. Even if the judge avoided relying on the balancing standard, the judge could conduct singling-out analysis to probe whether the law was plausible as an ordinary health and safety regulation and employ the many tools judges use to “smoke out” hidden purpose.

C. TRAP LAWS, JUSTICE BARRETT, AND JUSTICE GINSBURG

But now that Justice Barrett has replaced Justice Ginsburg on the Court, does this analysis of Chief Justice Roberts’s concurring opinion even matter?

https://www.youtube.com/watch?v=ZY637UZ49Ng. Like Bordlee, David Reardon saw good news. As he read *June Medical*, the Chief Justice “signaled that he will continue to entertain regulations that protect women’s health,” and Reardon concluded, “[t]he good news for abortion opponents is that provisions in *Roe* allowing laws to protect health can be expanded to prevent 80% or more of all abortions.” David Reardon, *Making Abortion Rare, the Chief Justice Roberts Way*, *AfterAbortion.Org* (Aug. 13, 2020), https://afterabortion.org/making-abortion-rare-the-chief-justice-roberts-way.

304 See supra Section II.A.

305 Id.

306 See supra text accompanying note 275.

307 See supra text accompanying note 298.

308 See supra notes 263–64 and accompanying text.
In this simple sense, it does. As the Court presently interprets the Constitution, the Constitution directs judges to enforce its liberty and equality guarantees by scrutinizing restrictions on abortion that claim to protect women’s health. There are sitting judges as well as judges yet to be appointed who are ready to do so. But as Justice Barrett’s appointment signals, the Supreme Court might soon change that law.

There are many cases that the Court could choose as vehicles to change the law. Rather than speculate about how Justice Barrett and the other conservative Justices would reason in these different cases, I focus simply on the constitutional law governing health-justified restrictions on abortion. How will Justice Barrett’s arrival on the Court alter the way the Court reviews the constitutionality of TRAP laws? What understandings of the modern constitutional tradition are at risk, now that Justice Ginsburg is no longer there to defend them? If the Court as currently constituted upholds a TRAP law, how might that decision transform its interpretation of the Constitution’s liberty and equality guarantees?

There is much we know and yet much to learn. Before her Supreme Court nomination, Justice Barrett publicly attested to her opposition to abortion more clearly than any recent nominee. Justice Barrett’s expressed opposition to abortion and her statements of a more limited commitment to stare decisis would seem to suggest she is likely to join the dissenting justices in Whole Woman’s Health and June Medical. That is what Vice President Pence signaled to voters.

Yet unlike Justice Ginsburg, who answered questions about the constitutional basis of the abortion right in her confirmation hearing, Barrett was unwilling to answer questions about her constitutional views on abortion during her confirmation hearing. For example,

\[\text{footnote} 309\] See supra text accompanying notes 35–36 (sources discussing her prior expression of opposition to abortion and her Seventh Circuit decisions on abortion). At the University of Notre Dame, Barrett was a member of the University Faculty of Life organization. See S. Comm. on the Judiciary, Questionnaire for Nominee to the Supreme Court, Senate Comm. on the Judiciary (Sept. 29, 2020), https://www.judiciary.senate.gov/imo/media/doc/Amy%20Coney%20Barrett%20Senate%20Questionnaire%20(Public)%20(002).pdf (listing Amy Coney Barrett’s membership in the University Faculty for Life from “approximately 2010–2016”). For an open letter that she signed attesting to her faith, see infra note 371 (discussing a Letter to Synod Fathers from Catholic Women Barrett signed).

\[\text{footnote} 310\] See supra text accompanying note 6.

\[\text{footnote} 311\] Compare infra text accompanying note 348 (quoting then-Judge Ginsburg answering a question in her confirmation hearings about whether she believed the abortion right was grounded in due process or equal protection), with North, supra note 35 (reporting that “[d]uring
Barrett’s prior public commentary does not shed much light on how she would evaluate woman-protective abortion restrictions, other than a lecture she gave just before the 2016 election in which she briefly remarked that the Supreme Court was likely to allow states to impose more restrictions on clinics, a noteworthy way to respond to *Whole Woman’s Health* and a result she seemed to support on federalism grounds.312

1. *Food and Drug Administration v. American College of Obstetricians in a changing court.* A recent decision of the Supreme Court adds to our understanding of Justice Barrett’s views on the constitutionality of woman-protective abortion restrictions and highlights how differently Justice Ginsburg viewed the question. In January 2021, the conservative Justices voted to allow the Food and Drug Administration (FDA) to single out the drug used for medication abortion for burdensome health-justified regulation.313 “The FDA required patients to “go to a clinic in person to pick up their mifepristone prescriptions, even though physicians may provide all counseling virtually, women may ingest the drug unsupervised at home, and any complications will occur long after the patient has left the clinic.”314

The Trump administration’s FDA waived in-person requirements for other drugs during the COVID-19 pandemic but not for

---

312 See Nina Totenberg & Domenico Montanaro, *Who Is Supreme Court Nominee Amy Coney Barrett?*, NPR (Sept. 24, 2020, 2:02 PM), https://www.npr.org/sections/supreme-court-nomination/2020/09/24/915781077/conenator-who-is-amy-coney-barrett-front-runner-for-supreme-court-nomination (reporting that in 2016 then-Professor Barrett observed that “I don’t think the core case, Roe’s core holding that women have a right to an abortion, I don’t think that would change. . . . But I think the question of whether people can get very late-term abortions, you know, how many restrictions can be put on clinics, I think that will change”); *Hesburgh Lecture 2016: Professor Amy Barrett at the Jacksonville University Public Policy Institute, YouTube* (Dec. 5, 2016), https://www.youtube.com/watch?v=7yTEdZ8IlI&feature=youtu.be (discussing *Whole Woman’s Health* just before the 2016 election and describing clinic regulation as a “who decides” question about federalism (without any mention of individual liberty or discussion of clinic closings) and observing that “[i]n the case out of Texas, after the Kermit Gosnell affair and all of that, states have imposed regulations on abortion clinics, and I think the question is how much freedom the Court is willing to let states have in regulating abortion”).


mifepristone.\textsuperscript{315} The case presented a classic case of a TRAP regulation in action.

In \textit{Food and Drug Administration v. American College of Obstetricians},\textsuperscript{316} the Court granted an application for stay of a district court opinion preliminarily enjoining enforcement of the FDA’s requirement during the COVID-19 pandemic.\textsuperscript{317} The conservative Justices voted to grant the stay but gave no account of their reasons.\textsuperscript{318} Their silence about the constitutional stakes of the case was ominous, especially by contrast to cases involving pandemic policies they believed affected religious liberty, where a range of conservative justices felt compelled to express the particulars of their position.\textsuperscript{319} Chief Justice Robert concurred in the decision to grant the stay, insisting that the case did not involve the question whether the FDA requirements for mifepristone impose an undue burden but instead concerned the question whether courts should defer to government’s judgments about public health emergencies.\textsuperscript{320} Justice Breyer voted to deny the application to stay enforcement of the district court’s opinion.\textsuperscript{321}

In a fierce dissent, Justices Sotomayor and Kagan agreed with the district court that the FDA regulation singling out mifepristone for burdensome regulation during the pandemic violated \textit{Casey, Whole Woman’s Health}, and \textit{June Medical}.\textsuperscript{322} The dissenters pointed out that “[o]f the over 20,000 FDA-approved drugs, mifepristone is the only one that the FDA requires to be picked up in person for patients to take at home”\textsuperscript{323} and emphasized that “[t]his country’s laws have long singled out abortions for more onerous treatment than other medical procedures that carry similar or greater risks.”\textsuperscript{324} They objected that

\textsuperscript{315} \textit{Id.}
\textsuperscript{316} 141 S. Ct. 578 (2021) (mem.).
\textsuperscript{317} \textit{Id.} at 578.
\textsuperscript{318} \textit{Id.}
\textsuperscript{319} See \textit{South Bay United Pentecostal Church v. Newsom}, 141 S. Ct. 716 (2021) (mem.).
\textsuperscript{321} \textit{Id.} at 578.
\textsuperscript{322} \textit{Id.} at 581 (Sotomayor, J., dissenting). Justice Breyer indicated he would deny the application but did not join the dissent. See \textit{id.} at 578.
\textsuperscript{323} \textit{Id.} at 579.
\textsuperscript{324} \textit{Id.} at 585 (citing Linda Greenhouse & Reva B. Siegel, \textit{Casey and the Clinic Closings: When “Protecting Health” Obstructs Choice}, 125 \textit{Yale L.J.} 1428, 1430 (2016)).
the record was “bereft of any reasoning”: “The Government has not submitted a single declaration from an FDA or HHS official explaining why the Government believes women must continue to pick up mifepristone in person, even though it has exempted many other drugs from such a requirement given the health risks of COVID-19.”

Recounting the wide range of pandemic-related health harms and delays in treatment that the FDA travel requirement could inflict on women, especially low-income women who depend on public transportation, and the ways enforcement of the regulation heightened the risk of infection for communities already affected by health disparities, the dissenters called for the government to “exhibit greater care and empathy for women seeking some measure of control over their health and reproductive lives in these unsettling times.” In concluding, Justices Sotomayor and Kagan invoked Justice Ginsburg: “[Women’s] ability to realize their full potential . . . is intimately connected to their ability to control their reproductive lives.”

In this context, Justice Barrett’s silence was telling. While it is widely assumed that Justice Barrett voted with the majority, there is a possibility, however slim, that she cast a vote in dissent and chose not to reveal it. But even if that is so, Justice Barrett’s refusal publicly to object to a health-justified restriction on abortion that exposed women to myriad health harms spoke volumes, given the stakes of the constitutional controversy. Through this silence, Justice Barrett separated herself from Justices Sotomayor and Kagan, whose dissent invoked Justice Ginsburg to express how laws taking from women control of their reproductive lives injure women.

This split among women on the Court was almost a matter of design. Years before nominating her, President Trump spoke of Barrett

---

321 Id. at 584–85.
322 Id. at 585.
323 Id. (quoting Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting)).
325 The order does not record the votes of the individual Justices. The Court does not always record the votes on its orders. See William Baude, Foreword: The Supreme Court’s Shadow Docket, 9 N.Y.U. J. of L. & Liberty 1, 14 (2015).
as his choice to replace Justice Ginsburg.\textsuperscript{330} Conservative strategists reasoned that appointing a woman who opposed \textit{Roe} would ensure that women on the Court would divide about abortion and that a woman’s vote against abortion rights could be justified as a new form of women’s rights. “I think the optics do matter. It’s harder to make the case that a woman is against women’s rights,” Curt Levey of the conservative Committee for Justice explained.\textsuperscript{331} Or as Ramesh Ponnuru put it, “If \textit{Roe v. Wade} is ever overturned . . . it would be better if it were not done by only male justices, with every female justice in dissent.”\textsuperscript{332} Some depicted Barrett as a new kind of feminist. Erika Bachiochi, editor of \textit{The Cost of Choice}\textsuperscript{333} and a long-time critic of the sex-equality argument for abortion rights,\textsuperscript{334} has explained that “Judge Barrett embodies a new kind of feminism, one that builds upon, while remaking, RBG-style feminism.”\textsuperscript{335}


\textsuperscript{333} \textit{See supra} text accompanying notes 121–30.


For her part, Barrett observed: “I have been nominated to fill Justice Ginsburg’s seat, but no one will ever take her place.” 336 The statement can be read many ways.

Together, June Medical and the FDA decision tell us that the law concerning abortion is about to change, and in ways that could reverberate beyond the abortion context. To what forms of sex-role-based coercion is Justice Barrett, or Justice Kavanaugh, or Chief Justice Roberts prepared to subject women in the name of protecting their health?

Justice Ginsburg opposed laws that impose traditional sex roles on men and women, including laws that bring government pressure to bear on their decisions about having children. A brief account of Justice Ginsburg’s approach to laws regulating pregnancy identifies foundational understandings of the modern tradition that could be transformed by a decision upholding woman-protective restrictions on abortion.

2. How Justice Ginsburg understood liberty and equality limits on the regulation of pregnancy. Justice Ginsburg fought for rights of pregnant women for almost a half century. 337 She built her approach to equal protection with pregnancy at the core, not periphery. Ginsburg’s second brief in the Supreme Court argued the case of a Catholic Air Force officer who challenged a regulation authorizing her discharge from the military on grounds of pregnancy or new motherhood—pressuring the officer to end her pregnancy to keep her job—while male Air Force officers who were about to become fathers were not similarly threatened with discharge from the military. 338 Officer Susan

---


337 For Ginsburg’s recollection of her personal experiences of pregnancy discrimination, see Siegel, supra note 73, at 182. See generally id. (tracing Ginsburg’s efforts with other feminist advocates to challenge laws discriminating against pregnant women—arguing under equal protection, employment discrimination law, and the Equal Rights Amendment—and connecting this work to her judgments on the Supreme Court).

338 See Brief for the Petitioner, Struck v. Sec’y of Def., 409 U.S. 1071 (1972) (No. 72–178), 1972 WL 135840. The Struck case, which was overlooked because it was mooted before argument in the Supreme Court, was very important to Justice Ginsburg. For more on the case, see Neil S. Siegel & Reva B. Siegel, Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination, 59 DUKEM L.J. 771 (2010), reprinted in The Legacy of Ruth Bader Ginsburg (Scott Dodson ed., 2015). For a recent interview with the plaintiff and other
Struck, Ginsburg wrote in 1972, “was presumed unfit for service under a regulation that declares, without regard to fact, that she fits into the stereotyped vision . . . of the ‘correct’ female response to pregnancy.”

(Ginsburg included in her brief, filed just before Roe, a due process challenge to the regulation as violating the plaintiff’s right to sexual privacy and her autonomy in deciding “whether to bear . . . a child” and asserted Struck’s right to free exercise of religion.\footnote{The same year as Ginsburg challenged the Air Force regulation in Struck, Ginsburg litigated Moritz v. Commissioner of Internal Revenue, 469 F.2d 466 (10th Cir. 1972), which struck down a tax deduction for the cost of a caregiver the IRS allowed only for women and formerly married men. She continued to challenge laws that enforced sex-role conformity around caregiving for both sexes. See, e.g., Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (striking down a law denying social security survivor’s benefits earned by a wage earner who died in childbirth to her widower who sought to draw on them to care for their infant son).}

And, just as Ginsburg challenged laws penalizing pregnant women who failed to conform to sex roles, she challenged laws that penalized men who engaged in care work rather than breadwinning—arguing that women and men both should be free to choose care work and not coerced into proper sex-roles by the state because of the dignitary and status-based injuries coercion of this kind can inflict.\footnote{For an account locating the Struck case in Ginsburg’s efforts over the course of her career as advocate and as judge to challenge pregnancy discrimination, see Siegel, supra note 73, which discusses her arguments under equal protection law, employment discrimination law, and the ERA, both as an advocate and as a Justice.}

As a Justice on the Supreme Court, Ginsburg wrote one of her most famous majority opinions in United States v. Virginia.\footnote{See Brief for the Petitioner, supra note 338, at 50–51 (citation and internal quotation marks omitted).} In Virginia, the Supreme Court for the first time discussed a law mandating the accommodation of pregnancy as classifying on the basis of sex and subject to heightened scrutiny. Virginia directs judges to look to history in enforcing the Equal Protection Clause to ensure that laws classifying on the basis of sex, including laws regulating pregnancy, are not “used, as they once were . . . to create or perpetuate the legal, social,
and economic inferiority of women.\textsuperscript{344} \textit{Virginia} makes clear that the Constitution forbids the use of state power to enforce traditional sex roles, especially where the coercion subordinates women.\textsuperscript{345}

Ginsburg approached abortion through the lens of the same commitments that guided her 1970s antidiscrimination work, whether on behalf of pregnant women or caregiving men, as the \textit{Struck} case illustrates.\textsuperscript{346} She continued to emphasize interconnections between the liberty and equality cases in lectures of the 1970s, 1980s, and 1990s\textsuperscript{147} and in her Supreme Court confirmation hearing in 1993. Asked her views about constitutional protections for abortion, she answered forthrightly that the due process and equal protection guarantees each protected a woman’s decision about pregnancy from government control: “[Y]ou asked me about my thinking about equal protection versus individual autonomy, and my answer to you is it’s both. This is something central to a woman’s life, to her dignity. It’s a decision that she must make for herself. And when Government controls

\begin{footnotesize}
\begin{enumerate}
\item Id. at 534. See Siegel, supra note 73, at 204–06 (locating \textit{Virginia}’s discussion of pregnancy in the Court’s equal protection case law).
\item See generally Siegel, supra note 73 (challenging the common assumption that the Court’s decision in \textit{Geduldig v. Aiello}, 417 U.S. 484 (1974), insulates the regulation of pregnancy from equal protection scrutiny and demonstrating, through an account featuring Ruth Ginsburg as advocate and judge, how the Supreme Court came to integrate the regulation of pregnancy into its equal protection sex discrimination framework, in cases including \textit{Virginia}, 518 U.S. at 204–06, and \textit{Nev. Dep’t of Hum. Res. v. Hibbs}, 538 U.S. 721, 736 (2003)).
\item In 2012 Justice Ginsburg recalled the \textit{Struck} case:

\begin{quote}
Nonetheless, her choice was, you get an abortion or you get out. That’s the reproductive choice case I wish had come to the Supreme Court first. Because what it was about was a woman’s decision about her life’s course. Would she bear the child or not? And perhaps the court’s understanding of the issue would have been advanced if a woman took the position: I don’t want the government to dictate my choice. Flatow, supra note 340.
\end{quote}

\end{enumerate}
\end{footnotesize}
that decision for her, she’s being treated as less than a fully adult human responsible for her own choices.\textsuperscript{348}

It is therefore not surprising that Ginsburg’s challenge to woman-protective antiabortion justifications for the Partial Birth Abortion Ban Act in \textit{Gonzales v. Carhart}\textsuperscript{349} expressed these same understandings—the same constitutional understandings that led her to challenge the Air Force regulation requiring Officer Struck to choose between her pregnancy and her job. The statute at issue in \textit{Carhart}, which banned a method of performing abortions late in pregnancy, was enacted on fetal-protective reasoning, but Justice Kennedy added a woman-protective justification to the majority opinion upholding the statute, influenced by an amicus brief quoting abortion-regret affidavits in support of a suit reopening \textit{Roe} and its companion case\textsuperscript{350} (abortion-regret claims for which Norma McCorvey recently explained she was coached and paid\textsuperscript{351}).

Justice Ginsburg began her opinion in \textit{Carhart} by quoting the many passages of sex equality reasoning in \textit{Casey}\textsuperscript{352} and, on the basis of this authority, emphasized that “legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”\textsuperscript{353}

Then, invoking equality principles she had helped establish over a lifetime of litigating and deciding constitutional cases, Justice Ginsburg challenged the woman-protective justification for restricting abortion as violating women’s dignity, safety, equality, and freedom. “[T]he Court deprives women of the right to make an autonomous choice even at the expense of their safety.”\textsuperscript{354} “This way of thinking


\textsuperscript{349} 550 U.S. 124 (2007).

\textsuperscript{350} For a movement genealogy of the abortion-regret claims in \textit{Carhart}, see Siegel, \textit{supra} note 88, at 1641–47.

\textsuperscript{351} For McCorvey’s end-of-life repudiation of her claims of abortion regret, see Jenny Gross & Aimee Ortiz, \textit{Roe v. Wade Plaintiff Was Paid to Switch Sides}, Documentary Says, N.Y. Times (May 19, 2020), https://www.nytimes.com/2020/05/19/us/roe-v-wade-mccorvey-documentary.html, which recounts that “[b]efore dying in 2017, Norma McCorvey said she had supported anti-abortion groups only for the money.”

\textsuperscript{352} \textit{See Carhart}, 550 U.S. at 171 (Ginsburg, J., dissenting).

\textsuperscript{353} \textit{Id.} at 172.

\textsuperscript{354} \textit{Id.} at 184.
reflects ancient notions about women’s place in the family and under the Constitution—ideas that have long since been discredited.”

Justice Ginsburg emphasized, directing her readers to compare *Muller v. Oregon* and *Bradwell v. State* with *United States v. Virginia* and *Califano v. Goldfarb*. She then invoked the joint opinion in *Casey* expressing these core principles, quoting *Casey’s* direction that “[t]he destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society,” and then its core “inform, not hinder” principle. “[M]eans chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it.”

In challenging woman-protective justifications for abortion restrictions, Justice Ginsburg invoked an understanding of women as equal citizens that is vindicated through cases interpreting both the Constitution’s liberty and its equality guarantees.

3. *The constitution’s liberty and equality guarantees in a changing court.***

Let us assume, on the basis of the evidence we now have, that Justice Barrett would vote to uphold at least some woman-protective health-justified restrictions on abortion, as the rest of the conservative Justices have.

In choosing how she would justify such a vote, Justice Barrett would be taking positions about the meaning of the Constitution’s liberty and equality guarantees—perhaps most dramatically if she joined Justice Alito in applying rational basis review to such a law, on the premise that the law burdens no constitutional rights.

Would Justice Barrett even acknowledge that a pro-woman, pro-life law like Louisiana’s raises concerns under *Casey*—or under *Virginia*? Given that the text of an admitting privilege statute like Louisiana’s Unsafe Abortion Act addresses the pregnant woman as well as the

355 Id. at 185.

356 208 U.S. 412 (1908). See id. at 421–22 (arguing that “as healthy mothers are essential to vigorous offspring, the physical wellbeing of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race . . . legislation designed for her protection may be sustained even when like legislation is not necessary for men, and could not be sustained”).

357 16 Wall. 130 (1873) (reasoning that the Fourteenth Amendment allows states to bar a woman from practicing law on account of her special family role).


359 430 U.S. 199 (1977); see *Carhart*, 550 U.S. at 185 (Ginsburg, J., dissenting).

360 *Carhart*, 550 U.S. at 186 (quoting *Casey*, 505 U.S. at 869–70 (plurality opinion)).

356 For some of this background information, see, for example, *supra* notes 309–12 and notes 328–35 and accompanying text.

362 *See supra* text accompanying notes 284–91.
physician, would Justice Barrett scrutinize the assumptions about women on which the law’s claim to protect women from “unsafe” abortions rests? (Would Justice Barrett view these assumptions about women as “discredited,” as Justice Ginsburg did when she compared woman–protective justifications for abortion restrictions to the views about women expressed by the Court in 1908 in *Muller v. Oregon*?) Would Justice Barrett endeavor to distinguish Virginia on the ground that because pregnancy is a real difference, no sex–role stereotyping of pregnant women is possible—a position a majority of the Supreme Court rejected in *Virginia* and in *Nevada Department of Human Resources v. Hibbs*?

Or would Justice Barrett avoid equal protection scrutiny under *United States v. Virginia* because her views about equal protection are closer to Justice Scalia’s originalist dissent in that case (which she has discussed with some measure of approval)? Do her originalist commitments lead her to reject the Court’s cases holding that the Constitution prohibits sex discrimination, as Justice Scalia did, or might...

---

563 See *La. Stat. Ann.* § 40:1061.10(A)(2)(b) (West 2020) (directing the provision of information to the pregnant woman so that she can contact the physician with admitting privileges and locate the hospital at which the physician has privileges); see also *Act* 620, 2014 Leg., Reg. Sess. (La. 2014) (enacted).


565 See id. (citing *Muller v. Oregon*, 208 U.S. 412, 421 (1908)).


567 See *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (“But in my view the function of this Court is to preserve our society’s values regarding (among other things) equal protection, not to revive them. . . . For that reason it is my view that, whatever abstract tests we may choose to devise, they . . . ought to be crafted so as to reflect—those constant and unbroken national traditions that embody the people’s understanding of ambiguous constitutional texts.”); see also id. at 601–03 (celebrating and defending from constitutional challenge the “old-fashioned” gender code on which women’s exclusion from VMI was based).

For Barrett’s views, see Amy Coney Barrett, *Originalism and Stare Decisis*, 92 *Notre Dame L. Rev.* 2121, 2123, 1926 & n.20 (2017), which discusses *Virginia*, sex discrimination case law, and Brown v. Board of Education, 347 U.S. 483 (1954), as “arguably nonoriginalist precedents.” See also id. at 1943 (considering how Justice Scalia reconciled his commitment to originalism and to stare decisis and concluding that “[n]othing is flawless, but I, for one, find it impossible to say that Justice Scalia did his job badly”).

568 For Justice Scalia’s most direct originalist challenge to sex discrimination law, see Stephanie Condon, *Scalia: Constitution Doesn’t Protect Women or Gays from Discrimination*, CBS News (Jan. 4, 2011, 5:33 PM), https://www.cbsnews.com/news/scalia-constitution-doesnt-protect-women-or-gays-from-discrimination (“Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn’t. Nobody ever thought that that’s what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things
she practice a more dynamic brand of originalism\textsuperscript{369} aligned with her writings recognizing that the Court decides cases responsively with public debate.\textsuperscript{370}

In short, does Justice Barrett interpret the Constitution as allowing government policies designed to pressure women—especially poor women—into motherhood? If she does, is that because the injuries to women’s dignity, health, and family that TRAP laws inflict are simply not of constitutional significance or instead because she believes that state action pushing resisting women into traditional roles protects “women’s health”?\textsuperscript{371} However she resolves these questions, would Justice Barrett acknowledge that there is fierce debate about the dignitary and physical harms that woman-protective abortion restrictions inflict? Or would she join with other conservative justices in deferential review that refutes even to recognize constitutional concerns about the dignitary and health impact of laws that pressure poor women into childbearing?

This is the critical juncture where we learn what Erika Bachiochi meant when she explained “Judge Barrett embodies a new kind of feminism, one that builds upon, while remaking, RBG-style feminism.”\textsuperscript{372} This is the critical juncture in which those conservative called laws.”). Justice Barrett clerked for Justice Scalia from 1998–1999. See S. Comm. on the Judiciary, Questionnaire for Nominee to the Supreme Court, Senate Comm. on the Judiciary (Sept. 29, 2020), https://www.judiciary.senate.gov/imo/media/doc/Amy%20Coney %20Barrett%20Senate%20Questionnaire%20(Public)%20(002).pdf; Ruth Marcus, Amy Coney Barrett’s Alignment With Scalia Has Implications Far Beyond Roe v. Wade, Wash. Post (Oct. 2, 2020, 6:51 PM), https://www.washingtonpost.com/opinions/amy-coney-barretts-alignment -with-scalia-has-implications-far-beyond-roev-wade/2020/10/02/d9278210-04e4-11eb-b7ed -141d88560e_story.html (“Speaking in the Rose Garden after President Trump announced his selection, Barrett invoked the ‘incalculable influence’ of her ‘mentor,’ Justice Antonin Scalia, adding: ‘His judicial philosophy is mine, too—a judge must apply the law as written.’”).


\textsuperscript{371} See supra Part II (surveying beliefs about women espoused by advocates of pro-woman, pro-life laws). For a statement about faith, life, sex, and family, as well as views on poverty to which Justice Barrett has attested, see Letter to Synod Fathers from Catholic Women, Ethics & Pub. Pol. Ctr (Oct. 1, 2015), https://eppc.org/synodletter. The open letter is of course best read in full. Among the many prominent Catholic leaders who signed this statement are Amy Barrett (signing as professor of law), as well as Erika Bachiochi and Dorinda Bordlee. Others include Carrie Severino, head of the Judicial Crisis Network, and Marjorie Dannenfelser, President of Susan B. Anthony List. It would take another article to consider how beliefs of this kind bear on constitutional interpretation.

\textsuperscript{372} Bachiochi, supra note 335.
Justices who claim to respect women as equals demonstrate the beliefs about women and the Constitution on which that claim rests. As they change constitutional law in the midst of wide-ranging public debate, are the Justices forthright about the constitutional understandings they repudiate and embrace? This is the critical juncture in which the Justices will demonstrate their beliefs about the role of a judge in a constitutional democracy.

IV. Conclusion: What Expanding the Frame on June Medical Teaches about Pro-Life Law

For a half century, equal protection and due process cases have promised a pregnant woman freedom from the kind of government “protection” that deprives a woman of the ability to make decisions about her own health, family, and “life’s course.” For a half century, the Supreme Court has interpreted the Constitution’s liberty and equality guarantees to distinguish between an undertaking responsibly chosen and an undertaking that is government coerced. Constitutional protections for choice matter most when the undertaking coerced is one that the community disparages and disrespects, as the story of June Medical illustrates.

We see disrespect when government protects women’s health by restricting abortion with a single-minded focus it does not devote to protecting the health of women who are bearing children, giving birth, and caring and providing for new life. Under these circumstances, antiabortion animus seems to concern control more than care.

Americans are now asking what values pro-life jurisdictions are enforcing when the government has a robust appetite for abortion restrictions—but notably less interest in choice-respecting policies that reduce abortion and support life in all its forms. Expanding the


For analysis of how fetal-protective abortion restrictions conflict with equal protection case law, see Reva B. Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection Reasoning, 44 Stan. L. Rev. 261 (1992); Reva B. Siegel, Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression, 56 Emory L. J. 815 (2007); and Siegel, supra note 10. See also Reva B. Siegel, The Nineteenth Amendment and the Democratization of the Family, 129 Yale L.J.F. 450 (2020) (tracing claims for voluntary motherhood and the democratization of family care work from the decade before the Civil War to the present).
frame and pointing out inconsistencies in the policies of pro-life jurisdictions is another way of piercing the claimed justifications for these policies and exposing the status-based judgments antiabortion animus can express and the injuries to dignity, health, and life that antiabortion animus can inflict.\textsuperscript{374}

As the Court unravels Roe, these frame-expansion arguments probing the meaning of pro-life will escalate in constitutional politics. Questions about pro-life legislators’ inconsistent commitments to life and health arose in the fierce legislative debate over admitting privilege laws in Texas and in Louisiana.\textsuperscript{375} And these questions shaped the Reverend William Barber’s opposition to a near total ban on abortion in Alabama. Pointing to the state’s high infant mortality rate and large numbers of uninsured people, Barber questioned “whether Alabama officials were really pro-life”: “They won’t support life by addressing poverty . . . They won’t support life by addressing health care. They won’t support life by pushing for living wages. And so their claim is immoral hypocrisy.”\textsuperscript{376}

Emphasizing these very inconsistencies, Judge Carleton Reeves called the woman-protective health justifications for Mississippi’s fifteen-week ban “gaslighting”\textsuperscript{377}:

[T]his Court concludes that the Mississippi Legislature’s professed interest in “women’s health” is pure gaslighting. In its legislative findings justifying the need for this legislation, the Legislature cites Casey yet defies Casey’s

\textsuperscript{374} Siegel, supra note 10, at 209 (observing that “many prolife jurisdictions lead in policies that restrict women’s reproductive choices and lag in policies that support women’s reproductive choices. Comparing state policies in this way makes clear that the means a state employs to protect new life reflects views about sex and property, as well as life”).


\textsuperscript{377} Jackson Women’s Health Org. v. Carrier, 349 F. Supp. 3d 536, 540 n.22 (2018); supra text accompanying notes 41–42. Mississippi’s law justified the 15-week ban with a legislative finding that “[a]bortion carries significant physical and psychological risks to the maternal patient, and these physical and psychological risks increase with gestational age” and that “[t]he State of Mississippi also has ‘legitimate interests from the outset of pregnancy in protecting the health of women.’” H.B. 1510, 2018 Leg., Reg. Sess. (Miss. 2018) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992)).
core holding. The State “ranks as the state with the most [medical] challenges for women, infants, and children” but is silent on expanding Medicaid. Its leaders are proud to challenge Roe but choose not to lift a finger to address the tragedies lurking on the other side of the delivery room: our alarming infant and maternal mortality rates.

No, legislation like H.B. 1510 is closer to the old Mississippi—the Mississippi bent on controlling women and minorities. The Mississippi that, just a few decades ago, barred women from serving on juries “so they may continue their service as mothers, wives, and homemakers.” The Mississippi that, in Fannie Lou Hamer’s reporting, sterilized six out of ten black women in Sunflower County at the local hospital—against their will. And the Mississippi that, in the early 1980s, was the last State to ratify the 19 Amendment—the authority guaranteeing women the right to vote.378

Expanding the frame revealed Mississippi’s claim to protect women by banning abortion as a project of gender and racial control, not care, Judge Reeves objected. On appeal in the Fifth Circuit, Judge James Ho rebuked Judge Reeves, asserting that his opinion displayed “alarming disrespect for the millions of Americans who believe . . . that abortion is the . . . violent taking of innocent human life. . . .”379

But increasingly, each side makes claims to protect life and looks to government to intervene in very different ways. Expanding the frame, the Reverend William Barber explained: “You can’t be for life inside the womb and not be for life outside the womb.”380 Highlighting inconsistency in policy choices across contexts can identify the role that gender, race, and class-based judgments as well as beliefs about sex and property play in shaping pro-life policy.381 When financial resources are among the most common reasons given for a women’s decision to end a pregnancy,382 when “[h]alf of all women who got an abortion in 2014 lived in poverty, double the share from

378 Jackson Women’s Health, 349 F. Supp. 3d at 540 n.22 (citations omitted).
379 Jackson Women’s Health Org. v. Dobbs, 945 F.3d 265, 277 (5th Cir. 2019) (Ho, J., concurring) (writing lengthy opinion criticizing Judge Reeves, never addressing his argument that the woman-protective rationale was “gaslighting,” while objecting that “[t]he opinion issued by the district court displays an alarming disrespect for the millions of Americans who believe that babies deserve legal protection during pregnancy as well as after birth, and that abortion is the immoral, tragic, and violent taking of innocent human life”).
381 See Siegel, supra note 10.
1994,”183 when “being denied a wanted abortion results in economic insecurity for women and their families, and an almost four-fold increase in odds that household income will fall below the Federal Poverty Level,”184 why do antiabortion groups like AUL not list or advocate for redistributive measures as pro-life laws?185 The organization’s ethical opposition to abortion does not explain this silence. Or might it?

How exactly is it pro-life to coerce and forsake? The seeming inconsistency is resolved if government intervention is justified to prevent what is seen as intentional life-taking by women who should give themselves over to caring for life as others will not. Observe that this is an agent-focused, blame-centered account of the pro-life principle, not the only way of understanding the pro-life principle,186 and one especially likely to become infused with status-based judgments precisely because it locates responsibility for care selectively on blame-worthy agents rather than approaching responsibility for care as shared by the whole community.

What appears to be a universal theory of responsibility in the abstract turns out to involve judgments about poor women in practice. On this agent-focused, blame-centered account of the pro-life principle, government actors can assert commitments to life, private property, and

184 See Introduction to the Turnaway Study, supra note 129, at 3.
the limited state—and so absolve themselves of responsibility for the lives of the women and children they have intervened in, whom they view as unworthy dependents, people who are “riding in the cart,” not “pulling the cart.” As Judge Reeves explained, the apparent inconsistency in pro-life policy choices can be resolved if pro-life means control and not care.

Let’s expand the frame again and return to the pandemic. An agent-focused, blame-centered account of the pro-life principle seems to explain the policy choices of those who call themselves “pro-life” where government action on abortion is concerned but who are unwilling to support government mask mandates or to provide people health care and rudimentary means of support—even in a pandemic.

Those opposing shut-down orders and mask mandates under the banner of “my body, my choice” are not announcing their sudden conversion in the abortion debate; they are demanding that the government respect the liberty of those they view as especially deserving of freedom and respect—cart-pullers, not cart-riders—in circumstances where they recognize that human life is at stake, but, they believe, wrongful life-taking is not.

---

387 See supra text accompanying note 203 (quoting Governor Jindal explaining his refusal to accept federal health insurance for hundreds of thousands of people in Louisiana on the grounds that “we should design our policies so that more people are pulling the cart than riding in the cart. . . . We should measure success by reducing the number of people on public assistance.”).

388 See LLCoolJ (@llcoolj), Twitter (Nov. 17, 2020, 12:45 AM), https://twitter.com/llcoolj/status/1328575048001744897 (asking “How can you be pro life but unwilling to wear a mask??”).

389 See supra text accompanying notes 5–10.

390 See supra text accompanying notes 7–8.

391 For example, Rusty Reno, editor of the conservative Catholic magazine First Things, made headlines as a pro-life leader who opposed public health shut-down orders and minimized the pandemic. These views focused attention on the limited pro-life principle to which Reno subscribes, and its distance from the care ethic. See Damon Linker, A Pro-Lifer Shrugs in the Face of Mass Death, The Week (Mar. 25, 2020), https://theweek.com/articles/904580/prolifer-shrugs-face-mass-death (“Abortion is about killing. Public health is about dying. That difference is everything for Reno. Ending a pregnancy is a great evil because it is the intentional taking of an innocent human life. But other forms of dying that happen by nature (a virus killing its victim is a natural process), like deaths that follow indirectly from social and economic structures that prevail in the United States, are matters of moral indifference.”). See generally Dan McLaughlin, It Is Not Hypocrisy for Pro-Lifers to Accept a Risk of Death, Nat’l Rev. (May 13, 2020, 6:28 PM), https://www.nationalreview.com/2020/05/it-is-not-hypocrisy-for-pro-lifers-to-accept-a-risk-of-death (“To the pro-lifer, looking at a particular person and taking their life away—actively, or by refusing life-or-death assistance—is a deliberate choice that is different in a morally meaningful way from simply adopting this or that public policy that is statistically projected to increase risks of death.”).
Whatever pro-life means and whether the Constitution speaks to these questions through its liberty or equality guarantees or not at all, it is better to fight this out as a fight about constitutional values as Justice Kennedy, Justice Ginsburg, and Justice Scalia did than to bury the constitutional question in law jargon about balancing. Why is the Chief Justice of the United States Supreme Court mocking as un-judicial judges who are acting to protect the vulnerable from government coercion? Is it beyond the judicial role for a judge to smoke out inconsistency in the use of state power when state power inflicts the form of coercion and the kind of harms to dignity, health, and life that this use of state power does?

However painful it may be to make sense of this strange mix of policies as expressing pro-life commitments, it is worse still for judges to bury this mix of policies under cites to Williamson v. Lee Optical.392 Attacking “balancing” allows judges to license double-speak about state action enforcing gender roles that can injure as well as degrade; to sanction without naming forms of government coercion that many Americans oppose; and to eradicate public contest over the Constitution’s meaning while elevating white-washing into a practice of democratic principle.393 The Trump Court has the power to practice constitutionalism this way. History will judge the constitutional vision and values it demonstrates.

392 348 U.S. 483 (1955); see, e.g., supra text accompanying notes 288–91.
The Pregnant Citizen, from Suffrage to the Present

Reva B. Siegel*

This Article examines how courts have responded to the equal protection claims of pregnant citizens over the century women were enfranchised. The lost history it recovers shows how equal protection changed—initially allowing government to enforce traditional family roles by exempting laws regulating pregnancy from close review, then over time subjecting laws regulating pregnancy to heightened equal protection scrutiny.

It is generally assumed that the Supreme Court’s 1974 decision in Geduldig v. Aiello insulates the regulation of pregnancy from equal protection scrutiny. The Article documents the traditional sex-role understandings Geduldig preserved and then demonstrates how the Supreme Court itself has limited the decision’s authority.

In particular, I show that the Rehnquist Court integrated laws regulating pregnancy into the equal protection sex-discrimination framework. In United States v. Virginia, the Supreme Court analyzed a law mandating the accommodation of pregnancy as classifying on the basis of sex and subject to heightened scrutiny; Virginia directs judges to look to history in enforcing the Equal Protection Clause to ensure that laws regulating pregnancy are not “used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.” In Nevada Department of Human Resources v. Hibbs, the Court then applied the antistereotyping principle to laws regulating pregnancy, as a growing number of commentators and courts have observed.

I conclude the Article by considering how courts and Congress might enforce the rights in Virginia and Hibbs in cases involving pregnancy under both the Fourteenth and the Nineteenth Amendments. To remedy law-driven sex-role stereotyping that has shaped the workplace, the household, and politics, the Article proposes that Congress adopt legislation mandating the reasonable accommodation of pregnant employees, such as the Pregnant Workers Fairness Act. These sex-role stereotypes

* Nicholas deB. Katzenbach Professor, Yale University. © 2020, Reva B. Siegel. This Article was written for a special edition on the Nineteenth Amendment’s 100-year anniversary on the joint invitation of the American Bar Association’s Commission on the Nineteenth Amendment and The Georgetown Law Journal. I thank Judge M. Margaret McKeown and the editors of the Journal for the invitation to participate. For comments on the draft, I am indebted to readers including Douglas NeJaime, Robert Post, Kate Shaw, Julie Suk, Deborah Widiss, and the members of the faculty workshop at the USC Gould School of Law. For research assistance, I thank Dylan Cowit, Rachel Frank, Duncan Hosie, Chandini Jha, Zain Lakhani, Danny Li, Laurel Raymond, Akanksha Shah, and Kath Xu.

I dedicate this Article to mothers and to life-giving everywhere; to my mother Eve who passed away during its writing—she placed in national and international fencing competitions while she carried me and her work as a fencing coach made possible my college education—to my daughter-in-law Jen and granddaughter Willa just born, as well as to the generations of advocates who fought for their equal citizenship stature.

167
affect all workers, but exact the greatest toll on low-wage workers and workers of color who are subject to rigid managerial supervision.

When we locate equal protection cases in history, we can see how an appeal to biology can enforce traditional sex roles as it did in Geduldig—and see why a court invoking Geduldig today to insulate the regulation of pregnancy from scrutiny under Virginia and Hibbs would not respect stare decisis, but instead retreat from core principles of the equal protection sex-discrimination case law.

**Table of Contents**

**Introduction** ................................................................. 169

I. **The Pregnant Citizen, from 1914 to the Present** ..................... 176
   A. Henrietta Rodman and the Feminist Alliance’s “Teacher–Mother” Campaign of 1914 ............................................. 177
   C. Senator Jennifer McClellan in 2020: Advocating for a Pregnant Workers Fairness Act—and the Equal Rights Amendment .................................................. 185

II. **Equal Protection, Sex-Role Stereotyping, and Pregnancy: From the Burger Court to the Rehnquist Court** ...................... 189
    A. Locating Equal Protection Doctrine in History ................. 189
    B. Carving Out Pregnancy from the Reach of New Sex-Discrimination Cases ......................................................... 190
    C. Physiological Naturalism in Equal Protection Cases, and the Rise of Social Science on the Sex Stereotyping of Pregnant Women ................................................. 199
    D. The Rehnquist Court Integrates Pregnancy into the Equal Protection Sex-Discrimination Framework ..................... 204
       1. *Virginia*: Restating Intermediate Scrutiny to Include Pregnancy ............................................................. 204
       2. *Hibbs*: Recognizing Sex Stereotyping Involving Pregnancy Under Equal Protection ................................. 206
       3. Case Law Recognizing These Developments in Equal Protection Law ...................................................... 210
III. **Equal Citizenship and Pregnancy, at the Centennial**

A. Applying the *Virginia/Hibbs* Framework to Laws Regulating Pregnancy

B. How Congress Can Play a Role in Enforcing Equal Protection: A Section Five Case for the Federal Pregnant Workers Fairness Act

1. Case Law on Congress’s Power to Enact Section Five Legislation Regulating Pregnancy

2. How a Pregnant Workers Fairness Act Could Enforce Guarantees of Equal Citizenship

**Conclusion**

**Introduction**

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.¹

Few notice that the Constitution addresses reproduction when its preamble announces that “We the People” establish the Constitution to “secure the Blessings of Liberty to ourselves and our Posterity.”² For centuries Americans have read the preamble without hearing those who are capable of bearing “our Posterity” speak as part of “We the People.” The assumption that those who bear children are less than full citizens persists long after women’s enfranchisement and into the present day.

As the Nineteenth Amendment turns 100, this Article considers equal protection claims of pregnant citizens and shows how the increasing authority of women in the American constitutional order—as voters, consumers, employees, employers, lawyers, judges, professors, candidates for office, and government officials—has changed how constitutional law regards claims involving “mothers or mothers-to-be.”³ Judgments about pregnancy—like judgments about race—

---

¹ U.S. Const. pmbl.
² Id.
rest on understandings about social roles. At the founding, the law gave male heads of household authority over women and the ability to represent them in voting and the market; this understanding of women as dependent citizens, defined through family relations to men, continued to shape the law even after women’s enfranchisement, despite women’s efforts to democratize family structure in order to secure equal citizenship. Locating equal protection law in this constitutional history, we can ask: What gender-based understandings of citizenship has the Court preserved, modernized, repudiated, or remedied as it has enforced the Constitution?

For a century after ratification of the Reconstruction Amendments, the Court denied Fourteenth Amendment challenges to laws that discriminated on the basis of sex, and repeatedly justified gender-differentiated citizenship by invoking women’s family role and childbearing function. In the 1970s, the Burger Court responded to claims of the women’s movement by declaring for the first time that sex-based state action imposing traditional family roles on men and women was suspect under the Equal Protection Clause; but even as it did so, in Geduldig v. Aiello, the Court declared that pregnancy is a real sexual difference and insulated laws regulating pregnancy from similar scrutiny. The women’s movement opposed the Court’s decision in Geduldig and helped enact legislation prohibiting pregnancy discrimination that federal judges were called upon to enforce.

Within several decades, the Rehnquist Court had come to recognize that pregnant citizens are subject to traditional forms of sex-role stereotyping and decided

---


5. See, e.g., Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J. F. 450 (2020) [hereinafter Siegel, *The Nineteenth Amendment*] (tracing the family-related equal citizenship claims that connect the Reconstruction Amendments and the Nineteenth Amendment and continue into our own day); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002) [hereinafter Siegel, *She the People*] (showing how Americans adopting the Nineteenth Amendment were breaking with traditional conceptions of the family rooted in coverte, as well as with understandings of federalism that placed family relations beyond the reach of the national government—and demonstrating that Americans recapitulated these same debates in the century after the Nineteenth Amendment’s ratification).

6. See, e.g., Hoyt v. Florida, 368 U.S. 57, 62 (1961) (upholding a wife’s conviction for murdering her husband despite the absence of women on the jury and reasoning that the state could exempt women on the ground that “woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State . . . to conclude that a woman should be relieved from the civic duty of jury service.”), overruled by Taylor v. Louisiana, 419 U.S. 522 (1975); Breedlove v. Suttles, 302 U.S. 277, 282 (1937) ("In view of burdens necessarily borne by [women] for the preservation of the race, the State reasonably may exempt them from poll taxes." (citing Muller v. Oregon, 208 U.S. 412 (1908))); Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (Bradwell, J., concurring) (reasoning that a state could deny a woman a license to practice law because "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.").

7. 417 U.S. 484, 494, 496 n.20 (1974); see discussion infra Section II.B.

8. See discussion infra Section II.C.

9. In sex-role stereotyping, persons are assumed to have traits conventionally associated with one sex. The onset of pregnancy triggers scripts associated with motherhood. A pregnant woman’s role as a mother is assumed to unseat her for other social roles, or to compromise her ability to perform other social
equal protection cases holding that laws regulating pregnancy are part of the equal protection heightened-scrutiny framework. After tracing the evolution of equal protection cases on pregnancy in constitutional law and in constitutional history, this Article shows how courts and Congress can entrench these changes under the Fourteenth Amendment and Nineteenth Amendment, including by enacting statutes that deter and remedy sex-role stereotyping by mandating the reasonable accommodation of pregnant employees.

The stakes of this Article are practical as well as theoretical. The Article shows how gender-status law has changed over time, from the standpoint of constitutional doctrine and of constitutional history. For this reason, it may be helpful separately to introduce its doctrinal and historical lines of argument, even if in the end they are deeply interconnected.

In the simplest terms, this Article shows that equal protection sex-discrimination case law has evolved over the decades, not simply from the 1920s to the 1970s, but as importantly from the Burger Court to the Rehnquist and Roberts Courts. Supreme Court decisions no longer exempt laws regulating pregnant citizens from heightened equal protection scrutiny as they once did. Too few have noticed these doctrinal developments. The dominant view is that *Geduldig v. Aiello* insulates the regulation of pregnancy from equal protection oversight; leading scholars discuss the 1974 case as if it were the Court’s last equal protection decision addressing pregnancy. But a growing number of scholars disagree and demonstrate that equal protection law has evolved in its approach to pregnancy—as I argued over fifteen years ago when I first pointed out that the

---

10. See discussion infra Section II.D.
11. See discussion infra Section III.
Rehnquist Court had moved beyond the premises of the Geduldig opinion and had applied the antistereotyping principle to laws regulating pregnancy, on the understanding that government can no more enforce separate-spheres reasoning in regulating pregnancy than it can in any other context.15

This Article clarifies and consolidates these understandings as a matter of constitutional law and constitutional history. Reasoning within the conventions of doctrine, I show that the Supreme Court has not cited Geduldig in an equal protection decision since the 1970s;16 even more importantly, I show that in United States v. Virginia,17 the Supreme Court addressed laws regulating pregnancy as sex classifications subject to skeptical scrutiny and that in Nevada Department of Human Resources v. Hibbs,18 the Court ruled that laws concerning pregnancy based on sex-role stereotypes violate equal protection.19 I further show that scholars and some lower courts have begun to follow these decisions.20 I suggest ways that courts and Congress could enforce the Constitution’s equal-citizenship guarantees that would entrench and encourage these developments and remedy, in some small measure, the centuries of structural bias against caregivers in so many domains of our shared life.21

The critical constitutional history this Article contributes to the Nineteenth Amendment’s centennial has a role to play both outside and inside of doctrine. It helps us see changes in the law over time, and with this understanding, it can play a role in guiding enforcement of the Constitution’s equality guarantees. This history illustrates that sex-role stereotypes are not only expressed through claims about the family, but can also be expressed through seemingly objective claims about the body, particularly through claims about childbearing, a dynamic I term “physiological naturalism.”22 When we locate equal protection cases in the history of restrictions on women’s citizenship, we can see how an appeal to biology can enforce traditional sex roles23 as it did in Geduldig24—and see why a court

reprinted in THE LEGACY OF RUTH BADER GINSBURG (Scott Dodson ed., 2015); cf. Cary Franklin, Biological Warfare: Constitutional Conflict over “Inherent Differences” Between the Sexes, in 2017 THE SUPREME COURT REVIEW 169, 180–181 (Dennis J. Hutchinson et al. eds., 2018) [hereinafter Franklin, Biological Warfare].

15. See Reva B. Siegel, You’ve Come a Long Way, Baby: Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs, 58 STAN. L. REV. 1871, 1892 (2006) (“We might read Hibbs as limiting Geduldig sub silentio, but it seems as reasonable to read Hibbs as answering the question Geduldig reserved. Where regulation of pregnant women rests on sex-role stereotypes, it is sex-based state action within the meaning of the Equal Protection Clause.” (footnote omitted)).

16. See infra note 229 and accompanying text.


19. See discussion infra Section II.D.1–2.

20. See discussion infra Section II.D.3.

21. See discussion infra Section III.B.

22. See discussion infra Section II.C.

23. The critical point, in matters of gender no less than race, is to recognize the many and evolving forms of status inequality that simple appeal to the body can enforce. See Muller v. Oregon, 208 U.S. 412, 422–23 (1908) (appealing to woman’s “physical structure and a proper discharge of her maternal functions” to justify law restricting the hours a woman can work); Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896) (“Legislation is powerless to eradicate racial instincts or to abolish distinctions based
invoking *Geduldig* today to insulate the regulation of pregnancy from scrutiny under *Virginia* and *Hibbs* would not respect stare decisis, but instead retreat from core principles of the equal protection sex-discrimination case law, which now call for applying heightened scrutiny to laws regulating pregnancy.

This Article’s critical constitutional history helps us see how modern equal protection law concerning pregnancy has evolved—from a body of law that exempted pregnancy from skeptical scrutiny to a body of law that requires skeptical scrutiny of laws regulating pregnancy. But history can do more than highlight and explain these changes in the law; it can guide courts and Congress in enforcing the Fourteenth and Nineteenth Amendments. For centuries, American law has addressed citizens as gendered members of households, making assumptions about independence and dependence that unequally distribute power—voice, authority, opportunity, and resources—in ways that have fundamentally shaped our political, economic, and intimate lives. It matters for those enforcing the Constitution’s equality guarantees to understand how seemingly benign appeals to family roles and seemingly objective references to childbearing functions have long justified laws depriving some citizens of voice, authority, opportunity, and resources to which others are assumed entitled.

As Part III of the Article argues, these patterns are of internal significance to our law. *United States v. Virginia* directs judges to look to history in enforcing the Equal Protection Clause to ensure that laws regulating pregnancy are not “used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.” 25 Laws regulating pregnancy are subject to the anti-stereotyping principle that governs all other forms of sex-based state action. 26 To deter and remedy law-driven sex-role stereotyping that has shaped the workplace, the household, politics, and many other domains, this Article proposes that Congress adopt legislation mandating the reasonable accommodation of pregnant employees, such as through the Pregnant Workers Fairness Act (PWFA) Congress is now considering, 27 legislation premised on the modern understanding of citizenship that pregnant wage-earners can stay in the workforce, and have the same interest, need, capacity, and right to keep working as all other parents. In recent years, over half the states have enacted laws of this kind. 28 The proposed legislation mandates pregnancy-specific accommodations; yet the proposed pregnancy accommodation statute is itself couched in gender-neutral, not sex-specific,

---

upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. . . . If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.’”).

26. See discussion infra Section III.A.
27. Pregnant Workers Fairness Act, H.R. 2694, 116th Cong. (2019); see infra Section III.B.
28. See infra note 317 and accompanying text.
terms and so could accommodate transgender men who are pregnant as well as cisgender women.29

The PWFA’s requirement of reasonable accommodation is designed to deter and remedy exclusions rooted in sex-role assumptions about workers and the gendered family structures in which workers are embedded that law has enforced for centuries. These sex-role stereotypes affect all workers, but are commonly enforced against low-wage workers and workers of color who are subject to rigid managerial supervision.30 As I show, under existing case law, Congress has ample power to combat stereotyping by enacting a PWFA using its power to enforce the Fourteenth Amendment.31 Yet especially in this centennial year, it is appropriate that Congress draw upon its legislative power to enforce the Nineteenth Amendment as well.32

Could the Roberts Court repudiate the case law of the Rehnquist Court, change course, and claim that Geduldig is still “good law”? Of course that is possible. I write at a time when it is unclear whether the Roberts Court will adhere to prevailing understandings of sex-role stereotyping doctrine under federal employment discrimination law; and when advocates urge ratification of the Equal Rights Amendment out of concern that federal judges may not keep faith with the body of equal protection doctrine that has developed under the Fourteenth Amendment since the 1970s.33 By showing how equal protection law has evolved

29. The language of the pregnancy accommodation mandates varies. In some cases the laws refer to women and in others they do not. See infra note 318; Jessica Clarke, Pregnant People?, 119 COLUM. L. REV. F. 173, 179 (2019) (observing that “not just women, but also transgender men and nonbinary people, become pregnant. While some transgender men and nonbinary people may seek surgical treatments that leave them incapable of pregnancy, not all do”); Chase Strangio, Can Reproductive Trans Bodies Exist?, 19 CUNY L. REV. 223, 226 (2016) (“posing the question of whether reproductive trans bodies can exist in the law” and seeking to foster “collaborative engagement” across movements by “examining both reproductive and trans rights discourse”).
30. See infra notes 238, 321–22, 338 and accompanying text.
31. See discussion infra Section III.B.
32. For an account of Congress’s power to enforce a Pregnant Workers Fairness Act drawing on its powers under the Fourteenth and Nineteenth Amendments, see Siegel, The Nineteenth Amendment, supra note 5, at 488–89. For the first modern analysis of Congress’s power to enforce the Nineteenth Amendment, see generally Richard L. Hasen & Leah M. Litman, Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress’s Power to Enforce It, GEO. L.J. 19TH AMEND. SPECIAL EDITION 27 (2020).
since the ratification of the Nineteenth Amendment, I hope to clarify the principled commitments driving the law’s historical development and future growth, while at the same time making clear the normative stakes of any retreat led by those who would elevate original understanding, tradition, or biology as the foundation of our constitutional law.\textsuperscript{35}

Part I begins this Article’s account of equal protection law with three stories of women asserting claims of pregnancy discrimination over the course of the last century: the first story dates from the Progressive Era, just before ratification of the Nineteenth Amendment; the second occurs in the 1970s, at the Amendment’s half-century anniversary; and the third occurs in the present, in the era of the Amendment’s centennial. These stories tie equal protection doctrine itself to the longer history of law enforcing family roles, illustrating how laws constraining women’s participation in public life evolve in form and in justification—shifting from a focus on marriage to pregnancy and motherhood—as women acquire authority in the American constitutional order. These stories offer a framework in which to understand how equal protection doctrine on sex discrimination and pregnancy evolved in the late twentieth century, and in which it might yet grow.

Part II of this Article reads the equal protection decisions of the Burger and Rehnquist Courts addressing sex discrimination and pregnancy in this framework. Locating the case law in a historical framework focuses attention on the ways that reasoning inside of the Supreme Court’s decisions evolved. Initially, the Court’s decision in \textit{Geduldig v. Aiello}\textsuperscript{36} segregated pregnancy cases from other equal protection, sex-stereotyping cases of the 1970s, but after decades of litigation under statutes prohibiting pregnancy discrimination in the workplace, the Rehnquist Court began to integrate pregnancy into the framework of its equal protection sex-discrimination cases. In this part of the Article, I provide the most detailed account to date of the Court’s decisions integrating laws regulating pregnancy into the equal protection framework: I demonstrate that \textit{United States v. Virginia}, the Court’s leading decision on heightened scrutiny of sex classifications,\textsuperscript{37} applies to pregnancy, and that \textit{Nevada Department of Human Resources v. Hibbs}, its key decision on Congress’s power to enforce equal protection


\textsuperscript{36} 417 U.S. 484 (1974).

through the Family and Medical Leave Act,\textsuperscript{38} applies the antistereotyping principle to laws regulating pregnancy. These shifts in the Supreme Court case law have been recognized by some scholars\textsuperscript{39} and lower courts.\textsuperscript{40}

I conclude the Article in Part III by considering how, in the era of the suffrage centennial, courts and Congress might enforce the equal protection right to be free of sex-role stereotyping in cases involving pregnancy. Drawing on recent work proposing a synthetic reading of the Fourteenth and Nineteenth Amendments that courts could enforce through the \textit{Virginia} framework,\textsuperscript{41} I show how courts could build upon the inquiry that \textit{Virginia} now mandates in cases of sex-based state action by incorporating into the constitutional inquiry the history of sex-stereotyping pregnant citizens have faced, including history this Article recounts. As importantly, Congress can enforce guarantees of equal citizenship by enacting legislation that would remedy and deter sex-role stereotyping directed at pregnant and potentially pregnant employees by mandating the reasonable accommodation of pregnant workers. As I show, under existing case law, Congress has ample power to enact such a law using its power to enforce the Fourteenth Amendment. As the stories opening this Article suggest, a law mandating the reasonable accommodation of pregnancy in the workplace would destabilize—and remedy in some small part—generations of law-imposed, sex-role stereotyping that continues to limit the participation of pregnant and potentially pregnant citizens active in politics, the market, and other critical domains of social life.

\section{The Pregnant Citizen, from 1914 to the Present}

As women have acquired increasing political authority, they have challenged a dizzying array of sex-, class-, and race-linked barriers to employment. I recount three efforts to challenge pregnancy discrimination spanning the last century, from the era before women’s enfranchisement to the present—and explore the themes of change and continuity they present.

On one reading, these three stories tell a hopeful story of change in which women are increasingly empowered to act in the American constitutional order and we can see the traditional sex-role associations of pregnancy slowly diminishing. But there is a more skeptical reading of the three stories: as women exercise new forms of authority in the American constitutional order, we see law’s role in enforcing gender stratification evolve. In this tale of preservation through transformation,\textsuperscript{42} as law abandons other status-markers of women’s differential

\begin{itemize}
\item \textsuperscript{38} 538 U.S. 721, 737–40 (2003).
\item \textsuperscript{39} See sources cited supra note 14.
\item \textsuperscript{40} See discussion infra Section II.D.3.
\item \textsuperscript{41} See Siegel, \textit{The Nineteenth Amendment}, supra note 5, at 485–89.
\item \textsuperscript{42} Conflict over a status regime can prompt its modernization, a dynamic I have termed “preservation-through-transformation.” See Reva B. Siegel, \textit{“The Rule of Love”: Wife Beating as Prerogative and Privacy}, 105 YALE L.J. 2117, 2178–80 (1996); Reva B. Siegel, \textit{Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action}, 49 STAN. L. REV. 1111, 1113 (1997) (“The ways in which the legal system enforces social stratification are various and evolve over
status (in the domain of suffrage or marriage), law begins to focus on pregnancy and motherhood as a new status-marker of women’s differential status. When the law can no longer appeal to marriage, or “the law of the Creator” to justify women’s exclusion from the privileges men hold, as Bradwell v. Illinois did, law begins to reason from the body. As women are increasingly endowed with forms of civil and political equality, pregnancy and motherhood take on new importance in law—as reasons why those newly endowed with civil and political equality are still not equal.

A. Henrietta Rodman and the Feminist Alliance’s “Teacher–Mother” Campaign of 1914

In the years before women gained the right to vote, high school English teacher and labor organizer Henrietta Rodman advocated for the rights of teachers to keep their jobs when they married and when they became mothers, and may have been the first to challenge the firing of a pregnant woman as “discrimination.” Rodman was a feminist pioneer. She founded and led the Feminist Alliance, which at its inaugural meeting in 1914 announced, “Feminism is a movement which demands the removal of all social, political, economic, and other discriminations which are based upon sex, and the award of all rights and duties in all fields on the basis of individual capacity alone,” and began pursuit of a new constitutional amendment in support of these principles. Allied with Charlotte

---

208 U.S. 412, 422–23 (1908).

In fact, the practice of appealing to women’s physiology to make arguments about their roles began in the late nineteenth century in the physicians’ campaign to criminalize abortion. See Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 319–23 (1992).

43. 83 U.S. 130, 141 (1873) (Bradley, J., concurring) (“The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.”).

44. Today, the most famous expression of reasoning from the body in the Court’s case law is Muller v. Oregon:

Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted . . . that her physical structure and a proper discharge of her maternal functions . . . justify legislation. . . . Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each . . . . This difference justifies a difference in legislation . . . .

45. On Rodman’s labor activism, see Patricia Carter, Guiding the Working-Class Girl: Henrietta Rodman’s Curriculum for the New Woman, 1913, 38 Frontiers: J. Women Stud. 124, 128–29 (2017). On Rodman’s discrimination claims, see, for example, infra notes 46, 56, and accompanying text.

Perkins Gilman, Crystal Eastman, and others in the Greenwich Village group Heterodoxy, Rodman worked for cultural, institutional, and constitutional change.47 She acted conscientiously to dispense birth control advice to young women at a time when it was unlawful,48 challenged exclusionary university admissions policies, fought for women’s suffrage, and with Gilman, designed a communal feminist apartment house to free working women from the bulk of housework and childcare.49 As a member of the New York Civic Club with W.E.B. Du Bois, Mary White Ovington, and Ida Tarbell, she spoke out against lynching.50

Rodman’s most famous crusade was the “teacher–mother campaign.” At the time, New York City, like most other cities, required women teachers who married to quit their jobs; Rodman organized the teachers in New York City to campaign against the practice.51 When the New York City Board of Education acceded to Rodman’s campaign and allowed married women to keep their teaching jobs, the Board then announced that it would require the resignation of

---

47. See Siegel, The Nineteenth Amendment, supra note 5, at 466–67.
48. On the birth control advocacy of the suffragists, see Siegel, The Nineteenth Amendment, supra note 5, at 469 n.79. See also ERIC B. EASTON, DEFENDING THE MASSES: A PROGRESSIVE LAWYER’S BATTLES FOR FREE SPEECH 93 (2018) (“In the spring of 1916, Rodman asked Roe to help recruit prominent physicians in support of an amendment to the penal code to allow physicians to prescribe contraception methods.”).
51. Patricia Anne Carter, A Coalition Between Women Teachers and the Feminist Movement in New York City, 1900–1920, at 107–203 (Feb. 1985) (unpublished Ed.D. dissertation, University of Cincinnati) (on file with ProQuest Dissertation and Theses). These policies were widespread beyond New York City. Id. at 142–43 (“In a 1914 survey of 48 cities in the U.S. with populations over 100,000, thirty-seven cities had regulations which prevented the employment of women teachers after marriage.”).
women with newborn children teaching in the public schools.\textsuperscript{52} The Board’s chair invoked the language of separate spheres to justify excluding pregnant teachers and new mothers from the classroom:

\begin{quote}
A married woman’s sphere is the home, if she has a family. A woman who has infant children to rear has no business trying to take care of these and at the same time teach school. On the birth of a child a woman teacher must be absent from school for a period ranging from two months to a year. . . . A mother places her children first, just as the Board of Education places first the children it provides for.\textsuperscript{53}
\end{quote}

Two years later, the New York Board of Education reaffirmed its policy against retaining new mothers in a report that elaborated its reasoning as rooted in the belief that the mother’s place was in the home.\textsuperscript{54} The Board’s escalating affirmations of the separate-spheres tradition were plainly expressions of resistance to claims about women’s work that Rodman and the teachers were asserting. An editorial dryly observed: “our public school system is a victim of that comparatively new and distressing malady called feminism.”\textsuperscript{55}

In a campaign culminating in the 1914–1915 school year, Rodman took up the case of the “teacher–mothers” and challenged the Board’s discrimination before the Board, in the courts, and in the court of public opinion.\textsuperscript{56} She rallied supporters at public demonstrations—an audience of 800 people attended one meeting at Cooper Union\textsuperscript{57}—and secured the support of a group of notable individuals John Dewey, Anna Howard Shaw, Fola La Follette, and Rabbi Stephen Wise to support the teacher–mothers in their quest for leave with job security.\textsuperscript{58} Rodman’s statement to rally support called the school’s policy of bringing criminal charges for neglect of duty against women taking maternity leave “a crime against women who are forced to choose between two activities, both of which are necessary for

\begin{footnotesize}
\begin{enumerate}
\item On the New York City Board of Education’s policy, see \textit{id.} at 140–41, which documents the Board’s “intention to begin barring women with small children from teaching in public schools.” The chairperson of the Board, Abraham Stern, sent a clear message so that the new mother would understand that “if she did not leave immediately on her own volition, the Board would be forced to dismiss her from her job.” \textit{Id.} at 141; see also \textit{id.} at 142–43 (discussing several other cities with similar policies on new mothers).
\item \textit{Bar Out Teachers with Small Babies}, N.Y. TIMES, Nov. 30, 1911, at 13.
\item See Carter, \textit{supra} note 51, at 150–51 (quoting the Board’s conclusion that “[w]e still believe that there is ‘no home without a mother,’ and that the old-fashioned mother who considers it her primary function to rear and maintain a pure and proper home is doing yeoman service to the State. The home can never fulfill its true function when its head is an ‘absent mother.’ What will become of the children who are brought up at home where there is an absentee mother and who are taught in school by an absentee mother?”).
\item \textit{Id.} at 167 (quoting \textit{The Teacher’s Right to Motherhood}, LITERARY DIG., Nov. 29, 1913, at 1051).
\item Carter, \textit{supra} note 49, at 162–63; Carter, \textit{supra} note 51, at 147–48 (“Rodman explained that the League [for the Civic Service of Women] intended ‘to make the Board of Education and every one else in the city and the State realize that bearing a child was a civic service and that discrimination by the Board of Education or any other employer was wrong.’”); Sochen, \textit{supra} note 49, at 103.
\item Carter, \textit{supra} note 51, at 167.
\item \textit{Id.} at 172.
\end{enumerate}
\end{footnotesize}
their fullest development,” and urged New Yorkers “to come to the defence of your sisters, who are struggling to retain the most primitive rights of women—to work and bear children.”

Escalating her media campaign, in November 1914, Rodman wrote a letter to the sports columnist of the New York Tribune entitled “Sporting Note” inviting him to attend a new kind of game called “mother baiting” played

at the Hall of the Board of Education, 500 Park Avenue, on Wednesday, at four o’clock. The majority of the members of the Board of Education are expected to play on one side, and on the other, two women, each with a baby a few days old. The object of the game is to kick the mothers out of their positions in the public schools. It will be played according to the rules of the Board of Education.

Mother-baiting is popular with the majority of the Board. The game is rather rough, but, like wife-beating, which used to be so popular, it is always played for the good of the women.

For daring to speak out against the Board, Rodman was suspended for a year without pay. After the Board refused to reinstate Rodman for the rest of the school year, Rodman accepted a position at the New York Tribune as an education reporter, which allowed her to continue freely criticizing the Board, only now with a guaranteed daily readership. The Board, however, soon reinstated the seventeen teacher–mothers that school year with full pay for their time in suspension and came to recommend a two-year maternity leave for New York City teachers.

Rodman’s case helped play a role in establishing principles of freedom of speech and pushed New York City to become only the fourth U.S. city to allow maternity leaves of absence. Her attorney, Jean Norris, later became the first

---

60. Henrietta Rodman, Sporting Note, N.Y. TRIB., Nov. 10, 1914, at 8.
61. The New York City Board of Education, infuriated, responded by charging Rodman with “gross misconduct and insubordination” and suspending her for the rest of the school year without pay. Sochen, supra note 49, at 105.
63. See Sochen, supra note 49, at 108.
64. See Free Speech for Teachers, NEW REPUBLIC, June 26, 1915, at 193 (drawing attention to the case in an early issue of the New Republic out of concern that “Miss Rodman’s act in writing to the Tribune was not one in the course of her employment as a teacher. It was something that she did in her capacity as a citizen outside of the schoolroom,” and then observing that the Board’s sanction “raises a fundamental issue of democratic government: how far should persons be compelled to give up their rights as citizens when they enter the public service?” and urging someone to take the case to the courts to “determine whether the terms of our bill of rights have any application to these issues”).
65. However, this move did not placate Rodman, who “criticized the two year absence period as being unduly long,” Sochen, supra note 49, at 109, and declared that there was “no future for the woman teachers in the public schools” because of the board’s domineering control, Cristal Eastman and Garley Flynn Seeking Freedom, supra note 50.
A half century later, women had gained the right to vote and were just beginning to attend law school in increasing numbers. They no longer needed to rely on public opinion as a tool of social change for the reasons that Henrietta Rodman did. Yet, women were still vastly underrepresented in representative government, on the bench, and on law faculties. Discrimination—including pregnancy discrimination—remained rampant, as a 1973 report of the ACLU Women’s Rights Project (WRP) observed, documenting, in support of its equal-protection-litigation campaign, “the kinds of penalties that major institutions in our society routinely inflict upon pregnant women.” WRP’s founder, Ruth

66. See Carter, supra note 49, at 168. For Norris’s role in supporting teachers in New York who were threatened with dismissal because of marriage and pregnancy, as well as her role in representing Henrietta Rodman, see Mae C. Quinn, Fallen Women (Re)framed: Judge Jean Hortense Norris, New York City – 1912–1955, 67 U. Kan. L. Rev. 451, 464–71 (2019). For Norris’s appointment as the first woman judge in New York State, see id. at 476.


68. Henrietta Rodman, Teachers’ Champion Dying of Paralysis, N.Y. TRIB., Jan. 24, 1923, at 11; see Quinn, supra note 66, at 465 (observing Rodman’s involvement in the Heterodoxy Club, a group that included lesbians and women of color); supra note 50 and accompanying text (discussing Rodman’s opposition to discrimination against African-American women in the South and her activism against lynching).

69. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 54 (2d ed. 1993) (describing the low level of female law student enrollment until the 1970s, when “New York University was one of the first to admit law classes made up of 25 percent women, in the early 1970s. Rutgers University followed after a spate of activity by women students brought the admission of enough women to comprise 40 percent of the law school. Rutgers’ faculty included Ruth Bader Ginsburg, who helped women law students there organize one of the first conferences on women in the law, in May 1970, and was one of the first advocates for women’s equality in law schools and in the courts. . . .”) Soon most major law schools were admitting women in far greater proportions than in the past.”

Bader Ginsburg,74 knew of these practices from personal experience. In interviews, Justice Ginsburg has recalled her own work experiences in the 1950s:

I qualified to work as a claims adjuster for the Social Security Administration at Fort Sill...I told the head of the office when I started that I was 3-months pregnant. He said, “Well, we can’t place you as a GS-5 because you won’t be able to go to Baltimore for training. So, we will list you as a GS-2 and you’ll do the work of a GS-5.” It was also expected that when my child was born, I would leave. You can see why I am exhilarated by the change I have seen.75

Ginsburg’s account of teaching law at Rutgers in the 1960s sounds little different from the conditions that Henrietta Rodman fought at the turn of the century. Ginsburg recalls that during her second year of teaching:

I had a year-to-year contract, and I was pretty sure that if I told them I was pregnant, I wouldn’t get a contract for the next year. So I wore my mother-in-law’s clothes. It was just right. She was one size larger. And I got through the spring semester. When I had the new contract in hand, I told my colleagues, when I came back in the fall, there would be one more in our family. So they stopped thinking that I was gaining a lot of weight.76

By 1970, at the half-century anniversary of the Nineteenth Amendment’s ratification, feminists active in the civil rights, labor, and antiwar movements held a Strike for Equality in which they demanded recognition of the Constitution’s guarantees of equal citizenship through ratification of the Equal Rights Amendment (ERA), and access to equal employment and educational opportunities, abortion rights, and universal child care.77 At the time of the strike, the Supreme Court had never held that a law violated the Equal Protection Clause because it discriminated on the basis of sex.

It was in this era that Ginsburg began bringing cases before the Supreme Court in a campaign to secure the recognition of women’s equal-citizenship rights under the Constitution. She challenged laws like the one in Reed v. Reed that

---

74. See Amy Leigh Campbell, Raising the Bar: Ruth Bader Ginsburg and the ACLU Women’s Rights Project, 11 TEX. J. WOMEN & L. 157, 165 (2002) (“The ACLU’s Board of Directors declared women’s rights to be their top legal and legislative priority in December 1971 following the victory in Reed v. Reed. The Board hired Professor Ruth Bader Ginsburg to found and direct the Women’s Rights Project (WRP) in the spring of 1972 in recognition of her successful collaboration with ACLU attorney Mel Wulf.”) (footnote omitted)).


drew sex-based distinctions between male and female candidates to administer a decedent’s estate. Her cases targeted laws that imposed sex-role stereotypes on women and men; she contested differences that law imposed on men and women without asserting that the sexes were in fact the same.

As Ginsburg chose her early cases targeting traditional sex-role stereotyping in public and private life, she highlighted laws regulating pregnancy. In one of her first actions at the newly founded WRP, Ginsburg appealed a Ninth Circuit decision in Struck v. Secretary of Defense on behalf of an Air Force officer who was subject to automatic discharge on grounds of pregnancy or new motherhood—leaving her only the option of aborting the pregnancy—while male Air Force officers who were about to become fathers were not subject to a similar requirement. Ginsburg contested the regulation on equal protection and substantive due process grounds. Ginsburg urged the Supreme Court to suspend sex-role assumptions and recognize that there were other similarly situated persons in the Air Force to whom the plaintiff could be compared: “Because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the equal protection clause of the Fourteenth Amendment.” Ginsburg explained that the Air Force’s policy of immediately discharging pregnant women officers who continued their pregnancies “reflect[ed] arbitrary notions of woman’s place wholly at odds with contemporary legislative and judicial recognition that individual potential must not be restrained, nor equal opportunity limited, by law-sanctioned stereotypical prejudices,” and asked the Court to review the regulation under a strict scrutiny framework, echoing the claim for strict scrutiny that she had just presented the Court as an amicus in Frontiero.

---

78. 404 U.S. 71, 73 (1971).
80. In the early 1970s, Ginsburg authored briefs and law review articles arguing that laws according differential treatment on the basis of pregnancy should be subject to strict scrutiny under the Equal Protection Clause and under the Equal Rights Amendment. See infra note 163 (citing sources in addition to the Struck brief).
82. See Brief for the Petitioner, supra note 81, at 7–12.
83. Id. at 17.
84. Id. at 14.
85. Id. at 26–52.
86. See Brief of American Civil Liberties Union Amicus Curiae, Frontiero v. Richardson, 411 U.S. 677 (1973) (No. 71-1694).
Ginsburg closed her brief, filed just before the Court handed down Roe v. Wade, with a due process challenge to the policy as violating Struck’s “right to sexual privacy, and her autonomy in deciding ‘whether to bear . . . a child’” and her right to free exercise of religion. The Air Force ultimately abandoned its discriminatory policy before the Supreme Court could rule on the case, perhaps aware of the dangers of asking the Court to rule in a case in which the government was asking a Catholic woman to have an abortion as the price for maintaining her position in the Air Force.

In Struck, Ginsburg argued that because pregnancy was a locus of traditional sex-role stereotyping, laws regulating pregnancy required strict scrutiny. As we will see, this approach was shared by movement lawyers building sex equality jurisprudence under the ERA, and under the Constitution’s existing equal protection guarantees. But it was not shared by the Court. Even as the movement lawyers persuaded the Court to hold unconstitutional sex-based laws resting on “‘archaic and overbroad generalization[s]’” that enforced “‘old notions’ of role typing” and “increasingly outdated misconceptions concerning the role of females in the home rather than in the ‘marketplace and world of ideas,’” the Court resisted such arguments in cases involving pregnancy. Soon after the plurality decision in Frontiero calling for applying strict scrutiny to sex-based state action, the Burger Court handed down its 1974 decision in Geduldig v. Aiello—upholding exclusion of pregnancy from California’s comprehensive disability benefits program on the ground that pregnancy was “an objectively identifiable physical condition with unique characteristics” and observing that “[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in Reed and Frontiero.”

Part II of this Article examines more closely feminist lawyers’ equal protection claims about pregnancy in the 1970s and the Burger Court’s response, and then demonstrates how that body of law has evolved in intervening decades.

88. Brief for the Petitioner, supra note 81, at 54 (alteration in original).
89. Id. at 56–58.
90. See Siegel, The Pregnant Captain, supra note 81, at 42.
91. See, e.g., Barbara A. Brown, Thomas I. Emerson, Gail Falk & Ann E. Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 YALE L.J. 871, 893–96 (1971); see also id. at 930 n.116 (criticizing mandatory maternity leave and suggesting a variety of sex-stereotypical views the policy might reflect).
92. See infra Part II.
95. 411 U.S. 677, 688 (1973) (Brennan, J., plurality opinion).
96. 417 U.S. 484, 496 n.20 (1974) (citations omitted). For a fuller legal context, see infra Part II, describing interplay of Fourteenth Amendment, ERA, and Title VII claims.
C. SENATOR JENNIFER MCCLELLAN IN 2020: ADVOCATING FOR A PREGNANT WORKERS FAIRNESS ACT—AND THE EQUAL RIGHTS AMENDMENT

Today, a full century since the Nineteenth Amendment was ratified, women have made major gains in their integration in politics, law, and the market. 97 Still, pregnancy discrimination persists. 98 The New York Times has recently reported that “[w]hether women work at Walmart or on Wall Street, getting pregnant is often the moment they are knocked off the professional ladder. . . . The number of pregnancy discrimination claims filed annually with the Equal Employment Opportunity Commission has been steadily rising for two decades and is hovering near an all-time high.” 99

Recently, Jennifer L. McClellan, a Virginia State Senator, became the first member of the Virginia House of Delegates to become pregnant while in office; she reports that she was asked whether she would be retiring. 100 McClellan pointed out that no one asked the same question of her male colleague who was expecting a child. 101 McClellan did not retire but instead ran for the Virginia Senate. There, she has co-led the charge for Virginia to become the thirty-eighth state to ratify the ERA. 102 Moments after the legislative window opened in


101. See id.

November 2019, McClellan submitted an ERA-ratification resolution in the Virginia Senate, placing it “at the symbolic head of the list for that chamber.” In explaining her support for the ERA, McClellan emphasized that she was “proud to be among a number of women of color taking up the mantle to ratify the Equal Rights Amendment” after “women of color were overlooked in the building of the ERA and women’s rights.” Recognizing the significance of her own presence in the Virginia General Assembly, McClellan pointed out that she does not “think Thomas Jefferson ever envisioned nursing mothers in this Capitol, but he never would have envisioned me here, period.”

Senator McClellan’s experience of maternity has directly informed her advocacy. McClellan recently helped enact the Pregnant Workers Fairness Act (PWFA) in Virginia requiring the reasonable accommodation of pregnant workers. At this point, over half of the states—twenty-nine, many of them “red”—


104. McClellan, supra note 100.


107. McClellan recalled explaining, during a committee discussion for a school breastfeeding accommodations bill that ultimately passed, why lactation breaks were essential and why teachers could not “just wait until lunch” to breastfeed. RVAbreastfeeds, supra note 106 (McClellan explaining that “[s]he put in a bill now that required schools to have a lactation policy that would include breaks and a private place for teachers and students to pump, and a place to store it. And I remember being in a committee meeting where some of the older men, who I guess their wives didn’t breastfeed or something, and they said, ‘Well, can’t you just wait until lunch?’ And I said, ‘Okay, if you have a teacher, school starts at 6:30 in the morning. Even if she’s having lunch at like 11:30, here’s what starts to happen.’ And I started to explain engorgement, and all of a sudden they were all like, ‘Okay, never mind.’ And it was just like, ‘Alright,’ like ‘fine.’ But no one had ever been that voice in the General Assembly who could speak from experience like ‘it hurts’ or ‘you leak.’ . . . Or they’re like, you know, ‘Why can’t you just restrain your breast?’ And it’s like, ‘It doesn’t quite work that way.’ . . . I could better put myself in . . . nursing mothers’ shoes because I was going through it myself.”).

have passed their own versions of the PWFA.\footnote{See Dina Bakst, \textit{Improving Federal Law for Pregnant Workers}, \textit{Hill} (Jan. 15, 2020, 2:30 PM), https://thehill.com/opinion/healthcare/478413-improving-federal-law-for-pregnant-workers [https://perma.cc/R2ML-WPKZ].} A federal PWFA has been introduced in the House of Representatives, and after its approval in committee markup, has recently moved to the full House for a vote.\footnote{See Pregnant Workers Fairness Act, H.R. 2694, 116th Cong. (2019).} The Act provides for reasonable accommodations of pregnancy in the workplace, premised on the radical assumption that employees who become pregnant will continue their employment rather than leave the workforce.\footnote{See Bryce Covert, \textit{The American Workplace Still Won’t Accommodate Pregnant Workers}, \textit{Nation} (Aug. 12, 2019), https://www.thenation.com/article/pregnant-workers-discrimination-workplace-low-wage.} This view of women’s equal citizenship in economic life, mirroring their equal citizenship through leadership in civic life, appears to be gaining traction.


level, Sarah Palin (AK) and Jane Swift (MA) are the only Governors who have given birth while in office.118 When the candidates received considerable public attention for their pregnancies, both expressed concerns about their pregnancies overshadowing their public policy agendas.119 Though statistics on pregnant, statewide office-holders are not officially gathered, anecdotal evidence suggests there are scarcely any statewide office-holders who have been pregnant.120 The scarcity of pregnant lawmakers may be explained, in part, by the unwillingness of many voters to elect women who appear to be involved in caring for children.

The social science research shows that pregnant women are negatively stereotyped, viewed as less competent and committed, and are less likely to be hired.121 This negative sex-role stereotyping extends to politics. In a 2018 Pew Research Center survey, fifty-one percent of respondents reported it would be better for a woman seeking high political office to have children before entering politics.122 About a quarter said a female candidate should wait until she is politically well-established before having children, with an additional nineteen percent reporting it would be better for her not to have children at all.123

The beliefs reported in the Pew poll make the success of pregnant lawmakers like McClellan and Carroll Foy even more astonishing. They remind us that sex-role stereotyping is even more robustly entrenched in politics than in the markets. In each domain, norms are slowly evolving—it is remarkable that half of the states have enacted a pregnant workers fairness act, and that a handful of women can now finally run for office, even when they are pregnant and “showing.”124

120. See Kate Zernike, ‘And I’m a Mom,’ Candidates and Voters Warm to Kids on the Trail, N.Y. TIMES (Sept. 12, 2018), https://www.nytimes.com/2018/09/12/us/politics/women-midterms-children.html (“Ms. Teachout is believed to be only the third woman to run for statewide office while pregnant.”).
121. In one foundational 1993 study, survey participants viewed pregnant women as “overly emotional, often irrational, physically limited, and less than committed to their jobs. They were not seen as valued or dependable employees.” Jane A. Halpert, Midge L. Wilson & Julia L. Hickman, Pregnancy as a Source of Bias in Performance Appraisals, 14 J. ORGANIZATIONAL BEHAV. 649, 655 (1993).
123. Id.
But there are many, many Americans who—consciously and vocally, as well as unconsciously—still hold the views expressed by the New York Board of Education a century ago, tipping the balance against pregnant women and new mothers in markets and in politics, often in ways blamed on the women themselves.

II. **Equal Protection, Sex-Role Stereotyping, and Pregnancy: From the Burger Court to the Rehnquist Court**

A. **Locating Equal Protection Doctrine in History**

As the stories opening this Article illustrate, in the century after the ratification of the Nineteenth Amendment, Americans continued to reason through traditional, gender-based family roles as they made decisions about employment and politics. These understandings were carried forward, not simply through custom and consent, but through laws that pushed resisting mothers and mothers-to-be out of employment on the assumption they were dependents of male wage earners.

Could women contesting such laws appeal to constitutional guarantees of equal protection? As we have seen, Ruth Bader Ginsburg and other feminist lawyers challenged laws excluding pregnant women from employment as a core example of sex discrimination in the 1970s. But as we will now examine more closely, the Burger Court was unwilling to incorporate their arguments into the new body of sex-discrimination doctrine it was forging under the Equal Protection Clause. The Burger Court’s earliest equal protection, sex-discrimination cases prohibited sex-based state action that imposed stereotypical sex roles on women, but treated laws regulating pregnancy, “an objectively identifiable physical condition with unique characteristics,”¹²⁵ as if such laws were not always subject to these same constraints.

I term this limit on equal protection law “physiological naturalism.”¹²⁶ Physiological naturalism is the belief that objective facts about reproductive differences—rather than judgments about social roles—motivate and justify regulations that uniquely burden one sex.¹²⁷

In what follows, I show how the understanding of sex discrimination and pregnancy dramatically changes in the Court’s equal protection cases over the...
decades. The Burger Court initially talked about pregnancy as a real difference, reasoning about pregnancy through the lens of physiological naturalism in order to limit the new body of equal protection doctrine that prohibits sex-based state action imposing sex-stereotypical views on women. But with the enforcement of civil rights laws prohibiting pregnancy discrimination, views about pregnancy in the Court’s equal protection decisions have significantly evolved. As I document in this section, there is a clear shift from the cases of the Burger Court to the cases of the Rehnquist Court, when the Supreme Court integrated laws regulating pregnancy into the canonical equal protection sex-discrimination framework and prohibited sex stereotyping of “mothers or mothers-to-be.”

B. CARVING OUT PREGNANCY FROM THE REACH OF NEW SEX-DISCRIMINATION CASES

The Nineteenth Amendment barring sex discrimination in state qualifications for voting changed many things, but it did not enfranchise all women and it did not move judges to eliminate from law sex-based family roles that for so long organized public and private life. In 1937, nearly two decades after the Nineteenth Amendment’s ratification, the Court denied a man’s equal protection challenge to a poll tax from which the state of Georgia exempted women in Breedlove v. Suttles. The Court reasoned that women could be exempted from the poll tax “in view of burdens necessarily borne by them for the preservation of the race,” and further observed that “[t]he laws of Georgia declare the husband to be the head of the family and the wife to be subject to him. To subject her to the levy would be to add to his burden.” In 1937, nearly two decades after the Constitution was amended to give women the right to vote, the Court still understood citizenship through the family and authorized sex discrimination by invoking women’s capacity to bear children as well as the old rules of the common law of marital status.

By the 1960s, women had mobilized—in the civil rights, labor, and youth movements of the era—to challenge these understandings. They argued that it was impossible to secure equal citizenship for women without changing the conditions in which women raise families and as the Struck case in section I.B.

128. For work showing how constitutional values can be enforced by legislators as well as courts, see generally Robert C. Post & Reva B. Siegel, Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel, 110 YALE L.J. 441 (2000), and Robert C. Post & Reva B. Siegel, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 YALE L.J. 1943 (2003).


132. Id. (citing Muller v. Oregon, 208 U.S. 412, 421 (1908)).

133. Id. (citation omitted).

134. See, e.g., supra text accompanying note 77 (describing the movement’s demands in its 1970 Strike for Equality).
illustrates, they challenged laws that pushed men and women into sex-differentiated family roles. And the Supreme Court acted responsively. In 1973, Justice Brennan’s plurality opinion in *Frontiero v. Richardson* quoted *Bradwell v. Illinois*—“The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator”—to illustrate the kind of “gross, stereotyped distinctions between the sexes” which American law had enforced for hundreds of years, but that the justices were now interpreting the Equal Protection Clause to forbid. “No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas,” the Court urged two years later in *Stanton v. Stanton*. But despite warning against sex-based state action that imposed maternal roles on women, the Court resisted applying this same standard to laws regulating pregnancy. In *Cleveland Board of Education v. LaFleur*, reaching the Court just after *Frontiero* in 1973, feminist lawyers challenged a commonplace restriction: a mandatory maternity-leave law that required a pregnant schoolteacher to take leave without pay for five months before she was due to deliver, and only allowed the teacher to return to work the following semester after the newborn was three months old. Without knowing the story of Henrietta Rodman’s campaign, feminists could still ask probing questions about the sex-role assumptions animating mandatory maternity leaves. Lawyers challenged the mandatory maternity law on equal protection grounds, seeking strict scrutiny review. But the Court did

135. See supra Section I.B.
136. 411 U.S. 677, 684–85 (1973) (plurality opinion) (internal quotation marks omitted) (quoting *Bradwell v. Illinois*, 83 U.S. 130, 141–42 (1873) (Bradley, J., concurring)).
137. Id.
138. Id. at 688 (holding that “classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect”).
141. In a 1971 article many termed the “unofficial legislative history” of the Equal Rights Amendment, Professor Thomas Emerson and his feminist co-authors argued that the ERA would require strict scrutiny of protective labor legislation mandating maternity leave. They probed the reasoning behind mandatory leave laws, observing:

Another possibility is that the legislators were willing to sacrifice women’s roles as workers, which they considered relatively unimportant, to the supposed demands of pregnancy and motherhood, without much investigation either of medical evidence or alternative legislation with less impact on women’s rights as independent adults. Or perhaps male legislators were acting on the basis of Victorian beliefs about the impropriety of women who are “in the family way” appearing in public at all. Since denying pregnant women the right to work when they are medically able and willing to work means that they cannot support themselves, this type of legislation, whatever its ostensible purpose, embodies an unrealistic assumption that all pregnant women have men to support them during their forced confinement.

not ask about the sex-role assumptions shaping a mandatory-leave law that required a pregnant woman to take leave without pay five months before she was to deliver and only allowed her to return to work the following year after the newborn was three months old.\(^{143}\) The Court avoided the plaintiffs’ equal protection claims, but was evidently unsettled by them, ruling that the mandatory maternity-leave policy violated due process by creating an irrebuttable presumption of unfitness to work.\(^{144}\)

The next year, in the 1974 case *Geduldig v. Aiello*, the Court faced an equal protection challenge to a California law that provided disability benefits for state workers that covered all work-disabling conditions whether incurred on the job or off the job, but excluded disability benefits for normal pregnancy.\(^{145}\) Plaintiff Sally Armendariz miscarried after she was struck by another car.\(^{146}\) Ordered by her doctor to stay home for three weeks, Armendariz, the family’s breadwinner, sought assistance from California’s temporary disability insurance program, a program she had paid into for ten years.\(^{147}\) The state denied Armendariz’s claim, finding her disability related to pregnancy and thus ineligible.\(^{148}\)

In justifying the exclusion, California invoked the breadwinner/caregiver roles which assume women’s market participation ends with motherhood (and that pregnant women are therefore a cost with little benefit to their employers): “Pregnancy and childbirth, unlike illness and injury, often result in a decision to leave the work force.”\(^{149}\) The Court refused to apply heightened scrutiny of the kind the plurality had in *Frontiero*, and deferred to the policy as a rational way of saving public monies.\(^{150}\)

143. The Supreme Court did not scrutinize the mandatory leave rule to determine whether a law requiring a teacher to take close to a year of unpaid leave reflected or enforced sex-stereotypical reasoning about pregnant women, despite a record suggesting no formal justification for the requirement and much evidence of sex-role stereotyping. See 414 U.S. at 644.

The district court found:

The evidence shows that prior to the rule [mandating leave], the teachers suffered many indignities as a result of pregnancy which consisted of children pointing, giggling, laughing and making snide remarks causing interruption and interference with the classroom program of study. . . . The evidence shows that in one instance where a teacher’s pregnancy was advanced, children in a Cleveland junior high school class were “taking bets on whether the baby would be born in the classroom or in the hall.”

LaFleur v. Cleveland Bd. of Educ., 326 F. Supp. 1208, 1210 (N.D. Ohio 1971). The district court found that the primary purpose of the rule requiring the teacher to take close to a year of unpaid leave was “to protect the continuity of the classroom program.” Id. at 1211.

144. See 414 U.S. at 644–46.


146. See Dinner, *supra* note 14, at 77.

147. *Id.*

148. *Id.*


150. Justice Stewart understood *Geduldig* as a case involving claims on public benefits and emphasized his recent opinion in *Danridge v. Williams*: “Particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point. [T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.”
The Court in turn justified this decision by pointing to facts about the female body. Justice Stewart asserted that when the state regulates reproduction, public authorities form objective judgments about the physiology of the female body, which are presumptively “reasonable” and not likely to raise concerns of the kind at issue in sex-discrimination cases like *Frontiero*: “While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* and *Frontiero*. . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics.”151 Unless plaintiffs could show that that the regulation of pregnancy was “mere pretext[]”—animated by “invidious discrimination”—lawmakers were “constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.”152 “The lack of identity between the excluded disability and gender as such” was clear because the “program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.”153

The Burger Court was unwilling to extend its cases requiring scrutiny of sex-role assumptions to the regulation of pregnancy in equal protection cases arising under the Constitution; in *General Electric Co. v. Gilbert*, the Court moved to apply its reasoning in *Geduldig* to pregnancy discrimination cases arising under Title VII of the 1964 Civil Rights Act.154 But Congress soon repudiated the Court’s efforts. Within two years, it enacted the Pregnancy Discrimination Act of 1978 (PDA), which defined discrimination on the basis of pregnancy as discrimination on the basis of sex under the nation’s employment discrimination law.155 This matrix of legal developments created a framework for a legislative–constitutional settlement of a kind to emerge from the struggles of the 1970s, which, as we will see, would continue to evolve over the decades.

Why did the Justices find the pregnancy exclusions a legitimate way of saving money when they would not have similarly countenanced other sex- or race-based exclusions?156 In part, the Justices’ unwillingness to extend their cases requiring scrutiny of sex-role assumptions to the regulation of pregnancy in equal protection cases demonstrated the reflex of an all-male bench still unwilling to

---

151. *Geduldig*, 417 U.S. at 496 n.20 (citations omitted).
152. *Id.*
153. *Id.*
156. See supra note 150.
hire women clerks. Justice Blackmun’s notes on the LaFleur case—written after his decision in Roe—show that he repeatedly referred to pregnant teachers as “girl[s]” and concurred in the employer’s view of pregnant women as “unattractive.” As Ken Karst described Geduldig and Gilbert in his Supreme Court Foreword in 1977, “These decisions are textbook examples of the effects of underrepresentation on ‘legislative’ insensitivity. Imagine what the presence of even one woman Justice would have meant to the Court’s conferences.”

But in the 1970s, the Justices’ unwillingness to scrutinize the regulation of pregnancy as they did other forms of sex-based state action was not an unconsidered reflex; it was a considered refusal to embrace feminist arguments. In the

---

157. Although the first female Supreme Court clerk was hired by Justice Douglas in 1944, the second and third female clerks were not hired until 1966 and 1968, respectively. See Todd C. Peppers, Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk 20–21 (2006); Jennie Berry Chandra, Lucile Lomen: The First Female United States Supreme Court Law Clerk, in In Chambers: Stories of Supreme Court Law Clerks and Their Justices 198, 199 (Todd C. Peppers & Artemus Ward eds., 2012). Justice Brennan reportedly told his clerks during the 1968 Term “that he worried about having to watch what he said if a woman clerk worked in his chambers. He did not feel he could have the same sort of relaxed rapport with a female clerk or colleague. If a woman ever got nominated to the Court, Brennan predicted, he might have to resign.” Seth Stern & Stephen Wermiel, Justice Brennan: Liberal Champion 388 (2010). For the 1974 Term, Justice Brennan hired future Ninth Circuit Judge Marsha Berzon as his first female clerk only after one of his former clerks wrote the Justice “an impassioned letter . . . asking him to reconsider” and arguing that his failure to hire Berzon “on account of her sex likely violated the Constitution—in large part due to an interpretation of the Fourteenth Amendment championed by Justice Brennan.” John J. Szmer et al., Taking a Dip in the Supreme Court Clerk Pool: Gender-Based Discrepancies in Clerk Selection, 98 MARQ. L. REV. 261, 268–69 (2014); see also Marsha S. Berzon, Book Review Symposium: The Common Man?, 89 TEX. L. REV. 1395, 1399–1400 (2011) (recounting Berzon’s learning of the backstory of Justice Brennan’s decision to hire her as a clerk). From 1973 to 1980, only twenty-four of the Court’s 248 clerks were women. See Cynthia L. Cooper, Women Supreme Court Clerks Striving for “Commonplace,” 17 PERSP. 18, 19 (2008).

158. See, e.g., Memorandum from Justice Harry A. Blackmun on No. 72-777, Cleveland Board of Education v. LaFleur, and No. 72-1129, Cohen v. Chesterfield County School Board 3 (Oct. 15, 1973) (on file with the Library of Congress, Harry A. Blackmun Papers, Box 175, Folder 72-777) (“Pregnancy entails some additional hazards, but those will be present whether the girl is teaching or is not teaching.”). Justice Blackmun wrote in his notes that “in the later stages of an individual pregnancy a woman may appear rather unattractive. This, in my view, depends a great deal on the particular person concerned. Certainly the same thing happens wholly apart from pregnancy.” Id. at 3–4. Justice Blackmun also frequently described the female oral advocates’ appearances in his notes; for instance, he described an attorney arguing Geduldig with the phrase “long stringy hair, tall 30 open mouth.” Memorandum from Justice Harry A. Blackmun on No. 73-640, Geduldig v. Aiello (Mar. 26, 1974) (on file with the Library of Congress, Harry A. Blackmun Papers, Box 188, Folder 73-640).

159. Justice Blackmun’s notes on Gilbert show that he voted against applying sex-role scrutiny to the regulation of pregnancy under Title VII over the plea of a female clerk who recounted her experience with pregnancy discrimination. The clerk, Donna Murasky, argued in a bench memo to Justice Blackmun that “Congress might well be aware that much of the discrimination against women has its basis in the childbearing function that they perform,” and then wrote in a footnote, “I thought that I would add a personal note here. In 1972 when I was seeking summer employment, a partner at a major Chicago law firm made numerous inquiries about whether I was planning to have children and whether I was then pregnant. I doubt whether that experience is unique, and I doubt whether my male counterparts
campaign for an equal rights amendment and in cases challenging the exclusion of pregnant women from the workplace, feminist lawyers explained how laws regulating pregnancy could enforce sex-role stereotypes, applying the stereotyping concept to pregnancy even before sociologists did.\footnote{Ginsburg’s equal protection arguments in Struck, see supra Section I.B. See also Brief for the Petitioner, supra note 81, at 50–51 (“Petitioner was presumed unfit for service under a regulation that declares, without regard to fact, that she fits ‘into the stereotyped vision . . . of the ‘correct’ female response to pregnancy.’” (quoting Heath v. Westerville Bd. of Educ., 345 F. Supp. 501, 505, 506 n.1 (S.D. Ohio 1972))). Ginsburg also argued for strict scrutiny of laws regulating pregnancy under the ERA. See infra text accompanying notes 173–76; see generally Ruth Bader Ginsburg, Gender and the Constitution, 44 U. CIN. L. REV. 1 (1975) (discussing equal protection and ERA standards). Ginsburg was not alone in claiming that sex stereotyping of pregnancy violated the Equal Protection Clause. Philip J. Hirschkop, the same attorney who represented Mildred and Richard Loving in Loving v. Virginia, 388 U.S. 1 (1967), made arguments similar to Ginsburg’s in challenging the mandatory maternity leave in Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974). See Brief for Petitioner at 5–6, Cohen v. Chesterfield Cty. Sch. Bd., 411 U.S. 947 (1973) (No. 72-1129), 1973 WL 172268 (arguing that the Court should grant sex suspect status to a mandatory maternity leave policy and “[s]ex discrimination has been held to exist when all or a defined class of women are subjected to disadvantaged treatment based on stereotypical assumptions about their sex which operate to foreclose opportunity based on individual merit” (emphasis omitted)). (The ACLU filed an amicus brief in the case in which Ginsburg argued that “the challenged [pregnancy] regulations establish a suspect classification” and should be “subjected to close judicial scrutiny” under Frontiero v. Richardson. See Brief of American Civil Liberties Union et al., Amici Curiae, at 26–27, Cohen, 411 U.S. 947 (No. 72-1129), and La Fleur, 414 U.S. 632 (No. 72-777), 1973 U.S. S. Ct. Briefs LEXIS 11, at *41, 45–47 (citing Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (Brennan, J., plurality opinion)).)

Likewise, Wendy Williams, the lawyer for Carolyn Aiello and other women who brought an equal protection challenge to California’s disability insurance program for its exclusion of pregnancy-related disabilities in Geduldig v. Aiello, argued that “discrimination on the basis of pregnancy often results from gross stereotypes and generalizations which prove irrational under scrutiny.” Brief for Appellees at 24, Geduldig v. Aiello, 417 U.S. 484 (1974) (No. 73-640), 1974 WL 185752. The proper standard of review for such sex stereotyping, according to Williams, was strict scrutiny. Id. at 25. Williams further anticipated counterarguments based on the ERA’s unique physical characteristic exception and explained how the legislative history of the ERA supported her view. Id. at 42–46.}


163 By 1972, Ruth Ginsburg was already asking the Court to apply strict scrutiny to policies that discriminated on the ground of pregnancy to determine whether sex stereotyping was involved. For Ginsburg’s equal protection arguments in Struck, see supra Section I.B. See also Brief for the Petitioner, supra note 81, at 50–51 (“Petitioner was presumed unfit for service under a regulation that declares, without regard to fact, that she fits ‘into the stereotyped vision . . . of the ‘correct’ female response to pregnancy.’” (quoting Heath v. Westerville Bd. of Educ., 345 F. Supp. 501, 505, 506 n.1 (S.D. Ohio 1972))). Ginsburg also argued for strict scrutiny of laws regulating pregnancy under the ERA. See infra text accompanying notes 173–76; see generally Ruth Bader Ginsburg, Gender and the Constitution, 44 U. CIN. L. REV. 1 (1975) (discussing equal protection and ERA standards). Ginsburg was not alone in claiming that sex stereotyping of pregnancy violated the Equal Protection Clause. Philip J. Hirschkop, the same attorney who represented Mildred and Richard Loving in Loving v. Virginia, 388 U.S. 1 (1967), made arguments similar to Ginsburg’s in challenging the mandatory maternity leave in Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974). See Brief for Petitioner at 5–6, Cohen v. Chesterfield Cty. Sch. Bd., 411 U.S. 947 (1973) (No. 72-1129), 1973 WL 172268 (arguing that the Court should grant sex suspect status to a mandatory maternity leave policy and “[s]ex discrimination has been held to exist when all or a defined class of women are subjected to disadvantaged treatment based on stereotypical assumptions about their sex which operate to foreclose opportunity based on individual merit” (emphasis omitted)). (The ACLU filed an amicus brief in the case in which Ginsburg argued that “the challenged [pregnancy] regulations establish a suspect classification” and should be “subjected to close judicial scrutiny” under Frontiero v. Richardson. See Brief of American Civil Liberties Union et al., Amici Curiae, at 26–27, Cohen, 411 U.S. 947 (No. 72-1129), and La Fleur, 414 U.S. 632 (No. 72-777), 1973 U.S. S. Ct. Briefs LEXIS 11, at *41, 45–47 (citing Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (Brennan, J., plurality opinion)).)

Likewise, Wendy Williams, the lawyer for Carolyn Aiello and other women who brought an equal protection challenge to California’s disability insurance program for its exclusion of pregnancy-related disabilities in Geduldig v. Aiello, argued that “discrimination on the basis of pregnancy often results from gross stereotypes and generalizations which prove irrational under scrutiny.” Brief for Appellees at 24, Geduldig v. Aiello, 417 U.S. 484 (1974) (No. 73-640), 1974 WL 185752. The proper standard of review for such sex stereotyping, according to Williams, was strict scrutiny. Id. at 25. Williams further anticipated counterarguments based on the ERA’s unique physical characteristic exception and explained how the legislative history of the ERA supported her view. Id. at 42–46.}
sex-discrimination cases, and ensure that the regulation of pregnancy was subject to the same prohibition on enforcing traditional family roles that the Court was applying to other forms of sex-discriminatory action.

Employers who wanted the Court to reaffirm their prerogative to exclude pregnant women from the workplace were canny in appealing to the Justices President Nixon appointed.164 They did not use the language of separate spheres that the New York Board of Education had invoked in Henrietta Rodman’s case in 1911.165 They understood that the Justices who decided Frontiero accepted changes in women’s roles, but were concerned about moving “too fast” and constitutionalizing the ERA and the entitlements of the welfare state.166

And so defenders of the status quo urged the Burger Court to employ modern language to preserve traditional sex roles and to develop a special equal protection standard for the regulation of pregnancy that was expressed in the language of the ERA’s “unique physical characteristic exception” (UPC) rather than in old modes of sex-role talk. The unique physical characteristics exception was a corollary principle to the ERA explaining when and why the regulation of pregnancy was a permissible form of state action and when it was an impermissible violation of the ERA’s prohibition on sex-based state action.167 General Electric first called for the Court to incorporate a (very diluted) reading of the UPC into equal protection law in an amicus brief in Geduldig.168 A month later, the U.S. Chamber of

For an account of how mandatory maternity leave would be analyzed under the ERA, see Brown, Emerson, Falk & Freedman, supra note 91, at 930 (“It is true that the state may regulate conditions of employment for women in a physical condition unique to their sex, but the kind of regulation imposed would be subject to careful judicial review, utilizing [strict scrutiny].”).

164. For the stance of the business community litigating these cases, see Deborah Dinner, Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law, 91 WASH. U. L. REV. 453, 475–80 (2014):

Employers, insurance executives, and business trade associations mobilized family-wage and separate-sphere ideologies to justify the exclusion from coverage within disability, sick leave, and health insurance. They argued that women were only marginal labor-market participants who would leave the workforce when they entered their childbearing years. The discriminatory treatment of pregnancy and childbirth under public and private insurance schemes rested not only on cost rationales but also on ideologies about both the family and wage work.

Id. at 475; see also Deborah Dinner, The Costs of Reproduction: History and the Legal Construction of Sex Equality, 46 HARV. C.R.–C.L. L. REV. 415, 425 (2011) (discussing defendant companies’ attempts to persuade the Court “that the pregnancy exclusion derived from a legitimate economic calculus rather than from sex-based animus”).

165. See supra text accompanying note 53.

166. President Nixon’s three appointees to the Court were Justices Blackmun, Powell, and Rehnquist. Justices Blackmun and Powell concurred in Frontiero, declining to join Justice Brennan’s plurality opinion extending strict scrutiny to sex classifications. Justice Rehnquist dissented. In Geduldig, Justice Stewart emphasized his recent decision in Dandridge v. Williams, see supra note 150 and accompanying text, and was joined by Justices Blackmun, Powell, and Rehnquist.


168. General Electric submitted a brief in Geduldig asserting that the legislative history of the ERA “supports the argument that the pregnancy exclusion in the California statute before the Court reflects a reasonable, non-arbitrary, classification.” Brief for General Electric Company as Amicus Curiae at 10, Geduldig v. Aiello, 417 U.S. 484 (No. 73-640).
Commerce followed General Electric’s lead in weaponizing the ERA in its own amicus brief in the case.169 Through these briefs, the business community showed the Court that it could carve out a special rule for the regulation of pregnancy in its new sex-discrimination cases, and do so not in the older and now-discredited language of separate spheres, but in new language of sex equality, in physiological discourse associated with exceptions under the ERA.170

General Electric filed an amicus in Geduldig, the case concerning California’s disability benefits program, because its own case was headed toward the Court presenting the question of pregnancy discrimination under federal employment discrimination law. (General Electric offered its employees a disability plan for nonoccupational sickness and accidents that did not cover disabilities relating to pregnancy.)171 When the Court soon thereafter took General Electric Co. v. Gilbert, Ginsburg and Emerson filed an amicus in the case designed to correct the misimpression about ERA jurisprudence that General Electric’s brief in Geduldig had created, and to dissuade the Court from applying its decision in Geduldig to Title VII.172

The Ginsburg–Emerson brief explained how the ERA applied to laws regulating pregnancy and reiterated the view that Emerson’s article on the ERA had set forth in 1971: the ERA’s unique physical characteristic principle required strict scrutiny of pregnancy regulations to ensure that they did not enforce sex stereotypes.173 Under the ERA, Ginsburg and Emerson argued, courts must apply strict scrutiny to pregnancy classifications because they purport to deal with

---

The legal principle underlying the Equal Rights amendment as proposed by Mrs. Griffiths [Rep. Martha Griffiths of Michigan] is that the law must deal with the individual attributes of the particular person and not with stereotypes or over-classification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. “Equality” does not mean “sameness”. As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. Id. at 33 (alteration in original) (emphasis omitted) (quoting H.R. REP. NO. 92-359, at 7 (1971)). See also id. at 31–38 (containing a seven-page discussion of the unique physical characteristic principle in the ERA’s legislative history and concluding that “the legislative history underlying the ERA teaches that . . . where, as with the pregnancy exclusion in the California statute, there exists a basis for differentiation predicated on the unique characteristics of the female sex, a classification based on such differentiation is neither unreasonable nor unlawful”).

169. See Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of the Appellant at 31–32, Geduldig v. Aiello, 417 U.S. 484 (1974) (No. 73-640), 1974 WL 186477 (Mar. 12, 1974) (citing the same testimony of Rep. Martha Griffiths of Michigan as General Electric did and concluding that “if a physical characteristic such as the capability to bear children is unique to one sex, the proposed Equal Rights Amendment does not prohibit legislation which regulates or applies to that unique characteristic, since the regulation could not deny equal rights to the sex not possessing this characteristic”).

170. Presumably, the ERA’s unique physical characteristic exception is the source of Geduldig’s observation that “[n]ormal pregnancy is an objectively identifiable physical condition with unique characteristics.” 417 U.S. at 496 n.20; see supra text accompanying note 151.


172. See Brief Amici Curiae of Women’s Law Project and American Civil Liberties Union, Gilbert, 429 U.S. 125 (Nos. 74-1589 & 74-1590) (on file with American Civil Liberties Union Archives).

173. Id. at 5, 14. For Emerson’s article, see source cited supra note 91 and accompanying text.
physical characteristics unique to one sex. They set forth the unique physical characteristics inquiry as a two-step test: “(1) Is the unique feature of the characteristic relevant to the purpose of the classification? (2) Is there a compelling state interest in legislating on this particular subject in this manner?” The classifications at issue in the case failed this test, they wrote, because the purpose of a pregnancy classification was not “related to the unique properties of that characteristic.”

In General Electric Co. v. Gilbert, Ginsburg and Emerson were able to persuade Justice Brennan to adopt the stereotyping inquiry in dissent, but the majority decided to apply its reasoning in Geduldig to Title VII. The Court’s decision in Gilbert ignited a firestorm, and within twenty-two months over 200 organizations mobilized in a Campaign to End Discrimination Against Pregnant Workers and persuaded Congress to override the Court’s decision and enact the Pregnancy Discrimination Act of 1978. This legislation made clear that under Title VII of the 1964 Civil Rights Act, distinctions on the basis of pregnancy are distinctions on the basis of sex. Moved to action by a broad-based feminist mobilization, Congress enacted the PDA on the understanding that pregnant women are subject to sex-role stereotyping.

---

174. See Brief Amici Curiae of Women’s Law Project and American Civil Liberties Union supra note 172, at 14.
175. Id. at 16.
176. Id. at 17; see also Ginsburg, supra note 163, at 37–38 (explaining how and why the strict scrutiny framework would apply under the unique physical characteristics exception of the ERA). As a practical matter, all feminist theorists of the UPC understood that an exception required oversight or the exception would swallow the rule; and with an exception involving pregnancy this was especially the case.
177. Justice Brennan grasped the stereotyping argument, which he sets out in his Gilbert dissent:

General Electric’s disability program was developed in an earlier era when women openly were presumed to play only a minor and temporary role in the labor force. . . . More recent company policies reflect common stereotypes concerning the potentialities of pregnant women [such as] Cleveland Board of Education v. LaFleur, 414 U.S. 632, 644 (1974), and have coupled forced maternity leave with the nonpayment of disability payments.

Gilbert, 429 U.S. at 149 n.1 (Brennan, J., dissenting) (citations omitted).
178. See id. at 136–38.
181. As Senator Jacob Javits, Senate cosponsor of the PDA, explained:

Mr. President, we can no longer in this country legislate with regard to women workers on the basis of outdated stereotypes and myths. The facts are that women, like men, often need employment to support families, that women, like men, find their work and their careers important sources of self-esteem and personal growth, and that women, like men, have the skills and motivation to make important contributions to this country’s life, if only we will clear away the arbitrary restraints that sometimes stand in the way. I believe that this body’s commitment to equality of treatment by sex is firm, and thus we should now reaffirm the policy of equality on the job, especially when the female employee is uniquely female, when she is pregnant.
Initially, at least, the interbranch conflict created a split regime: the PDA governed only cases arising under the civil rights statute and so isolated Title VII from the equal protection framework the Burger Court fashioned to govern sex-discrimination cases. Each of these bodies of law grew as distinct bodies of law, but as we will see, in time they converged.

By the end of the 1970s, the Court developed a new body of equal protection law that prohibited sex-based state action reflecting and enforcing traditional sex-role assumptions about women as mothers; yet the Court invoked women’s physical differences from men as a reason to refuse to apply similar sex-role scrutiny to laws regulating women when they are pregnant. Once again, conflict modernized the rules and reasons of gender-status law. By subjecting laws concerning pregnancy to weak equal protection scrutiny, the Court could commit to scrutinizing sex-based state action yet allow government to regulate women’s conduct in matters concerning pregnancy without effective oversight.

C. PHYSIOLOGICAL NATURALISM IN EQUAL PROTECTION CASES, AND THE RISE OF SOCIAL SCIENCE ON THE SEX STEREOTYPING OF PREGNANT WOMEN

The views the Justices expressed about pregnancy in the 1970s equal protection cases persisted long after the 1970s, on occasion finding expression in the case law. After examining these scattered passages in the case law, I trace a less noticed dynamic in the cases, showing how the Justices’ views about sex stereotyping of pregnant women have evolved over the decades—likely as they have participated in enforcing the PDA itself.
Physiological naturalism in equal protection cases is not limited to cases concerning pregnancy; on occasion, Justices will reason this way in upholding sex-based laws that regulate extramarital sex. In the 1981 case *Michael M. v. Superior Court*, which upheld a sex-based statutory rape law that punished young men but not women for sex in which both might have consented, Justice Rehnquist reasoned that the state could punish only men in order to equal the deterrent that the threat of pregnancy presented for women: “We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity.”\(^{184}\) On this account, the burdens the sex-based statutory rape law imposed on men reflect facts about the female body and not constitutionally suspect beliefs about social roles.\(^{185}\)

Twenty years later in *Nguyen v. INS*, Justice Kennedy emphasized reproductive differences in rejecting an equal protection challenge to a law that conferred citizenship on the children of U.S. citizens when the child was born abroad and out of wedlock, even though the statute’s criteria for citizenship depended on whether the citizen parent was a woman or a man.\(^{186}\) Justice Kennedy’s opinion for the Court upheld the sex-based law on the ground that Congress could regulate the transmission of citizenship in a way that took account of the different roles women and men play in reproduction.\(^{187}\) Justice Kennedy objected that “[m]echanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real”; asserted that “the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class”; and emphasized, “[t]he difference between men and women in relation to the birth process is a real one, and the

---

184. 450 U.S. 464, 471 (1981) (plurality opinion); see id. at 473 (“[T]he risk of pregnancy itself constitutes a substantial deterrence to young females. No similar natural sanctions deter males. A criminal sanction imposed solely on males thus serves to roughly ‘equalize’ the deterrents on the sexes.”).

185. Justice Stewart explained, “while detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes. In this case we deal with the most basic of these differences: females can become pregnant as the result of sexual intercourse; males cannot.” *Id.* at 478 (Stewart, J., concurring). Justice Stewart immediately distinguished sex classifications that concern reproductive differences from other sex classifications which he saw as reflecting constitutionally-suspect generalizations or status judgments, observing that “a State is not free to make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class.” *Id.* (quoting Parham v. Hughes, 441 U.S. 347, 354 (1979) (internal quotation marks omitted)).

186. 533 U.S. 53, 73 (2001). Where the dissenters viewed the sex-differentiated treatment of parents as reflecting sex-role stereotypes, see *id.* at 89–94 (O’Connor, J., dissenting), the majority understood the law as vindicating Congress’s interest in ensuring that parents transmit citizenship to children born out of wedlock only when a tie develops between them, a relationship opportunity that birth affords the mother but not the father. See *id.* at 66 (majority opinion).

187. See *id.* at 73.
principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender."

Passages like these in *Michael M.* and *Nguyen* are rare, but seem to articulate a belief that is playing some significant but not adequately explained role in shaping equal protection law—the belief that laws based on reproductive differences between the sexes do not rest on constitutionally suspect stereotypes in the way that laws based on generalizations about social differences between the sexes do. As we have seen, reasoning of this kind appears in *Geduldig v. Aiello.* In these scattered passages in the case law, Justices suggest that because reproductive differences are objective, real, and categorically distinguish the sexes, judgments about pregnancy are free of stereotypes and constitutionally suspect assumptions about social roles.

Of course, the model of physiological naturalism, which imagines that legislative judgments about real sex differences that categorically distinguish men and women are based on facts and free of sex-role assumptions, is demonstrably wrong. Judgments about pregnant women are shaped by social roles.

Volumes of social science report that “people, especially men, tend to hold negative stereotypes about pregnant women.” When women become mothers, their labor market prospects tend to suffer—a dynamic social psychologists term a “motherhood penalty” or family responsibilities discrimination. The

188. *Id.*
189. Cf. Mary Anne Case, "The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies, 85 CORNELL L. REV. 1447, 1450 (2000) ("[V]irtually every sex-respecting rule struck down by the Court in the last quarter century embodied a proxy that was overwhelmingly, though not perfectly, accurate. Moreover, overbreadth alone seems to be enough to doom a sex-respecting rule. This is so even though many of the generalizations embodied in sex-respecting rules struck down by the Court are not only overbroad but also ‘archaic.’ That is to say, that as well as being descriptively less than perfectly accurate, these generalizations also embody outdated normative stereotypes (i.e., ‘fixed notions concerning the roles and abilities of males and females’ or ‘the accidental byproduct of a traditional way of thinking about females’)."
190. 417 U.S. 484 (1974). There, the Court reasoned that, “[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* and *Frontiero.* Normal pregnancy is an objectively identifiable physical condition with unique characteristics.” *Id.* at 496 n.20 (citations omitted). Unless plaintiffs could show that the regulation of pregnancy was “mere pretext[]”—animated by “invidious discrimination”—lawmakers were “constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.” *Id.*
192. *Id.* at 1359.
193. See *id.* For studies examining discrimination against pregnant women, see *id.* at 1369–72.
194. *Id.* at 1362; see, e.g., U.S. EQUAL EMP’T OPPORTUNITY COMM’N, No. 915.002, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES 10 (2007) (“Employment decisions that discriminate against workers with caregiving responsibilities are prohibited by Title VII if they are based on sex or another protected characteristic, regardless of whether the employer discriminates more broadly against all members of the protected class. For example, sex discrimination against working mothers is prohibited by Title VII even if the employer does not discriminate against childless women.”); Joan C. Williams & Stephanie Bornstein, *The Evolution of
social science research shows that pregnant women are viewed as less competent and committed, and are less likely to be hired.\textsuperscript{195} In one foundational 1993 study, survey participants viewed pregnant women as “overly emotional, often irrational, physically limited, and less than committed to their jobs. They were not seen as valued or dependable employees.”\textsuperscript{196} In performing a task, they are viewed as doing worse than nonpregnant women performing the same task.\textsuperscript{197}

Studies from psychology and sociology reveal pervasive stereotypes about a pregnant worker’s competence,\textsuperscript{198} commitment,\textsuperscript{199} absenteeism,\textsuperscript{200} and likely attrition.\textsuperscript{201} These judgments reflect sex-role expectations, as demonstrated by a recent series of field studies in which managers differently rated applicants when the applicants wore a pregnancy prosthesis.\textsuperscript{202}

At this point, decades of social science studies—\textit{as well as decisions under the PDA itself}\textsuperscript{203}—demonstrate that pregnant women are regularly subject to sex-role stereotyping. And these decisions have created a fascinating feedback loop. Federal judges deciding cases under Title VII are regularly asked to decide cases with fact patterns involving sex stereotyping and pregnancy discrimination, and


\textsuperscript{196} Halpert, Wilson & Hickman, \textit{supra} note 121, at 655.

\textsuperscript{197} See id.; see also Jane A. Halpert & Julia Hickman Burg, \textit{Mixed Messages: Co-Worker Responses to the Pregnant Employee}, 12 \textit{J. BUS. & PSYCHOL.} 241, 247 (1997) (“Many women felt that their skills, abilities, and work were not viewed as positively by others in the organization when they became pregnant.”).

\textsuperscript{198} See, e.g., Sara J. Corse, \textit{Pregnant Managers and Their Subordinates: The Effects of Gender Expectations on Hierarchical Relationships}, 26 \textit{J. APPLIED BEHAV. SCI.} 25 (1990); Halpert, Wilson & Hickman, \textit{supra} note 121; Barbara Masser et al., ‘\textit{We Like You, But We Don’t Want You’—The Impact of Pregnancy in the Workplace}, 57 \textit{SEX ROLES} 703 (2007).

\textsuperscript{199} See, e.g., Fox & Quinn, \textit{supra} note 162, at 238; Halpert, Wilson & Hickman, \textit{supra} note 121, at 655.

\textsuperscript{200} See, e.g., Cunningham & Macan, \textit{supra} note 195, at 504.

\textsuperscript{201} See, e.g., id.

\textsuperscript{202} See, e.g., Michelle R. Hebl et al., \textit{Hostile and Benevolent Reactions Toward Pregnant Women: Complementary Interpersonal Punishments and Rewards That Maintain Traditional Roles}, 92 \textit{J. APPLIED PSYCHOL.} 1499, 1499 (2007). The field studies are particularly persuasive because three sets of observers—the actresses (with and without the pregnancy prosthesis), paired in-store observers, and blinded coders listening to tape recordings—all independently rated managers as more hostile toward the “pregnant” applicant. \textit{See id.} at 1504; Whitney Botsford Morgan et al., \textit{A Field Experiment: Reducing Interpersonal Discrimination Toward Pregnant Job Applicants}, 98 \textit{J. APPLIED PSYCHOL.} 799, 804–07 (2013). For similar studies, see Benard et al., \textit{supra} note 191, at 1369–72.

so have become increasingly familiar with the dynamics of pregnancy discrimination as they have been called upon to enforce the civil rights statute over the decades. As I will now show, over the decades since enactment of the PDA, these understandings about the dynamics of pregnancy discrimination have gradually reshaped constitutional case law.

Claims of physiological naturalism have declined in equal protection law. By 2003, even Chief Justice Rehnquist came to recognize that sex-role stereotyping shapes judgments about pregnancy, declaring that Congress had power under the Fourteenth Amendment to redress equal protection violations in cases where states provide lengthy maternity leave to women employees but not men, reasoning that “differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women’s work.”204 In 2015, Justice Kennedy offered a lengthy account of the stereotyping endured by pregnant employees in his dissent from Young v. United Parcel Service, the Court’s most recent decision enforcing the PDA,205 and then in 2016, Justice Kennedy joined a majority opinion that distinguished his opinion in Nguyen and struck down a related sex-based citizenship law in Sessions v. Morales-Santana.206 One of the striking things about Justice Kennedy’s dissent in the Court’s Young decision is the way it weaves reasoning from statutory and constitutional precedents concerning pregnancy discrimination.207

As an outgrowth of these dynamics, views about pregnancy in the Court’s equal protection decisions have evolved and the Court itself has begun to integrate laws regulating pregnancy into the heightened scrutiny framework for equal protection sex-discrimination cases.

205. 575 U.S. 206, 251 (2015) (Kennedy, J., dissenting). In the Court’s most recent case interpreting the PDA, Justice Kennedy offered a clear account of the sex-role stereotyping that pregnant workers face, even as he dissented from the Court’s holding:

There must be little doubt that women who are in the work force—by choice, by financial necessity, or both—confront a serious disadvantage after becoming pregnant. . . .

“Historically, denial or curtailment of women’s employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second.” Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721, 736, 123 S.1972, 155 L. Ed.2d 953 (2003) (quoting The Parental and Medical Leave Act of 1986: Joint Hearing before the Subcommittee on Labor–Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., 100 (1986)). Such “attitudes about pregnancy and childbirth . . . have sustained pervasive, often law-sanctioned, restrictions on a woman’s place among paid workers.” AT & T Corp. v. Hulteen, 556 U.S. 701, 724, 129 S.Ct. 1962, 173 L.Ed.2d 898 (2009) (Ginsburg, J., dissenting). Although much progress has been made in recent decades and many employers have voluntarily adopted policies designed to recruit, accommodate, and retain employees who are pregnant or have young children, pregnant employees continue to be disadvantaged—and often discriminated against—in the workplace.

Id. at 251–52.

207. See supra note 205.
D. THE REHNQUIST COURT INTEGRATES PREGNANCY INTO THE EQUAL PROTECTION SEX-DISCRIMINATION FRAMEWORK

The Supreme Court’s evolving approach to pregnancy in its equal protection cases is a completely ordinary part of the development of sex-discrimination law. In the early 1970s, when the Burger Court declared that the Constitution prohibited state action that imposes sex roles or sex stereotypes, the Court, in the first several years of enforcing sex-discrimination law, prohibited all the practices that it understood as contributing to unjust sex-based restrictions on individual opportunity.208

But the meaning and application of the equality principle evolves in history, as Americans engage in—often contentious—debate over the principle.209 The nation’s understanding of sex stereotyping—of what is reasonable and arbitrary in state enforcement of sex roles—has shifted dramatically in the intervening decades.210

In the more than half a century since the National Organization of Women organized to seek enforcement of the sex-discrimination provisions of the 1964 Civil Rights Act211 and the forty years since the PDA’s passage, Americans—including judges called upon to enforce the statutes—have shifted in their views of pregnant employees and working mothers, and these evolving views are expressed in the Supreme Court’s equal protection decisions. As I show, the Supreme Court itself has restated the intermediate scrutiny standard in terms that explicitly include pregnancy and it has reasoned about sex stereotyping in terms that include pregnancy. Lower courts have noticed and acted on these developments.

1. Virginia: Restating Intermediate Scrutiny to Include Pregnancy

After nearly twenty years of cases under the Pregnancy Discrimination Act, the Court expressed the heightened scrutiny standard for its equal protection sex-discrimination cases in United States v. Virginia in terms that recognized physical differences between the sexes and extended scrutiny to regulation implicating differences, rather than suggest that real differences might stand outside equality’s reach.212

208. See supra note 182 and accompanying text.
209. See generally Reva B. Siegel, Brennan Center Symposium Lecture: Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA, 94 CALIF. L. REV. 1323 (2006) [hereinafter Siegel, Constitutional Culture] (showing how movement conflict guided courts in interpreting the Fourteenth Amendment in sex discrimination cases); Reva B. Siegel, Community in Conflict: Same-Sex Marriage and Backlash, 64 UCLA L. REV. 1728 (2017) [hereinafter Siegel, Community in Conflict] (examining how arguments evolved during the decades of debate over same-sex marriage).
The Court’s opinion in Virginia, written by Justice Ruth Bader Ginsburg a few years after she joined the Court and speaking for a majority that included Justices Stevens, O’Connor, Kennedy, Souter, and Breyer, remains to this day the leading case on the heightened scrutiny standard in sex-discrimination cases.\textsuperscript{213} In Virginia, Justice Ginsburg reaffirmed and restated the standard;\textsuperscript{214} and then in the next paragraph explained the standard in terms that included and covered pregnancy. Justice Ginsburg observed that “[s]upposed ‘inherent differences’ are no longer accepted as a ground for race or national origin classifications,” but “[p]hysical differences between men and women . . . are enduring.”\textsuperscript{215}

“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. Sex classifications may be used to compensate women “for particular economic disabilities [they have] suffered,” California v. Webster, 430 U.S. 313, 320 (1977) (per curiam), to “promot[e] equal employment opportunity,” see California Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 289 (1987), 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, see Goesaert, 335 U.S., at 467, to create or perpetuate the legal, social, and economic inferiority of women.\textsuperscript{216}

Virginia’s canonical restatement of the heightened scrutiny standard discussed the regulation of pregnancy as an example of a sex-based classification by citing California Federal Savings and Loan Ass’n v. Guerra,\textsuperscript{217} a decision arising under the PDA and involving a state law mandating the reasonable accommodation of pregnant employees. Like Geduldig, Virginia assumed equal protection coverage extends to pregnancy, but it approached the question of protection differently. Rather than depict regulation concerning sex differences as presumptively beyond the reach of equal protection, Virginia expressed heightened scrutiny in terms that recognize sex differences and provide substantive criteria for determining the kinds of sex classifications that violate the Constitution. Virginia set out a normative framework concerned with determining, in historical context, whether a law subordinates.\textsuperscript{218} In Virginia, the Court explained that sex classification’s

\textsuperscript{213} The case arose after the United States sued the Commonwealth of Virginia and the Virginia Military Institute, alleging that the school’s all-male admissions policy violated the Equal Protection Clause of the Fourteenth Amendment. \textit{Id.} at 523.

\textsuperscript{214} \textit{Id.} at 533 (observing that “[t]he State must show ‘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’’); \textit{see also id.} (observing that “the reviewing court must determine whether the proffered justification is ‘exceedingly persuasive’”).

\textsuperscript{215} \textit{Id.} (citation omitted).

\textsuperscript{216} \textit{Id.} at 533–34 (alteration in original).

\textsuperscript{217} 479 U.S. 272.

\textsuperscript{218} See Franklin, \textit{The Anti-Stereotyping Principle}, supra note 14, at 145–46 (“In Virginia, anti-stereotyping doctrine serves as a check on the state’s regulation of ‘real’ differences. Virginia makes clear that anti-stereotyping doctrine governs all instances of sex-based state action, whether or not ‘real’ differences are involved. In fact, the Court’s opinion suggests that equal protection law should be
constitutionality depends on whether the classification is employed for a legitimate end (such as remedying past wrongs or promoting equal opportunity) or inflicts constitutional wrongs of the kind that sex classifications inflict when they are used “as they once were, to create or perpetuate the legal, social, and economic inferiority of women.”

Virginia treats a California law regulating pregnancy as an example of a sex classification subject to heightened scrutiny and offers a historically informed antisubordination standard to determine whether laws regulating pregnancy violate equal protection. This historically informed standard invites the decision-maker to attend to the understanding of social roles on which the legislation is premised, and can be applied to laws regulating pregnancy like the law at issue in Cal Fed.

In Cal Fed, Justice Marshall upheld California’s statute mandating the reasonable accommodation of pregnant employees under the Pregnancy Discrimination Act, employing a standard much like Virginia’s; he declared that the law was consistent with Title VII and served like ends after ascertaining that the law mandating accommodation was narrowly drawn to cover pregnancy and the period of actual physical disability only, and did not reflect stereotypical notions about pregnant workers associated with protective labor legislation of the early twentieth century. Justice Marshall’s analysis in Cal Fed exemplifies the kind of historically informed antisubordination inquiry that Virginia itself mandates to determine whether state action regulating pregnancy violates equal protection.

2. Hibbs: Recognizing Sex Stereotyping Involving Pregnancy Under Equal Protection

Justice Ginsburg was able to speak for a majority of the Rehnquist Court in Virginia because the Justices’ views had evolved in the intervening twenty years. We can see an even more pronounced expression of these changes in Nevada Department of Human Resources v. Hibbs, when Chief Justice Rehnquist held that Congress could enact the family leave provisions of the Family and Medical Leave Act to remedy and deter sex-stereotyping violations of equal protection involving women when they are “mothers or mothers-to-be” and never paused to mention Geduldig. Writing for six members of the Court, Chief Justice

particularly alert to the possibility of sex stereotyping in contexts where ‘real’ differences are involved, because these are the contexts in which sex classifications have most often been used to perpetuate sex-based inequality.”

219. Virginia, 518 U.S. at 534 (citation omitted).
220. Cf. Siegel, supra note 4 (advancing a social-roles analysis of pregnancy discrimination).
221. See Guerra, 479 U.S. at 290 (observing that the statute was “narrowly drawn to cover only the period of actual physical disability on account of pregnancy, childbirth, or related medical conditions. Accordingly, unlike the protective labor legislation prevalent earlier in this century, § 12945(b)(2) does not reflect archaic or stereotypical notions about pregnancy and the abilities of pregnant workers. A statute based on such stereotypical assumptions would, of course, be inconsistent with Title VII’s goal of equal employment opportunity” (footnote omitted)).
Rehnquist analyzed the question in ways that showed a maturing grasp of sex stereotyping in matters of reproductive regulation.

There is a world of difference between Geduldig and Hibbs. Hibbs reasoned from a sophisticated understanding of how the motherhood penalty and family-responsibilities discrimination shapes judgments about pregnancy. Chief Justice Rehnquist compared the treatment of expectant parents and observed that sex-role stereotyping, rather than physical difference, explained the provision of maternity leave:

Many States offered women extended “maternity” leave that far exceeded the typical 4- to 8-week period of physical disability due to pregnancy and childbirth, but very few States granted men a parallel benefit. . . . This and other differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women’s work.

Chief Justice Rehnquist went on to explain how “the pervasive sex-role stereotype that caring for family members is women’s work” produces the interlocking stereotypes, identified by sociologists as well as theorists of the motherhood penalty and family responsibilities discrimination: that pregnant women and new mothers lack competence and commitment as employees. Rehnquist observed:

Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman’s domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

In Hibbs, nearly thirty years after Geduldig, Chief Justice Rehnquist explained that Congress could use its Section Five power to enact the leave provisions of the Family and Medical Act to redress equal protection violations harming both sexes that involved maternity leave and the sex stereotyping of pregnant

---


223. See *supra* notes 191–202 and accompanying text.

224. Hibbs, 538 U.S. at 731 (footnotes omitted).

225. See *supra* notes 191–202 and accompanying text.

226. Hibbs, 538 U.S. at 736. To see how far Rehnquist’s views evolved since the era of *Geduldig*, see Siegel, *supra* note 15, at 1875 (reporting Rehnquist’s views on the ERA in 1970, including the worry that it would “transform ‘holy wedlock’ into ‘holy deadlock’”).
women.\textsuperscript{227} Use of Section Five power was appropriate, Chief Justice Rehnquist emphasized, to remedy or deter violations involving “subtle discrimination that may be difficult to detect on a case-by-case basis.”\textsuperscript{228}

Neither Virginia nor Hibbs mentioned Geduldig, which the Court has not cited in an equal protection decision since Congress enacted the PDA in the mid-1970s.\textsuperscript{229} Given the Court’s failure to mention Geduldig in a constitutional decision in over forty years, even when urged,\textsuperscript{230} it is reasonable to read Virginia and Hibbs as doing more than limiting Geduldig sub silentio. The Court’s subsequent decisions in Virginia and Hibbs answer the question Geduldig raised; they demonstrate how regulation of pregnancy fits in the Court’s equal protection cases. Geduldig understood judgments about pregnancy as judgments about the body,\textsuperscript{231} whereas Hibbs demonstrates that judgments about pregnancy can be, and are also shaped by sex-role judgments, like other judgments about embodied persons. In this way, Hibbs rejects the premises of physiological naturalism: that regulatory judgments about pregnancy simply reflect physical facts and should be accorded more deference than other sex-dependent (or for that matter, or race-dependent) judgments.

Virginia and Hibbs integrate laws regulating pregnancy into an ordinary equal protection framework. Virginia explained heightened scrutiny with attention to

\begin{itemize}
  \item \textsuperscript{227} See Siegel, supra note 15, at 1886–94. For commentators who have since read Hibbs as recognizing that pregnancy can be subject to sex stereotyping, see supra note 14.
  \item \textsuperscript{228} Hibbs, 538 U.S. at 736.
  \item \textsuperscript{229} Shortly after the Court decided Geduldig, the Court tried applying Geduldig to federal employment discrimination law and was roundly rebuked by the Congress, which amended Title VII in 1978 to clarify that distinctions on the basis of pregnancy are distinctions on the basis of sex, and to prohibit pregnancy discrimination in employment. See Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2018); supra notes 154–55 and accompanying text.
  \item Citations to Geduldig in the Court’s equal protection cases stop after these developments in the mid-1970s. I have not found a majority opinion invoking Geduldig to interpret the Equal Protection Clause since the era of its repudiation by Congress in the PDA.
  \item A quarter-century ago, Justice Scalia invoked Geduldig in a statutory case concerned with proving sex-based animus in abortion-clinic protests. See Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263, 274 (1993) (holding that under the civil rights statute 42 U.S.C. § 1985(3), plaintiffs had to prove “invidiously discriminatory animus” such as ill will, and that the goal of preventing abortion “is not the stuff out of which a § 1985(3) ‘invidiously discriminatory animus’ is created”).
  \item Justice Scalia’s opinion in the Court in Bray claims that the Court applied Geduldig to its abortion funding decision in Harris v. McRae, 448 U.S. 297 (1980), See Bray, 506 U.S. at 271–73. That is false. Justice Stewart’s opinion in McRae—which he wrote just two years after Congress rejected Geduldig–Gilbert reasoning by passing the PDA—never even mentioned the equal protection–sex discrimination line of cases or Geduldig, even though the government invoked Geduldig as a reason for rational basis. See Brief for the Secretary of Health, Education, & Welfare at 27, Harris v. McRae, 448 U.S. 297 (1980) (No. 79-1268), 1980 WL 339637 (“Similarly, the Court has reviewed legislative classifications involving pregnancy in accordance with the rational basis test.” (citing Geduldig v. Aiello, 417 U.S. 484, 495–96 (1974))).
  \item \textsuperscript{230} See infra note 294 (discussing Coleman v. Court of Appeals of Md., 466 U.S. 30 (2012)).
  \item \textsuperscript{231} See supra note 190 and accompanying text (discussing the majority’s reasoning in Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974) (“While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in Reed . . . and Frontiero.”)).
\end{itemize}
inherent sex differences, expressly mentioning a law providing pregnancy leave as an example of sex classification, and setting out a historically informed antisubordination standard for determining when such regulation violates equal protection: “Sex classifications may be used . . . to ‘promot[e] equal employment opportunity,’ . . . But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.”

Hibbs employs comparative analysis to probe whether laws singling out pregnancy are enforcing sex-role stereotypes or other constitutionally impermissible social roles—or instead accommodating the distinctive physical features of reproduction.

No longer does the Court employ physiological naturalism to isolate the regulation of pregnancy from the constitutional prohibition on sex stereotyping, as it did in Geduldig. Instead in Hibbs, the Court showed how the regulation of pregnancy can trigger core sex-role stereotypes and a “self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees.” These historically enforced and subordinating stereotypes include the sex-differentiated breadwinner/caregiver family roles of the separate-spheres tradition (“The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.”). For hundreds of years, American law imposed these gender-differentiated roles, but the Court has now interpreted the Equal Protection Clause to forbid it: “No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.” Yet employers may mistrust working pregnant women and new mothers who violate traditional role expectations, “foster[ing] employers’ stereotypical views about women’s commitment to work and their value as employees,” as the Court observed in Hibbs—stereotyping that is exacerbated in low-wage workplaces, and with workers of color.

---

233. Comparator evidence is helpful but not necessary to demonstrate discriminatory bias:
   Role-based accounts of discrimination seek to transform social relations to include and respect those whom we have excluded or disrespected. Role-based approaches to antidiscrimination law often employ tools of comparison to identify expressions of disrespect or the imposition of disfavored roles. Comparison may help identify discriminatory judgments or acts, without defining the essence of discrimination.

Siegel, supra note 4, at 988 (footnote omitted).
237. Hibbs, 538 U.S. at 736.
238. See Stephanie Bornstein, Work, Family, and Discrimination at the Bottom of the Ladder, 19 Geo. J. on Poverty L. & Pol’Y 1, 5, 16, 39 (2012); see also infra note 338 and accompanying text.
3. Case Law Recognizing These Developments in Equal Protection Law

Most pregnancy-discrimination litigation remains under the PDA, but there are lower court opinions recognizing these developments in the constitutional case law—cases in which judges have read Hibbs to modify Geduldig and thus enlarge the scope of 42 U.S.C. § 1983 sex-stereotyping claims under the Equal Protection Clause. As one court put it: “Geduldig has not been overruled, though Hibbs and Back make clear that discrimination based on stereotypical assumptions regarding pregnant women does violate the Equal Protection Clause.”

The Second Circuit affirmed another section 1983 decision which followed Hibbs in recognizing that laws on pregnancy could reflect stereotypical views about pregnant women. The court rejected a Hibbs-inspired sex-discrimination challenge to a maternity leave policy that was only available to women, on the ground that the challenged policy appropriately distinguished between medical leave and child care leave that was available to both sexes, and so was “substantially related to the actual medical requirements of pregnancy and birth, not traditional notions of a mother’s role in the family.”

239. Zambrano-Lamhaouhi v. N.Y. City Bd. of Educ., 866 F. Supp. 2d 147, 174 n.11 (E.D.N.Y. 2011) (emphasis omitted) (citing Siegel, supra note 15, at 1891–92) (“[Geduldig] leaves open the possibility that some legislative classifications concerning pregnancy are sex-based classifications. . . . We might read Hibbs as limiting Geduldig sub silentio, but it seems as reasonable to read Hibbs as answering the question Geduldig reserved. Where regulation of pregnant women rests on sex-role stereotypes, it is sex-based state action within the meaning of the Equal Protection Clause.” (emphasis omitted) (footnote omitted)).


The Eleventh Circuit claims to be open to equal protection claims challenging discrimination against pregnant women based on stereotypes. See Johnson v. Ala. Dep’t of Human Res., 508 F. App’x 903, 906 (11th Cir. Jan. 31, 2013) (“Johnson’s claim lies at the intersection of these two rules. Claims like Johnson’s may allege a type of pregnancy classification or gender stereotype discrimination that amounts to gender discrimination under the equal protection clause. They may allege neither.”).

But the Eleventh Circuit seems to have difficulty recognizing stereotypes about pregnant women. The district court reasoned:

Plaintiff has not proffered admissible evidence that Defendants terminated her for any gender-related reason or stereotype aside from the pregnancy itself. According to Plaintiff, her supervisor exclaimed, at the time of their meeting, “Oh no, they sent me another pregnant lady,” and commented she did not think Plaintiff would make it to her due date. Plaintiff

622
The Ninth Circuit has also recognized that Hibbs modified Geduldig—"laws which facially discriminate on the basis of pregnancy . . . can still be unconsti-
tutional if the medical or biological facts that distinguish pregnancy do not reason-
ably explain the discrimination"—but was only confident that Hibbs addressed
the scope of Congress’s powers under Section Five, and was not as confident
about the decision’s bearing on section 1983 equal protection claims challenging
medical regulations burdening abortion more than other procedures of compara-
ble or greater risk.242

III. EQUAL CITIZENSHIP AND PREGNANCY, AT THE CENTENNIAL

As we have seen, equal protection law is continuing to grow. Where the
Burger Court first imagined pregnancy as a "real difference" that was typically
not subject to the sex stereotyping enjoined in equal protection cases, the
Rehnquist Court applied the core principles of the sex-discrimination cases
to pregnancy. Virginia and Hibbs provide a framework for applying equal protec-
tion antistereotyping principles to laws regulating pregnancy. Today, judges are
far more versed in recognizing "invidious discrimination" involving pregnancy
than they were a half century ago. We know much more about the sociology of
pregnancy discrimination than judges would have had any reason to grasp in the
early 1970s, and now have a historical understanding of the ways government

contends that when she was terminated, she was told she was being let go because she could
not keep up with her work due to her pregnancy and would be taking maternity leave.
Plaintiff cites Back v. Hastings on Hudson Union Free School Dist. for the proposition that
unlawful gender stereotyping exists when an employer concludes that "a woman cannot be a
good mother and have a job that requires long hours, or in the statement that a mother who
received tenure would not show the same level of commitment she had shown because she
had little ones at home." However, Plaintiff has not submitted any evidence that she was dis-
criminated against because of stereotypes of motherhood. Plaintiff already had a child at the
time of her employment, and no mention was made of her inability to do her job with a child
or children at home. Viewing the evidence in the light most favorable to the Plaintiff, all evi-
dence of discrimination relates solely to the condition of pregnancy. This is not a Title VII
case. Plaintiff has not produced sufficient evidence to convince a reasonable jury that
Defendants violated the Equal Protection Clause of the Fourteenth Amendment.

241. Tucson Woman’s Clinic v. Eden, 379 F.3d 531, 548 (9th Cir. 2004).
242. Id.
244. See supra notes 191–202 (reviewing sociological literature).
has shaped family and market relations.\textsuperscript{245} With this foundation, it is easier to understand how laws regulating pregnancy can enforce the breadwinner/caregiver sex-roles discussed in the sex-discrimination cases of the early 1970s.\textsuperscript{246}

In what follows, I briefly consider how courts can continue to build upon the framework in \textit{Virginia} and \textit{Hibbs} that they have already begun to apply. I then turn to consider how Congress might also redress the legacy of state action by enacting legislation that mandates the reasonable accommodation of pregnancy in the workplace.

\textbf{A. APPLYING THE VIRGINIA/HIBBS FRAMEWORK TO LAWS REGULATING PREGNANCY}

In \textit{United States v. Virginia}, the Court reaffirmed its sex-discrimination case law, reciting a “heightened review standard” that the Court has employed since the 1970s and early 1980s. This standard requires the government to show that sex-based state action serves important government objectives and that the discriminatory means employed are substantially related to the achievement of those ends.\textsuperscript{247} In fact, \textit{Virginia} offers a gloss on the 1970s inquiry that, as we have seen, focuses the reviewing court on questions of discriminatory bias \textit{even in circumstances implicating sex-role differentiation} that makes the framework newly capable of discerning discriminatory bias \textit{in cases including pregnancy}, and it expressly applied the framework to a case involving pregnancy. Perhaps most fruitfully for present purposes, the \textit{Virginia} framework supplies normative guidance for future applications, expressing the equal protection inquiry in terms of a historically informed social-roles analysis.

Rather than declare all sex classifications suspect, or enshrine rigidly comparative accounts of discrimination, \textit{Virginia} focused equal protection scrutiny of sex-based state action on the legitimacy of the government’s ends, asking whether the government is regulating in ways that perpetuate historically subordinating conditions. The Court cautioned that “‘[i]nherent 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.”\textsuperscript{248} The Court then explained that a sex classification’s constitutionality depended on whether the classification was employed for a legitimate end—such as remedying past discrimination or promoting equal opportunity—or was instead enforced in such a way as “to create or perpetuate the legal,

\begin{itemize}
\item \textsuperscript{246} See supra notes 136–39 and accompanying text.
\item \textsuperscript{248} 518 U.S. at 533.
\end{itemize}
social, and economic inferiority of women.”

Under this framework, not all sex-based classifications impermissibly discriminated. Virginia characterized the state law in Cal Fed, which mandated accommodating pregnant workers in a non-stereotypical fashion, as a law that classified on the basis of sex “to promot[e] equal employment opportunity.”

But under Virginia’s framework, a law that classified on the basis of pregnancy would be unconstitutional if it enforced “artificial constraints on an individual’s opportunity,” or worked to “perpetuate the legal, social, and economic inferiority of women.”

Hibbs illustrated one paradigmatic way in which laws regulating pregnancy can violate equality guarantees: by enforcing sex stereotypes premised on traditional breadwinner/caregiver roles of the family. In such a case, the law is imposing, and not merely reflecting, social roles. This Article demonstrates how laws regulating pregnancy have long enforced women’s role as economic dependents of wage earners rather than as households’ economic providers, exacerbating sex-linked wage disparities. Consider how these restrictions on the employment of pregnant workers and new mothers, enforced across sectors and over time, disrupted and marginalized women’s employment and depressed their wages. Henrietta Rodman’s story shows how the New York City Board of Education used talk of spheres to justify its ban on married women, pregnant women, and new mothers; more than a half century later, government entities were still defending mandatory maternity leaves in Cleveland Board of Education v. LaFleur.

In that same era, the government excluded women from military service when pregnant and denied women disability benefits when pregnant, and the ACLU documented “the kinds of penalties that major institutions in our society routinely inflict upon pregnant women.”

But this Article also shows that laws regulating pregnancy evolved in justification. As the feminist movement gained strength in the 1970s, the Court began to treat talk of separate spheres as suspect. In Geduldig, when California urged the Court to uphold its exclusion of pregnancy from an otherwise comprehensive disability-benefits program, the state instead pointed to pregnancy as the role-marker of economic dependency: “Pregnancy and childbirth, unlike illness and

249. Id. at 534.
250. See id. at 533–34 (alteration in original) (quoting Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 289 (1987)). Cal Fed upheld the state law on the grounds that it was narrowly drawn to cover pregnancy and the period of actual physical disability only and did not reflect stereotypical notions about pregnant workers associated with protective labor legislation of the early twentieth century.
251. Id.
252. See supra note 53 and accompanying text.
254. See supra Section I.B. (discussing Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir. 1971)).
255. See supra text accompanying notes 145–48.
256. HAYDEN, supra note 73, at 2; see generally id. (documenting laws and other practices discriminating against pregnant women in public schools and higher education; in employment, including benefits and insurance; and in credit).
257. See supra notes 136–39 and accompanying text.
injury, often result in a decision to leave the work force.”258 In Geduldig, we saw employers urging the Court to justify its benefits decision in the language of the ERA’s unique physical characteristic exception rather than in the now constitutionally suspect language of separate spheres.259 The example suggests that, with modernization, social roles are expressed in terms of reproductive physiology rather than in the language of separate spheres, domesticity, or marriage.

Yet, thirty years later, our case law has begun to decipher this transformation, and to ask judges to probe biological and seemingly functional justifications for regulating pregnancy in order to determine whether laws regulating pregnancy might nonetheless reflect and enforce constitutionally suspect sex roles. In Hibbs, Chief Justice Rehnquist saw evidence of sex-role stereotyping when states offered lengthy maternity leave to women only in statutes that coupled time for recovery from birth with time for early infant care that might have been given to parents of either sex.260 (In recent years the Supreme Court has extended Hibbs’ skeptical scrutiny of biological justifications into other equal protection contexts as well.261)

Courts can follow Virginia’s directions to determine whether sex-based state action perpetuates historically subordinating conditions by reading the Fourteenth and Nineteenth Amendments together, synthetically, so that Virginia’s inquiry is informed by the long constitutional history of family- and household-based restrictions on women’s citizenship. As I have shown, at the founding, the law gave male heads of household authority over women and the ability to represent them in voting and the market. This understanding of women as dependent citizens, defined through family relations to men, continued to shape the law long after women’s enfranchisement.262 Women’s quest for emancipation from representation by men in the household, politics, and the market can orient Virginia’s analysis, which appeals to history when it prohibits laws that “perpetuate” subordination.263 I have elsewhere described this synthetic, historically informed inquiry:

Women’s long quest for the vote and for freedom and equality in the family can guide how judges apply equal-protection law. Just as the constitutional disestablishment of slavery and segregation orients race-discrimination law, so too can the disestablishment of male household headship—intersectionally understood—orient sex-discrimination law.

259. See supra notes 167–70 and accompanying text.
260. See supra notes 223–26 and accompanying text.
261. Cary Franklin offers an extended and important analysis of this point in the context of the Court’s equal protection decisions on the marital presumption in same-sex relationships and on parental recognition outside of marriage. See generally Franklin, Biological Warfare, supra note 14 (discussing the Court’s decisions in Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017), and Pavan v. Smith, 137 S. Ct. 2075 (2017)).
262. See Siegel, The Nineteenth Amendment, supra note 5. On the household at the founding, see id. at 458–59.
. . . Reading the Fourteenth and Nineteenth Amendments together gives specific constitutional grounding to disestablishment of traditional sex roles in the family, amplifying the constitutional authority of sex-discrimination law in ways that those concerned with original understanding can respect.264

For this very reason, I understand this synthetic reading of the Fourteenth and Nineteenth Amendments as applying Virginia’s framework, and not departing from it. Those who fought for women’s right to vote sought “to emancipate women from legally-enforced dependence on men and to recognize women as juridically, politically, and economically independent from men in matters of family life.”265

Recovering this history helps identify the assumptions about social roles structuring laws regulating pregnancy today. Do laws that regulate pregnant citizens treat them as economically independent citizens, or do they perpetuate the history of women’s legally enforced dependence on men? Are laws regulating the pregnant citizen based on biology only, or are they also based on social roles enforced in ways that “perpetuate the legal, social, and economic inferiority of women”?266 Do the laws enforce “[s]tereotypes about women’s domestic roles” and “reinforce[] parallel stereotypes presuming a lack of domestic responsibilities for men”?267 Courts can draw on the history of women’s quest for equal citizenship to guide application of Virginia’s antisubordination framework and Hibbs’s anti-stereotyping principle.

To illustrate, we might apply this equal protection framework to the California law at issue in Geduldig—a law that provided disability benefits coverage for all work-disabling conditions except for workers who became pregnant. Under the California law, wage earners who contributed to a state fund designed to insure against wage loss resulting from non-occupational disabilities could claim benefits for most any kind of disability-related wage loss, but wage earners could not claim benefits when they missed work for pregnancy-related reasons; because Sally Armendariz miscarried after a car accident, she could not recover from a disability fund she had paid into for a decade, even as her family’s sole breadwinner.268 California explained the sex-role assumptions animating its adverse treatment of pregnant workers when it justified its decision to exclude benefits for pregnant workers by invoking sex-role stereotypes about the likelihood of new mothers leaving the work force,269 appealing to the view of women’s position in the labor force that the New York City Board of Education used to force the

265. Siegel, The Nineteenth Amendment, supra note 5, at 485.
266. Virginia, 518 U.S. at 534.
268. See supra text accompanying notes 145–48.
269. See supra text accompanying note 149.
resignation of teacher–mothers. The California law at issue in Geduldig assumed women are economic dependents of a (male) wage earner just as the New York Board of Education did. In Geduldig, talk of the physiology of pregnancy distracts attention from these crucial, social-role based judgments. Does the law view a pregnant wage earner as economically independent, or does the law view a pregnant wage earner as the dependent of a male wage earner?

As we have seen, since Hibbs a growing number of federal judges realize that equal protection review of laws regulating pregnancy cannot stop at claims about physiology, but instead requires consideration of the judgments about social roles on which the law is based. Following Justice Rehnquist’s lead in Hibbs, they apply the antistereotyping principle to laws regulating pregnancy and analyze state action directed at pregnant employees to insure that it does not reflect “‘[s]tereotypes about women’s domestic roles.’” These cases involving equal protection claims alleging sex-role stereotyping that excludes on the basis of pregnancy converge with other section 1983 cases alleging sex-stereotyping that excludes on the basis of gender identity or sex orientation. Hibbs demonstrates that workplace norms have long rested on law-backed understandings about the ideal family roles supporting workplace participation. Workers may choose to participate in these arrangements, but the Court’s equal protection cases tell us that it is unconstitutional for the state to impose traditional family roles on citizens as a condition of employment.

To this point we have considered how applying Virginia informed by a synthetic reading of the Fourteenth and Nineteenth Amendments can enable those enforcing the Constitution more clearly to recognize and remedy gendered restrictions on citizenship. But if the turn to history identifies gendered restrictions on citizenship, that same history shows that women are subject to regulation along axes including race, class, citizenship, sexuality, and religion, and thus demonstrates the importance of enforcing Virginia with attention to an intersectional understanding of equality. Consider the example of pregnancy discrimination in the workplace. Employers may direct pregnancy discrimination against both majority and minority women, yet minority and low-wage workers seem more likely to be excluded. These dynamics are systematically underreported; for example, it is rarely noted that Lillian Garland, the complainant–receptionist

270. See supra text accompanying note 53.
272. See, e.g., Glenn v. Brumby, 663 F.3d 1312, 1321 (11th Cir. 2011) (holding that firing a transgender employee because of gender nonconformity is sex-based discrimination violating equal protection); see id. at 1316 (discussing sex stereotyping and citing Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989)). For an example involving harassment on the basis of sexual orientation, see Winstead v. Lafayette County Board of County Commissioners, 197 F. Supp. 3d 1334, 1345 (N.D. Fla. 2016) (citing Price Waterhouse on sex stereotyping).
274. See infra notes 303–06 and accompanying text.
who was pushed out of her job in the *Cal Fed* case, was African American.\(^{275}\) Family-responsibilities discrimination takes the form of mistrust—belief that the woman worker’s dual loyalties to family and market will compromise her commitment and competence in the workplace—as a man’s dual loyalties to family and to market do not.\(^{276}\) These doubts seem to be exacerbated when workers are marginalized and devalued along more than one axis of status.\(^{277}\) The kinds of discrimination at play in any given case are of course fact-dependent, with the logic of an exclusion varying with the domain and the group targeted.\(^{278}\)

There are many reasons for integrating the history before and after the Nineteenth Amendment into the *Virginia* framework, much as the Supreme Court considers *Brown v. Board of Education*\(^ {279}\) in interpreting the Equal Protection Clause.\(^ {280}\) This history helps identify restrictions on women’s citizenship as they may diverge from race-based restrictions on citizenship—and as they may intersect with race-based restrictions on citizenship. It teaches us to appreciate how meanings, structures, and distributions from the old world of women’s disfranchisement can be carried forward in time and across domains in new institutional forms. As we consider this history, we can recognize connections between gender roles enforced in the family, in the market, and in politics. We can see relationships between norms espoused in the 2018 Pew poll on women in politics\(^ {281}\) and norms espoused by the New York Board of Education a century earlier in 1911,\(^ {282}\) and appreciate how practices in one domain may shape the other.

But federal courts are not the only institutions with the power to intervene and break the generation-to-generation renewal of these gendered restrictions on women’s participation in the market and other domains of citizenship. Congress also has a role in enforcing the Constitution’s equality guarantees. I consider how Congress might enact a law mandating reasonable accommodation of pregnancy in the workplace, a law that might remedy in some small part sex-role understandings in markets and politics that law has helped entrench. I show how Congress could enact such a law in exercise of its powers to enforce the Fourteenth Amendment, and in closing, under the Nineteenth Amendment as well.


\(^{276}\) See supra text accompanying notes 191–202.

\(^{277}\) See supra text accompanying notes 234–38.

\(^{278}\) This Article focuses on cases of pregnancy discrimination in the workplace and does not attempt to analyze the complex variations involved as regulation shifts in subject matter, domain, and focal group.

\(^{279}\) 347 U.S. 483 (1954).


\(^{281}\) See source cited supra note 122 and accompanying text.

\(^{282}\) See supra notes 53–54 and accompanying text.
B. HOW CONGRESS CAN PLAY A ROLE IN ENFORCING EQUAL PROTECTION: A SECTION FIVE CASE FOR THE FEDERAL PREGNANT WORKERS FAIRNESS ACT

Congress can enforce the understandings we have seen emerge in the Court’s equal protection case law through exercise of its powers to enforce the Fourteenth Amendment. One way Congress can remedy and deter sex stereotyping against pregnant and potentially pregnant workers and secure equality of opportunity in the workplace in accordance with Virginia and Hibbs is by enacting a law that would require employers to make reasonable accommodations for pregnant workers—for example, through a bill called the Pregnant Workers Fairness Act.283 By enacting such a law, Congress would be acting in conformity with the law of the Rehnquist Court, which requires that exercises of Section Five power enforce constitutional rights recognized by the Court in its Section One case law. At the same time, taking a longer view, Congress would be engaged in acts of legislative constitutionalism, strengthening understandings of equal citizenship that prior acts of legislative constitutionalism helped engender.284

The process of enacting and enforcing a Pregnant Workers Fairness Act would develop the understandings of sex stereotyping that have been emerging since the dawn of the sex-discrimination cases, and, in the process, break down barriers to women’s equal participation in the public and private spheres.

1. Case Law on Congress’s Power to Enact Section Five Legislation Regulating Pregnancy

Congress’s power to enforce the Fourteenth Amendment is tied to the Court’s interpretation of Section One of the Fourteenth Amendment, as the Court emphasized in City of Boerne v. Flores.285 Congress must remedy or deter violations of Section One as interpreted by the Court: “There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”286

Congress has authority to enforce the equal protection guarantee in cases of state action regulating pregnancy, as our discussions of Virginia and Hibbs have


284. Understandings of equal protection were shaped over time by the ratification of the Nineteenth Amendment, then by Congress inaugurating ratification debates over the Equal Rights Amendment, which provoked and guided federal courts into enforcing Fourteenth Amendment in cases of sex discrimination, see Siegel, Constitutional Culture, supra note 209, at 1403–18; Serena Mayeri, Constitutional Choices: Legal Feminism and the Historical Dynamics of Change, 92 CALIF. L. REV. 755, 794 (2004), and then by Congress’s role in enacting a host of civil rights statutes that prohibit sex discrimination, see, for example, Robert C. Post & Reva B. Siegel, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 YALE L.J. 1943, 1995–96 (2003) (discussing legislation enacted by the 92nd Congress at the same time as it was sending the ERA to the states for ratification), including the PDA and the FMLA.


286. Id. at 520.
shown and as the Ninth Circuit and several other courts have explained. To date there are only a few cases to guide the exercise of that authority. The Supreme Court affirmed Congress’s Section Five authority to enforce federal employment discrimination law against the states two years before Congress enacted the PDA, but has never addressed Congress’s Section Five authority to enact the PDA itself. Some lower courts have addressed Congress’s constitutional authority to enforce the PDA (but only a few courts have done so since Boerne), but none has done so as this Article does: as enforcing guarantees of equal citizenship for women and securing their right to participate in public life on equal terms, and to be free from sex-role stereotyping directed against “mothers or mothers-to-be” — a right the Court has enforced in cases spanning the last half century including not only Geduldig but also Virginia and Hibbs.

As we have seen, the Court has already addressed Congress’s Section Five authority to enforce equal protection through the Family and Medical Leave Act in ways that implicate pregnancy. In Hibbs, the Court ruled that Section Five provided Congress authority to enact the family-leave provisions of the FMLA because they were congruent and proportional to the goal of remedying and deterring sex discrimination that would violate equal protection — and reasoned about excessively long maternity leave as an example of unconstitutional sex-stereotyping. But in another FMLA case, Coleman v. Court of Appeals of Maryland, the Court ruled that Congress lacked Section Five authority to enact the portions of

287. See supra notes 239–42 and accompanying text. The Ninth Circuit ruled that Hibbs modifies Geduldig and recognized that Congress has Section Five authority to redress sex stereotyping involving pregnancy. See Tucson Woman’s Clinic v. Eden, 379 F.3d 531, 548 (9th Cir. 2004).


289. In early PDA cases, courts relied on both the Commerce Clause and an expansive notion of Section Five power as a basis for the PDA’s legitimacy. See, e.g., Vineyard v. Hollister Elementary Sch. Dist., 64 F.R.D. 580, 585 (N.D. Cal. 1974) (“Under Section 5 of the Fourteenth Amendment, Congress has the power to pass appropriate legislation to implement the dictates of the Equal Protection Clause. The implementing legislation may reach more broadly than the Equal Protection Clause itself. Congress intended Title VII to be just such a broad implementing legislation.” (citation omitted)); EEOC v. County of Calumet, 519 F. Supp. 195, 197 n.1 (E.D. Wis. 1981) (“Congress often passes legislation under its Fourteenth Amendment power to prohibit discrimination that the Constitution would otherwise permit. For example, in [Geduldig], the Supreme Court held that a State disability insurance plan that excluded pregnancy benefits was a rational classification that did not violate equal protection. In 1978, Congress amended Title VII to add § 701(k), which makes unlawful disability plans that exclude pregnancy benefits.”). Even immediately after to the Court’s decision in Boerne, 521 U.S. 507, courts viewed the PDA as an example of Congress validly overruling the Supreme Court. See Christians v. Crystal Evangelical Free Church (In re Young), 141 F.3d 854, 860 (8th Cir. 1998); Magic Valley Evangelical Free Church, Inc. v. Fitzgerald (In re Hodge), 220 B.R. 386, 397 (D. Idaho 1998).

After Boerne took hold, courts discussed the PDA as redressing sex discrimination more generally. See Laro v. New Hampshire, 259 F.3d 1, 14 (1st Cir. 2001) (“In enacting the PDA, Congress was expressly concerned with the issues of gender-based discrimination. . . .”).


291. See id. at 737.
the statute that mandate self-care leave for employees who miss work due to illness including pregnancy. The Court reasoned that the FMLA’s legislative record did not establish a sufficient connection between medical leave and violations involving the Court’s equal protection sex-discrimination cases.

Coleman does not bar using Section Five power to legislate on pregnancy, and can in fact be read as wholly aligned with Virginia and Hibbs. At its core, Coleman counsels the importance of holding congressional hearings to compile record evidence of constitutional violations involving state action that enforces sex stereotypes within the meaning of the Court’s Section One cases. Such hearings could, at one and the same time, consolidate a twenty-first-century understanding of the Court’s sex-discrimination case law from Reed to Young and continue the project of engaging the judiciary and the public about the dynamics of sex stereotyping involving pregnant and potentially pregnant workers.

With this brief review of pertinent case law, we are in a position to consider how Congress might draw on its Commerce Clause and Section Five powers to enact legislation to redress pregnancy discrimination in the workplace—in this case a Pregnant Workers Fairness Act.

2. How a Pregnant Workers Fairness Act Could Enforce Guarantees of Equal Citizenship

Coleman requires that, before legislating, Congress must hold hearings to educate public and private decisionmakers (including both employers and judges)

292. 566 U.S. 30, 43–44 (2012) (plurality opinion); id. at 44 (Thomas, J., concurring); id. at 44 (Scalia, J., concurring).

293. See id. at 37–39.

294. Coleman merits brief discussion in that it seems to present a problem with using Section Five power to address pregnancy discrimination, and oddly winds up providing additional unexpected support for the exercise of such power—from Justice Kennedy, of all sources. In Coleman, Maryland invoked Geduldig to argue that Congress lacked Section Five power to enact the self-care leave provisions of the FMLA. See Brief for the Respondents at 23, Coleman, 566 U.S. 30 (No. 10-1016), 2011 WL 6046212 (“Before the FMLA was enacted, it was well established that a state’s refusal to provide pregnancy leave to its employees was not unconstitutional.” (citing Geduldig v. Aiello, 417 U.S. 484, 495 (1974))). This prompted Justice Ginsburg in dissent to call for reversing Geduldig. See Coleman, 566 U.S. at 54–57 (Ginsburg, J., dissenting).

But Justice Kennedy, writing for the plurality, came to the conclusion that Congress lacked Section Five power to enact the self-care leave provisions of the FMLA without ever citing Geduldig—as Ginsburg herself points out. See id. at 60 n.6 (“Notably, the plurality does not cite or discuss Geduldig v. Aiello . . . .”). Justice Kennedy instead objected that Congress had failed to create a legislative record showing how providing unpaid leave for the employees’ medical needs, including pregnancy, remedied and deterred sex discrimination. See id. at 37–42 (plurality opinion).

In the course of reviewing the legislative record, Justice Kennedy pointed out that “Congress did not document any pattern of States excluding pregnancy-related illnesses from sick-leave or disability-leave policies”—though this observation suggested that such a pattern would be evidence of an equal protection sex-discrimination violation. See id. at 39. In this respect, the Coleman plurality reasons from the understanding of equal protection and pregnancy in Virginia and Hibbs even as it rejects the Section Five claim.

and to create a record of constitutional violations that a Section Five statute would remedy and deter.  

296. See supra note 294 and accompanying text.

297. See supra notes 145–53 and accompanying text.

298. See, e.g., Bornstein, supra note 238, at 16 (“Statements made to many of these employees reveal supervisors acting upon stereotypes related to pregnancy—either a fear that the employee will need to quit soon or will be physically unable to work due to pregnancy, regardless of how physically demanding the actual job, or that she will be less committed to working.”); supra notes 191–202 and accompanying text (discussing empirical literature on stereotyping of pregnant workers).


300. See id. (discussing Congress using its Section Five power to remedy “subtle discrimination that may be difficult to detect on a case-by-case basis”); Katzenbach v. Morgan, 384 U.S. 641, 652–58 (1966) (discussing the findings that might justify the exercise of Section Five authority as “appropriate legislation to enforce the Equal Protection Clause”); South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966) (discussing how factfinding might justify Congress exercising its power to enforce the Fifteenth Amendment: “Congress ha[s] found that case-by-case litigation [is] inadequate to combat widespread and persistent discrimination in voting . . . . Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims”).


302. See Kitroeff & Silver-Greenberg, supra note 99.

at special risk; employers may impose job definitions inflexibly, and employees may not be FMLA-covered or able to afford taking unpaid leave.304 “Only 39 percent of working parents and 35 percent of working mothers” are both eligible for FMLA leave and can afford to take unpaid leave.305 A quarter of women are fired or quit when they bear a child.306 The section 1983 cases provide a sampling of this dynamic as it unfolds in the public sector.307

Hearings of this kind might usefully explore reasons why the PDA and FMLA have not proven sufficient to prevent and deter discrimination against pregnant and potentially pregnant employees.308 PDA cases typically compare treatment of the pregnant employee to other employees who are “similar in . . . ability or inability to work”309 to determine whether exclusion of a pregnant employee is discriminatory. Forty years of PDA litigation has demonstrated both practical and normative problems with this comparative approach.310 Disparate impact might provide an alternate path to accommodation, and disparate impact is available

eds., 2016) (“A total 23% of women who were pregnant with their first child, 23% of women who were pregnant and already had a child/children, and 13% of women who had children and were done being pregnant reported that they had experienced [pregnancy] discrimination in the workplace.”); id. at 82–83 (discussing survey design).

304. See Deborah J. Anthony, The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal, 16 J. GENDER, SOC. POL’Y & L. 459, 474 (2008) (“The problems resulting from the FMLA’s limitations are numerous and provide significant barriers to access for some groups, especially women, minorities, and the poor.”).


307. See supra notes 239–42 and accompanying text.

308. See, e.g., Long Over Due: Exploring the Pregnant Workers’ Fairness Act Hearing, supra note 295 (statement of Dina Bakst, Co-Founder & Co-President, A Better Balance) (pointing out that the comparative framework of the PDA fails women, particularly women in low-wage and physically demanding jobs, and that these women also often fall through the cracks of the FMLA).


310. Where employers have different accommodation practices for different classes of employees, litigation turns into a dispute about which comparator should determine the question of discrimination. See Young v. United Parcel Serv., Inc., 575 U.S. 206 (2015). As litigation has repeatedly demonstrated, a particular workplace may not have sufficient and relevant cases to determine—on the basis of comparison—whether refusal to accommodate in a particular case is discriminatory. See generally Joanna L. Grossman, Expanding the Core: Pregnancy Discrimination Law as It Approaches Full Term, 52 IDAHO L. REV. 825, 851–54 (2016).
under the PDA as all justices recently recognized in Young, but there is scarcely any case law enforcing PDA disparate impact claims because judicial resistance has been so great.

For these and other reasons, redress of pregnancy discrimination is expanding beyond rigidly comparative frameworks. Rather than assume a pregnant woman loses her job unless she can find an exact comparator to anchor any claim to accommodation, federal and state laws are moving to a new norm, premised on the assumption that a woman who becomes a mother is entitled to keep her job, just as a man who becomes a father is entitled to keep his.

Congress sought to provide job security of this kind on a universalist model when it enacted the FMLA, but because of objections about expense the statute provides twelve weeks of unpaid leave for medical disabilities including pregnancy and only for employees of employers of fifty or more. The statute’s self-care and family leave provisions were structured to avoid exacerbating sex stereotyping by employers apprehensive about women taking leave, but bargaining over the costs of the FMLA’s universalist coverage resulted in other restrictions and compromises that reduced the FMLA’s utility for many low-wage workers. As we have seen, for those pregnant employees who work for

---

311. Siegel, supra note 4, at 1004 ("[B]oth the majority and the dissents recognized that plaintiffs may advance both disparate-impact and disparate-treatment claims of pregnancy discrimination. Young reminds us that even when there is no ‘comparator,’ the disparate-impact framework provides an alternative avenue for challenging rigid job descriptions and claiming reasonable accommodations that might allow a pregnant worker to hang onto her job, without imposing onerous costs on her employer." (footnotes omitted)).

312. See, e.g., id. at 982 & n.45.

313. Describing an early state statute mandating that employers provide their employees leave for pregnancy to the extent compatible with business necessity, Justice Marshall observed that its aims were coincident with the PDA’s: “By ‘taking pregnancy into account,’ California’s pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs.” Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 289 (1987).


Adhering to equal-treatment feminists’ aim, the self-care provision, 29 U.S.C. § 2612(a)(1) (D), prescribes comprehensive leave for women disabled during pregnancy or while recuperating from childbirth—without singling out pregnancy or childbirth. See S. Rep. No. 101-77, p. 32 (1989) (A “significant benefit of the temporary medical leave provided by this legislation is the form of protection it offers women workers who bear children. Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation which provides job protection only for pregnancy-related disability. Legislation solely protecting pregnant women gives employers an economic incentive to discriminate against women in hiring policies; legislation helping all workers equally does not have this effect.”).

315. See Anthony, supra note 304, at 474 (“The problems resulting from the FMLA’s limitations are numerous and provide significant barriers to access for some groups, especially women, minorities, and the poor.”); see also Patricia A. Shiu & Stephanie M. Wildman, Pregnancy Discrimination and Social Change: Evolving Consciousness About a Worker’s Right to Job-Protected, Paid Leave, 21 YALE J. L. & FEM. 119, 157 (2009) (observing that “the absence of paid leave” is “a barrier for those who cannot take leave because they cannot forego their income”).
smaller employers, and for the many workers who need each and every paycheck to support themselves and their family, the FMLA offers little relief; it is estimated that only about a third of working mothers are eligible for and can afford to take FMLA leave. Until the nation provides parents paid leave, the best solution seems to be helping workers stay employed to the extent they can do so consistent with their health and their employer’s business needs.

Responding to the inadequacies of the PDA as presently interpreted and of the FMLA as currently designed, twenty-nine states, including some of the most conservative states, have enacted PWFAs imposing on employers a duty to make reasonable accommodations for the pregnant worker. These statutes impose a duty of accommodation that is pregnancy-specific, though not necessarily sex-specific. The states enacting PWFAs impose this duty of reasonable accommodation on grounds of equality—and efficiency. The statutes mark the felt inadequacies of federal antidiscrimination and welfare standards and express a transformed understanding of sex equality in the workplace that must be traced at least in part to the PDA and FMLA whose requirements the states now feel the need to supplement.

Despite the changed understandings of pregnancy discrimination expressed by the passage of PWFAs in twenty-nine states, the persistence of pregnancy discrimination demonstrates the need for a federal law, backed by federal enforcement resources, to build on these state-law developments. A federal PWFA would ease the burden on working women who lack the time and resources to bring difficult-to-prove PDA claims, and who are not eligible for or cannot take FMLA leave.

316. See supra note 305 and accompanying text.
317. As of April 2020, twenty-nine states and five localities “provide explicit protections for pregnant workers in need of a modest accommodation.” A BETTER BALANCE, supra note 283.
318. The substantive provisions of some PWFAs are drafted with gender-neutral language. See, e.g., Pregnant Workers Fairness Act, H.R. 2694, 116th Cong. (2019) (extending protections to “a job applicant or employee affected by pregnancy, childbirth, or related medical conditions”); CAL. GOV’T CODE § 12945(a)(3)(A)–12945(a)(3)(C) (West 2020) (extending protections to “an employee [with] a condition related to pregnancy, childbirth, or a related medical condition”). Other PWFAs use sex-specific language that refers exclusively to female employees. See, e.g., NEV. REV. STAT. §§ 613.4353–4383 (2019) (“Reasonable accommodation’ means an action . . . taken by an employer for a female employee or employee for employment who has a condition relating to pregnancy, childbirth or a related medical condition.”); N.J. STAT. ANN. § 10:5-12(s) (West 2020) (“[A]n employer of an employee who is a woman affected by pregnancy shall make available to the employee reasonable accommodation in the workplace.”).
320. See Kitroeff & Silver-Greenberg, supra note 99; Silver-Greenberg & Kitroeff, supra note 98.
321. See A BETTER BALANCE, FACT SHEET: THE PREGNANT WORKERS FAIRNESS ACT (2020), https://www.abetterbalance.org/resources/fairness-for-pregnant-workers-bill-factsheet/ [https://perma.cc/V9LJ-JQ8A] (explaining that currently, women who need accommodations must identify another similar person in the workplace who was given an accommodation, and that women lost two-thirds of the cases
It is exactly for this reason that an accommodation mandate can remedy and deter violations of equal protection. The reasonable accommodation framework relieves individual employees of the burden of proving animus: of showing that an employer’s inflexible imposition of workplace standards reflects sex stereotyping that flows from the invidious assumption that pregnant workers are not competent or committed workers. By changing tacit or explicit sex-role assumptions about pregnancy that have long structured the workplace, a federal PWFA would remedy and deter stereotyping in the hiring and promotion of young potentially pregnant women.

Finally, it should go without saying, that the record of state action is plentiful in these cases: visible both as administrative action in the section 1983 cases we

brought after Young v. UPS due primarily to the difficulty of meeting this evidentiary standard, which is not imposed on claims for accommodations under the Americans with Disabilities Act of 1990).

322. For testimony developing the case that the PWFA’s accommodation mandate combats sex stereotyping in the workplace, see Long Over Due: Exploring the Pregnant Workers’ Fairness Act Hearing, supra note 295, at 21–22 (arguing that the PWFA, like the PDA, combats pernicious sex-role stereotypes and through its accommodation mandate provides equal treatment for pregnant workers).

For commentary on the ways that employers can use inflexible management styles to force pregnant workers out of the workplace, see Bornstein, supra note 238, at 21 (“A third way in which employers of low-wage workers demonstrate hostility to pregnancy is by refusing to allow even the smallest of workplace adjustments for pregnant workers—adjustments that employers would often make for other, non-pregnant employees who needed them.”); id. at 26 (“The inflexibility of many low-wage jobs is often compounded by rigid attendance policies that penalize workers for justifiable absences, for being minutes late, or even for assumption of future absences—for example, the stereotype that a single mother will be ‘unreliable.’”). For a report illustrating the interplay of employer stereotyping and inflexibility in management style, see Nat’l Women’s L. Ctr. & A Better Balance, It SHOULDN’T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS 7 (2013), https://www.nwlc.org/wp-content/uploads/2015/08/pregnant_workers.pdf [https://perma.cc/JHF4-G3Q6] (“When a woman worker is already seen as an outsider, her pregnancy and any requests for changes in her job related to the pregnancy can be taken as further evidence that the job is inappropriate for a woman, leading employers to refuse to make accommodations.”); id. at 10 (quoting one woman who reported that “[a]lthough my employer provided indoor work for employees with on-the-job injuries and accommodated people with disabilities, I was never permitted to work inside. . . . I feel like I was punished for being pregnant”); id. at 11 (reporting that after another woman became pregnant, she asked her manager for permission to avoid heavy lifting at the supermarket, and he responded by giving her more heavy lifting assignments; she miscarried the child; during her next pregnancy, the employer refused accommodation despite accommodating a coworker with a shoulder injury and she was fired); Brigid Schulte, Discrimination Against Pregnant Workers Has Been Rising, Report Says, WASH. POST (June 17, 2013), https://www.washingtonpost.com/local/discrimination-against-pregnant-workers-has-been-rising-report-says/2013/06/17/1189378-d79c-11e2-a9f2-42ee3912ae0e_story.html (highlighting selective accommodation in the story of Peggy Young, who did not receive accommodation for her pregnancy although workers received accommodations for other conditions). For sociology documenting the sex stereotyping of pregnant women, see supra text accompanying notes 191–202.

323. On the use of Section Five law to alleviate burdens of proof on individual claimants, see supra note 300 and accompanying text. A Section Five statute that accommodates pregnancy in the workplace inhibits sex discrimination in hiring and promoting young women. It also remedies unconstitutional sex stereotyping involving pregnancy. Courts have upheld Title VII’s disparate impact provision as a remedy for intentional discrimination that is difficult to prove. See In re Emp’t Discrimination Litig. Against Ala., 198 F.3d 1305, 1321–23 (11th Cir. 1999); see also Okrulhlik v. Univ. of Ark., 255 F.3d 615, 626 (8th Cir. 2001) (quoting Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 987, 990 (1988)); Claude Platton, Title VII Disparate Impact Suits Against State Governments After Hibbs and Lane, 55 DUKE L.J. 641 (2005).
have examined and as a thick web of law and norms reaching back to the era of women’s disfranchisement in the stories of Henrietta Rodman, Susan Struck, and others throughout this Article. An accommodation statute like the PWFA is at best a modest offset, given the centuries of state action that helped engender the sex-role understandings about a mother’s place that continue to limit prospects, both for the pregnant and the potentially pregnant, in the marketplace, education, and politics.

CONCLUSION

Only recently has our constitutional law rejected understandings of citizenship that justified women’s disfranchisement. At the founding, the law gave male heads of household authority over women and the ability to represent them in voting and the market; and the government continued to enforce that understanding of women as dependent citizens, defined through family relations to men, long after women’s enfranchisement, despite women’s efforts to secure equal citizenship. As this Article shows, for generations it was commonplace for federal and state law to force pregnant women and new mothers out of employment, dramatically restricting their career prospects and earning capacity and marking women wage-earners as intermittent members of the labor force. In this way, even as the Constitution formally protected woman’s right to vote, the law perpetuated meanings, structures, and distributions from the world of woman’s disfranchisement and carried forward the understanding of a woman as a dependent of her husband (or father) across domains in new institutional forms.

These arrangements were constitutional arrangements, imposed over protest and sanctioned by the Supreme Court under Fourteenth Amendment for most of its life. Even as the Supreme Court declared laws imposing breadwinner/caregiver stereotypes unconstitutional in the 1970s, the Court deferred to laws regulating pregnancy in Geduldig, reasoning that pregnancy is an “objectively identifiable physical condition with unique characteristics” and assuming these laws to be “reasonable” unless shown to reflect “invidious discrimination.” In initially excepting laws regulating pregnancy from close equal protection scrutiny, equal protection doctrine itself legitimated laws imposing dependency on women as a “natural” incident of reproduction itself.

But this Article tells a story of change as well as continuity. Women mobilized to challenge laws imposing dependency and enforcing discrimination in the public and private spheres; helped provoke national debate over the ERA; filed suits prompting the growth of equal protection doctrine; and organized to pass, amend, and enforce civil rights statutes, including the PDA and the FMLA. Over time,

324. See notes 239–42 and accompanying text.
325. For accounts showing efforts to protest laws of this kind spanning the nineteenth, twentieth, and twenty-first centuries, see Siegel, The Nineteenth Amendment, supra note 5; Siegel, She the People, supra note 5.
327. Id. at 496 n.20; see supra Section II.B.
the Nation’s understanding of pregnancy discrimination markedly, if unevenly, evolved.\textsuperscript{328} And as we have seen, the Supreme Court itself internalized these changes. By the turn of this century, the Supreme Court was emphasizing that women deserve equal protection of the law even when they differ from men, and extending the prohibition on sex-stereotyping to laws governing pregnancy.\textsuperscript{329}

We stand then at a pivotal historical juncture. After centuries of law-enforced sex-role stereotyping, pregnancy discrimination is widespread, and continues to play a critical role in limiting opportunities for women in the market and in politics.\textsuperscript{330} Yet public norms concerning pregnancy are slowly evolving, have reoriented our equal protection law, and moved twenty-nine states and five localities to enact laws mandating the accommodation of pregnant workers. These numbers suggest that large numbers of Americans are beginning to recognize that it is not right to treat women as the law once taught them to—and that changes slowly appearing in our constitutional and civil rights law express an emergent understanding of equality with broad-based popular support.

In 1974, in \textit{Geduldig}, Justice Stewart assumed that laws drawing distinctions on the basis of pregnancy were as likely “reasonable” as “invidious,” thought of pregnant workers as “expensive,” and concluded that there was “an objective and wholly noninvidious basis for the State’s decision not to create a more comprehensive insurance program than it has.”\textsuperscript{331} In the early 1970s, the bench did not recognize that apparently objective judgments about cost can themselves be the site of sex stereotyping—as Congress recognized in passing the PDA.\textsuperscript{332} As late as the 1990s, Richard Posner interpreted PDA disparate-treatment and disparate-impact claims in a cost-benefit analysis that authorized generalizations about a pregnant worker’s likely failure to return to work, speculated about a pregnant worker’s low value to the employer, and showed no awareness that judgments about cost could be informed by sex stereotyping.\textsuperscript{333}

\textsuperscript{328} See supra Sections I.B, II.A–C.
\textsuperscript{329} See supra Section III.D.
\textsuperscript{330} See supra Sections I.C, II.C; supra text accompanying notes 191–202.
\textsuperscript{331} Geduldig, 417 U.S. at 495–96, 496 & n.20.
\textsuperscript{333} See Troupe v. May Dep’t Stores Co., 20 F.3d 734, 737–38 (7th Cir. 1994). Judge Posner offered a thought experiment to provide cost-benefit guidance in interpreting Title VII, in which he offered no warning against generalizing about members of a protected class or warning about the content of the particular sex stereotypes directed at the group in question. Posner’s assumptions about accommodating pregnant women are also expressed in his refusal to recognize disparate impact claims under the PDA.
State pregnant workers fairness acts belong to a new world; they grew out of the world of the PDA and the FMLA, the world of Virginia and Hibbs. With the passage of antidiscrimination laws like the PDA and with greatly improved societal mechanisms for coordinating work and family-care arrangements, expectations about the value and reliability of working pregnant woman have begun to change, reflecting an evolution in norms that antidiscrimination law has helped prompt.\textsuperscript{334} The state PWFAs enacted in over half the country provide clear and compelling evidence—in addition to sociological studies, PDA case law, and the Supreme Court’s own case law—that the nation’s understanding of what is “reasonable” and what is “invidious” in the treatment of pregnant workers has evolved dramatically in the last half century.

Half a century after Geduldig, even conservative states enacting PWFAs can grasp the business case for providing reasonable accommodation for pregnant employees.\textsuperscript{335} Half a century after Geduldig, even conservative states enacting PWFAs recognize equality reasons for providing reasonable accommodation for pregnant employees; a law promoting gender equality can be justified as probusiness, profamily, and prolife. In Utah, a PWFA “benefits the economy and is good for business. Providing reasonable accommodations improves recruitment and retention, increases employee satisfaction and productivity, reduces absenteeism, and improves workplace safety. Our economy benefits when women are able keep working, continue supporting their families, and avoid getting on public assistance programs.”\textsuperscript{336} Accommodations “promote healthy families. For many women, work is not a choice. Women who are denied accommodations but must work have no choice often but to continue working under unhealthy conditions which may pose a risk to them or their unborn child.”\textsuperscript{337} As Nevada Senator Nicole Cannizzaro put it: “It is important for women to be able to say that they want to or have to provide for their families but also that they want to have families to begin with. These two decisions should not be mutually exclusive. It is shameful women are still being fired, forced out of their jobs or denied

\textit{See, e.g.}, id. at 738 (“Employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees. . . . But, properly understood, disparate impact as a theory of liability is a means of dealing with the residues of past discrimination, rather than a warrant for favoritism.”).

\textsuperscript{334} Cf. Siegel, \textit{supra} note 4, at 996 n.103 (noting that, in the context of Title IX and sports, antidiscrimination law has supported coordination enabling the emergence of new social norms).

\textsuperscript{335} \textit{See Hearing on H.B. 1463 Before the H. Comm. on Indus., Bus. & Labor, 64th Leg., Reg. Sess. attachment 1, at 3 (N.D. 2015) [hereinafter \textit{Hearing on H.B. 1463}] (statement of Rep. Naomi Muscha) (“I think common sense tells us that treating employees well results in good bottom lines for businesses. High employee morale contributes to raising other aspects of a business such as recruitment and retention of employees, safety, productivity, and reduced absenteeism.”); cf. H.B. 8, 98th Gen. Assemb., Reg. Sess. (Ill. 2015) (“Enabling pregnant workers to work through pregnancy is good for businesses. Providing pregnant employees with reasonable, temporary accommodations increases worker productivity, retention, and morale, decreases re-training costs, and reduces health care costs associated with pregnancy complications.”)}.


\textsuperscript{337} \textit{Id. at 39:13}.\n
\textbf{640}
employment opportunities simply because they become pregnant.”\footnote{338}{Minutes of the Sen. Comm. on Commerce, Labor \\& Energy, 79th Sess. 5 (Nev. 2017) (statement of Sen. Nicole Cannizzaro), https://www.leg.state.nv.us/App/NELIS/REL/79th2017/Meeting/6191?p=2006191 [https://perma.cc/LE8D-7KAM].} Young v. UPS, the most recent PDA case, demonstrates that conservatives on the Court may be receptive where accommodating pregnancy is concerned.\footnote{339}{575 U.S. 206 (2015). Chief Justice Roberts joined Justice Breyer’s majority opinion in Young along with Justices Ginsburg, Sotomayor, and Kagan; Justice Alito filed a separate concurrence. See generally Katherine Shaw, “Similar in Their Ability or Inability to Work”: Young v. UPS and the Meaning of Pregnancy Discrimination, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES, supra note 14, at 205. Shaw discusses coalition politics in Young and the PDA before it. See id. at 216–17, 222.} (As another Nebraska senator who identified as prolife observed, “I believe this is a bill that we need to ensure that women can confidently remain employed as they are nursing children and that’s an important part of . . . our work force.”\footnote{340}{357 U.S. 1 (1957). Justice Douglas dissented from the Court’s opinion in Young v. UPS, though he agreed that pregnancy-related accommodations are “an entitlement under the laws of this country, as well as a moral and legal right.” See id. at 10 (opinion concurring in part and dissenting in part) (statement of Justice Douglas).} The great and striking development in this story is that as the Nineteenth Amendment turns 100, Americans of many political stripes are recognizing the wrong of forcing pregnant employees out of work. Legislators enacting accommodation mandates reason that the exclusions harm workers’ job prospects, health, families, and businesses all at once. These judgments are of critical importance: they represent an emergent public understanding of equality spanning communities with divergent perspectives on the family that legislators and judges can enforce. But this emergent understanding of equality is one that will require law to enforce. We know that pregnancy discrimination remains an immense practical problem in workplaces of every kind.\footnote{341}{Many legislators emphasized that low-wage workers have a particular need for reasonable accommodations. Representative Naomi Muscha (D, sponsor) of North Dakota said, “Statistics show that the majority of pregnant workers who need some slight accommodations are low-wage earners or in nontraditional occupations. Very frequently the women are primary breadwinners in the family or even the sole breadwinner. If they are forced to leave work unpaid, it’s not just the woman who suffers, but rather the whole family.” Hearing on H.B. 1463, supra note 335, attachment 1, at 3 (statement of Rep. Naomi Muscha).} As we have seen, large numbers of Americans openly report that they consider a woman’s family responsibilities in determining her fitness to hold office.\footnote{342}{357 U.S. 1 (1957). Justice Douglas dissented from the Court’s opinion in Young v. UPS, though he agreed that pregnancy-related accommodations are “an entitlement under the laws of this country, as well as a moral and legal right.” See id. at 10 (opinion concurring in part and dissenting in part) (statement of Justice Douglas).} Meanings and arrangements entrenched by centuries of law do not simply dissipate; they evolve into new forms and stubbornly persist, structuring work and politics and multiple domains of social life. Because meanings traverse domains, the question happily can be addressed from the margins and the center, concurrently, through law, politics, and culture. The newly enacted accommodation statutes have begun to address the problem. Just over half the states have enacted them, and the statutes are so new that it will take at least another decade to discover the most practical ways to enforce them and for federal civil rights legislation, existing and future, to incorporate these new
approaches to enforcing longstanding principles requiring equal treatment and prohibiting sex-stereotyping.

As the Nineteenth Amendment enters its second century, it is time for officials in federal, state, and local government to enforce the Nineteenth Amendment together with the Reconstruction Amendments, with an equally dynamic understanding of equal citizenship.\(^{343}\) Read together, the Amendments provide ample authority to redress norms and structures in the workplace and in politics that are the legacy of dependent citizenship.\(^{344}\)

But the history chronicled in these pages reminds us of law’s deep duality. After centuries of enforcing dependent citizenship over generations and across domains, can law finally break this tradition? Can law reimagine and support the citizen who is active in the household, in the market, and in democratic politics in the twenty-first century?

\(^{343}\) See Siegel, *The Nineteenth Amendment*, *supra* note 5, at 451 & n.1 (observing that “the nation’s understanding of transformative amendments may evolve with the constitutional community they help reshape” and that it was “nearly a century after the Fourteenth Amendment’s ratification when the Court made clear that equal protection prohibited laws imposing racial segregation”).

\(^{344}\) See, *e.g.*, *id.* at 478–89 (discussing courts’ and Congress’s power to enforce equal citizenship under the Reconstruction Amendments and the Nineteenth Amendments).
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

NO. 26 MAP 2021

ALLEGHENY REPRODUCTIVE HEALTH CENTER, ET AL.
v. PENNSYLVANIA DEPARTMENT OF HUMAN SERVICES, ET AL.

BRIEF OF AMICUS CURIAE EQUAL RIGHTS AMENDMENT PROJECT AT THE CENTER FOR GENDER AND SEXUALITY LAW AT COLUMBIA LAW SCHOOL IN SUPPORT OF PETITIONERS

ERA PROJECT
By: Katherine Franke*
James L. Dohr Professor of Law
Faculty Director, ERA Project
Columbia Law School
435 W. 116th Street
New York, NY 10027
Phone: (212) 854-0061
kfranke@law.columbia.edu

*TAdmitted to practice in New York and California

Ting Ting Cheng*
Director, ERA Project
Columbia Law School
435 W. 116th Street
New York, NY 10027
Phone: (212) 854-0161
tingting.cheng@law.columbia.edu
*Admitted to practice in New York

Counsel for Amicus Curiae

Dated: October 13, 2021
TABLE OF CONTENTS

TABLE OF AUTHORITIES ........................................................................................................ iv
STATEMENT OF INTEREST OF AMICUS CURIAE ................................................................. 1
INTRODUCTION ......................................................................................................................... 2
ARGUMENT ................................................................................................................................. 3

I. The Coverage Ban Amounts to a Form of Disparate Treatment on the Basis of Sex That
Violates the Equal Rights Amendment .................................................................................... 3

II. The Coverage Ban’s Burden on Access to Abortion is Grounded in and Perpetuates
Illegitimate Sex-Based Stereotypes in Violation of the Pennsylvania ERA and Fundamental
Sex Equality Principles ............................................................................................................. 8

III. The Ability to Effectively Control One’s Reproductive Life is Essential to the
Possibility of Equality in the Workplace and Elsewhere and as Such the Coverage Ban
Violates the Pennsylvania Equal Rights Amendment ............................................................. 13

IV. Interpreting the State ERA to Invalidate the Coverage Ban Would Bring Pennsylvania
into Alignment with Other States’ Interpretation of State Constitutional Protections for Sex
Equality ...................................................................................................................................... 17

CONCLUSION .......................................................................................................................... 19
<table>
<thead>
<tr>
<th>CASES</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bradwell v. The State of Illinois,</td>
<td>2</td>
</tr>
<tr>
<td>83 U.S. 130 (1872)</td>
<td></td>
</tr>
<tr>
<td>Oncale v. Sundowner Offshore Services,</td>
<td>3</td>
</tr>
<tr>
<td>523 U.S. 75, 80 (1998)</td>
<td></td>
</tr>
<tr>
<td>Bostock v. Clayton County,</td>
<td>3</td>
</tr>
<tr>
<td>140 S.Ct. 1731 (2020)</td>
<td></td>
</tr>
<tr>
<td>FDA v. Am. Coll. of Obstetricians &amp; Gynecologists,</td>
<td>4</td>
</tr>
<tr>
<td>141 S. Ct. 578 (2021)</td>
<td></td>
</tr>
<tr>
<td>Gonzales v. Carhart,</td>
<td>4</td>
</tr>
<tr>
<td>Nev. Dep’t of Hum. Res. v. Hibbs,</td>
<td>4</td>
</tr>
<tr>
<td>Hoyt v. Florida,</td>
<td>4</td>
</tr>
<tr>
<td>368 U.S. 57 (1961)</td>
<td></td>
</tr>
<tr>
<td>Muller v. Oregon,</td>
<td>4</td>
</tr>
<tr>
<td>208 U.S. 412 (1908)</td>
<td></td>
</tr>
<tr>
<td>Reed v. Reed,</td>
<td>4</td>
</tr>
<tr>
<td>404 U.S. 71 (1971)</td>
<td></td>
</tr>
<tr>
<td>United States v. Virginia,</td>
<td>5</td>
</tr>
<tr>
<td>518 U.S. 515 (1996)</td>
<td></td>
</tr>
<tr>
<td>California Fed. Sav. &amp; Loan Assn. v. Guerra,</td>
<td>5</td>
</tr>
<tr>
<td>479 U. S. 272 (1987)</td>
<td></td>
</tr>
<tr>
<td>Cerra v. E. Stroudsburg,</td>
<td>6</td>
</tr>
<tr>
<td>299 A.2d 277 (Pa. 1973)</td>
<td></td>
</tr>
<tr>
<td>Henderson v. Henderson,</td>
<td>7</td>
</tr>
<tr>
<td>327 A.2d 60 (Pa. 1974)</td>
<td></td>
</tr>
<tr>
<td>Frontiero v. Richardson,</td>
<td>8</td>
</tr>
<tr>
<td>411 U.S. 677 (1973)</td>
<td></td>
</tr>
</tbody>
</table>
Craig v. Boren, 429 U.S. 190 (1976) ................................................................................................................... 8

Schlesinger v. Ballard, 419 U.S. 498 (1975) ................................................................................................................... 8

Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978) ................................................................. 8


Adoption of Walker, 360 A.2d 603 (Pa. 1976) .................................................................................................................. 11


DiFlorido v. DiFlorido, 331 A.2d 174 (Pa. 1975) ........................................................................................................ 11


Harris v. McRae, 448 U.S. 297 (1980) .................................................................................................................. 17

N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841 (N.M. 1998) ................................................................. 18

Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982) ................................................................. 18

Moe v. Secretary of Administration Finance, 382 Mass. 629 (1981) ................................................................. 18

Committee to Defend Reproductive Rights v. Myers, 29 Cal.3d 252 (1981) ................................................................. 19


STATUTES


P.A. CONST. art. I, § 28 (1971) ................................................................. 7


N.M. CONST. art. II, § 18 ................................................................. 18

OTHER AUTHORITIES


Horatio Storer, *Why Not? A Book for Every Woman* (1866) ................................................................................................................................. 11

E.P. Christian, *The Pathological Consequences Incident to Induced Abortion*, 2 DETROIT REV. MED. & PHARMACY 145 (1867) .......................................................................................................................... 11


PEW, Philadelphia’s Poor: Experiences From Below the Poverty Line, (https://pew.org/2NyZSJG) ..........................................................................................................................15


Foster DG, Roberts SCM, and Mauldon J, Socioeconomic consequences of abortion compared to unwanted birth, (2012), https://apha.confex.com/apha/140am/webprogram/Paper263858.html .................................................................17


Nancy Felipe Russo, Abortion, unwanted childbearing, and mental health, Salud Mental. 37, 283-289 (2014) ..............................................................................................................................17

STATEMENT OF INTEREST OF AMICUS CURIAE

The Equal Rights Amendment Project at Columbia Law School’s Center for Gender and Sexuality Law (“the ERA Project”) is a law and policy think tank established to develop research, policy papers, expert guidance, and strategic leadership on the Equal Rights Amendment (“ERA”) to the U.S. Constitution, and on the role of the ERA in advancing gender-based justice. The ERA Project provides academic, legal, and policy expertise to support efforts to expand protections for gender-based equality and justice.

The ERA Project brings rigorous academic research to bear on, inter alia, the question of the meaning and scope of state and federal measures written to secure and advance sex equality. To that end, this brief describes how Pennsylvania’s Equal Rights Amendment should be understood to invalidate the Pennsylvania Abortion Control Act’s limit on state-funded health care as a matter of fundamental sex equality.

Professor Katherine Franke, James L. Dohr Professor of Law, Founding Director of the Center for Gender and Sexuality Law, and Faculty Director of the ERA Project, is among the nation’s leading scholars and teachers working on sex-based equality. Her scholarship has been published in the Yale Law Journal, Pennsylvania Law Review, Columbia Law Review, Stanford Law Review, among other elite journals, and she has published two books tracing the connections between sex and race discrimination.

Ting Ting Cheng is the Director of the ERA Project. Before joining the ERA Project, she was a staff attorney at Legal Momentum, the Women's Legal Defense and Education Fund. Earlier, she was an attorney at the New York City Commission for Human Rights and a public defender and immigrant defense attorney at Brooklyn Defender Services.
Cheng was the Legal Director of the 2017 Women’s March on Washington and served on the National Organizing Committee. She was a foreign law clerk to Justices Albie Sachs and Edwin Cameron of the Constitutional Court of South Africa. In addition, Cheng was a Fulbright Scholar to South Africa, where she received the Amy Biehl Award.

INTRODUCTION

Our nation’s history is the story of a gradual repudiation of the notion of second-class citizenship or caste.¹ The meaning of full and equal civil status for all people has evolved over the United States’s almost 250 years since its founding. This is particularly true for the idea of sex equality. Nineteenth century courts sought to protect women’s safety and well-being by placing them in a cage rather than a pedestal, reflecting the common beliefs at the time as described in a notorious ruling of the United States Supreme Court: “The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.”² Today, we hold a very different concept of sex equality and women’s citizenship—one that not only embraces a commitment to formal equality between people regardless of their sex, but also repudiates outdated, deterministic stereotypes about women’s roles as fulfilling the biological functions of motherhood and as caregivers in the home. So too have sex equality principles evolved to accommodate the ways in which gender-based stereotypes and norms burden not only women, but also men (insofar as they too must bear the weight of what it means to be “a real, masculine man”), and people with other gender identities who often suffer the discriminatory bias of those who judge people who do not conform to

²Bradwell v. The State of Illinois, 83 U.S. 130, 141 (1872) (Bradley, J. concurring) (upholding Illinois’s denial of a law license to a woman based on her sex).
traditional expectations of what it means to be a man or a woman. The U.S. Supreme Court has embraced the view that sex equality laws are designed, of course, to protect women, but also men who are burdened by “sex-specific and derogatory terms ... as to make it clear that the harasser is motivated by general hostility” toward men, *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 80 (1998), and people who have been discriminated against on the basis of their gender identity, *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020).

Pennsylvania ratified the Equal Rights Amendment (“ERA”) in 1971 to incorporate modern principles of sex equality into the fabric of the state’s fundamental law. In so doing, Pennsylvania expressly disavowed legal measures that discriminate on their face on the basis of sex, that embrace outdated, stereotypic notions of women’s proper role as wife and mother, and that undermine the very possibility of sex equality in the workplace and other aspects of public life. The Pennsylvania Abortion Control Act (“Coverage Ban”) violates the state ERA on several ways: by funding different, and worse, health care services for women based on sex, and by embracing and perpetuating outmoded gendered stereotypes of identity, role in society, and autonomy to make fundamental decisions about one’s reproductive life. Even worse, the Coverage Ban functionally relegates low-income women and pregnant people generally to second class status. For these reasons, the Coverage Ban should be declared invalid.

ARGUMENT

The argument that follows will lay out the several ways in which bans on access to abortion amount to forms of sex discrimination.

I. The Coverage Ban Amounts to a Form of Disparate Treatment on the Basis of Sex That Violates the Equal Rights Amendment
Fundamental sex equality principles, as embodied by the Pennsylvania ERA, instruct that the state may not burden women’s access to health care in ways that men are not similarly burdened. Supreme Court Justice Sonia Sotomayor summarized this principle succinctly last term: “This country’s laws have long singled out abortions for more onerous treatment than other medical procedures that carry similar or greater risks,” imposing “an unnecessary, irrational, and unjustifiable undue burden on women seeking to exercise their right to choose.” *FDA v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 578, 585 (2021) (Sotomayor, J., dissenting) (citing *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting)). As amicus explains more fully below, the state of Pennsylvania may not impose unjustified and dangerous restrictions on access to health care in ways that differentiate on the basis of sex.

For much of the history of the United States, federal and state laws were built upon a common belief that women and men were sufficiently different in kind that laws “protecting” the “weaker sex” were justified as proper reflections of women’s inherent or natural difference from, if not inferiority to, men. The Supreme Court both embraced and relied upon this view in upholding laws that paternalistically denied women the right to work on terms equal to their male colleagues or to serve on juries: “a woman is, and should remain, ‘the center of home and family life,’” and “‘a proper discharge of [a woman’s] maternal functions … justifi[es] [protective] legislation.’” *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 729 (2003) (third alteration added) (citing *Hoyt v. Florida*, 368 U.S. 57, 62 (1961), and *Muller v. Oregon*, 208 U.S. 412, 422 (1908)).

The Supreme Court explicitly rejected the “separate spheres” doctrine in 1971 when Ruth Bader Ginsburg, then a women’s rights litigator, urged the Court in *Reed v. Reed* to develop a sex-based equal protection doctrine skeptical of such laws. 404 U.S. 71, 77 (1971). The Court
accepted this invitation, ruling that an Idaho law that created a statutory preference for men over women as administrators of estates amounted to a form of discrimination prohibited by the Equal Protection Clause of the Fourteenth Amendment. The Court ruled, “By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause.” *Reed v. Reed*, 404 U.S. 71, 77 (1971). Ginsburg’s “brief in *Reed* sought to demonstrate that Idaho’s preference for male administrators was part of a much broader pattern of sex-role enforcement that associated men with the marketplace and women with the home.” Cary Franklin, *The Anti-Stereotyping Principle In Constitutional Sex Discrimination Law*, 85 NYU L. REV. 83, 124 (2009).

Extending the equality principle secured in *Reed* to pregnancy discrimination was Ginsburg’s next agenda. She prevailed in *United States v. Virginia*, after she had ascended to the Court as an associate justice. In a ruling that she authored that was joined by five other justices, her line of reasoning made clear that equal protection principles should apply with equal force to pregnancy-based classifications. Justice Ginsburg’s landmark opinion recognized that pregnancy-based regulations, too, are sex classifications subject to heightened scrutiny under the Equal Protection Clause. *United States v. Virginia*, 518 U.S. 515 (1996). In *Virginia*, the Court held that sex classifications cannot be justified by physical differences between men and women. The Court affirmed that the Constitution’s equality guarantees extend to women as men’s equals, regardless of any “inherent differences” between the sexes. Those “[i]nherent differences,” the Court explained, “remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.” *Id.* at 533-34 (citing *California Fed. Sav. & Loan Assn. v. Guerra*, 479 U. S. 272, 289 (1987)).

Repudiating the separate spheres doctrine once and for all, the Court in *Virginia* held that
the Constitution’s guarantee of equal protection means that sex “classifications may not be used, as they once were … to create or perpetuate the legal, social, and economic inferiority of women.” Id. at 534 (internal citation omitted). Seven years later Chief Justice Rehnquist confirmed that the sex equality protection in the Equal Protection Clause applied to laws regulating pregnancy. In Nev. Dep’t of Hum. Res. v. Hibbs, the Chief Justice ruled that “differential [maternity and paternity] leave policies were not attributable to any differential physical needs of men and women.” 538 U.S. 721 at 731 (2003).


Only two years after the passage of the State ERA, the Pennsylvania Supreme Court held in Cerra v. E. Stroudsburg that a school district’s termination of a pregnant employee constituted sex discrimination, explaining that “pregnant women are singled out and placed in a class to their disadvantage. They are discharged from their employment on the basis of a physical condition peculiar to their sex. This is sex discrimination pure and simple.” 299 A.2d 277, 214 (Pa. 1973).

The Pennsylvania Abortion Control Act (“Coverage Ban”) prohibits use of Medical
Assistance Program ("Medical Assistance") funds to cover abortions outside of three narrow exceptions. 40 Pa. Cons. Stat. Ann. §§ 3501, 3502 (2013). While Medical Assistance provides comprehensive care to men without exceptions to any sex specific or reproductive health related care, it excludes abortion coverage for women and singles out abortion as a restricted medical service while covering pregnancy and childbirth-related healthcare. This disparate treatment in medical funding deprives women of their constitutionally protected right to control their reproduction and equal coverage of their right to reproductive health. This right is explicitly secured under the Pennsylvania Equal Rights Amendment, P.A. CONST. art. I, § 28 (1971).

Pennsylvania’s ERA states that “Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.” P.A. CONST. Art. I, § 28 (1971). The Pennsylvania Supreme Court has interpreted the state’s ERA as prohibiting all legal distinctions based on gender. In Henderson v. Henderson, the Supreme Court struck down a law that excluded men from receiving alimony and covered related fees during a divorce proceeding. 327 A.2d 60 (Pa. 1974). The Court expressed this “absolutist” approach to the ERA: “The thrust of the Equal Rights Amendment is to ensure equality of rights under the law and to eliminate sex as a basis for distinction. The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities. The law will not impose different benefits or different burdens upon the members of a society based on the fact that they may be man or woman.” Id. at 62; see generally Phyllis W. Beck & Joanne Alfano Baker, An Analysis of the Impact of the Pennsylvania Equal Rights Amendment, 3 Widener J. Pub. L. 743 (1994).

Thus, the Coverage Ban amounts to a form of sex-based classification that clearly violates sex equality protection specifically found in Pennsylvania’s Constitution, Art. I, § 28.
II. The Coverage Ban’s Burden on Access to Abortion is Grounded in and Perpetuates Illegitimate Sex-Based Stereotypes in Violation of the Pennsylvania ERA and Fundamental Sex Equality Principles

In the early 1970s, when the U.S. Supreme Court first began to seriously examine the justiciability of sex-based equal protection claims under the Fourteenth Amendment, it understood that it was doing so in response to “arbitrary legislative choice[s]” that reflected “a long and unfortunate history of sex discrimination,” and “an attitude of ‘romantic paternalism’” grounded in “gross, stereotyped distinctions between the sexes.” These stereotypes were found either to “foster[] ‘old notions’ of role typing,” further “archaic and overbroad generalizations,” or perpetuate inaccurate and “outdated misconceptions concerning the role of females in the home rather than in the ‘marketplace and world of ideas.’”

As a result, the Supreme Court recognized an additional foundation upon which sex discrimination claims could rest, beyond a sex-based classification rule: “It is now well recognized that employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman’s inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.” This rule was even more fully embraced by the Supreme Court in *U.S. v. Virginia* when the Court ruled “generalizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying

---

5 *Id.*
6 *Id.* at 685.
9 *Boren*, 429 U.S. at 198-99 (quoting *Stanton v. Stanton*, 421 U.S. 7 (1975)).
opportunity to women whose talent and capacity place them outside the average description.” 518 U.S. 515, 550 (1996).

In addition to the rule that the state may not impose sex-based classifications, including classifications based on pregnancy, the principle of sex-based equality also prohibits lawmaking that is based on or perpetuates stereotypes about the proper roles and abilities of women and men. “The wrong of sex discrimination must be understood to include all gender role stereotypes whether imposed upon men, women, or both men and women ... What it means to be discriminated against because of one’s sex must be reconceived beyond biological sex as well. To the extent that the wrong of sex discrimination is limited to conduct or treatment which would not have occurred but for the plaintiff’s biological sex, antidiscrimination law strives for too little.” Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, 144 U. Penn. L. REV. 1, 2-3 (1995).

Notably, in Hibbs, the U.S. Supreme Court held that Congress could enact the Family and Medical Leave Act to remedy and prevent inequality in the provision of family leave because historically, “ideology about women’s roles” had been used to justify discrimination against women particularly when they were “mothers or mothers-to-be.” 538 U.S. at 736 (citation omitted). Hibbs made clear that pregnancy-based regulations anchored in archaic stereotypes about gender roles can violate the Equal Protection Clause. As Chief Justice Rehnquist described, these laws were based on “the pervasive sex-role stereotype that caring for family members is women’s work.” Id. at 731. Discrimination is afoot when false or stereotypical differences are mistaken for real differences, and thereby similar cases are mistaken as dissimilar. Justice Blackmun similarly connected the denial of the full range of reproductive health care to sex-based stereotypes in Planned Parenthood of Southeastern Pennsylvania v.
Casey, 505 U.S. 833 (1992), the “assumption—that women can simply be forced to accept the ‘natural’ status and incidents of motherhood—appears to rest upon a conception of women’s role that has triggered the protection of the Equal Protection Clause,” 505 U.S. at 928 & n.4 (Blackmun, J., concurring in part). See also Serena Mayeri, Undue-ing Roe: Constitutional Conflict and Political Polarization in Planned Parenthood v. Casey, In Reproductive Rights and Justice Law Stories (Reva B. Siegel, Melissa Murray, and Katherine Shaw eds., Foundation Press 2019) (describing the role of sex equality principles in academic and judicial discourse leading up to Planned Parenthood v. Casey).

These “women-protective” policy rationales echo the language used to justify 19th-century abortion bans that enforced marital duties of wives, ensured the reproduction of white women, and preserved the demographic character of the nation while supposedly protecting women’s health.\(^{11}\) For example, in an 1871 report on criminal abortions, the American Medical Association described women who chose to have abortions as “unmindful of the course marked out for her by Providence, [as] she overlooks the duties imposed on her by the marriage contract.” D.A. O’Donnell & W.L. Atlee, Report on Criminal Abortion, 22 Transactions Am. Med. Ass’n 239, 241 (1871). One leading physician stated that “[i]nterference with Nature so that [women] may not accomplish the production of healthy human beings is a physiological sin of the most heinous sort,” warning that avoiding their biological destiny would destroy women’s health and social standing. See Horatio Storer, Why Not? A Book for Every Woman 37 (1866). Women were also deemed throughout history to be incompetent to make their own decisions about childrearing, existing to fulfill the central purpose that women are “psychologically constituted and for which they are destined by nature.” Id. at 75. Ending a pregnancy would

lead to hysteria for women, so the view goes, because women lacked the capacity to make one of the most important decisions in her life. See E.P. Christian, *The Pathological Consequences Incident to Induced Abortion*, 2 DETROIT REV. MED. & PHARMACY 145, 146 (1867).


The public policy rationales that have been articulated to support the Coverage Ban are based on improper stereotypes about gender-based identities and roles in society. Pennsylvania legislators originally passed the Coverage Ban based on the justification that the state “favor[s] childbirth over abortion.” Act of December 19, 1980, No. 239, 1980 Pa. Laws 1321. The policy justification later included protecting “the life and health of the woman subject to abortion and [] the life and health of the child subject to abortion.” Abortion Control Act of 1982, 18 Pa.C.S. § 3201. *Fischer v. Department of Pub. Welfare*, 509 Pa. 293, 308 (1985)
When passing the Coverage Ban, Pennsylvania relied on outdated and impermissible sex stereotypes when it expressed its preference for “childbirth over abortion.” Being coerced by state law to carry a pregnancy to term, and thus forced into parenthood conscripts the pregnant person into an ineluctably gendered-frame and narrative limiting who pregnant people are and can be.

The Coverage Ban further enforces harmful sex stereotypes by coercing pregnant people, especially the most marginalized and underserved women in the state who depend on Medicaid to cover their basic healthcare needs, into continuing an unwanted pregnancy and thus conforming to an outdated gendered destiny in the home raising children rather than in the workplace, the boardroom, the statehouse, or any other more “masculine” spheres of life.

The Coverage Ban is not only based on impermissible stereotypes about women’s roles as wives and mothers, but also causes significant harm, which is directly contrary to the asserted policy rationale of protecting the life and health of the woman. Denying women on Medicaid their constitutionally protected right to reproductive freedom comes at the expense of women’s health and wellbeing, their economic stability, their educational attainment, workforce participation, and self-realization. Rather than protecting women, the Coverage Ban’s reliance on outdated sex stereotypes forces women on Medicaid to choose between continuing their pregnancies against their will and using money otherwise needed for basic survival in order to afford an abortion—in both cases causing severe financial instability and putting herself and her family in peril. The high cost of abortions causes women to either not obtain an abortion at all or attempt to meet the cost of an abortion in ways that have harmful consequences in other aspects of their lives: such as not paying rent or utilities, skipping car payments, reducing food intake, and borrowing money using costly “payday” loans at high interest. Far from protecting the life
and health of women, the Coverage Ban harms pregnant people seeking abortion access—especially Black and Latina women, who make up a disproportionate share of Medicaid enrollees.

III. The Ability to Effectively Control One’s Reproductive Life is Essential to the Possibility of Equality in the Workplace and Elsewhere and as Such the Coverage Ban Violates the Pennsylvania Equal Rights Amendment

Long before her appointment to the U.S. Supreme Court, Ruth Bader Ginsburg was an advocate and scholar who recognized that the ability to control one’s reproductive capacities was essential to workplace equality and indeed equal citizenship more generally. As Ginsburg argued, without the capacity to rationally plan or space parenthood, parents who bear the largest burden of childrearing—typically women—would be incapable of participating equally in the workplace, in politics, and in other contexts fundamental to robust citizenship. In this sense, access to contraception and abortion were instrumental to full equality across a range of contexts. This approach to sex equality rested on an underlying conception of sex discrimination that recognized that sex-based “classifications may not be used, as they once were...to create or perpetuate the legal, social, and economic inferiority of women.” United States v. Virginia, 518 U.S. 515, 534 (1996).

Beginning in the 1980s, scholarship surrounding sex equality considered the presence of sex discrimination in both the formulation and effects of abortion restrictions. For example, Catharine MacKinnon linked abortion rights and women’s equality through arguing that no

---

matter what decision is ultimately reached, a woman’s reproductive decision-making, though
difficult, is “a moment of power in a life otherwise led under unequal conditions which preclude
choice in ways she cannot control.”\textsuperscript{13} Other scholars such as Professor Sylvia A. Law
emphasized that legal restrictions on abortion interfere with women’s equality rights because of
their “devastating sex-specific impact.”\textsuperscript{14}

The United States Supreme Court acknowledged the equality principles that support the
consitutional right to abortion. In \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey},
for example, the Court observed that “the ability of women to participate equally in the economic
and social life of the Nation has been facilitated by their ability to control their reproductive
in \textit{Gonzales v. Carhart}, stated that the abortion right “protects a woman's autonomy to determine
her life's course, and thus to enjoy equal citizenship stature.” 550 U.S. 124, 172 (2007)
(Ginsburg, J., dissenting).

The real-world impact of the Coverage Ban makes clear that a right to abortion access is
a necessary condition for—and thus instrumental to—women’s full equality. The Coverage Ban
has been devastating to low-income women, harming their ability to participate equally in the
wage labor market and other public functions essential to full citizenship.\textsuperscript{15} In a state where
around 85\% of counties lack abortion facilities, the issue of abortion access is a challenge faced
by many women.\textsuperscript{16} For women with Medicaid coverage, paying for abortions comes at a

(\url{https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=7341&context=ylj}).
\textsuperscript{14} Sylvia A. Law, \textit{Rethinking Sex and the Constitution}, 132 U. Pa. L. REV. 955
\textsuperscript{15} See generally Declaration from Colleen M. Hefflin in Petition for Review in the Nature of a Complaint (2019), for
substantial cost to already strapped financial resources.\textsuperscript{17} Women must face additional costs of long distance travel, lodging, childcare coverage, job disruptions and reduced income. Scraping funds together for poor women oftentimes result in delays in obtaining an abortion, which increase risks, complications, and the likelihood of more invasive procedures.\textsuperscript{18}

The Coverage Ban puts abortion access out of reach for many low-income women and disproportionately impacts women of color, the LGBTQ community, immigrants, and young women.\textsuperscript{19} Poor women in need of reproductive health care in Pennsylvania face overlapping barriers to health care, educational and economic opportunities, access to housing, job security, financial safety nets, and social and political equality.\textsuperscript{20} For these women, the Coverage Ban’s restriction on abortion access and its prohibitive cost present a barrier that is sometimes impossible to overcome.

Detailed studies demonstrate the harmful impact of restrictive abortion access laws. A University of California San Francisco study—called the “Turnaway Study”—shows that being denied an abortion and carrying an unintended pregnancy to term leads to significant negative


\textsuperscript{18} Sarah Roberts, Heather Gould, Katrina Kimport, Tracey Weitz, Diana Foster, Out-of-Pocket Costs and Insurance Coverage for Abortion in the United States, 24(2) Women’s Health Institute Journal (2014). (See study at University of California, San Francisco in the Women’s Health Institute Journal; noting that low-income women were more likely to cite cost as a reason to delay abortion procedures when compared to their wealthier counterparts (\texttt{https://www.whijournal.com/article/S1049-3867(14)00004-8/fulltext}); see also Guttmacher Institute, Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters (\texttt{https://www.guttmacher.org/gpr/2016/07/abortion-lives-women-struggling-financially-why-insurance-coverage-matters}).


\textsuperscript{20} PEW, Philadelphia’s Poor: Experiences From Below the Poverty Line, (\texttt{https://pew.org/2NyZSJG}). (For discussion of access to economic safety nets within the family, see Colleen M. Heflin and Mary Pattillo, Poverty in the Family: Race, Siblings, and Socioeconomic heterogeneity,” 35(4) Social Science Research 804 (2006) (\texttt{https://www.sciencedirect.com/science/article/pii/S0049089X04000870}).

15

665
physical, psychological, and economic outcomes for the women. A subsequent analysis of data from the Turnaway Study supports a link between obtaining a desired abortion and achieving both short- and long-term personal goals.\textsuperscript{21} Additionally, a report from the National Latina Institute for Reproductive Health shows that one in four women on Medicaid are forced to carry their pregnancy to term due to the financial burdens of paying for an abortion out of pocket.\textsuperscript{22} A study on abortions globally found that countries with highly restrictive abortion laws experience significantly more unsafe abortion procedures than other countries, resulting in a discriminatory burden on the safety of women as a result of the restriction.\textsuperscript{23}

Increasingly, women who have abortions live in poverty. In 2014, half of all women who chose to end their pregnancies lived in poverty, double the amount from 10 years prior.\textsuperscript{24}

Coercing women into continuing their pregnancies can push these women further into poverty. Women who are denied abortions face more economic struggles than women who obtain


abortions, according to researchers at the University of California, San Francisco. The ongoing pandemic and the resulting economic and public crisis heighten the pressures that the Coverage Ban imposes on underserved communities seeking abortion access. In addition to socio-economic harm, the lack of access to abortion care results in severe mental health consequences and may further perpetuate intimate partner abuse.

Justice Thurgood Marshall, dissenting in *Harris v. McRae* (in which the United States Supreme Court upheld the Hyde amendment) described the federal coverage ban as a “form of discrimination repugnant to the equal protection of the laws guaranteed by the Constitution [that] marks a retreat from *Roe v. Wade* and represents a cruel blow to the most powerless members of our society.” 448 U.S. 297 (1980) (Marshall, J., dissenting). Although Medical Assistance was created to protect the most under-resourced individuals from unexpected and emergency health issues, the Coverage Ban, far from its purported purpose of protecting the health and wellbeing of the pregnant woman, harms the very people Medical Assistance was designed to benefit.

By creating a tiered system of health care coverage for reproductive health care and creating a substantial barrier for access to abortion for low income and poor people, the Coverage Ban further entrenches sex inequality in violation of the ERA.

**IV. Interpreting the State ERA to Invalidate the Coverage Ban Would Bring Pennsylvania into Alignment with Other States’ Interpretation of State Constitutional Protections for Sex Equality**

---


High courts in several states have interpreted ERAs comparable to Pennsylvania’s to prohibit bans on Medicaid coverage for abortion care. Notably, the New Mexico Supreme Court held that an agency rule barring the use of Medicaid fund for abortion is a form of sex discrimination in violation of its ERA, clarifying that “[i]t would be error . . . to conclude that men and women are not similarly situated with respect to a classification simply because the classifying trait is a physical condition unique to one sex.” *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 859 (N.M. 1998).27

Similarly, a Connecticut regulation restricting the funding of abortions by the state Medicaid program was struck down under the Connecticut ERA. The Connecticut Supreme Court reasoned that excluding abortion from Medicaid coverage “flies in the face of the Medicaid program's admitted goals…and since that one exception also is a subject of a woman's constitutional rights, the regulation impinges upon those constitutional rights to the same practical extent as if the state were to affirmatively rule that poor women were prohibited from obtaining an abortion.” *Doe v. Maher*, 40 Conn. Supp. 394, 448 (1986).

Many courts have upheld comprehensive Medicaid coverage for reproductive health care including abortion based on equal protection and other grounds. In *Right to Choose v. Byrne*, the New Jersey Supreme Court held that state restriction of Medicaid funds for only abortions to preserve a woman's life, but not her health, “violates the right of pregnant women to equal protection of the law” because the right to have an abortion is a fundamental right for all women, including women on Medicaid. 450 A.2d 925, 928 (N.J. 1982). Similarly, the Massachusetts Supreme Court found that the failure to pay for medically necessary abortions violated the due process clause of its state constitution. *Moe v. Secretary of Administration Finance*, 417 N.E.2d

---
27 See N.M. CONST. art. II, § 18 (“Equality of rights under law shall not be denied on account of the sex of any person”).
387 at 646-7 (Mass. 1981) (holding that once the state "chooses to enter the constitutionally protected area of choice, it must do so with genuine indifference."). The Supreme Court of California affirmed its long-standing state constitutional principle that once benefits are conferred, it may not be done on “a selective basis which excludes certain recipients solely because they seek to exercise a constitutional right.” Committee to Defend Reproductive Rights v. Myers, 29 Cal.3d 252, 264, 625 P.2d 779, 172 Cal.Rptr. 866 (1981). And the Alaska Supreme Court held that the state must adhere to neutral criteria in distributing Medicaid coverage without “deny[ing] medically necessary services to eligible individuals based on criteria unrelated to the purposes of the public health care program” and discriminating based on the exercise of a constitutional right. State, Dep’t of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 915 (Alaska 2001).

As such, the court should find that Pennsylvania’s Coverage Ban on funding for abortion amounts to a clear violation of the state’s constitutional protections for sex equality, thus repairing the state’s status as an outlier when it comes to the interpretation of modern sex equality principles.

CONCLUSION

By denying Medical Assistance for important and constitutionally protected reproductive health needs, the Coverage Ban imposes a significant barrier to fundamental reproductive choice, and this barrier is fundamentally rooted in a long history of outdated sex-based classifications, odious sex-stereotyping, and documented impediments to equal citizenship for all Pennsylvanians, regardless of their sex.

In this brief, amicus, scholars of sex equality generally and of measures such as the Pennsylvania Equal Rights Amendment in particular, offer the court several ways in which the
Coverage Ban violates fundamental sex equality principles. Through whichever path the court takes, the destination is unavoidable: the Coverage Ban violates the Pennsylvania Constitution’s protections securing sex-based equality.

Respectfully submitted,

Date: October 13, 2021

Katherine Franke*
ERA Project
Columbia Law School
435 W. 116th Street
New York, NY 10027
Phone: (212) 954-0061
Phone: (212) 854-7946

*TAdmitted to practice in New York and California

Ting Ting Cheng*
ERA Project
Columbia Law School
435 W. 116th Street
New York, NY 10027
Phone: (212) 854-0161

*TAdmitted to practice in New York

Counsel for Amicus Curiae
CERTIFICATION OF COMPLIANCE

The foregoing Amicus Brief complies with the word count limitation under Pa. R.A.P. 531 and 2135. Excluding the cover page, table of contents, table of authorities, Proof of Service and any addenda, this Amicus Brief contains 6082 words. In preparing this certificate, the word count feature of Microsoft Word was relied upon.

Dated: October 13, 2021

[Signature]

Katherine Franke
CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 13th day of October, 2021, a true and correct copy of the foregoing Amicus Brief for Appellants was served in compliance with Pa.R.A.P.121.

Amal Bass
Women's Center & Shelter Civil Law Project
Address: 125 S 9TH St Ste 300
Philadelphia, PA 19107-5117
Phone No: (215) 928-5772
Counsel for Appellant

Christine K. Castro
Women's Center & Shelter Civil Law Project
125 S 9TH St Ste 300
Philadelphia, PA 19107
Phone No: (215) 928-5761
Counsel for Appellant

David Samuel Cohen
Drexel University School of Law
Drexel College of Law
3320 Market St Ste 232
Philadelphia, PA 19104
Phone No: (267) 975-4313
Counsel for Appellant

Michael Stephen DePrince
Troutman Pepper Hamilton Sanders Llp
2000 K St NW Ste 600
Washington, DC 20006
Phone No: (202) 220-1244
Counsel for Appellant

Donald Louise Fisher
Troutman Pepper Hamilton Sanders Llp
100 Market Ste Ste 200
Harrisburg, PA 17101
Phone No: (717) 255-1166
Counsel for Appellant

Carrie Yvette Flaxman
Planned Parenthood Federation of America
1110 Vermont Ave NW Ste 300
Washington, DC 20005-6300
Phone No: (301) 461-2100
Counsel for Appellant

Susan Frietsche
Women's Center & Shelter Civil Law Project
428 Forbes Ave Ste 1710
Pittsburgh, PA 15219
Phone No: (412) 281-2892
Counsel for Appellant

Leah Greenberg Katz
Pepper Hamilton Llp
3000 Two Logan Sq
Philadelphia, PA 19103-2799
Phone No: (215) 981-4547
Counsel for Appellant
Jan Paula Levine
Troutman Pepper Hamilton Sanders LLP
3000 Two Logan Sq
Philadelphia, PA 19103-2799
Phone No: (215) 981-4714
Counsel for Appellant

Adam Ryan Martin
Troutman Pepper Hamilton Sanders LLP
P. O. Box 1181
Harrisburg, PA 17108-1181
Phone No: (717) 255-1132
Counsel for Appellant

Kaitlin Leigh Meola
Troutman Pepper Hamilton Sanders LLP
3000 Two Logan Sq
Philadelphia, PA 19103
Phone No: (215) 981-4703
Counsel for Appellant

Thomas B. Schmidt
100 Market St
Po Box 1181
Harrisburg, PA 17108-1181
Phone No: (717) 255-1164
Counsel for Appellant

Eugene K. Cuccarese
Department of Human Services
Office of General Counsel
Piatt Place 301 Fifth Avenue Suite 430
Pittsburgh, PA 15222
Phone No: (412) 565-2557
Counsel for Appellee

David Russell Dye
Ball, Murren & Connell, LLC
2303 Market St
Camp Hill, PA 17011-4627
Phone No: (717) 232-8731
Counsel for Appellee

Brian S. Paszamant
BLANK ROME LLP
One Logan Sq 130 N 18th St
Philadelphia, PA 19103
Phone No: (215) 569-5791
Counsel for Appellee

Fitz Patrick, Katherine Marie
Ball, Murren & Connell, LLC
2303 Market St
Camp Hill, PA 17011-4627
Phone No: (717) 232-8731
Counsel for Appellee

Thomas Paul Howell
Governor's Office Of General Counsel
333 Market St 17th Fl
Harrisburg, PA 17101
Phone No: (717) 783-6563
Counsel for Appellee

Doris M. Leisch
Pa Governor's Ogc
333 Market St Fl 17
Harrisburg, PA 17101
Phone No: (717) 783-6563
Counsel for Appellee

Teresa Roos McCormack
Ball, Murren & Connell, LLC
2303 Market St
Camp Hill, PA 17011-4627
Phone No: (717) 232-8731
Counsel for Appellee

Matthew John McLees
Department of Human Services
Office of General Counsel
Counsel
625 Forster St 3rd Fl West
Harrisburg, PA 17120
Phone No: (717) 783-2800
Counsel for Appellee
Philip Joseph Murren  
Ball, Murren & Connell, LLC  
2303 Market St  
Camp Hill, PA 17011-4627  
Phone No: (717) 232-8731  
Counsel for Appellee

Jason Adam Snyderman  
BLANK ROME LLP  
One Logan Sq 130 N 18th St  
Philadelphia, PA 19103  
Phone No: (215) 569-5774  
Counsel for Appellee

John Patrick Wixted  
BLANK ROME LLP  
Address: 130 N 18TH St  
Philadelphia, PA 19103-6998  
Phone No: (215) 569-5500  
Counsel for Appellee

Kenneth Serafin  
Acting Chief Counsel, Matthew McLees, Deputy Chief Counsel, Governor's Office of General Counsel, Department of Human Services  
Address: Health & Welfare Building, 3d Floor West, Harrisburg, PA 17120  
Phone No: (717) 783-2800.  
Counsel for Respondents

Dated: October 13, 2021  
Katherine Franke
No. 19-1392

In the Supreme Court of the United States

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE
MISSISSIPPI DEPARTMENT OF HEALTH, et al.,
Petitioners,
v.

JACKSON WOMEN’S HEALTH ORGANIZATION, et al.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF OF EQUAL PROTECTION
CONSTITUTIONAL LAW SCHOLARS SERENA
MAYERI, MELISSA MURRAY, AND REVA SIEGEL
AS AMICI CURIAE IN SUPPORT OF
RESPONDENTS

ROBERTA A. KAPLAN
Counsel of Record
RAYMOND P. TOLENTINO
MARCELLA COBURN
RACHEL TUCHMAN
ANNA COLLINS PETERSON
Kaplan Hecker & Fink LLP
350 Fifth Avenue, 63rd Floor
New York, NY 10118
(212) 763-0883
rkaplan@kaplanhecker.com

Counsel for Amici Curiae

September 20, 2021
TABLE OF CONTENTS

TABLE OF AUTHORITIES ........................................ iii
INTEREST OF AMICI CURIAE .................................. 1
SUMMARY OF ARGUMENT ....................................... 1
ARGUMENT .................................................................. 5

I. HB 1510 VIOLATES THE EQUAL PROTECTION CLAUSE .................................. 5
   A. This Court’s Precedents Recognize That Equality Principles Underlie the Constitutional Right to an Abortion .......... 5
   B. Pregnancy Regulations Are Sex-Based Classifications Subject to Heightened Scrutiny .......................... 7
   C. Because HB 1510 Regulates Pregnancy, It Must Satisfy Heightened Scrutiny .................. 11

II. MISSISSIPPI’S JUSTIFICATIONS FOR HB 1510 ARE INEXTRICABLY INTERTWINED WITH OUTDATED STEREOTYPES ABOUT WOMEN .................................................. 12
   A. Historical Context Illustrates That Sex Stereotypes Are Interwoven into Abortion Restrictions Like HB 1510 ... 14
   B. HB 1510 Rests on Modern Expressions of Outdated Sex-Role Stereotypes .......................... 16
III. RELIANCE ON IMPERMISSIBLE SEX STEREOTYPES LED MISSISSIPPI TO FOREGO LESS DISCRIMINATORY MEANS TO ACHIEVE ITS GOALS OF PROTECTING WOMEN’S HEALTH AND FETAL LIFE...................................................20

A. Abortion Restrictions Like HB 1510 Do Not Protect Women But Rather Expose Them to Harm .........................21

B. Mississippi Repeatedly Rejected Nondiscriminatory Alternatives That Would Protect the Health of Women and Families.............................................22

IV. HB 1510 DOES NOT ADVANCE EQUALITY INTERESTS...............................29

CONCLUSION .............................................................................34
# TABLE OF AUTHORITIES

## CASES

<table>
<thead>
<tr>
<th>Case</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bostock v. Clayton County,</td>
<td>5</td>
</tr>
<tr>
<td>140 S. Ct. 1731 (2020)</td>
<td></td>
</tr>
<tr>
<td>Box v. Planned Parenthood of Ind. &amp; Ky., Inc.,</td>
<td>29</td>
</tr>
<tr>
<td>139 S. Ct. 1780 (2019)</td>
<td></td>
</tr>
<tr>
<td>Bradwell v. Illinois,</td>
<td>8</td>
</tr>
<tr>
<td>83 U.S. (16 Wall.) 130 (1872)</td>
<td></td>
</tr>
<tr>
<td>Cal. Fed. Sav. &amp; Loan Ass’n v. Guerra,</td>
<td>8, 9</td>
</tr>
<tr>
<td>479 U.S. 272 (1987)</td>
<td></td>
</tr>
<tr>
<td>FDA v. Am. Coll. of Obstetricians &amp; Gynecologists,</td>
<td>6, 7</td>
</tr>
<tr>
<td>141 S. Ct. 578 (2021)</td>
<td></td>
</tr>
<tr>
<td>Frontiero v. Richardson,</td>
<td>8, 19</td>
</tr>
<tr>
<td>411 U.S. 677 (1973)</td>
<td></td>
</tr>
<tr>
<td>Geduldig v. Aiello,</td>
<td>8</td>
</tr>
<tr>
<td>417 U.S. 484 (1974)</td>
<td></td>
</tr>
<tr>
<td>Gonzales v. Carhart,</td>
<td>6, 12</td>
</tr>
<tr>
<td>Hoyt v. Florida,</td>
<td>8</td>
</tr>
<tr>
<td>368 U.S. 57 (1961)</td>
<td></td>
</tr>
<tr>
<td>Lawrence v. Texas,</td>
<td>6</td>
</tr>
<tr>
<td>Muller v. Oregon,</td>
<td>8</td>
</tr>
<tr>
<td>208 U.S. 412 (1908)</td>
<td></td>
</tr>
<tr>
<td>Nev. Dep’t of Hum. Res. v. Hibbs,</td>
<td>3, 8, 10, 11</td>
</tr>
</tbody>
</table>
Planned Parenthood of Se. Pa. v. Casey,
505 U.S. 833 (1992) ........................................ passim

Reed v. Reed,
404 U.S. 71 (1971) ............................................. 8

Roe v. Wade,
410 U.S. 113 (1973) ........................................... 2, 12, 29

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

Whole Woman’s Health v. Hellerstedt,
136 S. Ct. 2292 (2016) .................................... 18

STATUTES

OTHER AUTHORITIES
Stephen Benard et al., Cognitive Bias and the Motherhood Penalty, 59 HASTINGS L.J. 1359 (2008) ......................................................... 17


L.C. Butler, The Decadence of the American Race,
77 BOS. MED. & SURGICAL J. 89 (Sept. 5, 1867) .... 30
E.P. Christian, *The Pathological Consequences Incident to Induced Abortion*, 2 DETROIT REV. MED. & PHARMACY 145 (1867)...................................... 15


vi


L.D. Griswold et al., *Additional Report from the Select Committee to Whom Was Referred S.B. No. 285, 1867 Ohio Senate J. Appendix 233* .... 16, 31


J.J. Mulheron, *Foeticide: A Paper Read Before the Wayne County Medical Society*, 10 PENINSULAR J. MED. 385 (1874)................................. 15


O.S. Phelps, *Criminal Abortion: Read Before the Calhoun County Medical Society*, 1 DETROIT LANCET 725 (1878)................................................................. 15

H.S. Pomeroy, *The Ethics of Marriage* (1888) .... 14


Dorothy Roberts, *Killing the Black Body* (2d ed. 2017) ................................................................. 31


Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 19TH AMENDMENT SPECIAL EDITION GEO. L.J. 167 (2020)......................................................... 11


HORATIO STORER, *WHY NOT? A BOOK FOR EVERY WOMAN* (1866) ........................................... 14, 15, 30


Emily Wax-Thibodeaux & Ariana Eunjung Cha, *The Mississippi Clinic at the Center of the Fight to End Abortion in America*, THE WASH. POST (Aug. 24, 2021) ................................................................. 28


INTEREST OF AMICI CURIAE

Amici Serena Mayeri, Melissa Murray, and Reva Siegel are professors of constitutional law and equality law. They submit this brief to identify and explain the equal protection principles that support Respondents' position and afford an independent basis on which to affirm the judgment below.¹

Serena Mayeri is Professor of Law and History at University of Pennsylvania Carey Law School; Melissa Murray is Frederick I. and Grace Stokes Professor of Law at New York University School of Law; and Reva Siegel is Nicholas deB. Katzenbach Professor of Law at Yale Law School.²

SUMMARY OF ARGUMENT

The fundamental right at stake in this case matters to millions of Americans—not only to those who choose to end their pregnancies, but also to those who make life decisions secure in the understanding that they could make that choice if necessary. One in four women of child-bearing age in this country will have an abortion. They represent every race, religion,
socioeconomic background, and more. They often are already raising children themselves. And because our society provides such inadequate infrastructure for families and so little support for caregivers, increasingly, those who decide to end their pregnancies are living in poverty.

HB 1510 impermissibly burdens the constitutional right to liberty and bodily autonomy—in direct violation of this Court’s precedent in Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). See Resp. Br. 2-3, 12-15. But HB 1510 also violates another fundamental constitutional guarantee—the right to equal protection under the law. See id. at 36-41. As amici explain in this brief, the Equal Protection Clause supplies an additional, independent basis for the constitutional right to an abortion, and it forbids states like Mississippi from trampling on that right by passing laws like HB 1510.

---


Under this Court’s equal protection jurisprudence, laws that classify on the basis of sex—including laws that regulate pregnancy—are subject to heightened scrutiny. *United States v. Virginia*, 518 U.S. 515, 533-34 (1996) (“Virginia”); see also *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 728-34 (2003). To survive heightened scrutiny, the State of Mississippi must offer an “exceedingly persuasive justification” for its sex-based classification: specifically, it must show that its decision to regulate by sex-discriminatory means is substantially related to the achievement of important governmental objectives. *Virginia*, 518 U.S. at 531-33. In making that showing, the State may “not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females,” nor may sex classifications “be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.” *Id.* at 533-34 (internal citation omitted). HB 1510 does not pass constitutional muster under this standard.

Mississippi has enacted HB 1510 to “protect[] the life of the unborn” and to “protect[] the health of women.” See H.B. 1510 § 1(2)(b)(i)-(v), 2018 Leg., Reg. Sess. (Miss. 2018) (citations omitted). With certain narrow exceptions, the statute prohibits physicians from performing “an abortion” on a “maternal patient” after 15 weeks—singling out a pregnant woman and imposing on her the role of mother. See *id.* § 1(4). But the State denies the enormity of this imposition by expressly claiming that coercing motherhood, over a woman’s objection, protects the woman in addition to any fetal life she may carry. See *id.* § 1(2)(b)(ii)-(v). The statute’s paternalist justifications derive from “overbroad generalizations,” *Virginia*, 518 U.S. at 533,
about women as destined for motherhood that date back to nineteenth-century anti-abortion campaigns.

Relying on these antiquated sex-role stereotypes, Mississippi assumed it could fulfill both of its important objectives (protecting fetal life and women’s health) by prohibiting abortion after 15 weeks. Because the State relied so heavily on sex-role stereotypes to achieve its two ends, it failed to explore the many less discriminatory and noncoercive ways to reduce abortion and to protect the life and health of women and future generations—such as by providing appropriate and effective sex education or assisting those who wish to bear children.

For these reasons, Mississippi has failed to offer an “exceedingly persuasive justification” for forcing a woman to continue pregnancy. Id. at 531. HB 1510 instead enforces a sex-based and coercive classification that “perpetuate[s] the legal, social, and economic inferiority of women.” Id. at 534. Although people of all gender identities may become pregnant, seek abortions, or bear children, see Resp. Br. 13 n.3, this brief focuses on the constitutionally impermissible sex-role judgments about women that historically undergird laws regulating abortion, see infra Part II, including HB 1510. See, e.g., Miss. H.B. 1510 § 1(2) (using language such as “maternal patient” and “women”); see also infra n.13 (reporting on debate among State legislators about the Mississippi women on whom the State’s abortion regulations focus).

---

5 Laws that discriminate on the basis of pregnancy can involve various forms of sex-based discrimination, as this Court has
This brief proceeds in four parts. First, amici demonstrate that, under this Court’s existing precedent, laws that regulate pregnancy, like HB 1510, are sex classifications subject to heightened scrutiny. Second, amici explain how HB 1510’s attempt to protect both women’s health and fetal life violates settled equal protection principles by relying on archaic notions about a woman’s social role. Third, amici show that Mississippi relied on these impermissible assumptions to enact HB 1510’s regulation on abortion and, in fact, rejected numerous other less discriminatory means of protecting women’s health and fetal life. And fourth, amici explain why attempts to justify HB 1510 on equality grounds are meritless.

ARGUMENT

I. HB 1510 VIOLATES THE EQUAL PROTECTION CLAUSE

A. This Court’s Precedents Recognize That Equality Principles Underlie the Constitutional Right to an Abortion

The right to make decisions about whether to end a pregnancy is grounded in both the Due Process and Equal Protection Clauses. In Casey, this Court acknowledged that women’s talent, capacity, and right “to participate equally in the economic and social life

acknowledged. Cf. Bostock v. Clayton County, 140 S. Ct. 1731, 1744 (2020) (“In Phillips, the employer could have accurately spoken of its policy as one based on ‘motherhood.’ In much the same way, today’s employers might describe their actions as motivated by their employees’ homosexuality or transgender status.”).
of the Nation” is dependent on “their ability to control their reproductive lives.” 505 U.S. at 856. Indeed, because of the physical, emotional, spiritual, economic, and social stakes of pregnancy and motherhood, the State cannot “insist, without more, upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and of our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.” Id. at 852; see also Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) (“[L]egal challenges to undue restrictions on abortion procedures … center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship … ”).6

And just last Term, Justice Sotomayor recognized the equality interests at stake in accessing abortion. Justice Sotomayor observed that “[t]his country’s laws have long singled out abortions for more onerous treatment than other medical procedures that carry similar or greater risks,” imposing “an unnecessary, irrational, and unjustifiable undue burden on women seeking to exercise their right to choose.” FDA v. Am. Coll. of Obstetricians & Gynecologists, 141 S. Ct. 578, 585 (2021) (Sotomayor, J., dissenting) (citing Gonzales, 550 U.S. at 172 (Ginsburg, J., dissenting)).

---

6 Cf. Lawrence v. Texas, 539 U.S. 558, 575 (2003) (“Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”).
Those undue burdens are often most severe for low-income women and women of color. Id. at 582.

Accordingly, Justices of this Court have long acknowledged the fundamental equality principles that underlie the constitutional right to an abortion. Similarly, and over time, the Court has applied its prohibition on discriminatory sex-based classifications to laws regulating pregnancy. As amici explain in further detail below, HB 1510 violates those equality principles by imposing an unjustified and profoundly dangerous sex-based restriction on a woman’s right to control her own reproductive life.7

**B. Pregnancy Regulations Are Sex-Based Classifications Subject to Heightened Scrutiny**

Throughout much of American history, belief in traditional gender roles has shaped the Nation’s laws, including the assumptions that “a woman is, and should remain, ‘the center of home and family life,’” and that “‘a proper discharge of [a woman’s] maternal

---

7 Even before Casey, prominent legal scholars recognized that the abortion right is also protected by the Constitution’s equality guarantees. See Casey, 505 U.S. at 928 & n.4 (Blackmun, J., concurring in part) (observing that the “assumption—that women can simply be forced to accept the ‘natural’ status and incidents of motherhood—appears to rest upon a conception of women’s role that has triggered the protection of the Equal Protection Clause” and citing scholarship); see also Serena Mayeri, Undue-ing Roe: Constitutional Conflict and Political Polarization in Planned Parenthood v. Casey, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES 150-52 (Melissa Murray, Katherine Shaw & Reva B. Siegel, eds. 2019) (describing role of sex equality principles in academic and judicial discourse leading up to Casey).
functions … justifies protective legislation,” Hibbs, 538 U.S. at 729 (third alteration added) (citing Hoyt v. Florida, 368 U.S. 57, 62 (1961), and Muller v. Oregon, 208 U.S. 412, 422 (1908)). Those sex-role stereotypes led three members of this Court to insist that “[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.” Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., joined by Swayne and Field, JJ., concurring in judgment) (upholding a state’s denial of a law license to a woman because of her sex).

Fifty years ago, this Court changed course and began to strike down sex-based state action that enforced these traditional gender stereotypes as unconstitutional under the Equal Protection Clause. See Reed v. Reed, 404 U.S. 71, 76 (1971); Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973) (plurality opinion) (citing Bradwell as evidence of the Nation’s “long and unfortunate history of sex discrimination”). The Court did not initially give a clear account of how pregnancy-based regulations perpetuate these stereotypes. See Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974). But as the Court gained experience interpreting the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2018), it began to explain how certain laws regulating pregnancy could be based on impermissible sex-role stereotypes, see Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 289-90 (1987) (Marshall, J.) (upholding a state law mandating a reasonable, unpaid pregnancy disability leave as consistent with the Pregnancy Discrimination Act and Title VII because it “promotes equal employment opportunity” and “does not reflect archaic
or stereotypic notions about pregnancy and the abilities of pregnant workers”)

The Court thereafter made clear that equal protection principles apply with equal force to pregnancy-based classifications. Justice Ginsburg’s landmark decision in *United States v. Virginia* recognized that pregnancy-based regulations, too, are sex classifications subject to scrutiny under the Equal Protection Clause. See *Virginia*, 518 U.S. at 533-34 (citing *Cal. Fed.*, 479 U.S. at 289). In *Virginia*, the Court held that sex classifications cannot be justified by physical differences between men and women. The Court affirmed that the Constitution’s equality guarantees extend to women as men’s equals, regardless of any “inherent differences” between the sexes. Those “[i]nherent differences,” the Court explained, “remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.” *Id.*

Not every sex classification, the Court reasoned, was constitutionally infirm. Sex classifications that “promot[e] equal employment opportunity” or “advance [the] full development of the talent and capacities of our Nation’s people”—like the state law establishing unpaid pregnancy disability leave at issue in *Cal. Fed.*—are permissible. *Id.* at 533 (quoting *Cal. Fed.*, 479 U.S. at 289 (first alteration in original)). But the Court in *Virginia* held that the Constitution’s guarantee of equal protection means that sex “classifications may not be used, as they once were … to create or perpetuate the legal, social, and economic
inferiority of women.” *Id.* at 534 (internal citation omitted).

Seven years later, Chief Justice Rehnquist elaborated on *Virginia*’s logic, further confirming that the Equal Protection Clause applied to laws regulating pregnancy. In *Hibbs*, the Court held that Congress could enact the Family and Medical Leave Act to remedy and prevent inequality in the provision of family leave because historically, “ideology about women’s roles” had been used to justify discrimination against women particularly when they were “mothers or mothers-to-be.” 538 U.S. at 736 (citation omitted).

*Hibbs* made clear that pregnancy-based regulations anchored in archaic stereotypes about gender roles can violate the Equal Protection Clause. As Chief Justice Rehnquist put it, the “differential [maternity and paternity] leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women’s work.” *Id.* at 731. Laws perpetuating such sex-role stereotypes injured women *and* men. And “[t]hese mutually reinforcing stereotypes,” the Chief Justice recognized, “created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver.” *Id.* at 736 (“Because employers continued to regard the family as the woman’s domain, they often denied men similar accommodations or discouraged them from taking leave.”).

Taken together, *Virginia* and *Hibbs* establish that laws regulating pregnancy are sex-based classifications that violate the Equal Protection
Clause when they are rooted in sex-role stereotypes that injure or subordinate. See Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 19TH AMENDMENT SPECIAL EDITION GEO. L.J. 167, 189-211 (2020); see also id. at 208 & n.229 (explaining Geduldig’s status after Virginia and Hibbs).

C. Because HB 1510 Regulates Pregnancy, It Must Satisfy Heightened Scrutiny

HB 1510 singles out pregnant women for coercive regulation. By its terms, the law is designed to deprive women, and not men, of their right to make choices about whether or not to have children.

Because Mississippi has chosen “discriminatory means” to protect health and life, the State must satisfy heightened scrutiny by offering an “exceedingly persuasive” justification for its choice of means that does not rely on “overbroad generalizations” about the differences between sexes. *Virginia*, 518 U.S. at 533. In scrutinizing sex-based state action for impermissible sex stereotyping, the *Virginia* standard examines the law’s historical context and the State’s decision-making in a larger policy context to ascertain whether the State’s sex-based classification is being used “to create or perpetuate the legal, social, and economic inferiority of women.” *Id.* at 534.8

---

8 *See Virginia*, 518 U.S. at 535-40 (determining from historical context that stereotyped beliefs about sex roles originating in nineteenth-century ideas about women’s physical and reproductive fragility underpinned the exclusion of women from VMI); *id.* at 539 (determining from policy context that VMI’s
HB 1510 does not satisfy heightened scrutiny for at least two reasons. First, considered in historical context, the State’s legislative findings reflect “ancient notions about women’s place in the family and under the Constitution—ideas that have long since been discredited.” Gonzales, 550 U.S. at 185 (Ginsburg, J., dissenting). See infra Part II. Second, relying on these traditional sex roles, the State assumed it could protect fetal life and the health of women by prohibiting abortion after 15 weeks. But gripped by those stereotyped beliefs, Mississippi failed to adopt many alternative, less discriminatory means of reducing abortion and supporting those who seek to raise children. See infra Part III.

II. MISSISSIPPI’S JUSTIFICATIONS FOR HB 1510 ARE INEXTRICABLY INTERTWINED WITH OUTDATED STEREOTYPES ABOUT WOMEN

Petitioners insist that Roe and Casey “shackle States to a view of the facts that is decades out of date.” Pet. Br. 4. To the contrary, Mississippi’s own logic and its laws are anchored in the past.

Today, as in the past, advocates of laws like HB 1510 argue that restricting abortion will protect fetal life and protect women—all while denying that limiting abortion access risks hurting women. See rejection of coeducation in 1986 did not reflect “any Commonwealth policy evenhandedly to advance diverse educational options”).

9 In the 1990s, in response to public unease with arguments against abortion that ignored or attacked women, advocates
Miss. H.B. 1510 § 1(2)(b)(i) (finding that banning abortion protects fetal life); id. § 1(2)(b)(ii)-(v) (finding that banning abortion protects women).

These justifications are not new. The nineteenth-century anti-abortion campaign, too, claimed that regulating abortion would protect women’s physical and psychological health. The anti-abortion campaign shows how a call to protect a pregnant woman’s health can function as an effort to enforce a woman’s role as mother. Most importantly, the campaign demonstrates how seemingly benign concerns can be deeply entangled with wholly unconstitutional reasons for compelling a woman to bear a child. See Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 STAN. L. REV. 261, 280-323 (1992) (showing how nineteenth-century doctors argued that banning abortion would protect fetal life, protect a woman’s health, enforce wives’ marital duties, and control the relative birthrates of “native” and immigrant populations, in order to preserve the demographic character of the nation); see also infra Part IV.

began to emphasize that restricting abortion not only protects fetal life, but also protects women’s psychological and physical health. See Reva B. Siegel, Why Restrict Abortion? Expanding the Frame on June Medical, 2020 SUP. CT. REV. (forthcoming 2021) (manuscript at 20-33), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3799645 (explaining how anti-abortion movement’s “pro-woman and pro-life” claims implicitly and expressly appeal to the sex role-based belief that what is best for children is best for the mother’s health).
A. Historical Context Illustrates That Sex Stereotypes Are Interwoven into Abortion Restrictions Like HB 1510

In the nineteenth century, the physician who led the campaign to ban abortion, Dr. Horatio Storer, claimed that childbearing was “the end for which [married women] are physiologically constituted and for which they are destined by nature.” See HORATIO STORER, WHY NOT? A BOOK FOR EVERY WOMAN 75-76 (1866); JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900, 78, 89, 148 (1978) (recounting Storer’s role in persuading Americans to ban abortion). According to Storer, avoiding this pre-ordained biological and social role would lead to a woman’s physical and social ruin. See STORER, supra, at 37 (“[A]ny infringement of [natural laws] must necessarily cause derangement, disaster, or ruin.”); H.S. POMEROY, THE ETHICS OF MARRIAGE 97 (1888) (“Interference with Nature so that she may not accomplish the production of healthy human beings is a physiological sin of the most heinous sort ...”). The American Medical Association’s 1871 Report on Criminal Abortion denounced a woman who ended a pregnancy: “She becomes unmindful of the course marked out for her by Providence, she overlooks the duties imposed on her by the marriage contract.” D.A. O’Donnell & W.L. Atlee, Report on Criminal Abortion, 22 TRANSACTIONS AM. MED. ASS’N 239, 241 (1871).

During this same time, doctors further justified controlling women’s roles by asserting women’s incompetence to make their own decisions about sex and childbearing. Because they understood
childbearing as the “end for which [women] are psychologically constituted and for which they are destined by nature,” anti-abortion advocates claimed that termination of pregnancy is “disastrous to a woman’s mental, moral, and physical well-being.” STORER, supra, at 75-76. The notion that interrupting a pregnancy produced feminine hysteria followed neatly from the premise that women lack decisional capacity to choose to avoid motherhood. See E.P. Christian, The Pathological Consequences Incident to Induced Abortion, 2 DETROIT REV. MED. & PHARMACY 145, 146 (1867) (noting that “violence against the physiological laws of gestation” would cause a “severe and grievous penalty” because of “the intimate relation between the nervous and uterine systems manifested in the various and frequent nervous disorders arising from uterine derangements”). Further, the choice to avoid motherhood was believed to confer “a moral as well as a physical taint” that “stamps its effects indelibly on the constitution of the female.” J.J. Mulheron, Foeticide: A Paper Read Before the Wayne County Medical Society, 10 PENINSULAR J. MED. 385, 390 (1874).

And just as women’s minds were supposedly irrevocably and deleteriously affected by abortion, so too were their bodies. Physicians claimed that abortion would “insidiously undermine[]” women’s reproductive organs, and “permanently incapacitate[] [women] for conception.” STORER, supra, at 50. A woman who has an abortion “destroys her health ... [and] sooner or later comes upon the hands of the physician suffering with uterine disease.” O.S. Phelps, Criminal Abortion: Read Before the Calhoun County Medical Society, 1 DETROIT LANCET 725, 728 (1878).
According to anti-abortion advocates, these and other health issues were a “direct result of this interference with nature’s laws.” L.D. Griswold et al., *Additional Report from the Select Committee to Whom Was Referred S.B. No. 285*, 1867 Ohio Senate J. Appendix 233, 234 (emphasis added). It should come as little surprise that “[s]tatements hostile to the woman’s rights movement appeared in many of the anti-abortion tracts penned by America’s doctors and their supporters.” Siegel, *Reasoning from the Body*, supra, at 303; see generally id. at 302-14.10

**B. HB 1510 Rests on Modern Expressions of Outdated Sex-Role Stereotypes**

HB 1510 recites Mississippi’s interests in banning abortion to protect fetal life and women’s health. See Miss. H.B. 1510 § 1(2)(b)(i)-(ii). Although the State does not employ nineteenth-century rhetoric in its legislative findings, its asserted justifications for HB 1510 are a modern twist on the same old sex-role

---

10 Emphasizing the importance of a woman’s right to “voluntary motherhood” (that is, to oppose her husband’s sexual advances), abolitionist and suffragist Lucy Stone remarked, “[i]t is very little to me to have the right to vote, to own property, … if I may not keep my body, and its uses, in my absolute right.” Id. at 305 (quoting Letter from Lucy Stone to Antoinette Brown (Blackwell) (July 11, 1855), quoted in Elizabeth Cazden, Antoinette Brown Blackwell: A Biography 100 (1983)). Doctors leading the nineteenth-century campaign against abortion attacked arguments for voluntary motherhood on the grounds that recognizing a wife’s right to refuse her husband’s sexual advances would make marriage a relation of “legalized prostitution.” See id. at 308-14. This debate over women’s sexual and reproductive autonomy offered competing perspectives on the practice of abortion.
stereotypes that animated anti-abortion campaigners in centuries past.

Like nineteenth-century physicians, Mississippi assumes that women are incapable of deciding for themselves how to balance the comparative health risks and emotional burdens of continued pregnancy, childbirth, and abortion. For instance, the legislative findings in HB 1510 declare that “[a]bortion carries significant physical and psychological risks to the maternal patient,” including “depression; anxiety; substance abuse; and other emotional or psychological problems.” *Id.* § 1(2)(b)(ii), (iv). The State Legislature further asserts that the “medical, emotional, and psychological consequences of abortion are serious and can be lasting.” *Id.* § 1(2)(b)(v) (internal quotation marks omitted); see Pet. Br. 8.

That unsupported assertion reflects the same stereotypical view of women’s fragile, maternal psyche espoused by nineteenth-century anti-abortion advocates. Meanwhile, the mental and emotional stress of pregnancy, childbirth, and caring for children—in an economy that discriminates against mothers and pregnant people—go entirely unmentioned. See Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1359-61 (2008). Rather than leave judgments about how to balance these risks to women, Mississippi has decided to make the decision for itself, banning abortions after 15 weeks on the ground that doing so is in the psychological best interests of the “maternal patient.” Miss. H.B. 1510 § 1(2)(b)(ii).

There is a second, even more fundamental, sex-role assumption underlying HB 1510. As the Court in
Virginia recounted, it was commonplace for nineteenth-century doctors to argue that women who violated sex roles (e.g., by pursuing higher education) risked jeopardizing their reproductive physiology. See Virginia, 518 U.S. at 536-37 & n.9. The physicians in Storer’s campaign repeatedly warned of the litany of health harms that would attend a woman’s deviation from her reproductive destiny. See supra Part II.A. The reasoning Mississippi offers for banning abortion after 15 weeks—to protect the health of the “maternal patient,” Miss. H.B. 1510 § 1(2)(b)(ii), (iii), echoes the sex-role assumptions of the nineteenth-century anti-abortion campaign: a pregnant woman’s “health” will suffer if she deviates from her natural maternal role. But whatever health risks may be associated with abortion (on one hand) and bearing children in Mississippi (on the other), the choice of whether to assume those risks and how to weigh them belongs to women and not the State.

Moreover, when Mississippi claims that abortion in the second trimester is more dangerous than childbirth, id. § 1(2)(b)(iii), it appears to be making an empirical claim. In fact, Mississippi is appealing to the traditional sex-role assumption that a woman will suffer if she chooses to avoid her natural maternal role. If its claim were genuinely based in science, the State would address the scientific finding that childbirth is many times more dangerous than abortion—as this Court and others have recognized. See Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292, 2315 (2016) (observing that “[n]ationwide, childbirth is 14 times more likely than abortion to result in death”); Siegel, Why Restrict Abortion?, supra (manuscript at 49-50 & n.259) (describing Judge
Richard Posner and others criticizing an anti-abortion expert for persistently, and falsely, claiming that abortion is more dangerous than pregnancy). See generally Elizabeth G. Raymond & David A. Grimes, The Comparative Safety of Legal Induced Abortion and Childbirth in the United States, 119 OBSTETRICS & GYNECOLOGY 215 (2012) (concluding that the risk of death associated with childbirth is approximately 14 times higher than with abortion). See infra Part III.

While the justifications undergirding HB 1510 may superficially be couched in the language of health and science, even a cursory examination of the relevant historical context reveals that the State’s justifications are just re-packaged versions of the same sex-role stereotypes used by nineteenth-century anti-abortion advocates. Thus, HB 1510 carries forth a long and unfortunate tradition of state-sponsored paternalism, in which the coercive control of a woman is justified as an act of benign solicitude. See Frontiero, 411 U.S. at 684 (explaining that traditional forms of sex discrimination were “rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women not on a pedestal, but in a cage”).

To be clear, Mississippi may surely protect the health of women and the next generation, but in seeking to achieve these important ends, the State may “not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.” Virginia, 518 U.S. at 533. Those are precisely the assumptions about women on which HB 1510 relies in presenting coercion as protection. These well-worn sex-role stereotypes may be archaic, but they are anything but quaint: when these sex-role
stereotypes are enforced through a law restricting abortion, they can deprive a woman of her autonomy, her job, her health, and even her life.

III. RELIANCE ON IMPERMISSIBLE SEX STEREOTYPES LED MISSISSIPPI TO FOREGO LESS DISCRIMINATORY MEANS TO ACHIEVE ITS GOALS OF PROTECTING WOMEN'S HEALTH AND FETAL LIFE

Mississippi employed sex-discriminatory means to achieve its goals of protecting women’s health and protecting fetal life. *Virginia* requires the State to demonstrate that its choice of sex-discriminatory means is “substantially related to the achievement of” important government ends, by advancing an “exceedingly persuasive justification” that does not rely on sex-role stereotypes. *See Virginia*, 518 U.S. at 533-34. It cannot make that showing here.

Mississippi could have employed *many* policy means to reduce abortion and protect the health of women and children. Relying on available federal funds, it could have provided appropriate and effective sex education and expanded access to contraception; it could have expanded access to health insurance and provided assistance to needy families. But instead, Mississippi has restricted abortion access.

In its belief that banning abortions at 15 weeks would protect both the fetus *and* the health of the pregnant woman—a belief that is itself rooted in stereotypes about women’s roles as child bearers before all else—Mississippi pushed women who seek to end pregnancies into harm’s way by compelling
pregnancy and childbirth, when the State could have pursued its ends by alternate, less discriminatory means. The State singled out women who sought to end pregnancy instead of pursuing its ends by aiding those who want to avoid parenthood and supporting those who want to raise children.

Because Mississippi so heavily relied on sex-role stereotypes to enact a law that singled out and harmed women, the State has not demonstrated that its ban on abortion after 15 weeks is “substantially related” to important ends. Instead, the State’s reliance on sex-role stereotypes led it to protect through coercion, which in turn “perpetuate[s] the legal, social, and economic inferiority of women.” *Id.*

**A. Abortion Restrictions Like HB 1510 Do Not Protect Women But Rather Expose Them to Harm**

Mississippi seeks to protect women and fetal life by banning abortion after 15 weeks. But the ban it has adopted to achieve those ends actually jeopardizes, rather than protects, the health of women.

Not only does HB 1510 take from women control over their life decisions, as nineteenth-century doctors preached, it subjects women to myriad health harms in a State where the social safety net makes grossly inadequate provision for women or children. See Michele Goodwin, *Banning Abortion Doesn’t Protect Women’s Health*, N.Y. TIMES (July 9, 2021), https://www.nytimes.com/2021/07/09/opinion/roe-abortion-supreme-court.html.

The risks of compelled pregnancy are considerable, in a state where the maternal mortality rate is

Pregnancy in Mississippi presents particular risks for Black women, who accounted for “nearly 80 percent of pregnancy-related cardiac deaths” between 2013 and 2016. Id. at 16. The pregnancy-related mortality rate for Black women was nearly three times the rate for white women. Id. at 12 (ranging from 51.9 to 61.4 deaths per 100,000 live births compared to 18.9 to 36.7 deaths per 100,000 live births).

Forcing pregnancy and childbirth onto women against their will places their health and lives at risk. HB 1510, therefore, does not promote—let alone substantially relate to—Mississippi’s claimed goal of promoting women’s health.

B. Mississippi Repeatedly Rejected Nondiscriminatory Alternatives That Would Protect the Health of Women and Families

Mississippi had many policy alternatives for protecting the health of women and families. But in considering the many options before it, the State has consistently rejected noncoercive opportunities to improve the health of mothers and infants, even declining federal monies available to support these ends. The consequences are especially dire for Black mothers and infants. Despite the increased risks they face in Mississippi, the State has repeatedly declined
to enact policies that could improve their health and wellbeing.


Yet ensuring access to health care is largely dependent on income and insurance coverage, and Medicaid expansion under the Affordable Care Act (ACA) has been shown to reliably improve insurance access. Jamie R. Daw et al., *Medicaid Expansion Improved Perinatal Insurance Continuity for Low-Income Women*, 39 HEALTH AFFS. 1531 (Sept. 2020). Increasing access to Medicaid could not only reduce maternal and infant deaths, but could also give a pregnant person lacking alternative health insurance the security to continue an unplanned pregnancy and to cope with delivery and postpartum care.

Mississippi, however, has refused to expand Medicaid under the ACA, compromising health care access for under-resourced Mississippians. Sarah Varney, *How Obamacare Went South in Mississippi*, THE ATLANTIC (Nov. 4, 2014), https://www.theatlantic.com/health/archive/2014/11/how-obamacare-went-
south-in-mississippi/382313/. This policy decision left an estimated 138,000 otherwise eligible people without health coverage and deprived the state of an estimated $1.2 billion in federal funds.

Ironically, after signing HB 1510, then-Governor Phil Bryant announced that he was “committed to making Mississippi the safest place in America for an unborn child, and this bill will help us achieve that goal.” Jenny Gathright, Mississippi Governor Signs Nation’s Toughest Abortion Ban into Law, NAT’L PUB. RADIO (Mar. 19, 2018), https://www.npr.org/sections/thetwo-way/2018/03/19/595045249/mississippi-governor-signs-nations-toughest-abortion-ban-into-law. But, in reality, Mississippi’s refusal to accept federal funding to provide health care for its residents directly contributes to its startlingly high infant and maternal mortality rates, especially in communities of color.11

2. Lack of financial resources is among the most common reasons that women provide for ending a pregnancy. See M. Antonia Biggs et al., Understanding Why Women Seek Abortions in the US, 13 BMC WOMEN’S HEALTH 29 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3729671.

The Temporary Assistance for Needy Families (TANF) program, which provides grants to support low-income families with children, enables Mississippi to channel

---

11 In 2018, the State ranked worst in the nation for infant mortality, with a rate of 8.43 infant deaths per 1,000 live births. MISS. STATE DEPT OF HEALTH, INFANT MORTALITY REPORT 1 (2019), https://msdh.ms.gov/msdhsite_static/resources/8431.pdf. Black infants constitute most infant deaths in Mississippi and are almost twice as likely to die as white infants. Id. at 8.
federal monies to its low-income residents. Participating in TANF offers a clear, noncoercive means of empowering people to choose to continue pregnancy with resources to support dependent family members.

Remarkably, despite this opportunity to support at least some women in choosing to continue pregnancies and to reduce the nation’s highest child poverty rate, in 2019, Mississippi spent only about five percent of its TANF funds on direct assistance to families. Ali Safawi, Mississippi Raises TANF Benefits but More Improvements Needed, Especially in South, CTR. FOR BUDGET & POL’Y PRIORITIES (May 4, 2021), https://www.cbpp.org/blog/mississippi-raises-tanf-benefits-but-more-improvements-needed-especially-in-south. And the number of poor families receiving TANF has declined precipitously: less than 3,000 families received the maximum benefit of $170 per month by 2021, down from 23,700 families in 1999. See Anna Wolfe, Mississippi Found ‘Absurd’ Ways to Spend Welfare on Anything but the Poor. These Bills Would Put More Money into Families’ Pockets, MISS. TODAY (Jan. 29, 2021), https://mississippitoday.org/2021/01/29/mississippi-found-absurd-ways-to-spend-welfare-on-anything-but-the-poor-these-bills-would-put-more-money-into-families-pockets. Until 2021,

---

12 TANF money has also been blatantly wasted in the State. Beginning in 2016, the director of the Mississippi Department of Human Services spearheaded the “largest public embezzlement scheme in state history.” Anna Wolfe, Embattled Welfare Group Paid $5 Million for New USM Volleyball Center, MISS. TODAY (Feb. 27, 2020), https://mississippitoday.org/2020/02/27/welfare-program-paid-5-million-for-new-volleyball-center/. Millions of
Mississippi maintained the lowest TANF benefit levels in the nation, refusing for decades even to adjust for inflation. *Id.*

Moreover, many women who decide to end a pregnancy are poor and low-income mothers who fear that having another child will compromise their ability to provide for the children they already have. Mississippi preserves policies that reinforce those genuine concerns. For instance, the State maintains a family cap, limiting TANF benefits for additional children born into families that receive public assistance. Mississippi’s family cap survives despite evidence that these policies “harm children’s health” and “deepen poverty,” evidence that has prompted their repeal in many states. Teresa Wiltz, *Family Welfare Caps Lose Favor in More States*, PEW STATELINE (May 3, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/05/03/family-welfare-caps-lose-favor-in-more-states.


_______________________________

dollars meant for TANF instead were diverted to “a new volleyball stadium, a horse ranch for a famous athlete, multi-million dollar celebrity speaking engagements, high-tech virtual reality equipment, luxury vehicles, steakhouse dinners and even a speeding ticket.” Wolfe, *Mississippi Found ‘Absurd’ Ways to Spend Welfare on Anything but the Poor*, supra.
For example, instead of using federal monies to implement comprehensive sex education at no cost to the state, Mississippi funded a “Teen Pregnancy Prevention Summit” featuring pamphlets discouraging the use of contraceptives because they supposedly harm girls’ “physical[,] emotional and spiritual well-being.” Andy Kopsa, *Sex Ed Without Condoms? Welcome to Mississippi*, THE ATLANTIC (Mar. 7, 2013), https://www.theatlantic.com/national/archive/2013/03/sex-ed-without-condoms-welcome-to-mississippi/273802; see also Alana Semuels, *Sex Education Stumbles in Mississippi*, L.A. TIMES (Apr. 2, 2014) (recounting a public school sex education curriculum which instructed students to unwrap a piece of chocolate, pass it around the class, and observe how dirty it became to “show that a girl is no longer clean or valuable after she’s had sex”).

The consequences of these policies for women’s and children’s health are severe: Mississippi boasts some of the nation’s highest rates of teen pregnancy, gonorrhea, chlamydia, and syphilis. Sarah Fowler, *Mississippi Has the Highest Rate of this STD, Ranks 3rd for Two Others*, MISS. CLARION LEDGER (Oct. 15, 2019), https://www.clarionledger.com/story/news/local/2019/10/15/gonorrhea-std-rate-mississippi-highest-chlamydia-syphilis-access-to-care-factor/3932140002/. Nevertheless, Mississippi continues to rely on a mode of protecting women’s health and fetal life that is rooted in impermissible sex stereotypes, and does so by restricting access to reproductive health care.
Mississippi objects that Casey’s protections for women’s decision-making “prevent[] States from providing health benefits and protections that they can provide in other contexts.” Pet. Br. 41-42. But Mississippi has a wealth of policy options for reducing the incidence of abortion in the state and protecting women’s health. See Emily Wax-Thibodeaux & Ariana Eunjung Cha, The Mississippi Clinic at the Center of the Fight to End Abortion in America, THE WASH. POST (Aug. 24, 2021) (recounting story of a young woman receiving follow up care after abortion in the state’s only remaining clinic who said “that because Mississippi teaches only abstinence in public schools, no one explained to her how to prevent pregnancy if she had sex”).

In short, Mississippi could provide care and support for individuals who wish: to avoid pregnancy, to bear children who will not languish in poverty, to preserve their own or their children’s health, or to safeguard their ability to provide for existing children. Instead, Mississippi chooses to prevent women from making the most intimate, consequential decisions for themselves and to coerce women into giving birth under dangerous, demeaning conditions.\footnote{For a debate among white and Black Mississippi lawmakers about the women regulated by the State’s abortion restrictions, including remarks by Republican Sen. Joey Fillingane, co-sponsor of HB 1510, see Emily Wagster Pettus, Mississippi Considers Abortion Ban After Fetal Heartbeat, ABC NEWS, (Feb. 5, 2019), https://abcnews.go.com/us/wirestory/misissippi-considers-abortion-ban-fetal-heartbeat-60864978.} HB 1510 thus functions more as a tool of control than as an
expression of care for Mississippi’s women and children. See Pet. App. 46a n.22.

IV. HB 1510 DOES NOT ADVANCE EQUALITY INTERESTS

Increasingly, those who support abortion restrictions take the extraordinary position that laws like HB 1510 actually promote equality under the law by preventing abortion from being used for eugenic purposes. In his separate concurrence in the judgment below, Judge Ho, drawing on a concurrence by Justice Thomas, asserts “that abortion ‘has proved to be a disturbingly effective tool for implementing the discriminatory preferences that undergird eugenics’” and notes that “the current ‘abortion ratio … among black women is nearly 3.5 times the ratio for white women.’” Pet. App. 35a (quoting Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1790-91 (2019) (Thomas, J., concurring)).

Such efforts to link abortion to eugenics ignore the fundamental differences between a state-sponsored program of eugenic regulation designed to control the demographic character of the community and a law protecting an individual’s decision to terminate a pregnancy. In the former, decisional authority rests with the state. In the latter, the state protects the authority of an individual to make reproductive decisions consistent with her individual beliefs and circumstances.

Without acknowledging these differences, abortion opponents insist that, today, Roe and the constitutional law of abortion rights are being used as a tool of eugenic manipulation. There is a certain irony
here: If there is any historical association between abortion law and projects of demographic control, it lies in the nineteenth-century campaign to criminalize abortion itself.

The nineteenth-century campaign unfolded during an era of nativist, anti-immigrant, anti-Catholic feeling. See ERIKA LEE, AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED STATES 42-44 (2019). Storer and others blamed abortion for the differences in birth rate between “native” (i.e., Protestant) women and “foreign” women. See STORER, supra, at 62-63; id. at 64-65 (observing that “abortions are infinitely more frequent among Protestant women than among Catholic [women]”); see also, e.g., William McCollom, Criminal Abortion, TRANSANCTIONS VT. MED. SOC’Y 40, 42 (1865) (“Our own population seem to have a greater aversion to the rearing of families than ... the French, the Irish and the Germans.”); L.C. Butler, The Decadence of the American Race, 77 BOS. MED. & SURGICAL J. 89, 93-94 (Sept. 5, 1867) (comparing Protestant and Catholic doctrine on abortion with attention to the relevant reproductive rates of Protestants and Catholics). Storer tied Protestant families’ declining size to Protestant women exercising reproductive autonomy; he thus sought abortion bans to increase the number of Protestants. He questioned whether “the great territories of the far West, just opening to civilization, and the fertile savannas of the South” would be filled by “our own children, or by those of aliens? This is a question that our own women must answer; upon their loins depends the future destiny of the nation.” STORER, supra, at 85. His words resonated with at least some state lawmakers enacting abortion
restrictions. See L.D. Griswold et al., supra, at 235 (“Shall we permit our broad and fertile prairies to be settled only by the children of aliens?”). Doctors leading the campaign to criminalize abortion sought to wrest control of the reproductive decisions of “our own women” to protect fetal life, to enforce marital roles, and to preserve the demographic character of the nation. Siegel, *Reasoning from the Body*, supra, at 297-300.


But the twentieth century eugenics movement did not focus on abortion as a way to control the population. It turned to laws permitting sterilization of the “feebleminded” and “habitual criminals,” as well as laws criminalizing miscegenation and interracial marriage. *Id.* at 2037. By the mid-twentieth century, policies of reproductive control primarily targeted impoverished communities of color perceived as threats to the public fisc by curtailing individuals’ ability to make decisions about their reproductive lives. *Id.* at 2047.
Mississippi’s own history is instructive. In the 1950s and 1960s, state lawmakers prescribed sterilization as a punishment for nonmarital childbearing. See id. at 2042 (describing 1964 Student Nonviolent Coordinating Committee pamphlet *Genocide in Mississippi*). Civil rights leader Fannie Lou Hamer famously estimated that six in ten Black women who gave birth in Sunflower County Hospital during this period underwent post-partum sterilization without their consent, and often without their knowledge, a practice so common it was colloquially called a “Mississippi appendectomy.” CHANA KAI LEE, FOR FREEDOM’S SAKE: THE LIFE OF FANNIE LOU HAMER 21-22, 80 (1999); REBECCA M. KLUCHIN, FIT TO BE TIED: STERILIZATION AND REPRODUCTIVE RIGHTS IN AMERICA, 1950-1980 at 93-94 (2009). As history makes clear, there is simply no comparison between state policies of reproductive control aimed at limiting birth among marginalized groups and the individual right to make reproductive decisions free from state coercion.

Further, when abortion opponents point to the incidence of abortion among minority communities as evidence that abortion is rife with “eugenic potential,” they ignore the “structural impediments communities of color face in reproductive decisionmaking.” Murray, supra, at 2090-91. For many people of color, “the decision to terminate a pregnancy is shot through with concerns about economic and financial insecurity, limited employment options, diminution of educational opportunities, and lack of access to health care and affordable quality childcare.” Id. at 2090-91. Efforts to associate abortion with eugenics obscure how Mississippi’s own policy choices, by failing to
support families, perpetuate the conditions that lead increasing numbers of poor women and women of color to decide to end their pregnancies. See supra Part III. Rather than link abortion rates to the policy choices that perpetuate poverty, opponents shift blame on to women who make decisions about abortion in a nation that provides scarcely any support for those who conceive, bear, and raise children.

* * *

For a half century, this Court has affirmed that the Equal Protection Clause forbids the State from imposing traditional gender roles. See also Ruth Bader Ginsburg, Sex Equality and the Constitution: The State of the Art, 4 WOMEN'S RTS. L. REP. 143, 143-44 (1978). HB 1510 does just that. It discriminates on the basis of sex, enforcing nineteenth-century sex-role stereotypes that compel a woman to continue pregnancy while the State foregoes alternative nondiscriminatory means to achieve the same ends.

In Casey, the Court explained that a pregnant woman’s “suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture.” Casey, 505 U.S. at 852. Mississippi has banned abortion after 15 weeks to protect the life and health of the fetus and the “maternal patient.” Miss. H.B. 1510 § 1(2)(b)(ii)-(v). The statute addresses a pregnant woman as a mother, but in the same breath, it deprives her of control over whether to become a mother—all while claiming to act in the name of her “physical and psychological” “health.” See id. Mississippi offers no persuasive justification for its
ready embrace of sex-based coercive means to protect life and health when less discriminatory means were available.

At the heart of both the Due Process Clause and the Equal Protection Clause is the individual’s right to be free from state imposition of traditional gender roles. HB 1510 denies that fundamental constitutional guarantee.

**CONCLUSION**

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

ROBERTA A. KAPLAN  
*Counsel of Record*  
RAYMOND P. TOLENTINO  
MARCELLA COBURN  
RACHEL TUCHMAN  
ANNA COLLINS PETERSON  
Kaplan Hecker & Fink LLP  
350 Fifth Avenue, 63rd Floor  
New York, NY 10118  
(212) 763-0883  
rkaplan@kaplanhecker.com

September 20, 2021  
*Counsel for Amici Curiae*
INTRODUCTION: THE RIGHT TO PRIVACY?

From May 2006 until September 2007, I conducted ethnographic fieldwork research in the obstetrics clinic of Alpha Hospital, a large public hospital in Manhattan. After successfully integrating myself into the clinic, I

* Associate Professor of Law and Associate Professor of Anthropology, Boston University. Ph.D., Columbia University Department of Anthropology; J.D., Columbia Law School; B.A., Spelman College. I would like to thank Nicholas P. De Genova, Brinkley Messick, Neni Panourgia, Kendall Thomas, Rayna Rapp, Kris Collins, and Linda McClain for their helpful comments on earlier drafts of this Article. Thanks are also owed to Renée Burgher for excellent research assistance. Finally, I thankfully acknowledge the mothers and mothers-to-be who I encountered in the Alpha obstetrics clinic for sharing their stories with me.

1 This research was made possible by a generous grant from the Wenner-Gren Foundation for Anthropological Research. For an extensive analysis of my research in and of the Alpha obstetrics clinic, see Khiara M. Bridges, REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION (forthcoming 2011) [hereinafter BRIDGES, REPRODUCING RACE]; see also Khiara M. Bridges, Pregnancy, Medicaid, State Regulation, and the Production of Unruly Bodies, 3 NW. J. L. & SOC. POL'Y 62 (2008) [hereinafter Bridges, Unruly Bodies] (exploring from a Foucauldian perspective the enrollment process of the New York State Prenatal Care Assistance Program, a Medicaid program that covers the prenatal care expenses of indigent women); Khiara M. Bridges,
participated in most aspects of its daily life—making my participant-observations from the waiting areas, the receptionists’ intake desk, the nurses’ triage rooms, the physicians’ and midwives’ examination rooms, and the offices of the many categories of professionals who provide medical care and social services to Alpha patients. The overwhelming majority of pregnant patients receiving prenatal care from the Alpha obstetrics clinic are poor, and almost all rely upon Medicaid, specifically the Prenatal Care Assistance Program (“PCAP”),\(^2\) to cover the costs of their prenatal healthcare expenses. Prior to beginning PCAP-subsidized prenatal care at Alpha Hospital, pregnant women are compelled, by law, to be interviewed by a battery of professionals—including nurses, health educators, financial officers, HIV-counselors, and social workers.

I had the opportunity to sit in on a social worker’s consultation with an African American woman, Erica, who was pregnant with her fourth child. I had asked the social worker, Tina, an energetic, though overworked woman, to ask Erica if I could sit in during her consultation. Erica consented and allowed me to tape record her session. I quote her consultation at length:

Tina ("T"): Are you working?
Erica ("E"): No—I’m in college still.
T: How are you supporting yourself?
E: [long pause] How could I forget what it’s called .... Welfare!
[laughs]
T: You receive public assistance?
E: Yes.
T: How much?
E: Um, 354 . . .
T: And does that include what they give you for your rent?
E: Yes. Well, I don’t pay rent.
T: You don’t pay rent?


\(^2\) I also compiled over 120 hours of in-depth interviews with patients, staff, providers, and hospital administrators.

\(^3\) The Prenatal Care Assistance Program ("PCAP") is a special program within the New York State Medicaid program that provides comprehensive prenatal care services to otherwise uninsured or underinsured women. See N.Y. STATE DEP’T OF HEALTH, PREGNANT CARE ASSISTANCE PROGRAM (PCAP): MEDICAID POLICY GUIDELINES MANUAL (2007), available at http://www.emedny.org/ProviderManuals/Prenatal/PDFS/Prenatal-Policy_Section.pdf [hereinafter N.Y. STATE DEP’T OF HEALTH, PCAP POLICY MANUAL]. PCAP is an extension of the Medicaid program insofar as it is available to undocumented immigrant women as well as women who earn up to 200% of the federal poverty level—two categories of women who would otherwise be ineligible for Medicaid. Id. at 5. PCAP coverage terminates eight weeks after the woman gives birth. Id.
E: I live in a shelter.
T: What shelter do you live in?
E: Beta Houses.
T: Who’s your caseworker?
E: Ms. C.
T: Do you have the number?
E: Yeah—I have the number: 1-212-555-1212. She has an extension: 1212.
T: And how long have you been there?
E: Almost four months.
T: And can you tell me what the circumstances were that put you in shelter?
E: Domestic violence.
T: And how long did the domestic violence last?
E: Two months.
T: So, you were in a domestic violence relationship for about two months, and then you moved to a shelter.
E: Uh-huh.
T: And how long was your relationship?
E: It wasn’t really a relationship. It was, like, I would say—three months.
T: I’m sorry?
E: Three months—it was, like, a three-month relationship.
T: It was a three-month relationship. And do you have a police report and an order of protection?
E: The police report, yes. Not the order of protection—still didn’t get it.
T: Would you like to talk to someone about the domestic violence?
E: No . . . .
T: Who’s the father of the baby?
E: Nathanial Thompson.
T: Is the father of the baby living with you?
E: No.
T: How long have you been in a relationship with the father?
E: 10 years.
T: The father of the baby?
E: Uh-huh. Same father as all the rest of them.
T: How old is he?
E: How old? 34.
T: Can you identify the father?
E: Yes . . . .
T: What’s his name?
E: Nathanial Thompson.
T: And how would you describe your relationship with the father?
E: Fine—now.
T: "Fine now"?
E: Uh-huh.
T: Does he intend to help when the baby comes?
E: Yes—he’s my fiancé. I just didn’t get my ring yet. He better hurry up.
T: Is he working?
E: Yes. No, he doesn’t work. Sorry. He’s in college.
T: How does he support himself?
E: I know that he’s on public assistance, but I don’t know what he gets or anything like that.
T: But, he’s going to able to support you and your child?
E: Yes, he’s going to get a job by the time—he’s about to be done with college.
T: You feel that when he’s done with school, he’s going to be financially able to support the child?
E: He’s going to be making 43,000 [dollars] a year.
T: You know that already?
E: Yes. His job is already set up.
T: What does he do?
E: He’s a computer technician. I don’t know how he does it. I hate computers.
T: You are in a better situation than a lot of our patients.
E: I just have to get up out this dag-gone shelter. Then, I’ll be fine.4

What is remarkable about this exchange is that Erica was led into a conversation about a romantic relationship that tragically involved severe, homelessness-inducing violence, the healthiness of her relationship with the father of her children, her earnings capacity, the earnings capacity of the father of her children, and any previous contact that she had had with the welfare state (in addition to answering questions about her history, if any, with tobacco and alcohol products, controlled substances, mental illness, and a host of other issues that I have not included in this excerpted portion of the interview) because she was pregnant and had presented herself to a public hospital with the hope of receiving state-assisted prenatal care. It is important to observe at the outset that this is an intensely personal, painfully intimate conversation that privately-insured pregnant women can avoid enduring.

I attempt to accomplish two goals in this Article. The first goal is to argue that PCAP’s compelled consultations function as a gross and substantial intrusion by the government into poor, pregnant women’s private lives.5

---

4 Interview with Erica (July 3, 2007) (on file with author). I return to a discussion of this particular interview with Erica infra Part IV.
5 This is an argument that I have made elsewhere. See generally Bridges, Unruly Bodies, supra note 1.
Indeed, the families that these women seek to create or expand are made “public” inasmuch as the state insists upon expunging the highly-idealized line that is thought to protect the “private family” from state involvement in order to maintain a supervisory, regulatory, and occasionally punitive presence in poor women’s families. The second goal is to investigate why it is that indigent women and families fail to enjoy a presumption of privacy with regard to matters that have been imagined, within political and popular discourse, as private. Poor women’s and poor families’ “privacy,” if it was valued, could prevent the state from accomplishing the wholesale occupation of their lives. This Article attempts to arrive at an explanation for the public nature of indigent women’s and families’ would-be private lives.

One prominent line of feminist thought, best exemplified in the work of Martha Fineman, asserts that the private family becomes “public” whenever the husband/father is absent. With respect to unmarried mothers who are poor, the absence of the male figure makes visible the mother/caretaker’s dependency insofar as she is compelled to call upon the state, rather than the husband/father, for support. With respect to single mothers, specifically divorced mothers, who are not poor, Fineman observes that these women have limitations placed on their physical movement absent the state or their ex-husbands’ consent. She also argues that the “elusive and ill-defined ‘best interest of the child’” standard that determines which parent will be granted

6 In her exposition on the failure of the right to privacy to protect the private lives of some mothers from government intervention, Fineman explains:

[t]here is a presumption with constitutional dimensions that natural families have a right to be free of state intervention and control . . . . These presumptions that cushion traditional families are eroded when single mothers make similar or parallel demands. Single mother families fall outside of prevailing ideological constructs about what (or who) constitutes a complete or real family—they may be thought of as “public” families, not entitled to privacy.


For Fineman, “public families” are families in which the father is absent; thus, the “public family,” as Fineman defines it, is the family headed by an unmarried mother. She notes, “the prevailing presumption for these families is that the absence of a father creates a void, one that is appropriately filled by the state—by the bureaucrats who populate the many institutions, including legal ones, that deal with single mothers.” Id. at 178. The failure of the “public family” to conform to hegemonic constructions of the heteronormative family—that is, the failure of the “public family” to consist of the mother-father-child triad—results in its exposure to interference, surveillance, and regulation by the state. Id. at 177–80.

7 Id. at 161–66 (describing the “[i]nevitable and [d]erivative [d]ependencies” created by the fact that children, the elderly, the sick, and the disabled must be cared for by someone, noting that “[t]he very process of assuming caretaking responsibilities creates dependency in the caretaker—she needs some social structure to provide the means to care for others,” and arguing that women are problematized when they have no wage earner to support them and they must “go begging to the state”). Id. at 161, 163, 165.

8 Id. at 178 (“Divorced mothers . . . . are typically precluded from leaving the state with their children without paternal or state consent. They can be threatened with the loss of their children in modification proceedings post-divorce . . . .”).
physical and legal custody of children subjects divorced mothers to suspicion, supervision, and punishment. The inclusion of non-poor families within Fineman's definition of the "public family" is an important move; indeed, one of the primary components of Fineman's intervention is to demonstrate that families of all socioeconomic statuses are made "public" whenever the male figure is not present. However, this powerful analysis may miss the phenomenon that a family can still be "public" when a husband/father is present; this is so when the family must rely on certain public services and forms of state assistance.

While many Alpha patients are single or do not otherwise have a husband/father present in their families, many other Alpha patients are, in fact, married or within stable relationships with the fathers of their children. In light of this, the argument that the absence of the male figure is the condition of possibility for state intervention in women's lives must be adapted somewhat: it is not the absence of the male that precipitates the dissolution of Alpha patients' privacy rights, but rather the receipt or intended receipt of government aid. That is, it is poor women's and families' poverty that subjects them to the suspension of their rights to privacy. The critical insight

---

9 Id.
10 See Martha L.A. Fineman, Masking Dependency: The Political Role of Family Rhetoric, 81 VA. L. REV. 2181, 2197 (1995) [hereinafter Fineman, Masking Dependency] ("What have [mothers on public assistance] done to 'deserve' such harsh words and punitive measures? In large part it is the stigma of being poor. But more than poverty is at issue. The broad general target is unmarried women with children, and the attacks on these mothers are the opening salvo of a reactionary plan to discipline women who do not conform to the roles they are assigned within the traditional scheme of the family.") (footnote omitted).
11 Other scholars have focused on class as a crucial factor animating the delivery of social services and the construction of family law, more generally. See, e.g., Barbara J. Nelson, The Origins of the Two-Channel Welfare State: Workmen's Compensation and Mothers' Aid, in WOMEN, THE STATE, AND WELFARE 123, 133, 145 (Linda Gordon ed., 1990) (comparing the development of welfare programs that were designed to benefit male wage workers (i.e., Worker's Compensation) with welfare programs that were designed to benefit impoverished females (i.e., Mother's Aid) and demonstrating that while the former program was "judicial, public, and routinized in origin," the latter "was characterized by "moralistic, diffuse decision criteria" and was "cumbersome and repeatedly intrusive"); Jean Koh Peters, Three Systems of Family Law: A Preliminary Historical Investigation, in REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 545 app. at 546 (3d ed. 2007) (identifying three systems of family law, which include one designed for "non-poor white people," which primarily functioned to protect family wealth; one designed for "poor white families," which was highly interventionist and frequently removed "children from their homes based primarily on family poverty"; and one designed for "black slaves," who "were not allowed to form as families in the eyes of the law") (emphasis omitted); Jill Elaine Haysday, Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations, 90 GEO. L.J. 299, 357 (2002) ("The law of parenthood, as it is authoritatively understood, remains deferential to parental judgment and strongly predisposed against intervention. But it continues to be the case that the law takes the provision of financial support through certain government programs associated with failed fatherhood and dependency as grounds for subjecting entire families to rules and norms that are interventionist, instrumental, and wholly at odds with those conventionally identified with the law of parental relations."); Jacobus tenBroek, California's Dual System of Family Law: Its Origin,
offered by the present analysis is that the reliance on the welfare state (for medical services or otherwise) makes "public" even the family that has managed to fulfill heteronormative ideals. Thus, the "public family," as I use the term, is understood as a family that receives public assistance in the form of Medicaid and whose receipt of public assistance makes possible the violation or disappearance of privacy and parental rights that was insightfully observed and powerfully criticized by Fineman.

The apparent evanescence by legal fiat of poor women’s privacy rights in the Alpha obstetrics clinic allows for an entry into an examination of the right to privacy, more generally. What is the nature of the present right to privacy? Is the right to privacy possessed by poor women in “public families” the same as that possessed by non-poor women? Is it accurate to even call that which is possessed by poor women in “public families” a privacy right?

It ought to be noted at the outset that the language of “privacy” has fallen out of favor in recent years. While jurists invoked “privacy”—and the right to it—throughout the series of cases that articulated the constitutional status of the state’s obligation of noninterference in individuals’ and families’ lives with regard to matters pertaining to the family, sex, and procreation, the Court more recently has shifted to the language of “liberty” when speaking of the same matters. Moreover, even during its heyday as a jurisprudential concept, “privacy,” as the basis upon which to base a funda-

---

*Development, and Present Status, 16 STAN. L. REV. 257, 257–58 (1963–64) (describing California’s private and public system of family law, the former being “civil, nonpolitical, and less penal” and the latter being “heavily political and measurably penal”). The present Article examines the phenomenon observed by these scholars in the context of the delivery of medical services.”

12 See, e.g., Roe v. Wade, 410 U.S. 113, 152–53 (1973) (noting that while “[t]he Constitution does not explicitly mention any right of privacy[,] . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution” and holding that the right of privacy protects a woman’s decision to terminate her pregnancy); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (holding that the state was prohibited from banning the sale of contraceptives to unmarried persons and arguing that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child”); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (holding that the state was prohibited from banning the sale of contraceptives to married persons and arguing that the Court was “dealing with a right of privacy older than the Bill of Rights”).

13 See Lawrence v. Texas, 539 U.S. 558, 567 (2003) (holding that “[t]he liberty protected by the Constitution allows homosexual persons the right to” express their sexuality via “intimate conduct with another person”) (emphasis added); Planned Parenthood v. Casey, 505 U.S. 833, 857, 869 (1992) (noting “the scope of recognized protection accorded to the liberty relating to intimate relationships, the family, and decisions about whether to beget or bear a child” and arguing that “it follows that it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy”) (emphasis added). Indeed, the dissent in Gonzales v. Carhart, in which the Court upheld a federal ban on a specific method of performing second and third trimester abortions, appeared to renounce the utility of the rhetoric of privacy when articulating what is at stake in the right to an abortion: “[t]hus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a
mental right, had many detractors—including among them liberals and radicals who otherwise may have been supportive of the liberties and/or activities protected by the privacy right. However, "privacy" may continue to be a valuable concept. For example, some scholars have argued that privacy, despite its limitations, is foundational to the creation of moral personhood and identity. Linda McClain, for one, has explored privacy as the condition of possibility for the cultivation of the self. She writes that "privacy affords . . . the literal and metaphorical space or opportunity for self-development or self-constitution, as well as for revision of the self." These "goods of privacy," for McClain, sustain the concept against its detractors—critics who blame it for both the underparticipation of women in society as well as for the government's refusal to act affirmatively to help individuals pursue the good life.


14 See, e.g., Nadine Taub & Elizabeth M. Schneider, Women's Subordination and the Role of Law, in POLITICS OF LAW: A PROGRESSIVE CRITIQUE 328, 331–35 (David Katryns ed., 3d ed. 1998) (arguing that state noninterference in the "private" sphere facilitates the subordination of women); Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 YALE L.J. 1281, 1311 (1991) (criticizing the right to privacy as a foundation for reproductive rights and arguing that it obfuscates the violence and disenfranchisement that makes motherhood a status to be avoided for many women); Reva B. Siegel, 'The Rule of Love': Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2158, 2161–70, 2200–05 (1996) (documenting how "privacy talk was deployed in the domestic violence context to enforce and preserve authority relations between man and wife" and noting similar discourses of privacy in interspousal tort immunity laws and in the controversy surrounding the civil remedies available under the Violence Against Women Act).

15 See generally Anita L. Allen, Coercing Privacy, 40 WM. & MARY L. REV. 723, 755 (1999); see generally ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY (1988) [hereinafter ALLEN, UNEASY ACCESS] (examining the moral, philosophical, and legal implications of privacy-related issues for American women).


17 McClain, Reconstructive Tasks, supra note 16, at 772.

18 Id. at 762. For other defenses of the concept of privacy, see Annette Ruth Appell, Virtual Mothers and the Meaning of Parenthood, 34 U. MICH. J.L. REFORM 683, 759 (2001) [hereinafter Appell, Virtual Mothers] (arguing that critics of privacy take it for granted, "overlooking the fact that many families are already very public and struggle against state oversight and control that is often uninvited and unhelpful" and noting that "[t]hese families are more public because they are poor or otherwise do not meet dominant norms—norms that frequently privilege White, middle class, married, and heterosexual persons"); Caitlin E. Borgmann, Abortion, the Undue Burden Standard, and the Evisceration of Women's Privacy, 16 WM. & MARY J. WOMEN & L. 291, 324–25 (2010) (noting a correlation between the Court's rejection of the language of "privacy" when speaking about women's right to terminate an unwanted pregnancy and its recent practice of upholding abortion regulations, such as ultrasound viewing laws, that burden the woman's abortion decision without directly preventing the abortion altogether); Naomi R. Cahn, Models of Family Privacy, 67 GEO. WASH. L. REV. 1225, 1227 (1999) (arguing that "family privacy" continues to be a valid concept); Michele Estrin Gilman, Welfare, Privacy, and Feminism, 39 U. BALT. L.F. 1, 18-19 (2008) ("[I]t is not clear that reproductive rights can be defended without some conception of privacy. Privacy allows women
Moreover, the Court’s decision in *Lawrence v. Texas*, striking down a Texas law that criminalized same-sex sodomy, suggests that the rhetoric of privacy has not been retired to the jurisprudential graveyard, but rather persists as a useful way of describing the locations where the government ought not to tread and the activities that it ought not to regulate. While the majority opinion does not ground its decision to strike down the Texas sodomy law at issue in a “right to privacy”—indeed, the Court only mentions the “right to privacy” or the “right of privacy” when it looks to *Griswold* and *Eisenstadt* for their precedential value—the language of privacy is nevertheless abundant in the opinion.

Finally, while the “right to privacy” has been used to describe individuals’ and families’ interests in being free from government intervention in matters pertaining to the family, sex, and procreation, it is also used to refer to individuals’ interest in keeping certain information to themselves—even when the information does not necessarily pertain to the family, sex, and procreation. The language of “informational privacy” has not fallen out of favor in the way that “privacy” has fallen out of favor when it is used in reference to state noninterference in matters relating to family, sex, and procreation, etc. As will be described in Part IV, the right to privacy of poor, pregnant women seeking PCAP-subsidized prenatal care is abridged not only in the sense that the government intervenes in matters pertaining to their families, but also in the sense that they lose the ability to keep certain private information to themselves. Accordingly, the “right to privacy” is doubly implicated by the interventions mandated by the PCAP mechanism, making it even more appropriate to speak about the invasions produced by

---


20 The Court based its decision to strike down the law on its determination that the law violated gay persons’ “right to liberty under the Due Process Clause.” *Id.* at 578.

21 *Id.* at 564–65.

22 See, e.g., *Id.* at 567 (noting that the regulation at issue touches upon “private human conduct . . . in the most private of places”); *Id.* at 569–70 (observing that the “private acts” prohibited by the statute occur “in private” due to “the very private nature of the conduct”); *Id.* at 578 (concluding that persons affected by the statute “are entitled to respect for their private lives” and arguing that “[t]he State cannot demean their existence or control their destiny by making their private sexual conduct a crime”).

23 See Gilman, *supra* note 18, at 5 (noting that “[i]nformational privacy concerns the interest individuals have in controlling their personal data and limiting access to such information by others” and arguing that the receipt of government assistance in the form of TANF limits poor women’s informational privacy).

24 See *Id.* at 1 (noting that due to recent developments in the form of anti-terrorism efforts, health care reform, and “internet consumerism,” privacy—in the form of informational privacy—has been a hot topic).
the PCAP apparatus as violations of poor women’s and poor families’ right to privacy.

The intent of this Article is not to argue that privacy is a useful vocabulary—normatively or descriptively—for all women. However, for the marginalized, indigent women who must turn to the state for assistance if they are to achieve healthy pregnancies and infants, privacy is a concept of great significance; indeed, the devastating absence of privacy may be that which distinguishes their experiences with the state from their monied counterparts. As Dorothy Roberts instructively observes, privacy, when respected, stands as an important limitation on state power—preventing a totalitarian occupation of individuals’ lives. 25 This demarcation of legitimate and illegitimate spaces for governmental power is especially important for poor women and women of color, the “private spheres” of whom the state (and, during chattel slavery, other private individuals) has treated as legitimate sites of regulation. 26 Because of the vulnerability that poor women experience as a direct result of the lack of privacy, I, too, am unwilling to “toss out the baby . . . with the bathwater.” 27 This Article, then, explores poor mothers’ and families’ experiences without privacy—whether it is understood as a freestanding right or, alternatively, a subset of a liberty interest.

The exploration proceeds as follows: Part I gives a detailed description of the requirements that poor, pregnant women must satisfy and the information that they must share in order to enroll in New York State’s Prenatal Care Assistance Program and to receive state subsidized prenatal health care. A

---

25 See Roberts, Punishing Drug Addicts, supra note 18, at 1469–71 (contending that privacy is a useful concept for defending the reproductive rights of poor women of color).

26 See id. at 1470–71 (“Women of color . . . often experience the family as the site of solace and resistance against racial oppression. For many women of color, the immediate concern in the area of reproductive rights is not abuse in the private sphere, but abuse of government power.”); see also Appell, Virtual Mothers, supra note 18, at 765–79 (arguing that poor families of color can benefit from more, not less, privacy); Cahn, supra note 18, at 1240 (noting the “importance of privacy to poor families, who are generally subject to intrusive governmental intervention”); Gilman, supra note 18, at 20 (observing that, recently, the state has moved to privatize poverty while simultaneously denying poor women privacy); McClain, Reconstructive Tasks, supra note 16, at 770–71 (arguing that privacy provides the stuff that distinguishes experiences of freedom from experiences of unfreedom and noting that while experiences of unfreedom—specifically, in its iteration as chattel slavery in the U.S.—are marked by the pornographic display of bodies, rape, forced reproduction, and the like, privacy provides seclusion, restricted access, and secrecy).

27 Allen, Uneasy Access, supra note 15, at 71 (remaining committed to the concept of privacy). However, I, too, believe that a more robust conception of privacy—that is, privacy understood as an affirmative duty of government—would better protect poor women and women of color than would privacy understood as a negative right. See Roberts, Punishing Drug Addicts, supra note 18, at 1479 (arguing in favor of a revamped conception of privacy that “includes not only the negative proscription against government coercion, but also the affirmative duty of government to protect the individual’s personhood from degradation and to facilitate the processes of choice and self-determination” and clarifying that “[t]his approach shifts the focus of privacy theory from state nonintervention to an affirmative guarantee of personhood and autonomy”).
brief overview of other state Medicaid laws with similar requirements is also given. This Part argues that poor, pregnant women’s privacy is violated when they are forced to divulge intimate details about their lives—details that far exceed the purview of their medical care. Part II continues with a brief history of the right to privacy, tracing its history as a right that protected the family entity from state interference to a right that protected the individual from state power. This Part makes the argument that while the right to privacy, in its contemporary form, is properly understood as an individual-inhering right or liberty, specters of its entity-inhering past nevertheless endure. That is, entity privacy may continue to be a relevant concept in modern family law.

Part III then poses the question: if entity privacy is not a mere anachronism, but rather remains a functional, effective concept and practice, how does one explain the violation of poor families’ entity privacy that is required by PCAP and other similar Medicaid laws? This Part argues that entity privacy fails to protect poor families from state intervention, interference, and regulation not because they fail to conform to heteronormative constructions of the family; indeed, many poor families consist of the mother-father-child triad. Rather, entity privacy offers no protection to poor families because wealth is the condition of possibility for the exercise and enjoyment of the right. Moreover, if entity privacy is justified on the grounds that our liberal democratic order depends upon families producing future citizens who, having not been standardized by the state, can stand in opposition to state power, then poor families are thought not to be capable of producing competent citizens; indeed, the parents that helm these families have failed to exhibit one of the most valuable characteristics of the citizen within capitalism—economic independence. State intervention in the family entity is, therefore, justified.

Part IV continues the exploration by conceptualizing the invasion mandated by PCAP as one that is not a violation of poor families’ entity privacy, but rather is a violation of the poor, pregnant woman’s individual right to privacy. This Part observes that the state is justified in nullifying the rights of the individual—specifically parental rights—when it acts to protect the child. However, the individual women whose rights are nullified by the PCAP mechanism have not demonstrated that their children need protecting; indeed, the state knows nothing about the women as parents except that they are or will be indigent parents. The assumption, then, is that parenting by the poor will be poor parenting. This Part concludes that the failure to thrive within capitalism is thought to index a moral and intellectual laxity that could translate into parental neglect or abuse; this is a laxity, moreover, that justifies the state’s preemptive nullification of individual rights in the purported service of child protection.

Part V explores the argument that the reason why the state may invade the privacy of poor women and poor families is because they have bartered away their right to privacy in exchange for a welfare benefit. This Part dis-
putes that poor women and poor families enjoy a right to privacy that may be given away. Instead, it argues that it may accord better with poor women's and families' actual experiences to describe them as never having a right to privacy about which to speak. This is because rights within the present economic system are always already premised on wealth. A brief conclusion follows.

I. THE NEW YORK STATE PRENATAL CARE ASSISTANCE PROGRAM

In the state of New York, uninsured pregnant women with incomes falling below 200% of the federal poverty line are eligible to enroll in PCAP, a Medicaid program that pays the prenatal healthcare expenses of women who qualify. While PCAP is a New York State Medicaid program, it differs from standard New York State Medicaid insurance in terms of the duration of coverage offered, as well as its eligibility requirements. A pregnant woman seeking PCAP coverage is "presumed eligible upon a preliminary showing . . . that her household income falls below [the requisite] poverty level"—much unlike standard Medicaid coverage, which requires that the application be verified before coverage can begin. Further, while "Medicaid applicants are required to exhaust certain household resources for eligibility, . . . PCAP applicants need only satisfy the income requirement." Moreover, in New York, undocumented immigrants are eligible for PCAP coverage, although they remain ineligible for standard Medicaid coverage.

The process of enrolling in PCAP is quite onerous. Women are, by legislative mandate, obliged to divulge a broad swath of information about their lives—what I call an "informational canvassing"—prior to even seeing an obstetrician, nurse midwife, or registered nurse for the initial prenatal examination. It is true that much of the information gathered as part of the

28 See N.Y. State Dep't of Health, PCAP Policy Manual, supra note 3, at 5.
29 See id.
31 Id.
32 N.Y. State Dep't of Health, Documentation Guide, Immigrant Eligibility for Health Coverage in New York State 5 (2004), available at http://www.nyhealth.gov/health_care/medicaid/publications/docs/gis/04ma003att1.pdf (stating that "undocumented pregnant women continue to be eligible for PCAP" although they are otherwise ineligible for any treatment other than emergency medical services).
33 The public advocate for New York City described the requirement that women submit to an informational canvassing prior to receiving an examination from a healthcare provider as a "barrier" to prenatal care. See Office of the N.Y.C. Pub. Advocate, Hurdles to a Healthy Baby: Pregnant Women Face Barriers to Prenatal Care at City Health Centers 13 (May 2007), available at http://publicadvocategotbaum.com/pages/reports.html (select from "2007 Reports"). She writes:

Requiring multiple visits prior to the first prenatal care appointment not only delays entry into prenatal care for pregnant women but also may discourage women already struggling to juggle the demands of work and/or childcare or overcome other barriers to appropriate health care, such as immigration, language, or transportation issues, or stigmatized behavioral issues. While social workers, HIV

731
PCAP enrollment process is information that one would expect all pregnant women—privately-insured and publicly-insured alike—to share upon beginning prenatal care. However, much of the information gathered from PCAP-insured women is not quite typical (when the wealthier, privately-insured woman is taken as the norm), being culled only from the woman whose pregnancy intersects with her indigence and need for public assistance.

The informational canvassing of indigent women is a product of PCAP providers’ statutory obligation to have women consult with a nurse, health educator, HIV counselor, Medicaid financial officer, nutritionist, and social worker. Below, I describe the nutritional risk assessment and the psychosocial assessment in greater detail.

Before beginning that discussion, however, it is relevant to ask at the outset whether the informational canvassing of indigent pregnant women is a product of pregnant women’s indigence rather than a product of their pregnancy. Some scholars have argued that pregnancy itself invites outside intrusion and control into women’s lives. Some counselors and nutritionists provide valuable services, meeting with them should not be a precondition for prenatal care.

Id.

34 I have described this canvassing, as well as women’s experiences with it, elsewhere. Bridges, Unruly Bodies, supra note 1, at 70–86. Interestingly, the informational canvassing and concomitant invasion of privacy required during the PCAP enrollment process parallels the invasions of privacy that poor women can expect upon the receipt of welfare in the form of cash benefits. Gilman, supra note 18, at 2 ("[F]ormal welfare requirements overlay routinized surveillance of poor women, who must comply with extreme verification requirements to establish eligibility, travel to scattered offices to procure needed approvals, reappear in person at welfare offices at regular intervals to prove their ongoing eligibility and answer intrusive questions about their child rearing and intimate relationships.").

35 The statute provides:

The PCAP provider shall establish and implement a program of nutrition screening and counseling which includes . . . individual risk assessment including screening for specific nutritional risk conditions at the initial prenatal care visit and continuing reassessment as needed; . . . [and] documentation of nutrition assessment, risk status and nutrition care plan in the patient medical record . . . .


36 The statute provides: “A psychosocial assessment shall be conducted and shall include: (1) screening for social, economic, psychological and emotional problems; and (2) referral, as appropriate to the needs of the woman or fetus, to the local Department of Social Services, community mental health resources, support groups or social/psychological specialists.” Id. § 85.40(h).

37 See, e.g., BARBARA DUDEN, DISEMBODYING WOMEN: PERSPECTIVES ON PREGNANCY AND THE UNBORN 28 (Lee Hoinacki trans., Harvard University Press 1993) (1991) ("Prenatal care programs . . . transform [the pregnant woman’s] body into a field of operations for technocratic and bureaucratic interventions."); CATHARINE A. MACKINNON, WOMEN’S LIVES, MEN’S LAWS 135 (2005) ("[T]he law of reproductive issues has implicitly centered on observing and controlling the pregnant woman and the fetus using evidence that is available from the outside. The point of these interventions is to control the woman through controlling the fetus."); Paula A. Treichler, Feminism, Medicine, and the Meaning of Childbirth, in BODY/POLITICS: WOMEN AND THE DISCOURSES OF SCIENCE 113, 120 (Mary Jacobus et al. eds., 1990) ("The health of childbirth becomes a signal for the health of the state . . . . Many decisions about pregnancy, childbirth, and maternity have
asked intrusive questions because they are poor or because they are preg-
nant? Accordingly, it is instructive to compare the requirements imposed by
PCAP with the requirements imposed by private insurances to determine
whether the experiences of the pregnant poor with having to divulge intimate
details about their lives are qualitatively different from the experiences of
the pregnant non-poor. Such a comparison would be difficult to conduct,
however. To begin, most private insurances do not oblige obstetricians,
nurse practitioners, or midwives to conduct any particular examination or
provide any particular form of education or counseling.38 Rather, the ques-
tion with most private insurances is whether they will cover the cost of a
service that the prenatal care provider deems necessary or advisable.39 As a
result, the inquiry turns to whether most private healthcare providers conduct
a form of “informational canvassing” that, although not mandated by law, is
nevertheless considered standard medical care. The American College of
Obstetricians and Gynecologists (“ACOG”), a non-profit organization com-
prised of physicians, is the leader in reporting standards of healthcare in the
OB/GYN specialty;40 accordingly, one could expect that many, if not most,
private prenatal care providers look to ACOG guidelines when providing
care.41 Moreover, while the guidelines suggest that providers impart “gen-

therefore been concerns of the state as well as of the childbearing woman and her fam-
ily.

38 See, e.g., Benefit Detail: Maternity Services, Blue Care Elect Preferred, Blue Cross
Blue Shield of Massachusetts (July 1, 2010) (on file with author) (stating in the “Covered
Services Description” that members are covered for the “[d]elivery of one or more than
one baby, including prenatal and postnatal medical care by a Physician or Nurse Mid-
wife”). The policy does not oblige pregnant women to undergo any specific medical care
or informational canvassing pursuant to that medical care. The Benefit Detail does pro-
vide that “all members may take part in a program that provides support and education
for expectant mothers. Through this program, members receive outreach and education
that add to the care the member gets from her obstetrician or Nurse Midwife.” Id. (em-
phasis added). It should be noted that the policy provides that members “may”—as
opposed to “must” or “shall”—receive “support and education for expectant mothers.”
Additionally, the policy provides coverage for a home visit subsequent to the birth of the
infant; the “visit may include: parent education; assistance and training in breast or bottle
feeding; and appropriate tests.” Id. (emphasis added). Again, the stress here is on the
use of the word “may.”

39 See, e.g., id. (providing that the insurance will cover the cost of more than one
home visit by a healthcare provider if “Blue Cross Blue Shield determines [additional
visits] are clinically necessary”).

acog.org/from_home/ACOGFactSheet.pdf (last visited Oct. 6, 2010) (noting that over
90% of OB/GYNs in the U.S. have an ACOG affiliation and stating that ACOG “keeps
its members informed about current medication standards and ACOG’s professional rec-
mendations” through various publications).

41 Genetics and Public Policy Center, Professional Practice Guidelines for Ge-
netic Testing, 4 (Feb. 1, 2006), http://www.dnapolicy.org/resources/Professional_Guide-
lines_Meeting_Summary.pdf (reporting the results of a survey that “found that ACOG’s
eral patient education” to their patients, counsel them on “nutrition in pregnancy,” and provide “psychosocial services,” it is important to remember that these guidelines are just that—guidelines. Ultimately, the provider decides whether or not to provide care in accordance with them. On this point, the guidelines note:

The guidelines should not be viewed as a body of rigid rules. They are general and intended to be adapted to many different situations, taking into account the needs and resources particular to the locality, the institution, or the type of practice. Variations and innovations that improve the quality of patient care are to be encouraged rather than restricted. The purpose of these guidelines will be well served if they provide a firm basis on which local norms may be built.

Consequently, the extent to which privately-insured women are asked to undergo the intrusive informational counseling experienced, as a legal mandate, by poor women relying upon Medicaid for prenatal care is an empirical question—the subject of further ethnography, perhaps. However, it may be sufficient to note that individual medical practices likely vary quite extensively; further, a privately-insured pregnant woman can simply find another provider if she encounters a physician, nurse practitioner, or midwife who insists upon including the counseling and educational portions of the ACOG guidelines as part of his or her practice. Publicly-insured women, if they wish to receive healthcare at all, do not have this option.

**A. Nutritional Risk Assessment**

At Alpha Hospital, the nutritional risk assessment begins with the nutritionist asking the woman to recount her most recent four meals. As the woman recounts in exacting detail what was eaten and in what amounts, the nutritionist diligently documents the information in the medical chart. The woman is then given a form with an itemized list of foods; she is asked to circle the number of times per week or per day she eats each food item. If,
after this process, the nutritionist determines that the woman is at "nutritional risk," she checks a box labeled "inadequate/unusual dietary habits" on the bottom of the form that the woman has completed. The "nutritional risk assessment" concludes with the woman making a verbal commitment to meeting the nutritional needs of herself and her fetus. The entire process takes anywhere from fifteen minutes to half an hour, depending on the care taken by the nutritionist as well as whether there is a need for interpreter services.

Information about one's diet may not be "protected" information but there is a strong argument to be made that it is fairly described as "private" information. Indeed, divulging one's nutritional successes and failures—the "good" and the "bad" foods that we eat, the frequency at which we eat too much (or not eat enough), etc.—may be experienced as the sharing of intimate knowledge about oneself. Moreover, the information might be considered intimate and private because very rarely are people required to share their dietary habits with others, especially persons who are unfamiliar to them and who may be situated in an antagonistic relationship to themselves. The autonomy to keep this information to herself or to share with others is denied to the poor, pregnant woman seeking PCAP coverage of her prenatal care expenses, as she is required to give this private information about herself if she hopes to receive prenatal care with the assistance of the state.

46 If "inadequate/unusual dietary habits" are found, the woman is made eligible for the Women, Infants and Children Program for Pregnant, Breastfeeding and Postpartum Women ("WIC"). WIC is a federal program, administered by the New York State Department of Health, with the mission of "safeguard[ing] the health of low-income women, infants, and children up to age 5 who are at nutritional risk" by providing food vouchers for foods that are high in the nutrients (like protein, calcium, iron, and vitamins A and C) found lacking in the diets of poor women and their families. About WIC, FOOD & NUTRITION SERV., U.S. DEP’T OF AGRIC., http://www.fns.usda.gov/wic/aboutwic/default.htm (last visited Mar. 2, 2009); see also FOOD & NUTRITION SERV., U.S. DEP’T OF AGRIC., NUTRITION PROGRAM FACTS (2009), available at http://www.fns.usda.gov/wic/WIC-Fact-Sheet.pdf; N.Y. COMP. CODES R. & REGS., tit. 10, § 85.40(f)(4) (2009) (stating that the PCAP provider must, as part of its duty to provide "nutrition services" to its patients, make "arrangements for services with funded nutrition programs available in the community including provision for enrollment of all eligible women and infants in the Supplemental Food Program for Women, Infants and Children (WIC), at the initial visit"). The WIC statute provides that the program is only available to women who are at "nutritional risk." 7 C.F.R. § 246.7(e) (2006) (stating that a determination of "nutritional risk . . . may be based on referral data submitted by a competent authority"). Accordingly, if the woman is interested in receiving WIC vouchers, it is to her benefit that the nutritionist deems her diet "inadequate/unusual."

47 One of the most remarkable things about Alpha Hospital is the vast diversity that characterizes the patients who receive their care there. As a result, the hospital has in place a highly effective system for providing to healthcare workers and their patients interpreter services in a wealth of languages—from common languages like Spanish, Urdu, and Cantonese to more unexpected languages like Zapotec, spoken by groups of Indians in Mexico. When interpreter services are required, the length of consultations tends to double.
B. Psychosocial Assessment

During the “psychosocial assessment,” a social worker screens the patient for several “risk factors,” including: the unplanned-ness and/or unwanted-ness of the current pregnancy; the woman’s intention to give up the infant for adoption or to surrender the infant to foster care; an HIV-positive status; a history of substance abuse; a lack of familial or environmental support; marital or family problems; a history of domestic violence, sexual abuse, or depression; mental disability; a lack of social welfare benefits; a history of contact with the Administration for Children’s Services (the bureau responsible for investigating charges of child abuse and neglect); a history of psychiatric treatment or emotional disturbance; and a history of homelessness.\footnote{Alpha Hospital Psychosocial Screening Form (on file with author).} If a woman admits to the presence of a “risk factor,” the social worker gathers more information about it with the goal of putting the woman in contact with additional professionals who may be able to assist her.

Expectedly, the interview with a social worker can be quite invasive, as the social worker asks the patient a series of intimate, private questions in order to discover the presence of a “risk factor” and, if found, to ask a series of more intimate, private questions. Tina, one of two social workers who worked in the Alpha obstetrics clinic, helpfully itemized the questions that she asks the pregnant women that she encounters in the clinic as part of the “psychosocial assessment”:

Was this pregnancy wanted and do you want to have this baby? Do you have any experience? ... If you’re a first-time mom, do you have anybody who can teach you how to take care of a baby? Is the father involved? Do you have a place to live? Money to buy things for the baby? A social support system? Do you have anything in your history that might make the parenting difficult? There might be things that surface for you at a time when you need to be at your best for your baby. Is there any child abuse, sexual abuse, domestic violence? ... Is there any substance abuse? Does she consider it a problem? Is she in a program? Has she been arrested? Has she ever had any children taken away from her—which means that she has a history of poor parenting? Are you breastfeeding, bottle-feeding? Did you apply for WIC?\footnote{See supra note 46 and accompanying text.} ... After you deliver this child and are taking care of a newborn, do you plan on having another baby right away? If you’re not, it’s easier to not [become pregnant again] if you [choose a contraceptive that you could leave in place for long periods of time]. Do you know what options are out there? Are you going to breastfeed? If
you are, there are [contraceptives] that are better while you’re breastfeeding. Do you have everything that you’re going to need to know? Do you want parenting classes? Yes—you can go here for them. Do you have everything that you’re going to need for the baby? No—try going to this place. Maybe they can help you. You have to be in the best condition that you can be in for your baby. So, maybe you should get counseling. Here are some places that you can go . . . . Do you want to kill yourself? If so, come with me.50

It should also be noted that, even when the woman does not have a “risk factor,” she leaves the interview with the social worker having answered a universe of intimate questions about herself—much of it prosaic, much of it private.

C. Additional Required Consultations

The nutritional risk assessment and the psychosocial assessment are conducted alongside several other consultations—including those with a Medicaid financial officer51 and a nurse/health educator.52

1. Medicaid Financial Officer

During this interview, women are obliged to share financial information about themselves. This interview can be experienced by women as obbling them to confess facts that are deeply personal to them. Due to the necessity of having to prove their incomes, these women—who, because of their precarious economic and structural position, exist as a vulnerable and exploitable labor force—are frequently compelled to confess that they or their partners have worked “off the books” or have engaged in criminalized activities in order to support themselves.

Moreover, women frequently find themselves in the position of having to confess their immigration statuses during this interview. A woman’s immigration status is made relevant during this interview because she is required to prove her identity.53 Proof of identity may be established by a state driver’s license or ID card, birth certificate, United States or foreign pass-

50 Interview with Tina (Jan. 12, 2007) (on file with author)
51 N.Y. COMP. CODES R. & REGS. tit. 10, § 85.40(b)(2) (2009) (“Following the determination of a pregnant woman’s presumptive eligibility for Medicaid benefits, the PCAP provider shall act as a pregnant woman’s authorized representative in the completion of the Medicaid application process if the woman provides consent for such action.”).
52 N.Y. COMP. CODES R. & REGS. tit. 10, § 85.40(g) (2009) (“Health and childbirth education services . . . shall be provided by professional staff . . . and shall include . . . family planning.”).
53 Alpha Hospital, “Frequently Asked Questions about Applying for PCAP” (on file with author).
port, or a permanent resident alien card. That the woman is residing in the country "illegally" is usually admitted when the woman, faced with her lack of "official" documentation in the form of a driver's license or state ID card, asks how she will be able to establish her identity for the purposes of the Medicaid enrollment process. It is an understatement of the highest degree to describe this as a frightening admission for women, pregnant or not, who are residing in the country without documentation.

2 Nurse/Health Educators

During this interview, women receive an "education" about their contraceptive options; moreover, this is an education that continues every trimester until the woman gives birth, and then once again during her postpartum visit. In addition to obliging a woman to hear about her contraceptive "options" at least three times while she is pregnant and yet again during the weeks following the birth of her infant, there is also an institutional practice of having nurses visit women in their postpartum recovery rooms, mere days after the birth of their babies, to offer them the long-acting Depo-Provera injection. Further, the childbirth education classes offered within the hospital similarly place a strong emphasis on the importance of electing and using a method of contraception. It is not unreasonable to interpret the stress that the hospital places on contraceptives as a condemnation of patients' future pregnancies and a censure of the present pregnancy that has immediately brought them to the institution.

The effect of the consultations with the nutritionist, social worker, Medicaid financial officer, and nurse/health educator is that poor women's private lives are made available for state surveillance and problematization, and they are exposed to the possibility of punitive state responses. Pursuant to the PCAP mandate, private information about women's immigration status, health status, and economic status is gathered and undoubtedly made into objects of knowledge for citywide, statewide, and nationwide statistics; their diets are quantified, problematized, and censured; and their histories with substance abuse, sexual abuse, public assistance, and any and all forms of contact with the state—no matter how remote and seemingly irrelevant to the woman—are made salient once again. Moreover, their fertility is condemned as they are repeatedly encouraged to begin considering the method of contraception that they will use after giving birth, a repetition of "contra-

54 Id.
55 I have described elsewhere the institutional emphasis that is placed on encouraging the pregnant patient to think about and elect a contraceptive method that she will use after the birth of her baby. See Bridges, Wily Patients, supra note 1, at 34–44 (describing this emphasis).
56 See id. at 32–33.
57 Id.
58 Id. at 43 (arguing that the present pregnancies of Alpha patients are implicitly scorned as a result of the institution's stress on containing the patients' future fertility).
ceptive education" that implicitly constructs the present pregnancy as an event that never should have occurred. In essence, consequent to the PCAP mechanism, a poor, pregnant woman’s right to privacy—that is, her right to prevent the government from intruding into her personal, intimate affairs—has been violated.

Moreover, this invasion of poor, pregnant women’s privacy facilitates the enduring surveillance and regulation of poor families by the state. Subsequent to the PCAP enrollment process, the state has all the information necessary to sweep poor families within the ambit of child protective services, the foster care system, Immigration and Customs Enforcement, and, if deemed necessary, the criminal justice system. Indeed, the invasion of poor, pregnant women’s privacy that is mandated by the PCAP mechanism is surveillance. It is regulation. It is an intervention into the private lives of poor women and their families—as the state, through “education,” begins the process of forming women into the kind of parents that the state thinks that they should be.

Finally, to add a bit of context, indigent pregnant women at Alpha experience these violations of privacy rights in an environment marked by a hospital staff that tends to be hostile, belligerent, and antagonistic. Below, I quote at length an interview that I had with an African American patient, Cheryl, describing her experience with hostile staff and her reaction to it. Like many patients, Cheryl had arrived at the hospital for her initial prenatal care appointment with the expectation that she would receive a medical examination by a physician, midwife, or nurse practitioner. Instead, she was informed that her appointment that day would consist of the informational canvassing described above. She explains:

It began with the lady at the front desk. She was sucking her teeth at me. And I was like, “You don’t need to suck your teeth at me.” I said, “We need to speak about this calmly.” And she cut me off and yelled “You were misinformed!” I was really disappointed because I felt .... It is probably not just Alpha . . . . I am used to a level of compassion and care that I really found lacking here. I don’t understand why people work in a hospital if you don’t care about the people that you are dealing

---

59 I could relate numerous stories about women losing custody of their infants once born, as well as losing custody of their older children, subsequent to their contact with the PCAP bureaucratic apparatus. For those stories, see generally BRIDGES, REPRODUCING RACE, supra note 1.


61 See Bridges, Wily Patients, supra note 1, at 4–12, 25–30 (describing several instances of staff antipathy toward patients and explaining this characteristic of the hospital staff as the enactment of larger cultural and political discourses within which indigent mothers are constructed as legitimate objects of contempt).
with. Isn’t that a part of your job, and isn’t that part of the reason why you became a nurse or OB/GYN or midwife? There was one lady who took my blood. She was nice to me, and I cried. By the time I saw her, I felt defeated. I was like, “Just take my blood. I don’t really care what you do.” But, she was nice. And I was like, “Why isn’t anyone else like you?”

I understand that this is a large hospital and they care for so many minorities and different people all the time. I know the patients aren’t necessarily the smartest people in the world and don’t have the best personalities . . . . I just felt like they don’t care . . . . I even went to the Medicaid office to find a listing of different places that I could go to, and they were like, “No, we don’t provide that information.” And I said, “How do you not provide that information? You are Medicaid. You are supposed to.” And they said, “No. We don’t; we never have; and we never will.”

I kind of feel stuck here . . . . The way that I’ve been treated has been really surprising to me, and a part of me can’t wait for this to be over so I can just take my baby home. I don’t want to come back here and deal with these people.

I’ve been watching those baby shows on TV. [On one of them,] there is this lady who had severe itching, and the doctor said she had something with her liver and that it could cause complications in her delivery. So, I am, like, freaking out. I have severe itching. When I get out of the shower, it feels like my legs are like on fire. It is, like, really bad. So, the last time I was here a few weeks ago, I went to ask [the midwife about it] real quick before I was getting ready to leave . . . . The whole visit was real quick—like, “Oh yeah, that is the baby’s heartbeat. Blah blah.” And I was, like, “Hey, I have some dry skin . . . .” And she cut me off and said, “Oh, you have to go to a dermatologist.” Not even taking the time to hear what I am saying. I was just going to say, “Yeah, I was watching TV, and I saw this lady, and I was just wondering . . . .” I don’t feel like I need a dermatologist to check me out. You are my midwife. You should be able to sit there calmly and listen to me. She just kept looking at me like, “Damn, I have to deal with this girl . . . .”

Cheryl’s interview demonstrates, dramatically, that indigent women’s privacy rights are not simply violated by the PCAP apparatus; but rather, not infrequently, their rights are violated in an environment of disgust and disregard.

62 Interview with Cheryl (Feb. 15, 2007) (on file with author)
D. Other States

It is worth noting that the New York State PCAP program is not unique; several other states’ Medicaid-funded prenatal care programs require pregnant women to submit to various non-medical assessments as a condition of their receipt of state-subsidized healthcare. For example, California’s Comprehensive Perinatal Services Program provides “nutrition services,” “health education services,” and “psychosocial services” to pregnant, indigent women. Moreover, pregnant women must be “reassessed” every trimester during their pregnancy and once again postpartum. The statute also specifies that indigent pregnant women should be referred to other services that are not, by statute, part of the Comprehensive Perinatal Services Program—including WIC, family planning services, and genetic disease counseling.

In order for providers in Massachusetts to be reimbursed for the prenatal healthcare services that they provide an indigent woman under the state’s Medicaid program, they must also provide a social work referral, if needed, as well as “health-care counseling,” which includes, among other topics, instruction on “hygiene and nutrition during pregnancy” and “family planning.”

---

63 CAL. CODE REGS. tit. 22, § 51348(c) (2010) (providing that women must have an assessment of their nutritional health at their first prenatal care visit and subsequent reassessments every trimester, with the goal of “prevent[ing] and resolv[ing] . . . nutrition problems” and “helping the patient understand the importance of . . . maintain[ing] good nutrition during pregnancy and lactation.”).

64 Id. § 51348(d). In exacting detail, the statute spells out on what bases women should be evaluated during their “health education status” assessment:

- current health practices; past experience with health care delivery systems; prior experience with and knowledge about pregnancy, prenatal care, delivery, postpartum self-care, infant care, and safety; client’s expressed learning needs; formal education and reading level; learning methods most effective for the client; educational needs related to diagnostic impressions, problems, and/or risk factors identified by staff; languages spoken and written; mental, emotional, or physical disabilities that affect learning; mobility/residency; religious/cultural influences that impact upon perinatal health; and client and family or support person’s motivation to participate in the educational plan.

65 Id. § 51348(e). Again, the statute spells out in exacting detail what should be reviewed during the assessment of the patient’s “psychosocial status”: “current status including social support system; personal adjustment to pregnancy; history of previous pregnancies; patient’s goals for herself in this pregnancy; general emotional status and history; wanted or unwanted pregnancy, acceptance of the pregnancy; substance use and abuse; housing/household; education/employment; and financial/material resources.” Id. § 51348(e)(1)(A).

66 Id. § 51348(d).

67 Id. § 51348(j).

68 130 MASS. CODE REGS. 433.421(B)(4)(c) (2010).

69 Id. § 433.421(B)(5). Other topics that must be addressed during the “health-care counseling” session include “smoking and substance abuse,” “care of breasts and plans for infant feeding,” “obstetrical anesthesia and analgesia,” “the physiology of labor and
Finally, Illinois has enacted a detailed statute that sets out an exhaustive list of services that providers must give to indigent, pregnant women.\textsuperscript{70} In addition to the expected nutritional assessment,\textsuperscript{71} a history must be taken of the patient, during which the provider gathers information about her "social and occupational . . . background, health habits, [and] previous pregnancies."\textsuperscript{72} Moreover, the patient must submit to "counseling," which addresses everything from "[p]hysical activity and exercise," "[c]hild care arrangements," "[p]arenting skills, including meeting the physical, emotional and intellectual needs of the infant, with specific appraisal to detect parents at risk of child abuse or neglect," "[e]motional and social changes occasioned by the birth of a child, including changes in marital and family relationships, the special needs of the mother in the postpartum period, and preparing the home for the arrival of the newborn," "[d]iscussions regarding postpartum family planning options," and "other relevant topics in response to patient concern."\textsuperscript{73}

II. A Brief History of the Right to Privacy\textsuperscript{74}

The privacy right first articulated in \textit{Griswold v. Connecticut}\textsuperscript{75} was not an individual-inhering right, but rather an \textit{entity}-inhering one; that is, the \textit{Griswold} right to privacy protected the family as a unit from governmental intervention and regulation.\textsuperscript{76} Moreover, it was only with later articulations the delivery process, including detection of signs of early labor," "plans for transportation to the hospital," "plans for assistance in the home during the postpartum period," and "plans for pediatric care for the infant." \textit{Id.}

\textsuperscript{70} \textit{ILL. ADMIN. CODE tit. 77, § 630.30(b) (2010).}
\textsuperscript{71} \textit{Id.} § 630.30(b)(3)(F).
\textsuperscript{72} \textit{Id.} § 630.30(b)(3)(A).
\textsuperscript{73} \textit{Id.} § 630.30(b)(3)(L).
\textsuperscript{74} The history of the right to privacy given here only touches on the right as it protects individuals from government intervention in matters pertaining to the family, sex, and procreation. While the right to \textit{informational} privacy is also implicated by the PCAP enrollment process, see \textit{supra} notes 23–24 and accompanying text, I have omitted this history in the immediate account.

\textsuperscript{75} 381 U.S. 479 (1965).
\textsuperscript{76} \textit{Id.} at 485–86 (describing the case as concerned with "a relationship lying within the zone of privacy" and noting that the "right of privacy" that protects the marital relationship "[is] older than the Bill of Rights"). The Court had long described the heteronormative family as a unit that enjoys a constitutionally-protected right to be free from state regulation. \textit{See, e.g., Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (describing Meyer and Pierce as decisions that "respected the private realm of family life which the state cannot enter"); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (concluding that a state law requiring children to attend public schools infringed upon the liberty of parents to direct their children's education); Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (striking down a law that prohibited the teaching of modern foreign languages in schools on the basis that the law interfered with parents' rights to direct the education of their children). Prince upheld a law prohibiting minors from selling merchandise in public places—a regulation that functioned to interfere with the family insofar as it proscribed a parent's ability to direct a child to work. 321 U.S. at 170. The Court based its decision on the ability of the state, pursuant to the doctrine of \textit{parens patriae}, to protect minors. \textit{Id.} at 166. Interestingly, the Court articulated the state's expansive right of
of the right, most notably in *Eisenstadt v. Baird*, that the right was transformed such that it inhered in the *individual* and functioned to protect private aspects of individuals' lives from state intervention.

The privacy right's history as entity privacy raises interesting questions when it is put into conversation with the "problem" of the "public parens patriae"—going on to use the doctrine to uphold an interference in the family unit—in a case that arose out of a fact pattern that did not involve a heteronormative family; Sarah Prince, the named plaintiff, was the *aunt* of the minor who was caught selling magazines on a city street. *Id.* at 159. In an interesting article, Richard Storrow argues that *Prince* was consistent with privacy jurisprudence because the jurisprudence evidences a commitment to using the privacy right to protect traditional, nuclear family units; because the minor was not Sarah Prince's daughter, the Court refused to allow the privacy right to protect their "family" from interference by the state. See Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 Mo. L. Rev. 527, 538–39 (2001).

77 *405* U.S. 438, 454 (1972) (striking down a Massachusetts law prohibiting the sale of contraceptives to unmarried persons).

78 Fineman identifies entity privacy as a common law concept—an outgrowth of nineteenth century, liberal ideology that divided society into public and private spheres. See *Fineman, Neutered Mother*, supra note 6, at 186–87; Martha Albertson Fineman, *What Place for Family Privacy?*, 67 Geo. Wash. L. Rev. 1207, 1212 (1999) [hereinafter *Fineman, Family Privacy*] ("The idea of the entity of the family as something 'private' predates, and is analytically separate from, the constitutional idea of individual privacy, although this 'new' arena of privacy seems rooted in older notions about family relations."); Vivian Hamilton, *Principles of U.S. Family Law*, 75 Fordham L. Rev. 31, 39 (2006) ("Long before the U.S. Supreme Court explicitly named it a constitutionally protected individual right, states implicitly recognized and respected the concept of marital and family privacy."); *Id.* at 1216; *Hamilton, supra*, at 39 ("State noninterference permitted husbands to exercise authority over (and reflected their obligations towards) their wives, children, and other household members."). Fineman observes that entity privacy is damning to women and children because they, "as individuals[,] ... are undifferentiated, and therefore invisible, within the family as an entity. The reluctance to look beyond entity to individuals within the family has meant that they have been subject to potential dominance and oppression." Fineman, *Family Privacy*, supra, at 1216; *Hamilton, supra*, at 39 ("State noninterference permitted husbands to exercise authority over (and reflected their obligations towards) their wives, children, and other household members."). Fineman notes that the concept of entity privacy has been critiqued by many feminists because it "only operated as a mask for male oppression within families ... ". *Id.* See also Pamela Scheininger, *Legal Separateness, Private Connectedness: An Impediment to Gender Equality in the Family*, 31 Colum. J. L. & Soc. Probs. 283, 304 (1998) ("[I]n categorizing the marital unit and family as 'private' and insulating them from government intervention, the courts have also protected that unit from judicial and state scrutiny of patriarchal and sexist practices that harm women and children. Specifically, the state is unwilling and unlikely to interfere with the family even if the intra-family practice involves violence against women and children."); Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 Geo. Wash. L. Rev. 1247, 1254 (1999) (critiquing entity privacy because it is incongruent with state intervention in the family although abused or neglected children may desperately require the intervention, and noting, more generally, that "[w]hen we adopt a theoretical framework that endows any 'unit' of persons with 'autonomy,' or a 'right' to be free of state intervention, in practice, we are conferring
family.” That is, within the right to privacy in its present, individual-inhering articulation, are specters of entity privacy nevertheless extant? If so, are spectral entity privacy protections afforded to all families—including “public families”? Moreover, does entity privacy offer a more effective avenue of protecting the privacy interests of poor women and their families than does individual privacy? This inquiry can only properly begin with an examination of the Griswold opinion.

A. From Griswold to Eisenstadt Through Casey, or From Entity Privacy to Individual Privacy Through Individual Liberty

In Griswold, the Court found unconstitutional a Connecticut ordinance that proscribed contraceptive use. The Court decided upon the constitutionality of the statute as it applied to married persons—although, as written, the ordinance applied to both married and unmarried persons alike. Unaddressed within the text of the decision is the basis for the Court’s decision that the marital status of the appellants’ clients carried such significance that it could rule on the constitutionality of the statute only as it applied to married persons. Which is to say: the Court might have ruled on the ordinance’s constitutionality as it applied to persons of the same racial identification/ascription, socioeconomic status, age, or religious affiliation (or disaffiliation) as the appellants’ clients. Yet, it did not. Instead, it found only the marital status of the clients constitutionally significant, thereby necessitat-

Entity privacy has had its fair share of supporters. See, e.g., Appell, Virtual Mothers, supra note 18, at 686 (“Dismantling family privacy while leaving in place the larger political scheme that permits autonomy-limiting income and power disparities will effectively target poor and non-dominant families who already must struggle to maintain their integrity.”); Cahn, supra note 18, at 1243 (“Without some notion of family privacy, the state can and will intervene . . . .”); Fineman, Family Privacy, supra, at 1223 (making an argument in favor of entity privacy because of the needs of families, however configured, for self-government). Communitarians have also advocated the return of entity privacy. The charge is that individual-inhering privacy has worked to pit individual family members against other family members, therefore contributing to the decline of the family. Professor Mary Ann Glendon has most cogently articulated this argument. I will discuss her work infra note 98.

Arguably, a right to privacy that protects individuals’ entitlement to be free from state intervention in matters pertaining to family, sex, and procreation is no more—having been subsumed by, or transformed into, a liberty interest. For a discussion of this possibility, see supra notes 13–15 and accompanying text.

The central statute provided: “Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.” Griswold v. Connecticut, 381 U.S. 479, 480 (1965). A separate statute made it a crime for any person to aid or abet the commission of another crime. Id. Thus, in concert, the statutes criminalized the activities of those who helped other persons obtain contraceptives, i.e., physicians and family planning advocates.

See id.

Id. at 486.
The opinion in *Griswold* frames the law in question as one that "operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation." It then takes a brief sojourn through its previous holdings and finds that other unarticulated, yet extant rights can be found in the shadowy penumbras of the Bill of Rights. The exploration ends with the rhetorical question: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" Answering its own question, the Court states that "[t]he very idea is repulsive to the notions of privacy surrounding the marriage relationship." The Court terminates its opinion by waxing philosophically and eloquently about the nature of marriage:

"We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is the coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bi-lateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." This concluding paragraph of the decision serves to emphasize the centrality of the marital relation in this first articulation of the privacy right. Thus, it misrepresents *Griswold* to claim that the constitutionalized right to privacy has always been about an individual's bodily integrity, or that the privacy right, since its first articulation, has been about an individual's personal decisional autonomy.

---

84 *Griswold*, 381 U.S. at 482.
85 Id. at 482–85.
86 Id. at 485.
87 Id. at 485–86.
88 Id. at 486.
89 Also informing the Court's decision in *Griswold* are "zonal" notions of privacy. That is, the Court finds in the text of the Constitution recognition of the privacy that should be given to the physical space, the zone, of the home. See Borgmann, *supra* note 18, at 293 (noting that the right of privacy, when first articulated, "had a distinctly spatial sense"). The Court describes the Fourth and Fifth Amendments as protections "against all government invasions 'of the sanctity of a man's home and the privacies of life.'" *Griswold*, 381 U.S. at 484 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)). However, the relevant home is not just any home; when understood in the context of the *Griswold* Court's initial framing of the constitutionally-suspect Connecticut law and the final paragraph lauding the institution of marriage, we understand that the home spoken of in the opinion is the heteronormative, marital home.
90 Justice Brennan appears to make such an assertion in *Carey v. Population Services International*, 431 U.S. 678 (1977). He argues that, while *Griswold* clearly appears to be about the marital relationship, *Eisenstadt* and *Roe* "put *Griswold* in proper perspective." Id. at 687. Indeed, "*Griswold* may no longer be read as holding only that a State may not
accurately describe what the right to privacy, and now a liberty interest locatable in the Due Process Clause, has come to protect.91 However, a faithful reading of Griswold demands the conclusion that the right to privacy was really about the sanctity of the heterosexual marital relation and the protection from governmental intrusion that the Court believed should be afforded to that unit.

The Griswold privacy right very closely corresponds to what has been understood within liberalism as the “private sphere”—that is, a purportedly “natural” and “prepolitical” arena into which the government cannot intrude without violating supposedly “widely-held” notions of decency and propriety. Within liberalism, state intervention in the private sphere is always and necessarily a restriction on liberty, as “the state should restrict itself to formally guaranteeing the equal liberty of everyone to pursue in the private sphere their particular conceptions of the good.”93 Subsequent to the state’s successful guarantee of the formal equality of individuals, it becomes illegitimate for that same state to interfere in the relationships and activities that take place in the private sphere. This spatialized dichotomization of society into private and public spheres appears to serve as the theoretical underpinning of the privacy right as articulated in Griswold.

Per Griswold, prohibit a married couple’s use of contraceptives. Read in light of its progeny, the teaching of Griswold is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.” Id.; see also Jean L. Cohen, Regulating Intimacy: A New Legal Paradigm 6 (2002) (“What was new in this jurisprudence was not the application of the concept of privacy to the marital relationship or to the family construed as an entity. Rather, the innovation lay in the Court’s attempt to articulate constitutional grounds for directly protecting the personal privacy and decisional autonomy of individuals in relation to ‘intimate’ personal concerns, whether these arise within the family setting or outside it.”). Perhaps, in disregarding the relatively unambiguous language of Griswold by contending that the decision ought not to be read as articulating a privacy right that inhered in the marital unit, Justice Brennan and those who would make this countertextual assertion feel that an admission that the right to privacy has transformed over the years would open the Court to charges of judicial activism; that is, these countertextualists might suspect that permitting that the right has evolved and experienced modifications in the decades since its first articulation would be equivalent to admitting that the right to privacy has no anchor in the text of the Constitution—making the right even more susceptible to elimination in the age of political conservatism and originalist interpretations of the Constitution.

However, there is a compelling argument to be made that the right to privacy should be retained because of what it has become. For example, Cohen argues that the right “shield[s] the personal dimensions of one’s life from undue scrutiny or interference” and therefore “protect[s] experimental, creative processes of personal identity formation.” Id. at 51. Admitting that the right to privacy has become about individual decisional autonomy and bodily integrity ought not to impugn the right’s defensibility. Indeed, the right’s advocates might acknowledge the disunity that characterizes the right’s form from Griswold to Eisenstadt, yet nevertheless argue for the persistence of the right based on the significance of that which it has come to protect.

91 See Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 857 (1992) (arguing that the Court’s decision in Roe, which found that there was a constitutional right to privacy that protected a woman’s decision to terminate a pregnancy, may be seen “as a rule (whether or not mistaken) of personal autonomy and bodily integrity”).
92 Cohen, supra note 90, at 3.
93 Id.
the borders of the private sphere were coexistent with the four walls of the marital home; further, the activities that historically and rightfully took place there—i.e., procreation and the avoidance thereof—were not legitimately subject to regulation by the public/state.\(^{94}\) As such, the Court in \textit{Griswold} took upon itself the duty of enforcing a separation between these two spheres; that the public sphere would intrude into the private sphere to enforce a ban on activities that justly belonged there was "repulsive" to the Justices rendering the decision.\(^{95}\) Therefore, it seems wholly accurate to describe the \textit{Griswold} privacy right as a sphere-inhering right (that is, one inhering in the private sphere) or entity-inhering right (that is, one inhering in the private sphere—residing family entity).

However, subsequent articulations of the right to privacy supposedly sounded a death knell for privacy as an entity- or sphere-inhering right. Beginning with \textit{Eisenstadt}, decided seven years after \textit{Griswold}, and continuing

\(^{94}\) Counterpoised to this legal paradigm is a stance more amenable to state intervention in the private sphere. In this paradigm, it is acknowledged that the private sphere is frequently the site of power inequalities, domination, and repression. Accordingly, "direct, substantive legal regulation in a domain once considered off-limits to state intrusion—the private family—is indispensable to justice between genders." \textit{Id.} at 2. Thus, it appears that while the decision in \textit{Griswold} is consistent with the liberal paradigm, its progeny (i.e., \textit{Eisenstadt}, \textit{Roe}, \textit{Casey}, and \textit{Lawrence}), in their abandonment of the private/public sphere dichotomy, is more congruent with the latter legal paradigm.

\(^{95}\) It is worth noting that the private sphere protected by the Court in \textit{Griswold} does not fully correspond to liberal dichotomizations of society. Within liberalism, the private sphere is comprised of the heteronormative family \textit{in addition to} the economic market. Thus, to the extent that \textit{Griswold} recognizes a private sphere notably devoid of the economic market, its notion of such a sphere more closely corresponds to the patriarchal private sphere recognized by feminists rather than traditional, liberal notions of the private sphere. See, e.g., Carole Pateman, \textit{The Patriarchal Welfare State, in Feminism, the Public and the Private} 241 (Joan B. Landes ed., 1998). In her critique of traditional, liberal dichotomies of society, Pateman writes that there exists:

a double separation of the private and public: the \textit{class} division between civil society and the state (between economic man and citizen, between private enterprise and the public power); and the \textit{patriarchal} separation between the private family and the public world of civil society/state. Moreover, the public character of the sphere of civil society/state is constructed and gains its meaning through what it excludes—the private association of the family.

\textit{Id.} at 245.

Pateman argues that the traditional liberal formulation does not fully grasp the gender politics of Western societies. Rather, the gendered division of these societies is better ascertained by dichotomizing society into a public world of civil society/state versus a private sphere of the family. Thus, Pateman would note that \textit{Griswold} only recognizes a division "between the private family and the public world of civil society/state"—what Pateman identified as a patriarchal dichotomy of affairs. \textit{Id.} at 245; see also Fineman, \textit{Family Privacy, supra} note 78, at 1207 ("Family is distinguished from both the market (a chameleon institution, public vis-à-vis the family but 'private' vis-à-vis the state) and the state (the quintessential public institution)."); Frances E. Olsen, \textit{The Family and the Market: A Study of Ideology and Legal Reform}, 96 HARV. L. REV. 1497, 1501-02 (1983) (noting that there are two dichotomies involved in the distinction between the "public sphere" and the "private sphere": "on the one hand, a dichotomy between the market, considered public, and the family, considered private" and "on the other hand, a dichotomy between the state, considered public, and civil society, considered private").
through the succeeding re-articulations of the privacy right, the right has been held to inhere no longer in the family entity, but instead in the autarkic, atomistic individual. The facts of Eisenstadt differ from Griswold only insofar as the woman to whom the contraceptive was dispensed was unmarried.\textsuperscript{96} Thus, a new question of constitutional import was raised: Did unmarried persons, like their married counterparts, enjoy a right to privacy that protected their use of contraceptives from state sanction? The Court answered in the affirmative, holding that the Equal Protection Clause prohibited the state from discriminating between married and unmarried persons: "[W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike."\textsuperscript{97} Thus, the Court transformed the right of privacy articulated in Griswold from something that concerned the heteronormative conjugal unit and the boundaries of the marital home into something decidedly different; that is, the right of privacy was made over into one that was possessed and enjoyed by the individual.\textsuperscript{98} The Court explains itself at some length:

\begin{quote}
\textsuperscript{97} Id. at 453.  
\textsuperscript{98} Communitarians have critiqued the transformation of the right to privacy from one that inhere in an entity to one that inhere in individuals. For example, Mary Ann Glendon argues that the Court made a grave error when it reinterpreted the right of privacy as one possessed by an individual. See Mary Ann Glendon, Rights Talk: The Imposition of Political Discourse (1991). She argues that it is because the privacy right is individual-inhering that "poor, pregnant women . . . have their constitutional right to privacy and little else. Meager social support for maternity and childraising, and the absence of public funding for abortions in many jurisdictions, do in fact leave such women largely isolated in their privacy." Id. at 65; cf. Woodhouse, supra note 78, at 1261–62 (advocating the replacement of the concept of privacy with dignity and arguing that "[m]ost struggling mothers would trade a right to be left alone, which does little to help them survive, for the right to be treated in a respectful manner, even as one accepts government assistance"). However, there is a compelling argument to be made that it is not because the right to privacy is an individual right that there is "meager social support for maternity and childraising." Nor is the construction of the right to privacy as an individual-inhering right responsible for the fact that in many jurisdictions, there is no public funding for abortions. In fact, there is no reason to believe that an entity- or sphere-inhering privacy right would better protect indigent women, as Glendon seems to suggest. Actually, it may be naive to suppose that an entity-based privacy right (for which the middle-class, heteronormative family is the model) would protect the unmarried, low-income women that Glendon claims "have their constitutional right to privacy and little else." The problem is not juridical constructions of the bearer of the right to privacy, but rather class. The problem lies with the verity that the state has not been conceptualized as bearing a fundamental responsibility to protect the dispossessed and disenfranchised.  
\end{quote
It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.99

In making an argument under the Equal Protection Clause to expand Griswold's holding, Eisenstadt alters the base of the right to privacy to one that is closer to (individual) decisional autonomy and (individual) bodily integrity—that is, the ability to decide what happens to one's own body. Entity privacy had been rejected; the right to privacy as an individual-inhering right had been affirmed.100

obviate[ ] the need for privacy as decisional autonomy when it comes to certain choices that the relational, embedded, interdependent, communicative individual may have to make in modern societies. We do not initially choose the communities we are born or socialized into, or the strong evaluations and commitments these generate; but surely as adults we must have the opportunity to affirm and embrace some of these communities and commitments and abandon those which, upon reflection, we cannot. Only if decisional autonomy in this sense is respected in every person, however situated, only if the individual's capacity for moral deliberation and justification, on the one side, and for ethical judgment and self-reflection . . . , on the other, are protected against coercion by the state or the majority of the community, can the individual function as a moral agent at all.

Cohen, supra note 90, at 47. Indeed, a group-inhering right, without additional regulation of group politics, offers no protection against "state paternalism, whether in the guise of community norms or majority will." Id. at 48.

99 Eisenstadt, 405 U.S. at 453.

100 While abandoning the family entity and the marital relation as the crux of the right to privacy, Eisenstadt might not have abandoned basing the right of privacy in a relation altogether. That is, the Court might have recognized that contraceptives are only relevant to individuals engaged in a sexual relationship with someone else. Thus, the Court might have anchored the right in that relation of two persons—not a marital relation, but rather a sexual relation. An alternative holding might have found that sexual intercourse between two persons conceivably created a different, yet equally legitimate, sphere of activity into which the state could only improperly intrude—an entity that the state could not properly regulate. I should not be read as arguing in favor of the conceptualization of all sexual relationships as constitutive of "families"; instead, I simply note that when the parties involved in a sexual relationship so choose, an alternate Eisenstadt holding might have made a constitutionally-protected variety of the "family" available to them. However, such a pronouncement would have been quite a radical holding, as the decision might have compelled the acknowledgment and recognition of different types of "family"-like relations that comprise the private sphere. The "family" might no longer only be constrained in such a way that it always and only coincides with its heteronormative, patriarchal variety; instead, it would be able to be identified in various formations of individuals—including formations that are comprised of individuals of the same sex.

Had the Court elected to democratize the notion of the family and maintained the right to privacy as a right that inheres in a relation among two people, this form of "entity privacy" need not have retained the problematic characteristics that "entity privacy" possessed when it rendered patriarchal violence and domination immune from state intervention. See supra note 78 and accompanying text. Cohen suggests the same when she
B. Privacy to Liberty

As noted in the Introduction, while the Court, since Eisenstadt, has reaffirmed constitutional protection for the activities once protected under the rubric of “right to privacy,” it has shied away from attaching the appellation of “privacy” to this interest.\(^\text{101}\) This resignifying of the right to privacy began in Casey, in which a plurality of the Court reaffirmed Roe v. Wade\(^\text{102}\) by declaring that there exists a right to an abortion—albeit one that was more limited than the abortion right first articulated nineteen years earlier.\(^\text{103}\) The Casey plurality declined to use the language of privacy when describing the source of the abortion right, instead opting to use the language of liberty.\(^\text{104}\) The plurality noted that there is a substantive component to the Due Process Clause’s protection against deprivations of “life, liberty, and property”;\(^\text{105}\) moreover, the plurality argued that the “liberty” protected by the Due Process Clause was expansive enough to encompass the interests and activities—including, most relevantly to the decision, a woman’s choice to terminate an unwanted pregnancy—that had been protected previously under the rubric of privacy.\(^\text{106}\) Thus, we witness in Casey the somewhat

---

101 See supra note 13 and accompanying text.
102 410 U.S. 113 (1973).
103 Casey rejected Roe’s trimester framework and replaced it with the “undue burden standard,” by which abortion regulations that burden, but do not unduly burden, a woman’s ability to terminate a pregnancy are constitutional. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 878 (1992).
104 Id. at 844 (“Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman’s right to terminate a pregnancy in its early stages, that definition of liberty is still questioned.”); see also Borgmann, supra note 18, at 299 (observing that Casey may have “essentially abandoned privacy as a basis for abortion rights in favor of liberty”); Cohen, supra note 90, at 63 (noting that the Casey plurality “did not invoke a general right to privacy [but rather] a right to liberty” and underscoring that “[t]he liberty not privacy was the centerpiece of the plurality opinion”); Hamilton, supra note 78, at 63 (noting that the “concept of privacy itself may be ceding ground to the broader notion of liberty (with its more explicit constitutional grounding) as the justification for individual protections”).
105 Casey, 505 U.S. at 846–50 (defending the doctrine of substantive due process and arguing that the Court must discern that which is protected by the due process clause through “reasoned judgment”).
106 Substantive due process protects “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.” Id. at 851 (citing Carey v. Population Serv. Int’l, 431 U.S. 678, 685 (1977)). “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.” Id.
subtle transformation of privacy to liberty,\textsuperscript{107} the consequences of which are not entirely clear.\textsuperscript{108}

Moreover, the \textit{Casey} opinion reiterates that the right of privacy-cum-liberty interest resides with the individual—not with a family entity, a sphere, or heteronormative home. The plurality notes that there is “a constitutional liberty of the woman to have some freedom to terminate her pregnancy”; yet, “[t]he woman’s liberty is not so unlimited”; therefore, before viability, “the woman has a right to choose to terminate her pregnancy”; indeed, “[t]he woman’s right to terminate her pregnancy before viability is the most central principle of \textit{Roe v. Wade}.”\textsuperscript{109} \textit{Casey} clearly pronounces that the right to privacy/liberty interest is an individual-inhering one. As an individual right/interest, the extent of the activity protected by it must be limited by others’ interests: “What is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so.”\textsuperscript{110} It is arguably because the right-holder is conceptualized as atomistic and individualized—that is, because the right/interest is possessed by the individual woman in her solitariness—that the Court was compelled to consider the right of the individual exercising it against the interests of others.\textsuperscript{111}

\textsuperscript{107} It should be noted that the Court in \textit{Lawrence v. Texas} articulated an individual’s interest in being free from state intervention in the more intimate aspects of his/her physical and emotional life—that is, his/her right to privacy—as a component of his/her liberty. 539 U.S. 558, 578 (2003). The \textit{Lawrence} Court also notes that, “liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” \textit{Id.} at 572; see also \textit{Casey}, 505 U.S. at 915 (Stevens, J., concurring) (“The woman’s constitutional liberty interest also involves her freedom to decide matters of the highest privacy and the most personal nature.”). Notably, the Court in \textit{Lawrence} looked to privacy jurisprudence when tracing the genealogy of the liberty interest that was violated by the Texas statute. 539 U.S. at 564–66 (citing \textit{Pierce}, \textit{Meyer}, \textit{Griswold}, \textit{Eisenstadt}, and \textit{Roe}). For a discussion of the language of privacy in the \textit{Lawrence} opinion, see supra notes 19–22 and accompanying text.

\textsuperscript{108} Borgmann has suggested that the constitutionality of the recent spate of laws that burden the abortion right by requiring biased counseling prior to the abortion procedure may be due, in part, to the reframing of the right to abortion as an issue of “liberty” and not one of “privacy.” \textit{See} Borgmann, supra note 18, at 325 (“The cost of winning \textit{Casey} is that women have protection for the ultimate abortion decision, but almost no protected zone of privacy in which to make that decision. Perhaps the right to abortion would benefit from renewed attention to the more familiar sense of privacy—not just privacy as an awkward and unsuitable synonym for equality, liberty, or autonomy . . . , but privacy as a protected space within which a person can make these kinds of important moral decisions without interference from the state.”).

\textsuperscript{109} \textit{Casey}, 505 U.S. at 869–71 (emphasis added).

\textsuperscript{110} \textit{Id.} at 877.

\textsuperscript{111} To this end, the Court in \textit{Casey} was asked to determine the constitutionality of spousal notification provisions in state abortion laws. The Pennsylvania abortion law at issue provided that, “except in cases of medical emergency . . . no physician shall perform an abortion on a married woman without receiving a signed statement from the woman that she has notified her spouse that she is about to undergo an abortion.” \textit{Id.} at 887. The Court struck down the regulation. \textit{Id.} at 895. The question posed by the spousal notification provision is interesting when one considers that the right to privacy, as originally enunciated in \textit{Griswold}, was derived from the heteronormative family and the marital abode. The irony is in the fact that the right to privacy, which has its foundations in romantic notions of an ideal, healthy marital relation, was now being deployed to
C. The Persistence of Entity Privacy

Although the liberty interest that protects that which was previously protected by the right to privacy is clearly, in its more current expressions, something that inheres in the individual, specters of its entity-inhering past nevertheless endure. In *Michael H. v. Gerald D.*, a plurality of the Court used an entity-inhering variety of the privacy right to deny a father visitation rights to his biological child. The child, Victoria—the paternity of whom the biological father, Michael H., had established and with whom he had begun a meaningful relationship—was conceived and born while her mother, Carole, was married to another man, Gerald D. After Carole reconciled with Gerald D., the married couple sought to preclude Michael H. from having any contact with or legal rights to Victoria. Justice Scalia, writing for the plurality, held that Michael H. had no legal claim to his biological child, as the latter had been born within a marital relationship to which he was not a part. The plurality held that it was improper for the state to intervene in that marital relationship in order to permit or facilitate the parental rights of an outside party. Spectres of entity privacy inform the outcome and haunt the interstices of the opinion, as when Scalia poses the question of whether the legal tradition in the U.S. historically has protected the relationship between an unmarried father and his child. Answering in the negative, he writes:

"Quite to the contrary, our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts..."

---

113 Dailey has offered a similar reading of the case, describing the decision as one in which "the Justices appear to agree that constitutional liberty protects the family unit from unjustified state intrusion." Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 Tul. L. Rev. 955, 980 (1993) [hereinafter Dailey, *Constitutional Privacy*].
115 Id. at 115–16.
116 Id. at 125–27.
117 Id. at 124–27.
What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so.\textsuperscript{118}

Spectral concerns with the marital relation and the deference that ought to be shown to it are most apparent in the conclusion of the plurality opinion, in which Scalia writes:

The primary rationale underlying [the California statute's] limitation on those who may rebut the presumption of legitimacy is a concern that allowing persons other than the husband or wife to do so may undermine the integrity of the marital union. When the husband or wife contests the legitimacy of their child, the stability of the marriage has already been shaken. In contrast, allowing a claim of illegitimacy to be pressed by the child—or, more accurately, by a court-appointed guardian ad litem—may well disrupt an otherwise peaceful union.\textsuperscript{119}

In the same way, Justice O'Connor, in a concurring opinion, appears also to have been visited by apparitions of entity privacy, encouraging her to find the marital entity deserving of protection from state interference-qua-enforceable parental rights held by an outside party:

[A]fter its rather shaky start, the marriage between Carole and Gerald developed a stability that now provides Victoria with a loving and harmonious family home. In the circumstances of this case, I find nothing fundamentally unfair about the exercise of a judge's discretion that, in the end, allows the mother to decide whether her child's best interests would be served by allowing the natural father visitation privileges.\textsuperscript{120}

This short excursus on the ghost of entity privacy, clearly present within \textit{Michael H.}, should not be read as arguing that the right to privacy-cum-liberty interest no longer exists as an individual-inhering right. I am not making the claim that individual privacy/liberty has been defeated in the wake of entity privacy's triumphant return. Instead, what I contend is that the privacy right/liberty interest as an entity-inhering concept is not a mere anachronism, relevant only inasmuch as it represents a stage in the history of privacy jurisprudence that has long ago been superseded. Far from being abandoned to the annals of antiquity, entity privacy is present—informing privacy, equal protection, and liberty claims decades after it was thought to

\textsuperscript{118} Id. at 124, 127.
\textsuperscript{119} Id. at 131.
\textsuperscript{120} Id. at 135–36 (O'Connor, J., concurring).
be deemed constitutionally antiquated.\textsuperscript{121} Entity privacy may be considered
germene when scholars and activists seek to ascertain the content of consti-
tutional protections, even if opinions within privacy jurisprudence no longer
articulate it as dispositive. As such, entity privacy continues to inform judi-
cial and non-judicial notions of the propriety of some state interventions and
the proper role of the state.\textsuperscript{122}

If entity privacy is undestroyed and relevant, what does it mean that the
families of the pregnant seekers of prenatal care at Alpha Hospital can be
inquired into, subsequently problematized, and, if the "need" is discerned,
directly regulated by the state?\textsuperscript{123} If PCAP indeed functions as a violation of
poor families' entity privacy, it is relevant to ask why there is no presump-
tion of entity privacy within the Alpha obstetrics clinic.\textsuperscript{124} Why do not no-

---

\textsuperscript{121} Dailey has argued similarly, writing: "[T]he family as an independent institution
has not in fact withered out of constitutional existence, but is very much alive in privacy
doctrine." \textit{Dailey, Constitutional Privacy}, supra note 113, at 964. And again: "The in-
terpreters of constitutional liberty have never withdrawn protection for the 'sanctity' of
family life. . . . In case after case involving constitutional privacy, the Court has empha-
sized that the family unit and familial relationships define the core of this fundamental
interest." \textit{Id.} at 979.

\textsuperscript{122} Fineman, for one, champions the return of entity privacy, in part because of her
belief that families that do not conform to the heteronormative ideal need protection from
state power. \textit{See} Fineman, \textit{Family Privacy}, supra note 78, at 1210–11 (advocating an
entity privacy that "could be drawn around caretaking or dependency units" and clarify-
ing that this entity privacy "would not be a right to separation, secrecy, or seclusion, but
the right to autonomy or self-determination for the family even though it is firmly located
within a supportive and reciprocal state").

\textsuperscript{123} In an insightful article, Radhika Rao argues that the right to privacy is not prop-
erly understood as a tool to protect a sole individual from state power; rather, it protects
an association of individuals from state power. \textit{Radhika Rao, Reconceiving Privacy: Re-
lationships and Reproductive Technology, 45 UCLA L. Rev. 1077, 1103 (1998)}. She
describes the right as one of "relational privacy": "Privacy is not a right attached to
isolated individuals; it measures social institutions, such as marriage and the family, that
mediate between the individual and the state." \textit{Id.} at 1078. However, Rao underscores
that this right of relational privacy ends when the individuals that comprise the relation
are in conflict; the privacy right only protects their activities when they are "allied
against the state." \textit{Id.} at 1099. If Rao's description of the privacy right is correct, it
reveals an interesting assumption about the poor families that I have argued do not enjoy
a robust right to privacy. That is, if privacy as a limitation on state power is only availa-
able to associations of individuals who are not in conflict, then the fact that there are little
or no limitations on state power to intervene in poor families—i.e., they do not enjoy a
right to privacy that is respected—reveals that these families are presumed to be in con-
flict; they are imagined as presumptively conflicted. Thus, the state apprehends the mem-
bers of poor families as already situated in antagonistic relationships to one another and
treats them accordingly.

Interestingly, Rao writes that "[w]henver two or more individuals are engaged in
intimate activities without oppression within the group and without external effects upon
others, they should receive shelter under the right of relational privacy." \textit{Id.} at 1105
(emphasis added). Perhaps the reason why poor families do not receive shelter via the
right of relational privacy is because they are imagined to have "external effects." Per-
haps the external effects that they are imagined to have are consequences of their eco-
nomic dependence and the likelihood that they will raise future citizens who "suffer"
from a similar economic dependence. I explore this argument \textit{infra} Part III.

\textsuperscript{124} Indeed, why also is there no presumption of individual privacy? I explore this
question \textit{infra} Part IV.
tions of entity privacy make inquiries into the intimate corners of families seem like a "repulsive" enterprise? Why is "repulsion" not felt by the professionals who perform these inquiries several times per day on a daily basis? Why has not the coerced permeability of the boundaries surrounding poor families generated protests that the endeavor is indecent, unseemly, and indecorous? This lack may say less about the viability of entity privacy as a legal and moral concept than it does about contemptuous perceptions of poor families. That is, the absence of protest about the privacy violations enabled—indeed, required—by Medicaid does not demonstrate that entity privacy has been abandoned; instead, it demonstrates that poor families, when they have been affronted or insulted, are not conceived of as entities worthy of romantic philosophic waxing and defiled senses of decency.

III. ENTITY PRIVACY AND "PUBLIC FAMILIES"

To reach the conclusion presented above—that poor women’s families are not apprehended as entities deserving of the romanticism conferred upon the families of their non-poor counterparts—one can observe that traditional notions of entity privacy were designed to protect "traditional" families. 125 The insufficiency attributed to the poor families (such as those of Alpha patients) derives from their presumed failure to conform to the "traditional" family archetype, frequently consisting of the mother-child dyad as opposed to the husband-wife-child triad. 126 This argument would conclude with the observation that the nonconformance of the families of Alpha patients to ideals of the patriarchal heteronormative family results in their construction as undeserving of state noninterference. 127

125 See Cahn, supra note 18, at 1235 (noting that entity privacy, or marital privacy, "narrowly" protects "traditional marital unit[s]"); Fineman, Family Privacy, supra note 78, at 1216 (noting that, historically, entity privacy only protected "family units that conform to ideological conventions about appropriate form and function—intact nuclear families").

126 It may reveal that noninterference is not afforded to families as such, but rather to men as the only properly entitled heads of patriarchal families. See Hamilton, supra note 78, at 61 ("Family privacy protected from undue state interference the individual rights of the husband/father as the head and public representative of his family.").

127 Dailey makes such an argument in her analysis of the family within privacy jurisprudence; she contends that when family formations fall short of emulating those arrangements that society and government are interested in promoting and protecting, they do not receive the benefit of state noninterference. Dailey, Constitutional Privacy, supra note 113, at 956. She writes:

From laws prohibiting divorce in the early years of the republic to contemporary laws denying homosexuals the right to marry, the state has continually shaped and promoted a particular vision of family life. Far from prohibiting state intervention in a prepolitical social sphere, the ideal of family privacy expresses a particular set of family values by protecting only those social relations that the state deems worth protecting. The boundaries of family privacy are drawn by political choice...
A different route through which to reach a similar conclusion is to argue that the “entity” term within “entity privacy” contemplates the heteronormative family—that is, the husband-wife-child triad. Accordingly, the argument would be that families helmed by unmarried women are not “families” within the ambit of “entity privacy” and, thus, enjoy neither a presumption nor actual experience of privacy. Olsen references this construction of the family in her analysis of “the private family” within liberal political theory; she notes that “[t]he notion of noninterference in the family depends upon some shared conception of proper family roles . . . .”

And that is the dilemma presented by families headed by unmarried women: inasmuch as the parental roles within the heteronormative family are distributed across two (married) individuals, single mothers necessarily collapse the distribution into a sole person. In such a collapse, the “propriety” of the “proper family roles” is lost, and noninterference as a state policy loses its justification. Alternatively, perhaps it is thought that the unmarried mother does not assume the “family role” traditionally assumed by the husband/father; instead of the distribution of “proper family roles” into a lone female individual, perhaps what is presumed is abandonment of the “family role” historically assumed by the husband. Confronted with the unfulfilled role of the father, the state occupies the space. As such, state noninterference, and privacy/liberty, becomes bad public policy.

Hodgson v. Minnesota, holding unconstitutional a statute that required an adolescent to notify both of her parents prior to receiving an abortion, exemplifies this concern with the familial roles that (two) parents assume—the delineation of parental duties—when raising a child. Justice Stevens’ majority opinion notes that “[t]he family may assign one parent to guide the children’s education and the other to look after their health.” The opinion goes on to note that “[a] natural parent who has demonstrated sufficient commitment to his or her children is thereafter entitled to raise the children free from undue state interference.” Reading these two propositions together suggests that the rejection of single-parent families as worthy of entity privacy may, at least partially, be premised on the belief that unmarried women have not “demonstrated sufficient commitment to . . . her children.” That is, if those who enjoy entity privacy and are free to raise their children without state interference are those who have “demonstrated

---

Id. Because single parent families—especially those helmed by poor women of color—are not a “social relation[] that the state deems worth protecting,” entity privacy is not drawn in such a way that includes these families within its ambit. Id.

128 Olsen, supra note 95, at 1506.
130 Id. at 446.
131 Id. at 447; cf. Appell, Virtual Mothers, supra note 18, at 701–02 (“Parental rights doctrine bestows the right to make these decisions on adults who have shown a prescribed level of commitment to the child . . . .”).
132 Hodgson, 497 U.S. at 447.
sufficient commitment to [their] children,”"133 and the poor, pregnant single woman appears to have no right to raise her children free of state interference, then perhaps she is perceived as not having demonstrated commitment to her children—a commitment that her marriage to the father of her children might presumably evidence. One could argue that the marriage of the mother is imbued with the power to index her commitment to her child; as such, the failure or refusal to add a paternal, third term to the mother-child dyad signals the absence of her allegiance to the second term in her “family”; the non-married status of the mother signals the absence of her commitment to provide her children with a (real) family. This deficiency of the mother-child bond, demonstrated by the mother’s marital status, justifies the exercise of the state police power within the deficient “family.” Or so the argument goes.

However, this does not conclude the analysis because, as noted earlier, the “public families” that I encountered in the Alpha obstetrics clinic were not infrequently composed of the mother-father-child (or soon-to-be-child) triad. That is to say, many of the families that I met did, indeed, conform to notions of the heteronormative family. In spite of this, entity privacy was universally denied to the families of all patients within the clinic—not just single pregnant women or the families headed by single women—as all patients were required to submit to the informational canvassing by which they enroll in PCAP. Consequently, the explanation for the non-presumption of entity privacy in the Alpha obstetrics clinic does not follow the structure of the families at hand, but rather the class of those families. That is, the obvious characteristic that all of the families seeking healthcare in the Alpha obstetrics clinic share is not family structure, but poverty. Moreover, it is the characteristic of poverty that destroys the assumptions that motivate traditional notions of entity privacy.

A. Theorizing (and Justifying) Entity Privacy

But, what are those assumptions? Some scholars have argued that that which is at stake in state noninterference with the family—explicitly, that which is at risk every time the state intervenes in the family unit—is the ability of the family to independently produce productive citizens into whose hands the nation will ultimately fall.134 Parental authority, and the limitation of state power in matters regarding the family, is necessary if children are to

133 Id.
134 See, e.g., Anne C. Dailey, Developing Citizens, 91 Iowa L. Rev. 431, 440 (2006) [hereinafter Dailey, Developing Citizens] ("In a democratic republic, . . . it is the proper role of parents rather than the State to 'prepare' children for citizenship. This understanding of children's place in a democratic polity follows from the Justices' views about the vulnerability of children to state coercion and the important role that parental rights play in shielding young children from state indoctrination."). Appell understands this justification for state noninterference in family life as a species of "public family" theory. See Appell, Virtual Mothers, supra note 18, at 707 (observing that public family theories
grow up to one day participate freely in a free society. As Dailey explains:

Family privacy protects a realm of parental authority that is not in itself a sphere of negative liberty, but that is a means for the development of responsible citizens.

Parental authority is not, of course, without limits. Yet those limits are themselves set by reference to the public ends of family life. Parental authority is exceeded when it threatens to impair the child’s development into a responsible civic individual. The settled boundaries of parental authority inject a strong normative vision of the “good citizen” into family life. It must be exercised in the service of creating citizens equipped to participate in a liberal democracy.

If one transports Dailey’s line of reasoning to the poor women whose interests in the privacy of their family entities are not respected within the Alpha obstetrics clinic, one understands that these families are thought to be incapable of producing desired and desirable future citizens; state intervention in these family entities, then, is required for the protection of liberal democracy. Expressed differently, parental authority with regard to the development of future citizens is not deferred to when the parents do not inspire confidence. If the maintenance of the “liberal democratic order” is at risk when the state intervenes in families deserving of entity privacy, then the liberal democratic order is similarly at risk when the state fails to inter-

justifying protecting families from state intervention because families prepare children for citizenship in a democratic society.

See Dailey, Constitutional Privacy, supra note 113, at 957–58; see also Appell, Virtual Mothers, supra note 18, at 708 (“[When the state does not interfere in families,] [c]hildren then mature into adults who possess pluralistic values and the ability to think critically because of their allegiance to family and community. This rearing function enriches the government by creating citizens separate enough from the state to be capable of exercising the power to govern.”).

Dailey, Constitutional Privacy, supra note 113, at 991–92. Mangold would concur: “Colonial fathers were charged with the proper upbringing of their children, responsible for educating and training them to be productive citizens of the community. Colonial laws allowed intervention into the parent-child relationship to assure that child rearing was appropriate for raising employable and moral children.” Susan Vivian Mangold, Transgressing the Border Between Protection and Empowerment for Domestic Violence Victims and Older Children: Empowerment as Protection in the Foster Care System, 36 New Eng. L. Rev. 69, 81 (2001).

Rosenbury makes an interesting argument that entity privacy and parental authority are respected when the decisions that parents make are consistent with the state’s views. See Laura A. Rosenbury, Between Home and School, 155 U. Pa. L. Rev. 833, 889–90 (2007) (“The boundaries of family privacy are thus constructed not by respect for parental prerogatives, but by the views of the states and courts. When child rearing conforms to those views, family privacy is respected. When child rearing challenges those views, family privacy ends.”). One could argue that the denial of entity privacy as a matter of course to poor families seeking PCAP coverage evidences a presumption that the decisions made by poor families will be inconsistent with the state’s views.
vene in those families undeserving of entity privacy—that is, poor families. Moreover, it is the poverty of the families that warrants the denial of the presumption that they will ultimately generate productive citizens.\textsuperscript{138}

The unwillingness to defer to the families of poor, pregnant clients of the Alpha obstetrics clinic may be interpreted as manifesting a hegemonic discourse within which the failure to realize economic self-sufficiency justifies distrust, suspicion, and antipathy. The inability to thrive within capitalism—which, hegemonically, is understood as manifesting a lack of “American” values\textsuperscript{139}—is such an anathema that, if and when those who have demonstrated this failure decide to reproduce, they are perceived as not deserving of trust to produce desirable citizen-progeny; rather, the presumption is that, absent state interference, they will likely produce children who will mature into adults like themselves—“un-American,” economically dependent threats to the nation’s coffers, values, and future.\textsuperscript{140} Justice Stevens’ opinion in \textit{Hodgson} ought to be reconsidered at this point—specifically his statement that “a natural parent who has demonstrated sufficient commitment to his or her children is thereafter entitled to raise the children free from undue state interference.”\textsuperscript{141} There is something suggestive about the fact that an indigent “public family” that is wholly triumphant in its fulfill-

\textsuperscript{138}Interestingly, Dailey writes that severe poverty may threaten the ability of families to develop the citizens that sustain a democratic republic. Dailey, \textit{Developing Citizens}, supra note 134, at 475–76 (“The kind of chronic, severe poverty experienced by families . . . operates as a form of political disenfranchisement for this entire class of children.”). She ultimately argues that, because of the threat that poverty poses to families’ ability to develop citizens, it is imperative that the government support these families. \textit{Id.} at 487–88 (noting the “important constitutional interest in helping families to succeed in their constitutionally defined caregiving duties”). However, the danger of her insight is that, in the absence of a robust system of support for poor families and in the presence of the dismantling of the welfare state, poverty’s effect on families’ ability to develop citizens can be used to justify state intervention in poor families.

\textsuperscript{139}For an exploration of the simultaneity of “American” values and the values associated with market capitalism, see Bridges, \textit{Wily Patients}, supra note 1, at 20–22; see also \textit{Nicholas De Genova & Ana Y. Ramos-Zayas, Latino Crossings: Mexicans, Puerto Ricans, and the Politics of Race and Citizenship} 78 (2003) (“[T]he quiet and routine exploitation of seemingly docile ‘immigrants’ can be conveniently reinterpreted by employers—as ‘hard work,’ the stuff that perpetually animates the ‘American Dream.’”).

\textsuperscript{140}If entity privacy is respected because state noninterference allows parents to cultivate “diverse private preferences [and] moral values” in their children, then when entity privacy is not respected, it demonstrates a distrust of those private preferences and moral values that parents would instill. Dailey, \textit{Developing Citizens}, supra note 134, at 482. See also \textit{Appell, Virtual Mothers}, supra note 18, at 785 (noting that state intervention in families “minimize[s] or eliminate[s] these families as sites of production of values that diverge from that status quo”); Storrow, \textit{supra} note 76, at 566 (noting that state noninterference in families is “basic to the structure of our society because the family is ‘the institution by which we inculcate and pass down many of our most cherished values, morals and culture’” (quoting \textit{Bellotti v. Baird}, 443 U.S. 622, 634 (1979))). Perhaps the state fears that poor parents will cultivate a “preference” for removing oneself from the labor market and the “moral value” of economic dependence. See Dailey, \textit{Developing Citizens}, supra note 134, at 483 (“One approach to the problem of parental authority in a democracy has been to set some limits on acceptable parental values and behavior.”).

ment of heteronormative ideals in terms of the marital status of the parents still does not enjoy the entity privacy that would otherwise entitle the natural parents to parent their children without state intervention. Indeed, this fact suggests that the economic insufficiency of the family is the commitment that has not been demonstrated. In line with Justice Stevens’ reasoning, parents who have not triumphed financially within capitalism have not demonstrated an adequate commitment to their children.

Economic self-sufficiency is the unspoken condition of possibility upon which state noninterference rests. As one scholar writes, “[A] long tradition of family case law extols the ‘autonomous’ family unit and protects it, except in the most compelling circumstances, from state intervention.” I emphasize the use of “autonomous.” Because the families that seek prenatal care services from Alpha are dependent upon the government for their economic viability, they cannot be said to exist within autonomous family units; these families instead exist, or persist, as a result of government intervention. Any commitment to governmental noninterference in the family that might otherwise exist is nullified by “public families” inability to be that “autonomous family unit” that traditional liberal theory posits as existing prior to, or otherwise independent of, state intervention. “Public families,” because they confound the public/private dichotomy that is the foundation of the liberal state, are marked as sites where the intervention of the state into the family can be effected without threatening the social order.

Olsen similarly notes that the family is conceptualized as an “independent” institution within liberal political theory—making it possible to rationally state intervention into “public families” as a consequence of these families’ nonconformance to traditional schemas due to their dependence on public assistance. She writes that one of “[t]he basic assumptions that

142 Indeed, the Court, in the course of holding that the Amish families in Wisconsin v. Yoder, 406 U.S. 205 (1972), were entitled to state noninterference in their decisions to reject formal education for their children after they had completed the eighth grade, makes much of the economic self-sufficiency of the Amish families. The Court writes that, while the Amish may have “idiosyncrasies” that distinguish them from mainstream society, “[i]ts members are productive and very law-abiding members of society [who] reject public welfare in any of its usual modern forms.” Id. at 222 (emphasis added); see also id. at 222 n.11 (observing that “the Green County Amish had never been known to commit crimes, that none had been known to receive public assistance, and that none were unemployed”) (emphasis added); id. at 223 (noting the “self-sufficiency of the community”); id. at 224 (noting that there had been no showing that “upon leaving the Amish community Amish children, with their practical agricultural training and habits of industry and self-reliance, would become burdens on society because of educational shortcomings”); id. (“There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today’s society.”); id. at 234 (arguing that the state had not demonstrated that removing Amish children from traditional schools after the eighth grade would “result in an inability to be self-supporting”); id. at 235 (noting the Amish’s “long history as a successful and self-sufficient segment of American society”).


144 See Olsen, supra note 95, at 1504.
underlie arguments in favor of the private family” is that “the family is capable of existing in some sense apart from state activity, as a natural formation rather than only as a creation of the state.” 

Yet, “public families” violate this “basic assumption.” Indeed, their acceptance of money and services from public coffers inverts the description that is thought to govern the relationship between the family and the state; instead of “existing in some sense apart from state activity,” “public families” are thought to be viable entities only as a result of state activity. Having confounded the logic of state nonintervention, state intervention becomes the rule that governs the state’s relationship to the family. Within the binary that situates “natural” formations antithetically to state-inflected configurations, “public families” lose their “naturalness”—and, consequently, their privacy.

One can say that having breached the assumption postulating the autonomy of the family, “public families” are thought to similarly defy the second assumption—that “‘the family’ is a coherent way of talking about [the] relations among [these] people.” Without regard to whether the persons in the family consider themselves as such, the “public family” within liberal theory becomes a random, heterogeneous collection of individuals, ill-deserving of the designation of “family.” Further, the suppositions that are concomitant with notions of the “family”—namely that the heads of such families can competently raise the younger members of the families—do not append to the association of individuals that is the “public family.” As the limits that surround this “family”—marking the space that ought to be free from the state’s presence—have been compromised by the financial dependence of the entity, the state’s presence is reiterated, becomes more brazen, and acquires another directive: to raise the children in the face of the parents’ presumed inability to do so.

---

145 Id.
146 Id.
147 See Storrow, supra note 76, at 529 (arguing that “groups of persons not regarded as families have no shield of privacy against governmental interference with their relationships”). Appell makes a similar argument in her analysis of the overrepresentation of poor families of color within the foster care system in this country. See Annette R. Appell, Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System, 48 S.C. L. Rev. 577, 579–80 (1997) [hereinafter Appell, Protecting Children]. She notes that while there exists a “high political currency of ‘family values,’” id. at 579, poor families are frequently, and somewhat glibly, dismantled when the foster care system intervenes in these families and seizes custody of children. She notes, as a potential explanation of the ease with which the state extinguishes poor families, the possibility that their families “are not viewed as ‘real families,’ so the larger society tolerates their fissure . . . . This ‘othering’ of poor families, particularly when they are of color, makes it easy for the dominant culture to devalue them: to view them as dysfunctional and not families at all.” Id. Similarly, “[j]ust as these families are not families, these mothers are not really mothers.” Id. I will take up this point further in the following Part.
B. The Myth of Entity Privacy?

Teitelbaum makes an interesting claim that ought to be considered alongside the question of "public families" and the entity privacy that is not afforded to them. He argues that "social, political, intellectual, and legal" historians have generally agreed with one another that the industrialization of the economy and the progression of capitalism produced the family as an entity to be counterpoised to the market; because the sphere of commodity exchange was decidedly public, the family became the designedly private refuge from the self-interested jockeying within the market. He writes:

Liberal theory sees the nineteenth century family as a functional response to industrial capitalism . . . . The family as refuge, in which the wife assumed a special role in preserving moral values, managing the home, and rearing the children was an essential condition of survival in industrial society: no man could endure an unrelieved competitive existence.

He argues that the family within critical theories has been similarly conceptualized. Teitelbaum argues that in most theories postulated by historians, the privatization of the family parallels the development of the public sphere of market relations.

Teitelbaum was one of many who sought to explode commonly-held notions of the private family by underscoring the interest that the state has had in the family throughout history. This sustained public interest in the family—an interest that not uncommonly manifested in state assumption of custody of children within "inadequate" families—defeats any position that would hold the family to be a private entity.

This reading, if applied to the poor, pregnant women whom I encountered within the Alpha obstetrics clinic, could be used to argue that that

---

149 Id. at 199.
150 Id.
151 Id. ("The Marxist theory of the family is not crucially different. Small households, in which the wife performed uncompensated services, facilitated both the amassing of capital and then its expenditure on industrial commodities. In at least this sense, the bourgeois family is an integral part of the capitalist economy. Changes in the family . . . respond directly to changes in economic arrangements or demands.") (footnote omitted).
152 Id. at 200-06 (describing a "general theory of family history" in which the predominant view of the family is "developmental, moving from an hierarchically ordered household closely integrated with the community towards an egalitarian, companionate family sharply separated from the public world"). Id. at 200, 206.
153 Teitelbaum is not alone in his dissidence; Dailey joins him, articulating a "competing, subversive strand within both family history and constitutional case law . . . [which] argues that the modern family has never constituted a purely private institution, but has always been subject to state regulation and public control" and noting "the extensive state involvement in the formation and structure of the family as well as on the family's political role in both facilitating and constraining governmental power." Dailey, Constitutional Privacy, supra note 113, at 994.
which is in operation during their attempts at Medicaid-subsidized prenatal care is not the violation of the “entity privacy”—as the family entity has never, throughout history, enjoyed privacy in any coherent sense of the word. Instead, the programmatic inquiry into the affairs of the woman, and consequently the family, who will be the primary influence upon the unborn child is simply another incidence of the exercise of the public interest in the family. This interpretation would suggest that there is nothing anomalous about this exercise; neither does it reveal anything about the sociopolitical location of these particular families. Instead, the apparatus erected by Medicaid within the Alpha obstetrics clinic evidences a concern that has applied to all families throughout the history of the nation.

It is undeniable that the state-qua-public indeed has had a long-standing interest in the family as the formation within which future citizens of the society originate. However, what should not be elided is that some family formations are more susceptible than others to becoming objects of the state’s interest in protecting its future citizens. Moreover, the characteristic that determines the ability of the public interest to reach a particular family is class. That is, it is the class of the family that tends to determine whether state power will be able to touch it and, consequently, whether the public interest in the raising of children will be realized in any particular instance. 154

The obstetrics clinic of a public hospital is a public space par excellence within which the state can find subjects upon which to exercise its regulatory, and potentially punitive, power. Without the capture of a subject upon which to implement its power, the state interest in the family remains abstract and theoretical; it exists, but nominally so. However, the poverty of an individual or a family produces them as a medium upon which the state can enact its promises. It is through them that the state interest can become material and tangible. Essentially, the physicality of the poor body asking for state assistance within the clinic enables the actualization of that which might otherwise exist in theory only.

Moreover, “public families” might be understood to allow the explicit demonstration of a power that the state has over all families—a power that some may have denied and buried beneath romantic notions of the family’s insularity. As such, “public families” reveal the precariousness of all families’ privacy. The invasive prodding to which “public families” are exposed

154 Appell makes this point cogently and eloquently:
Poor families are more susceptible to state intervention because they lack power and resources and because they are more directly involved with governmental agencies . . . . [P]oor families lead more public lives than their middle-class counterparts: rather than visiting private doctors, poor families are likely to attend public clinics and emergency rooms for routine medical care; rather than hiring contractors to fix their homes, poor families encounter public building inspectors; rather than using their cars to run errands, poor mothers use public transportation.
Appell, Protecting Children, supra note 147, at 584 (footnote omitted).
demonstrates the existence of a reviled power that is universally available to all; thus, “public families” become produced as a site for revulsion. The projection of disgust for the power onto that which makes the power visible may explain the dearth of sympathy for the families so invaded.155

IV. THE OVERWHELMING OF RIGHTS BY STATE INTERESTS

That “public families” do not enjoy an entity privacy that the state is bound to respect—an entity privacy that is, arguably, still enjoyed by non-poor families—represents only one instance of the failure of privacy rights/liberty interests to manifest within the space of the Alpha obstetrics clinic. What I will explore in this Part is the sense in which individual privacy rights/liberty interests similarly fail to manifest within the clinic. Essentially, the intrusive inquiries required by the state prior to Medicaid subsidization of prenatal care expenses demonstrate that the women who seek prenatal care from Alpha Hospital are apprehended as subjects whose privacy rights the state is not bound to respect. This Part explores the sense in which the individual privacy rights/liberty interests of the poor, pregnant women that I encountered within the Alpha Hospital have been compromised by their economic dependence.

It may be unreasonable to expect entity privacy to protect “public families” from state intervention owing to the fact that entity privacy may be solely spectral, phantasmic and without substance. The line of reasoning would contend that the holding in Michael H. was an anomaly, an exception to the contemporary articulation of the right to privacy as an individual-inhering right or interest. As discussed above, Eisenstadt, Roe, and Casey—the last in the triumvirate having been decided subsequent to Michael H.—have firmly established the current right to privacy/liberty interest as one that proscribes the state from intervening in certain “private” aspects of the individual’s life.156 If this argument is correct, it makes more sense to interrogate the ways in which the programmatic inquiries posed by the state prior to Medicaid subsidization of prenatal care violate not the entity privacy of the poor family, but the right of the poor woman to individual privacy.157

155 The dearth of sympathy for “public families” invaded by state power may be evidenced most competently by the fact that PCAP and other similar state laws remain on the books and are materialized in clinics across the nation every day, having not been repealed through democratic processes.

156 See supra Parts II.A–B.

157 But, at certain moments, she who attempts to disentangle individual privacy from entity privacy is engaged in a perilous enterprise. This is due to the fact that the individual right of parental autonomy regarding private matters (i.e., those that pertain to the family and the individual’s children) looks a lot like the right of the family to be free from state intervention. See Rosenbury, supra note 137, at 866 (“[E]ntity-based privacy usually amounts to parental autonomy—the right of parents to speak for their children and to make decisions about their upbringing, free from state intrusion.”). Nevertheless, some would maintain that the language of individual privacy (as the right of an individual to decisional autonomy regarding matters that pertain to her family) must be employed if
The argument would be that, in order to follow the tack that privacy jurisprudence has taken since Eisenstadt, we ought to ask how the demand for knowledge concerning the intimate provinces of a woman’s life is a violation of the woman’s individual right to keep these intimate details to herself. We ought to also ask how the interjection of the state into the woman’s decision-making process regarding parenting and futurechildbearing is a violation of the woman’s individual right to make these decisions without state interference and coercion. We may then conclude that it infringes on the woman’s individual-inhering privacy right/liberty interests to compel her to give details about her eating habits, sexual history, past and present tobacco, drug and alcohol use and/or abuse, employment status, history of domestic or sexual violence, past and present contact with state agencies, history of physical or emotional abuse, past and present receipt of financial assistance from the government, etc. We may then conclude that it infringes on the woman’s individual-inhering privacy right/liberty interests to stipulate that in order for her to receive a welfare benefit, she allow the state into her decisions concerning “whether to bear or beget a child” by compelling her to undergo mandatory contraception counseling. Essentially, the state compels the woman to make her private life available to state surveillance, intervention, and regulation; the analysis is properly focused when it asks how this compulsion violates her individual right to privacy/liberty interests—not the entity privacy of her family.

When formulated in this way, we must consider the ostensible motivation for the state’s inquiry: the governmental interest in protecting the unborn child and the child, once she/he is born, from abuse or neglect. Indeed, the state’s inquest and its ability to limit individual rights is arguably a product of its power of parens patriae, by which the state has authority to intervene in the family in order to protect children. This interest in child protection, it may be argued, must be pursued without regard to the damage that it inflicts upon the integrity of the woman’s right to privacy/liberty interest in privacy. The exhaustive itemization of the particularities of the woman’s existence enables the state to ascertain the environment into which the woman privacy—in spite of Michael H.—is no longer a cognizable right subsequent to Eisenstadt. See id. at 864. (“The right [to entity privacy] is frequently viewed as attaching to parents as individuals, not to the family as a whole.”).

158 Appell has noted instructively that “abuse” and “neglect” are not objective concepts, but rather may embody classist and racist preferences. See Appell, Virtual Mothers, supra note 18, at 788–89 (“Neglect and, to a lesser extent, abuse, are problematic standards that are extraordinarily contingent on cultural norms of decisionmakers. Many . . . have criticized these standards as class-based and racially discriminatory.”). It may also be noted that the counseling could be interpreted as being geared towards maximizing the health of the fetus and subsequent infant. However, there is a concomitant presumption that the mother is incapable of, or unwilling to, ensure the health of the fetus and subsequent infant absent the state’s intervention (and, thus, potentially a poor parent).

159 See Hamilton, supra note 78, at 42–43 (describing the concept of parens patriae as existing in tension with parental authority and noting that the state exercises its power of parens patriae in order to “protect families’ more vulnerable members”).
man’s child will be born as well as the likelihood that the woman will properly parent the child once born. It is pursuant to this state interest that intimate, private data about the woman is gathered. For example, any prior contact that a woman has had with the Administration for Child Services ("ACS"), which investigates charges of child abuse and neglect, is inquired into because it plausibly evidences a history of poor parenting and, by implication, indicates that the woman is likely to be a poor parent in the future. The same is true of inquiries that, for example, confirm that a woman continues to smoke cigarettes, drink alcohol, or use illegal drugs although she is aware that she is pregnant; the information is thought to index a woman’s neglect of herself and, through and simultaneous to that neglect, the neglect of her fetus. If the encyclopedic inquisitive net cast by the state indicates that a woman is likely to be a poor parent, the state will use the information gathered to maintain her within its regulatory apparatus in order to protect the child once it is born. The exhaustiveness of the inquest—and that it touches on information that the woman may consider private—is necessary, it may be argued, because the end in mind, always, is the protection of the child. The means to this end, the violation of poor women’s right to privacy/liberty interest in privacy, is thought to be an unfortunate, yet inevitable, happenstance.

This conflict—between the individual’s interest in protecting herself from state intervention in matters that pertain to herself and her family, on the one hand, and the state’s interest in protecting the child from the parent who raises her, on the other—has been industriously explored within the

160 Scholars have noted how the state translates a pregnant woman’s perceived neglect of her fetus into a presumption that she will be a poor parent in the context of determinations of parental unfitness and the termination of parental rights of women who drink alcohol or use illegal drugs while pregnant. See, e.g., David C. Brody & Heidee McMillin, Combating Fetal Substance Abuse and Governmental Foolhardiness Through Collaborative Linkages, Therapeutic Jurisprudence and Common Sense: Helping Women Help Themselves, 12 HASTINGS WOMEN’S L.J. 243, 250 (2001) (noting several cases in which courts found that a pregnant woman’s use of drugs or alcohol during pregnancy authorized the removal from the mother’s custody of the infant once born and any siblings); Lynn M. Paltrow, Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade, 62 ALB. L. REV. 999, 1050–51 (1999) (citing a brief submitted to a Colorado court in which state officials argued that the parental rights of a pregnant drug user should be terminated before the child was born because of the “[m]other’s unfitness during the critical prenatal care stages of her pregnancy”) (alteration in original); Ian Vandewalker, Taking the Baby Before It’s Born: Termination of the Parental Rights of Women who Use Illegal Drugs While Pregnant, 32 N.Y.U. REV. L. & SOC. CHANGE 423, 423 (2008) (“Several states allow a mother and child to be permanently separated for something the mother did before the child was born. These states have made the use of illegal drugs while pregnant a ground for terminating a mother’s parental rights. The intuition motivating such a policy is that drug users are bad parents, and the state protects children by removing them from such parents.”) (footnote omitted); see also 750 ILL. COMP. STAT. 50/1(D)(t) (2010) (defining an “unfit person” who is legally incapable of having custody of a child as someone who is responsible for the presence in “the child’s blood, urine, or meconium [of] any amount of a controlled substance”).
literature that investigates the foster care system.\textsuperscript{161} Although many scholars problematize the discriminatory enforcement of child protection laws insofar as poor, racially-subjugated families are swept within the state's regulatory ambit at disproportionately high rates,\textsuperscript{162} most scholars do not question that it is licit for the state to limit parental rights when the circumstances demand it. "The state has the right to intervene within the family or parent-child relationship as long as it has a significant interest."\textsuperscript{163} Moreover, a "significant interest" that constitutes the condition of possibility for the legitimate limitation of parental rights is the state's interest in keeping the child safe from harm—even (or, perhaps, especially) if the threat comes from the child's own parent.\textsuperscript{164} This tension between parental rights and the state's interest in child protection is dramatized daily in the child protection system.\textsuperscript{165}

Most scholars do not question the legitimacy of the state's \textit{parens patriae} power to limit or countermand the individual's (parental) right to direct the upbringing of her child as long as the state acts to protect the child.\textsuperscript{166}

\begin{footnotesize}
\footnote{161}{Dorothy Roberts has also explored this conflict in her analysis of the prosecutions of pregnant drug addicts. \textit{See} Roberts, \textit{Punishing Drug Addicts}, supra note 18, at 1422 ("[P]unishing a woman for using drugs during pregnancy pits the state's interest in protecting the future health of a child against the mother's interest in autonomy over her reproductive life—interests that until recently had not been thought to be in conflict.").} \\
\footnote{162}{\textit{See}, e.g., Appell, \textit{Protecting Children}, supra note 147, at 580 (analyzing "the policies, practices, and perspectives that help to fuel the growing industry that has arisen from the state's 'protective' involvement with poor families and families of color and the state's punitive treatment of the mothers of these families"); Appell, \textit{Virtual Mothers}, \textit{supra} note 18, at 770–79 (describing the predominance of poor families of color within the child protection system); Cahn, \textit{supra} note 18, at 1244 (noting that poor women are more likely to be swept up within the ambit of child protection systems and agencies); Sally K. Christie, \textit{Foster Care Reform in New York City: Justice for All}, 36 CoLUM. J.L. & Soc. PRoss. 1, 12–15 (2002) (investigating the causes of the overrepresentation of poor and African American children in foster care).} \\
\footnote{163}{Christie, \textit{supra} note 162, at 27.} \\
\footnote{164}{\textit{See} Appell, \textit{Virtual Mothers}, \textit{supra} note 18, at 703 (observing that parents have rights to raise their children without state interference "absent proof that the parent is abusing or neglecting the[ir] child[ren]"); Fineman, \textit{Family Privacy}, \textit{supra} note 78, at 1215 (noting that parental conduct is deferred to unless it is abusive or neglectful); Rosenbury, \textit{supra} note 137, at 846 (observing that the state may intervene in the parent-child relationship in order to protect the child's welfare).} \\
\footnote{165}{Mangold, \textit{supra} note 136, at 74 ("While parents have a right to raise their children free from state intervention, children have a countervailing right to protection from abuse and neglect. This tension between parental rights and child protection is the key conflict in the child protection system . . . ."); \textit{see also} Hamilton, \textit{supra} note 78, at 43 ("The state intervenes in the 'intact' family in limited situations—namely, when it perceives a serious threat to the physical or mental health of the child, and even then, not in all cases.") (footnotes omitted).} \\
\footnote{166}{\textit{See}, e.g., Storrow, \textit{supra} note 76, at 575 ("[I]n the interest of the protection of the child.") (footnote omitted). Some scholars would argue that the rights that are overridden by the state's power of \textit{parens patriae} are parental rights—not individual rights; that is, they would argue that parental rights are not a type of individual right, but rather are entirely distinct from them. \textit{See}, e.g., Appell, \textit{Virtual Mothers}, \textit{supra} note 18, at 697–98 ("[T]hese parental rights are not individual rights, but rights that arise out of these relationships and apply to decisions for or about others. They are distinct from other decisional privacy rights that involve . . . .")} \\
\end{footnotesize}
This uncontroversial formulation of the condition precedent for the legitimate limitation of parental rights raises an intriguing question when it is analogized to the women seeking prenatal care within the Alpha obstetrics clinic. But first, a caveat: the analogy to the state’s power of parens patriae and its ability to limit parental rights must be adapted a bit to the circumstance confronted by poor, pregnant women in the Alpha obstetrics clinic. The doctrine of parens patriae allows the state to supersede the individual’s right to direct the upbringing of his/her child—a right that may be understood in the language of privacy rights/liberty interests. However, the privacy right/liberty interest that is abridged in the Alpha obstetrics clinic is not so much the individual’s right to direct the upbringing of her child, but rather the individual’s right to keep private, intimate information to herself and to make decisions autonomously. Nevertheless, the comparison is instructive.

When one makes the analogy between the state’s power of parens patriae and the circumstance confronted by poor, pregnant women attempting to receive a welfare benefit in the form of state subsidization of prenatal healthcare expenses, and when one observes that the state’s use of its parens patriae power to limit an individual’s (parental) rights is legitimate only when it seeks to protect a child from abuse and neglect, one can conclude that the limitation of poor, pregnant women’s individual (privacy) rights is legitimate as long as it is premised on the protection of children from abuse and neglect. But, one must ask: why is the state convinced—so much so that it has erected an elaborate, cumbersome, bureaucratic apparatus—that the children born (or to be born) to poor women are in need of protection such that the meticulous and methodical audit of all of the pregnant poor is imperative? It deserves underscoring that, if the formulation described above is true and the state only legitimately nullifies individual (parental or privacy) rights when it acts to protect the child, then the PCAP apparatus is either illegitimate, or it is the legitimate result of the state’s interest in protecting poor, pregnant women’s children. If the latter, one must ask: why...
does the state presume that poor, pregnant women will abuse or neglect their children?^{169}

The salient characteristic that is shared by all women seeking prenatal care at Alpha is their poverty. Moreover, it is reasonable to conclude that it is this characteristic that casts suspicion over poor women’s ability to not fail their children such that state nullification of these women’s privacy rights is rational, expected, and appropriate. The most benign interpretation of this fact states, simply, that a mother’s poverty yields the possibility that she will be unable to meet the material needs of her child. Indeed, the inability of a parent to provide for the material subsistence of her child has, in the past, justified the removal of the child from the parent’s home by child protective agencies.^{170} The benign interpretation posits that the state nullifies a woman’s right to privacy because in her poverty, the state assumes a likelihood of parental neglect in the form of the inability to meet an infant’s basic, fundamental needs.

^{169} While some scholars observe that the state has arguably expanded its power of parens patriae and may intervene in the family more frequently than it did in years past, none have argued that this expansion is legitimate when the state uses its power to intervene in the family preemptively—that is, absent proof of abuse or neglect or the parent’s demonstrated propensity to abuse or neglect a child. See Hamilton, supra note 78, at 64 (observing that states have given themselves even broader powers of parens patriae in recent years).

^{170} In 1998, it was estimated that ten percent of the children removed from their parents’ homes by the state were so removed because of “environmental neglect”—defined as the lack of those basic materials that persons need to survive (i.e., food, clothing, and housing). Christie, supra note 162, at 13. Christie also perceptively notes that a family’s poverty may also cause stress within the unit, which child protective agents may perceive as abuse or neglect of the child: “Poverty can also lead to added stress and greater tension within poorer families. Upon seeing such tensions, caseworkers evaluating these families may conclude that a child is better off in foster care.” Id. at 14 (footnotes omitted). On this issue, Appell persuasively describes how the poverty of a woman may be perceived as abuse or neglect by state agents whose socioeconomic status preclude their ability to empathize with those who are subject to abuse or neglect investigations. I quote her at length:

Food, jobs, and decent housing are elusive. Five sisters may live together with their fifteen children in a roach infested slum: their only other housing option being a roach infested apartment in a public housing high-rise where their children will be in daily danger of being shot or “shaken down.” Because they live where they do, the state charges these mothers with neglect for subjecting their children to an injurious environment.

These mothers do not have access to affordable childcare. They depend on informal kinship and community networks for babysitting. If a mother leaves her child with a neighbor or an aunt, rather than a nanny or a licensed day-care center, she is considered to have neglected her child . . . .

Poor mothers are more likely to live in high risk areas under high stress related to the blight and violence which surrounds them and under the strain of living on government benefits that are below subsistence level . . . . When judged by someone who has a car or car-fare and who does not have to spend much time worrying about obtaining food, clean clothing, toiletries, or dodging bullets and crack dealers, these mothers appear not to care enough about mothering.

Appell, Protecting Children, supra note 147, at 585–86 (footnotes omitted).
However, were this benign interpretation true, the questions asked of women upon their initiation of prenatal care would concern, more specifically, their ability to provide food, clothing, and shelter for their children. If this interpretation were true, the ambit of the state’s inquisition would focus on the question of the woman’s economic viability and whether her financial condition could support an expanded family. Instead, inquiries about women’s sexual histories, experiences with substance use and abuse, histories of sexual and domestic violence, and strategies for preventing the conception and birth of more children far exceed the purview of a concern about the material conditions in which newborn children can expect to be placed. Indeed, a less benign interpretation is required: the state’s presumption of the abusive potentials of the poor, pregnant women who present themselves at Alpha is a consequence of the discursive construction of poverty as an index of the moral integrity of the person so impoverished. Explicitly, the inability to thrive within a capitalist economy and the consequent reliance upon the state for financial survival is thought to index a perceived moral laxity that results in the production of unplanned, unwanted children and their subsequent mistreatment and exploitation; moreover, the mistreatment and exploitation of children is sufficiently probable and expected that

171 Other scholars have made similar insights about the discursive construction of poverty as an index of the poor person’s moral integrity. See, e.g., Joel F. Handler & Yeheskel Hasenfeld, The Moral Construction of Poverty: Welfare Reform in America 17–18 (1991) (noting the "moral values of work" and arguing that, historically, the poor have been constructed as "morally deviant" and arguing that "[s]tigmatizing those who fail to conform affirms the moral worth of those who do"); Michael Katz, In the Shadow of the Poorhouse: A Social History of Welfare in America, at xi–xii (1986) ("In the land of opportunity, poverty has seemed not only a misfortune but a moral failure."); Joel F. Handler, The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context, 16 N.Y.U. Rev. L. & Soc. Change 457, 467 (1987–88) (arguing that throughout history, "the failure to earn one’s living was a moral failure"); Hasday, supra note 11, at 304–05 (observing that the New York Society for the Prevention of Cruelty to Children “focused on families that had not been successful in the wage labor economy, operating on the principle that this economic failure had been caused by some crucial moral or character flaw”); Jack Katz, Caste, Class, and Counsel for the Poor, 1985 Am. B. Found. Res. J. 251, 251 (1985) ("In modern society, poverty has been defined not only by quantitative measures of well-being but as a morally distinct category."); Thomas Ross, The Rhetoric of Poverty: Their Immorality, Our Helplessness, 79 Geo. L.J. 1499, 1501 (1991) ("The premise of moral weakness suggests that the problem is really quite simple. If poor people simply chose to ‘straighten up and fly right,’ all would be well. If they would accept and commit to the moral norms of those of us not in poverty, they would cease to be poor, albeit only after a long time and much hard work.").

172 Alternately, indigent mothers’ failure might be understood not as the inability to sell their labor within market capitalism, but rather their failure to attach themselves to a man who has successfully sold his labor such that women’s dependency is masked. See Fineman, Masking Dependency, supra note 10, at 2182 ("Those members of society who openly manifest the reality of dependency—either as dependents or caretakers in need of economic subsidy—are rendered deviants. Unable to mask dependency by retreating to contrived social institutions like the family, single mother caretakers in particular are stigmatized . . . for embodying a dependency that society would rather deny."). I thank Kris Collins for making me aware of this argument.
the prevention thereof justifies the violation or dramatic limitation of all poor, pregnant women’s rights to be free from state intervention in private matters.\textsuperscript{173} That there is a professed relationship between an individual’s ostensibly failure as a purveyor of her labor and that same individual’s commitment to love, nurture, and care for her own children speaks to the power of society’s commitment to capitalism.\textsuperscript{174}

In this way, one can make sense of the term “social risk,” the term that serves as the justification for requiring all women seeking Medicaid subsidization of their prenatal care expenses to submit to consultations with a social worker: as explained to me by one of the social workers who works within the Alpha obstetrics clinic, she and her colleague are required, by legislative mandate, to consult with all Alpha prenatal care patients who have been identified as at “social risk”; further, a woman is identified as at “social risk” due to her mere status as a seeker of Medicaid subsidization of her prenatal care expenses. Hence, a woman’s lack of access to private insurance through an employer and her inability to purchase it independent of that channel serve to denote her poverty, and her poverty renders apposite and obligatory an intrusive inquest into her private life.

Further, the content of what is designated by “social risk”—that is, what exactly the poor woman, by virtue of her poverty, is at risk of—is revealed when one examines the questions that are asked of women during their requisite conference with the social worker. That “social risk” signifies more than the risk that the woman’s poverty will make her unable to meet the material needs of her infant is made apparent by the fact that the interrogation into the woman’s economic circumstances comprises only a small portion of the consultation. That there are moralistic undercurrents within the “social risk” designation is made obvious when the social worker poses state-mandated questions into matters—like how long she has been in a relationship with the father of her child, whether this pregnancy and previous pregnancies were unplanned, or whether she has thought about how she

\textsuperscript{173} It is interesting to consider an argument made by Dailey in this context: Dailey argues that when the state refuses to intervene in the family—whether premised on entity privacy or premised on the parental right to autonomy with regard to matters that concern her child—the effect is the granting of rights to the parent over the child. She writes, “‘[A]ny allotment of liberty to the parent necessarily diminishes the liberty of the child; conversely, any enhancement of a child’s liberty curtails that of the parents . . . .’ [P]arental rights entitle parents to rights against the state, but over another person.” Dailey, \textit{Constitutional Privacy}, supra note 113, at 986–87. Insofar as the Medicaid apparatus effectively dismantles any right that the woman-as-parent has against the state with regard to her personal affairs that may (or may not) affect her child, then one can understand Medicaid as the manifestation of a distrust of the poor, pregnant woman: before giving the poor, pregnant woman rights against the state over her child, the state must deem her deserving of the right. Conversely, non-poor women receive this clearance as a matter of course; it is a function of their class status.

\textsuperscript{174} Again, Hasday makes a similar observation in the context of the nineteenth century reform literature. See Hasday, \textit{supra} note 11, at 323 (“‘[I]t reasoned that mothers who failed to constantly supervise their children at home, and fathers who failed to make that possible, had to lack love and concern for their children.’”).
will prevent future pregnancies\textsuperscript{175}—that are irrelevant to a determination of whether and how a pregnant woman will meet her infant's basic requirements for food, shelter, and clothing.

Further still, even those questions that are designed to interrogate the woman's economic circumstances and whether she will be able to meet the material needs of her infant—that is, queries that are legitimate insofar as they are posed by a state concerned with the physical security of a woman's child—nevertheless produce a sense of discomfort and illegitimacy. This is to say that although these questions seek information about the economic sufficiency of the woman, they often produce a sense of disquietude within the women being interrogated because they elicit information that damns the woman within a hegemony that associates economic success with the moral rectitude of the person.

Consider the excerpt of the interview with Erica, an indigent Black woman who was, at the time of her pregnancy, living in a shelter because of domestic violence that she had experienced at the hands of a former boyfriend.\textsuperscript{176} When the social worker, Tina, asks Erica how she supports herself, there is a long pause, after which Erica says, "How could I forget what it's called?" After another long pause, she answers, "Welfare!" Tina then asks her if she receives "public assistance." Erica answers in the affirmative. Yet, her apparent inability to remember the signifier "welfare" is fascinating. Arguably, the "welfare" signifier, and the confession that it performs of the dejectedness of the speaker's economic-qua-moral position within market capitalism, was so odious to Erica that she "forgot" it in an attempt to spare herself the embarrassment of saying it out loud. Tina's offer of the signifier "public assistance," then, could be understood as an effort to help Erica describe her reliance upon state aid without the moralistic connotations that "welfare" has acquired. Erica accepted the more morally agnostic "public assistance," and, consequently, later used "public assistance" to describe that upon which her fiancé relied for financial support. Also noteworthy is the defensive stance that Erica inhabited when speaking about her fiancé's financial future. Her fiancé's expected annual salary of forty-three thousand dollars would expiate at least some of the condemnation that, as a

\textsuperscript{175} Admittedly, it is possible to link a pregnant woman's future pregnancies with her ability to provide for the material needs of the fetus that she carries once born. However, given the discursive condemnation of poor women's fertility, it is nevertheless consistent to interpret the institutional focus on future contraceptive use as evidencing a skepticism of the moral integrity of the poor woman. For discussions regarding the regulation of indigent women's fertility, see Dorothy Roberts, \textit{Killing the Black Body: Race, Reproduction, and the Meaning of Liberty} 202–45 (1997) (discussing proposals to regulate the fertility of women who rely on state assistance and the constitutional implications of them); Dorothy E. Roberts, \textit{The Only Good Poor Woman: Unconstitutional Conditions and Welfare}, 72 Denv. U.L. Rev. 931, 945 (1995) [hereinafter Roberts, \textit{Unconstitutional Conditions}] ("Poor women are entitled to the benefits of society only if they agree not to reproduce. According to these policies, an acceptable poor woman is one who consents to use birth control: \textit{the only good poor woman is an infertile poor woman.}").

\textsuperscript{176} See supra Introduction.
consequence of Erica and her partner’s present and avowedly temporary reliance upon public assistance, would be visited upon them within a hegemony that associates the absence of economic self-sufficiency with immorality. Tina’s statement that Erica was “in a better situation than a lot of [her] patients” could be understood as a—perhaps magnanimous, perhaps disingenuous—gesture that allowed Erica to understand herself as morally distinct from other persons who really deserved the blame and censure that had been given to Erica and her partner, i.e., those who were “really” at fault for their poverty. When Erica could physically dissociate herself from those persons, whom her fellow residents in the shelter came to represent, her penitence would be complete and she would “be fine.”

I should note that the transcript of the interview fails to communicate the palpable tension that was produced in the room when Tina began to ask Erica about her relationship with the father of her children and the relationship that she had had with the man whose violence had forced her into a shelter. After the interview, and after Erica had been escorted to the next professional that she was scheduled to see that day, I asked Tina how she would explain Erica’s protective deportment:

Tina: She wasn’t being open. She wasn’t being open. She was being guarded. And she was being a little—if I had pushed her, she might have gotten hostile. She was a bit hostile. I don’t know if you picked up on it.

Khiara: What hostility did you see?

Tina: Just in the way that she was answering questions. It could just be—she has built up a little bit of a roughness. It’s not as blatant as other people. She has an edge. She has an edge. In the—what?—ten minutes that she was here, I couldn’t tell you how she is normally. Maybe that’s the way she is all the time. But, I did perceive an edge. And you can imagine that if somebody was in a domestic violence situation and is now living in a shelter, they might pick up an edge. And maybe if you have survived a domestic violence relationship, then it’s probably your edge that got you through it.177

As mentioned earlier, however, the social worker’s interrogation into the woman’s economic circumstances comprises only a fraction of her legislatively-mandated consultation with the woman seeking to initiate prenatal care. Accordingly, it is not unreasonable to conclude that “social risk” denotes more than the risk that the woman’s poverty will make her unable to meet the material needs of her infant. The “social risk” condition of the woman not only makes relevant questions about how a woman supports herself, but also makes legally relevant a slew of other intimate questions unrelated to economic circumstance. It is not outside the universe of reason to

---

177 Interview with Tina (July 3, 2007) (on file with the author).
conclude that the woman’s poverty, which alone qualifies her as “social risk,” is what makes questions that inquire into her moral integrity somehow germane, and this because poverty is thought to index a moral permissiveness, the magnitude of which the state has the duty to determine and upon which the health and safety of the woman’s unborn child hinges.

To the extent that the state’s intervention in the private lives of poor, pregnant women is premised upon an ideology within which economic failure indexes a moral failure and the concomitant likelihood of harming a child, a relevant query at this point is the extent to which the state is acting to protect the child from abuse and neglect as opposed to merely punishing the mother for her failure to thrive within capitalism. This is a question that is also raised within the foster care reform literature, where scholars have questioned the fact that child protective agencies frequently focus on the perceived personal shortcomings of poor women and not on their ability to parent their children.178 Instead of directing the inquiry to whether the child has been harmed or is at risk of being harmed due to the actions or inactions of the parent—that is, instead of protecting the child—child protective services frequently direct their inquiry to whether the parent (the mother, commonly) has made “good” choices in terms of sexual partners, drug and alcohol usage, and educational attainment.179 The outcome is that the state often intervenes into poor, single mothers’ families and seizes custody of their children not because the children have been, or are at risk of being, injured in some way, but rather because these poor, single mothers have engaged themselves in supposedly insalubrious relationships with unsavory men, have used drugs or alcohol, or have not otherwise lived their lives in conformance with traditional social norms.180 The state focuses on the “inadequacies” within their personal lives as opposed to their competence to parent. This “punitive maternal focus serves . . . to expand the scope of state

178 See, e.g., Appell, Protecting Children, supra note 147, at 579 (noting that poor mothers of color “deviate from the normative notions of mother and womanhood and are defined as bad,” resulting in an “often punitive, rather than empowering, system focused more on mothers than on their children”); Bernadine Dohm, Bad Mothers, Good Mothers, and the State: Children on the Margins, 2 U. Chi. L. Sch. Roundtable 1, 6 (1995) (“From the beginning, the juvenile courts and the broader social welfare system intervened in the lives of destitute women to regulate and monitor their behavior, punish them for ‘deviant’ mothering practices, and police the undeserving poor.”); Justine A. Dunlap, Sometimes I Feel like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect, 50 Loy. L. Rev. 565, 588 (2004) (“[I]f failure-to-protect charges cast the abused mother as a bad mother . . . . The system and the batterer have the same refrain towards the mother: it—whatever ‘it’ is—is her fault. The charge revictimizes the mother by removing her children and premises their return on her conformity with governmental edict.”); Odeana R. Neal, Myths and Moms: Images of Women and Termination of Parental Rights, 5 Kan. J. L. & Pub. Pol’y 61, 62 (1995) (arguing that termination of parental rights is often “not based on the mother having harmed the child, but rather on the mother exhibiting the characteristics of being a bad woman” and concluding that “[s]ince bad women can never be good mothers, their relationships with their children are terminated on that basis”).

179 Appell, Protecting Children, supra note 147, at 588.

180 Id. at 605.
intervention beyond child protection into every realm of mothers’ lives in the name of making them good mothers.”

It is helpful to apply this critique to the pregnant women seeking prenatal care at Alpha Hospital and to take the analysis one step further: the PCAP device not only improperly seeks to discover the inadequacies within women’s personal lives, but through the search for those inadequacies, the state punishes the women for being poor and pregnant. Indeed, the scope of the survey made by PCAP far exceeds the determination of whether a woman has harmed her fetus or whether she will harm her child once delivered. Instead, the inquiry focuses on coercing the confession of, and enabling the documentation of, the personal failures of the woman. It should be emphasized that these particular women’s personal failures are assumed to be extant principally because these are women who have made the “imprudent,” “irresponsible” decision of becoming pregnant and maintaining a pregnancy when they have not managed to either attain economic self-sufficiency within market capitalism or attach themselves to a man who has. Questions are asked of a poor woman not because the child to whom she will give birth might be wounded or wronged in some way by her mother’s imperfect diet, cigarette smoked years ago, or the other banalities about which information is demanded as a condition of the receipt of Medicaid. Instead, this information is gathered because the patient’s poverty is presumed to indicate the absence of a moral vigilance that might manifest in harm to her child, and also because, in the articulation of that information—in the routing of the poor, pregnant woman’s right to privacy/liberty interests—the state exacts punishment on the woman for allowing her poverty to intersect with her pregnancy.

In the following Part, I explore a question that becomes emergent from the inquiry: if the right to privacy/liberty interest in privacy can be preemptively limited because of the economic dependence of the rights-holder, can one argue that that which is possessed by the poor is a “right” at all? Is the right to privacy/liberty interest in privacy always already a function of class, such that it is more accurate to speak of the absence of poor persons’ rights instead of the violation of their rights?

V. THE BARTERING OF “RIGHTS”

There is an argument that PCAP does not demand the violation of the privacy rights/liberty interests of poor, pregnant patients; instead, the women, through their acceptance of Medicaid and other forms of state aid, have bartered away their rights to privacy/liberty interests. The disquisition of

\[181\] Id. at 579–80.
\[182\] See Roberts, Unconstitutional Conditions, supra note 175, at 941 (noting that “[t]he sphere of privacy protected by liberal rights largely evaporates once the individual invites in state assistance” and that “[a]n individual’s acceptance of government benefits

775
intimacies mandated by Medicaid does not infringe upon women’s right to privacy/liberty interests because these women have given away the privacy rights/liberty interests that they have in exchange for government assistance. 183

is deemed to constitute a waiver of privacy”). The dilemma raised by the PCAP program is a subset of the more general problem of unconstitutional conditions, a doctrine holding that “government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.” Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1415 (1989). As Sullivan argues, the doctrine is “riven with inconsistencies.” Id. at 1416–17 (describing cases in which the Court has held that a government action is an unconstitutional condition while declining to find an unconstitutional condition in cases with similar fact patterns). Moreover, the Court has refused to find unconstitutional conditions imposed by state laws affecting the reproductive rights and autonomy of indigent women. See id. at 1464, 1500–01 (discussing Maher v. Roe, 432 U.S. 464 (1977), and Harris v. McRae, 448 U.S. 297 (1980), in which the Court held that the government’s funding of indigent women’s childbirth-related expenses, but refusal to fund indigent women’s abortion-related expenses, did not force poor women to surrender their abortion rights in exchange for a welfare benefit and was, therefore, not an unconstitutional condition). Sullivan’s analysis of the doctrine reveals that, in many areas—some involving poor people, some not—the government may burden an individual’s constitutionally-protected rights when the government concomitantly grants some benefit to that individual. See id. at 1416–17. The question then becomes why the phenomenon discussed in this Article, whereby indigent women and families are required to exchange privacy rights/liberty interests for a welfare benefit, should raise our hackles any more than the other myriad areas in which the government requires individuals to relinquish rights in exchange for a benefit. The answer may be that this particular exchange has little justification. As Hasday has argued, very little time and energy have been devoted to justifying the two-tiered system of family law. She writes:

Why should it be the case that a . . . mother and child’s call for government support through certain tainted programs[ ] is still enough to subject every member of that family to legal rules and presumptions that are interventionist, instrumental, and wholly opposed to those conventionally associated with family law? Why should the law sustain two separate and very different normative regimes for governing parenthood whose application turns on whether money is transferred in this particular social modality?

Hasday, supra note 11, at 385. Further, when one acknowledges that the exchange has effects that may be repulsive to our notions of equality, effectively producing a class of people and families that have robust rights and a class of people and families with no rights about which to speak, it may be that we conclude that the doctrine of unconstitutional conditions in this area should work to strike down laws like the ones discussed in the present Article. See Sullivan, supra, at 1497–99 (describing the creation of a “system of constitutional caste” when the government may restrict the constitutional rights of some (i.e., the poor) but not others).

In an influential article, Rubenfeld has argued that the right to privacy protects individuals from being standardized by a biopolitical state interested in normalizing its citizens. See Jed Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737, 784 (1989) (arguing that without a right to privacy, there is a danger of a “particular kind of creeping totalitarianism, an unarmed occupation of individuals’ lives”). If poor persons, indeed, must barter their right to privacy for a government benefit, Rubenfeld’s insight reveals that this exchange is required because of the belief that it is to the benefit of society that the poor become normalized. The state takes their request for government assistance as an opportunity to “occupy” the lives of the poor—to normalize the abnormal who, due to their indigence, have existed on the margins of society.
In a different, but related, context, Roberts explores the constitutionality of requiring poor women to surrender their privacy rights in order to receive government assistance: she analyzes welfare reform proposals made by several states, pursuant to which the provision of a welfare grant to a woman is conditioned on her use of contraception. As outlined by Roberts, there are numerous variations on this theme:

The most benign is to make contraceptives freely available to welfare recipients . . . . This approach might be combined with the added incentive of offering a cash bonus to women on welfare for using [contraceptives] . . . . A third option is to deny additional benefits for children born to women who are already receiving public assistance . . . .

A fourth possibility is to use more coercive means to ensure that women receiving government aid remain infertile . . . . At least two states have proposed legislation to mandate the use of [a temporary, yet long-term contraceptive device] as a condition of receiving welfare benefits.

In order to avoid the conclusion that such proposals are manifestations of the hegemonic devaluation of poor women's fertility, one must accept some vision of the dissolution of the protective boundary around poor women's private affairs upon their acceptance of public assistance. Through her receipt of public aid, she has declined to "immunize [her] private sphere from state interference." As a result, "[t]he sphere of privacy protected by liberal rights largely evaporates once the individual invites in state assistance. An individual's acceptance of government benefits is deemed to constitute a waiver of privacy." Thus, "the government's spending power" is used as a technique with which to "supervise the everyday lives of poor families."

Roberts acknowledges that an inevitable tension arises when a demand for government intervention in the form of welfare entitlements is simultaneous to a demand for government nonintervention in the form of a woman's right to determine her reproductive present and future. She writes that those

---

184 See Roberts, Unconstitutional Conditions, supra note 175, at 933–34; see also Cahn, supra note 18, at 1243 (noting the history of welfare programs that make women comply with "morality requirements" as a condition of receiving state aid).
185 Roberts, Unconstitutional Conditions, supra note 175, at 933–34.
186 Id. at 940.
187 Id. at 941.
188 Id. As another example of how the offer of state aid forces women to cede access to other aspects of their lives that do not readily appear to exist within the purview of that aid, Roberts cites the "man-in-the-house" rules, which allowed states to condition the granting of welfare benefits on the recipients' conformance to the state's notion of "appropriate" sexual behavior for unmarried women. Id. at 942. And, "[m]ore recently, women on welfare have been required, as a condition of receiving benefits, to undergo mandatory paternity proceedings that include state scrutiny of their intimate lives." Id. at 942.
who would champion the persistence of welfare recipients’ privacy rights paradoxically seek to:

disconnect the demand for privacy from government intrusion and the demand for government intervention through financial support. [T]hey rely on the liberal resistance to government while hoping for the illiberal assistance of government . . . . [T]hey require[ ] us to close our eyes for a moment and pretend that poor women are not dependent on government assistance; then we may open our eyes the next moment and plead for government support for their decision to have children.189

Those who find the PCAP apparatus discomforting in light of its ostensibly vacating of poor women’s privacy rights/liberty interests are faced with the same tension articulated by Roberts—a tension that is produced at the intersection of the woman’s petition for Medicaid subsidization of her healthcare expenses with her desire to maintain the invisibility of her intimate affairs. We are asked to understand the disquietude generated by this felt tension as the quixotic longing for the persistence of the poor woman’s privacy rights/liberty interests. We are told to surrender our notions of the inalienability of rights like the right to privacy. And we are expected to realize that the conflict exists only when we insist upon the continuance of the woman’s privacy right/liberty interests; indeed, when we allow that the woman has bartered her rights in exchange for government assistance, the tension resolves and in its place remains a “legitimate,” unfettered state presence in women’s private lives.

This begs the question: what does it reveal about the nature of rights in our particular sociopolitical location when a right—once imagined as fundamental among jurists and legal scholars, as well as among those who believe themselves to be in possession of it—is so easily bartered away? Perhaps we misspeak when we assert that poor women’s rights have been exchanged for state assistance. And perhaps we dissemble the actual nature of rights within our political economy when we claim that the state violates the “right” of the pregnant woman seeking Medicaid coverage of her prenatal care expenses. Perhaps nothing has been bartered, nothing has been violated.

That is, perhaps “rights” are always already a function of class, such that the poor do not have any rights about which to speak. The Medicaid-mandated apparatus within the Alpha obstetrics clinic does not violate the rights of the pregnant patients because their socioeconomic status precludes their possession of any “rights” that the state is bound to respect. Many scholars have intimated towards this conclusion without decisively arriving

189 Id. at 940.
For example, in her attempt to problematize Fineman’s notion of the “public family” by trying to add a class analysis to a problematic that proceeds solely upon gender lines, Roberts notes that while “single mothers’ privacy is based on patriarchal definitions of the family, it is also true that dependence on government aid provides an additional rationale, as well as the opportunity, for state regulation. Wealth can help to buy the presumption of privacy.” That which is at operation within the Alpha obstetrics clinic calls into question whether Roberts’ formulation, while true, is sufficiently robust. It is not that Alpha patients, because of their poverty, do not have presumptions of privacy; rather, their privacy is presumed altogether nonexistent. So framed, it does not appear that wealth helps to buy the presumption of privacy, but rather that wealth is the condition of possibility for privacy. Class is the salient characteristic within Alpha because it enables an
exit from the Medicaid device that demands the evacuation of the pregnant woman's rights.

CONCLUSION

Through the examination of women's interaction with the PCAP apparatus, this Article has argued that indigent families are made public upon their receipt of state assistance; further it has explored why it is that indigent women and families fail to enjoy a presumption of privacy with regard to matters that have been discursively constructed as private. This exploration suggests that poverty, as constructed within our present sociopolitical location, is believed to index a lack of moral integrity—a lack that, in turn, justifies the erasure of the line that is imagined to separate private conduct from public intervention. The exploration leads to the possibility that, perhaps, the poor barter their privacy rights in exchange for government assistance. Yet, the ease with which the poor barter their rights suggests that it may be more accurate to describe the poor as never having rights to begin with. Indeed, a more honest description may entail admitting that, in our particular sociopolitical location, wealth is a condition of possibility for rights.

That wealth is a condition of possibility for rights would help to explain the generally dismal state of poor women's privacy rights/liberty interests in the U.S. insofar as the Supreme Court has determined that a poor woman's right to privacy/liberty interests does not impose any duty upon the state to help her pay the cost of an abortion. When one considers that the right to privacy for non-poor women enables their access to abortion services, while the "right" to privacy for poor women dismal fails to accomplish the same feat, can we still argue that non-poor women and poor women possess the same right? We are confronted with a situation wherein the right to privacy for poor women is without content and without effect. Again, is a right that is devoid of substance a right at all? The Supreme Court has similarly held that the right to privacy possessed by a poor woman does not impose upon the state the obligation to provide even those abortions that would save her from being maimed. Simply stated, the right to privacy possessed by the

intending to argue that Weberian power can be reduced to Marxist class, I do not think it inaccurate, in the least, to claim that that which determines the inability of the Alpha patient to defend elements of her life that have been discursively constructed as private from public exposure is her lack of power derived from her subordinate class position. When rights are understood as the stuff through which persons defend private elements of their lives, then the inability of that defense can be understood as the absence of the right. Id.

193 Maher v. Roe, 432 U.S. 464, 469 (1977) (holding that "[t]he Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents," and, therefore, that a State had no obligation to fund "nontherapeutic" abortions for indigent women).

194 Harris v. McRae, 448 U.S. 297, 316–17 (1980) (noting that because "a woman's freedom of choice" does not carry with it "a constitutional entitlement to the financial
poor woman is so impoverished of value and consequence that it can not even protect her physical health. Once again, do we overstate that about which we speak when we call this a “right”? Further, the insignificance of the “rights” possessed by the poor is not particular to the right to privacy; the Supreme Court has similarly held that poor people’s “rights” do not entitle them to shelter\textsuperscript{195} or other life-sustaining services.\textsuperscript{196}

It deserves underscoring that my argument is not about the impoverishment of rights discourse. My claim is not that, at this time, rights are formulated as rights \textit{against} government interference when what is needed are rights \textit{to} some conception of liberty. While a reformulation of rights as imposing an affirmative duty on the state, rather than an interdiction upon state action—that is, a conversion of rights to “rights \textit{to}” rather than “rights \textit{against}”—would be a dramatic improvement to the present state of rights within the U.S., this transformation within rights discourse may not adequately resolve the dilemma at hand. That is, even if rights were conceptualized and enforced as rights \textit{to} some conception of liberty, the poor may still find themselves without these new rights \textit{to} positive government action. Is there reason to believe that “rights \textit{to}” would not still remain a function of class? There is a danger that the poor would, in spite of a revolutionary reformulation of rights, find themselves in the same predicament in which they now find themselves: possessing “rights” without substance, meaning, or effect.

\textsuperscript{195} Lindsey v. Normet, 405 U.S. 56, 74 (1972) (finding that no obligation exists for the government to provide adequate housing).

\textsuperscript{196} Youngberg v. Romeo, 457 U.S. 307, 317 (1982) (observing that “[a]s a general matter, a State is under no constitutional duty to provide substantive services for those within its border”).
Increasingly, state statutes are the primary means through which legal norms affecting low-income pregnant women's autonomy, privacy, and liberty are introduced and shaped. Arrests, forced bed rests, compelled cesarean sections, and civil incarcerations of pregnant women in Alabama, Florida, Indiana, Iowa, Mississippi, New Mexico, South Carolina, Texas, Utah, and Wisconsin merely scratch the surface of a broad attack on pregnant women. This recent era of maternal policing reshapes physician and police interactions with pregnant women accused of violating fetal protection laws (FPLs); inspires (and sometimes requires) medical officials to breach confidentiality when treating pregnant women; motivates selective prosecution against poor women, particularly
those of color; and evinces improper judicial deference to medical authority rather than law.

This Article makes three claims. First, it argues that doctors breach what should be an unwavering duty of confidentiality to pregnant patients by trampling the well-established expectations of the patient-physician relationship. Second, it argues that even if states' chief goal is to promote fetal health by enacting protectionist laws, punitive state interventions contravene that objective and indirectly undermine fetal health. Finally, the Article argues that FPLs unconstitutionally situate pregnant women as unequal citizens by unjustly denying them basic human and legal rights afforded other citizens.

Introduction ...................................................................................................... 783

I. Implementation of State Law: The Shifting Role of Medical
Personnel in Fetal Protection Law Cases .............................................. 795
A. States Increasingly Rely on Medical Personnel to Interpret
State Statutes ................................................................................. 798
  1. Samantha Burton's Involuntary Bed Rest ........................................ 799
  2. Christine Taylor's Arrest for Tripping While Pregnant .......... 806
  3. Rennie Gibbs's Charge of Depraved Heart Murder in
Stillbirth Case .......................................................................... 808
B. Medical Staff Are Poor Interpreters of Law, and This New
Focus on Law Compromises Their Medical Judgment ................ 812
  1. Marlise Muñoz: Brain-Dead Pregnant Woman Kept on
Life Support to Incubate Fetus ................................................ 814
  2. Angela Carder: Denying a Pregnant Patient Chemotherapy .. 815

II. The Fiduciary Relationship, Criminal Leverage, and Medical
Utility .................................................................................................... 818
A. The Fiduciary Relationship in Common Law: A Bundle of
Principles, Obligations, and Rights ............................................... 820
B. Formidable Discretionary Power: FPLs Lead to the Corruption
of the Physician-Patient Relationship ........................................... 824
C. Enlistment of Doctors to Police Pregnant Patients: Inimical to
Public Health Goals ....................................................................... 829
  1. Driving Women away from Needed Medical Care ........... 830
  2. Decline In Trust: Undermines Health Goals and
Outcomes .......................................................................... 833
  3. Shackling Further Undermines Pregnant Patients'
Health ............................................................................... 835

III. The Equal Protection Conundrum ........................................................ 839
A. The Empirical Problem ................................................................. 840
  1. Abstracted Legal and Medical Framing............................... 841
INTRODUCTION

Imagine a time when fetal protection legislation emboldens a state’s attorney to prosecute a pregnant woman for smoking a cigarette.1 On the one hand, inhaling nicotine and carcinogens undoubtedly risks both pregnant women’s health and that of their fetuses.2 On the other hand, cigarette smoking is otherwise a rigorously defended legal activity. State governments persistently choose not to ban cigarette smoking, despite concerns for public health and safety and ongoing civil litigation against tobacco companies. But does the state’s asserted special solicitude for fetal health justify prosecuting pregnant women for smoking, and would such prosecution pass constitutional muster?

When the state chooses to prosecute a pregnant woman for threatening fetal health, it raises a host of questions. Under what circumstances and justifications does it so? Why does some conduct during pregnancy and not others raise red flags and lead to punitive state interventions? What do these choices signify regarding the exercise of prosecutorial discretion? How should we assess the constitutionality of these prosecutorial choices?

1. Press Release, Nat’l Advocates for Pregnant Women, Supreme Court of New Mexico Strikes Down State’s Attempt to Convict Woman Struggling with Addiction During Pregnancy (May 11, 2007), available at http://www.advocatesforpregnantwomen.org/whats_new/victory_in_the_new_mexico_supreme_court_l.php (reporting that, during oral arguments before the Supreme Court of New Mexico, the state’s attorney admitted that the law used to prosecute Cynthia Martinez’s drug addiction during her pregnancy “could potentially be applied to pregnant women who smoked.”).

These questions are important because state statutes are increasingly the primary means through which medical and constitutional norms, including selective invasions of privacy, disclosures of medical information, arrests, prosecutions, and convictions relating to pregnancies are introduced and shaped.3 A recent report issued by Lynn Paltrow, Executive Director of the National Advocates for Pregnant Women (NAPW), and Professor Jeanne Flavin underscores this point. The authors document over four hundred cases from 1973 to 2005 “in which a woman’s pregnancy was a necessary factor leading to attempted and actual deprivations of a woman’s physical liberty.”4 Their account of fetal protection interventions on pregnant women adds to the earliest literature in this field, examining the intersections of race and sex in policing women’s reproduction.5

Nearly twenty-five years ago, Professor Dorothy Roberts offered a chilling account of government interventions in the pregnancies of low-income, drug-addicted African American women. Roberts exposed race as an intrinsic and entrenched aspect of fetal protection prosecutions in the United States during the late 1980s and early 1990s.6 She explained that state intrusions on the pregnancies of poor women of color “are particularly harsh” because these women “are the least likely to obtain adequate prenatal care, the most vulnerable to government monitoring, and the least able to conform to the white, middle-class standard of motherhood.”7

In the wake of Roberts’s groundbreaking article, other scholars critiqued government intrusions on pregnant women’s liberty, primarily examining state interventions in drug-addicted women’s reproduction.8 Nearly a decade ago,
Professor Linda Fentiman introduced an economic analysis to the field, arguing that pregnancy interventions are a poor response to inadequate health care for low-income children and their mothers, particularly because they undermine women’s ability to fully participate in the economic growth of their families and the nation. Professor April L. Cherry advanced a novel Free Exercise Clause critique, explaining that courts’ dismissals of pregnant women’s religious liberty claims are “particularly disrespectful of religious minorities and inappropriate if the free exercise clause is to have any meaning in the lives of those whose faith guides them in these matters.” In a subsequent article, Professor Cherry issued a feminist critique, positing that fetal protection efforts reduced pregnant women to “fetal containers” and “maternal environments.”

Professor Michelle Oberman, a prominent health law scholar, examined fetal protection as a conflict not exclusively between mothers and fetuses, but instead between pregnant patients and medical providers. More recently, Professor Julie Cantor explained that forcing women to accept medical interventions on behalf of fetuses belies legal tradition that makes clear that citizens, including parents, “have no legal duty to use their bodies to save one another.” Cantor offers a duty-to-rescue analysis that brings reflections from abortion debates to fetal protection analysis. Nor are proponents of fetal protection silent on this issue, particularly in light of allegations that fetuses experience pain, which has produced symbolic victories (if technical defeats) in the personhood movement.
This Article does not reiterate the theoretical arguments advanced in prior scholarship. Rather, it argues that legislative fetal protection efforts are on the rise, driving the creation, enactment, and enforcement of statutes authorizing criminal intervention in women’s pregnancies. These statutes dramatically exceed prior limits, extending beyond penalizing poor African American pregnant women for illicit drug use, particularly crystallized cocaine (crack). Contemporary fetal protectionism includes sanctioning women for refusing cesarean sections, forcibly confining them to bed rest, and instigating prosecutions for otherwise legal conduct. Frequently class matters as much as race, meaning African American and Latina women no longer serve as the default targets of fetal protection laws, which scholars and activists persuasively demonstrated a quarter-century ago. Over sixty prosecutions in Alabama of poor pregnant women (many of whom are white) in the past few years signify an eerie return to the eugenics-era past.

2012, the U.S. House of Representatives’ Subcommittee on the Constitution and Civil Justice held a hearing on fetal pain. Speaking in favor of the District of Columbia Pain-Capable Unborn Child Protection Act (H.R. 3803), Professor Colleen Malloy testified that “[w]ith our advanced ‘views into the womb,’ we are now able to appreciate the active life of the developing fetus as one who is engaged with his or her uterine locale.” Hearing Before the Subcomm. on the Const. & Civ. Just. of the H. Comm. on the Judiciary, 112th Cong. 3 (2012) (statement of Colleen A. Mallory, M.D.), available at http://www.nrlc.org/uploads/fetalpain/TestimonyColleenMalloyHR3803.pdf (arguing that “fetal pain is no less than the . . . adult pain experience.”); Theresa Stanton Collett, Fetal Pain Legislation: Is It Viable?, 30 PEPP. L. REV. 161 (2003) (urging the legislative protection of fetuses from pain); Erik Eckholm, Theory on Pain Is Driving Rules for Abortions, N.Y. TIMES, Aug. 1, 2013 (reporting on “a push to ban abortion at 20 weeks after conception, on the theory that the fetus can feel pain at that point”).

Fetal pain discourse only recently gained significant public attention, despite three decades of debate within the scientific community. Two decades ago, Professor Vincent Collins, along with two dozen professors and physicians, wrote to President Ronald Reagan publicly congratulating him for bringing the term “fetal pain” to the fore. Letter from Vincent Collins et al., Professor of Anesthesiology, Northwestern University, University of Illinois Medical Center, to Ronald Reagan, President (Feb. 13, 1984) (“That the unborn, the prematurely born, and the newborn of the human species is a highly complex, sentient, functioning, individual organism is established scientific fact.”).

For a review of the literature advocating recognition of fetal personhood, see Patricia A. King, The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn, 77 MICH. L. REV. 1647 (1979); Jeffrey Parness & Susan Fritchard, To Be or Not to Be: Protecting the Unborn’s Potentiality of Life, 51 U. CIN. L. REV. 257 (1982) (arguing that with the exception of the Supreme Court denying fetuses personhood in Roe v. Wade, “the unborn are persons under most inheritance and trust law.”); Janet Stitch, Recovery For The Wrongful Death Of a Viable Fetus: Werling v. Sandy, 19 AKRON L. REV. 127 (1985) (“the rationale used to extend recovery to the viable fetus should be considered with respect to the non-viable fetus to ensure legal protection whenever a wrongful act has been committed.”).

15. LYNN PALTROW, CRIMINAL PROSECUTIONS AGAINST PREGNANT WOMEN: NATIONAL UPDATE AND OVERVIEW (1992) (listing the racial identification of pregnant women subjected to state intervention, and finding that the majority were African American); Roberts, supra note 5, at 1421 n.6 (noting that the majority of women targeted for state criminal prosecution, because of drug use during pregnancy, “are poor and Black.”); Gina Kolata, Bias Seen Against Pregnant Addicts, N.Y. TIMES, July 20, 1990, at A13 (citing an ACLU study that found 80 percent of the women targeted for criminal intervention for drug use during pregnancy were African American, Latina, and “members of other minorities.”).
This Article analyzes these issues and argues that fetal protection laws and broader efforts to arbitrate women's pregnancies not only violate professional medical ethics and norms, but also emerge from constitutionally suspect judgments about pregnant women. This Article adopts the term “fetal protection laws” (FPLs) to refer to an array of legislation that purports to promote the protection of fetuses. Such legislation includes feticide laws, drug policies, statutes criminalizing maternal conduct, and statutes authorizing the confinement of pregnant women to protect the health of fetuses. In some instances, prosecutors interpret existing laws intended to protect children from physical abuse to apply to fetuses—and thus these applications also fall within the category of fetal protection laws. According to proponents, fetal protection laws are intended to promote the health and safety of fetuses by criminalizing actual or intended harm to the unborn.

However, historically, the common law predicated fetal harms such as manslaughter and murder of an infant on an actual birth and the fact that the child was alive at the time the criminal act occurred in order for an individual to be convicted under state law for causing injury to a child. Contemporary fetal protection efforts ignore not only this history, but also the wisdom for it. At the time of Professor Roberts’s iconic article, prosecutors engaged in artful legal maneuvering to convince courts that existing child abuse statutes should apply to fetuses. Legislatures have since remedied what they perceived as a

18. These laws are illustrated by those criminalizing drug delivery to a fetus. See ALA. CODE § 26-15-3.2 (2006).
19. WIS. STAT. ANN. § 48.133 (West 2013) (granting the court “exclusive original jurisdiction” over an unborn child in need of protection when the expectant mother “habitually lacks self-control in the use of alcohol beverages, controlled substances . . . .”). The Wisconsin law allowed State authorities to incarcerate Alicia Beltran, who was fourteen weeks pregnant, after she told a health care provider about a past (but not current) pill addiction. Erik Eckholm, Case Explores Rights of Fetus Versus Mother, N.Y. TIMES, Oct. 24, 2013, at A1 [hereinafter Eckholm, Fetus versus Mother].
20. See, e.g., Whitmer v. State, 492 S.E.2d 777, 780 (S.C. 1997) (holding that a viable fetus is a “child” within the meaning of the state’s child abuse and endangerment laws).
21. For a discussion of the underlying legal theories behind these laws, see Paltrow & Flavin, supra note 4, at 322–26. See also Kenneth A. De Ville & Lorettta M. Kopelman, Fetal Protection in Wisconsin’s Revised Child Abuse Law: Right Goal, Wrong Remedy, 27 J.L. MED. & ETHICS 332, 332 (1999) (discussing laws in Wisconsin and South Dakota allowing confinement of pregnant women who abuse drugs or alcohol and how they are motivated by “the state’s interest in promoting the health of future citizens”).
22. State v. Osmus, 276 P.2d 469, 476 (Wyo. 1954) (stating that to convict a defendant of infanticide, it must be shown “first, that the infant was born alive, and second, if the infant was born alive that death was caused by the criminal agency of the accused”).
fatal gap in the law, which excluded the “unborn” from protections afforded children.

For example, in Alabama, House Bill 19 (enacted July 1, 2006) revised section 13A-6-1 of the Code of Alabama to include “an unborn child in utero at any stage of development, regardless of viability” as a “person” and “human being” as related to state criminal laws referencing manslaughter, criminally negligent homicide, murder, and assault.24 In 2013, the Alabama Supreme Court further expanded fetal rights in that state by interpreting the term “child” as used in section 26-15-3.2, Alabama Code 197 (commonly referred to as “the Chemical Endangerment Statute”), to include both viable and nonviable fetuses.25 The Alabama Supreme Court recently upheld this ruling in Ex parte Ankrom—finding that it was illegal under the statute not only for a pregnant woman to ingest illicit substances, but also to even enter locations where such substances are manufactured or sold.26 Similarly, in Arizona, SB 1052 (enacted April 25, 2005) amended several state statutes27 to grant viable and nonviable fetuses the status of minors less than twelve years of age for purposes of determining criminal sentencing in murder and manslaughter cases.28 In recent years, other states have enacted comparable legislation.29

her baby to drugs while pregnant”—and noting that the prosecution “invented a novel interpretation of the statute”).


25. Ex parte Ankrom, No. 1110176, 2013 WL 135748, at *22 (Ala. Jan. 13, 2013) (Parker, J., concurring) (concluding, “the decision of this Court today is in keeping with the widespread legal recognition that unborn children are persons with rights that should be protected by law.”).

26. Id. at *15 (reasoning that the word “environment” includes situations in which a person lives and can refer to “an unborn child’s existence within her mother’s womb”). The Alabama statute provides that “a responsible person commits the crime of chemical endangerment of exposing a child to an environment in which he or she . . . . knowingly, recklessly, or intentionally causes or permits a child to be exposed to, to ingest or inhale, or to have contact with a control substance, chemical substance, or drug paraphernalia . . . .”). ALA. CODE § 26-15-3.2 (2006) (emphasis added). Because the court held that the term “child” included unborn children, exposing a fetus to an environment where controlled substances are present could be considered child endangerment. Ex parte Ankrom, No. 1110176 at *15.


28. See id.

29. In Florida, Florida Statute § 782.09, otherwise known as “the Killing Of Unborn Quick Child By Injury To Mother Law,” expanded criminal laws to include the unlawful killing of a fetus or an “unborn quick child” as murder in the same degree “as if committed against the mother.” FLA. STAT. ANN. § 782.09 (West 2005). Other provisions of the law created new crimes to include the killing of a fetus as manslaughter, and extended punishment to vehicular homicide, FLA. STAT. ANN. § 782.071 (West 2001), and DUI manslaughter, FLA. STAT. ANN. § 316.192 (West 2010). It is worth noting that at the time of enactment, the Florida law carved out an exception for abortion and prosecuting pregnant women. Id. Recently, however, Florida and other state legislatures have turned to personhood legislation to expand fetal protection even against pregnant women. See id.

Personhood referenda mark another significant phenomenon in the advancement of fetal protection efforts. Personhood legislation mandates granting born status and rights to fetuses and
More alarmingly, medical personnel play an increasingly central role in implementing FPLs. This recent era of maternal policing, in addition to inspiring (and sometimes requiring) medical officials to breach their duty of confidentiality in the treatment of pregnant women,\(^{30}\) reshapes police interaction with pregnant women accused of crimes, motivates selective

sometimes embryos, including nonviable ones, contradicting the framework of prevailing constitutional law. For example, the North Dakota Senate and House passed the Inalienable Right to Life of Every Human Being at Every Stage of Development law in 2013, granting embryos and conceivably pre-embryos “inalienable” rights. S. Con. Res. 4009, 63rd Leg. Assemb., Reg. Sess. (N.D. 2013). The law now awaits a popular ballot vote in 2014. This legislation, the first such law to pass both the Senate and House of a state, requires that “the inalienable right to life of every human being at any stage of development must be recognized and protected.” Id. In an interview, Senator Margaret Sitte, sponsor of North Dakota’s personhood law, suggested that countering \textit{Roe v. Wade} was the purpose of her legislation. She explained, “We are intending that it be a direct challenge to \textit{Roe v. Wade}, since Scalia said that the Supreme Court is waiting for states to raise a case.” Laura Bassett, \textit{North Dakota Personhood Measure Passes State Senate}, HUFFINGTON POST (Feb. 7, 2013, 5:24 PM), http://www.huffingtonpost.com/2013/02/07/north-dakota-personhood_n_2640380.html.

Obvious maternal fetal conflicts extending beyond abortion are implicated and realistically in tension with such laws, including the risk that honoring embryo life could undermine maternal health and risk maternal death or lead to the possible criminalization of otherwise legal behavior during pregnancy. See Marcia Angell & Michael Greene, Op-Ed., \textit{Where are the Doctors?}, USA TODAY (May 15, 2012, 6:36 PM), http://www.usatoday.com/news/opinion/forum/story/2012-05-15/women-contraception-abortion-reproductive-rights-doctors/54979766/1. That these measures are gaining momentum is evidenced by the broad number of states taking up personhood legislation—even when such measures ultimately fail at the ballot box. See id. Thus, referenda in Mississippi and Colorado and petitions in Florida, Georgia, Nevada, Ohio, Montana, California, Kansas, Virginia, Alabama, and other states to redefine “personhood” mark only the most recent manifestations of legislative fetal protection efforts. And although these personhood amendments have so far failed, the arrests, prosecutions, and involuntary “maternity rest” restraining orders obtained against pregnant women under other extant state and federal laws evidence that such fetal protection efforts are more than an isolated, fringe legislative movement. A comprehensive summary of state statutes and cases is on file with the author. For a discussion of recent legislation restricting reproductive rights, see Marcia Angell & Michael Greene, Op-Ed., \textit{Where are the Doctors?}, USA TODAY (May 15, 2012, 6:36 PM), http://www.usatoday.com/news/opinion/forum/story/2012-05-15/women-contraception-abortion-reproductive-rights-doctors/54979766/1; see also Monthly State Update: Major Developments in 2014, GUTTMACHER INST. (Apr. 1, 2014), http://www.guttmacher.org/statecenter/updates/index.html; 2011 Ballot Measures: Election Results, NAT'L CONF. STATE LEG. (Nov. 9, 2011, 7:45 AM), http://www.ncsl.org/legislatures-elections/elections/ballot-measure-election-results.aspx; Keith Ashley, \textit{Voters in the Georgia GOP Primary Will Vote on Personhood}, PERSONHOODUSA (May 22, 2012), http://cm.personhoodusa.com/voters-georgia-gop-primary-will-vote-personhood; Eckholm, \textit{Fetus versus Mother, supra note 19}; Julie Rovner, \textit{Abortion Foes Push to Redefine Personhood}, NAT'L PUB. RADIO (June 1, 2011), http://www.npr.org/2011/06/01/136850622/abortion-foes-push-to-redefine-personhood; Grace Wyler, \textit{Personhood Movement Continues to Divide Pro-Life Activists}, TIME, July 24, 2013, available at http://nation.time.com/2013/07/24/personhood-movement-continues-to-divide-pro-life-activists/ (discussing efforts by Wisconsin Republicans to enact a personhood amendment granting human embryos the same civil rights as people).

30. See Angell & Greene, supra note 29 (noting that recent legislative restrictions on reproductive freedom work “mainly by intruding on the relationship between doctor and patient”). \textit{Ferguson v. City of Charleston} illustrates such a policy, which required doctors and nurses to report pregnant women’s drug tests results to police without the women’s knowledge. 532 U.S. 67, 83–86 (2001) (holding that a state hospital’s performance of a diagnostic test to obtain evidence of a patient’s criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure).
prosecution,31 and obligates judges to make poor judgment calls.32 So far, thirty-eight states have implemented feticide statutes, a particularly worrying species of fetal protection laws.33

_Regina v. Knight_34 is one of the earliest reported cases involving the manslaughter prosecution of a woman for failing to protect her fetus. Upon hearing compelling evidence leading to the “conclusion that the child had been born alive, and had died by the hands of the mother,” the Chief Justice reasoned that even under those circumstances the mother could not be guilty of manslaughter as there was no basis in law or doctrine for such a prosecution.35 Generally, in utero harms did not serve as the basis for child abuse, manslaughter, or murder convictions, particularly because proximate causation could not be established due to remoteness.36 Moreover, the legal presumption of life was rooted at birth, not conception.37 In essence, the crime of fetal abuse did not exist prior to contemporary legislative efforts. As the case _Rex v. Izod_38 demonstrated a century ago, a woman’s manslaughter conviction in the death of her child required a showing of criminal “neglect after the child has been completely born.”39 In that case, a widow’s failure to provide care to her fetus during labor and post-birth was evidence of negligence and serious neglect, but

31. See Linda C. Fentiman, _In the Name of Fetal Protection: Why American Prosecutors Pursue Pregnant Drug Users (And Other Countries Don’t)_ (2009) ("The criminal prosecution of pregnant women for causing fetal harm exemplifies the . . . dangers of the American system of autonomous state prosecutors. Locally elected, politically ambitious, and largely unsupervised, individual prosecutors have wide discretion in deciding whether, when, and whom to prosecute.").

32. _In re A.C._, 533 A.2d 611, 617 (D.C. 1987), _vacated_, 573 A.2d 1235 (D.C. 1990) (upholding a court-ordered cesarean section of a terminally ill pregnant woman and concluding that the trial court judge “did not err in subordinating A.C.’s right against bodily intrusion to the interests of the unborn child and the state”); _In re Unborn Child of Samantha Burton_, No. 2009 CA 1167, 2009 WL 8628562 (Fla. Cir. Ct. Mar. 27, 2009) (granting an order authorizing Tallahassee Memorial HealthCare to provide “medically necessary” treatment “to preserve the life and health of Samantha Burton’s unborn child,” including involuntary bed rest).


35. Ironically, the defendant was “eventually found guilty of concealing” the childbirth and sentenced to twenty-four months of hard labor. _Regina v. Knight_, _Rex v. Izod_, and _State v. Osmus_ present troubling facts: they each involve poor women who at delivery passively allow their infants to expire. In at least one case, it appears the woman may have taken affirmative steps to end the life of the infant. Yet, in each instance, the courts take great strides to clarify that the crime of manslaughter does not apply to the women’s failures to provide appropriate prenatal, labor, and postnatal care, even when it contributes to fetal harm or infant death. _State v. Osmus_, 276 P.2d 469 (Wyo. 1954); _R. v. Izod_, (1904) 20 Cox CC 699; _R. v. Knight_, (1860) 2 F. & F. 46.

36. See _Izod_, 20 Cox CC at 691 (reasoning that although a woman may be guilty of neglect for failing to care for her fetus, the neglect “is not enough to justify a verdict of manslaughter” if the neglect is confined to the time the child is in utero).

37. See id. at 691 (holding that “a child must be completely born before it can be the subject of an indictment for either murder or manslaughter.”) (emphasis added). This suggests that until a child is “completely born,” it is not considered a legal entity for purposes of murder or manslaughter.

38. _Id._

39. _Id._ at 691.
not manslaughter, because there was no finding of "neglect of the child itself treated as a separate being." 40

In 1954, the Wyoming Supreme Court cited Rex v. Izod when it overturned the manslaughter conviction of Darlene Osmus in her newborn's death.41 In rejecting the state's two central contentions that Osmus was guilty of nonfeasance under Wyoming's child abuse and neglect statute42 and manslaughter for failure to obtain prenatal and delivery care,43 Justice Blume emphasized that the law "relate[d] to a really living child."44 The court stressed that "one of the questions is as to whether or not the child was born alive."45 According to the court, the law did "not directly provide or even intimate that it applies to a child[,] such as involved in this case,"46 which contracted severe pneumonia shortly after birth.47

By contrast, contemporary fetal protection efforts mark a dramatic departure from the criminal jurisprudence a century prior because they adopt the legal standard that fetuses are persons. Under this standard, viability and the capacity to live outside of the womb are neither necessary nor relevant. This shift in law is significant as it normalizes treating the unborn as if they were born and alive at the time of injury, which not only implicates abortion policy, but also criminal law and women's other constitutional interests.

40. Id.
41. Darlene Osmos was a twenty-year-old unmarried woman who claimed she did not know she was pregnant when she went into labor and gave birth to the infant in the bathroom late one night. Osmus, 276 P.2d at 470-71. She testified that the infant was born dead, and that she had not informed anyone of the situation. Id. Three days later, she left the infant's body on the side of the highway. She was accused of murder, found guilty of manslaughter, and sentenced to two to four years in prison. Id.
42. WYO. STAT. ANN. § 58-101 (1945). The statute in question reads: "It shall be unlawful for any person having or being charged by law with the care or custody or control of any child under the age of nineteen (19) years knowingly to cause or permit the life of such child to be endangered or the health or morals or welfare of such child to be endangered or injured, or knowingly to cause or permit such child to be in any situation or environment such that the life, health, morals, or welfare of such child will or may be injured or endangered, or willfully or unnecessarily to expose to the inclemency of the weather, or negligently or knowingly abandon or fail to provide the necessities of life for such child, or to ill-treat, abuse, overwork, torture, torment, cruelly punish such a child, or to negligently or knowingly deprive or fail to furnish necessary food, clothing or shelter for such child, or in any other manner injure said child."
43. Justice Blume explained, "[S]uch nonfeasance must, of course, have occurred prior to the birth of the child and hence has no possible connection with [the law] so that an instruction setting out that section was error again in the light of that theory." Osmus, 276 P.2d at 475.
44. Id. at 474.
45. Id.
46. Id.
47. Id. at 472. The Wyoming Supreme Court further explained that the establishment of guilt in such cases requires direct and immediate causation, noting that the court does not consider a remote cause as an efficient or proximate cause. Blume opined, "A cause must be the efficient, commonly called the proximate, cause or it is not a cause at all in law. That is the rule in the law of torts and we see no reason why it should not apply here." Id. at 474. But see People v. Chavez, 176 P.2d 92, 94 (Cal. Dist. Ct. App. 1947) (holding that a viable fetus in the process of birth is a human being within the meaning of homicide statutes even when the birth is not fully complete).
For women subject to contemporary fetal protection laws, the consequences can be extraordinarily harsh. In July 2013, Alicia Beltran was arrested, shackled, and confined by court order to a drug treatment center for seventy-eight days after she refused a doctor’s orders to take a potentially dangerous opiate blocker. During a prenatal checkup, Beltran had confided to medical staff that she previously battled an addiction to opiates but managed to overcome drug dependency. She revealed that before becoming aware of her pregnancy, she ingested a single Vicodin tablet for pain. Christine Taylor was arrested in 2010 for falling down a set of stairs in her Iowa home. Hospital staff reported Taylor to police after interpreting the fall as attempted feticide. Melissa Rowland’s reluctance to submit to an immediate cesarean section prompted medical personnel in Utah to urge her arrest. In Florida, a state court authorized Samantha Burton’s involuntary confinement because she refused bed rest against her physician’s recommendation. Several days after her hospital incarceration, Burton suffered a miscarriage, alone in a dreary, gray hospital room that, according to her lawyer, resembled a jail cell. As these examples illustrate, nurses and doctors often act as interpreters of state law, framing the described events as volitional, criminal acts against developing fetuses, and therefore against the broader community and the state.

State legislation criminalizing pregnant women’s unhealthy—but otherwise legal—conduct, such as ignoring doctors’ recommendations or

---

48. See Eckholm, Fetus versus Mother, supra note 29.
49. Id.
51. Id.
55. Id.
falling down steps, reinvigorates old, but clearly unsettled, reproductive policy debates related to maternal responsibility, autonomy, and privacy. Proponents of FPLs typically point to pregnant drug addicts as the targets of their legislative efforts because they are unsympathetic; other pregnant women like Taylor, Rowland, and Burton are simply collateral damage. Texas Representative Doug Miller's statement of support for fetal protection legislation illustrates this special solicitude: "I am interested in providing additional safety and protection for our next generation, and it must happen now . . . . The Texas Legislature can no longer sit idly by while its next generation is born addicted to illegal drugs, born with physical and mental abnormalities, set up for educational hardship, and destined to be on Social Security benefits. Parents must be responsible for their actions."

Yet the symbolic walls proponents erect—distinguishing the illicit drug user from all other pregnant women—deserve scrutiny. On inspection some of the distinctions between these cohorts are quite arbitrary. For example, studies

57. See, e.g., Mary Becker, From Muller v. Oregon to Fetal Vulnerability Policies, 53 U. CHI. L. REV. 1219 (1986) (critiquing fetal vulnerability policies in the workplace); Marianne N. Prout & Susan S. Fish, Participation of Women in Clinical Trials of Drug Therapies: A Context for the Controversies, MEDSCAPE WOMEN'S HEALTH, Oct. 2001, at 3, available at http://www.medscape.com/viewarticle/408956 (illustrating the political debate over pregnant women's clinical research participation in its discussion of a revised regulation that was issued during the Clinton administration and was intended to enhance pregnant women's participation in clinical research, but was delayed by a directive from President George W. Bush); Joanne Cavanaugh, Pregnant Pause, JOHNS HOPKINS MAG., Sept. 2001, http://www.jhu.edu/~jhurag0901web/pregnant.html (stating that debates about pregnant women's participation in clinical drug trials "touches one of the most emotional debates of our time: the right of a woman to make her own health care decisions vs. views that a fetus has rights and is vulnerable because it can't give consent to experimental treatment."); see also U.S. Military Drops Ban on Soldiers Getting Pregnant, CNN (Dec. 25, 2009, 8:55 AM), http://www.cnn.com/2009/WORLD/meast/12/25/iraq.us.soldiers.pregnant/ (discussing the U.S. military's repeal of a "controversial rule that called for punishing soldiers in northern Iraq for becoming pregnant or impregnating another soldier"). The rule was created by Major General Anthony Cucolo, who designed it to make soldiers "think before they act." Under Major General Cucolo's command, four pregnant women were given letters of reprimand and sent back to the United States. Id.

58. See, e.g., Condon, supra note 56 (stating that cocaine-using pregnant women "knowingly cause neurological damage to their unborn children" and that without legal recourse, health care providers must sit by and "watch them destroy a baby"); Sofia Resnick, Texas Proposed Law Could Jail Women for Taking Drugs During Pregnancy, AM. INDEP. (Feb. 24, 2011), americanindependent.com/171004/texas-proposed-law-could-jail-women-for-taking-drugs-during-pregnancy (quoting Texas Rep. Doug Miller speaking about the bill he sponsored that would have made it a state felony offense for a women to ingest controlled substances during her pregnancy). Barbara Harris, founder of Project Prevention, formerly known as Children Requiring a Caring Community (CRACK), pushes an equally caustic message in news interviews and on billboards and posters that feature statements such as "Don't let a pregnancy ruin your drug habit." Harris is a staunch advocate of aggressive criminal law reform and sterilization targeting drug addicts. Her organization pays drug addicts to undergo sterilization procedures. See Rheana Murray, Group Pays Drug Addicts to Get Sterilized or Receive Long-Term Birth Control, Sparks Criticism, N.Y. DAILY NEWS (May 9, 2012, 10:31PM), http://www.nydailynews.com/life-style/health/group-pays-drug-addicts-sterilized-receive-long-term-birth-control-sparks-criticism-article-1.1075432#ixzz2pNJd4zAX.

suggest white women and women with higher levels of education are more likely than others to seek and acquire prescription medications, including Xanax, Oxycontin, Demerol, Ritalin, and Tylenol with codeine during their pregnancies. These legally obtained prescription drugs may be as harmful to fetuses when taken during pregnancy as illegally obtained prescription or illicit drugs, however, often only the latter drug users are targeted for prosecution.

This Article argues that FPLs penalize pregnant women for fetal outcomes incidental to maternal control, carving out punishable distinctions between pregnant women’s conduct and that of all other groups. FPLs undermine pregnant women’s constitutional rights to be treated as equal citizens, to be free from unreasonable searches and seizures, and to be secure in their bodies. This Article demonstrates that fetal protection efforts reveal hostility to the concerns of low-income pregnant women. It argues that, because these laws do very little to promote fetal health, FPLs measure women’s obedience and not fetal risk. These laws counterproductively emphasize prosecution and incarceration over patient autonomy and medical treatment, normalizing shaming and stigmatization in poor women’s pregnancies. FPLs ignore the fiduciary relationship between physicians and their patients, which should be no less rigorously affirmed and defended than the attorney-client relationship. However, by conscripting doctors as gatekeepers for this type of legislative agenda, policy makers incorrectly presume that health care providers are immune to class and race bias because of their education. Moreover, as cases in


61. See, e.g., Lindsay Tanner, Pregnant Moms Using Cocaine Has Less Effect on Infants Than Previously Thought, Says Research, CHRISTIAN SCI. MONITOR (May 30, 2013), http://www.csmonitor.com/The-Culture/Family/2013/0530/Pregnant-moms-using-cocaine-has-less-effect-on-infants-than预先thought-says-research (noting study’s finding that cocaine use in pregnancy is not as associated with harms as was previously believed); Abusing Prescription Drugs During Pregnancy, AM. PREGNANCY ASS’N, http://americanpregnancy.org/pregnancyhealth/abusingprescriptiondrugs.html (last updated May 2011) (discussing how use of any drug, including prescription drugs, can have harmful consequences, such as birth defects, preterm labor, and low birth weight); Medications and Pregnancy, CDC, http://www.cdc.gov/pregnancy/meds/ (last updated Apr. 15, 2014) (noting that many medications may have adverse effects in pregnancy but that “little information is available about the safety of most medications during pregnancy—including those available over the counter”).

this Article attest, doctors do not always judge dispassionately and their clouded judgment may affect judicial enforcement, which is subject to similar pathologies as health care enforcement.

This Article develops in four parts. Part I takes up my claim that fetal protection statutes authorizing criminal intervention in women’s pregnancies entrench discriminatory norms. Specifically, this Part shows that, in asking doctors and nurses to police pregnant women’s behavior, these moralizing laws become further defined by subjective “decency” standards and interpretations at the ground level, including reliance on stereotypes, and thus prove fallible and discriminatory.

Part II further examines the role of doctors in fetal protection interventions. It analyzes the applicability of bioethics principles to contemporary fetal protection interventions and makes several normative claims: confidentiality is essential to the physician-patient relationship and should not be violated by health care providers; medical treatments should avoid subjecting patients to unnecessary suffering, including, but not limited to, unnecessary reproductive surgeries; and patients must be at liberty to withdraw from medical treatment, even if doing so risks death. Part II concludes by explaining why FPLs are unlikely to achieve medical utility.

Part III considers whether FPLs, despite burdening women’s medical and reproductive liberty, pass constitutional muster. It argues that such laws operate at odds with Fourteenth Amendment due process and equal protection values. This Part also advances a normative claim that punitive state interventions in women’s pregnancies do not simply reflect the government’s interest in protecting fetal health. Instead, it argues that fetal protection efforts reflect suspect judgments about pregnant women generally, and poor pregnant women in particular, because states selectively engage this purported interest. Selective prosecutions and interventions function to discourage and punish some conduct that may threaten fetal health while simultaneously bypassing other fetal-endangering behavior without medical or legal justification. Part III argues that even if states can articulate an important interest in regulating pregnant women’s reproductive conduct, the means by which states enforce the legislation may not be substantially related to the states’ ultimate goal of protecting fetal health.

I. IMPLEMENTATION OF STATE LAW: THE SHIFTING ROLE OF MEDICAL PERSONNEL IN FETAL PROTECTION LAW CASES

Nurses and doctors increasingly must interpret and implement state fetal protection laws and implement key statutory provisions. More than one-third

63. See GUTTMACHER INST., STATE POLICIES IN BRIEF: SUBSTANCE ABUSE DURING PREGNANCY (2014) (listing states that require health care professionals to report suspected prenatal
of states now consider pregnant women’s illicit drug use a form of child abuse, resulting in unprecedented forms of criminal and civil punishment. Several states permit civil confinement of pregnant women to protect their fetuses. Fifteen states mandate doctors and nurses report pregnant women whom they suspect of illicit drug use, establishing a low and vague threshold of suspicion rather than actual proof.

Health care professionals’ reporting obligations arise in part due to the influence of federal legislation. The Keeping Children and Families Safe Act of 2003 mandates that states receiving federal funds for child abuse and neglect services must promulgate regulations requiring health care providers involved in the delivery or care of infants “identified as being affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug abuse), available at http://www.guttmacher.org/statecenter/spibs/spib_SADP.pdf; see also WISC. STAT. ANN. § 48.133 (West 2013) (granting the court “exclusive original jurisdiction” over an unborn child in need of protection when the expectant mother “habitually lacks self-control in the use of alcohol beverages, controlled substances . . .”).

64. The states include: Arkansas, Colorado, Florida, Illinois, Indiana, Iowa, Louisiana, Minnesota, Nevada, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, and Wisconsin. GUTTMACHER INST., supra note 63.

65. That seventeen states consider illicit drug use and dependency to be a form of child abuse is unprecedented even though drug dependency is not a particularly new phenomenon. See id. In the early twentieth century legislatures feared a broad scale heroin epidemic among elite white women, including mothers. Stephen R. Kandall, Women and Addiction in the United States—1850 to 1920, in DRUG ADDICTION RESEARCH AND THE HEALTH OF WOMEN 33, 34–35, 40, 45–46 (Cora Lee Washington & Adele B. Roman eds., 1998) (discussing the high rates of heroin and opiate use in general among women in the late nineteenth and early twentieth centuries and legislative efforts to curb narcotics sales). Politicians specifically targeted drug trafficking and traffickers for the rise in heroin overdoses and addictions among the elite white women. A century later, the political approach to women’s illicit drug use is quite different as are the penalties, which include criminal punishment and civil penalties. Clifford B. Farr, The Relative Frequency of the Morphine and Heroin Habits, 101 N.Y. MED. J. 894 (1915) (reporting a 1915 survey at Philadelphia General Hospital that found that 25 percent of heroin addicts were women); Joseph McFer & George E. Price, Drug Addiction: Analysis of One Hundred and Forty-Seven Cases at the Philadelphia General Hospital, LXVI JAMA 476, 478 (1916) (discussing how anti-narcotic laws made opiates and heroin more expensive, and thus more difficult to obtain by lower class individuals).

66. MINN. STAT. ANN. § 253B.02 (West 2013) (defining a “chemically dependent person” who can be committed to include a pregnant woman “who has engaged during the pregnancy in habitual or excessive use, for a nonmedical purpose,” of alcohol and certain drugs); OKLA. STAT. ANN. tit. 63, § 1-546.5 (West 2000) (“A district attorney may convene a multidisciplinary team to assist in making a determination of the appropriate disposition of a case of a pregnant woman who is abusing or is addicted to drugs or alcohol to the extent that the unborn child is at risk of harm.”); S.D. CODIFIED LAWS § 34-20A-63 (allowing “emergency commitment” of an “intoxicated person who . . . [i]s pregnant and abusing alcohol or drugs); WISC. STAT. ANN. § 48.133 (West 2013).

67. The states are: Alaska, Arizona, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, North Dakota, Oklahoma, Rhode Island, Utah, and Virginia. GUTTMACHER INST., supra note 63.

exposure” to notify the child protective services system of the exposure.69 This is often the first step in police notification.70

But what explains health care providers’ decisions to report nondrug related cases or threatening to do so? When Lisa Epsteen indicated that she wanted to wait two additional days for a vaginal delivery rather than undergo the cesarean section recommended by Dr. Jerry Yankowitz, chairman of the University of South Florida’s (USF) department of obstetrics and gynecology, he sent the mother of five a threatening email, warning: “I would hate to move to the most extreme option, which is having law enforcement pick you up at your home and bring you in, but you are leaving the providers of USF/TGH no choice.”71 Epsteen knew she had a complicated, high-risk pregnancy72 but did not expect the threat or involvement of law enforcement in giving birth. She recounted to a Tampa Bay Times reporter fears about “cops on my doorstep taking me away from home—in front of my children—to force me into having surgery.”73 She recounted feeling betrayed, bullied, and abandoned by her doctor.74 Eventually, medical staff at USF accommodated Epsteen’s request after receiving a letter from National Advocates for Pregnant Women (NAPW), demanding that Yankowitz cease and desist “any further threats or actions against Ms. Epsteen.”75 Nevertheless, Epsteen’s traumatic experience highlights concerns central to this Article, including the fact that fetal protection laws embolden some doctors to threaten criminal punishment even when no crime has been committed.

In their politicized roles as deputized interpreters of the law, physicians and nurses may misinterpret the law or, even worse, prioritize exercising their legal judgment over their medical judgment. In this context, physicians and nurses are called upon to wear two hats: that of health care provider, and that of law enforcer. There are three main reasons conflicts arise when medical personnel act as both health care providers and law enforcers. First, patients’ interests in their health and privacy may become subordinate to physicians’ desires to accommodate or promote state interests. Indeed, physicians and

70. In most states, statutes specifying procedures that State agencies must follow in handling reports of suspected child abuse include requirements for “cross-system” reporting and information sharing among social service agencies, law enforcement, and prosecutors. CHILD WELF. INFO. GATEWAY, CROSS-REPORTING AMONG RESPONDERS TO CHILD ABUSE AND NEGLECT (2012), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/xreporting.pdf. Some states mandate that all initial reports to a child protective services agency must also be cross-reported to the appropriate law enforcement agency. Id.
72. In fact, her high-risk pregnancy was what led her to Dr. Yankowitz in the first place because he was one of only a few doctors willing to try a vaginal birth after cesarean. Id.
73. Id.
74. Fortunately for Epsteen, she had the capacity and wherewithal to reach out to NAPW. Id.
75. Id.
nurses may fear civil or criminal punishment for failing to inform on their patients. Second, physicians’ legal duties to comply with law enforcement protocols may conflict with their ethical duties to the patient, including maintaining confidentiality and avoiding malfeasance. Third, physicians’ obligations to the profession may conflict with obligations to law enforcement by interfering with physicians’ independent medical judgment. Importantly, in addition to any conflicts of interest that may arise in this context, medical professionals’ legal decisions may also be at odds with patients’ constitutional rights.

Section A unpacks cases that offer a lens into the phenomenon of medical personnel interpreting fetal protection law. Section B critiques this increased reliance on medical personnel as a problematic delegation of significant discretionary power that has increased the harmful presence of bias and stereotyping in the enforcement of fetal protection laws.

A. States Increasingly Rely on Medical Personnel to Interpret State Statutes

Cases across the United States illustrate how physicians and hospital staff operate not only as caretakers to their patients, but also interpreters of state statutes. States increasingly seek physicians’ appraisal of pregnant women’s behavior under the guise of promoting fetal health. Substantively, however, state interventions in women’s pregnancies seem far more related to evaluating women’s compliance and obedience. Indeed, fetal protection efforts expose legislative antagonism to the interests of low-income pregnant women. This Section argues that FPLs are intended to measure women’s obedience and not actual fetal risk, since these laws do very little to promote fetal health. The cases described below could be substituted by other examples in Alabama, Maryland, Mississippi, South Carolina and other states. Although the

76. Physicians’ obligations to the profession are not distinct, but complementary to, their obligations to the patient and at times can conflict. See Linda B. Johnston, Playing Doctor: Who Controls the Practice of Medicine?, 66 ST. JOHN’S L. REV. 425, 425 n.2 (1992). For example, a physician’s interpretation of his duty to “do no harm,” an obligation meant to protect the patient and maintain the profession’s integrity, may conflict with the patient’s best interests, if the patient is asking the doctor to do something that the doctor believes is “harmful” (i.e., physician-assisted suicide, euthanasia).

77. See id. (“The nature of medical work has always required independent professional judgment.”).

78. As Lynn Paltrow, Executive Director of NAPW, explains, Epsteen’s experience “raises serious concerns about the misuse of state authority to deprive pregnant women of their constitutional personhood and to endanger the health of women and babies.” Press Release, Nat’l Advocates for Pregnant Women, Florida Doctor Threat of Arrest of Pregnant Woman Dangerous and Without Legal Authority (Mar. 6, 2013), available at http://advocatesforpregnantwomen.org/blog/2013/03/.


80. See, e.g., State v. Buckhalter, 119 So.3d 1015, 1017, 1019 (Miss. 2013) (affirming the trial court’s dismissal of Nina Buckhalter’s indictment for manslaughter, which alleged she “willfully” caused her child’s death by using drugs during pregnancy and concluding that the indictment was
scope of cases resulting in law enforcement is unknown, Lynn Paltrow estimates that the 413 interventions that she recently documented represent “a substantial undercount.” However, like similar cases, the accounts below call our attention to a hard reality: obtaining appropriate prenatal care can be subject to state (political) rather than medical (patient-centered) considerations. Moreover, the cases are particularly illustrative of a trend that extends beyond specific geographic regions in the United States.

1. Samantha Burton’s Involuntary Bed Rest

In 2010, during a routine prenatal medical visit, Samantha Burton’s physician ordered bed rest at the hospital for the duration of her pregnancy—when she was only twenty-five weeks pregnant. While recommending bed rest to a patient is not unusual, seeking a court order to enforce it is another matter. Yet, officials at the hospital Burton visited did just that, setting into action a plan to obtain a court order allowing the hospital to confine Burton against her will. In the process, these officials refused to consider Burton’s protestations for a second opinion, her desire to return home to her two children, or her plea to switch to a different hospital. Instead, Burton was...
relegated to conditions emblematic of solitary confinement; she remained alone in a dreary hospital room until her fetus died and was surgically removed three days later.

Forced medical solitary confinement, while distinct from prison solitary confinement, shares relevant parallels that trigger human and constitutional rights concerns pertaining to the deprivation of liberty, forced institutional restraint, isolation from the general population and community, the denial of contact, loss of freedom to move within a facility, mental health deterioration, and stigma. Individually and collectively, conditions such as these raise significant concerns related to human dignity, so much so that Senator Dick Durban cautioned that only when “absolutely necessary” should confinement be used in the prison context. The same is true in medicine. Senator John McCain recounted from personal experience that “it’s an awful thing, solitary. It crushes your spirit and weakens your resistance more effectively than any other form of mistreatment.” More than a century ago, the U.S. Supreme Court recounted the devastating effects of solitary confinement on prisoners:

A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane, others still, committed suicide . . . and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.


87. On petition by the State Attorney, the order was granted. In re Unborn Child of Samantha Burton, No. 2009 CA 1167, 2009 WL 8628562 (Fla. Cir. Ct. Mar. 27, 2009). The court order authorized the hospital to take action “necessary to preserve the life and health of Samantha Burton’s unborn child, including but not limited to restricting [her] to bed rest, administering appropriate medication, postponing labor, taking appropriate steps to prevent and/or treat infection, and/or eventually performing a cesarean section delivery of the child at the appropriate time.” Id.

88. Belkin, supra note 86.


91. In re Medley, 134 U.S. 160, 168 (1890).

acknowledging that "[a]lthough solitary confinement was developed as a method for handling highly dangerous prisoners, it is increasingly being used with inmates who do not pose a threat to staff or other inmates." Among those forced into confinement are many "who don’t really need to be there" from "vulnerable groups like immigrants, children, [and] LGBT inmates supposedly there for their own protection." Relevantly, confinement is not simply deleterious because of forced isolation; it often represents misuse of state-sanctioned authority by individuals in charge of vulnerable populations.

Hospitals, like prisons, "are psychologically powerful places, ones that are capable of shaping and transforming the thoughts and actions of the persons who enter them." Often, patients benefit from their hospital experiences, but sometimes medical stays are counterproductive and adverse, as in Samantha Burton’s experience. According to the circuit court judge, John Cooper, Burton’s physician deemed it "necessary to preserve the life and health of Samantha Burton’s unborn child." In deferring to perceived medical authority and accommodating Tallahassee Memorial Hospital (TMH) staff’s requests, the Leon County Circuit Court ordered Burton’s indefinite confinement. The trial court issued a rule that stated "as between parent and child, the ultimate welfare of the child is the controlling factor," and found that Florida’s interests in the fetus "override Ms. Burton’s privacy interests at this time."

Consequently, the court granted Burton’s physicians the authority to take whatever medical course of action necessary to achieve their goals—even against the patient’s will, including performing a nonconsensual cesarean delivery—despite the fact that there was no case precedent in Florida state law that upheld forcing a pregnant woman to undergo confinement and medical treatment for the benefit of a fetus. The court issued the following relief for TMH:

Tallahassee Memorial HealthCare, Inc., Dr. Jana Bures-Forsthoefel, members and employees of Dr. Forsthoefel’s medical practice and other attending health care providers are hereby authorized to provide

94.  Durbin, *supra* note 89.
95.  Leahy, *supra* note 93 (noting that, “far too often, prisoners today are placed in solitary confinement for minor violations that are disruptive but not violent.”).
100.  *Id.*
101.  *Id.*
102.  *Id.*
such medical care and treatment to Samantha Burton and her unborn child as in their reasonable professional judgment is necessary to preserve the life and health of Samantha Burton's unborn child, including but not limited to restricting Samantha Burton to bed rest, administering appropriate medication, postponing labor, taking appropriate steps to prevent and/or treat infection, and/or eventually performing a cesarean section delivery of the child at the appropriate time. Samantha Burton is ordered to comply with the attending physician's orders with regard to such medical care and treatment. 103

The court also ordered TMH to notify the Florida Department of Children and Families, and other applicable agencies, to intervene as necessary in the monitoring of Samantha Burton's children, 104 a process that necessarily leads to a file alleging some form of parental absence, neglect, or abuse. 105

In this case, law and medicine intersected in pernicious ways, extending even beyond the physician's decision to seek an order to confine Burton against her will. For example, Burton was not provided any legal representation at the civil commitment hearing, despite the significant liberty interests at stake. 106

This well-established principle is no less salient in civil cases. For example, in Lassiter v. Department of Social Services, the Supreme Court ruled that the Due Process Clause of the Fourteenth Amendment establishes a right to counsel when the state risks depriving an individual of her physical liberty. 107 The Court stressed an interest-balancing test, weighing government interest against private interest, "and the risk that the procedures used will lead to erroneous decisions." 108 The Court established that there is a presumption to a right to appointed counsel in adjudications where the indigent, "if he is unsuccessful, may lose his personal freedom." 109 A decade earlier, In re Gault reached a similar conclusion, establishing a right to counsel for civil delinquency proceedings, "which may result in commitment to an institution in which the juvenile's freedom is curtailed." 110

104. Id.
105. As a "mandatory reporter" under Florida law, TMH must report "known or suspected child abuse, abandonment, or neglect by a parent" to allow the Florida Department of Children and Families to undertake "protective investigation." FLA. STAT. ANN. § 39.201(2)(a) (West 2013).
106. Burton v. State, 49 So.3d 263, 266–67 (Fla. Dist. Ct. App. 2010) (Van Nortwick, J., concurring). Over fifty years ago in its landmark ruling, Gideon v. Wainwright (a case that originated in Florida courts), the U.S. Supreme Court affirmed that the Sixth Amendment establishes a constitutional right to appointed counsel in criminal cases. In that case, the Court found "[f]rom the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." Gideon v. Wainwright, 372 U.S. 335 (1963).
108. Id. at 27.
109. Id.
As acknowledged on appeal, Burton’s physical and liberty interests were no less paramount than the interests at stake in *Lassiter* and *In re Gault*. She was involuntarily hospitalized and mandated to undergo an invasive medical procedure that required anesthesia and the insertion of a broad incision in the abdomen and a second in the uterus. These procedures are painful postoperatively and can render the patient vulnerable to infection at the point of incision in the abdomen or uterus, blood clots in the legs or lungs, heavy blood loss, and drug side effects such as migraines, nausea, and vomiting. Cesarean surgeries can leave weak spots in the uterus, making subsequent efforts for a vaginal delivery risky. Yet, no counsel appeared to address these concerns (and others) until after the forced cesarean section had occurred. As Judge William Van Nortwick admonished in a concurring opinion, appointment of counsel subsequent to the hearing and after such a significant invasion of privacy cannot satisfy the clear due process requirement established by the Constitution.

Beyond concerns relating to the right to counsel, physical deprivations of liberty, and privacy—including Burton’s confinement violating her fundamental privacy right as enumerated in Florida’s constitution, “to be let alone and free from government intrusion into the person’s private life”—this case is troubling for other reasons overlooked by the District Court of Appeal.

Burton’s experience is an alarming illustration of the unconstitutional constraints imposed on pregnant women’s right to security in their bodies. Were it not for a pattern of “legislative and judicial misrepresentation and misuse of medical information” in the politicized agenda to dismantle reproductive rights, this case could be read as a particularly chilling, but isolated, example of an unconstitutional breach of privacy. But context prevents that narrow view of this case. Thus, the court could have found that the seizure


114. Id.

115. Id. at 265 (quoting FLA. CONST. art. I, § 23).

of Burton's body violated both the Fourth and Fourteenth Amendments (unlawful seizure by government officials and deprivation of liberty without due process, respectively). The subsequent seizure of her fetus may also have violated the Fourteenth Amendment's liberty guarantee articulated in *Newman* because the effect of TMH's actions amounted to the unconstitutional search and seizure of Burton's body as well as the fetus she gestated. In medical cases involving the nonconsensual harvesting of corneas from cadavers, the Ninth and Sixth Circuits have found such actions to be unconstitutional and in violation of litigants’ Fourteenth Amendment due process interests. A pregnant woman’s interest in her fetus can be no less salient than a spouse’s interest in her deceased husband’s corneas.

Nevertheless, Burton’s doctor and other hospital medical staff interpreted state law to provide that fetal protection interests trumped the liberty and privacy interests of their pregnant patient. Burton’s case thus poses a serious question: Are health care providers in the best position to make legal decisions regarding the disposition of their patients’ bodies?

117. The Fourth Amendment would apply even though *Burton* is a civil proceeding, because as the Supreme Court has explained, “[T]he Fourth Amendment [is] applicable to the activities of civil as well as criminal authorities . . . .” New Jersey v. T.L.O., 469 U.S. 325, 335 (1984). And even if health care providers' motives for the seizure were benign or for Burton or her fetus’s “benefit,” the Supreme Court has also held that such a motive “cannot justify a departure from Fourth Amendment protections.” *Ferguson v. Charleston*, 532 U.S. 67, 85 (2001).

118. See *Newman v. Sathyavagiswaran*, 287 F.3d 786, 789 (9th Cir. 2002) (noting that “the Supreme Court has repeatedly affirmed the right of every individual to the possession and control of his own person, free from all restraint or interference of others is so rooted in the traditions and conscience of our people, as to be ranked as one of the fundamental liberties protected by the substantive component of the Due Process Clause.”); *Brotherton v. Cleveland*, 923 F.2d 477, 482 (6th Cir. 1991) (discussing an individual's “possessory right to his body” and a wife’s “legitimate claim of entitlement” to her deceased husband's body, which are protected by the Fourteenth Amendment). In *Ferguson*, the U.S. Supreme Court found that the Medical University of South Carolina breached the petitioners' constitutional interests to be free from unlawful searches and seizures, ruling that the nonconsensual use of the mothers' urine tests to obtain evidence of drug use constituted unlawful searches in violation of their constitutional rights. 532 U.S. at 85–86.

119. The Fourth Amendment would apply even though *Burton* is a civil proceeding, because as the Supreme Court has explained, “the Fourth Amendment [is] applicable to the activities of civil as well as criminal authorities . . . .” *T.L.O.*, 469 U.S. at 335.

120. *Brotherton*, 923 F.2d at 482. Two decades ago, the Sixth Circuit ruled that Deborah Brotherton’s constitutionally protected property interest in her deceased husband’s corneas had been violated by the local coroner when the coroner authorized a nonconsensual eye-tissue removal from Mr. Brotherton. *Id.* In Ohio and all other states, the immediate next of kin (the spouse, if married) is granted the authority to gift or decline tissues and organs donation in such situations. *Id.* In this case, Mrs. Brotherton refused to make such a donation and she objected to the procedure in writing. *Id.* Despite Mrs. Brotherton’s explicit objections to that procedure, which were noted in Mr. Brotherton’s medical record, the coroner proceeded with the extraction. *Id.* The Sixth Circuit held that Mrs. Brotherton possessed a constitutionally protected property interest in her husband’s corneas and that deprivation without a hearing violated her Fourteenth Amendment Due Process Clause interests. The court reasoned that Brotherton had an express interest in controlling the disposition of her husband’s body. *Id.* at 482. A similar decision was reached by the Ninth Circuit in *Newman v. Sathyavagiswaran*, 287 F.3d at 799–800 (holding that the parents of deceased children had an interest in the disposition of their deceased children’s bodies that must be weighed against the state’s interest in obtaining organs or other organs from deceased individuals).
determinations that may contravene fundamental interests and involve unlawful searches and seizures? And, while prosecutors and even courts may be perceived as appropriate checks on medical staff interpreting state laws to protect fetuses, their judgment is immune neither to the influence of moral panic nor to doctors’ assertions of medical urgency, particularly given the common but erroneous perception that medicine and science are infallible. 121

Indeed, the judge who granted the confinement order denied Burton’s request to switch hospitals because “such a change is not in the child’s best interest at this time,” a chilling reference given Burton’s liberty interests at that stage and that the fetus was not yet born. 122

What is also alarming about this example is that although Burton’s case ultimately came to light through the American Civil Liberties Union’s (ACLU) advocacy on her behalf, it did so only after three days of involuntary confinement and a forced cesarean section. 123 While the confinement order was overturned on appeal, 124 this provided only a symbolic victory on the constitutional merits of Burton’s claims that her autonomy and bodily integrity were unconstitutionally violated by the state.

The problem inherent in medical experiences like Burton’s is that complications during pregnancy are not unique. Burton’s symbolic victory does not change the fact that as long as fetal protection laws exist, medical personnel may be perversely incentivized to mistreat other women similarly situated to

121. The “crack baby myth” is a prime example of the fact that medicine and science are not infallible. See Michael Winerip, Revisiting the ‘Crack Babies’ Epidemic that was Not, N.Y. TIMES, May 20, 2013 [hereinafter Revisiting the ‘Crack Babies’ Epidemic], http://www.nytimes.com/2013/05/20/booming/revisiting-the-crack-babies-epidemic-that-was­not.html?_r=0. This myth was perpetuated by limited scientific studies in the 1980s that predicted “a generation of children would be damaged for life.” Id. These predictions, touted by the media and politicians seeking to “crack down” on drug users, were wrong and blown out of proportion. Id. See also Deborah A. Frank et al., Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure, 285 JAMA 1613, 1613, 1622-24 (2001) (finding “no convincing evidence that prenatal cocaine exposure is associated with developmental toxic effects that differ in severity, scope, or kind from the sequel of multiple other risk factors,” such as alcohol or the quality of the child’s environment); Hallam Hurt et al., Children with In Utero Cocaine Exposure Do Not Differ From Control Subjects on Intelligence Testing, 151 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 1237, 1241 (1997) [hereinafter Children with In Utero Cocaine Exposure Do Not Differ from Control Subjects on Intelligence Testing] (finding no difference between the intelligence test results of cocaine-exposed children and a control group at four years of age); Hallam Hurt et al., School Performance of Children with Gestational Cocaine Exposure, 27 NEUROTOXICOLOGY & TERATOLOGY 203, 207 (2011) (finding no statistically significant difference between successful grade progression in grades 1-4 between children with gestational cocaine exposure and a control group) [hereinafter School Performance of Children with Gestational Cocaine Exposure]. In Regina McKnight’s final adjudication, in which the Supreme Court of South Carolina reversed McKnight’s conviction of homicide by child abuse, the court explicitly pointed out the expert witnesses’ problematic use of “apparently outdated scientific studies,” which the jury likely used in its conclusion that McKnight was guilty. McKnight v. State, 661 S.E.2d 354, 360-61, 366 (S.C. 2008).

122. Belkin, supra note 86.

123. See James, supra note 54.

Burton. The appellate decision suggests that even with this vindication and clear rule of law, women might only be compensated retroactively for the violation of their fundamental rights, which is alarmingly inadequate. Indeed, the court reviewing Burton’s confinement held that the case was reviewable, even though Burton’s pregnancy and confinement had both ended, because the issue posed by the case would otherwise be “capable of repetition yet evading review.” Since many women will become pregnant and undoubtedly many of those will experience sickness, anxiety, depression, or risk during their gestations, many more similarly situated pregnant women could experience similar liberty deprivations if obstetricians continue to prioritize law enforcement objectives over women’s fundamental interests. As a policy matter, we should be concerned that fetal protection laws encourage doctors to subordinate pregnant women’s interests to the supposed interests of their fetuses in a way that violates these women’s fundamental rights.

2. Christine Taylor’s Arrest for Tripping While Pregnant

Fetal protection cases like Burton’s illuminate the great heights medical staff and prosecutors will scale in the name of protecting fetal interests. As the Christine Taylor case illustrates, the subordination of women’s rights, reduction of their expectations of privacy, and scaling back of important constitutional protections appear concomitant with furthering those interests, particularly when FPLs authorize criminal prosecution. The two cases reveal an absurdity in the range of conduct possible to trigger significant constitutional deprivations of liberty and privacy. Like Samantha Burton, Christine Taylor, a twenty-two-year-old pregnant mother of two living in Iowa, did not anticipate that a medical visit could result in her incarceration.

Taylor’s “crime” was to trip and fall down the stairs during the second trimester of her pregnancy. After receiving treatment from emergency medical technicians, she voluntarily sought further care at a hospital. During interviews with a nurse and a doctor, Taylor, a Maryland native, confided that she felt ambivalence about her pregnancy during its early stages. She shared intimate details about her estranged husband’s threat that he was leaving her; he had already moved back to Maryland. Taylor explained her anxiety to an Iowa reporter: “And here I was alone, pregnant with two young kids, with no family around or support. I just thought, ‘It’s not fair.’ . . . I was so upset and frantic I almost blacked out, and I tripped and fell.” She informed medical staff that because of this and the prospect of raising three children as a single parent, she

125. Id. at 264.
had considered both adoption and abortion after learning about the pregnancy. Thereafter, medical staff alerted the police, because they interpreted Taylor’s case to fit within Iowa’s criminal feticide statute, which prohibits “intentionally terminate[ing] a human pregnancy after the end of the second trimester of the pregnancy . . .” 128

It is difficult to know what exactly triggered the medical staff’s call to the police, other than the fact they believed Taylor had attempted to kill her fetus. Was it a misperception that even considering an abortion during the first trimester of a pregnancy served as sufficient evidence that a harmless fall months later violated the state’s feticide law? According to a reporter who interviewed Taylor, “she believes the personal views of medical workers . . . played a part in a decision to accuse her last month of attempted feticide.” 129 Could it have been that Taylor simply lacked credibility to medical staff who assumed that, given her earlier ambivalence about the pregnancy, the fall was a surreptitious attempt to abort her fetus? Or might this case simply be about a perceived medical duty to report? In other words, given the pressure and anxiety experienced by medical personnel to serve not only as interpreters of state fetal protection laws, but also as informants on their patients, perhaps the medical staff believed that the Iowa law required physicians to report any and all medical visits indicating an intentional or negligent threat of harm to a fetus. It may be that the medical staff believed they were simply doing what was legally expected of them and failure to report would risk their license. Even so, under any of these circumstances, the call to police and Taylor’s subsequent ordeal serve as chilling examples about the misuse and misapplication of fetal protection laws.

Taylor’s pregnancy survived her fall; 130 nevertheless, she was arrested shortly after leaving the hospital and returning home to her children. Two squad cars intercepted her taxi and officers arrested her. Christine Taylor was incarcerated at the local jail for two days, while police launched an investigation to determine whether she meant to kill her fetus by tripping in her home. 131 For three weeks, local prosecutors pursued their attempted feticide investigation against her until the case was dropped. But, according to the prosecutor, this was only because Taylor was not yet in the third trimester of her pregnancy when she fell, which brought her outside of the feticide statute. 132

In both fetal protection cases described in this Section, physicians erred in their interpretation of law; there was no legal foundation for the forced confinement and cesarean section ordered in Burton’s case, and Taylor’s doctor

128. IOWA CODE ANN. § 707.7 (West 2011).
129. Rood, supra note 127.
130. Nichols, supra note 126.
131. Rood, supra note 127.
132. Id.
lacked sufficient legal grounds to alert law enforcement. Tripping down steps while pregnant may cause injury to a woman and her fetus but it is not a crime, even if the nurse and doctor treating her disbelieved Taylor’s version of events. Importantly, the medical staff misread Iowa’s feticide law, the statute in question.

3. Rennie Gibbs’s Charge of Depraved Heart Murder in Stillbirth Case

Rennie Gibbs’s ongoing criminal prosecution in Mississippi for depraved heart murder of her dead fetus further illustrates the extent to which physicians and medical staff may misconstrue and misinterpret fetal protection laws, while in the process trampling pregnant patients’ constitutional rights and triggering criminal prosecutions. As with Taylor’s encounter at a hospital in Iowa, which resulted in her arrest, the prosecution of Gibbs, an African American teen, hinged on a doctor’s construal of her conduct toward her stillborn infant. In Gibbs’s case, the medical examiner claimed Gibbs’s drug addiction, which did not abate during pregnancy, demonstrated indifference toward the life of her fetus, and its death was the direct result of her depraved heart. Her arrest and prosecution following a traumatic perinatal outcome is yet another example of the misuse and misapplication of medical information for politicized reproductive purposes. Unlike Taylor’s traumatic ordeal, Gibbs’s prosecution, which began in 2006, continued until early April 2014 when a judge dismissed the case. Mississippi prosecutors threaten to retry the case. If convicted of depraved heart murder for birthing a stillborn baby, Rennie Gibbs will face a mandatory life sentence.

Gibbs was only fifteen years old when she became pregnant, and although a teenager, she struggled with drug dependence on crystallized cocaine. In

133. Notably, in both cases, subsequent legal actors (a judge in one and police officers in the other) relied on the statements of physicians in determining that confinement was the next appropriate course of action.


135. Associated Press, Court to Hear Case of Woman Accused in Stillbirth, supra note 134; Calhoun, supra note 80.

136. Brief of Appellant at 36, Gibbs v. State, (Miss. Nov. 12, 2010) (No. 2010-M-819) [hereinafter Brief of Appellant, Gibbs v. State], available at http://judicial.mc.edu/briefs/2010-IA-00819-SCCTT.pdf (“Under the statutory interpretation advanced by the prosecution, Ms. Gibbs faces life in prison because of her combined status as a pregnant woman and drug user.”). The statute at issue reads: “The killing of a human being with the authority of law by any means or in any manner shall be murder in the following cases: . . . (b)When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without premeditated design to effect the death of any particularly individual, shall be second-degree murder.” MISS. CODE ANN. § 97-3-19(B) (West 2013). MISS. CODE ANN. § 97-3-21(2) (West 2013) provides that “a person who shall be convicted of second-degree murder shall be imprisoned for life . . . if the punishment is so fixed by the jury.”

December of 2006, one month after turning sixteen, Gibbs suffered a stillbirth in the thirty-sixth week of her pregnancy. Dr. Steven Hayne performed an autopsy on the dead baby and concluded that it suffered from in utero exposure to cocaine, which caused its death. He ruled the stillbirth a murder, which is consistent with a long-standing, misinformed politicization of science dating back to the 1980s that misrepresents the risks of in utero cocaine exposure. That is, crack use became a particularly targeted offense during the U.S. War on Drugs, earning its convicted users grossly disparate, tougher sentences than that of powder cocaine sellers and users. The sentencing disparity, only recently addressed in 2013 by U.S. Attorney General Eric Holder, was 100 to 1, because politicians speciously claimed crack caused more socially deleterious behavior than powder cocaine, such as violence, crime, and the birth of “crack babies” (supposed biologically inferior children permanently hampered by physical and cognitive disabilities).

As a result, pregnant addicts endured a particularly unique attack not only as intensified targets of the drug war, but also as “bad mothers” on the path toward swamping the United States with crack babies, who develop into uneducable, disabled, and malformed children. States responded by prosecuting women under existing child abuse statutes for drug dependence occurring during pregnancy. However, meticulous empirical studies debunking politicized and inaccurate science on crack were published in leading peer-reviewed journals years before Gibbs’s arrest and in the years since this prosecution began. For example, on the basis of thirty-six studies, Deborah

138. Id.
141. This Article does not advocate drug use of any kind during pregnancy. Instead, it distinguishes the misinformed and misused scientific conjecturing rooted in the 1980s’ politicization of drug addiction (that spawned the U.S. War on Drugs as well as the crack baby mythology) from rigorous scientific research that provides a credible account of fetal exposure to cocaine and other drugs.
144. Id. (“The inner-city crack epidemic is now giving birth to the newest horror: a biounderclass, a generation of physically damaged cocaine babies whose biological inferiority is stamped at birth.”).
145. Frank et al., supra note 121. Dr. Hallam Hurt, former Chairwoman of the Division of Neonatology at the Albert Einstein Medical Center, conducted the longest research study on fetal cocaine exposure. In a 2009 study, she reported:

[In] middle school-aged children, we found no evidence of impaired [neurocognitive] function caused by gestational cocaine exposure, despite the fact that our sample size was
Frank and her co-investigators reported in the Journal of the American Medical Association in 2001 that “there is no convincing evidence that prenatal cocaine exposure is associated with developmental toxicity effects different in severity, scope or kind from the sequelae of multiple other risk factors.” Hallum Hurt’s 1997 study reported that children with in utero cocaine exposure did not differ from control subjects on intelligence testing. Both Hurt and Frank attribute poverty and co-founding factors to poor outcomes in children exposed to cocaine.

Nevertheless, stereotypes about crack babies persist, as does Gibbs’s prosecution, despite rigorous scientific evidence discrediting unreliable medical and political accounts about fetal cocaine exposure. Based on Dr. Haynes’s autopsy report, which ruled Gibb’s stillbirth a murder, Gibbs was arrested on February 4, 2007, charged with depraved heart murder for “kill[ing] her unborn child, a human being, while engaged in the commission of an act eminently dangerous to others and evincing a depraved heart, by using cocaine while pregnant with her unborn child . . . in violation of MCA § 97-3-19.” And, although she was barely sixteen at the time, Rennie Gibbs was charged as an adult.

This case rests significantly on the testimony and medical examination report issued by Dr. Haynes. That Gibbs’s fetus expired in stillbirth is undisputed. However, the factors that ultimately contributed to its death are not indisputable as prosecutors suggest, because “stillbirth is one of the most common adverse outcomes of pregnancy,” and it results from any number of adequate to detect a statistically and clinically significant difference (effect size of 0.5) and we used a [neurocognitive] battery shown to be sensitive to age and IQ . . . We found no difference between groups even with isolation of specific cognitive systems for evaluation of cocaine effects.


146. Frank et al., supra note 121, at 1622-24.
147. Hallum Hurt et al., Children With In Utero Cocaine Exposure Do Not Differ From Control Subjects on Intelligence Testing, supra note 121.
Upwards of 30 percent of pregnancies will terminate in miscarriage or stillbirth. Notwithstanding rigorous efforts to identify what causes perinatal fetal mortality, researchers report that “a substantial portion of fetal deaths are still classified as unexplained intrauterine fetal demise” because stillbirths are linked to environment, poverty, stress, diabetes, hypertension, and sexually transmitted diseases. The American Congress of Obstetricians and Gynecologists (ACOG) attributes stillbirths to race, as Black women are nearly twice as likely to suffer a stillbirth as compared to all other women. For example, Black women’s stillbirth rate occurs at 11.25 per 1,000 births compared to Asian, white, and Native American women, all of whom experience stillbirth at rates less than 6 per 1,000. This disparity persists even among Black women who receive “adequate” prenatal care.

Gibbs’s prosecution is one of first impression in Mississippi, as no woman or girl has been charged with such a crime for birthing a stillborn. According to

---


153. “Environment” could include both the physical, natural environment (such as exposure to toxins) as well as social environment (income, education, etc.). See, e.g., Carol J. Rowland Hogue, Demographics & Exposures, in STILLBIRTH: PREDICTION, PREVENTION AND MANAGEMENT 57, 69–70 (Catherine Y. Spong ed. 2011) (discussing various social environment factors’ impact on stillbirth risk); Marc Edwards, Fetal Death and Reduced Birth Rates Associated with Exposure to Lead-Contaminated Drinking Water, 48 ENVIRON. SCI. & TECH. 730 (2014).

154. Victoria Flenady et al., Major Risk Factors for Stillbirth in High-Income Countries: A Systemic Review and Meta-Analysis, 337 LANCET 1331, 1337 (2011) (noting that “women from disadvantaged populations in high-income countries continue to have stillbirth rates far in excess of those living without such disadvantage. . . . [P]overty could be the overriding factor preventing access to care” and thereby increasing risk of stillbirth).


158. Goldenberg et al., supra note 149, at 85 (“[I]n areas where syphilis is prevalent, up to half of all stillbirths may be caused by this infection alone.”).

159. According to the American Congress of Obstetricians and Gynecologists, “the most prevalent risk factors associated with stillbirth are non-Hispanic black race, nulliparity [no previous births], advanced maternal age, and obesity.” ACOG Committee on Practice Bulletins—Obstetrics, Management of Stillbirth, 113 OBSTETRICS & GYNECOLOGY 748, 749 (2009).

160. ACOG Committee on Practice Bulletins—Obstetrics, supra note 159, at 749.

161. Stress, hypertension, and other medical, psychological, social, and economic factors uniquely prevailing on the lives of pregnant Black women may explain the gross disparity in stillbirths occurring in African American pregnancies. Id.
Gibbs’s legal counsel, “there ha[ve] been no reported cases and no media reports showing that the State of Mississippi ha[s] ever applied the depraved-heart homicide statute to a pregnant woman who suffered a stillbirth or miscarriage.”\textsuperscript{162} That no prior cases are reported of a pregnant woman charged with this offense is unsurprising, because the explicit language of the statute does not “encompass the death of an unborn child.”\textsuperscript{163} Nor does the legislation on its face include pregnant women within the scope of the class of persons who can be prosecuted for violating this statute.\textsuperscript{164}

For these reasons, Gibbs’s attorneys continue to argue that the Mississippi legislature never intended the statute to apply to the unborn. They specifically cite the statutory language, highlighting that the statute underpinning Rennie Gibbs’s prosecution, Mississippi Code § 97-3-37, “specifically provides that an ‘unborn child’ can be the victim of assault, capital murder, and certain types of manslaughter, but not depraved heart murder.”\textsuperscript{165} Moreover, they assert that because there is “no reference to ‘unborn child[ren] in the depraved heart section of that statute, 97-3-19(1)(b),” the legislature never intended the law to apply against pregnant women and therefore the statute is misapplied against Miss Gibbs.\textsuperscript{166} Despite a rigorous defense, on April 23, 2010, the Circuit Court of Lowndes County denied Gibbs’s Motion to Dismiss.\textsuperscript{167}

\textbf{B. Medical Staff Are Poor Interpreters of Law, and This New Focus on Law Compromises Their Medical Judgment}

Importantly, both the Taylor and Burton cases demonstrate legislatures’ reliance on medical staff to police risky pregnancy cases. Nurses and doctors serve as more than just the eyes and ears of the state. Instead, as a formal matter, these cases illustrate that medical staff are the primary detectives and enforcers of state fetal protection statutes, often with the support of police, prosecutors, and even judges. We should be concerned about non-legally-trained medical staff increasingly enforcing fetal protection laws, as thirty-eight states have adopted some form of feticide legislation.\textsuperscript{168}

\begin{footnotesize}
\begin{enumerate}
\item[162.] Brief of Appellant, Gibbs v. State, \textit{supra} note 136, at 2.
\item[163.\textsuperscript{]} \textit{Id.}
\item[164.] \textit{Id.}
\item[165.] \textit{Id.} at 1.
\item[166.] \textit{Id.} at 2.
\item[167.] Subsequently, the Mississippi Supreme Court granted Gibbs’s petition for interlocutory review. \textit{Id.} at 2. Under Mississippi’s Rules of Appellate Procedure, an interlocutory appeal [M]ay be sought for a substantial basis exists for a difference of opinion on a question of law as to which appellate resolution may:
\begin{enumerate}
\item[(1)] Materially advance the termination of the litigation and avoid exceptional expense to the parties; or
\item[(2)] Protect a party from substantial and irreparable injury; or
\item[(3)] Resolve an issue of general importance in the administration of justice.
\end{enumerate}
MISS. R. APP. PROC. 5(a) (2008).
\end{enumerate}
\end{footnotesize}
As these cases demonstrate, in applying fetal protection laws, medical staff may subordinate medical judgment and diagnosis objectives to their criminal law enforcement responsibilities, which itself introduces problematic norms into the physician-patient relationship. Specifically, medical staff may prioritize criminal punishment over fiduciary responsibilities to patients, thus "requiring physicians to use less than the best medical judgment" in treating pregnant patients. In some instances, pregnant women's medical treatment is not merely subordinate but regarded as extraneous and peripheral. A South Carolina task force established at the Medical University of South Carolina (MUSC) and initiated by medical staff made clear that its role was to turn over noncompliant pregnant drug users to law enforcement officials. MUSC officials profiled their patients, singling out pregnant Black women to test for illicit drug use, relying on stereotypes and cultural biases to fulfill their law enforcement objectives.

Again, the problem is that medical staff are not only poor interpreters of law, but also, when they accept these legal roles, they do so at the expense of abrogating their medical duties. Doctors and nurses well know that there are medical reasons why pregnant women might not wish to undergo certain procedures. Nevertheless, these reasons are downplayed in fetal protection cases, such that perverse medical consequences may result from the very medical procedures imposed to save fetuses or mothers.

169. According to Solicitor Condon, a primary purpose of the task force established to address the issue of drug use during pregnancy was "to consider possible prosecution of the mothers of drug affected babies." Reply Brief of Appellant-Petitioner at 9, Ferguson v. Charleston, 532 U.S. 67 (2001) (No. 99-936).


172. See Ferguson v. Charleston, 532 U.S. 67, 70–73 (2001) (describing the Medical University of South Carolina's drug-screening program for pregnant woman suspected of using cocaine, but not of other substances); Roberts, supra note 5, at 1471 ("The singling out of Black mothers for punishment combines in a single government action several wrongs prohibited by" the Equal Protection Clause and the right of privacy and perpetuates "the legacy of racial discrimination embodied in the devaluation of Black motherhood.").

173. For example, C-sections come with many risks to both mother and baby, such as increased risk of respiratory problems, longer recovery and hospital stays, maternal mortality, risk of the C-section scar tearing in future pregnancies and/or deliveries and these many risks are a reason women may prefer natural childbirth. See AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, CESAREAN BIRTH (2011), http://www.acog.org/-/media/For%20Patients/faq006.pdf?dmc=1&ts=20121019T1416309306 (listing some of the complications of a C-section, including blood loss, blood clots, injury to bowel or bladder, and infection); ACOG Committee on Obstetric Practice, Committee Opinion: Cesarean Delivery on Maternal Request, 121 OBSTETRICS & GYNECOLOGY 904, 906 (2013) (recommending vaginal delivery in absence of maternal or fetal indication for cesarean delivery given the balance of risks and benefits between C-sections and vaginal deliveries); Danielle Buffardi, Benefits of a Vaginal Birth, AM. PREGNANCY ASS'N PREGNANCY BLOG (Feb. 3, 2012), http://www.americanpregnancy.org/pregnancyblog/2012/02/benefits-of-a-vaginal-birth/.

174. Bei Bei Shua's prosecution involves a question of medical evidence. Prosecutors claim that the rat poison Shuai consumed caused the medical condition that resulted in the baby's death. However, doctors presented compelling evidence that the treatments provided to save the baby's life could have caused the condition from which the daughter died. See Charles Wilson, Ind. Mom's Lawyer: Cause of Baby's Death Unproven, ABC NEWS (Oct. 10, 2012, 4:55 PM), http://bigstory.ap.org/article/ind-moms-lawyer-cause-babys-death-unproven.
I. Marlise Muñoz: Brain-Dead Pregnant Woman Kept on Life Support to Incubate Fetus

In Texas, hospital officials refused to remove thirty-three-year-old Marlise Muñoz, a brain-dead woman, from life support for two months because she was pregnant. In November 2013, fourteen weeks into her pregnancy, Muñoz collapsed at home, likely from a blood clot that entered her lungs. Shortly after receiving medical attention at the John Peter Smith Hospital in Fort Worth, Texas, doctors informed Muñoz’s family that she had suffered brain death and would not recover. However, instead of preparing to remove Muñoz’s body from life support as requested by her husband, Eric Muñoz, and parents, Lynne and Ernest Machado, all of whom confirmed Muñoz herself would have so wished, hospital officials refused, citing a Texas law that prohibits health care providers from ending life support to pregnant patients.

Texas is one of more than two-dozen states that prohibit removing life support from a pregnant woman. However, the Texas law is among the strictest in the nation. A dozen state statutes, including those of Kentucky, South Carolina, Texas, Utah, and Wisconsin, “automatically invalidate a woman’s advance directive if she is pregnant.” A study published by The Center for Women Policy Studies explains that these laws “are the most restrictive of pregnancy exclusion” legislation, because, regardless of fetal viability or the length of pregnancy, these laws require that a pregnant woman “remain on life sustaining treatment until she gives birth.” These laws fit a pattern of politically motivated legislation that misuses pregnant women’s medical crises as opportunities to legislate about reproduction. This type of legislation conflicts with pregnant women’s fundamental constitutional interests, including autonomy, liberty, and privacy. For example, state legislation forcing a pregnant woman to carry a fetus to term directly conflicts with the constitutional precedent established in Roe v. Wade and interferes with

177. Id.
178. Id.
179. Id.
180. Id.
182. Id.
a fundamental constitutional principle that guarantees each individual liberty.\footnote{183}

The Center for Women Policy Studies highlights the lack of public awareness that FPLs exist and the problems that arise due to their enforcement.\footnote{184} Moreover, as there is virtually no uniformity in pregnancy exclusion laws,\footnote{185} they may be written under unrelated or confusing titles. In some states FPLs are written into statutes addressing advance directives; other states include them in statutes involving trusts and estates.\footnote{186} Thus, even the savviest pregnant women and their advocates may not be on notice about pregnancy exclusion legislation that ignores advance directives and explicit instructions about end of life care.

Even if mandatory life support laws were enacted as paternalistic protective measures for pregnant women and their fetuses, their application to a dead pregnant woman borders on the absurd. Ernest Machado lamented that his daughter had been reduced to "a host for a fetus."\footnote{187} Until ordered to do otherwise, hospital officials had apparently planned to keep Muñoz's body on life support until her fetus became viable, against the express wishes of her family members.\footnote{188} As Lynne Machado explained to a \textit{New York Times} reporter, "It's not a matter of pro-choice and pro-life," rather, "It's about a matter of our daughter's wishes not being honored by the state of Texas."\footnote{189}

2. Angela Carder: Denying a Pregnant Patient Chemotherapy

As with Marlise Muñoz's end of life tragedy, the deaths of Angela Carder and her fetus are a stark illustration of how doctors' conscription into legal
roles may undermine their exercise of medical judgment. 190 Carder, a cancer patient, developed a new and life-threatening tumor while pregnant; she sought chemotherapy treatment at the George Washington University Hospital. 191 Carder's health rapidly deteriorated after being admitted as a cancer patient. At this point, Carder was close to death and chemotherapy provided the only chance she could survive until the twentieth-eight week of pregnancy (when it would be somewhat safer to deliver the baby), but the treatment posed some medical risk to her twenty-six-week-old fetus. 192 According to the D.C. Court of Appeals, "there was no evidence . . . showing that A.C. consented to, or even contemplated, a caesarean section before her twenty-eighth week of pregnancy." 193 In fact, testimony from Dr. Alan Weingold makes clear that Carder opposed the surgery:

THE COURT: You could hear what the parties were saying to one another?

DR. WEINGOLD: She does not make sound because of the tube in her windpipe. She nods and she mouths words. One can see what she's saying rather readily. She asked whether she would survive the operation. She asked [Dr.] Hamner if he would perform the operation. He told her he would only perform it if she authorized it but it would be done in any case. She understood that. She then seemed to pause for a few moments and then very clearly mouthed words several times, I don't want it done. I don't want it done. Quite clear to me. 194

Dr. Weingold further explained to the Court: "I would obviously state the obvious and that is this is an environment in which, from my perspective as a physician, this would not be an informed consent one way or the other. . . . I'm satisfied that I heard clearly what she said." 195

Despite this and her family's opposition, doctors and hospital officials intubated Carder and petitioned the Superior Court of the District of Columbia to authorize an immediate cesarean operation. 196 After adopting the hospital's recommendation, the "court ordered that a caesarean section be performed to deliver A.C.'s child." 197 Notwithstanding Carder's counsel immediate request

190. See In re A.C., 573 A.2d 1235, 1237 (D.C. 1990) (holding that when a pregnant patient is near death and her fetus is viable, the decision of what is to be done is to be decided by the patient, unless incompetent).
191. Id. at 1238. See also Terry E. Thornton & Lynn Paltrow, The Rights of Pregnant Patients: Carder Case Brings Bold Policy Initiatives, 8 HEALTHSPAN 10 (1991) (noting that "Angela. . . . decided to institute aggressive treatment of her cancer").
193. See id. at 1239.
194. Id. at 1240–41.
195. Id. at 1241.
196. Id. at 1257.
197. Id. at 1240.
for a stay, “a hastily assembled” panel consisting of three D.C. Court of Appeals judges denied the proposed injunction. 198

Following Carder’s court-ordered cesarean operation, her baby survived for two hours and Carder died two days later without receiving the cancer treatment she sought. 199 On appeal after her death, however, the D.C. Court of Appeals held that “in virtually all cases the question of what is to be done is to be decided by the patient . . . on behalf of herself and the fetus.” 200

The medical personnel’s extreme actions in Carder’s case, though shocking, are sadly not unique. In 2004, Pennsylvania doctors obtained a court order to force Amber Marlowe to deliver by cesarean section, because ultrasound imaging indicated that her baby might weigh as much as thirteen pounds. 201 Marlowe’s case highlights another angle of the FPL problem, the paternalist rejection of women’s ability to know their own bodies and make medical decisions for themselves and their pregnancies. In that case, the court order granted Marlowe’s doctors and the hospital the authority to perform a nonconsensual cesarean operation. 202 Marlowe, the mother of six—who were all big babies—fled the hospital and later delivered a healthy eleven-pound baby girl at another hospital. In a subsequent interview, Marlowe confided, “[W]hen I found out about the court order, I couldn’t believe the hospital would do something like that. It was scary and very shocking.” 203

The scope of the problems identified here—physicians prioritizing fetal health over maternal health and decision making based on legislative, law enforcement, and political pressure 204—are difficult to track as not all cases of

---

198. Id. at 1238.
199. Id.
200. Id. at 1237; Thornton & Paltrow, supra note 191; see also Veronika E.B. Kolder et al., Court-Ordered Obstetrical Interventions, 316 NEW ENG. J. MED. 1192 (1987) (discussing a national survey of the scope of court-ordered obstetrical procedures in cases in which the woman refused therapy deemed necessary for the fetus).
201. David Weiss, Court Delivers Controversy: Mom Rejects C-Sections; Gives Birth on Own Terms, TIMES LEADER, Jan. 16, 2004, at 1A.
202. Id.
204. “Project Prevention: Children Require a Caring Kommunity (“CRACK”)” is one such activist group whose website states that its main objective “is public awareness to the problem of drug addicts/alcoholics exposing their unborn child to drugs during pregnancy.” Objectives, PROJECT PREVENTION, http://www.projectprevention.org/objectives/ (last visited Apr. 9, 2014). Barbara Harris is the founder of CRACK, which offers $200 to any drug-addicted or alcoholic mother who agrees to be sterilized or have Norplant implanted. It also offers $200 to male drug addicts or alcoholics who agree to have a vasectomy. Jeff Stryker, Cracking Down, SALON (July 10, 1998 3:25 AM), http://www.salon.com/1998/07/10/cov_10feature/. In her discussion on pregnant drug-users, Harris states that “If they are drug addicts, they are drug addicts by choice. . . . People say it is a disease, fine. But it is a disease of choice—however they go there and whatever their background and however screwed up their life is. The babies don’t have a choice.” Id. She further states that “these women are literally having litters of children” and that they are “not acting any more responsible than a dog in heat.” Id.
compelled cesarean operations, confinement, or arrest are afforded judicial review or a written opinion when a court was involved. Nevertheless, the collateral consequences that flow from even this small sample of cases cause serious alarm. Indeed, each of these cases is "capable of repetition."

And, this phenomenon illumes a serious corruption of the physician-patient relationship.

Indeed, as the following section explores, asking doctors and nurses to enforce FPLs not only results in poor legal decision making and compromised medical judgment, it fundamentally distorts the fiduciary nature of the physician-patient relationship, which emphasizes self-determination, informed consent prior to any surgical intervention offered to a patient, the right to refuse medical care, and the right to privacy, among other legal protections.

II.

THE FIDUCIARY RELATIONSHIP, CRIMINAL LEVERAGE, AND MEDICAL UTILITY

Noticeably absent in the operation of contemporary fetal protection efforts are these foundational, internationally-agreed-upon bioethics principles: informed consent, autonomy, social justice, and voluntary participation. The earliest collective iteration of these principles derived from the adjudicative process in the criminal trials of Nazi doctors at Nuremberg. These doctors' deliberate disregard for the health and safety of nonconsenting human subjects in their research studies on sterilization, serology, human survival under distressing conditions, and mastery of euthanasia resulted in deaths and severe disabilities among survivors. The Nuremberg Doctors' Trial

205. James, supra note 54.


211. American and international medical ethics are rooted in the collapse of Nazi Germany and the subsequent trials at Nuremberg, where Third Reich physicians and researchers revealed the mass horrors of their human experimentation and broader brutality in the quest for scientific knowledge. NOLI DOCTORS AND THE NUREMBERG CODE 97–100 (George J. Annas et al. eds., 1992) (discussing a variety of the experiments conducted by the Nazis, which often involved "grave injury,
contributed to the articulation and establishment of universally recognized human rights principles in law and medicine that specify doctors' fiduciary duties and form the ethical framework for the physician-patient relationship.\textsuperscript{212}

Originally, these principles defined the general standard for medical experimentation on human subjects. However, as described below, they now cohere to form the basis of physicians' fiduciary obligations to patients, namely that voluntary consent is an essential component of any medical treatment;\textsuperscript{213} confidentiality is paramount to the physician-patient relationship and should not be trespassed by health care providers;\textsuperscript{214} medical treatments should avoid subjecting patients to unnecessary suffering, including, but not limited to torture, and ill-treatment\textsuperscript{215}; Nuremberg Code, supra note 206, at 181–82; George J. Annas, The Legacy of the Nuremberg Doctors' Trial to American Bioethics and Human Rights, 10 MINN. J. SCI. & TECH. 13, at 20–21 (2009); Steven Greenhouse, Capping the Costs of Atrocity: Survivor of Nazi Experiments Says 8,000 Isn't Enough, N.Y. TIMES, Nov. 19, 2003, http://www.nytimes.com/2003/11/19/nyregion/capping-the-cost-of-atrocity-survivor-of-nazi-experiments-says-8000-isn't-enough.html?pagewanted=all&sr=pm.

212. See Annas, supra note 211, at 20–21. The Nuremberg Doctors' Trial (one of thirteen criminal trials at Nuremberg) was conducted by the International Military Tribunal at Nuremberg and presided over by an international panel of judges. It began in 1946 and concluded in 1947. Id.

213. Informed consent for medical treatment, particularly surgery, is well founded in American law. Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914). Dating back more than a century, U.S courts established that express or implied consent must be granted by patients prior to surgery. Justice Cardozo's famous dictum, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages" highlights the standard for informed consent in a case where a female patient claimed that doctors removed a tumor from her uterus against her will and without regard to her specific instructions prohibiting them from doing so. Id. But see Paul Lombardo, Phantom Tumors and Hysterical Women: Revising our View of the Schloendorff Case, J.L. MED. & ETHICS 791, 793 (2005) (noting that the Schloendorff case may not have represented the sea change portended by Cardozo's "ringing pronouncement" until the 1950s when New York declined to recognize charitable immunity for a hospital).

214. The principle to preserve patient confidence is distilled in law and ethics. The American Medical Association offers this clear statement on the issue: "[T]he physician should not reveal confidential information without the express consent of the patient." American Medical Association, Opinion 5.05: Confidentiality, AMA CODE OF MED. ETHICS, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion505.page? (last visited Apr. 18, 2014). In limited cases where an exception is enforced by law or court order, the Association cautions that the physician should notify her patient and only "disclose the minimal information required by law, advocate for the protection of confidential information." Id. See also The Privacy Rule established by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") hazards against medical providers disclosure of individuals' health information. 45 C.F.R. § 164 (providing HIPAA's "Security and Privacy" requirements). Courts have also recognized the right to confidentiality as distinct, but complimentary to the privacy right to control one's information. See generally Whalen v. Roe, 429 U.S. 589, 599–600 (1977) (noting that privacy rights encompass two distinct spheres: an individual's interest in independent decision-making and an interest in avoiding or refusing disclosure of intimate information, including medical records); Eisenstadt v. Baird, 405 U.S. 438, 450 (1972) ("If the right of privacy means anything, it is the right of the individual... to be free from unwanted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child."). But see Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 349–51 (Cal. 1976) (imposing a duty to warn in a case where an imminent threat of harm to a third party is substantially likely to occur). Importantly, Tarasoff involved the stalking and murder of a college student, not a risk of harm to a fetus. Id.
unnecessary reproductive surgeries; and patients must be at liberty to withdraw from medical treatment, even if rejecting medical assistances might result in their deaths.

A. The Fiduciary Relationship in Common Law: A Bundle of Principles, Obligations, and Rights

The modern fiduciary relationship between health care providers and their patients represents a complex set of physician obligations that flow to their patients as a bundle of rights. Courts explain that the fiduciary relationship demands an important level of care, confidence, and loyalty across a broad sphere of physician-patient interactions. As one court stated decades ago, "[t]he courts frequently state that the relationship between the physician and his patient is a fiduciary one," creating in the physician "an obligation to make a full and frank disclosure to the patient of all pertinent facts related to his illness." For example, the California Court of Appeals, likely the first court to adopt the legal criterion of "informed consent" (replacing a general consent

---


216. In Wons v. Public Health Trust of Dade County, 500 So. 2d 679, 679 (Fla. Dist. Ct. App. 1987), the Florida Court of Appeals ruled that a competent adult woman possesses the lawful right to refuse blood transfusions even when she might die and leave behind minor children. In that case, the court ruled "the state has no compelling interest under the circumstances of this case sufficient to override the patient's constitutional right (a) to practice her religion according to her conscience, and (b) to lead her private life free from unreasonable government interference." Id. See also In re Brown, 478 So. 2d 1033, 1036 (Miss. 1985) (finding that a patient's right to reject a life-saving blood transfusion is "the individual's protection against the tyranny of the majority and against the power of the state"). In fact, decades prior to Nuremberg, by the early 1900s, "the expectation that the consent of patients was required before treatment was well settled" in law. Lombardo, supra note 213, at 798.

217. See, e.g., Canterbury v. Spence, 464 F.2d 772, 782 (D.C. Cir. 1972) ("The patient's reliance upon the physician is a trust of the kind which traditionally has exacted obligations beyond those associated with arms-length transactions."); Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 483 (Cal. 1990) (holding research physician must disclose conflicting financial interest to patient); Salgo v. Leland Stanford Jr. Univ. Bd. of Trs., 317 P.2d 170, 181 (Cal. Ct. App. 1957); Charity Scott, Why Law Pervades Medicine: An Essay on Ethics in Health Care, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 245, 264 (2000) ("Since the early part of this century, the law has expressed society's view that it was violation of autonomy—to treat the patient without some kind of consent.").

218. Natanson v. Kline, 350 P.2d 1093, 1101, 1104 (Kan. 1960) ("Anglo-American law starts with the premise of thorough-going self-determination. It follows that each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery, or other medical treatment.").
standard), clarified that "[a] physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment."\textsuperscript{219} The Minnesota Supreme Court issued a similar rule in 1958. The court explained that while it did not wish to burden the medical profession and its progress, physicians were nevertheless obligated to inform patients about their medical treatment, including less invasive surgical alternatives, in order to allow the patient to decide whether to live with the "serious consequences" of refusing medical care.\textsuperscript{220}

The legal rights that provide a sanctuary for patients should be no less protective of pregnant women who wish to be informed about medical options, including the refusal of care. The premise of U.S. laws in this field is the right to self-determination. U.S. law emphasizes that each patient is the master of her own body with the authority to grant a physician the license to treat a condition or to refuse medical interventions and therapies.\textsuperscript{221} This foundational legal principle serves as the basis of other patient rights and constraints on health care providers. Notably, a physician's duties to inform patients about risks and benefits of a given medical treatment,\textsuperscript{222} disclose potential conflicts of interests,\textsuperscript{223} safeguard confidences,\textsuperscript{224} and perform medical duties with

\begin{itemize}
\item \textsuperscript{219} Salgo, 317 P.2d at 181.
\item \textsuperscript{220} Bang v. Charles T. Miller Hosp., 88 N.W.2d 186, 190 (Minn. 1958).
\item \textsuperscript{221} Davis v. Hubbard, 506 F. Supp. 915, 930 (N.D. Ohio 1980) (explaining "there is perhaps no right which is older than a person's right to be free from unwarranted contact"); Natanson, 350 P.2d at 1104 (holding that law does not permit a physician to substitute her judgment for that of the patient).
\item Only narrow exceptions render the patient's voice mute on the subject of autonomous decision-making, such emergency or lack of capacity to consent to medical treatment. Cunningham v. Yankton Clinic, P.A., 262 N.W.2d 508, 511 (S.D. 1978).
\item \textsuperscript{222} Salgo, 317 P.2d at 181.
\item \textsuperscript{223} See, e.g., Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 483 (Cal. 1990).
\item \textsuperscript{224} The South Carolina Supreme Court compared the medical ethics requirement in that state to the professional standards imposed on lawyers. See S.C. Bd. of Med. Examiners v. Hedgepath, 480 S.E.2d 724, 726 n.2 (S.C. 1997). In this case, the South Carolina Supreme Court reinstated a doctor's censure by the South Carolina State Board of Medical Examiners for breaching the duty to maintain his patient's confidences. See also Hammonds v. Aetna Cas. & Sur. Co. 243 F. Supp. 793, 801 (N.D. Ohio 1965) (ruling "this court is of the opinion that the doctor warrants that any confidential information gained through the relationship will not be released without the patient's permission"); MacDonald v. Clinger, 84 A.D.2d 482, 487 (N.Y. App. Div. 1982) (ruling "[the defendant's breach was not merely a broken contractual promise but a violation of a fiduciary responsibility to plaintiff implicit in and essential to the doctor-patient relation" when he provided the patient's wife confidential information); Doe v. Roe, 400 N.Y.S.2d 668, 678 (Sup. Ct. 1977) (finding liability was "clear" when a doctor disclosed patient's confidential psychological information) ("[A]lmost every member of the public is aware of the promise of discretion contained in the Hippocratic Oath, and every patient has a right to rely upon this warranty of silence."); McCormick v. England, 494 S.E.2d 431, 435-36 (S.C. Ct. App. 1994) (stating that "[a] majority of the jurisdictions faced with the issue have recognized a cause of action against a physician for the unauthorized disclosure of confidential information unless the disclosure is compelled by law or is in the patient's interest or the public interest"); Berry v. Moench, 331 P.2d 814, 817 (Utah 1958) (ruling that "if the doctor violates ... confidence and publishes derogatory matter concerning his patient, an action would lie for any injury suffered"). Even as against the state and other entities, courts have upheld patient information privacy rights. See
\end{itemize}
competence and care\textsuperscript{225} give rise to enforceable legal obligations vital to the interests of her patients.\textsuperscript{226} This bundle of rights includes the basic "natural right" to be left alone.\textsuperscript{227}

The U.S. Supreme Court underscored the importance of the physician-patient relationship and the significance of loyalty, trust, and confidence in \textit{Jaffe v. Redmond}. Here, the Court explained that "the mere possibility of a therapist's disclosure may impede development of the confidential relationship necessary for successful treatment."\textsuperscript{228} The Court ruled that "protecting confidential communications between a psychotherapist and her patient" sufficiently promoted important interests.\textsuperscript{229} The Court compared the patient's private communications with her therapist to the protected speech between spouses and attorneys with their clients,\textsuperscript{230} ruling that the conversations and notes exchanged between an officer who shot and killed a man during the course of responding to a "fight in progress" and her therapist were protected from compelled disclosure.\textsuperscript{231}

Federal law further clarifies and codifies confidentiality requirements among some medical professionals, including federally funded drug treatment programs, prohibiting such organizations from divulging patient records. For example, federal law prohibits the disclosure of:

The [records], identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{225} Howard v. Univ. of Med & Dentistry of N.J., 800 A.2d 73, 77 (N.J. 2002) (noting the duty of care is an evolved standard originating in battery and now evolved to negligence).
\item \textsuperscript{226} For example, as early as 1905, a state supreme court affirmed an award of damages to a patient after she challenged a doctor's nonconsensual surgery, which she claimed caused hearing loss. Mohr v. Williams, 104 N.W. 12, 16 (Minn. 1905). Anna Mohr argued that while she had granted consent for surgery, license to operate was limited to her right ear and not the left. In upholding the trial court's award, the Minnesota Supreme Court opined that "every person has a right to complete immunity of his person from physical interference of others, except in so far as contact may be necessary under the general doctrine of privilege." \textit{Id.} Justice Brown proclaimed that "any unauthorized touching of the person of another... constitutes an assault and battery," including in the medical context. \textit{Id.}
\item \textsuperscript{227} The \textit{Mohr} court articulated a general principle that "the patient must be the final arbiter as to whether he will take his chances with the operation, or take his chances living without it." \textit{Id.} See also \textit{Pratt v. Davis}, where the Illinois Supreme Court, affirmed the lower court ruling in a lawsuit alleging that a doctor performed a nonconsensual hysterectomy on his patient. The court ruled that "it is manifest" that a patient’s consent "be a prerequisite to a surgical operation." 79 N.E. 562, 564 (Ill. 1906).
\item \textsuperscript{228} Jaffee v. Redmond, 518 U.S. 1, 10 (1996).
\item \textsuperscript{229} \textit{Id.} at 9. The Court also recognized that the privilege should extend to social workers. \textit{Id.} at 15.
\item \textsuperscript{230} \textit{Id.} at 10 (noting that "like the spousal and attorney-client privileges, the psychotherapist-patient privilege is rooted in the imperative need for confidence and trust").
\item \textsuperscript{231} \textit{Id.} at 4, 18.
\end{itemize}
\end{footnotesize}
any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States. 232

In a special section on criminal proceedings, the federal law further emphasizes, “No record . . . may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient.” 233 Not only have courts and Congress issued clear pronouncements about the legally enforceable fiduciary duties placed on doctors, so too have state legislatures, 234 medical boards, 235 and professional organizations. 236 National professional medical organizations stress the value and importance of physicians’ prioritizing their patients’ needs above all else, including law enforcement. The American Medical Association (AMA) and the American Public Health Association (APHA) 237 offer unequivocal statements that the role of doctors

---

234. All fifty states and the District of Columbia have enacted laws privileging the communications between psychotherapists and their patients. See Jaffe, 518 U.S. at 12 n.11 (listing each state’s psychotherapist privilege statute).
235. In 2013, the North Dakota State Board of Medical Examiners issued a stinging censure against a doctor for breaching patient confidence to an insurer, referring to the physician’s actions as “engaging in conduct that is dishonorable, unethical . . . and that is likely to deceive, defraud, or harm the public.” The Board further noted that “breaching the confidentiality between physician and patient is proscribed” by North Dakota statutes. N.D. State Bd. of Med. Examiners v. Wynkoop, OAH File No. 20130085 (Nov. 22, 2013), available at https://www.ndbomex.org/news/board_orders.asp (ordering that “if Respondent shall fail, neglect or refuse to comply with any of the terms, provisions, or conditions herein, the license of the Respondent . . . should automatically be suspended . . . ”). In another 2013 case, the Board of Medical Examiners suspended the license of a physician who accessed the medical records of an individual who was not her patient and found that this action violated that individual’s physician-patient confidentiality. N.D. State Bd. of Med. Examiners v. Albertson (Nov. 22, 2013), available at https://www.ndbomex.org/news/board_orders.asp (issuing a one-year license suspension stayed if upon the completion of completion of ethics course). See also In re Sudol, OIE No. 2009.5 (Dec. 9, 2009) (South Carolina Medical Examiners concluding that a therapist violated statutory provisions “by engaging in unethical and unprofessional behavior when she divulged confidential information without appropriate permission”).
237. Id. at Appendix (explaining that Amicus South Carolina Medical Association “opposes policies and practices that undermine patient confidentiality and weaken the trust between health care providers and patients that promotes positive treatment outcomes”). In the brief’s Appendix, the American Society of Addiction Medicine emphasized that it “staunchly opposes policies that create obstacles to or deter persons from receiving substance abuse treatment and counseling.” Id. The Society of General Internal Medicine warned, “[T]he failure to maintain proper patient confidentiality (at the heart of MUSC’s policy) will not only discourage women from seeking this vital care but may well interfere with physicians ability to provide it when sought.” The American Nurses Association cautioned that it “is concerned that when health care providers divulge patient information to law enforcement officials[,] women in need of prenatal care and/or substance abuse treatment are deterred
and nurses must be first and primarily to serve patients’ needs and not law enforcement goals. 238 These medical organizations justifiably caution against states’ efforts to conscript physicians and nurses into serving as informants because it confuses the role of health care providers, misleads patients without providing any notice, and potentially chills the physician-patient relationship.

If fiduciary duties are so well ensconced within the law, what could possibly justify the dilution or abandonment of legal and ethical obligations by doctors in cases involving pregnant patients? 239 Professor Michelle Oberman explains that a double standard has always existed in the context of pregnancy whereby doctors view not one, but “two lives involved.” 240 She astutely warned that doctors who embrace this view in the name of pregnancy ultimately propose that “women should have fewer rights than do their male counterparts.” 241 Furthermore, Oberman argued that this is a “legally and ethically obsolete premise.” 242 However, fetal protection cases described in this Article—many not envisaged even fifteen years ago—now challenge whether those premises really are outmoded. As the next section illustrates, contemporary fetal protection cases demonstrate a bold abrogation of even those fiduciary standards currently established by courts and the medical profession. The institutional shifts that imbed doctors as criminal law gatekeepers have led to the abdication of their legal fiduciary duties to their pregnant patients, perhaps to protect their medical licenses, despite the fact that trust and loyalty remain vital to the physician-patient relationship. 243

B. Formidable Discretionary Power: FP_Ls Lead to the Corruption of the Physician-Patient Relationship

Ferguson v. Charleston 244 represents a shift in the role of medical staff from serving the needs of patients to gathering medical evidence for the state to use against them. In that case, ten women initiated Section 1983 civil rights from seeking these essential services.” 245 These were a few of the organizations, among other organizations and many individual physicians, who joined the amicus brief.


239. Michelle Oberman rightly frames these dynamics as extending beyond maternal fetal conflicts to a new landscape riddled by patient-physician conflicts. She argues that it may be “doctors’ seemingly well-motivated efforts to promote maternal or fetal well-being” that induces physicians to impose “their perceptions of appropriate medical care on their pregnant patients.” Michelle Oberman, supra note 12, at 454.

240. Oberman, supra note 12, at 469–70 (citing WILLIAMS J. WHITRIDGE, WILLIAMS OBSTETRICS (Jack Pritchard & Paul MacDonald eds., 16th ed. 1980). Oberman further notes that feminists and others have invested in this framework “in contexts ranging from the employment setting to efforts to secure women’s rights to abortion.” 246 Id. at 470.

241. Id. at 471.

242. Id.

243. See Jaffee v. Redmond, 518 U.S. 1, 10 (1997).

244. 532 U.S. 67 (2001).
FETAL PROTECTION LAWS

litigation against the Medical University of South Carolina (MUSC) and local government officials, claiming that they were the victims of warrantless and nonconsensual searches initiated and performed by medical staff. Medical officials at MUSC volunteered to serve as informants against their patients and initiated contact with a local prosecutor, Charles Condon, upon learning that he campaigned to extend child abuse laws to the use of drugs by pregnant women. Condon established an interagency task force, which included police, the prosecutor’s office, and hospital staff. Together, they created what plaintiffs called the “Search Policy.” In a series of memoranda and meetings, Condon and his team informed medical personnel how to collect urine samples for use in criminal investigations and protect the samples’ “chain of custody,” and devised the method by which MUSC staff would report to police. Law enforcement staff trained the doctors and nurses, and Condon provided written guidance “listing criminal charges that could apply to women coming under the Search Policy.”

Medical staff at MUSC along with police and prosecutors “disproportionately targeted indigent, African American women for search and arrest.” In their search program, of the thirty women arrested, twenty-nine were African American. Special dispensation was sought for at least one white woman who met the criteria for arrest but remained free. Racial profiling may have contributed to the arrest of another white woman because a nurse and member of the interagency task force made a point of notating the patient’s chart with the following information: “Patient live[s] with her boyfriend who is a Negro.” While this notation did not serve any medically relevant purpose, it does reveal that an illicit extralegal consideration—race—was involved in the implementation and enforcement of South Carolina’s FPL. This particular nurse admitted at trial that she believed interracial

245. 42 U.S.C. § 1983 allows citizens to file suit for money damages against every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. 42 U.S.C. § 1983 (1996).
246. Id. at 73.
247. Id. at 70–71.
249. Id. at 2.
250. Id.
251. Id. at 4.
252. Id.
253. Id. at 12.
254. Id. at 13.
255. Id. at 12 (noting “Nurse Brown admitted that she called the Solicitor’s office and requested another ‘chance’ on behalf of a white patient who should have been arrested under the Policy’s terms”).
256. Id. at 13 n.10.
257. Id. (“The record demonstrates that Nurse Brown, who helped establish the Search Policy and was integral to its everyday implementation, held racist views.”).
relationships violated "God's way," and "raised the option of sterilization for black women testing positive for cocaine, but not for white women." This search process introduced a level of unusual cruelty into the delivery of medicine, altering a common understanding about hospitals providing safety, comfort, and respite to those seeking medical help. As transcripts in the case reveal, some women subjected to arrest were "denied the opportunity to change from their hospital gowns or to make a phone call to family members to make arrangements for the care of their children." In other instances, police apprehended the new mothers "while still bleeding, weak and in pain from having just given birth." Some were handcuffed and shackled, with chains circling their abdomen. Leg irons were used in some cases. For any woman who could not walk, "a blanket or sheet would be placed over the woman, and she would be wheeled out of the hospital to a waiting police car and transported to jail."

The collaboration between MUSC medical staff and law enforcement to obtain incriminating evidence against pregnant women seeking prenatal care exposes a provocative example of physicians wielding significant discretion in the furtherance of a criminal law purpose rather than serving patients' medical interests. Despite an ultimate vindication for the Ferguson petitioners, fetal protection prosecutions appear to be on the rise, leading to the arrest and imprisonment of a broad spectrum of pregnant women and new mothers. In Bei Bei Shuai's case, she was arrested and faced a first degree murder charge with a possible sentence of forty-five years to life in prison for the death of her newborn after a failed suicide attempt while pregnant. Shuai's subsequent plea deal in 2013 spared her a gruesome and unjust fate, but not before arrest, over a year of incarceration, and public humiliation. In another case, a member of a fundamentalist religious community was arrested for refusing medical care during her pregnancy. The threats of law enforcement and civil
confinement now extend to women who refuse cesarean birth, preferring natural births instead.269 Medical personnel’s exercise of judgment is critical to these arrests.

The discretionary power described above, much like that afforded prosecutors or police officers, can be corruptible and vulnerable to selective, but largely unchecked enforcement, social bias, political ideology, and prejudice.270 This is particularly worrisome in physician-patient contexts because doctors and nurses enjoy inimitable access to patients’ medical, social, and personal histories.271 Yet, unlike police and prosecutors, doctors do not receive legal training to understand patients’ constitutional rights or their legal duty to avoid racial profiling. There is no “detached scrutiny” of a neutral authority or judge to assess the permissibility of doctors gaining access to patient information for law enforcement purposes. No legal authority supervises the subjective dealings of doctors who may use the veil of medicine to obtain information for nonmedical purposes. By contrast, police cannot sign their own search warrants and for good reason. Justice Brandeis explained that the “greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well-meaning, but without understanding.”272

Ensnaring doctors into quasi-agent roles circumvents legal process and deceives patients because pregnant women lack notice and warning that their prenatal visit with their physicians may also serve as a potential criminal investigation. The Supreme Court has ruled that in criminal investigations, suspects in police custody must be warned of their right not to self-incriminate lest their constitutional rights be violated.273 A corollary principle does not exist in medicine; there is no medical “Miranda Warning.” However, that wise logic should prevail in medical cases, too. When individuals encounter police, they are on notice about the potential to fall under the criminal gaze. This is not true with doctors.

It should also be alarming that in Ferguson, medical staff lured women into a legal trap under the pretense of providing medical services. In Darlene

Wedge, Judge Confines Cult Mom to Secure Hospital, BOS. HERALD, Sept. 1, 2000, available at 2000 WLNR 227248.


270. See Brief of the NARAL Foundation et al. as Amici Curiae in Support of Petitioners, Ferguson v. Charleston, 532 U.S. 67 (2001) (No. 99-936), 2000 WL 1506972, at *23–*26 for a discussion about how discretionary power was abused and subjectively applied. See also Dwight L. Green, Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers, 39 BUFF. L. REV. 737, 738 (1991) (stating that prosecutorial discretion can lead to biased law enforcement because “[p]rosecutors reflect the unstated but operative norms in American courtrooms, which are predominately affluent, white, usually male, and often Protestant perspectives”); Song Richardson, Arrest Efficiency and the Fourth Amendment, 95 MINN. L. REV. 2035 (2011).


Nicholson’s case, the lead nurse searched her urine under the guise of medical treatment for hydration and threatened arrest after a positive urinalysis:

They said I was dehydrated and I needed to be hooked up to glucose. . . . They told me to drink lots of water. . . . I asked them if I was to be hooked up to the glucose machine. . . . They just told me to keep drinking water . . . and told me to use the bathroom in a cup. . . . And I asked what for and they said to see if I had enough fluid in my system so they could send me home. 274

Court documents reveal the extent of deception, threat, and entrapment: Sandra Powell went to MUSC in labor but was informed that because of a positive urinalysis for cocaine, she would be arrested immediately. When Powell pleaded for medical help by saying “please, what could I do to stop this or could you help me,” the nurse “responded simply that she would ‘be locked up.’” 275 The Plaintiff’s Brief and exhibit explain that Powell was arrested, while “still in pain and bleeding from childbirth,” wearing only a hospital gown during her transport to jail. 276 That patients arrested during the Search Policy’s early months did not receive drug treatment referral and “no opportunity to obtain treatment as an “alternative” to arrest” belies claims that the program had a medical emphasis. 277 Instead, “each aspect of the Search Policy was designed to assist law enforcement personnel in performing their duties.” 278

_Ferguson_ court documents, including memoranda, briefs, 279 court transcripts, 280 plaintiff exhibits, 281 joint exhibits, and the briefs’ appendices 282 illuminate that the program’s primary goal was to facilitate the arrests and criminal prosecutions of patients who used crack during their pregnancies through racially targeted drug screenings. For example, an MUSC physician testified that “although ingestion of heroin or alcohol poses serious risks of fetal harm, the nine criteria established by the taskforce members for searching pregnant women were drafted specifically to uncover cocaine use.” 283 The Supreme Court found that the MUSC program violated the _Ferguson _plaintiffs’

---

275. Id. at 8.
276. Id.
277. Id. at 6. Months after the program began, drug addiction treatment was offered as an ultimatum to avoid immediate arrest. Id. at 8.
278. Id. at 4.
281. Brief for Petitioners, supra note 248; Brief of Respondents, supra note 279. “Mr. Good [MUSC’s General Counsel] wrote to then Charleston County Solicitor Charles Condon to inquire as follows: I read with great interest in Saturday’s newspaper accounts of our good friend, the Solicitor for the Thirteenth Judicial Circuit, prosecuting mothers who gave birth to children who tested positive for drugs . . . Please advise us if your office is anticipating future criminal action and what if anything our Medical Center needs to do to assist you in this matter.” Brief for Petitioners, supra note 248, at 3.
282. Brief for Petitioners, supra note 248, at 3 nn.4--5; Brief for APHA et al. for Petitioner, supra note 236.
283. Brief for Petitioners, supra note 248, at 11.
Fourth Amendment rights because the program authorized nonconsensual
searches and seizures without a valid warrant.\textsuperscript{284} This ruling holds promise for
future pregnant women who are tracked and arrested under similar
circumstances. However, as a practical matter, such legal victories may obscure
the immediate costs associated with arrests and other real challenges for
pregnant women, such as: information asymmetries because pregnant women
may lack notice and awareness about health care professionals’ involvement
with fetal protection efforts; risk of termination of parental rights after two
years of incarceration, which is quite relevant as appeals may take years;
pressure to accept corrosive plea deals under threat of life sentences; and
inability of the most poor and vulnerable to afford knowledgeable, competent
legal counsel. Moreover, what the Court did not address is that the Search
Policy also represented a violation of fundamental medical ethical principles. In
addition, how the physician-patient relationship is corrupted by doctors’ and
nurses’ implementation of FPLs was also left unexamined.

In assessing fetal protectionism, medical personnel may—and frequently
do—make wrong calls. To comply with state statutes that encroach and burden
pregnant women’s constitutional rights, doctors increasingly subordinate
ethical obligations to their pregnant patients, while prioritizing punitive legal
redress over medical treatment. It is not surprising that medical personnel are
poor interpreters of state law; they are neither elected nor appointed, nor trained
in the law or legislative processes. Worst of all, FPL’s coercive effects and
absurd outcomes impact not only pregnant women, but also the medical
personnel who serve them.

\textbf{C. Enlistment of Doctors to Police Pregnant Patients: Inimical to Public
Health Goals}

The Burton\textsuperscript{285} and Ferguson\textsuperscript{286} cases as well as Epsteen’s,\textsuperscript{287} Beltran’s\textsuperscript{288}
and Taylor’s stories\textsuperscript{289} demonstrate the corruptibility of medical discretion and
the physician-patient relationship in fetal protection cases. For pregnant
women, detecting (and guarding against) the dual role of medical staff as health
care providers and quasi-state criminal informants can be virtually impossible
and counterintuitive, particularly as long as patients receive a modicum of
medical service. Patients assume that voluntary interactions with physicians
pave the path towards promoting their health and that confidentially sharing

\begin{thebibliography}{99}
\bibitem{287} See Stein, supra note 71.
\bibitem{288} Eckholm, Fetus versus Mother, supra note 29.
\bibitem{289} Hayes, supra note 50.
\end{thebibliography}
their social and medical histories will only be used to achieve that goal. 290
Unfortunately, fetal protection cases caution against that presumption. The
cases discussed in this Article and many others chronicled through Lynn
Paltrow’s extensive legal advocacy and research 291 suggest that poor pregnant
women trust their medical providers at a significant risk to their liberty and
privacy, which is not good for society.

1. Driving Women away from Needed Medical Care

Perversely, introducing criminal sanctions and court orders for bed rest
and cesarean operations may drive women away from seeking the very care
that only medical staff can provide. Driving pregnant patients away from
medical care is a form of punishment that harms not only women but
undermines the purported state interest in nurturing fetal development. George
Annas explains:

[M]arriage of the state and medicine is likely to harm more fetuses
than it helps, since many women will quite reasonably avoid
physicians altogether during pregnancy if failure to follow medical
advice can result in . . . involuntary confinement, or criminal charges.
By protecting . . . the integrity of a voluntary doctor-patient
relationship, we not only promote autonomy; we also promote the
well-being of the vast majority of fetuses. 292

Even without the threat of law enforcement, seeking routine medical help
can be embarrassing: urinating in a cup, exposing parts of one’s body virtually
unknown and unseen by anyone else, being prodded and poked in intimate
spaces, and submitting to physically uncomfortable gynecological exams can
be awkward, and disclosing intimate health secrets can be stigmatizing. 293 Yet,
patients surrender to these uncomfortable medical encounters, yielding their
trust along with their bodies. Patients participate in this process with the
expectation that their vulnerability will be afforded dignity and their

290. See, e.g., Cynthia M.A. Geppert & Laura Weiss Roberts, Protecting Patient
Confidentiality in Primary Care, 3 SEMINARS IN MED. PRAC. 7, 7 (2000) ("Many patients assume that
physician-patient confidentiality is an absolute.").
292. George Annas, Protecting the Liberty of Pregnant Patients, 316 NEW ENGL. J. MED. 1213,
1214 (1987).
293. For this reason, courts have ruled various types of medical information to be protected,
specifically referencing the potential for stigma, embarrassment, or humiliation: a high school
student’s pregnancy status, Gruenke v. Seip, 225 F.3d 290, 301 (3d Cir. 2000) (noting that it could be
embarrassing for a high school student to reveal a pregnancy); an inmate’s HIV-positive status, Doe v.
Delie, 257 F.3d at 317, 323 (3d Cir. 2001) (holding “that the Fourteenth Amendment protects an
inmate’s right to medical privacy, subject to legitimate penological interests”); a government
1995); a private employee’s health care information sought by the government, United States v.
Westinghouse, 638 F.2d 570, 577 (3d Cir. 1980) (carving out a privacy right that includes “results of
routine testing, such as X-rays, blood tests, pulmonary function tests, hearing and visual tests.”). Id. at
579.
communications protected. For pregnant patients, establishing and maintaining trust in their patient-physician relationship significantly influences their compliance with medical recommendations and the frequency of their prenatal visits.

As discussed above, confidentiality norms in the physician-patient relationship should rival only that of the psychotherapist and her patient, lawyer and her client, or clergy and parishioners because enlisting doctors to police pregnant patients undermines not only those women's individual interests, but also broader societal goals to promote a trustworthy system of medicine that advances the public health. As one health care organization succinctly stated, "[T]he public must be assured of nonpunitive access to comprehensive care." However, law enforcement's encroachment into prenatal care is particularly counterintuitive and counterproductive to that important goal precisely because it introduces a retributive, nonempathetic framework into physician-patient interactions, which undermines the trust relationship.

For these reasons, national medical associations warn that a law enforcement approach to maternal health only "threatens to make things worse" for women and their babies. The erosion of trust is a significant

297. Attorney-client communications are protected from compelled disclosure under Federal Rules of Evidence. See Swidler & Berlin, 524 U.S. 399 (1998). The attorney-client privilege is built upon the premise that to "encourage full and frank communication between attorneys and their clients and . . . promote broader public interests in the observance of law and administration of justice" the law must provide protection for a client’s communications with her attorney. See Swidler & Berlin, 524 U.S. 399 (1998) (holding that the attorney-client privilege does not terminate at the client’s death); Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). However, the attorney-client privilege and the duty to preserve client confidences are distinct and emanate from different sources of law. The duty of confidentiality is enforced by state law and in some jurisdictions demands a higher level of diligence in protecting client information. For example, in California, Business and Professions Code § 6068 (e)(1) mandates attorneys to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." This rule subjects all communications and information shared during the course of the professional relationship. Id. The Minnesota Rules of Professional Conduct, Rule 1.6 prohibits a lawyer from knowingly "1) . . . reveal[ing] a confidence or secret of a client, 2) us[ing] a confidence or secret of a client to the disadvantage of the client, 3) us[ing] a confidence or secret of a client for the advantage of . . . a third person, unless the client consents . . . . " Limited exceptions apply permitting disclosure of client communication, such as the threat of imminent danger to a third party.
298. Ezra E.H. Griffith & John L. Young, Clergy Counselors and Confidentiality: A Case for Scrutiny, 32 J. AM. ACAD. PSYCHIATRY L. 43, 44 (2004) ("There is a basic societal expectation that clergy will respect the confidences of their charges.").
300. Id. at 14.
concern articulated by medical organizations as they understand how indispensable patient trust is to gathering sensitive information to inform a proper diagnosis and treat health care concerns.

The reality of heightened fetal protection and pressure on physicians to comply with coercive state laws urged ACOG to issue a 2011 report warning that: “Drug programs that deter women from seeking prenatal care are contrary to the welfare of the mother and fetus. Incarceration and threat of incarceration have proved to be ineffective in reducing the incidence of alcohol and drug abuse.”

Consistent with its observation that fetal protection laws undermine patient health, ACOG now encourages its members to work with state legislators to repeal FPL that targets pregnant substance users.

Medical organizations are particularly concerned about the corrosive effects of law enforcement’s invasive reach into maternal health. They explain how pregnant women who suffer from drug addiction may be particularly hesitant to meet with doctors and reticent about providing details exposing the type, extent, and frequency of their drug use. Their fears concern not only their immediate pregnancies, but their children at home. Twenty years ago, a joint taskforce of the Southern Governors’ Association and the Southern Legislative Conference, which came to be known as The Southern Regional Project on Infant Mortality, released a powerful report concluding:

If pregnant women ... feel that they will be “turned in” by health care providers or substance abuse treatment centers, they will avoid getting care. If women are able to discuss their addiction with providers without fear of retribution ... they are more likely to enter treatment.

Collectively, medical organizations stress that criminal law enforcement as a means of addressing substance abuse or mental health by its design is inimical to understanding that drug addiction is a disease and not a crime. Legislatures seemingly misunderstand this important medical reality, taking an approach that undermines health. The National Perinatal Association explains


302. Id.


that "drug abuse is not strictly a social problem"; rather, "it is a chronic disease that impacts the brain, which makes stopping more than a matter of will power." And while many reports highlighting the ill effects of prosecuting pregnant women concentrate on drug offenders, the premise behind their clear advocacy of restoring maternal medicine to that (and not law enforcement) should certainly extend to women prosecuted for conduct rather than drug-related fetal harm. Presumably, law enforcement intrusion into the physician-patient relationship may distract care providers, diverting or at least dividing their attention, which should be singularly focused on their patients.

2. Decline In Trust: Undermines Health Goals and Outcomes

Researchers associate a decline in patient trust with lower patient and provider satisfaction, increased disenrollment of care, poorer patient compliance with treatment recommendations, "and indirectly, unfavorable health status." Researchers concerns about patient-physician trust gain added significance and urgency in low-income U.S. communities, where maternal-fetal morbidity occurs at a higher frequency than in some developing countries. The abrogation of trust in patient-physician relationships negatively impacts medical access and undermines the promotion of preventative care and delivery of effective perinatal services. More than likely, women will avoid doctors whom they cannot trust. And because of this fetal protection law enforcement laws' deleterious effect extends beyond pregnant women to the fetuses they carry. The American Public Health Organization emphasized in its amicus brief submitted to the U.S. Supreme Court that trust is an essential component of building "quality patient-provider relationships.

Despite the aggressive criminal and civil state interventions in women's pregnancies in recent decades, statistics released in a recent World Health
Organization (WHO) report, Trends in Maternal Mortality: 1990 to 2008,312 "place the United States fiftieth in the world for maternal mortality—with maternal mortality ratios higher than almost all European countries, as well as several countries in Asia and the Middle East."313 Although the majority of countries reduced their maternal mortality, a near double increase was reported for the United States.314 In response to the WHO study, maternal health advocates issued a report exclaiming that the U.S. approach to maternal care is a costly, human rights failure.315 Instead, perhaps the “overuse of medical procedures” such as cesarean surgeries, which have increased by 56 percent from 1996 to 2008 in the United States, intensify the risks of injuries to fetuses and pregnant women.316

Ironically, U.S. maternal mortality rates were at a low in 1987 (at about 6.6 per 100,000 live births)317 prior to the launch of hard-line legislative protectionism of fetuses that interfered in the physician-patient relationship. As the APHA recently reported, “both the WHO and the Centers for Disease Control and Prevention (CDC) vital statistics data show a substantial increase in the maternal mortality ratios over the last 2 decades.”318 The CDC now reports U.S. maternal mortality at a rate between 12 to 15 deaths per 100,000 live births, about 3 times above the national goal.319 Moreover, this phenomenon includes shockingly high maternal mortality rates among white women in the United States, who experience maternal mortality at a ratio of 10.5 deaths per 100,000 (a frequency higher “than the entire population of women in 31 other countries”).320

U.S. infant mortality has only marginally decreased over the past 15 years. The CDC reports that “during 2000–2005, the U.S. infant mortality rate did not decline significantly for the total population or for any racial/ethnic population.”321 From 2005 to 2009, infant mortality decreased overall by about

314. WORLD HEALTH ORGANIZATION ET AL., supra note 312; Coeytaux et al., supra note 313.
315. Coeytaux et al., supra note 313, at 189 ("For a country that spends more than any other country on health care and more on childbirth-related care than any other area of hospitalization—US $86 billion a year—this is a shockingly poor return on investment.").
316. Coeytaux et al., supra note 313, at 191.
318. Id.
319. Id.
320. Id.
7 percent to about 6.9 infant deaths per 1,000 live births. However, it remains very high among African Americans at 12.40 per 1,000 live births.\footnote{Id.} Notably, while improved data collection might explain the increase in reporting of maternal deaths, it does not explain the dramatic rate of maternal deaths in the United States. Medical experts explain that maternal mortality is preventable. Nevertheless, they note that rates as high as in the United States are "associated with the violation of a variety of human rights, including the mother’s right to life, the right to freedom from discrimination, and the right to health and quality health care."\footnote{Id.} What health improvements can be associated with state interventions in women’s pregnancies? Has the shifted role of health care providers produced healthier outcomes for women and babies, particularly those from low-income communities? Data such as that offered above provide compelling insights. However, more research is needed.

The protective character of law enforcement in this realm serves only to undermine and not enhance the health and well-being of pregnant women. Holding them criminally liable for the actions they undertake during pregnancy does not serve a recognized health purpose like in Powell’s case where she sought treatment for her addiction and instead suffered arrest. The urinalysis served to identify grounds to take her into custody and not to treat her addiction or to provide prenatal care.\footnote{Brief for Petitioners at 8, Ferguson v. Charleston, 532 U.S. 67 (2001) (No. 99–936) (noting that “she was removed ...in handcuffs and shackles to a waiting police car.”)} In Powell’s case, medical and court records reveal her consistent desire to obtain medical treatment for addiction, yet she was incarcerated instead.\footnote{Id. at 8 n.7 (“Medical records indicate that Ms. Powell repeatedly requested help in obtaining drug treatment.”).}

3. Shackling Further Undermines Pregnant Patients’ Health

In another case, after Lori Griffin’s arrest at her prenatal visit for distribution of cocaine to a minor, she endured three weeks “in jail in an unsanitary cell with a metal table and a cushion to serve as a bed.”\footnote{Brief for Petitioners at 7, Ferguson v. City of Charleston, 532 U.S. 67 (2001) (No. 99–936) (noting that “she was removed ...in handcuffs and shackles to a waiting police car.”)} Although police regularly brought her to the hospital for checkups, Griffin was subjected to receiving prenatal care while shackled and handcuffed,\footnote{Id. See also Tessa M. Gorman, Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs, 85 CALIF. L. REV. 441, 443 (1997)} which is medically inadvisable because it is physically distressing and unnecessary.\footnote{Id.}
The American College of Nurse Midwives (ACNM) issued a policy statement in response to the recent trend of shackling pregnant women. The group’s policy statement emphasizes, “Women should not be restrained during labor” because “[l]abor itself is a restraining condition.” The ACNM reminds doctors that “the impairment of movement should be avoided to prevent injury and to aid the medical staff in providing care and facilitating position changes necessary for labor and birth.” If shackling does not serve a security or medical purpose, why do states condone the practice?

States enforce shackling practices as a means of exerting retribution on its prisoners and instantiating physical and symbolic subordination. In the case of pregnant women, shackling functionally serves an added role. That is, pregnant women civilly committed like Alicia Beltran or criminally confined like Griffin by default fit the definition of “bad mothers.” For “bad mothers,” shackling during labor and delivery represents a unique type of punishment, specifically linked to their misbehavior during pregnancy and inability to conform to a more perfected ideal of motherhood. Rather than being afforded dignified childbirth, which would align with purported state interests, pregnant women are subjected to particularly punitive punishment in shackling as a mechanism to humiliate and castigate. As La Donna Hopkins recalled in testimony to the Illinois legislature:

Being shackled in transport to give birth was a demoralizing, uncomfortable and frightening experience. I was at Dwight [Correctional Facility] when I went into labor. I was placed in handcuffs, had a heavy chain across my belly that my hands were attached to, along with leg irons on my ankles. I was scared to walk because of the restrictive leg irons...No one saw me as a woman... I

(noting that shackles permeate much of the American black experience—from the cruelest forms of immigration to the byproducts of Jim Crow segregation, involving chain gangs.).


330. Id.

331. See, e.g., Priscilla A. Ocen, Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners, 100 CALIF. L. REV. 1239, 1309 (2012) (arguing that “the use of shackles on pregnant prisoners during labor and childbirth should be seen as a badge or incident of slavery”).
have never committed a violent crime—I am in minimum security, but I was treated like a murderer.\textsuperscript{332}

Similarly, Melissa Hall testified, "I was close to delivering my baby, I was in a lot of pain and I was screaming for the nurse . . . . The sheriff didn’t give me any sympathy or any privacy. He left the handcuff shackled to the bed and the leg iron shackled to the stirrup while I was delivering my baby."\textsuperscript{333}

Courts recognize the stigmatizing effects of shackling. For this reason, courts allow even those convicted of violent crimes the opportunity to appear in court without shackles. Writing for the majority in Holbrook\textit{ v. Flynn}, Justice Thurgood Marshall reasoned, "Shackling a defendant during court proceedings is an inherently prejudicial practice that may violate a defendant’s constitutional right to fair trial."\textsuperscript{334} Marshall explained that the barriers to justice and a fair trial included jurors’ perceptions about what is represented by shackling. Pregnancy by extension deserves similar protection from the prejudicial effects shackling can render in the pregnancy contexts. From pregnant women’s experiences with guards to health care professionals and other hospital staff and clients, shackling imposes a stigma of poor motherhood that may lead to subpar medical treatment.

Shackling pregnant women during labor and delivery further illustrates misguided public policy in reproductive health care. These powerful accounts of shackling also expose the externalities that emerge from statutory interventions in women’s pregnancies. Not all women arrested or detained for violating fetal protection will suffer this fate. However, for many pregnant women subjected to law enforcement interventions in their pregnancies, shackling is a default state mechanism.

For Beltran, a routine medical appointment disturbingly resulted in her being handcuffed and shackled, pleading for release from state-imposed civil confinement to protect her fetus.\textsuperscript{335} Likewise, had Griffin not been reported to law enforcement by her health care providers for drug addiction, she likely would have given birth without the further imprisonment by shackles that risked her health as well as the fetus during delivery. Nor are these accounts selective or isolated incidences. Because about 5–6 percent of women who enter prison are pregnant, over 6,600 will give birth during incarceration. A significant percentage of those women will be subjected to the denigrating and

\textsuperscript{332}. See \textit{International Human Rights Clinic et al., The Shackling of Incarcerated Pregnant Women: A Human Rights Violation Committed Regularly in the United States} S (2013) (quoting LaDonna Hopkins) [on file with author].

\textsuperscript{333}. \textit{Id.} at 4.


medically dangerous experience of being shackled during labor or labor and birth, making this an important issue for legal and human rights discourse.  

Despite federal law prohibiting shackling of pregnant women in federal prisons, states remain slow to follow this example. According to one study, thirty-two states have not enacted anti-shackling legislation to protect women during pregnancy.

Shackling is also psychologically damaging, particularly for African American women because of the iron chain’s cruel and unremitting use during slavery. Professor Priscilla Ocen advances this perspective, explaining that shackling “attaches to Black women in particular through the historical devaluation, regulation, and punishment of their exercise of reproductive capacity in three contexts: slavery, convict leasing, and chain gangs in the South.” Shackling pregnant women—a common feature of law enforcement in some states—has many negative connotations and brings to mind the shameful subordination of and discrimination against an entire class of persons during slavery.

The important state interest in promoting and safeguarding public health is not furthered by law enforcement’s intrusion in health care delivery. Yet, application of the criminal frame in medicine, particularly maternal health, risks corroding an already delicate system. Legislatures’ protective intuitions in pregnancy may prove fateful and dissuade pregnant women from seeking vital prenatal care. If hospitals and clinics become symbolically aligned with criminal justice and metaphorically associated with police precincts and jails, women may put off receiving crucial prenatal services.

There are other reasons for rethinking the state’s enlistment of doctors as quasi-criminal agents, namely quality of care and promotion of healthy outcomes for pregnant women and fetuses. In its amicus brief to the Supreme Court in Ferguson the APHA emphasized that if providers have a clear understanding of their patients’ drug addiction, “they can focus on providing interventions that substantially improve health outcomes for pregnant women

---

337. Id.
338. Id. at 1. Neither are the justifications for shackling pregnant women persuasive. In the states that abolished the practice, neither violence due to lack of restraint nor mass escape attempts are indicated. Id. at 6–7.
340. Id.
342. Id. at 13 ("Numerous studies have confirmed that the intrusion of the criminal justice system on health care practices aggravates exponentially the already-strong reluctance to seek medical attention and treatment.").
and for children.” They report that women are more likely to “complete drug treatment, and far more likely [to avail themselves of] early, comprehensive prenatal care.” And even women who cannot access treatment or who simply struggle with addiction throughout pregnancy can have improved fetal health outcomes with prenatal care. According to the APHA, “[P]regnant women who use cocaine but who have at least four prenatal care visits have been found to face significantly reduced chances of delivering low birth weight babies.”

III. THE EQUAL PROTECTION CONUNDRUM

In Parts I and II, this Article analyzed the imperfections of contemporary state interventions to protect fetal health. As discussed, state intrusions in pregnancies impose conflicting duties on physicians, requiring that they serve at one turn as vigilant gatekeepers of patient secrets and at another as interlopers and government informants. These methods to address fetal health—state-imposed bed rest, compulsory cesarean surgeries, prosecutions for failed suicide, and civil confinement to protect fetuses—create official hierarchies, ranking the legal and health interests of fetuses above those of pregnant patients.

Part III advances normative equal protection arguments in response to punitive state interventions in women’s pregnancies. It considers whether fetal protection laws could be challenged as violations of substantive due process, also protected by the Fourteenth Amendment. “[N]or shall any State deprive any person of life, liberty, or property, without due process of law …” U.S. Const. amend. XIV, § 1. This Article does not take up that constitutional analysis beyond that identified in Parts I and II as those issues are addressed in a forthcoming project, *The Drug War’s Forgotten Casualties: Women, Children and The Destruction of Family,* which also considers the primacy of Eighth Amendment considerations in protecting pregnant women from the cruel and unusual reach of the state into their pregnancies. (Unpublished on file with author). For a discussion of substantive due process analyses in reproductive health scholarship in recent years, see Annette Ruth Appell, *Accommodating Childhood,* 19 CARDOZO J.L. & GENDER 715, 752 (2013) (critiquing the Fourteenth Amendment as affording “negative-only rights against state-sponsored discrimination or interference with fundamental liberty, including exercise of religious, familial, and sexual freedom”); Andrew Coan, *Assisted Reproductive Equality: An Institutional Analysis,* 60 CASE W. RES. L. REV. 1143 (2010) (applying an comparative institutional analysis approach to assisted reproduction); Ariela R. Dubler, *Sexing Skinner: History and The Politics of the Right To Marry,* 110 COLUM. L. REV. 1348 (2010) (arguing that *Skinner v. Oklahoma* emerged from a political moment reflected in ongoing conversations about the relationship between sexual freedom, procreation and marriage); Melanie Jacobs, *Intentional Parenthood’s Influence: Rethinking Procreative Autonomy and Federal Paternity Establishment Policy,* 20 AM. U. J. GENDER, SOC. POL’Y & L. 489, 490 (2012) (challenging “why a man who has no intent or desire to be a father should be adjudicated a legal father - with subsequent legal responsibilities”); Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment’s Limit on Compelled Ideological
such legislative efforts, despite burdening women’s medical and reproductive liberties, pass constitutional muster. This Part considers whether FPLs conflict with Fourteenth Amendment values.\(^{348}\) Taken as an empirical question, it considers whether fetal protection efforts arbitrarily focus on some classes of pregnant women and certain types of potentially dangerous conduct to the exclusion of others. And if so, can that level of selective state punishment without medical and legal justification withstand constitutional challenge?

A. The Empirical Problem

The legitimacy of fetal protection laws rests on an explicit welfare assumption rooted in public health rationales. The laws are based on the assumption that state interventions in pregnancies promote the health of fertilized embryos and fetuses.\(^{349}\) Much of this thinking presumes a life and rights for embryos and fetuses apart and distinct from that of pregnant women who bear them. However, as shown throughout this Article, neither fetal nor maternal health outcomes are necessarily improved by punitive state interventions in women’s pregnancies. In fact, according to medical organizations, fetal protection efforts may result in worse health outcomes for pregnant women and their fetuses.\(^{350}\)

Empirical studies reveal that in the years since the aggressive involvement of states in women’s pregnancies, maternal mortality nearly doubled and only slight decreases in fetal mortality were observed.\(^{351}\) Despite the intuitive pull

\(^{348}\) The Fourteenth Amendment guarantees that “\(n\)o State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

\(^{349}\) It may be further assumed that the interventions are the least constitutionally burdensome means of promoting that interest. As with any government legislation, there is an underlying presumption of fairness and equity and that laws are not arbitrarily applied in the name of health nor selectively enforced.

\(^{350}\) Brief for APHA et al. for Petitioner, supra note 236, at 13.

\(^{351}\) The United States ranks fiftieth among nations reporting maternal morbidity to the World Health Organization. The rate of maternal death has doubled since 1987, while other nations’ rates of maternal morbidity declined during the same period. There is no explicit correlation between maternal and fetal mortality and fetal protection interventions. However, the data provides a broader view of maternal health at a time when states have enacted interventionists’ strategies in the name of
that fetal health benefits derive from punitive state intervention in women's pregnancies, the empirical literature on maternal-fetal health suggests otherwise.352 When states introduce punitive norms into child bearing that include interfering with the physician-patient relationship and threats of arrests and incarceration, women may forego care. Furthermore, there are no guarantees that women who come under the supervision of the state necessarily give birth in a hospital or under dignified circumstances. Babies are sometimes born in prison under exceedingly unsanitary conditions.353 Therefore, states' efforts to concentrate criminal attention on maternal conduct as a means to promote fetal health are destined to fail not only on moral but also on medical efficacy grounds.

1. Abstracted Legal and Medical Framing

Fetal health is a complex and nuanced issue. In Professor Reva Siegel's meticulously detailed historical account of abortion regulation,354 she observed that legal examination of fetal protectionist legislation was abstracted from the social context. Indeed, fetal protection regulation is also abstracted from the medical context. Siegel attributed this ingrained abstraction to nineteenth century anti-abortion and contraception movements in the United States, which "presented the fetus as an object of public interest, scarcely connected physically or socially to the woman bearing it."355 And when an embryo or fetus becomes the concern of regulation conspicuously apart from the pregnant woman gestating it, Siegel warns that "it becomes possible to reason about regulating women's conduct without seeming to reason about women at all."356
When legal analysis situates fetuses as independent and distinct from pregnant women, proponents of FPLs can easily establish tailored medical narratives about fertilized eggs, embryos, and fetuses, including their potential futures quite separate and apart from pregnant women's physical, psychological, and physiological selves. Often, these narratives lack empirical rigor, thus leading to arbitrary designations regarding what should be reregulated conduct and what is exempt. Race and class biases creep into arbitrary intervention. It becomes easier to ignore the social and economic conditions that dominate pregnant women's lives, including employment, marital status, education, and poverty. It also becomes easier to rationalize and analyze fetal harms similar to child harms, despite their logical and legal dissimilarities.

Dietrich v. Northampton is instructive on this point. In 1884, Justice Oliver Wendell Holmes ruled that it would be far too remote if an action could be maintained on behalf of a fetus still dependent on the pregnant woman bearing it. Justice Holmes reasoned that any argument which suggested that a fetus "stands on the same footing as . . . an existing person" is hindered and not helped by the fact that a fetus does not have even a "quasi independent life." In dicta, the court maintained that if a pregnant woman could not recover from the injury sustained by the fetus, neither would it be legally sound for the fetus to recover. Contemporary fetal protection regulation presents similar medical and legal concerns regarding remoteness.

357. Figdor & Kaeser, supra note 6, at 4 (noting stark racial disparities in pregnant patients' arrests).

358. Interestingly, these narrative constructions of the independent fetus emerged only in the last half of the century, and significantly, in the past thirty years as a focused component of the nation's drug war. For six decades, Dietrich v. Northampton represented juridical thinking on the issue of fetal rights and personhood. The Massachusetts Supreme Court ruled that a fetus of four or five months, that survived a negligently induced miscarriage for possibly ten to fifteen minutes did not meet the legal standard of a "person." Thus, the mother could not recover under the wrongful death statute enacted in Massachusetts. Dietrich v. Northampton, 138 Mass. 14, 17 (1884) (in denying the claim, the court noted, the fetus "was a part of the mother at the time of the injury."). See also Stallman v. Youngquist, 531 N.E.2d 335 (Ill. 1988) (denying recovery against a mother for unintentional injuries sustained in utero to a child born alive). Until 1946, all American jurisdictions followed Dietrich's ruling that the common law did not recognize a cause on behalf of a fetus. See Kathryn S. Banashek, Maternal Prenatal Negligence Does Not Give Rise to a Cause of Action, Stallman v. Youngquist, 125 Ill. 2d 267, 531 N.E.2d 335 (1988), 68 WASH. U. L.Q. 189, 190 (1990) (noting that "[h]istorically, courts denied a fetus recovery against any defendant for the negligent infliction of prenatal injuries on the ground that a mother and fetus comprised a single legal entity").

359. Dietrich, 138 Mass. at 16. For over sixty years, this opinion served as the basis for common law jurisprudence regarding the legal standing of a fetus. Courts consistently ruled that a fetus had no legal status apart from the pregnant woman bearing it. See Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); Stallman, 531 N.E.2d at 357.

2. The Multi-Headed Hydra: Environment and Poverty

Many different factors influence states' chief concerns about fetal birth weight and long term health beyond maternal conduct and control, such as secondhand smoke inhaled by the mother, her environment, and her exposure to domestic violence, poverty, pesticides, carcinogens, and lead. Sometimes, these factors perniciously combine in relentless cycles; poor women suffering the dire hardships of poverty are more likely to be exposed to lead in their homes, inhale pesticides intended to control pest infestations, and live near toxic waste facilities due to housing stratification, proximity to a military base, or the affordability of hazard-intense neighborhoods.
The Government Accountability Office’s (GAO) report on the correlation between hazardous waste dumping and racial and economic status further underscores the tragic circumstances in which low-income women of color live.\textsuperscript{368} These are not narratives of intent, which frame so much of legislative accounts about pregnant women’s conduct toward fetuses. In their study involving two thousand women, the California Birth Defect Monitoring Program found that women who lived within one-fourth mile of a hazardous waste site were twice as likely to birth babies with neural tube disabilities and four times as likely to birth children with serious heart conditions.\textsuperscript{369} It would

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{368} See, e.g., Jane Kay & Cheryl Katz, Pollution, Poverty, People of Color: The Factory on the Hill, ENVTL. HEALTH NEWS, June 4, 2012 (noting that low-income residents living near hazardous sites may find affordable homes and “save money on shelter, but they pay the price in health”), available at http://www.environmentalhealtnews.org/ehs/news/2012/pollution-poverty-and-people-of-color-richmond-day-1.
  \item \textsuperscript{369} The largest hazardous waste landfill in the United States is located in Emelle, Alabama a part of Sumter County, a community where 90 percent of the population is African American. Of the overall county, African Americans comprise 70 percent. Herbert, supra note 366; Curt Davidson, Emelle, Alabama: Home of the Nation’s Largest Hazardous Waste Landfill (last visited Apr. 16, 2015), http://www.umich.edu/~snre492/Jones/emelle.htm In this Alabama community, residents absorb hazardous waste from forty-eight states and some foreign nations. Curt Davidson, Emelle, Alabama: Home of the Nation’s Largest Hazardous Waste Landfill (last visited Apr. 16, 2015), http://www.umich.edu/~snre492/Jones/emelle.htm; Herbert, supra note 366. The disparities associated with where hazards are dumped and what communities are left to suffer the consequences is a devastating consequence of poverty and racism. See U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 364; Michael P. Healy, The Preemption of State Hazardous and Solid Waste Regulations: The Dormant Commerce Clause Awakens Once More, 43 WASH. U. J. URB. & CONTEMP. L. 177, 179 (1993) (critiquing the Supreme Court’s interpretation of the commerce clause to apply to the disposal of waste across state lines, which constrains states from imposing higher fees for out of state waste imported into the state); Richard Lazarus, Pursuing Environmental Justice: The Distributional Effects of Environmental Justice, 87 Nw. U. L. REV. 787, 790 (1993) (noting that environmental justice has been relatively under-explored by lawyers).
  \item \textsuperscript{367} See, e.g., Jane Kay & Cheryl Katz, Pollution, Poverty, People of Color: The Factory on the Hill, ENVTL. HEALTH NEWS, June 4, 2012 (noting that low-income residents living near hazardous sites may find affordable homes and “save money on shelter, but they pay the price in health”), available at http://www.environmentalhealtnews.org/ehs/news/2012/pollution-poverty-and-people-of-color-richmond-day-1.
  \item \textsuperscript{368} In a study based on census data from 1980, the GAO examined four hazard sites in the U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 364. They reported that with three of the four sites: Chemical Waste Management, Industrial Chemical Company, and the Warren County PCB Landfill, “the majority of the population [. . .] where the landfills are located is Black.” Id. The GAO also noted that at each of the four sites, the African American population had a lower mean income than the mean income of all other racial and ethnic populations within those towns, and represented the majority of those living below poverty for families of four. The mean income for a family in poverty was roughly $7,400 per year. Id. The income of the African Americans living near hazardous waste was lower than even the nation’s poverty level. GOV’T ACCOUNTABILITY OFFICE, supra note 364.
  \item \textsuperscript{369} CALIFORNIA BIRTH DEFECTS MONITORING PROGRAM, BIRTH DEFECTS AND HAZARDOUS WASTE SITES (1999), available at http://www.cdph.ca.gov/programs/BDMP/
be absurd to attach punitive reproductive standards to these women’s pregnancies in the name of promoting fetal health. 370

Fetal protection efforts largely ignore many of the intractable socioeconomic conditions experienced by low-income pregnant women. Though these conditions could also motivate state action on behalf of fetuses, states choose not to impose constraints on industries, manufacturers, municipalities, or states to reduce the environmental factors that may cause fetal harm. Dr. Hallum Hurt’s decades of research on the factors that cause poor academic performance, stress, and violence concludes that “poverty is a more powerful influence on the outcome of inner-city children than gestational exposure to cocaine.” 371

3. The “Crack Baby” Myth

Dr. Hurt’s research, following 110 children exposed to crack in utero, showed virtually no difference between these children and the control group. The violence and stress associated with their environments, however, proved quite profound:

81 percent of the children had seen someone arrested; 74 percent had heard gunshots; 35 percent had seen someone get shot; and 19 percent had seen a dead body outside—and the kids were only 7 years old at the time. Those children who reported a high exposure to violence were likelier to show signs of depression and anxiety and to have lower self-esteem. 372

Early iterations of fetal protection efforts primarily concerned fetal exposure to crack based on media consensus that the drug caused severe damage to fetuses. 373 The media pounced on a preliminary study conducted by

Documents/MO-CBDMP-HazWasteSites.pdf. See also JEAN D. BRENDER & JOHN S. GRIESENBECK, TEX. A&M SCH. RURAL PUB. HEALTH, HAZARDOUS WASTE SITES, INDUSTRIAL FACILITIES, AND ADVERSE PREGNANCY OUTCOMES IN DALLAS, DENTON, AND TARRANT COUNTIES, 1997–2000 1 (2008) (noting that prior studies find “an association between living near hazardous waste sites and all congenital malformations combined [with], chromosomal anomalies, neural tube and heart/circulatory defects), available at http://dc234.4shared.com/doc/eBvYQohn/preview.html. In this study, the authors found, women who birthed babies with isolated oral clefts were 5.7 times more likely than control group mothers to live within one mile of a hazardous waste site. Mothers of babies experiencing Down syndrome were also more likely to live within one mile of a hazardous waste site than the control group mothers. Id. at 6. Close proximity to hazardous waste was also associated with spina bifida and anencephaly. Id. The authors also noted characteristics among the women who lived in closer proximity to hazardous waste sites: they were more often Latina and with modest education. Id. at 8.

370. The conditions of abject poverty compound and may be difficult to extricate; what legislators perceive as the results of maternal harms may also be caused by environmental conditions associated with indigence and destitution.


372. Id.

a young doctor at Northwestern Memorial Hospital, Dr. Ira Chasnoff, whose research involved only twenty-three babies and no control group.374 Within three days of the study's release, media frenzy began.375 In interviews Chasnoff explained that his findings indicated crack has "just as devastating effect[s] on pregnancy and the newborn as heroin."376 Chasnoff warned that crack caused some babies to be born brain damaged and that some were overwhelmed by eye contact with their mothers.377 According to Chasnoff, the babies exhibited tremulous symptoms and others claimed the babies were too difficult to hold because they cried and flailed their arms. Hysteria followed Chasnoff's preliminary research, which earned him notoriety, but which should not have been generalized.

Chasnoff's paper as well as his imprudent pronouncements in interviews contributed to a powerful national narrative about crack threatening to unleash its progeny on a country ill-prepared for such devastation.378 Speculations describing the children as abnormal and predicting their inability "to enter classic school room[s] and function in large groups of children"379 stoked national concern. In media accounts, pundits and legislators distinguished crack from cocaine, claiming that crack posed a far more serious threat and "to many more young children" than powder cocaine, because "mothers use" crack.380

their own versions of the crack-baby story, taking for granted the accuracy of its premise . . . Reporters went into hospital nurseries and special schools and borrowed the images of premature babies or bawling African-American preschoolers to illustrate their crack-baby stories); Michael Winerip, Revisiting the 'Crack Babies' Epidemic, supra note 121; David C. Lewis et al., Top Medical Doctors and Scientists Urge Major Media Outlets to Stop Perpetuating “Crack Baby” Myth, NAT'L ADVOCS. FOR PREGNANT WOMEN (Feb. 25, 2004), http://www.advocatesforpregnantwomen.org/articles/crackbabyltr.htm.


376. Id.

377. Id.


380. In 1986, Congress acted on the widely embraced assumption that crack posed a more significant threat to its users and society by enacting a measure that came to be known as the “100-to-1 drug ratio.” Douglas J. Besharov, Crack Babies: The Worst Threat is Mom Herself, WASH. POST, Aug. 6, 1989, available at http://www.welfareacademy.org/pubs/childwelfare/crackbabies_89_0806.pdf. At the time, members of Congress and some within the medical community believed crack to be a more potent and powerful form of a cocaine derivative. See id.

Legislators also believed that crack concentrated the potency of cocaine, and drug sentencing laws came to reflect this perception so that "a person convicted of selling five grams of crack—about the weight of a teaspoon of salt—triggers the same five-year mandatory minimum sentence as a person convicted of selling 500 grams of powder cocaine, roughly the weight of a loaf of bread." See Theo Emery, Will Crack-Cocaine Sentencing Reform Help Current Cons, TIME MAG., Aug. 7, 2009, available at http://content.time.com/time/nation/article/0,8599,1915131,00.html.
Legislators assumed that crack and the pregnant women addicted to the drug caused a medical scourge on African American fetuses, and potentially the nation. Politicians expected these babies to require sophisticated medical treatments and, eventually, special needs services at public schools. One politician claimed that crack babies would be "the most expensive babies ever born in America" and that they were "going to overwhelm every social service" program that they would encounter until their deaths. President Ronald Reagan held a national press conference with the First Lady, Mrs. Nancy Reagan, to warn Americans about the crack scourge. Prominent individuals echoed these prophecies, firmly entrenching the crack baby myth. For example, John Silber, then the president of Boston University, lamented, "crack babies won't ever achieve the intellectual development to have consciousness of God." At the time, many legislators, prosecutors, and policy analysts shared the view that crack severely harmed fetuses, causing tens of thousands of infants to be born afflicted with disabilities and learning impairments.

Careful researchers whose studies offered more nuanced accounts about intrauterine exposure to crack found themselves shut out of the mainstream discourse. Charles Krauthammer's Philadelphia Inquirer article, "Worse Than 'Brave New World': Newborns Permanently Damaged By Cocaine" reflects the tone of news media investigating crack babies. Krauthammer, a Pulitzer Prize-winning journalist, warned readers that the "newest horror" was being born in American inner cities. That horror, "a bio-underclass, a generation of physically damaged cocaine babies whose biological inferiority is stamped at birth," lurked among Americans in poor neighborhoods, born to black

382. Retro Report, supra note 374 (quoting Representative George Miller).
385. Besharov, supra note 380. Crack became a matter of soundbites for political campaigns. In a typical example of inflamed punditry, William Weld, the former Governor of Massachusetts appealed to that state's voters in a heated U.S. Senate race using that rhetoric: "[a]t the same time working people are struggling to make ends meet, John Kerry wants to give their tax dollars to crack addicts." Timothy J. Connolly, Kerry and Weld Keep Pressure On, WORCESTER TELEGRAM & GAZETTE, Sept. 18, 1996, at A2.
387. Id.
mothers.\textsuperscript{388} The babies’ fates were irrevocably sealed according to Douglas Besharov, the former director of the National Center on Child Abuse, who originally coined the term “bio-underclass.”\textsuperscript{389}

News accounts of crack babies conflated the symptoms of prematurity with cocaine exposure. According to Dr. Claire Coles, Director of the Maternal Substance Abuse and Child Development Program (MSACD) at Emory University, the misrepresented accounts of babies shaking at birth were actually caused by prematurity.\textsuperscript{390} She informed \textit{The New York Times} in 2013 that if reporters had focused on prematurity they would have observed the same trembling.\textsuperscript{391}

After decades of research, doctors have not “identified a recognizable condition, syndrome, or disorder that should be termed ‘crack baby.’”\textsuperscript{392} In a joint letter sent to media throughout the United States on February 25, 2004, thirty eminent medical doctors and researchers explained that the term was no longer defensible.\textsuperscript{393} By this time, numerous medical studies, including a few

\begin{itemize}
\item \textsuperscript{388} Id.
\item \textsuperscript{389} In an opinion editorial, Besharov further ignited concerns about “bad mothers” and fetal crack exposure when he wrote that for “crack babies” their worst enemy was “mom herself.” Besharov, supra note 380. He claimed that some infants exposed to crack, “are born with deformed hearts, lungs, digestive systems or limbs; others suffer what amounts to a disabling stroke while in the womb.” Dramatic speculations bandied about as medical facts during the height of the drug war. Essentially, all medical challenges befalling African American offspring became read as conditions of crack exposure. For example, according to one reporter, fetal crack exposure allegedly caused babies to develop unusual genitalia. Pundits claimed that drug addicted women had “little or no interest in prenatal care.” That pregnant addicts received limited prenatal care was explained as a matter of choice or deep disregard for fetal health, not fear of arrest and incarceration. Besharov, supra note 380.
\item \textsuperscript{390} \textit{Crack Babies: A Tale From The Drug Wars: Retro Report}, (N.Y. TIMES May 20, 2013), available at http://nyti.ms/1I6qYmh (video interview with Claire Coles).
\item \textsuperscript{391} Id.
\item \textsuperscript{392} Lewis et al., supra note 373.
\item \textsuperscript{393} Scientists and doctors who signed the letter emphasized that their discontent derived “not merely [from] academic,” or medical concern. They all fully agreed that the term lacked scientific validity. Rather, their concerns pertained to broader social and legal adoption of the term in media and potentially by courts. The doctors pointed to a New Jersey case where foster parents, Raymond and Vanessa Jackson, attempted to justify depriving children in their care of food. The parents argued that the children’s underlying medical conditions, including the fact that one was an adolescent “crack baby” made it difficult for them to eat and was the reason why the four boys, ranging in age from nine to nineteen each weighed under fifty pounds. Ten years earlier, that justification might have carried significant sway given the irrational way in which American media stereotyped children of addicted mothers. Carol Ann Campbell, \textit{MDs Doubt Jacksons’ Explanation on Kids: Says Disorders Not Sole Cause in Starvation}, N.J. STAR LEDGER, Nov. 4, 2003, http://www.nj.com/news/ledger/index.ssf?/news/ledger/stories/20031104_childabuse_collingswood_doctors.html; Iver Peterson, \textit{In Home That Looked Loving, 4 Boys’ Suffering Was Unseen}, N.Y. TIMES, Oct. 28, 2003, http://www.nytimes.com/2003/10/28/nyregion/in-home-that-looked-loving-4-boys-suffering-was-unseen.html.
\item The letter represented another urgent appeal to newspapers, magazines, television networks, and news stations, “because media’s use of these terms has led to a situation in which children can be starved and abused and the ‘crack baby’ label can be used to excuse the results.” Among the signatories was Dr. Ira Chasnoff who decades before published studies, based on small research samples (twenty-six women in his original study) claiming a correlation between crack and dramatic
longitudinal research designs, repudiated the crack baby myth.\textsuperscript{394} More recently, on May 20, 2013, The New York Times acknowledged its complicity in the crack baby scare, noting that along with other news organizations, it published “articles and columns that went beyond the research.”\textsuperscript{395} The national narrative about crack exaggerated and misrepresented its health risks in fetuses.\textsuperscript{396} The so-called crack baby must be understood as a horrible, racially entrenched myth\textsuperscript{397} suffused with significant legal consequences unimagined at that time in any other prenatal context.

4. Fetal Health Versus Business Interests: Alcohol and Tobacco

As doctors began complying with fetal protection regulations by informing on their patients, and as courts swelled with the prosecutions of pregnant women for “delivering” crack to their fetuses,\textsuperscript{398} fetal impacts from alcohol consumption\textsuperscript{399} and cigarette smoking\textsuperscript{400} fell precipitously under the
radar. It's worth thinking about why this occurred. The point of such an inquiry is not to add one more category of concern to the growing list of issues that states find relevant for punitive intervention; this Article rejects criminal intrusions in women's pregnancies. It is worth thinking about why politicians carve out fetal protection exceptions for alcohol or tobacco use or addiction, particularly in light of the fact that U.S. women "are almost 20 times more likely to drink alcohol or smoke cigarettes than to use cocaine during pregnancy."}


401. One explanation is that the crack scare and crack baby myth provided important social and cultural narratives in the United States that served as cover for the horrors of poverty. That children struggled in school, were irritable, or even violent could be explained by maternal addiction, rather than poverty. The profound poverty in urban inner cities, with crowded schools, limited preschool opportunities, increasing unemployment rates, particularly among African Americans, could be ignored—or addressed through attacks on pregnant women. Both occurred.

Crack addiction explained poverty; poor African Americans lived in dire conditions due to their drug use and refusal to work. Poor African American women became pregnant as a means of generating income through welfare. In his stump speeches, former President Ronald Reagan claimed, the "[welfare queen's] collecting social security on her cards. She's got Medicaid, getting food stamps, and she is collecting welfare under each of her [eighty] names." Reagan claimed that in 1976, the "welfare queen" generated $150,000 per year in "tax-free cash." See 'Welfare Queen' Becomes Issue in Reagan Campaign, N.Y. TIMES, Feb. 15, 1976, at 51.

The disparaging metaphor of the "welfare queen" overlapped with "crack babies" to depict crazed, selfishly unsympathetic African American women who "sell their food stamps" to get high. See Besharov, supra note 380. These were the bad mothers who supposedly did not care about their kids. The chief of neonatology at Bronx Lebanon Hospital commented to the Washington Post, "I've never seen mothers like this before." The doctor claimed that mothers addicted to crack "sell their bodies" in front of their children, because "these mothers don't care about their babies." It played into implicit and explicit biases about who uses drugs in this nation. See id (quoting Dr. Jing Ja Yoon).

Reagan's compelling stump speeches throughout the country moved audiences to believe in the actual existence of this fictitious woman hoarding government resources—and there were many of them. He explained to a group in New Hampshire that "if you are a slum dweller, you can get an apartment with 11-foot ceilings, with a 20-foot balcony, a swimming pool . . ." and for only $113.20 per month in rent. This too was not true, but it painted an image of urban "slum dwellers" and "welfare queens" usurping government resources while refusing to work. See 'Welfare Queen' Becomes Issue in Reagan Campaign, supra (quoting Ronald Reagan's stump speech portrayal of a woman notoriously exploiting government assistance. Reagan claimed, "There's a woman in Chicago . . . she has 80 names, 30 addresses, 12 Social Security cards and is collecting veterans' benefits on four nonexisting deceased husbands.").

402. Rather, the concern is to distinguish known health risks from non-health risks, highlight the arbitrariness of fetal protection regulation overall, illumine the ways in which selective punishment regimes come about, and demonstrate that in light of other well-documented fetal-injurious activities—such as smoking and consuming alcohol during pregnancy—the absence of enforcement reveals that FPLs cannot justifiably be about fetal health. Instead, legislators are concerned about fetal health so long as profitable industries are not affected: pharmaceutical corporations, tobacco companies, and the alcoholic beverages industry.

403. Figdor & Kaeser, supra note 6, at 5 (citing National Institute on Drug Abuse). See also CENTER FOR BEHAVIORAL HEALTH STATISTICS AND QUALITY, RESULTS FROM THE 2010 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS (2011) (finding that one in six pregnant women aged 15–44 smoked cigarettes within one month of the survey administered in 2009 and 2010 and discussing that cigarette use has dropped among pregnant women from 18 percent
My hunch is that business interests matter in the national debate about fetal health. In 1996, Justice Stephen G. Breyer explained that "unregulated tobacco use causes ... more than 400,000 people to die each year from tobacco-related illnesses, such as cancer, respiratory illnesses, and heart disease." Breyer emphasized that "tobacco products kill more people in this country every year than ... AIDS, car accidents, alcohol, homicides, illegal drugs, suicides, and fires, combined." However, the majority in Food and Drug Administration v. Brown & Williamson Tobacco Corporation noted that although the FDA "amply demonstrated that tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States," banning smoking would impose significant costs on a vital U.S. business interest.

Notwithstanding smoking's well-documented health risks, including the copiously detailed 978-page report issued in 2014 by the U.S. Surgeon General, federal legislators choose to exempt this activity from more aggressive government intervention measures to protect fetal health. The Court identified two clear reasons for this hands-off policy. First, smoking is a matter of consumer choice and the exercise of autonomous decision making, so as long as consumers receive adequate information about the health risks of smoking, Congress finds no reason to ban the activity. Second, federal legislators prioritize economic considerations in the case of smoking. The Supreme Court understood "Congress's decisions to regulate labeling and advertising and to adopt the express policy of protecting commerce and the national economy ... to the maximum extent" to reveal its intent that tobacco

to just over 16 percent), available at http://www.samhsa.gov/data/nsduh/2k10nsduh/2k10results.htm#4.3.
405. Id.
406. Id. at 161.
407. For example, while Congress recognizes the detrimental health risks associated with cigarette smoking (and secondhand smoke) as demonstrated by at least six congressional hearings since 1965, it has "[n]onetheless ... stopped well short of ordering a ban. Instead, it has generally regulated the labeling and advertisement of tobacco products, expressly providing that it is the policy of Congress that 'commerce and the national economy may be ... protected to the maximum extent consistent with' consumers 'be[ing] adequately informed about any adverse health effects.'" See id. at 138–39. Despite known health risks, "Congress ... has foreclosed the removal of tobacco products from the market." A provision of the United States Code currently in force states that "[t]he marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare." Id. at 137 (citing 7 U.S.C. § 1311(a)).
products remain on the market.” The Court’s ruling in *Food and Drug Administration v. Brown & Williamson Tobacco Corporation* makes clear that the known health risks and costs associated with smoking, do not trump market considerations and financial interests.

Nevertheless, the 2014 Surgeon General Report on smoking explains that its effects extend from fertility through gestation and beyond, resulting in cases of fetal growth restriction, preterm delivery, placenta previa, placental abruption, some congenital abnormalities, and impaired lung development. Because over four hundred thousand infants experience in utero exposure to tobacco from maternal smoking, the consequences should not be ignored, just as they should not be unaddressed in the cases of women dependent on illicit drugs. From a health perspective, the question remains one of providing care and support to pregnant women. The reproductive repercussions associated with smoking, however, affect not only women’s reproductive health, but also men’s. According to Dr. Boris Lushniak, the acting Surgeon General, “cigarette use before and/or during pregnancy remains a major cause of reduced fertility as well as a maternal, fetal, and infant morbidity and mortality in the United States.”

409. *Food & Drug Admin.*, 529 U.S. at 139 (“A ban of tobacco products by the FDA would therefore plainly contradict congressional policy.”). Joseph R. DiFranza et al., *Legislative Efforts to Protect Children From Tobacco*, 257 JAMA 3387, 3387–89 (1987) (noting the passage of public health laws to reduce the incidence of child smoking, but noting that legislative efficacy was so lax that an eleven-year-old was able to purchase cigarettes in seventy-five of one hundred attempts).

410. More recently, Dr. Boris D. Lushniak, the acting Surgeon General for the United States, expanded the list of smoking-related illnesses to include colorectal and liver cancers, diabetes, vision loss, tuberculosis, rheumatoid arthritis, impaired immune function, and cleft palates in offspring of women smokers. Although not legally binding, the report nevertheless represents “a standard for scientific evidence among researchers and policy makers.” See Jane Brody, *Coming A Long Way on Smoking With a Long Way To Go*, N.Y. TIMES BLOG (Jan. 20, 2014), http://well.blogs.nytimes.com/2014/01/20/coming-a-long-way-on-smoking-with-a-way-to-go/?ref=smokingandtobacco (highlighting the fact that this year marks the 50th anniversary of the first surgeon general report warning about the cancerous effects of smoking and “in the decades since the 1964 report, damning evidence for the health hazards of smoking has continued to mount.”); THE HEALTH CONSEQUENCES OF SMOKING, supra note 408; Editorial Board, *Fitful Progress in the Antismoking Wars*, N.Y. TIMES, Jan. 9, 2014, http://www.nytimes.com/2014/01/10/opinion/fitful-progress-in-the-antismoking-wars.html?_r=0 (“nearly 44 million American adults still smoke, more than 440,000 Americans die every year from smoking, and eight million Americans live with at least one serious chronic disease from smoking.”); Sabrina Tavernise, *List of Smoking-Related Illnesses Grows Significantly in U.S. Report*, N.Y. TIMES, Jan. 17, 2014 (noting among a list of various diseases such as lung cancer, heart disease, and diabetes, smoking is correlated with ectopic pregnancies), http://www.nytimes.com/2014/01/17/health/list-of-smoking-related-illnesses-grows-significantly-in-us-report.html.


412. *Id.* at 120.

413. *Id.* at 68.

414. *Id.*
5. The Scapegoat: Retribution and Punishment

If fetal protection efforts are not about the health of fetuses, what function(s) do they serve? Increasingly fetal interventions are asserted to vindicate the interests of fetuses and the state. Viewed in this context, the laws are at least as much, if not more, about formal retribution and punishment as their alleged goal of protecting fetal health. In this way, states seek to protect the purported dignity interests of fetuses against the perceived reckless, lazy, and negligent conduct of "bad mothers."

This image of the bad mother is depicted and personified in deeply racialized ways in U.S. society. The crack scare provides one disturbing example. Another is the notorious welfare queen. FPLs play into faulty cultural constructs about race and responsibility and can be motivated by what Professor Dorothy Roberts referred to as "ethnocentric" values and conceptions. That is, states seek to intervene in women's pregnancies on health grounds rooted in historic racial and class stereotyping and bias, as the


416. See Roberts, supra note 5, at 1424.

417. FRANKLIN D. GILLIAM, JR., THE "WELFARE QUEEN" EXPERIMENT: HOW VIEWERS REACT TO IMAGES OF AFRICAN AMERICAN MOTHERS ON WELFARE (1999), available at http://www.niernan.harvard.edu/reportstitem.aspx?id=102223 (discussing how white Americans are exposed to welfare narratives that depict African American women as recipients and as a result whites are less likely to be supportive of welfare programs, are more likely to stereotype African American women, and more likely to embrace patriarchy).

418. The welfare queen mythology came to be associated with African American women. Catherine Albiston & Laura Beth Nielson, Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls, 38 HOW. L.J. 473, 475 (1995) (articulating that "attacks on 'welfare cheats' are directed at black mothers in particular"). Throughout the second half of the twentieth century, depictions of welfare recipients were often women of color. Id. These images were sometimes quite exaggerated and focused on the most needy of women as the most depraved and irresponsible: single with multiple children. As Ronald Reagan ran for President, he frequently warned audiences about the greedy welfare queens usurping government resources. See, e.g., KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY (2011) (discussing how the perception of fraud and deception now pervades public understanding about welfare, which in turn has resulted in welfare policies becoming more punitive); John Blake, Return of the Welfare Queen, CNN, Jan. 23, 2012, http://www.cnn.com/2012/01/23/politics/welfare-queen/ (discussing the use of the "welfare queen" imagery during political campaign seasons, cynically warning that "[s]he's out there, lurking in the 2012 presidential race like a horror movie villain who refuses to die"); Josh Levin, The Welfare Queen, SLATE (Dec. 19, 2013), http://www.slate.com/articles/news_and_politics/history/2013/12/linda_taylor_welfare_queen_ronald_reagan_made_her_a_notorious_american_villain.html ("Reagan's soliloquies on welfare fraud are often remembered as shameless demagoguery."); NewsOne Staff, Linda Taylor: Ronald Reagan's Welfare Queen Was Real...And White, Dec. 29, 2013, http://newsone.com/2819010/linda-taylor-ronald-reagans-welfare-queen-was-real-and-white/ (remarking that President Reagan made it his mission to vilify African American women as defrauders of welfare when the person he alluded to was actually a white woman); 'Welfare Queen' Becomes Issue in Reagan Campaign, supra note 401 (documenting then Governor Reagan's clever imagery of the "welfare queen" who pillages from government).

419. Roberts, supra note 5; Dorothy Roberts, Unshackling Black Motherhood, 95 MICH. L. REV. 938, 939 (1997) (explaining that FPLs seek to punish African American women for having babies).
grossly selective prosecutions in *Ferguson* demonstrated. In that case, prosecutors never implemented their drug scheme in the private obstetrics practice of the Medical University of South Carolina—only in the public care practice, thereby not only implicitly associating low-income women with “bad motherhood,” but shielding wealthier, white women from any possibility of such characterizations. As a result, doctors as well as prosecutors could and did create false narratives about drug use and addiction in pregnancy, focusing only on one drug—crack—and primarily screening only African Americans for crack.

African American women have been the selective targets of prurient state interest for centuries. Professor Dorothy Roberts refers to their selective


421. Figdor & Kaeser, *supra* note 6, at 5.

422. A rich scholarship on law and motherhood provides contours for a discussion on law and “bad motherhood.” While no one trait defines “bad motherhood” in the socio-political contexts, several recurring themes emerge in a review of scholarship. Historically, motherhood has concerned race and class to the exclusion of certain classes of women from ever attaining a legal or social status of being good mothers or mothers at all. Eugenics laws introduced in the early twentieth century in the United States deprived tens of thousands of poor women from ever achieving the status of motherhood. In *Buck v. Bell*, Justice Oliver Wendell Holmes opined that “three generations of imbeciles are enough” to justify the state depriving women from “continuing their kind.” The nation’s poor women were doomed to be this nation’s “bad mothers,” because they were indigent, lacked property, often could not vote, and sometimes reared their children as single parents. See Annette Appell, “Bad Mothers” and Spanish Speaking Caregivers, 7 NEV. L.J. 759 (2007) (noting that “we have in this country a long and continuing history of constructing the ideal of ‘mother’ according to skin color, religion, culture, national origin, language, ethnicity, class, and marital status.”); Kimberlé Crenshaw, From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control, 59 UCLA L. REV. 1418 (2012) (discussing the structural and political dimensions of mass incarceration and gender bias, exposing how they are interconnected in multiple ways); Martha Fineman, Images of Mothers In Poverty Discourses, 1991 Duke L.J. 274 (1991) (explaining the role of patriarchal discourse in framing welfare recipients as “constituting the cause as well as the effect of poverty”); Robin Levi et al., Creating The “Bad Mother”: How The U.S. Approach To Pregnancy In Prisons Violates The Right To Be A Mother, 18 UCLA WOMEN’S L.J. 1, (2010); Jane Murphy, Legal Images Of Motherhood: Conflicting Definitions From Welfare Reform, *Family, And Criminal Law*, 83 CORNELL L. REV. 688, 689 (1998) (analyzing that criminal law provides a lens to see who the nation values as “good mothers” and who is tossed away as “bad” mothers); Sonia Suter, Bad Mothers or Struggling Mothers?, 42 RUTGERS L. J. 695, 701-02 (2011) (explaining that above all else good birth is not likely what fetal drug laws are about, but instead presumptions about class influencing perceptions about bad motherhood).

423. See *Ferguson v. Charleston*, 532 U.S. 67 (2001). According to a recent law review article written by human rights attorneys, white women who make up over 76 percent of California’s population are underrepresented in its prisons. African American women, on the other hand, make up less than 8 percent of the state’s population and represent 29.3 percent of the women’s prison population. Levi et al., *supra* note 422, at 7.

424. Albiston & Nielson, *supra* note 418, at 477 (providing a historic overview of African American women’s reproduction, noting “neither the exclusion of black women from social welfare pro-grams nor control of their reproductive freedom are new social policies; even the connection
scrutiny from the state as resulting from “inseparable combination[s] of their
gender, race, and economic status.” But why have African American women
become the subjects of contemporary scorn and reproductive policing?

Twenty years ago, Dr. Ira Chasnoff explained to a *New York Times*
reporter that significant racial disparities in fetal interventions persisted despite
evidence of “equal rates of drug use” among white women and women of color,
because “our perception of who a drug abuser is” influences who is reported
to law enforcement. In other words, there was no empirical foundation that
justified disparate arrests rates; African Americans’ use of illicit drugs was no
greater than that of their white counterparts. Nevertheless, as Chasnoff
explained, “there is a perception that the people using drugs are mostly
minority, inner-city people.”

Lynn Paltrow’s research demonstrates that race continues to drive state
interventions in pregnancy, though recent prosecutions of poor, white
women in Alabama have exposed a different, but equally precarious, type of
profiling. States make an example of “bad mothers” by subjecting them to
punitive state measures ranging from civil confinement to criminal
incarceration. Meanwhile, states ignore the extralegal punishment of
pregnant women, precisely because the extralegal humiliations and
stigmatization serve an implicit retributive purpose connected with purported
fetal protection goals. What else realistically justifies the barbarity of shackling
pregnant women during labor and birth? For example, Minnesota law
permits the “use of full restraints—waist, chain, black box over handcuffs and
leg irons—during transportation of an inmate for the purpose of giving
birth.”

Importantly, neither the health interest nor the retribution justifications for
state intervention in women’s pregnancy are satisfactory. While promoting fetal
health is a laudable goal, the state cannot exert unconstitutional authority on its

---

427. *Id.*
428. Paltrow & Flavin, *supra* note 4, at 303 (noting that racial and class disparities persist in fetal interventions). African American women are ten times more likely than their white counterparts to be reported to protective services for drug use during pregnancy. *Id.*
430. Griggs, *supra* note 429 (debunking state justifications for shackling pregnant women prisoners, including concerns about safety, escape, and recidivism deterrence).
431. Griggs, *supra* note 429, at 266, 266 n.161 (citing MINN. STAT. ANN. §241.07 (West 2011)).
citizens to achieve that objective. As importantly, to the extent that states articulate a sincere desire to promote fetal health, appreciating that maternal conduct and health alone do not control fetal health outcomes is crucial. States unyielding gaze on low-income, pregnant women as “maternal environments” or “containers” ignores the myriad ways in which fetal health may be shaped by the environment, stress, and poverty that pregnant women encounter, but do not control.

B. Equal Protection and Pregnancy

Scholarly responses to attacks on reproductive liberty are significantly situated in liberal notions of substantive due process, offering persuasive arguments that women’s autonomy and privacy deserve the protections of the Fourteenth Amendment’s Due Process Clause. The principle arguments that ground liberal substantive due process analysis in reproduction relate to the infringement on women’s individual autonomy and personhood as well as the


433. Harmful environmental agents are linked to cancer, infertility, and many other chronic illnesses. Robert Brent et al., A Pediatric Perspective on the Unique Vulnerability and Resilience of the Embryo and the Child to Environmental Toxicants: The Importance of Rigorous Research Concerning Age and Agent, 113 PEDIATRICS 935(2004); Robert Brent, Environmental Causes of Human Congenital Malformations: The Pediatrician’s Role in Dealing With These Complex Clinical Problems Caused by a Multiplicity of Environmental and Genetic Factors, 113 PEDIATRICS 957 (2004).

434. Stress during gestation is associated with premature birth and hyperactivity during childhood. Severe stress during pregnancy, such as experiencing natural disasters, is linked to risk of mental illness, such as severe depression and schizophrenia, in adult offspring. J.A. DiPietro, The Role of Maternal Stress in Child Development, 13 CURRENT DIRECTIONS IN PSYCHOL. SCI. 71 (2004); A.C. Huizink et al., Prenatal Stress and Risk for Psychopathology: Specific Effects or Induction of General Susceptibility?, 130 PSYCHOL. BULL. 115 (2004).

435. Professor Emeritus Dan Agin argues that poverty transforms into inherited disease in urban inner cities and rural communities. He associates poverty with hazardous exposure to neurotoxins in the environment. He points to studies examining low-income pregnant women’s exposure to lead, which is correlated with low birth weight, hearing loss, attention deficits, autism, and other conditions affecting fetal development and child health, including death. See Dan Agin, MORE THAN GENES: WHAT SCIENCE CAN TELL US ABOUT TOXIC CHEMICALS, DEVELOPMENT, AND THE RISK TO OUR CHILDREN 25-26 (2009). Agin notes that pesticides play a unique role in fetal health that is largely associated with poverty. For example, he explains that insecticides to rid environments of roach infestation may account for the presence of those toxins found in pregnant women in low income neighborhoods in New York City. See id. See also Charles Larson, Poverty During Pregnancy, 12 PEDIATRICS & CHILD HEALTH 673, 673 (2007) (explaining that poverty’s impact on pregnancies may result in long-term outcomes, including “greatly increased risks for preterm birth, intrauterine growth restriction, and neonatal or infant death”).

436. See, e.g., supra note 5, at 1463 (arguing that the prosecutions of African American women “violate traditional liberal notions of privacy”). Roberts adds to this an equality framework that specifically addresses the unique interests of African American women. See also Anita Allen, Taking Liberties: Privacy, Private Choice, and Social Contract Theory, 56 U. CIN. L. REV. 461 (1987) (arguing that privacy also includes autonomous decision making); Oberman, supra note 12.
invidious force imposed by the government in women's childbearing, which unconstitutionally burdens a fundamental right. These concerns root quite simply in the right to be "let alone" and "left alone" both as matters of decisional autonomy and as matters of flesh—to be free from the physical impositions of others.

Much of the reproductive health scholarship borrows from the individual liberty framework established by the Supreme Court in *Roe v. Wade*, which situates constitutional protections for the right to procreate as well as to terminate a pregnancy in the Due Process Clause. In *Roe*, the Court reasoned that the right to privacy applies across a set of intimate life decisions, including "activities relating to marriage . . . procreation, . . . contraception, . . . family relationships, . . . and child rearing and education." 

This Article takes up a different challenge, descriptively and normatively reasserting the relevance of an equality framework in women's reproductive health generally, and specifically as applied to fetal protection cases in pregnancy such as those described in this Article. A sex equality argument in the fetal protection context would ask whether state interventions are really about promoting fetal health, or whether FPLs might also manifest constitutionally repugnant judgments about women, particularly pregnant women.

The application of an equality lens to answer punitive fetal health interventions in women's pregnancies reflects a concern that states uniquely enlist law enforcement (including doctors acting in a quasi-state agent capacity) to deploy their interests in gendered ways. If states deploy their fetal health interests in gendered ways, might that sex-selective approach indicate constitutionally suspect motivations? When states manifest their interests in

437. 410 U.S. 113, 152 (1973). The *Roe* Court concluded that "the right of privacy is one of the "basic civil rights of man" fundamental to our very existence and survival." *Id.* (delineating that a right to privacy extends across intimate life decisions). This approach sidelined suspect classification equality arguments such as had been previously urged by Ruth Bader Ginsburg and legal scholars. Before *Reed v. Reed*, the Supreme Court did not recognize sex discrimination as presenting any special constitutional concern. 404 U.S. 71 (1971) (holding that the Equal Protection Clause forbade states from enacting laws that treated distinct classes of people differently based on reasons unrelated to the purpose of the statute). Justice Blackmun in particular found the equal protection analysis put forth by Ginsburg (then a lawyer for the ACLU) to be "contrived," with "overbearing arguments." However, Blackmun's deliberations on women's equality evolved throughout his tenure on the bench. Linda Greenhouse suggests that he "came slowly to the cause of women's equality." Linda Greenhouse, *The Evolution of a Justice*, N.Y. TIMES MAG., April 11, 2005, http://www.nytimes.com/2005/04/10/magazine/10BLACKMUN.html?pagewanted=print&position=.


fetal health, they express these concerns almost exclusively among poor women who lack the social and economic capacities that protect wealthier, educated women from similar punitive encroachments by the state.

For example, when states pressure physicians to subject poor African American pregnant patients to invasive protocols as a means to determine illicit drug use in furtherance of fetal health, but significantly exclude white female patients from similar interventions, that disparity indicates a suspect motivation not explained by health or law rationales. Equally, when punitive fetal protection efforts operate exclusively in indigent communities (or where the indigent seek care) and not universally, such actions reflect decision making that carves out unjustifiable, discriminatory distinctions between classes of citizens that have no relationship to a permissible governmental purpose. Such distinctions might reasonably be explained by constitutionally impermissible stereotypes about good motherhood, maternal responsibility, and citizenship guiding legislative action. Such stereotypes might be argued to resemble caste legislation or caste enforcement. When this type of legislating cannot be shown to further its purported governmental interest, it proves itself to be arbitrary.

A sex equality framework is not only concerned about distinctions among women. To the contrary, distinctions between sexes are no more permissible

441 A clear example of an impermissible standard of equality would be if states were to discriminate against those persons legally entitled to have access to abortion services, limiting the right to only one ethnic group, for example, or distinguishing the right as between married versus unmarried women.

442 Traditionally, equal protection granted states broad latitude to enact legislation. States' low threshold was a rational basis test. That is, courts required that the challenged legislation be rationally related to a permissible governmental interest. Under this framework, states needed only show that the classification set forth in the legislation rationally related to a legitimate government interest and that such state action was not arbitrary. Gulf, C. & S.F Ry. v. Ellis, 165 U.S. 150 (1897) (applying equal protection to strike down a law mandating that railroads, but not other defendants, pay attorney's fees to prevailing plaintiffs). Modern Supreme Court application has involved three tiers of review: strict scrutiny in racial classifications (requiring the state's regulation to further a compelling governmental interest); a heightened intermediary scrutiny in sex discrimination (requiring that the legislation serve important governmental objectives and be substantially related to achieve those goals); and it has maintained a rational relationship level of review (requiring only a rational relationship to legitimate governmental ends).

443 Skinner v. Oklahoma, 316 U.S. 535 (1942) (an unanimous Court holding that where Oklahoma's Criminal Sterilization Act provided for the sterilization of habitual criminals convicted three times or more of felonious crimes of moral turpitude, but provided exclusions for white collar criminals, such regulations violated the Equal Protection Clause of the Fourteenth Amendment). See also Planned Parenthood v. Casey, 505 U.S. 833 (1992) (reaffirming its opinion in Roe, holding that the liberty and privacy interests that animated the Court's decision in Roe remained vital in the protection of a substantive right to privacy and that this right is protected from interference in "marriage, procreation, contraception, family relationships, child rearing, and education."); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (holding that the state of Louisiana failed to demonstrate an important interest in permitting husbands the authority to unilaterally dispose of joint property); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (holding that the provision of the Missouri workers' compensation laws denying a widower benefits on his wife's work-related death unless he either is mentally or physically incapacitated or proves dependence on his wife's earnings, but granting a widow death benefits without her having to prove dependence on her husband's earnings, violates the
than distinctions within sexual classifications. Distinctions between sexes to advance fetal health might reify stereotypes and ignore medical facts. For example, when the state uniquely and exclusively calls upon women, but not men, to advance fetal health, it does so under the flawed theory that women alone determine fetal health. Such regulations, then, reduce women to symbolic wombs and human incubators for the state. When states selectively express and enforce fetal health interests, distinguishing between the sexes and among the sexes, such considerations belie an interest in protecting fetal health. Instead, states' selective interest in protecting fetal health reflects adverse stereotypes about women and pregnancy. The Supreme Court has ruled that such arbitrary rules about pregnancy cannot stand.

1. Geduldig v. Aiello: An Equality Hurdle?

Scholars hesitant of this line of argumentation point to Geduldig v. Aiello as feminism's lost battle on equal protection and pregnancy. Scholars read that 1974 case as closing the door for equal protection claims by pregnant women. The case has also been construed to infer that that not all

Equal Protection Clause of the Fourteenth Amendment). Similarly in Califano v. Goldfarb, 430 U.S. 1999 (1977), the Court reached a plurality decision, pointing out that where "female insureds received less protection for their spouses solely because of their sex" that such circumstances were a discriminatory violation of the Fifth Amendment's equal protection guarantee. See also Caban v. Mohammed, 441 U.S. 380 (1979) (holding that a state law violates the Equal Protection Clause when it permits the mother, but not the father of a child born out of wedlock to intervene in the child's adoption).

444. See J.E.B v. Alabama ex rel. T.B., 511 U.S. 127 (1994) (holding that peremptory challenges based on juror sex are unconstitutional); Miss. Univ. v. Hogan, 458 U.S. 718 (1982) (sustaining a male applicant's challenge to the state's policy that excluded men from the Mississippi University for Women); Craig v. Boren, 429 U.S. 190 (1976) (finding that sex does not represent "a legitimate, accurate proxy for the regulation of drinking and driving"); Frontiero v. Richardson, 411 U.S. 677 (1973) (sustaining an equal protection challenge to a federal law providing male members of the armed forces an automatic dependency allowance for their wives while denying the same for female service members); Reed v. Reed, 404 U.S. 71 (1971).


446. 417 U.S. 484 (1974) (addressing pregnancy classifications, holding that "disability that accompanies normal pregnancy and birth" does not constitute invidious discrimination).

447. For a catalogue of the articles criticizing the Geduldig opinion, see Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. PA. L. REV. 955, 983 (1984) ("Criticizing Geduldig has since become a cottage industry."). More recently one scholar has suggested that "[t]he only reason state-mandated health insurance without contraception coverage does not raise serious Equal Protection Clause issues is because of an ill-reasoned, much-derided Supreme Court decision (by an all-male Court) holding that pregnancy discrimination was not sex discrimination." See Caroline Mala Corbin, The Contraception Mandate, 107 NW. U. L. REV. COLLOQUY 151, 161-62 n.63 (2012). A student note lamented, "the Equal Protection Clause of the Fourteenth Amendment appears to provide no additional protection for the pregnant woman seeking to challenge a court-ordered cesarean." Eric Levine, Note, The Constitutionality of Court Ordered Cesarean Surgery: A Threshold Question, 4 ALB. L.J. SCI. & TECH. 229, 301 (1994).

For a brief list of commentary immediately following the opinion, see Katharine Bartlett, Pregnancy and the Constitution: The Uniqueness Trap, 62 CALIF. L. REV. 1532, 1536 (1974) (criticizing the Court's "failed logic"); Phillip Cockrell, Pregnancy Disability Benefits and Title VII:
classifications that discriminate against women or disadvantage them as a class or a subclass are necessarily based on sex. In that case, California’s disability insurance program, which mandated participation, exempted work missed due to normal pregnancies from insurable coverage. It is worth noting that the original language exempted all pregnancies, even those requiring medicalization over eight days, from coverage.

In the lawsuit, four petitioners—three of whom experienced abnormal pregnancies resulting in terminations and miscarriages and one of whom experienced a normal pregnancy—argued that the program violated the Equal Protection Clause because it precluded the payment of benefits for any disability resulting from pregnancy. This particular issue was moot on hearing as the law had been changed to reflect pregnancy coverage for disabling conditions, which would cover the pregnancy concerns of three of the

448. The program was funded entirely from contributions deducted from wages earned by participating employees. Each worker was required to contribute one percent of her annual salary not to exceed eighty-five dollars. Geduldig v. Aiello, 417 U.S. 484, 487-88 (1974) (noting that “[t]he law only provides for disability benefits for certain disabling conditions, such as: any disability of less than eight days’ duration is not compensable, except when the employee is hospitalized. Conversely, no benefits are payable for any single disability beyond 26 weeks.”)

449. The policy imposed other limitations regarding minimum days of hospitalization necessary to trigger the program as well as provisions that precluded coverage over a maximum state.

450. The relevant original statute read:

‘Disability’ or ‘disabled’ includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work. In no case shall the term ‘disability’ or ‘disabled’ include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter. Cal. Unemp. Ins. Code § 2626.

The regulation was modified prior to the Supreme Court hearing on the matter to include pregnancy coverage for disabling pregnancies.

§ 2626 ‘Disability’ or ‘disabled’ includes both mental or physical illness, mental or physical injury, and, to the extent specified in Section 2626.2, pregnancy. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work.”

§ 2626.2 Benefits relating to pregnancy shall be paid under this part only in accordance with the following:

(a) Disability benefits shall be paid upon a doctor’s certification that the claimant is disabled because of an abnormal and involuntary complication of pregnancy, including but not limited to: puerperal infection, eclampsia, caesarian section delivery, ectopic pregnancy, and toxemia.

(b) Disability benefits shall be paid upon a doctor’s certification that a condition possibly arising out of pregnancy would disable the claimant without regard to the pregnancy, including but not limited to: anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyleonephritis, thrombophlebitis, vaginitis, varicose veins, and venous thrombosis. Id. at 490, n.15
four petitioners. Nevertheless, the Court issued a ruling grounded in an economic rational basis analysis, rejecting the application of an equal protection framework on the basis that excluding normal pregnancies did not constitute invidious discrimination.

Justice Potter Stewart’s majority opinion might give the cautious reader reason to construe the case as at least deflecting equal protection analysis from applying to pregnancy if not outright rejecting pregnancy as possibly qualifying for equal protection. In a much-derided footnote, Justice Stewart wrote, “the California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities.” Yet, there is more to be said contextually about the Geduldig Court and subsequent iterations of equality before the Supreme Court both as descriptive and normative matters. So how should we understand Geduldig?

First, it is important to understand what the case actually does and does not say. For example, the Court does not dismiss pregnancy as never qualifying for protection under the equality standard guaranteed by the Fourteenth Amendment. Neither does the Court issue a resounding rejection of the principle that pregnancy regulation can be sex regulation, and therefore can be discriminatory. The Court did not hold that discrimination based on pregnancy deserves a lower level of review and classification than cases that involve sex. The Court held that state regulations affecting pregnancy are not always suspect of sex discrimination. When a regulation is not suspect of sex, as when it is not suspect of race, a rational basis analysis will be used. Instead, Justice

---

451. Id. at 490.
452. For some, Geduldig represents a clear iteration for the Court that pregnancy is not suspect because the level of scrutiny afforded to this class did not reflect the recent precedents in Frontiero and Reed. But a more nuanced reading of the case is warranted. As Reva Siegel notes, “the conventional wisdom about Geduldig . . . is incorrect.” See Siegel & Siegel, Equality Arguments for Abortion Rights, supra note 440, at 167.
453. The majority held: (1) California has a legitimate interest in maintaining the self-supporting nature of its insurance program; (2) the state had an interest in “distributing the available resources in such a way as to keep benefit payments at an adequate level for the conditions covered; and (3) California “has a legitimate concern in maintaining the contribution rate at a level that will not unduly burden participating employees, particularly low-income employees who may be most in need of the disability insurance.” 417 U.S. 484, 496 (1974).
454. Id.
455. Siegel & Siegel, supra note 440.
456. This is not to say that the holding is not disappointing, particularly in light of insurance programs’ regulations regarding reproduction. The Court makes note that the insurance program established in 1946—a time even further removed from the then-recent analysis the court provided in Frontiero and Reed. Such programs likely did not anticipate women in the workplace, and likely perceived pregnancy in a stereotypic manner (i.e., perceiving pregnancy-related services to cost disproportionately more than other injuries that could be suffered in the workplace).
Stewart recognized "distinctions involving pregnancy" can be "mere pretexts designed to effect an invidious discrimination." 457

Second, despite how scholars have read the case, the Court's language is unambiguous that selective actions by a state involving pregnancy that are based on pretext for other causes or concerns can be invidious. 458 It is not the concern of this Article to take up why scholars and courts have misread the case. However, Justice William J. Brennan, Jr.'s powerful dissent may hold relevant clues that must also be understood in context. Brennan's methodic push for a strict level of scrutiny to be applied in sex discrimination cases surfaced in his dissent in Geduldig, but emerged in prior Supreme Court litigation. 459 Brennan articulated a vision for strict scrutiny jurisprudence in sex cases in Frontiero, decided just one year prior to Geduldig, and in that case he achieved a plurality decision. In this case, he issued a bristling warning to fend off a rollback on gains secured in prior cases and to hold tight the fragile plurality built on sex classification and strict scrutiny:

Yet, by its decision today, the Court appears willing to abandon that higher standard of review without satisfactorily explaining what differentiates the gender-based classification employed in this case from those found unconstitutional in Reed and Frontiero. The Court's decision threatens to return men and women to a time when "traditional" equal protection analysis sustained legislative classifications that treated differently members of a particular sex solely because of their sex. 460

Over time, perhaps too close a scholarly read of Brennan's dissent has resulted in a general misevaluation of Geduldig. Whatever the case, Brennan's dissent serves as an evolved framework for equality analyses based on sex and ultimately develops in a line of cases that expanded the counters of sex equality. 461

Finally, Geduldig can be understood as a parallel to Plessy v. Ferguson. 462 The gap that separates Plessy from Brown provides instructive lesson's for sex equality's journey. That is, in 1896 when Homer Plessy challenged the

---

457. Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974) (noting that "while it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification.")

458. Neil Siegel and Reva Siegel argue that the case "should be read to say what it actually says, not what most commentators and courts have assumed it to say." See Siegel & Siegel, Equality Arguments for Abortion Rights, supra note 440, at 168.

459. Brennan specifically speaks to the prior cases where his strict scrutiny jurisprudence on sex emerges, instructing "[b]ecause I believe that Reed v. Reed, and Frontiero v. Richardson, mandate a stricter standard of scrutiny which the State's classification fails to satisfy, I respectfully dissent." Geduldig, 417 U.S. at 496, 498 (Brennan, J., dissenting) (internal citations omitted).

460. Id. at 503.

461. For example, Brennan's observation that "singling out for less favorable treatment a gender [characteristic] peculiar to women... create[s] a double standard." Id. at 501.

462. 163 U.S. 537 (1896).
Louisiana Separate Car Act, requiring separate accommodations for African Americans and whites, on the basis that it violated his rights under the Thirteenth and Fourteenth Amendments of the U.S. Constitution, it was a relatively nascent period for the Court’s jurisprudence in equal protection. The perceived urgency that those who lived unequal lives felt likely did not influence the Court. The Court rejected Plessy’s claims, declaring that Louisiana had not implied any inferior status on African Americans in violation of a Fourteenth Amendment interest. However, the Court established a framework that purported to grant African Americans a “separate, but equal” citizenship, which decades later was dismantled by Brown v. Board of Education, a case that ultimately reconciled the folly of the Plessy decision. Feminism now awaits its Brown to close the gap in equality jurisprudence. Like the evolution between Plessy and Brown, landmark Supreme Court decisions can be read as demarcating evolving equal protection jurisprudence.

Geduldig offers one important lens to consider in the Court’s jurisprudence on pregnancy equality. Another application directly addresses the issue of fetal health protection in the workplace as discussed below.

2. Fetal Protection and the Workplace

In International Union v. Johnson Controls, the Supreme Court opined that male health may have as much bearing on fetal outcomes as women’s health. In the decade leading up to International Union, prominent manufacturing companies enacted FPLs framed as “medical regulations” or “medical policies” that prohibited fertile women from laboring in certain jobs. Some policies excluded women from most jobs at the plants under the

463. Justice Brown declared, “We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.” Id. at 551.


465. Indeed the equality struggle substantively engages two frames—that of formal equality versus substantive equality.


467. Among the companies that enacted fetal protection rules were American Cyanamid, Allied Chemicals, General Motors, B.F. Goodrich, St. Joseph Zinc, Gulf Oil, Dow Chemical, DuPont, BASF Wyandotte, Bunker Hill Smelting, Eastman Kodak, Firestone Tire & Rubber, Globe Union, Olin Corporation, Union Carbide and Monsanto. See JOAN BERTRIN, Reproductive Hazards in the
guise that they might become pregnant at some point, without regard for the women’s sexual orientation, desire to bear children, or marital status.\textsuperscript{468}

For example, American Cyanide enacted a fetal protection policy in 1978.\textsuperscript{469} Its plant, located in the rolling hills of economically depressed West Virginia, provided a competitive income for its 500 employees—approximately 5 percent were women. Senior management met with its 25 female employees to inform them that women between 15 and 50 years of age would be prohibited from working in most positions at the plant. Other companies enacted similar fetal protection regulations, effectively barring women from employment in some of the better paying jobs at manufacturing plants.\textsuperscript{470}

Fetal protection rules in the workplace served not only to bar women from meaningful, gainful employment, but also to secure a monopoly for men in coveted factory jobs. Fetal protection rules provided a persuasive proxy for sex discrimination. Meanwhile, the debate about fetal protection, pregnancy, and access to work opportunities played out in the wake of companies across the country enacting discriminatory laws.

In \textit{International Union}, the company established a FPL much like that of American Cyanide.\textsuperscript{471} The company’s manufacturing operation involved lead elements, which can pose fetal health risks. This had not been a concern for the company in the years prior to the Civil Rights Act of 1964, because the company did not employ any woman in its battery-manufacturing factory.\textsuperscript{472} However, in June of 1977, the company issued “its first official policy concerning its employment of women in lead-exposure work.”\textsuperscript{473} The policy read:

Protection of the health of the unborn child is the immediate and direct responsibility of the prospective parents. While the medical profession and the company can support them in the exercise of this

\textsuperscript{468} See id. at 277.

\textsuperscript{469} Id.

\textsuperscript{470} Id. Similar dynamics played out with regard to race during Jim Crow. That is, African Americans and other groups of color were discriminated against on the basis of pretext, even within unions. See \textit{Paul Moreno, Black Americans and Organized Labor: A New History} 61–63 (2006) (describing the violent events at Pana, Illinois where several African Americans were killed in retaliation for seeking to cross union lines). \textit{See also Horace R. Cayton, Black Workers and the New Unions} (1939); \textit{Sterling D. Spero & Abram L. Harris, The Black Worker: The Negro and the Labor Movement} (1931); \textit{Note, Discrimination by Labor Union Bargaining Representatives Against Racial Minorities}, 56 \textit{Yale L.J.} 731 (1947) ("Discrimination by labor unions against racial minorities, particularly Negroes, is still frequent despite reforms by some unions in recent years. Some unions positively refuse membership to Negroes. Others relegate them to ‘auxiliary’ chapters under the domination of white locals, where they pay dues to the union but have no effective voice in its affairs.").


\textsuperscript{472} Id.

\textsuperscript{473} Id.
responsibility, it cannot assume it for them without simultaneously infringing their rights as persons.

. . . . Since not all women who can become mothers wish to become mothers (or will become mothers), it would appear to be illegal discrimination to treat all who are capable of pregnancy as though they will become pregnant.\textsuperscript{474}

At the time that Johnson issued its official policy statement, it stopped short of restricting women of childbearing capacity from working within lead exposed areas.\textsuperscript{475} However, the company issued strong warnings to its female employees about lead risks.\textsuperscript{476} It also instituted a policy that “required a woman who wished to be considered for employment to sign a statement that she had been advised of the [pregnancy] risk.”\textsuperscript{477} The statement informed female employees that while evidence indicated “that women exposed to lead have a higher rate of abortion” and although this risk was “not as clear . . . as the relationship between cigarette smoking and cancer,” it was “medically speaking, just good sense not to run that risk if you want children and do not want to expose the unborn child to risk, however, small.”\textsuperscript{478}

Several years later, Johnson Controls shifted their policy from one that cautioned female employees about the risks of lead exposure to fetal development to a policy that excluded women’s employment in manufacturing jobs that could expose them to lead. The company barred all women, except those who could prove infertility, from holding certain jobs that could expose them to lead.\textsuperscript{479} The new fetal protection policy stated: “It is Johnson Controls’ policy that women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights.”\textsuperscript{480}

Johnson Controls initiated the new fetal protection policy after learning that eight of its female employees who became pregnant continued to test high for lead exposure.\textsuperscript{481} The new company policy defined women who are “capable of bearing children” as “all women except” the infertile.\textsuperscript{482} The female employees were required to medically demonstrate their infertility.\textsuperscript{483} These were hurdles that male employees were not required to scale.

\textsuperscript{474.} Id.  
\textsuperscript{475.} Id.  
\textsuperscript{476.} Id.  
\textsuperscript{477.} Id.  
\textsuperscript{478.} Id.  
\textsuperscript{479.} Id. at 191–92.  
\textsuperscript{480.} Id. at 192.  
\textsuperscript{481.} Id.  
\textsuperscript{482.} Id.  
\textsuperscript{483.} Id. at 192.
Importantly, the company did not bar all men “except those whose infertility was medically documented, from jobs involving actual or potential lead exposure exceeding the OSHA standard.”

Johnson Controls justified its policy based on concerns for fetal health, which the Court nevertheless rejected. Writing for the majority, Justice Harry A. Blackmun, found the fetal protection policy established by Johnson Control “obvious” in its “bias” against women. For example, fertile men were not subjected to the burdensome employment restrictions placed on fertile women. Fertile men, according to the Court, were afforded the “choice as to whether they wish to risk their reproductive health for a particular job.”

The Court revisited Section 703(a) of the Civil Rights Act of 1964, explaining that it “prohibits sex-based classifications in terms and conditions of employment, in hiring and discharging decisions, and in other employment decisions that adversely affect an employee’s status.”

Blackmun reasoned that a sex-based policy expressed as “protecting women’s unconceived offspring” was not benign. To the contrary, such policies constitute sex-based discrimination according to the Court. Any assumptions otherwise are “incorrect.” Justice Blackmun reasoned that the policy constituted facially impermissible discrimination. For example, the fetal protection policy classified its employees on the basis of gender and childbearing capacity rather than just fertility. Moreover, the company did not care to protect its male employees’ future born from possible risk of lead exposure, despite, as the record showed, “the debilitating effect of lead exposure on the male reproductive system.” In other words, it was sex and not fetal health that ultimately proved important to the company for purpose of its regulation. As Blackmun referenced, the company is “concerned only with the harms that may befall the unborn offspring of its female employees.”

Conceptually, that type of bias cannot pass constitutional muster, because it is a form of explicit discrimination that cannot survive judicial scrutiny. In
this case, the company "chose[] to treat all its female employees as potentially pregnant," and that policy evinces a form of unjustifiable sex discrimination.496

Unambiguous rules emerge from the Court's analysis and subsequent holding. For example, classifications on the basis of "potential for pregnancy" impermissibly exclude women.497 Second, that type of exclusion, under Title VII, must be viewed "in the same light as explicit sex discrimination."498 Third, the fetal protection policy was not neutral as it did not apply to the reproductive potential and capacities of Johnson's male employees.499 Fourth, the Court is not concerned with the absence of malevolent motives, because that does not "convert a facially discriminatory policy" into a policy that is neutral with discriminatory effect.500 Equally, a beneficent policy will not distract from the Court's analysis and undermine the purpose of equal protection. Fifth, "sex-specific fetal protection policies" in employment are forbidden under Title VII.501 And, subjecting all of one's female employees to a discriminatory policy that protects fetal health will constitute a violation of the Equal Protection Clause because it demonstrates discrimination on the basis of sex.502

The majority reasoned that unless Johnson Controls could somehow prove that sex was a "bona fide occupational qualification," a very narrow exception at that point in the Court's jurisprudence, the holding would stand.503 Johnson Control responded that its policy involved third-party safety, an argument that the Court forthrightly rejected, because the female employees' unconceived fetuses were not third parties.504 Even if they were third parties, their safety was not essential. As Blackmun wrote, "No one can disregard the possibility of injury to future children," but the business exception claimed by Johnson Controls was not deserving of the special solicitude it demanded of the Court.505 According to Blackmun, battery making was not so essential as to overcome the Court's suspicion of regulations that discriminate on the basis of sex even if to theoretically protect unborn third parties.506 The Court declined

496. Id. at 199.
497. Id.
498. Id. at 199.
499. Id.
500. Id. (stating that "[w]hether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.").
501. Id. at 211.
502. The Court found the fetal protection policy was discriminatory under the Pregnancy Discrimination Act of Title VII. The Court held that Title VII as amended by the Pregnancy Discrimination Act forbids "sex-specific fetal-protection policies." Civil Rights Act of 1964, 42 U.S.C. § 2000e(k); Int'l Union, 499 U.S. at 189.
504. Id. at 203.
505. Id. at 203–04.
506. The Court further clarifies, "Our case law . . . makes clear that the safety exception is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job." Id. at 204.
to adopt a policy that would allow the application of fetal protection policies to mandate selective “standards for pregnant or fertile women.”

It is worth thinking about Justice Blackmun, *International Union* (1991), and *Planned Parenthood of Southern Pennsylvania v. Casey* (1992) just briefly. Linda Greenhouse writes persuasively about how Blackmun’s equality jurisprudence evolved during his time on the bench. For example, in *Johnson Controls*, Blackmun is unequivocal in his reasoning that women possess decisional authority to do as they please with their bodies. Blackmun considers this concept unremarkable and well established in legislation that further extends women’s rights. Blackmun’s conclusion, “it is no more appropriate for the courts than it is for individual employers to decide whether a woman’s reproductive role is more important to herself and her family than her economic role,” presages and sets up his written opinion in *Casey*.

In *Casey*, Blackmun refers to choice and not simply substantive due process arguments in articulating a vision for “women to be equal to men under the Constitution. Specifically, Blackmun writes in passionate prose about sparing women’s equality from being “cast into darkness.” He explains, “State[] restrictions on a woman’s right to terminate her pregnancy . . . implicate constitutional guarantees of gender equality.” When the state burdens this right, it “conscripts women’s bodies into its service.” Blackmun warned that “forcing women to continue pregnancies and suffer the pains of childbirth” assigns women a life-long bondage to the state without any compensation to “women for their services.” Indeed, assumptions about motherhood and what is “natural” rest on a faulty conception, which elicits protection of the Equal Protection Clause.

3. Means, Ends, and Chilling Prenatal Conduct

Because a close reading of *Geduldig* preserves equal protection challenges in matters of invidious state discrimination against pregnant women, this Article proceeds by turning to its normative argument that FPLs violate the Equal Protection Clause of the U.S. Constitution. This and subsequent Sections advance an analysis based on what *Geduldig* should be read to say in light of the Court’s full opinion in that case as well as *International Union*, which serves as a reasonable guidepost. Finally, even a conservative reading of...
Geduldig should be reconciled by an evolved equal protection jurisprudence advanced and cultivated by the Court in the years since 1974 as evidenced through International Union as well as Nevada Department of Human Services v. Hibbs.\(^\text{516}\)

To understand invidious pregnancy discrimination as “never” evincing impermissible sex discrimination risks ignoring the expansive equal protection landscape cultivated by the Court. By modest analogy, it would be similar to focusing race equality analysis on Plessy v. Ferguson.\(^\text{517}\) I will not repeat the arguments made earlier that resituate Geduldig from the conventional reading that pregnancy discrimination can never be sex discrimination. As Professors Neil Siegel and Reva Siegel explain, that reading is plainly inaccurate.\(^\text{518}\) If the conventional interpretation of Geduldig offers an inexact understanding of the case, how should this be reconciled in light of the interests at stake?

The clearest approach is to adopt the standard flagged in footnote twenty of the majority’s opinion. In that footnote, Justice Stewart explained that “distinctions involving pregnancy” may impose “an invidious discrimination against the members of one sex or other.”\(^\text{519}\) Giving this expression from the Court full weight, the following arguments proceed on the basis that invidious pregnancy discrimination should be analyzed as sex discrimination under the Equal Protection Clause.\(^\text{520}\)

Prosecuting women, but not men, for violating fetal protection statutes constitutes discrimination against women. Simply stated, the means and ends do not fit. At best, locating fetal harms as the exclusive control of women “must be considered an unduly tenuous ‘fit.’”\(^\text{521}\) Dating back to Reed v. Reed\(^\text{522}\)

---

\(^{516}\) 538 U.S. 721 (2003) (According to the Court, “[m]any States offered women extended ‘maternity’ leave that far exceeded the typical 4- to 8-week period of physical disability due to pregnancy and childbirth, but very few States granted men a parallel benefit: Fifteen States provided women up to one year of extended maternity leave, while only four provided men with the same.” (quoting M. LORD & M. KING, THE STATE REFERENCE GUIDE TO WORK-FAMILY PROGRAMS FOR STATE EMPLOYEES 30 (1991)). The Court noted that pregnancy discrimination had become intractable and pervasive.

\(^{517}\) Being stuck in a Plessy moment would require ignoring the fact that the country in which we live is vastly different than it was at the time of the decision’s iteration.

\(^{518}\) See Siegel & Siegel, supra note 440, at 167 (arguing that the conventional reading of Geduldig is “incorrect”).

\(^{519}\) See Siegel & Siegel, supra note 440, at 167.

\(^{520}\) Finally, insights can be drawn from Nevada Department of Human Services v. Hibbs. 38 U.S. 721 (2003). In that case, the Supreme Court ruled that family leave policies discriminated against men by providing reduced time compared to that granted women to care for a family members. This constituted sex discrimination. The Court relied on expert documents and legislative history associated with the Family Medical Leave Act to point out how discriminatory stereotypes about pregnancy and sex roles has influenced the construction and implementation of state pregnancy and family leave policies. The court found that discriminatory implementation of family leave policies based on gender violated the Equal Protection Clause.


\(^{522}\) Reed v. Reed, 404 U.S. 71 (1971) (invalidating a law permitting preferences of men over women in the appointment of estate administrators).
and Frontiero, the Court has found that statutory classifications that distinguish between males and females are “subject to scrutiny under the Equal Protection Clause.” To withstand constitutional scrutiny, discrimination based on gender must serve important government objectives and be substantially related to achievement of those objectives.

In Craig v. Boren, the Supreme Court carved out an intermediary level of scrutiny for sex-based discrimination. In that case, the Court struck down an Oklahoma law prohibiting alcohol sales to adult males. The Court held that the law discriminated against young males, but not females, because it prohibited sales of a nonintoxicating beer to males under twenty-one and to females under eighteen. The Court found that the means—discriminating against young men by denying them the right to purchase beer—was not substantially related to Oklahoma’s purported end—promoting traffic safety. The Court acknowledged the importance of traffic safety, although perhaps not to the degree Justice Rehnquist did in his dissent. The majority reasoned that even though “arrest statistics assembled in 1973 indicated that males in the 18-20 age group were arrested for ‘driving under the influence’ almost 18 times as often as their female counterparts, and for ‘drunkenness’ in a ratio of almost 10 to 1,” singling out one sex for gender discrimination was impermissible where the means of reducing traffic deaths and injuries was tenuously connected to the end—even if the end was socially important. These early
cases helped establish the Court’s evolving jurisprudence on sex discrimination and the Equal Protection Clause. The Court’s early holdings indicate that even protectionist legislation is not spared a heightened scrutiny when sex-based restrictions are applied in arbitrary ways. 532

When states single out one sex for discriminatory purposes, including prosecution, forced bed rest, life support, and cesarean surgery interventions, they should provide “an exceedingly persuasive justification,” as articulated in United States v. Virginia. 533 This is a demanding burden to meet, because states must show that singling out women for punitive action serves “important governmental objectives and that the discriminatory means employed [are] substantially related to the achievement of those objectives.” 534 Moreover as these laws relate to fetal health, states should be made to demonstrate how such policies actually promote fetal health.

For example, the best fetal protection efforts taken by pregnant women will involve seeking prenatal services. 535 Prenatal care provides the opportunity for information sharing between doctors and patients and affords patients the opportunity to address health and emotional concerns about the pregnancy, receive advice regarding diet management, and monitor fetal health and development. 536 Health care providers consider prenatal care to be an essential component of gestation. 537

Yet, a series of cases documented by the National Advocates for Pregnant Women reveal that the overwhelming majority of intrusive state interventions, including arrests and confinement, are initiated by prenatal or medical visits at hospitals and clinics. 538 Sometimes the women are arrested at the clinics. 539 Ultimately, intervening in women’s pregnancies at prenatal appointments may chill the very behavior that government desires to promote. 540 When states chill

other hand, young women may slide under the radar, including those who are “reckless” or “drunk drivers” based on other stereotypes and entrenched views about women’s femininity and temperance. As to the latter, Brennan cautioned that young women may be under-policed or not policed for drunk driving. Rather than ticketing or arresting young women, Brennan surmised that officers “chivalrously escorted [them] home” for the same type of offenses that might have landed young men in jail. Id. at 223.

532. Id. at 202.
536. Id.
537. Id. ("having a healthy pregnancy is one of the best ways to promote a healthy birth.").
539. Id. at 334.
540. Id. at 330.
prenatal care, they erode the best avenue for achieving the healthiest outcomes for babies. One researcher warns that the “[u]ncomfortable relationships with health care providers and fear of reprisal on the part of pregnant women who are addicted make women four times less likely to receive adequate care, thereby creating health risks for women who are addicted, their unborn fetuses, and their other children.” The National Women’s Law Center echoes these concerns as have the American Medical Association, the Center for Reproductive Rights, and The National Partnership for Women & Families, and professional organizations, such as the American Public Health Association, and the American College of Obstetrics and Gynecology, to name a few.

If using prenatal services is one of the best ways to promote fetal health, chilling that conduct will not achieve government interests. Instead, it may very well undermine child and maternal welfare by creating an “unsafe” harbor around clinics and hospitals. Some scholars predict that women who can afford to end their pregnancies may seek abortions to avoid hospital “dragnets” altogether. Others suggest that pregnant women will simply avoid medical screenings. In either case, state encroachments of the type described in this Article fail to credibly engage in the means and ends analysis established as part of the Supreme Court’s equal protection jurisprudence.

4. State Action and Stereotypes

Selective, punitive interventions in pregnant women’s lives evince motivations other than protecting fetal health. Selective state action that singles out poor pregnant women to give birth to healthier babies while not imposing similar conditions and constraints on all others capable of fertility “reflect[s] constitutionally suspect judgments” about that class of pregnant women. In International Union, Justice Blackmun warned that discriminatory fetal protection policies that impose special conditions on fertile women are virtually non-justiciable.


544. Brief for APHA et al. for Petitioner, supra note 236.

545. CENTER FOR REPRODUCTIVE RIGHTS, supra note 541.

546. For example, Carmen Howell, a defense lawyer in Alabama, is “concerned that women who use drugs may also be having abortions to avoid prosecution.” Calhoun, supra note 80.

547. See, e.g., Elizabeth L. Thompson, The Criminalization of Maternal Conduct During Pregnancy: A Decisionmaking Model for Lawyers, 64 IND. L.J. 357, 370 (1989) (“Perhaps the greatest danger in adopting a statutory scheme of fetal neglect or endangerment laws is that it will, in fact, deter women from seeking prenatal care for fear of being ‘turned-in’ by their doctors.”).

548. See Siegel & Siegel, supra note 440, at 163.
impossible to justify, because the Equal Protection Clause is intolerant of sex
discrimination, even when it is motivated by beneficence.\textsuperscript{549} However, the
Court has found that policies that discriminate based on sex may be influenced
by stereotypes about sex as well as about gender roles.\textsuperscript{550}

One stereotype reflected in fetal protection measures is that women alone
control fetal health. While women do play an undeniably vital role in the care
and gestation of fetuses, they do not exclusively control fetal health. To the
contrary, numerous empirical studies indicate that fetal health is not controlled
exclusively by pregnant women,\textsuperscript{551} because environment contributes
significantly to fetal health. Scholars have acknowledged this much for some
time, and so have courts.\textsuperscript{552}

The aftermath of generations of legally and socially permissible sex
discrimination, according to Brennan, results in legislation "laden with gross,
stereotyped distinctions between sexes."\textsuperscript{553} The sex-based stereotyping
Brennan critiqued four decades ago in \textit{Frontiero} and \textit{Craig} persists in the fetal
protection sphere.

For example, poor pregnant women and women of color are criminally
hyper-policed during pregnancy to reduce the incidence of low birth weight and
miscarriage in ways that neither men, nor wealthier, white women
experience.\textsuperscript{554} Dr. Allen A. Mitchell's research on prescription drug
dependency during pregnancy provides empirical heft to buttress intuitions that
stereotyping occurs in the drafting and enforcement of FPLs. Mitchell, who
serves as Director of the Slone Epidemiology Center, debunks commonly held
presumptions about drug use during pregnancy, which likely drive the
enactment and enforcement of FPLs.\textsuperscript{555} Longitudinal studies conducted by
Mitchell and other scientists find that educated white women are more likely to
rely on prescription medications during pregnancy and their dependency on

\textsuperscript{550} Id. at 211 (stating that it is not appropriate for the courts or employers "to decide whether
a woman's reproductive role is more important to herself and her family than her economic role").
\textsuperscript{551} See, e.g., Rowland, supra note 153.
\textsuperscript{552} See, e.g., Daubert v. Merrell, 509 U.S. 579 (1993) (illustrating the difficulty in
establishing whether drugs or other factors cause birth defects); Int'l Union, 499 U.S. at 200 (rejecting
fetal protection regulation even though work environment exposed women to lead, which has a
demonstrated association with negative fetal and child health); Ambrosini v. Labarque, 101 F.3d
129, 131–32 (D.C. Cir. 1996) (finding causal connection between medroxyprogesterone exposure and
http://scholar.google.com/scholar_case?case=12702520309402028215&hl=en&as_sdt=6&as_vis=1&
oi=scholarr (denying company's motion to dismiss case alleging fetal harms were caused through the
mother's wrongful exposure to defendant's product).
\textsuperscript{553} Frontiero v. Richardson, 411 U.S. 677, 685 (1973).
\textsuperscript{554} See generally Roberts, supra note 5 (discussing the disproportionate targeting and
government intrusion into the lives of women of color, particularly in the realm of reproduction).
\textsuperscript{555} See Allen A. Mitchell et al., Medication Use During Pregnancy, with Particular Focus
these medications increases by age.\textsuperscript{556} His research findings demonstrate that during the first trimester of pregnancy, over 70 percent of women reported taking at least one medication that was not a vitamin or mineral and that drug use increased with age, and also by race.\textsuperscript{557} Moreover, Mitchell and his colleagues surmise that educated, white women are more likely to take prescription medications during pregnancy generally, and use more prescription medications during pregnancy as they age.\textsuperscript{558}

The Court would find it relevant that in light of rigorous evidence demonstrating a risk of fetal harm based on prescription drug use, states ignore that cohort of gestating mothers. Instead, they target poor users of illicit substances.\textsuperscript{559} In other words, despite the dramatic rise in prescription pain relief during pregnancy, which is directly linked to wealth and race, states rely on stereotypes, targeting poor women primarily.\textsuperscript{560}

Finally, the Supreme Court emphasizes that states cannot craft laws that spare some members of a class indignities and yet subject others to surreptitious law-enforcement dragnets when they seek prenatal care.\textsuperscript{561} Can states make a case that is exceedingly persuasive why some women, particularly poor women, are singled out to birth the healthiest babies when others are not? In \textit{United States v. Virginia}, Justice Ginsburg opined that "[t]he burden of justification is demanding and it rests entirely on the State."\textsuperscript{562}

Inherent differences between men and women or different categories of women pose "artificial constraints on an individual's opportunity,"\textsuperscript{563} and cannot be

\textsuperscript{556.} Id. at 51.e4--e5.
\textsuperscript{557.} Id. at 51.e3--e4.
\textsuperscript{558.} Id. at 51.e4--e5.
\textsuperscript{560.} See also Ferguson v. Charleston, 532 U.S. 67 (2001). In Mississippi University for Women v. Hogan, the Court cautioned that the test for determining the validity of gender-based discrimination is "straightforward," and "must be applied free of fixed notions concerning the roles and abilities of males and females." Again, the Court cautioned against discrimination based on archaic stereotypes. Archaic stereotypes in these contexts include the assumption that pregnant women hold exclusive control over fetal health outcomes and that women of color are more likely to engage in behavior that may put the fetus at risk than other pregnant women—hence the persistent policing.
\textsuperscript{563.} Id.
used as they were in prior generations to “create or perpetuate the legal, social,” and reproductive “inferiority” of women.564

CONCLUSION

This Article has shown how fetal protection efforts, while intending to promote fetal health, impose onerous burdens on the most vulnerable members of our society: pregnant women. These burdens emerge during pregnancy in some of the cruelest ways, invading their privacy, ignoring their confidence, trampling their autonomy, and imposing physically abusive norms on their bodies. Ultimately, such policies do very little to achieve states’ interests in fetal protection.

Punitive FPLs simply do not work. They concentrate on the unborn at the risk of ignoring those who are born. How do we resolve this? What policy answers the purported concerns of the state, while affording pregnant women dignity, citizenship, and equality?

This Article takes some steps toward answering those questions, unpacking the many tensions and complexities undergirding fetal protection policy. As a normative matter, the Article argues that the patient-physician relationship must shift in light of states increasingly turning to doctors as their quasi-law-enforcement gatekeepers. To pragmatically engage with that shift, the Article argues for a new standard in medicine and law that resituates the patient-physician relationship, incorporating more of the types of standards and expectations that flow between lawyers and their clients. Second, the Article offers a constitutional framework for thinking about potential constitutional challenges to these laws. Finally, the Article argues that pregnancy discrimination is sex discrimination. As such, it explains why the Court’s equal protection jurisprudence should apply in fetal protection cases.

564.  Id. at 534.
ABSTRACT. This Article proposes an innovative approach to remedying the crisis of political inequality: using law to facilitate organizing by the poor and working class, not only as workers, but also as tenants, debtors, welfare beneficiaries, and others. The piece draws on the social-movements literature, and the successes and failures of labor law, to show how law can supplement the deficient regimes of campaign finance and lobbying reform and enable lower-income groups to build organizations capable of countervailing the political power of the wealthy. As such, the Article offers a new direction forward for the public-law literature on political power and political inequality. It also offers critical lessons for government officials, organizers, and advocates seeking to respond to the inequalities made painfully evident by the COVID-19 pandemic.

AUTHORS. Kate Andrias is Professor of Law, University of Michigan Law School. Benjamin I. Sachs is Kestnbaum Professor of Labor and Industry, Harvard Law School. For helpful comments and discussion, the authors thank Sharon Block, Catherine Fisk, Daryl Levinson, Nina Mendelson, Bill Novak, David Pozen, Richard Primus, K. Sabeel Rahman, Ganesh Sitaraman, and participants at workshops at Columbia Law School, Michigan Law School, Michigan State Law School, Tel Aviv Law School, University of Wisconsin Law School, and Wayne State Law School. The authors also thank Harry Graver, Courtney Brunson, Ciara Davis, Jonathan Edelman, Annie Hollister, Donya Khadem, Jonathan Levitan, Rebecca Moonitz, Jared Odessky, Elizabeth Rodgers, Rachel Sandalow-Ash, Owen Senders, and Zachary Simon for excellent research assistance. Finally, the authors thank the editors of the Yale Law Journal.
## ARTICLE CONTENTS

### INTRODUCTION 548

I. INEQUALITY, DEMOCRACY, AND COUNTERVAILING ORGANIZATIONS 562
   A. The Unequal Landscape of Political Organization 562
   B. Political Inequality in a Democratic Republic 569
   C. Extant Approaches to Using Law to Combat Political Inequality 573

II. URGENCY AND PROMISE OF A LAW OF ORGANIZING 577

III. FACTORS AND FACILITATORS 586
   A. Framing 587
   B. Resources 595
      1. Funding 599
         a. Charitable Donations: Limits and Pitfalls 599
         b. Self-Funding Facilitated by Law 602
         c. Cost-Shifting 605
         d. State Subsidies 606
      2. Physical and Virtual Spaces 608
      3. Information 610
      4. Human Resources 612
   C. Free Spaces 613
   D. Removing Barriers to Participation 620
   E. Material Changes, Incremental Victories, and Structural Power 623
   F. Contestation and Disruption 627

### CONCLUSION 631
INTRODUCTION

Among the painful truths made evident by COVID-19 are the deep inequality of American society and the profound inadequacy of our social-welfare infrastructure. The nation’s lack of comprehensive health care, its underfunded and inefficient system of unemployment insurance, and weak workplace safety and health guarantees, along with nearly nonexistent paid sick leave, debtor-forgiveness rules, and tenant protections leave poor and working-class communities—particularly communities of color—dangerously exposed to the ravages of this pandemic, both physical and economic. America’s weak social safety net is, in turn, a product of a profound failure that has plagued American democracy for decades now: the wealthy exercising vastly disproportionate power over politics and government.

8. Even in the midst of the pandemic, as unemployment soared and poor and working-class Americans suffered enormous financial pain, the power of the wealthy was manifest in the relief bills that emerged from Washington. For example, the Coronavirus Aid, Relief, and
Indeed, public faith in American democracy is at near-record lows, and increasing numbers of Americans report that they no longer feel confident in the health of their democratic institutions. When asked why, many say that money has too much of an influence on politics and that politicians are unresponsive to the concerns of regular Americans. Research supports these fears, showing both that wealthy individuals are spending record sums on electoral politics and that elected officials are at best only weakly accountable to nonwealthy constituents.

Economic Security (CARES) Act suspended the limit on losses that can be used to offset, for tax purposes, nonbusiness income. This provision helps only individuals with more than $250,000 in nonbusiness income, and the congressional Joint Committee on Taxation estimates that 82% of the benefits of this part of the Act will go to individuals earning more than $1 million a year. Moreover, “[a]ccording to Congress’s official revenue estimators, the benefits of this CARES Act provision this year will go to 43,000 millionaires who receive a total of $70.3 billion from this break alone.” Steve Wamhoff, The CARES Act Provision for High-Income Business Owners Looks Worse and Worse, JUST TAXES BLOG (Apr. 24, 2020), https://itep.org/the-cares-act-provision-for-high-income-business-owners-looks-worse-and-worse [https://perma.cc/M9SH-CQCE].


As political scientist Martin Gilens has observed, “[W]hen preferences between the well-off and the poor diverge, government policy bears absolutely no relationship to the degree of support or opposition among the poor.”

Of course, democracy does not require that policymaking always follow majority will or the median voter’s preferences. But democracy, as well as the faith citizens have in their government, falters when lawmakers persistently disregard the priorities of nonwealthy citizens.

Much of the legal scholarship (and public commentary) concerned with this democracy deficit focuses on the increased flow of money into electoral politics and advocates for stemming that flow. Scholars writing in this vein criticize the Supreme Court’s jurisprudence, exemplified by *Citizens United v. FEC*, that has enabled unfettered campaign spending. They offer a range of reforms designed to limit the flow of money into elections, many of which would require a change in the composition of the Supreme Court or the ratification of a constitutional amendment. A related group of scholars advocates for shielding the legislative and administrative process from money’s influence through, for example, lobbying restrictions and disclosure requirements.

12. *Gilens*, supra note 11, at 81; see also *infra* Section I.B (discussing empirical findings).


16. See *infra* notes 134–136 and accompanying text. Lobbying restrictions, too, would be subject to constitutional challenge. See, e.g., United States v. Harriss, *347 U.S. 612*, 625 (1954) (stating that “the freedoms guaranteed by the First Amendment—freedom to speak, publish, and petition the Government” are involved in the assessment of lobbying regulation); Autor v. Pritzker, 740 F.3d 176, 182–84 (D.C. Cir. 2014) (emphasizing that registered lobbyists are protected by the First Amendment, and remanding for the district court to consider whether the policy barring government service by registered lobbyists was nonetheless justified).
CONSTRUCTING COUNTERVAILING POWER

A second robust body of scholarship focuses not on insulating the political process from money but on trying to ensure equal rights of individuals to participate in the governance process through elections. These scholars criticize barriers to equal voting rights, including contemporary uses of gerrymandering and legislation that impose hurdles on individual voters' ability to exercise the franchise or minimize the effective voting power of particular constituents.\(^\text{17}\) Scholars urge both doctrinal and legislative reform that would ensure more equal rights of participation.

In the last few years, a third approach has begun to emerge in the legal scholarship. This approach begins by recognizing the difficulty—both practical and constitutional—of keeping money out of politics. It also recognizes that while equal voting and participation rights are critical to the goal of combating political inequality, they are not enough to ensure political equality in a system where wealth functions so prominently as an independent source of political influence. Thus, this third approach moves beyond campaign finance and individual participation rights and focuses instead on what we will call countervailing power.

In particular, this approach is concerned with the ability of mass-membership organizations to equalize the political voice of citizens who lack the political influence that comes from wealth.\(^\text{18}\)

The beneficial effects of countervailing, mass-membership organizations are well known to theorists and researchers of democracy.\(^\text{19}\) Put simply, such groups increase political equality by building and consolidating political power for the


\(^{19}\) See *infra* Part I.
nonwealthy, thus serving as counterweights to the political influence of the rich. Mass-membership organizations can serve in this capacity because, at bottom, they aggregate the political resources and political power of people who, acting as individuals, are disempowered relative to wealthy individuals and institutions. 20 More particularly, mass-membership organizations enable pooling of politically relevant resources, including money, among individuals with few such resources; they provide information to decisionmakers about ordinary citizens’ views; they navigate opaque and fragmented government structures, thereby enabling citizens to monitor government behavior; and they allow citizens to hold decisionmakers accountable. And, in fact, when citizens are organized into mass-membership associations that are active in the political sphere, researchers find an exception to the general rule that policymakers are disproportionally responsive to the preferences and concerns of the wealthy. 21

Over recent decades, however, there has been a decline in broad-based, mass-membership organizations of low- and middle-income Americans. 22 This decline in countervailing organizations has exacerbated the political distortions caused by the increase in political spending by the wealthy. But the capacity for countervailing organizations to address the distorting effects of wealth raises a critical question for legal scholars: How can law facilitate the construction of countervailing organizations among the nonwealthy? Put differently, how can law facilitate political organizing among Americans whose voices are drowned out by the distorting effects of wealth? That is the question we address in this Article.

Recently, legal scholars have begun to address related topics. For example, K. Sabeel Rahman and Miriam Seifter have written about ways that participation in administrative processes can improve the organizational strength of citizen groups. Thus, Rahman argues for designing administrative processes in ways that enhance the countervailing power of ordinary citizens, 23 while Seifter urges administrative-law scholars to pay attention to the characteristics of interest groups participating in the administrative process and to consider “looking

---

20. See, e.g., Joshua Cohen & Joel Rogers, Secondary Associations and Democratic Governance, 20 POL. & SOC’Y 393, 424 (1992) (noting that such organizations help remedy political inequality “by permitting individuals with low per capita resources to pool those resources through organization”).
21. GILENS, supra note 11, at 121, 157–58.
22. See infra Section I.A.
CONSTRUCTING COUNTERVAILING POWER

within interest groups,” referencing the manner by which interest groups determine the views of their constituents, “to illuminate the quality and nature of participation in administrative governance.” 24 Tabatha Abu El-Haj has urged greater use of universal benefits and targeted philanthropy, to encourage the growth of mass-membership organizations, since both “create reasons to organize on the part of beneficiaries.” 25 Both of us have written about the countervailing role that labor organizations can play in politics. 26 And Daryl Levinson and one of us have written about the ways in which ordinary public policy often has the effect—and at times the intent—of mobilizing political organization around the policy. 27

Meanwhile, another group of legal scholars has highlighted the importance of social movements and their organizations in legal change, focusing on how movements shape decisionmaking by courts, legislatures, and administrative agencies. 28 In particular, a rich literature has developed on the relationship between popular mobilization and evolving constitutional principles, 29 and on

24. Miriam Seifter, Second-Order Participation in Administrative Law, 63 UCLA L. REV. 1300, 1304 (2016); see also Miriam Seifter, Further from the People? The Puzzle of State Administration, 93 N.Y.U. L. REV. 107, 146 (2018) (“The weakness of civil society oversight in the states undermines the notion that state governments are closer to the people; in turn, it highlights their vulnerability to regulatory failures and factional influence.”).

25. Abu El-Haj, supra note 18, at 71; see also Tabatha Abu El-Haj, Beyond Campaign Finance Reform, 57 B.C. L. REV. 1127, 1129-30, 1132-33 (2016) (“Those concerned about the outsized political influence of moneyed elites . . . should shift [the focus] to ways the law might encourage civic reorganization.”).

26. See Kate Andrias, The New Labor Law, 126 YALE L.J. 2, 84-88 (2016); Sachs, supra note 18, at 168-82.


how “cause lawyers” can best serve social movements. More recently, there has been a resurgence of scholarship that “cogenerates legal meaning alongside left social movements, their organizing, and their visions.” This work builds on an older tradition of critical legal studies and critical race theory that interrogates the limits of traditional legal rights in bringing about progressive social change given the political, economic, and social conditions that systematically disadvantage poor people and people of color.

To date, however, no one has tackled directly the question that we pose here. Rather than asking how the enactment of substantive legislation or administrative-participation mechanisms might boost organizing, how social

---


31. See Amna Akbar, Sameer Ashar & Jocelyn Simonson, Movement Law, 73 STAN. L. REV. (forthcoming 2021) (manuscript at 3) (on file with authors); see also infra note 44 (citing legal scholarship that engages with contemporary organizing efforts among workers, tenants, debtors, and others).


33. In prior work we have each made the case that legal scholars and reformers should pay more attention to “facilitating the participation of countervailing organizations in government,” Andrias, Separations of Wealth, supra note 18, at 405, and have argued that “reforms designed to facilitate political organizing are more likely to avoid the problems of circumvention that have undermined traditional modes of regulation,” Sachs, supra note 18, at 157; see also Andrias, Hollowed-Out Democracy, supra note 18. But the extant analysis—including our own—has been insufficiently informed by careful consideration of where and how law can successfully facilitate and empower mass-membership organizations of nonelites.
CONSTRUCTING COUNTERVAILING POWER

movements can or hope to reshape law, or how a focus on traditional legal rights disables fundamental social change, we ask how law could be used explicitly and directly to enable low- and middle-income Americans to build their own social-movement organizations for political power.

The question is particularly urgent today as the COVID-19 pandemic has exacerbated society’s existing inequalities. Working-class communities, especially low- and middle-income people of color, have experienced hardships as a result of the disease to a far greater extent than the wealthy—from massive unemployment to dangerous working conditions, from food insecurity to rising debt and risk of eviction. The suffering wrought by the pandemic, as well as by the financial crisis of 2008, has led to an upsurge in protests by low- and middle-income Americans, particularly among workers, tenants, and debtors. At the same time, endemic violence against Black communities, including the recent killing of George Floyd, has led to widespread organizing around issues of racial justice. These movements demand that government respond to the


555
concerns of ordinary Americans and attempt to elicit better treatment from powerful actors. Yet, despite their promise, such movements face significant obstacles in translating their members' anger into robust and lasting political power.\textsuperscript{37} A pressing task, therefore, is to ask how law can facilitate and protect these new and revived protest movements, helping to create durable organizations that can exercise sustained protest movements in the political economy.

We start from the premise that the robustness of countervailing, mass-membership organizations should be understood as a problem both of and for law. The shape of civil society and organizational life is already a product of legal structures and rules.\textsuperscript{38} And although law has frequently been a tool of oppression, rather than of empowerment, of poor and working-class people and movements,\textsuperscript{39} alternative legal regimes that encourage the growth of and the exercise of power by social-movement organizations of the poor and working class are possible. Indeed, for those who are committed to decreasing political inequality, alternative legal structures that encourage the growth of countervailing organizations are imperative.

In analyzing how legal and institutional reforms could facilitate a different picture of organizational and political life in the United States, we draw from the successes and failures of labor law—the area of U.S. law that most explicitly and directly creates a right to collective organization for working people—while also moving beyond that context to literature considering "how, in what forms, and under what conditions social movements become a force for social and political change."\textsuperscript{40} We do not attempt to adjudicate priority among factors that

\textsuperscript{37} See Steven Greenhouse, Turning Worker Anger into Worker Power, AM. PROSPECT (Apr. 29, 2020), https://prospect.org/labor/turning-worker-anger-into-worker-power [https://perma.cc/9G87-HTQJ] (discussing the recent upsurge in worker organizing and challenges in creating long-term power); Meyerson, supra note 33 (“Over the course of the Great Depression, the tenant organizations and leagues of the unemployed won occasional local victories over specific demands, but failed to become ongoing institutions.”).

\textsuperscript{38} See infra notes 147-165 and accompanying text.

\textsuperscript{39} See supra note 32 and infra notes 90–91, 162–165.

\textsuperscript{40} Nicholas Pedriana, From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women’s Movement in the 1960s, 111 AM. J. SOC. 1718, 1753 (2006); see also Doug McAdam, Conceptual Origins, Current Problems, Future Directions, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS 24–25 (Doug McAdam, John D. McCarthy & Mayer N. Zald eds., 1996) (considering definitions and interpretations of the term “political opportunity”); sources cited supra notes 38–39. This Article thus seeks to incorporate insights from social science into legal scholarship on social movements. See Eskridge, Channeling, supra note 29 (identifying three social-movement-theory frameworks); NeJaime, supra note 29, at 879.

556
CONSTRUCTING COUNTERVAILING POWER

Contribute to successful organizing, nor do we attempt to build an exhaustive list of such factors. Instead, we consolidate factors that have two attributes: (1) they are likely to contribute to the successful building of membership organizations among poor and working-class people, and (2) their existence or development might be enabled by law.

We recognize that some factors, undoubtedly critical to successful organizing, are beyond the reach of our proposal. For example, sociologists and historians have demonstrated that several structural opportunities helped facilitate the growth of the Civil Rights movement, including the collapse of cotton; the increase in Black migration and electoral strength; and the advent of World War II and the Cold War.41 These kinds of objective structural conditions, exogenous to movements themselves, are frequently important to movement formation, but they cannot be directly affected by the kinds of legal reforms we suggest. Likewise, sociologists have shown that strategic leadership within organizations is critical to movement success,42 but internal leadership dynamics are not easily affected through legal regulation.43

Three additional principles guide our analysis. First, because small-scale, concrete victories are essential to successful organizing, and because organizing tends to be most successful among people with shared identities and existing relationships, we focus on reforms that enable organizing within particular structures of authority and resource relations. By way of examples, we consider organizing among workers, tenants, debtors, and recipients of public benefits. We pick these contexts in part because they are ones rife with exploitation and

(assuming that social-movement scholarship could enable legal scholars to better assess the possibilities and limitations of law and courts for contributing to social change); Rubin, supra note 28 (describing a divergence between legal scholarship and social-movement scholarship); cf. Lauren B. Edelman, Gwendolyn Leachman & Doug McAdam, On Law, Organizations, and Social Movements, 6 ANN. REV. L. & SOC. SCI. 653, 654-55 (2010) (reviewing literature and arguing for a synthetic approach to the study of law, social movements, and organization); Michael McCann, Law and Social Movements: Contemporary Perspectives, 2 ANN. REV. L. & SOC. SCI. 17, 19-20 (2006) (arguing that sociolegal theory and social-movement theory should take greater account of one another in part to understand better the efficacy and legacy of legal mobilization).


43. That said, some of our proposals may have an indirect effect on factors like strategic-leadership development and political opportunities.
power imbalances and populated by the relevant income groups, and in part because they are home to important organizing efforts, both historical and contemporary. We do not suggest that these are the only relevant contexts in which our suggestions might be explored, nor do we in any sense imply that broader organizational development encompassing poor and working-class people as a whole is impossible or ineffective. In fact, the context-specific organizing regimes we envision might well facilitate broader community-based and political organization. However, we leave for another day exploration of how the law might directly enable broad-based political organization—say, a political organization of all poor people or a political-party system that incentivizes grassroots participation among nonwealthy individuals.

Second, we focus on how law can build organization, as opposed to more amorphous configurations of insurgency. The organizations our reforms seek to facilitate are very much social-movement actors, in that they seek to change “elements of the social structure and/or reward distribution of a society.” On labor exploitation and new worker-organizing efforts, see, for example, Andrias, supra note 26, at 6, 40-44; and Veena B. Duba!, Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities, 105 CALIF. L. REV. 65, 67 (2017).

44. See, e.g., Lisa T. Alexander, Occupying the Constitutional Right to Housing, 94 NEB. L. REV. 245, 269 (2015) (“These movements explicitly use the human right to housing as an organizing framework. . . . These movements define their actions as ‘liberating’ homes from the shackles of an unjust and immoral housing system that privileges profits over people.”); Luke Herrine, The Law and Political Economy of a Student Debt Jubilee, 68 U. BUFF. L. REV. 281, 325 (2020) (“In recent years, there have been some signs that more and more student debtors have begun to understand their plight not as an individual responsibility but as a collective failure.”). On labor exploitation and new worker-organizing efforts, see, for example, Andrias, supra note 26, at 6, 40-44; and Veena B. Duba!, Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities, 105 CALIF. L. REV. 65, 67 (2017).


46. John D. McCarthy & Mayer N. Zald, Resource Mobilization and Social Movements: A Partial Theory, 82 AM. J. SOC. 1212, 1217-18 (1977). We refer to the organizations interchangeably as mass-membership organizations and as social-movement organizations (SMOs). Social-scientific scholars broadly define a social movement as “a set of opinions and beliefs in a population which represents preferences for changing some elements of the social structure and/or reward distribution of a society.” Id.; see also Brown-Nagin, supra note 29, at 1503 (defining social movements as persistent, interactive campaigns that make “sustained, collective claims for relief or redistribution in response to social marginalization, dislocation, change, or crisis” (emphasis omitted)); Guinier & Torres, supra note 28, at 2736-57 (defining social movements).
CONSTRUCTING COUNTERVAILING POWER

countervailing power. Thus, our approach rejects the idea that formal structures facilitated by law are necessarily deradicalizing and inimical to social change.

Finally, our focus is on how law can facilitate organizations of working-class and poor Americans—not on either of two other questions: one, how law could be designed specifically to enhance the political power of communities of color, or two, how law could encourage the formation of interest groups generally. The first question could not be more critical. Just as our government is disproportionately responsive to the wealthy, it is also disproportionately responsive to white people, and the crisis of structural racism is perhaps the most acute we face as a nation. As such, a program for building political power among communities of color is just as necessary as a program for building power among workers and the poor. But it is also true that our focus on working and poor Americans ought, in practice, and in part due to the crisis of structural racism itself, to amount to a program for building power among and by communities of color. This is not the exclusive reach of our proposals, and continued attention must be paid to ensure that racial inequities do not infect the political organizing we aspire to enable. But because people of color are over-represented in the sectors of the population that we do address—low-income workers, tenants, government-benefits recipients, debtors—these communities would likely benefit from the success of our proposals. As to the second question, while a more expansive civil society may bring a host of benefits, including greater social cohesion and civic education, this Article’s concern is with building organizations that can serve as a countervailing force to the extraordinary power of economic elites in our political economy.

47. See McAdam, supra note 41, at 54-56 (emphasizing the importance of enduring organization).

48. Cf. Piven & Cloward, supra note 41 (providing a history of four disruptive social movements, and arguing that organization is often antibetical to movement success among poor people). For further discussion, see infra note 370 and accompanying text.

49. See, e.g., Brian F. Schaffner, Jesse H. Rhodes & Raymond J. LaRaja, Hometown Inequality: Race, Class, and Representation in American Local Politics 13-14 (2020) (“Whites and wealthier people receive substantially more ideological representation both from local government officials and from municipal policy outputs than do nonwhites and less wealthy individuals. The inequities in representation we identify are frequently shocking in their magnitude.”); John Griffin, Zoltan Hajnal, Brian Newman & David Searle, Political Inequality in America: Who Loses on Spending Policy? When Is Policy Less Biased?, 7 Pol. Groups & Identities 367, 368 (2019) (“[T]he racial inequalities we uncover are as large as, and often larger than, income-based bias.”).

We argue that a legal regime designed to enable this kind of organizing should have several components. First, the law should grant collective rights in an explicit and direct way so as to create a “frame” that encourages organizing. Second, as importantly, though more prosaically, the law should provide for a reliable, administrable, and sustainable source of financial, informational, human, and other relevant resources. Third, the law should guarantee free spaces—both physical and digital—in which movement organization can occur, free from surveillance or control. Fourth, the law should remove barriers to participation, both by protecting all those involved from retaliation—no worker may be fired, no tenant evicted, no debtor penalized, and no welfare recipient deprived of benefits because they are active in or supportive of the movement’s efforts—and by removing material obstacles that make it difficult for poor and working people to organize. Fifth, the law should provide the organizations with ways to make material change in their members’ lives and should create mechanisms for the exercise of real political and economic power, for example by providing the right to “bargain” with the relevant set of private actors and by facilitating organizational participation in governmental processes. Finally, the law should enable contestation and disruption, offering protections for the right to protest and strike.51

The particulars necessarily vary by context. For example, a law designed to generate organizing among tenants would start by affirmatively granting tenants the right to form and join tenant unions. It would grant such unions the right to access information and landlord property for organizational purposes. It would vest the organization with authority to collect dues payments through deductions from rent payments. It would mandate that landlords negotiate with tenants’ organizations over rent and housing conditions. It would ensure that organizations have special rights of participation in administrative processes related to housing policy. And it would provide for the right of tenants to engage in rent strikes and protests, free from retaliation. A law designed to facilitate organizing among debtors would similarly create a collective frame, provide a mechanism for funding, protect against retaliation, mandate bargaining and

51. Some, though not all, of the interventions we propose might require the state to determine which organizations are entitled to the law’s benefits. For example, if the government directly funds organizations, or requires bargaining with organizations, or mandates access to property for organizations, the law might need to establish criteria according to which organizations qualify (or don’t) for the entitlements in question. Current labor law offers one, quite imperfect model: many legal entitlements (the employers’ bargaining obligation, for example) are granted when, and only when, a union can demonstrate support from a majority of the relevant group of workers. See 29 U.S.C. § 159(a) (2018). This model could be modified so that some threshold showing of support—short of a majority—is required before the organization could avail itself of the relevant legal right. This administrability question is an important one but is beyond the scope of the current Article.
CONSTRUCTING COUNTERVAILING POWER

rights of participation in governance, and protect the right to protest and strike, but a debtor-organizing law might not provide for access to physical spaces, instead putting more emphasis on providing information and enabling online organizing.

Some of our proposals will generate resistance—theoretical, legal, and political. And, indeed, we concede that our approach has limitations. For example, we do not attempt to articulate the optimal level of political influence that the organizations in question ought to enjoy, nor a way of measuring when and whether they have become sufficiently strong. As Richard Pildes has written in a related context, we believe it is possible to “identify what is troublingly unfair, unequal, or wrong without a precise standard of what is optimally fair, equal, or right.”52 In addition, the scope of our inquiry is limited to problems of economic inequality. Yet we do not mean in any way to minimize other aspects of inequality, including racial and gender discrimination and hierarchy, which are both inseparable from economic inequality and worthy of separate examination and intervention. To that end, we believe law ought to require inclusion and nondiscrimination among poor and working people’s social-movement organizations.53

Finally, we recognize both that our recommendations will not provide a panacea to the imbalance in power that characterizes our political economy and that our proposals will be difficult to enact. Indeed, although we suggest a range of possible reforms and explain how they could be achieved, the goal is to illuminate law’s constitutive potential and to suggest a path for further work, not to provide a comprehensive blueprint.54 In short, analysis of what makes poor and working people’s social-movement organizations succeed helps show that law

---


53. Labor law provides a useful example for much in this Article, including the profound risk of racial and gender exclusion. The National Labor Relations Act (NLRA), for example, entrenched and perpetuated certain forms of race- and gender-based oppression by excluding from statutory coverage occupational groups—like domestic workers and agricultural workers—where Black, Latino, and women workers are disproportionately represented. See IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 53–61 (2006); see also infra note 384 (describing requirements of nondiscrimination, inclusion, and antisubordination that might be imposed on social-movement organizations to prevent internal domination along lines of race, class, and gender).

54. A host of institutional-design questions, specific to particular constituencies and contexts, are thus beyond the scope of this paper.
can make a difference — and that the absence of such law is a choice, one we believe our society cannot afford to make. 55

The remainder of this Article proceeds as follows. Part I describes the problem by tracing the relationship between rising economic inequality and the decline of mass-membership organizations, on the one hand, and political responsiveness on the other. It also explains why this form of inequality is a problem, theoretically, for a democratic republic, and describes existing approaches to using law as a mechanism for addressing political inequality. Part II details, at a high level of generality, the promise of legal intervention to encourage organization, drawing on historical and contemporary examples and underlining the extent to which the absence of such regimes is a political choice that favors a particular distribution of power. Part III uses social-science research and lessons from labor law to elaborate the conditions necessary for poor and working-class organizations to thrive and explains how law can facilitate the existence of such conditions in a range of contexts. Finally, in conclusion, we explain why progress toward a law of organizing might be feasible, notwithstanding significant obstacles.

I. INEQUALITY, DEMOCRACY, AND COUNTERVAILING ORGANIZATIONS

A. The Unequal Landscape of Political Organization

At every stage of the electoral and governing process, wealthy Americans dominate. 56 They vote at higher rates, they contribute more frequently and in greater amounts to campaigns, they volunteer more often on political campaigns, and they are more likely to contact a representative about an issue. 57 In

55. The legal reforms we suggest are targeted to generate organizing among people in specific income classes but not targeted to generate political organizing among people who hold specific political views. As a result, it is possible that our reforms would facilitate organizing by those who hold reactionary views as well as those who hold progressive ones. Of course, it will remain critical to combat discriminatory and exclusionary political developments through other means.

56. Kay Lehman Schlozman, Sidney Verba & Henry E. Brady, The Unheavenly Chorus: Unequal Political Voice and the Broken Promise of American Democracy 6-8, 14 (2012); see also id. at 122 & n.8, 136, 169, 197 (demonstrating that the higher the socioeconomic-status quintile to which a person belongs, the more likely he or she is to vote, contribute money to a campaign, engage in political discussion daily, be more persistently politically active over time, and to have come from a politically engaged family).

57. See id. at 136.
addition, wealthy individuals are, and have always been, far more likely to serve as elected and appointed leaders than are working-class and poor Americans.58

The story of how economic elites, as individuals, dominate campaign spending, lobbying, and elected office is likely familiar to most readers. Less well known is the relationship between inequality and political organization. Here, too, the picture is one of domination by the wealthy. Those in the top income quintile, for example, are far more active in organized political groups.59 They can more easily bear the economic costs of organization, and they are more likely to possess the skills, information, resources, and media savvy essential to the successful functioning of such groups.60 Similarly, business organizations are dominant in both federal- and state-level politics. Indeed, the majority of organized, national political groups focus on economic issues, and of these, more than three-quarters represent business interests.61 Over three-fourths of lobbying expenditures are made on behalf of corporate America.62 Political participation by business and the wealthy, moreover, vastly outpaces participation by organizations of the nonwealthy: business groups outnumber and far outspend organizations of working-class and poor Americans.63


59. SCHLOZMAN ET AL., supra note 56, at 259-61; see also id. at 276 (“[B]arriers to entry into the political fray have potential consequences for the representation—and, in particular, for the equal representation—of citizen interests.”).

60. For discussion of why the wealthy are better able to organize, see id. at 316-17; see also E.E. SCHATTSCHNEIDER, THE SEMI-SOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA 35 (1960) (discussing the disproportionate role that the wealthy play in political organizing).

61. See SCHLOZMAN ET AL., supra note 56, at 320,322 (noting that “[m]ore than two-thirds of the organized interests in Washington are institutions or membership associations directly related to the joint political concerns that arise from economic roles and interests” and those representing business constitute more than three-quarters of these).

62. LEE DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE 8-9 (2015). In fact, these numbers significantly undercount the true corporate investments in politics, because many activities seeking to influence the political process are not captured by lobbying-disclosure rules. See id. at 9.

63. Id. But see SCHLOZMAN ET AL., supra note 56, at 410 (noting that participation in litigation via amicus briefs is one exception). One study found that “72 percent of expenditures on lobbying originate with organizations representing business,” SCHLOZMAN ET AL., supra note 56, at 442. Another concluded that “[t]he lobbying expenditures by corporations and trade associations represent more than 84% of total interest group lobbying expenditures at the US federal level.” John M. de Figueiredo & Brian Kelleher Richter, Advancing the Empirical Research on Lobbying, 17 ANN. REV. POL. SCI. 163, 165 (2014). A single business group, the U.S. Chamber of Commerce, spent $1.62 billion lobbying the federal government between 1998 and 2020, Top Spenders, CTR. FOR RESPONSIVE POL., https://www.opensecrets.org/lobby/top.php?
This inequality in political organization has not always been so severe. In the years after the Civil War until the mid-twentieth century, American civil society was made up of numerous federated organizations with membership from the working class. 64 In the early twentieth century, labor organizations like the Knights of Labor, the American Federation of Labor, and the early industrial unions, along with civic organizations like the National Consumers League and National Urban League, engaged millions of low- and middle-income Americans and immigrants in grassroots political activity. Members participated in organizational meetings, decisionmaking, and leadership, as well as in political action at the local, state, and federal levels. Notably, these organizations were primarily member-funded. They were by no means perfect—some were exclusionary or segregated on the basis of race or gender—but they engaged Americans in democratic, political activity at all levels. 65

Progressive era intellectuals, writing against the background of a political economy with significant parallels to today’s, understood that working people’s organizations could redistribute power over political decisionmaking and thereby could ensure a more egalitarian political economy. 66 John Dewey, for example, wrote of a society of citizens whose equality was guaranteed by their participation in voluntary associations with real power in the governance process. 67

showYear=a&indexType=s [https://perma.cc/K8VR-AFK2], compared to $889 million by all labor unions combined, Ranked Sectors, CTR. FOR RESPONSIVE POL., https://www.opensecrets.org/federal-lobbying/ranked-sectors?cycle=a [https://perma.cc/H9JZ-JZN3]. The top three healthcare-industry groups spent more than three times as much on lobbying during this period as the American Association of Retired Persons (AARP). See Top Spenders, supra.

64. SKOCPOL, supra note 50, at 152-57.
65. Id. at 98-158; see also SUZANNE METTLER, SOLDIERS TO CITIZENS: THE G.I. BILL AND THE MAKING OF THE GREATEST GENERATION 2-5 (2005) (noting the ways in which civic organizations prepared Americans for participation in democratic politics); SCHLOZMAN ET AL., supra note 56, at 148 (discussing the role of labor unions in mobilizing voters).
66. See DONALD R. BRAND, CORPORATISM AND THE RULE OF LAW: A STUDY OF THE NATIONAL RECOVERY ADMINISTRATION 50 (1988) (describing progressives’ commitment to encouraging broad participation in economic decisionmaking in order to achieve fundamental structural changes in the economy); BILL NOVAK, A NEW DEMOCRACY: LAW AND THE CREATION OF THE MODERN AMERICAN STATE, 1866-1932 (forthcoming 2021) (manuscript at 51, 57-65) (on file with authors) (arguing that Progressive era “reformers had a thicker and more substantive conception of what was entailed by democracy than the comparatively thin renderings of deliberation, representation, voting, or office that prevail at present”); MARC STEARS, DEMANDING DEMOCRACY: AMERICAN RADICALS IN SEARCH OF A NEW POLITICS 94-97, 105-14 (2010) (describing the rise of industrial unions and their relationship to Progressive era democratic theory); ROBERT B. WESTBROOK, JOHN DEWEY AND AMERICAN DEMOCRACY 434-39 (1991) (discussing Dewey’s efforts to develop a workable form of democratic socialism).
67. John Dewey, What Are We Fighting for?, INDEPENDENT, Apr.-June 1918, at 482. For further discussion of progressive and New Deal approaches to working-class membership
Public opinion and the ballot, he argued, were insufficient tools to achieve change. For the public to solve its problems, organizations of citizens, and organizations of working-class Americans in particular, "needed concrete ways to exercise power over the range of economic and political decision making." 68

Following the Great Depression and the resulting protest movements among the unemployed and industrial workers, the New Deal fostered a rapid growth in the organization of the working class. 69 In 1935, Congress enacted the National Labor Relations Act (NLRA), which guaranteed workers the right to organize and bargain collectively with their employers. 70 In 1935, John Lewis of the United Mineworkers and Sidney Hillman of the Amalgamated Textile Workers Union formed the new Committee for Industrial Organization (CIO), with the goal of organizing all workers, immigrant and native-born, male and female. 71 The CIO's success was remarkable. In the year following the United Auto Workers strike at General Motors in Michigan, nearly five million workers took part in industrial action, and almost three million joined a union. 72 Over the next decade, unions continued to grow, with some becoming a vehicle for the empowerment of Black Americans as well as a force for rising living standards, workplace democracy, and political change. 73

The 1950s and 60s saw the rise of several new transformative social movements among low- and middle-income Americans. 74 In particular, the Civil Rights movement organized Black Americans and their allies, engaging them in a political struggle against racial injustice, including its economic dimensions. 75


68. Andrias, supra note 67, at 648.


72. LICHTENSTEIN, supra note 69, at 51-52.

73. Id. at 78-85, 104.

74. SKOCPOL, supra note 50, at 127-38.

75. See TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS: 1963-65, at 210-11 (1998); MICHAEL K. HONEY, TO THE PROMISED LAND: MARTIN LUTHER KING AND THE FIGHT FOR ECONOMIC JUSTICE 1-16 (2018); McADAM, supra note 41, at 75-84; PIVEN & CLOWARD, supra note 41, at 181-211.
The National Welfare Rights Organization and numerous related community-based groups organized welfare recipients and the poor more generally. Union organization among service workers and public-sector workers expanded during this period as well.

By the 1970s, however, membership organizations began to decline in prominence. Theda Skocpol estimates that membership in the federated mass-membership organizations built in the Progressive and New Deal eras dropped by sixty percent between 1974 and 1994. Today, less than a third of the organizational advocates operating in Washington are membership associations of any kind, and only about an eighth are membership associations of individuals. Although groups associated with the 1960s social movements have survived, they are no longer democratically governed mass-membership organizations. Most are now professionally managed advocacy groups, organized as charitable nonprofits funded mainly by wealthy donors.

Labor unions stand as an exception to this dominant model. Their membership and funding are still drawn from working Americans, and unions are still federated, national organizations whose members have governance rights and the organizational capacity to exercise power in the political economy. Unions provide voice for millions of Americans, enabling workers to improve collectively

78. See SKOCPOL, supra note 50, at 135-38; see also PUTNAM, supra note 50, at 27, 48-64 (showing Americans have become increasingly disconnected from one another and that institutions have disintegrated); SCHLOZMAN ET AL., supra note 56, at 320, 322 (describing the relative lack of organization among lower-income groups and the overwhelming dominance of elites and business interests in lobbying).
79. SKOCPOL, supra note 50, at 212-19.
80. Id. at 212-19; see SCHLOZMAN ET AL., supra note 56, at 319.
82. The other major exceptions include the AARP and the National Rifle Association, which maintain federated membership structures and continue to wield significant power, but neither focuses on organizing working-class or poor Americans on the basis of their class interests. See Abu El-Haj, supra note 18, at 95-97.
their wages, benefits, and working conditions. They also have significant political and civic impact by educating workers about political issues, mobilizing them to support political candidates, contributing financially to political campaigns, and successfully advocating for policy changes at the local, state, and federal levels. Researchers have found that unions are remarkably effective at boosting voter turnout, particularly among the least educated and least well-represented in the electorate. States with higher union density tend to have higher turnout rates among the working class. And union members, as a result of their experience with politically impactful and democratic organizations, tend to join more civic associations. In short, unions enable workers to participate


87. See McElwee, supra note 85.
collectively at every level of politics and government, equalizing power in the political economy and providing a countervailing voice to organized business groups. 88

At their high point in the 1950s, unions represented about a third of workers. 89 Since the 1970s, however, the labor movement’s size and power have declined considerably. This is partly a result of weaknesses in the original NLRA, antiunion reforms in the 1947 Taft-Hartley Act, and a host of Supreme Court decisions that privilege employers’ managerial and property rights over workers’ right to organize. After decades of capital flight, the fissuring of the employment relationship, and intense managerial resistance, unions now represent only about six percent of employees in the private sector and ten percent of the labor force overall. 90 Recently enacted antiunion laws in previously union-dense states, along with the Supreme Court’s decision in Janus v. American Federation of State, County & Municipal Employees, further threaten unions’ ability to exercise effective political voice. 91 In short, unions remain politically active and continue to provide substantial resources to proworker candidates, but because

88. See Jacob S. Hacker & Paul Pierson, Winner-Take-All Politics: How Washington Made the Rich Richer—and Turned Its Back on the Middle Class 57 (2010) ("[O]rganized labor’s role is not limited to union participation in the determination of wages. Much more fundamental is the potential for unions to offer an organizational counterweight to the power of those at the top."); Rosenfeld, supra note 83, at 4-8. For theoretical accounts of the importance of collective rights to democracy, see Robert A. Dahl, A Preface to Economic Democracy 5-6 (1982), which states that, "of the various kinds of equality that might exist in a good society, political equality is surely one of the most crucial, ... including ... the freedom to help determine, in cooperation with others, the laws and rules that one must obey"; and Alex Gourevitch, The Right to Strike: A Radical View, 112 Am. Pol. Sci. Rev. 905, 905, 909-15 (2018), which argues that "every liberal democracy recognizes that workers have a right to strike" because workers need the ability to resist "the oppression that workers face in the standard liberal capitalist economy."

89. Gerald Mayer, Cong. Research Serv., RL32553, Union Membership Trends in the United States (2004) ("As a percent of wage and salary employment and a percent of total employment, union membership peaked in 1954 at 34.8% and 28.3%, respectively.").


91. 138 S. Ct. 2448 (2018). See generally Kate Andrias, Janus: Two Faces, 2018 Sup. Ct. Rev. 21 (discussing recently enacted antiunion laws, as well as the evolution of Supreme Court doctrine).
there are so few of them and their funding is increasingly under attack, they repre-
sent a declining share of organizational activity in politics and governance.  

B. Political Inequality in a Democratic Republic

The impact of these developments on the health of American democracy is 
stark. Political scientists including Larry Bartels, Martin Gilens, and Benjamin 
Page are finding that government policymaking is responsive to the views of 
poor- and middle-income Americans only in settings where the balance of inter-

est-group power aligns with the preferences of these income groups. This 
finding confirms the critical role played by political organization, but it also con-
firms that in contemporary America—where the wealthy dominate political or-
nization—government is by and large unresponsive to the views of the vast 
majority of citizens.  

By examining two thousand public-opinion surveys conducted between 1981 
and 2002, and federal policy adoption during that same period, Gilens estimated 
the extent to which different income groups influence policy outcomes. His 
findings are unambiguous: with a single exception, “when preferences between 
the well-off and the poor diverge, government policy bears absolutely no 

---

92. See Hacker & Pierson, supra note 88, at 179-80; Schlozman et al., supra note 56, at 368-
69. In 2012, corporations spent $2.57 billion on reportable lobbying expenditures, which 
amounted to fifty-six times the amount spent by unions. Drutman, supra note 62, at 8-9, 14. 
Recent court decisions prohibiting unions from collecting fees from objecting workers, while 
maintaining the obligation that unions represent such workers, further weaken unions’ eco-
nomic and political position. See, e.g., Janus, 138 S. Ct. 2448; Harris v. Quinn, 573 U.S. 616 
(2014).

93. See Bartels, supra note 11; Gilens, supra note 11; Gilens & Page, supra note 11.

94. As with all empirical findings, there is debate about the extent to which Gilens’s and Page’s 
findings hold up. See Dylan Matthews, Remember that Study Saying America Is an Oligarchy? 3 
Rebuttals Say It’s Wrong., Vox (May 9, 2016, 8:00 AM EDT), https://www.vox 
com/2016/5/9/115022464/gilens-page-oligarchy-study [https://perma.cc/HCT5-ALN9] 
(summarizing the critiques). But see Martin Gilens & Benjamin I. Page, Critics Argued with 
Our Analysis of U.S. Political Inequality. Here Are 5 Ways They’re Wrong., Wash. Post (May 23, 
/05/23/critics-challenge-our-portrait-of-americas-political-inequality-heres-5-ways-they-
are-wrong [https://perma.cc/ELP9-JX2A] (responding to critics); Sean McElwee, To Influ-
ence Policy, You Have to Be More than Rich, Wash. Monthly (Feb. 16, 2016), https://washingtonmonthly.com/2016/02/16/to-influence-policy-you-have-to-be-more-than-rich [https://perma.cc/JNS-QMKT] (“A full accounting of the evidence leaves the core finding of Gilens and Page standing: the views of the wealthy are disproportionately represented by policymakers, and representation for low and middle income Americans primarily comes from their congruence with the wealthy.”).

95. Gilens, supra note 11, at 53.
relationship to the degree of support or opposition among the poor."96 Moreover, even when the poor and middle class agree with each other and disagree with the wealthy, it is still the views of the wealthy that predominate. Hence, "for Americans below the top of the income distribution, any association between preferences and policy outcomes is likely to reflect the extent to which their preferences coincide with those of the affluent."97 The rare exception occurs when organized political-group power is aligned with the preferences of the poor and middle class.98

The Gilens findings, moreover, hardly stand alone. Other recent work reveals that "the views of constituents in the bottom third of the income distribution receive[ ] no weight at all in the voting decisions of their [S]enators."99 Likewise, Presidents often respond to the "narrow political and economic interests" of the wealthy.100 And, at the state level, "the poor have next to no influence over... policy."101 Summarizing these findings, Gilens and Page conclude bluntly that in twenty-first-century America, "the majority does not rule—but at least not in the causal sense of actually determining policy outcomes."102

A political system in which government policy is responsive to the preferences of the wealthy few rather than to the majority of citizens may be more accurately categorized as an oligarchy than as a democracy or a republic.103

96. Id. at 81.
97. Id. at 83.
98. Id. at 122-23.
99. BARTELS, supra note 11, at 254.
101. Nicholas O. Stephanopoulos, Political Powerlessness, 90 N.Y.U. L. REV. 1527, 1578 (2015); see also Elizabeth Rigby & Gerald C. Wright, Political Parties and Representation of the Poor in the American States, 57 AM. J. POL. SCI. 552, 552 (2013) (finding that low-income preferences rarely "get incorporated in parties' campaign appeals at [the] early stage in the policymaking process"). Scholars are beginning to examine how race and gender interact with income for purposes of representation, with early studies suggesting that Black Americans are particularly likely to be ignored by policymakers. See Griffin et al., supra note 49, at 368.
102. Gilens & Page, supra note 11, at 576.
103. Like the political-science literature on which we rely, we use the term "preferences." However, we are not of the view that preferences are in any sense static or that the relationship between preferences and policymaking is unidirectional. Indeed, our analysis proceeds on the assumption that preferences are dynamic and subject to change through processes that include organizing. Put differently, the idea that government should respond to the preferences, priorities, and concerns of constituents is consistent with the idea that those preferences change over time through deliberation, contestation, and collective debate. Cf. Lisa Disch, Democratic Representation and the Constituency Paradox, 10 PERSP. ON POL. 599, 610 (2012) (challenging the focus on responsiveness to preferences and concluding that "[t]he fundamental
Indeed, in an influential recent book, political-science professor Jeffrey Winters defends the claim that the United States is now functioning as an oligarchy. As he describes the current political reality, “regardless of the other ways in which political power might be equal – such as one-person-one-vote or an equal right to speak or participate – yawning differences in material power create enormous inequalities in political influence and account for key political outcomes won by oligarchs.”  

But, whether best described as an oligarchy or not, the lack of government responsiveness to the views and desires of the vast majority of citizens is a serious problem for a democratic republic.

Indeed, nearly all democratic theorists consider responsiveness to constituents as an important feature of a functioning democracy. As Robert Dahl put it, “[A] key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens, considered as political equals.”

Hannah Pitkin, explicating the complicated nature of representation, concluded that, at the very least, representatives “must not be found persistently at odds with the wishes of the represented.” So, too, the Supreme Court, even as it has struck down campaign-finance regulations, has reiterated that “responsiveness is key to the very concept of self-governance through elected officials.” Nicholas Stephanopoulos puts this widely accepted point in terms of political “alignment,” arguing that alignment occurs when “the preferences of voters are congruent with the preferences of their elected representatives,” with respect to partisan affiliation, public-policy views, and public-policy outcomes. He argues that Madisonian, minimalist, pluralist, participatory, and deliberative democrats all put some version of alignment between voter preferences and representative behavior as an important component of their views of what comprises “democracy.”

---

105. We do not believe that responsiveness is the only important normative goal in a democracy, nor is it the only goal served by our proposals. See infra notes 111-112 and accompanying text.
107. HANNAFENICHELPITKIN, THE CONCEPT OF REPRESENTATION 209 (1967). Pitkin allows, however, for divergence with “good reason in terms of the[] interest” of the represented. Id.
109. See Stephanopoulos, supra note 17, at 287.
110. Id. at 313-16.
Although the relationship between preferences and policymakers in a democracy is neither simple nor unidirectional, the current U.S. government described by Bartels, Gilens, Page, and others is one defined, quite simply, by misalignment and unresponsiveness: the concerns of the majority are rarely reflected in government policy unless by coincidence, and instead that policy aligns with the preferences and priorities of a small, wealthy minority. This mismatch is a problem, moreover, not just from the perspective of democratic government, but from the perspective of republican government as well.

The Constitution, of course, requires that the “United States . . . guarantee to every state in this Union a Republican Form of Government,” a guarantee taken to extend to the structure of the federal government as well. As with democracy, there is robust debate about the particular characteristics of a “republican form of government,” but widespread agreement exists about its core.

111. See Lisa Disch, Toward a Mobilization Conception of Democratic Representation, 105 AM. POL. SCI. REV. 100, 101-12 (2011) (exploring the reflexive process that sets claims about preferences in play); Jane Mansbridge, Rethinking Representation, 97 AM. POL. SCI. REV. 515, 518 (2003) (analogizing legislators to market entrepreneurs insofar as they are both “active . . . in searching out and sometimes even creating preferences”).

112. The reforms we urge also serve other important democratic goals, including that of increasing and equalizing participation. As democracy-law scholars have argued, participation enhances the legitimacy of electoral outcomes, exposes government officials to more of the public’s views, and connects voters more closely to their representatives. See, e.g., Christopher S. Elmendorf, Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?, 35 HASTINGS CONST. L.Q. 643, 677 (2008); Pamela S. Karlan, The Rights to Vote: Some Pessimism About Formalism, 71 TEX. L. REV. 1705, 1709-11 (1993); see also Steven L. Winter, ‘Down Freedom’s Main Line,’ 41 NETH. J. LEGAL PHIL. 202, 203 (2012) (“Democracy’s moral appeal lies not in the promise of an impossible radical freedom, but in the commitment to equal participation in determining the terms and conditions of social life—what, even before the currency of the term ‘democracy,’ the ancient Greeks called isonomia.”). As such, the reforms urged in this paper should appeal even to those scholars who argue that because public opinion is “a continuous process” that is “never definitively represented,” “[t]here is thus no ‘baseline’ from which ‘distortion’ can be assessed,” ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 53 (2014). Moreover, though adequate discussion is beyond the scope of this Article, normative theories of nondomination, self-determination, and agonism also lend support to the kinds of organizational reforms this Article advocates. On nondomination, see Harry Arthurs, Labor Law as the Law of Economic Subordination and Resistance: A Thought Experiment, 34 COMP. LAB. & POL’Y J. 585, 602 (2013); and ANDERSON, supra note 83, at 64-71. On self-determination, see, for example, Hanoch Dagan, Autonomy and Property, in RESEARCH HANDBOOK ON PRIVATE LAW THEORY 184-86, 187-88, 199-202 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020). On agonism and the importance of contestation, see CHANTAL MOUFFE, AGONISTICS: THINKING THE WORLD POLITICALLY 5-9 (2013); and Disch, supra note 103, at 610-11.


features. Akhil Amar, for example, concludes that “majority rule popular sovereignty” is a “central pillar” and the “central meaning” of Republican government. Quoting from Federalist No. 39, Amar concludes, “Republicanism must be defined as against aristocracy and monarchy— as ‘a government which derives all its powers . . . from the great body of the people.”

Like Amar, both Jack Balkin and William Forbath define republican government by way of contrast to aristocracy and, of particular relevance here, to oligarchy. Balkin explains, “[T]he Founders opposed republicanism . . . to monarchy, aristocracy, and oligarchy. A republic is therefore an antimonarchical, antiaristocratic, and anti-oligarchical form of government.” And Forbath warns, “You cannot have a constitutional republic, or what the Framers called a ‘republican form of government’ . . . in the context of gross material inequality among citizens [because] gross economic inequality produces an oligarchy in which the wealthy rule.”

C. Extant Approaches to Using Law to Combat Political Inequality

In light of the problems for democratic and republican government posed by the current unresponsiveness of American government, legal interventions designed to rebalance political power as between the wealthy and the nonwealthy are essential. The public-law literature has identified ways in which extant law

115. Akhil Reed Amar, The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem, 65 U. COLO. L. REV. 749, 751 (1994). In support, Amar draws extensively on Hamilton who wrote in Federalist No. 22, for example, that “a fundamental maxim of republican government . . . requires that the sense of the majority should prevail.” Id. at 763 (quoting THE FEDERALIST No. 22, at 146 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

116. Id. at 764 (quoting THE FEDERALIST No. 39, at 240-41 (James Madison) (Clinton Rossiter ed., 1961)).

117. Balkin, supra note 114, at 1432.


119. While we focus on reforms to build countervailing political organization, we recognize that also important are reforms that would more equitably distribute economic power and
works to redistribute political power. In his *Harvard Law Review* Foreword, Daryl Levinson lays out four areas of public law that are concerned with “distributing power among political interests”: election law, judicial intervention on behalf of groups lacking political power, campaign-finance law, and anticapture judicial review (along with institutional design) in administrative and constitutional law.\(^{120}\) Although these areas are not designed to facilitate organizing among working-class voters, they all share an ambition of equalizing political power so as to correct for imbalances that would otherwise plague democratic participation.\(^{121}\)

For example, Levinson shows how parts of election law—or, the law of democracy—advance this goal. He explains that “the ideal of equalizing political power continues to serve as a normative touchstone in debates about how electoral rules and institutional structures should be designed”\(^{122}\) and that “in at least one area of election law the goal of redistributing political power has always been front and center: the enfranchisement and political empowerment of previously excluded black voters.”\(^{123}\) To ensure that Black voters not only have the formal right to vote but are also “effective[ly] represent[ed],” the federal government banned at-large election systems that diluted the power of Black minorities and also required the construction of majority-minority districts to empower these minorities actually to elect their desired representatives.\(^{124}\) Levinson also shows how judicial enforcement of constitutional rights to protect “politically powerless” groups, à la *Carolene Products* and political-process theory, is a second

---

120. Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 38, 112 (2016) (arguing that structural constitutional law should be more attentive to power as it manifests in democratic-level interests, as opposed to the power of government institutions); cf. Kate Andrias, Response, *Confronting Power in Public Law*, 130 HARV. L. REV. F. 1 (2016) (critiquing Levinson for remaining agnostic on existing maldistributions of power and for offering as a prescription only that "pockets of public law" ought to be linked to one another and to structural constitutionalism 'by a common concern with balancing and diffusing power').

121. Levinson, supra note 120, at 113.

122. Id. at 120.

123. Id. at 124.

area where law redistributes political power. Indeed, the essence of the *Carolene Products* footnote—and of political-process theory—is that certain groups lack an appropriate level of political power and that the law ought to step in to compensate for that absence. Thus, the Supreme Court has long held that a group’s political powerlessness is a relevant factor in determining whether that group qualifies as a suspect class and is therefore entitled to heightened judicial protection. As Levinson writes,

In the first instance, the *Carolene Products* approach calls for courts to rearrange the democratic process in order to fully empower disenfranchised groups. Failing that, however, courts are then charged with replicating the policy outcomes that would have resulted from an idealized process in which all groups exercised their fair share of power.

What we propose are legal interventions of a different sort but with the related goal of rebalancing political power in the direction of political equality. In essence, we suggest multiple ways that the law might enable low- and middle-income people to build organizations with political power—organizations aiming to increase the responsiveness of government to the policy preferences of low- and middle-income Americans, while at the same time shifting power relations between powerless individuals and powerful economic actors like employers, landlords, welfare agencies, and banks. These organizations would aggregate the political voice and resources—financial and human—of their members.

---

125. See id. at 129 & n.553 (discussing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

126. Levinson, supra note 120, at 129; see also Bruce A. Ackerman, Beyond *Carolene Products*, 98 HARV. L. REV. 713, 745 (1985) (“[If we are to remain faithful to *Carolene*s concern with the fairness of pluralist politics, we must repudiate the bad political science that allows us to ignore . . . victims of poverty and sexual discrimination who find it most difficult to protect their fundamental interests through effective political organization.”); Stephanopoulos, supra note 101, at 1577-79 (describing studies showing group-based powerlessness for low-income Americans). On the role of campaign-finance law in equalizing political power, see Levinson, supra note 120, at 135-36. See also HASEN, supra note 13, at 7 (arguing that limiting money in politics “would be a reasonable step” toward “equality in political power”); David A. Strauss, *What Is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 158 (arguing that campaign-finance reform can be justified by “[t]he promotion of equality”). On administrative law and institutional design, see Levinson, supra note 120, at 113-18. See also Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 17 (2010) (addressing the “overlooked elements of agency design that are particularly well-suited to addressing the problem of capture when interest groups line up on one side of an issue”); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 264-66 (1987) (describing ways to enhance constituency voices in agency administration); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1760 (1975) (developing an account of “administrative law as interest representation”).
It is through such aggregation that these organizations would amass political power and could thereby serve as a counterweight to the political influence that flows from wealth. As Joshua Cohen and Joel Rogers have explained,

"[I]nequalities in material advantage . . . translate directly to inequalities in political power. Groups can help remedy these inequalities by permitting individuals with low per capita resources to pool those resources through organization. In making the benefits of organization available to those whose influence on policy is negligible without it, groups help to satisfy the norm of political equality." 127

The closest extant analogue to what we propose in this Article is federal labor law. As we have explained previously, "In the United States, the legal regime that has most successfully facilitated lower- and middle-class political organizing has been labor law." 128 Despite its many flaws, which we explore below, labor law has helped workers build powerful political organizations (i.e., labor unions) through several basic mechanisms. First, labor law explicitly grants workers the right to organize and strike, creating a "frame" for collective action. Second, labor law has historically provided workers with a viable and sustainable organizational funding mechanism by requiring employers to bargain over payroll-deduction systems, and it has provided workers access to some of the information necessary for organizing. Third, the law provides workers the right to use the workplace as a geographical site for organizing by, for example, granting employees the right to discuss unionization on company property and, in limited contexts, allowing nonemployee union organizers to do the same. Fourth, the law plays a critical role in facilitating organizing by promising to insulate workers from employer retaliation. 129 Fifth, the law grants workers the collective right to bargain with employers over terms of employment, including their wages, hours and working conditions. Finally, once organized into unions, low- and middle-income workers are positioned to exercise collective political power through electoral and administrative channels—and also through collective direct action and protest when those traditional channels fail. 130

127. Cohen & Rogers, supra note 20, at 424.
128. Sachs, supra note 18, at 152; see also Andrias, Separations of Wealth, supra note 18, at 500 (discussing the importance of labor unions for low- and middle-income Americans).
129. See Sachs, supra note 18, at 172-75. Of course, the statutory labor-law regime only needs to grant these rights because common law first grants employers near authoritarian control over workers while on employer property. The prior distribution of power is neither natural nor neutral. See infra notes 147-150.
130. See supra notes 82–88; see also Alison D. Morantz, What Unions Do for Regulation, 13 ANN. REV. L. & SOC. SCI. 515, 520 (2017) (discussing how "[u]nion involvement has helped secure the
To be sure, labor law has significant limitations, many of which we have highlighted in our own previous work: labor law excludes large numbers of workers, many of whom are women and people of color; it is characterized by weak enforcement mechanisms, leaving workers effectively unprotected from retaliation when they organize or engage in protests, strikes, or other collective activity; the law places multiple limitations on the form and content of the right to strike; and, although the law provides a right to bargain, it mandates that such bargaining occur only at the worksite level (as opposed to the sectoral or industry level, where power over working conditions is frequently exercised). 131

Despite these very real shortcomings, however, labor law has served as a critical legal mechanism for facilitating the growth of powerful, collective political organizations of working people. In this way, it has been an important tool for rebalancing political power between wealthy and nonwealthy citizens. The ambition of this Article is to suggest how law might do this for low- and middle-income people more broadly and even more effectively.

II. URGENCY AND PROMISE OF A LAW OF ORGANIZING

Such a project is necessary because the democracy-reform proposals that have captured scholarly or political attention to date would do little to build countervailing social-movement organization among working-class and poor Americans. Instead, most scholars and advocates propose reforms to campaign-finance and lobbying law, increasing the voting rights of individual citizens, and improving transparency in politics and government. 132 While important, such proposals have limited capacity to create a more equal political economy. Limitations on the ability of the wealthy to fund campaigns or lobbying, in particular, would require the Supreme Court's First Amendment doctrine to be overruled by a new alignment on the Court or by constitutional amendment. 133 Moreover, such reform faces significant practical hurdles. Money finds new channels when campaign-finance and lobbying regulators shut down one avenue; therefore, capping contributions or even expenditures is unlikely to have much effect. 134

131. See Andrias, supra note 26, at 33.
132. See supra notes 13-17 and accompanying text.
133. See supra notes 14-16 and accompanying text.
134. See Samuel Issacharoff & Pamela S. Karlan, The Hydraulics of Campaign Finance Reform, 77 TEX. L. REV. 1705, 1708-17 (1999) (arguing that money finds new channels when existing routes are closed off); Kang, supra note 14, at 40 (detailing recent Court decisions and
Disclosure and transparency regimes, while valuable, have done little to counterbalance wealth's influence.\textsuperscript{135}

So, too, efforts to protect the right to vote at the individual level are essential. But participation through voting is only one small way in which citizens participate in politics and governance. Likewise, making it easier for a diverse range of participants to lobby,\textsuperscript{136} or to engage in the regulatory process more broadly,\textsuperscript{137} are worthy goals. But without greater organization, poor and working-class Americans are unlikely to engage their legislators or the administrative state effectively.

Legal interventions designed to facilitate and increase the power of countervailing mass-membership organizations are a necessary complement to describing "reverse hydraulics" whereby the Court rolled back campaign-finance law as it stood for decades and "political money has rushed back to newly deregulated channels like water finding its own level"); Sachs, supra note 18, at 165 & n.68 (discussing the limitations of lobbying reform).

\textsuperscript{135} See, e.g., Jennifer A. Heerwig & Katherine Shaw, Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure, 102 GEO. L.J. 1443, 1443 (2014) (finding that "compliance with existing disclosure regulations is inconsistent and that the current regime fails to identify the most potentially influential players in the campaign finance system"). Proposals for expanded public financing or "democracy vouchers" are perhaps more promising, but they have yet to gain political traction, and, in any event, on their own, would be insufficient to counterbalance the power of wealth throughout the political system. See CAGE, supra note 18, at 253-323 (arguing for a public voucher system to give each voter an equal amount to spend in support of political parties, as a complement to other reforms); LAWRENCE LESSIG, PUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 260-70 (2011) (urging the use of "democracy vouchers").


CONSTRUCTING COUNTERVAILING POWER

proposals that have thus far dominated reform debates. Organizations permit low- and middle-income individuals to pool resources and speak with a stronger voice.\textsuperscript{138} Organizations can turn out voters, involve citizens in lobbying, and influence public debate.\textsuperscript{139} They can also help shape regulatory agendas, comment on proposed rules, press for agency-enforcement activity, and navigate the complicated and fragmented processes of government. When political organizations are membership groups, rather than professionally managed “check-book” organizations, their participation helps facilitate more equal political involvement, while giving Americans a chance to practice democracy on a more regular basis.\textsuperscript{140}

Historians have illuminated the instrumental role mass-membership organizations played in the passage of a host of legislation—including labor legislation, the GI bill, and civil-rights legislation—even in the face of staunch opposition from elites.\textsuperscript{141} Social-movement theorists and legal scholars of movements have likewise demonstrated the critical role that movement organizations played in winning changes in law and policy.\textsuperscript{142} Recent quantitative empirical work supports the conclusion that organization is essential to achieving a more equitable democracy. As we have noted, Gilens finds an exception to the general rule that policymakers are far more responsive to the preferences of the wealthy: where countervailing interest-group power is exerted, government policy no longer simply tracks the preferences of the wealthy.\textsuperscript{143}

\textsuperscript{138.} See Cohen & Rogers, supra note 20, at 424; see also Clause Offe, Some Skeptical Considerations on the Malleability of Representative Institutions, in ASSOCIATIONS AND DEMOCRACY 114, 126–27 (Erik Olin Wright ed., 1995) (describing the conventional view of associative action and interest-group formation); John D. Stephens, The Transition from Capitalism to Socialism 49–50 (Michael Mann ed., 1980) (discussing the importance of labor unions and other organizations in strengthening the welfare state and facilitating movement from capitalism to socialism); David Bradley, Evelyne Huber, Stephanie Moller, François Nielsen & John D. Stephens, Distribution and Redistribution in Postindustrial Democracies, 55 WORLD POL. 193, 197 (2003) (“Organization in unions results in a shift of power in the market toward the union members.”).

\textsuperscript{139.} See Sachs, supra note 18, at 152, 157, 169.

\textsuperscript{140.} See supra notes 79–81 and accompanying text.

\textsuperscript{141.} For a few examples from the rich historical literature, see Lichtenstein, supra note 69, at 122–28, which discusses the role of labor unions in enacting wage legislation; Gary May, Bending Toward Justice: The Voting Rights Act and the Transformation of American Democracy (2013), which describes the role of Civil Rights movement in the passage of the Voting Rights Act; and Mettler, supra note 65, at 18–22, which details the role of the American Legion in the passage of the GI Bill. See also Branch, supra note 75 (providing an account of the role played by civil-rights mass-movement organizations in enacting legislative change).

\textsuperscript{142.} See infra Part III (collecting and analyzing sociology literature); supra notes 28–31 (citing legal literature on social movements).

\textsuperscript{143.} See Gilens, supra note 11, at 121–22, 157–58.
organized groups advance the preferences of low- and middle-income Americans, government outcomes more often correspond to the preferences of low- and middle-income Americans.144 Consistent with these findings, the state and local governments that have been most active in attempting to redress wealth inequality of late are those operating in regions with higher levels of organization among working people.145

The legal literature frequently treats the paucity of collective organization among nonelites as an inevitable collective-action problem, a natural occurrence.146 In reality, however, the lack of organization among low- and middle-income Americans—along with the strength of organization among elites—is, in part, a product of law. As Lauren Edelman and Mark Suchman have written, “[O]rganizations are not ‘real’ primordial creatures, but are social constructions, defined and given meaning in large part by legal institutions.”147 Legal forms sometimes directly influence organizational behavior and performance.148 On other occasions, law shapes organizational practices less directly, by contributing to an underlying cultural logic of “legal-rationality.”149 As legal realists, critical legal scholars, and, more recently, the burgeoning Law and Political Economy movement, have pointed out, law constructs economic and political power.150

---

144. For example, Martin Gilens found that unions are among the most important forces moving policy in a direction desired by the less well-off. Id. at 158.
145. See supra notes 85-87 (collecting political-science research on unions and governmental responsiveness).
149. Id. (citing MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 329-41 (A.M. Henderson & Talcott Parsons trans., The Free Press 1968) (1947)).
150. For just a few examples of these insights from the legal realists, see Morris R. Cohen, The Basis of Contract, 46 HARV. L. REV. 533, 568-70 (1933), which argues that, because of
So, too, the landscape of organizational life—and the rights and power wielded by different organizations—are neither natural nor neutral.

Thus, law has played a critical role in constructing the modern corporation;\(^{151}\) in shaping the boundaries between private firms, public agencies, collective enterprises, and nonprofit organizations;\(^{152}\) in empowering and constraining the modern trade union;\(^{153}\) and in enabling some forms of economic coordination, while disabling others under antitrust law.\(^{154}\) Ultimately, it is a background economic and social conditions, formal freedom of contract did not reflect a truly free choice. See also Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 472, 478 (1923) (“To take this control by law from the owner of the plant and to vest it in public officials or in a guild or in a union organization elected by the workers would neither add to nor subtract from the constraint which is exercised with the aid of the government. It would merely transfer the constraining power to a different set of persons.”). From the subsequent generation of critical legal scholars, see, for example, Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 660 (2007), which emphasizes, as law’s most significant feature, “its difficult, but inevitable, accommodation of power and reason”; and Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 958-68 (1985), which critiques the standard treatment of law in neoclassical microeconomic theory. See also Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 17 (1988) (“[A]ll markets are based on and constituted by a structure of legal rules ... [which] are intimately involved in shaping substantive outcomes, and therefore the distributive results of all bargaining processes.”). And from the newly revived field of Law and Political Economy, see Jedediah Britton-Purdy, Amy Kapczynski & David Singh Grewal, *Law and Political Economy: Toward a Manifesto*, LAW & POL. ECON. PROJECT (Nov. 6, 2017), https://lpeblog.org/2017/11/06/law-and-political-economy-toward-a-manifesto [https://perma.cc/AEU5-HHBV].


\(^{154}\) Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 380 (2020). As Katharina Pistor has recently detailed, under our current system, the legal construction of organization tends to benefit capital. Capital is coded “in institutions of private law, including property, collateral, trust, corporate, bankruptcy law, and contract law... [all of which] bestowed critical legal attributes on the select assets that give them a comparative advantage over others in creating new and protecting old wealth.” Pistor, supra note 119, at 21.
matter of political choice which organizations deserve status, protection, and rights under law. 155

In circumstances when the political choice has been to facilitate poor and working people's organizations, that choice has had effect. Indeed, recent empirical work on constitutions suggests that protecting organizational rights, including the right to form labor unions and political parties, has greater effect than granting individual rights because such organizations have both incentives and means to protect substantive rights. 156 The labor context in particular provides numerous examples of how law can further organization building. For example, in the five months following congressional recognition of the right to organize in the 1933 National Industrial Recovery Act, 1.5 million workers joined unions, an increase described by one scholar of the period as “dramatic.” 157 In just six years following the enactment of the NLRA in 1935, more than six million workers organized, 158 a massive increase from the earlier period in which law punished collective action among workers rather than facilitating it. 159 The subsequent passage of the Fair Labor Standards Act (FLSA) – which in its initial form gave unions a privileged position in negotiating wage minimums on an industry-by-industry basis and empowered them to bring collective actions against wage violations – further buoyed organizing among workers. 160 And during World War II, the tripartite War Labor Board, which afforded labor a relatively unprecedented role in setting national labor and employment policy, along with pro-union decisions from the National Labor Relations Board (NLRB), helped

155. See PISTOR, supra note 119, at 21; cf. Robert W. Gordon, New Developments in Legal Theory, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 413, 418 (David Kairys ed., 2d ed. 1990) (explaining that people tend to perceive legal prescriptions as “natural and necessary” or, at least, as “basically uncontroversial, neutral, acceptable”).

156. Adam S. Chilton & Mila Versteeg, Do Constitutional Rights Make a Difference?, 60 AM. J. POL. SCI. 575, 583 (2016) (explaining that the distinctive feature of organizational rights is that they aid the establishment of organizations that have the incentives and means to safeguard rights as well as the means to act strategically to protect them from government repression).

157. PHILIP DRAY, THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA 421 (2010).

158. See MAYER, supra note 89, at 23 tbl.A1.

159. On the use of courts against labor, see WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991). To be clear, our claim is not that law was the only, or even the primary, factor driving the rise and fall of unionization over the course of the twentieth century. As one of us has detailed in prior work, and as numerous scholars have documented, the legal regime was but one of multiple factors playing a role in the rise and fall of unions. See Andrias, supra note 26, at 13-46.

CONSTRUCTING COUNTERVAILING POWER

produce an explosion in union density, with the number of workers in unions growing from nine to fifteen million over the course of World War II.161

Conversely, the passage of the Taft-Hartley Act, which significantly constrained union rights, the repeal of the FLSA industry committees, and numerous subsequent doctrinal developments narrowing labor rights, correlate with a decline in union organization.162 In particular, the Taft-Hartley Act altered federal policy so that it no longer expressly favored workers' collective rights, instead balancing those rights with employees' "full freedom to refrain from engaging in union activity."163 Moreover, the Act codified employers' right to campaign against unionization, permitted individual states to pass "right to work" laws banning union-security agreements, and limited workers' ability to exercise power over the economy by forbidding unions from engaging in secondary boycotts.164 Though scholars disagree on the extent to which Taft-Hartley was a turning point or a codification of preexisting court precedent, little disagreement exists that the statutory amendments weakened labor unions, the social-movement organizations that prior law had previously helped facilitate.165


Membership in the United Auto Workers and the United Steelworkers increased twofold and in the Electric Workers fourfold, surpassing ninety percent, rivaling union coverage rates in the social democracies of Europe. Lambert, supra, at 106.

162. See Lambert, supra note 161, at 105.

163. 29 u.s.c. § 151 (2018).

164. Id. § 158(b)(4) (prohibiting secondary boycotts); id. § 158(c) (protecting employer speech); id. § 165(b) (enabling state "right to work" laws).

Law thus matters to the possibility of organizing for countervailing power. But the question remains, what would a legal regime explicitly designed to facilitate organizing by the poor and working class in contexts beyond labor look like? We offer ways to approach that question in the next Part, and to animate the analysis to come, we conclude this Part with a thought experiment—by imagining what a law designed to facilitate organizing would look like in a real-world context. For these purposes, consider housing. Today, when local zoning commissions, city councils, state legislatures, state and federal agencies, and Congress discuss housing policy, real-estate developers and landlords spend millions on lobbying. But affluent, single-family home owners turn out in force. But Section 8 recipients, poor renters, and the homeless—a group that is growing again after a decade of decline—rarely participate equally in the discussion, let alone exercise significant influence over decisionmaking. Meanwhile, rents and home purchase prices are rising much faster than income, with the median home

---


167. See Roderick M. Hills, Jr. & David Schleicher, Building Coalitions out of Thin Air: Transferable Development Rights and "Constituency Effects" in Land Use Law, 12 J. LEGAL ANALYSIS 79, 80 (describing the political economy of housing policy).


170. See Hills & Schleicher, supra note 167, at 80-81; cf. MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016) (following families in Milwaukee as they struggle to maintain housing).
price in some 200 cities approaching $1 million and “almost half of all renters pa[y]ing] more than 30 percent of their income in rent.” 171

In numerous cities and states, faced with unaffordable rents and substandard housing, tenants are organizing. 172 Indeed, in response to mass unemployment and economic distress resulting from the COVID-19 pandemic, tenant groups have organized numerous protests and rent strikes, while also pushing for new laws that commit funds to housing construction and restrict the unfettered ability of landlords to raise rents. 173 But the groups are typically local, they struggle for funding, and they are most active in a few urban centers like Los Angeles, San Francisco, and New York. 174 In many areas of the country, particularly in suburbs and rural communities, there is little organization among tenants or the homeless, and there is no legal infrastructure for their mobilization and political success.

Imagine, then, a new law of tenants’ unions that would foster incipient organizing. What should such a law look like? The discussion below suggests that the law should explicitly convey that substandard and unaffordable housing is an injustice and that tenants have a collective right to organize to achieve fair housing for all. The legal regime should guarantee safe spaces in which tenants and organizers could meet and discuss concerns about their housing conditions; give organizers the right to access properties to engage tenants in organizing; and


provide organizers with *information*, such as tenants’ names and contact information, as well as information about the housing market. As important, the law should create new *mechanisms to fund* tenant organizations, supplementing charitable donations with a dues system paid through rent check-off and subsidies from the government and landlords themselves. It should provide *resources* to train tenant leaders and allow them leave from their jobs so they could engage in housing organizing and policy work. It should allow tenants to *bargain collectively* with their landlords about problems in their buildings, while also giving tenant organizations a seat at the table during administrative processes regarding housing policy. By creating federated organizations, the tenant organizations could develop sufficient power to challenge local, national, and multinational corporate entities that influence housing policy.

Such organizations could also deploy their newly developed political power in ways that go beyond the particular issues around which they formed: just as labor unions speak across a range of policy questions broader than “labor” issues, tenants’ unions could as well, using their resources to further broader-based political organizing. The law should protect such “bargaining for the common good.” It also should guarantee the right to protest and to strike, free from retaliation by the government or the private landlord.

To be sure, this legal regime would not spontaneously or inevitably create robust social-movement organizations with political power at the local, state, and federal level. Many factors beyond the reach of law influence the ability of social-movement organizations to form and to thrive, including political opportunities, underlying economic trends, leadership capacity, and the commitment and energy of individual organizers. But law matters, and in the next Part we suggest a host of ways in which law can be structured to facilitate organizing for countervailing power.

### III. FACTORS AND FACILITATORS

Having illustrated in the last Part the importance of stronger countervailing social-movement organizations and the plausibility of legal intervention to encourage their growth, in this Part, we show how law can facilitate organization

---


176. In turn, the law might require the organizations to commit to independence, to democratic governance, to financial disclosure, and to nondiscrimination, inclusion, and a duty of fair representation. For a brief discussion of duties, see *infra* note 384.

177. See *supra* notes 41-42; see also McAdam, *supra* note 40, at 24-25 (describing the concept of “political opportunities”).

586
in contexts that are populated by low- and middle-income Americans and rife with exploitation and power imbalances. To do so, we draw from the social-sci-
ence literature, as well as from the experiences of labor law, to offer a more nu-
anced and theoretically grounded picture of how a different set of legal choices
could help facilitate conditions critical to organizing success. We undertake this
analysis with the recognition that while this literature is revealing and sugges-
tive, it does not aspire to be firmly predictive. We begin, in other words, with
the premise of Saul Alinsky's seminal work on organizing theory: “At no time in
any discussion or analysis of mass movements, tactics, or any other phase of the
problem, can it be said that if this is done then that will result. The most we can
hope to achieve is an understanding of the probabilities consequent to certain
actions.” In this spirit, the discussion that follows aims to illuminate a series
of legal interventions that would make organizing by the poor and working class
more probable even if not certain.

A. Framing

A prominent strand in the social-movement literature stresses the im-
portance of a symbolic or social-psychological requisite for successful collective
action. Put simply, this school of thought is concerned with understanding
the cognitive work that goes into translating the raw “events or occurrences” of
everyday life into issues around which people organize collectively. This body
of work thus examines the role played by “collective action frames,” which are
“action-oriented sets of beliefs and meanings that inspire and legitimate the ac-
tivities and campaigns of a social movement organization.”

Although the framing literature is now vast, the leading work in the field can
be productively condensed by focusing on four core aspects—or “tasks”—of col-
lective-action frames: diagnostic framing (which involves both problem

178. See D. James Greiner & Cassandra Wolos Pattanayak, Randomized Evaluation in Legal Assis-
tance: What Difference Does Representation (Offer and Actual Use) Make?, 121 YALE L.J. 2118, 2121
(2012) (referring to randomized control trials as the “gold-standard” for empirical research).
179. SAUL D. ALINSKY, RULES FOR RADICALS: A PRACTICAL PRIMER FOR REALISTIC RADICALS 17
(1971).
180. See generally Pedriana, supra note 40, at 1719 (analyzing the “legal framing of the women’s
movement in the 1960s” to “further develop theoretical knowledge on the cultural and sym-
)
identification and blame attribution and which is alternatively named “injustice” framing in the literature); *prognostic* framing (which involves developing a potential collective approach to addressing the identified problem); *motivational or agency* framing (through which the collective efficacy of the group to carry out the approach is implied); and *identity* framing (in which the collective identity of the group that will carry out the approach is developed).¹⁸³ Taken as a whole, the literature suggests that successful political organizing is enabled by collective-action frames that diagnose injustices, suggest collective solutions, motivate collective responses, and generate collective identity. In this Section, we review each of these four core framing tasks and then move to discuss ways in which law might be deployed to facilitate each of them.

According to Robert Benford and David Snow, the first thing a collective-action frame must do if it is to enable collective action is help potential-movement participants diagnose some set of conditions as a *problem* that ought to be remedied, rather than as a set of conditions that, although undesirable, is a natural, perhaps unavoidable part of life.¹⁸⁴ For William Gamson, such diagnostic work in the context of political action and mobilization necessarily involves diagnosing a set of conditions as an *injustice*.¹⁸⁵ This is critical because injustice, unlike a mere problem, brings forth what Gamson calls “hot cognition, not merely an abstract intellectual judgment about what is equitable,” but “righteous anger that puts fire in the belly and iron in the soul.”¹⁸⁶ For both sets of authors, problem identification is not enough: diagnosis must also involve blame attribution. In Benford and Snow’s words, “[s]ince social movements seek to remedy or alter some problematic situation or issue, it follows that directed action is contingent on identification of the source(s) of causality, blame, and/or culpable agents.”¹⁸⁷ For Gamson, “[a]n injustice frame requires a consciousness of motivated human actors who carry some of the onus for bringing about harm and suffering.”¹⁸⁸

Gamson, moreover, usefully distinguishes between different types of agents that might be blamed for the injustice diagnosed in a collective-action frame. At one end of the spectrum lie abstract, structural forces like the economic system, the political order, and the government. At the other end of the spectrum are individual human actors like a particular manager or landlord. Blaming an abstraction like the market or the political system risks diffusing the “indignation”
CONSTRUCTING COUNTERVAILING POWER

that Gamson finds essential to successful diagnostic framing. On the other hand, blaming particular agents risks shifting attention from structural forces that are legitimately responsible for people’s suffering. Thus, Gamson concludes that frames, to facilitate collective action, must work to attribute blame somewhere between broad, abstract structural forces and discrete human actors. As he writes:

To sustain collective action, the targets identified by the frame must successfully bridge abstract and concrete. By connecting broader socio-cultural forces with human agents who are appropriate targets of collective action, one can get the heat into the cognition. By making sure that the concrete targets are linked to and can affect the broader forces, one can make sure that the heat isn’t misdirected in ways that will leave the underlying source of injustice untouched. 189

So, perhaps, the injustice of low wages is laid at the feet of neither capitalism nor the factory superintendent, but the corporation that controls the employment relationship or even the corporations that make up the relevant economic sector. And the injustice of high rent and poor living conditions is laid at the feet of neither the market nor a particular building owner, but the landlords who have undue influence at the city council and state legislature.

Once an injustice is identified, and blame properly attributed, a successful collective-action frame then must identify and communicate an approach to remedying the injustice: it must, according to Benford and Snow, “articulat[e] . . . a proposed solution to the problem, or at least a plan of attack, and the strategies for carrying out the plan.” 190 Importantly, although there must be a connection between prognosis and diagnosis — how to address a problem depends on the nature of the problem to be addressed — the articulation of injustice and attribution of blame narrows but does not determine how to address the injustice. 191 This point may be obvious, but it is worth noting. Take the injustice of low wages in the fast-food industry as attributed to the five largest corporations controlling that industry. A range of approaches to remedying the injustice are plausible. Workers might, for example, sue the corporations under wage-and-hour laws, picket their restaurants as a means of pressuring the corporations, or organize into unions and attempt to bargain collectively wage increases. Any of these approaches would constitute a plausible approach to the injustice. The prognostic work of a collective-action frame involves articulating one or

189. Id. at 33.
190. Benford & Snow, supra note 182, at 616.
more of these approaches: this allows participants to formulate a viable plan of attack.

The first two framing tasks—diagnostic and prognostic—involve cognitive work about dynamics external to the mobilizing group: what is the injustice and who is causing it. The second two tasks—motivational and identity—involve cognitive work internal to the mobilizing group. This is work focused on bringing participants into motion and struggle, in an effort to build a collective identity. For Benford and Snow, motivational framing involves a call to action, the “construction of appropriate vocabularies of motive” that provide prods to action by, among other things, overcoming both the fear of the risks often associated with collective action and Olson’s vaunted free-rider problem.192 Gamson, who names this framing task “agency,” describes its function in terms of efficacy. Thus, to fulfill the agency task, a collective-action frame must give participants a sense both that they are capable of redressing the injustice in question and that their opposition is vulnerable to challenge. The frame must imply that “it is possible to alter conditions or policies through collective action” and must “deny the immutability of some undesirable situation.”193 In even simpler terms, the motivational task involves a communication to potential participants that “we can do this.”

As the above suggests, however, there remains a final task for the frame: defining, or creating, the “we” that can successfully act collectively against the articulated injustice. Gamson names this framing task “identity”: the process by which a collective identity among movement participants is constructed.194 Indeed, in stressing the importance of this kind of collective identity, this aspect of framing theory is resonant with other strands of social-movement theory which are centered around the observation that successful movement building and mobilization are enabled by the existence of a collective identity among movement participants. For example, Bert Klandermans, a leading scholar of identity and movement participation, writes that “[t]he basic hypothesis regarding collective identity and movement participation is fairly straightforward: a strong identification with a group makes participation in collective political action on behalf of that group more likely.”195

Here, the identity-construction task of a collective-action frame is connected closely to the blame-attribution task. As Gamson explains, in the political

192. Benford & Snow, supra note 182, at 617.
193. GAMSON, supra note 185, at 7.
194. Id. at 7-8.
context, collective identities are often oppositional: the “we” exists in opposition to a “they,” where “they” are the agents responsible for the injustice.\(^{196}\) Thus, if the injustice of low wages paid to fast-food workers is attributed to a particular manager, the “we” who can fight that injustice will be a narrow group, probably just those impacted by this particular manager’s actions. On the other hand, if low wages are attributed to the five largest corporations in the fast-food industry, the “we” can be all fast-food workers.

This is not to imply that collective identity flows ineluctably from successful blame attribution. However, collective-action frames can contribute to collective-identity construction, not only by identifying an oppositional “they,” but also by increasing the salience of certain aspects of potential participants’ identities. Because identities “exist in a hierarchy of salience,” the more salient an aspect of identity is, the more likely it is that the individual will act in accordance with that identity.\(^{197}\) For example, all individuals who live in a certain neighborhood will share a collective identity of neighborhood resident. This identity may remain largely irrelevant for much of an individual’s life and never form the basis for action of any kind. But, as Klandermans teaches, if the government constructs a waste-disposal plant in the neighborhood, “[c]hances are that within a very short time the collective identity of the people living in that neighborhood becomes salient.”\(^{198}\) Finally, we know from Bernd Simon’s work that a shared sense of unjust treatment can increase the salience of a collective identity that is the basis of that unjust treatment.\(^{199}\) For example, racial- and religious-based discrimination has functioned throughout history to increase the salience of collective identities based around racial- and religious-group membership.\(^{200}\) Thus, by framing certain events or occurrences as injustices, a frame can increase the salience of a collective identity built around the shared experience of that injustice. Framing low wages in the fast-food industry as an injustice suffered by all fast-food workers can contribute to the activation of a collective identity among fast-food workers. Framing high rents as an injustice suffered by tenants in a city can activate a collective identity of city tenants.

\(^{196}\) Gamson, supra note 185, at 7-8.


\(^{198}\) Klandermans, supra note 195, at 364.


In sum, then, theorists posit that successful collective action can be enabled by collective-action frames that accomplish four interrelated tasks: they diagnose an injustice and attribute blame for it; they elaborate a means of remediating the injustice; they motivate participants to fight for that remedy; and they help activate the identity of the collective who will do the fighting. As some social-movement theorists recognize, moreover, law has the capacity to serve as a powerful collective-action frame. Indeed, civil-rights law is often identified in the social-movement literature as a “master frame”—a frame that “resonates” deeply across social movements and protest cycles.\textsuperscript{201} In the workplace-rights context, legal scholar Jennifer Gordon describes the powerful way that rights have served as a collective-action frame:

\begin{quote}
The idea that employers were \textit{supposed} to be acting differently—that in paying so little and demanding so much they were ignoring a set of established norms, codified as rights—suggested a less individualized, more systemic explanation of the problems immigrant[\[\text{workers}\] faced in trying to earn enough money to support themselves and their families. . . . If the problem was systemic, immigrant[\[\text{workers}\] would need to respond in kind.\textsuperscript{202}
\end{quote}

And workplace statutes can also fulfill the diagnostic and prognostic work of collective-action framing.\textsuperscript{203}

But how might we tailor legal interventions in a manner designed to enable laws to serve as collective-action frames more generally? We think the ideal way to do so is as follows: couple statutory provisions of substantive standards with the right to organize collectively to enforce those standards and to achieve greater substantive protections in the future. For purposes of this discussion, imagine a statute that affirmed a right to adequate and sustainable housing, granted tenants the right to just-cause eviction, and also granted tenants a right to organize unions.\textsuperscript{204} The organizing right would include, among other things, the right of organizers to access tenant contact information; the right of organizers to come onto building property to speak to tenants and a free building space for the tenants’ union to meet; a robust antiretaliation guarantee; an obligation for the

\begin{flushleft}
\textsuperscript{201} Pedriana, \textit{supra} note 40, at 1725.
\textsuperscript{202} Gordon, \textit{supra} note 30, at 171-72.
\textsuperscript{204} See Alexander, \textit{supra} note 44, at 248 (showing how housing movements are constructing “the human right to housing in American law by establishing through private and local laws a right to remain, a right to adequate and sustainable shelter, a right to housing in a location that preserves cultural heritage, a right to a self-determined community, and a right to equal housing opportunities for nonproperty owners”).
\end{flushleft}
CONSTRUCTING COUNTERVAILING POWER

building owner (or other relevant economic actor, such as real-estate investment trusts) to bargain with a union once it was formed; and the right of the union to a seat at the table in administrative processes regarding housing policy. Such a statute has the potential to fulfill all four framing tasks.

With respect to diagnosis, the statute would clearly identify an injustice and attribute blame: by banning evictions without cause, the law identifies such evictions as unjust; by making building owners liable for damages, the law attributes blame to the owners. Thus, the provision of right and remedy might in themselves accomplish the diagnostic-framing task. But the law could go much further in the direction of diagnostic framing. For example, in the legislative findings or statement of purpose, the law could explicitly identify evictions without cause as an injustice by detailing the harms such evictions cause to families. The law might also name evictions without cause as one example of a broader injustice, namely the power of landlords unchecked by the collective strength of tenants. In either case, the findings and purposes can list the unjust benefits that building owners extract from without-cause evictions and can directly name owners as the source of the problem. They could go on to detail other deleterious consequences that flow from unchecked landlord discretion.

Crucially, given its status as a powerful source of social and political legitimacy, the law can offer convincing diagnoses. 205 As a complement to diagnoses made by tenant organizers themselves, a statutory pronouncement that evictions without cause are illegal and that building owners are legally liable for violating this norm provides an additional source of diagnosis, and one that many tenants would likely credit. These suggestions, moreover, are not at all unprecedented. For example, when Congress enacted the Wagner Act in 1935, it identified an injustice and attributed blame explicitly in the statute. Thus, 29 U.S.C. § 151 states that “[t]he denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining” had the effect of, inter alia, “depressing wage rates and the purchasing power of wage earners.”

With respect to prognosis, the statutory grant of organizing rights would articulate for potential participants a viable plan of attack. Here, again, the grant of rights itself might be sufficient. A law that marries a substantive right with a protected right to engage in collective action communicates that organizing is a means of remedying the injustice identified in the statute. Again, too, the law might go further in the direction of accomplishing the framing task. In particular, the findings and statement of purpose could identify the legislature’s faith in

205. See generally Pedriana, supra note 40, at 1726 (explaining how legal rights have a “powerful impact on how grievances and objectives are conceived, legitimized and acted upon in the American political system”).
the power of collective action as a means of carrying out its legislative goals. In our hypothetical statute, this might include a statement that substantive standards—the right to just-cause evictions—are generally best enforced when the protected class is organized collectively. More broadly, the findings and purposes section of the law might state that organizing would balance bargaining power between landlords and tenants and thus enable tenants to accomplish important goals beyond the protection of just-cause eviction. Here, again, there is historical precedent for law fulfilling the task of prognostic framing. Having articulated injustice and attributed blame, the Wagner Act’s findings section moves on to set out a viable plan of attack for workers. Thus, § 151 states:

It is hereby declared to be the policy of the United States to . . . encourag[e] the practice and procedure of collective bargaining and by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Our hypothetical statute can also perform the task of motivational framing. As the above discussion reveals, the task involves a combination of “prodding” participants into action, helping them overcome fears related to participation, and convincing them of their efficacy in combating the named injustice. With respect to motivating action, our statute signifies legal legitimation of and thus legal support for the tenants’ effort to organize unions in order to better their housing conditions. Such legitimation can motivate subsequent organizing efforts. For example, labor organizers successfully used congressional protection for the right to organize as a call to action. Thus, John L. Lewis famously translated legal protection for the right to organize into a slogan that was instrumental to the massive campaign of the United Mine Workers of America to unionize the coal mines, “The President wants you to join a union.” Our statute also can help overcome fears of participation by offering robust antiretaliation provisions, including significant damages for violations. And the statute can contribute to the interrelated goals of demonstrating the oppositions’ vulnerability and participants’ efficacy. The existence of the statutory right coupled with meaningful remedies is a step in the direction of establishing that landlords are vulnerable to challenge. And, as discussed above, the grant of access rights to organizers strengthens this function of the law.

Finally, the hypothetical statute can contribute to the construction—or activation—of a collective identity. By making landlords legally liable for evictions

---

CONSTRUCTING COUNTERVAILING POWER

without cause, and by granting tenants organizing rights, the statute establishes a "we" and a "they." "We" are the tenants protected by the statute; "they" are the landlords governed by it. Of course, much of the identity-activation work will occur—if it does—as a product of organizing and struggle that the statute might itself facilitate. As tenants begin to exercise the collective rights that the statute provides and engage in contestation with their landlords, it is likely that the collective identity of "tenant" will become more salient. The statute's contribution to this work should not be underestimated.

The hypothetical tenant-organizing statute imagined here would, of course, have analogues in multiple contexts. In the labor context, it would involve granting both new substantive standards—say, a just-cause dismissal guarantee—coupled with more robust protections for organizing than exist under current law. In the debtor context, it might involve a substantive right—cancellation of student debt—combined with a new explicit right to organize a debtor’s union.

A broader observation is in order before moving on. The ability of a law like this to accomplish the four core framing tasks is enhanced by the law’s explicitness. Coupling the grant of a substantive right with explicit protection for collective action makes clear the law’s determination that participants ought to organize to fight the injustice that the law condemns. Statutory findings and statements of purpose that name injustices and identify blameworthy agents make it even more likely that the law will effectively provide a diagnostic frame. So too, explicit legislative expression of support for organizing as a means of addressing injustice will increase the effectiveness of the law as a prognostic frame.

B. Resources

While the foregoing accounts of mobilization and organization stress symbolic factors, the literature suggests that resources of various kinds are equally important. John D. McCarthy and Mayer N. Zald, for example, argue that traditionally powerless groups have capacity to sustain movement activity only if they are able to aggregate resources through social-movement organizations.207

Resources enable movements to form and then to engage in effective political action and protest. They help movements "convert[] adherents into constituents and maintain[] constituent involvement." Constituents, in turn, create more resources for the movement. Ultimately, resource aggregation is critical to the ability of movements to persist over time. Daniel M. Cress and David A. Snow have observed that "fluctuation in the level of discretionary resources accounts . . . for variation in the activity levels of social movements." Sarah Soule, Doug McAdam, John McCarthy, and Yang Su have found that resources matter more for movement formation and collective protest than numerous other factors, including political opportunities.

Empirical work demonstrating the importance of resources cuts across populations, time periods, and geography. To take just a few examples, sociologists have demonstrated the importance of resources to organizing success among national women's and civil-rights organizations in the mid-twentieth century in the United States; homelessness-rights organizations in cities in the late 1980s and early 1990s; environmental organizations in both the United States and Western Europe; state-level suffrage organizations in the Past and Future of the Resource Mobilization Research Program, in FRONTIERS IN SOCIAL MOVEMENT THEORY 326 (Aldon D. Morris & Carol McClurg Mueller eds., 1992) (exploring the developments of resource-mobilization research).


209. McCarthy & Zald, supra note 46, at 1221.

210. Id.

211. McAdam, supra note 41, at 22-23, 43-48, 54-56.


213. Soule et al., supra note 208, at 249-54.

214. See Edwards & McCarthy, supra note 207, at 116-17 (surveying literature).


216. Cress & Snow, supra note 212, at 1107.

nineteenth century; shantytown residents in Chile during the Pinochet regime; and antiapartheid activists in South Africa.

Social-movement organizers recognize that a principal antecedent task to effective collective action is resource aggregation. So do their political opponents. Consider the battle over union funding that has persisted over many decades. Though union leaders and union opponents agree on little, they share a conviction that funding is essential to the success of the labor movement and its impact on politics.

While early work treated resources as an undifferentiated category, subsequent studies offer varying taxonomies of resources, tangible and intangible, upon which movements depend. Bob Edwards and John D. McCarthy provide a fivefold typology: moral, cultural, social organization, human, and material. Michael McCann discusses “instrumental” resources, which can be manipulated or exchanged in a direct way, and “movement culture” resources, which are associational bonds that contribute to effective communication and solidarity. Cress and Snow focus on four categories: moral, material, human, and informational resources. Though the literature has not settled on a single

way of unpacking the category of resources, certain types of resources repeatedly emerge as essential. These include: funding, informational resources, human resources, and spaces—physical and virtual. Other intangible resources, such as credibility and legitimacy, are important as well.

Obtaining sufficient resources to sustain effective organizing and political activity is a significant challenge for social-movement organizations.\(^{227}\) As Mancur Olson warned in his classic text, when an organization primarily delivers collective goods, individuals will not, on their own, bear the costs of obtaining such goods.\(^{228}\) To some extent, this familiar account is overdrawn, as many individuals participate in social movements for ideological or moral reasons, even where rational-choice theorists would predict indifference.\(^{229}\) Nonetheless, few individuals can or will bear the full costs of sustaining social movements. The problem is particularly acute among communities with limited resources.\(^{230}\)

Classic public-choice theory has long recognized the organizational advantages of high-income, well-organized constituencies in the legislative and regulatory process, but it largely treats these advantages as a given.\(^{231}\) On this account, certain interests have an inevitable advantage over a dispersed public when it comes to resources. Law might shield against these advantages, for example through limiting campaign contributions or adjusting judicial review of administrative action, but law is not itself responsible for creating the advantages.\(^{232}\) As the following Section demonstrates, however, the resource problem faced by poor people’s movements is already fundamentally shaped by law—and can be reshaped by legal intervention.

\(^{227}\) See Edwards & McCarthy, supra note 207, at 117.


\(^{229}\) See Rubin, supra note 28, at 16 (describing how "[s]ocial movement scholars soon became aware that the resource-mobilization approach failed to account for ... [ideological and moral] motivations").

\(^{230}\) SCHLOZMAN ET AL., supra note 56, at 13-16.


1. **Funding**

   a. **Charitable Donations: Limits and Pitfalls**

   The most obvious resource needed by social-movement organizations for their operation and survival is money. Currently, the law facilitates fundraising primarily through grants of nonprofit status by state governments and tax-exempt status by the Internal Revenue Service to qualified organizations. Foundations, philanthropies, and individual donors contribute to qualified nonprofit organizations of their choice. In the process, donors reduce their own tax burden. Most rights organizations in the United States are organized under section 501(c)(3) of the tax code and receive the bulk of their funding from large donations by foundations and philanthropies.

   Legal-mobilization scholars largely have viewed this external funding as indispensable to successful rights litigation and social-movement building. Early social-movement theory also emphasized the extent to which professional, philanthropically funded social-movement organizations contributed to movement building in the 1960s and 1970s.

   Although the value of donations to low-resourced organizations is substantial, more recent work has demonstrated that reliance on foundation money and charitable donations also has significant drawbacks. First, the tax code puts constraints on the kinds of activities in which recipients of charitable donations can

---


237. See McCarthy & Zald, supra note 46, at 1216-17.
engage. Organizations respond to these constraints by dividing their political activity from their nonpolitical tax-exempt activity and by limiting their political engagement. Accordingly, several scholars who worry about the decline of mass-membership organizations and their engagement in politics argue that the law should be reformed to permit political activity by 501(c)(3)s or at least those nonprofits that qualify as mass-membership organizations. But such a proposal misses the mark. Allowing 501(c)(3)s to engage in unfettered political activity would not address the fundamental problem created by social-movement organizations’ reliance on charitable donations: when most resources flow from elite donors and foundations, those entities influence which organizations are funded, shaping the overall organizational landscape. Not surprisingly, social movements that resonate with the concerns of relatively privileged social groups predominate. Groups that focus on the mobilization of the poor receive less funding and are less numerous than groups that focus on concerns of higher-income populations.

Second, and perhaps more troubling, when poor and working people’s organizations receive most of their funding from elite donors, the democratic character of such organizations can be undermined. Organizations find their

238. Edwards & McCarthy, supra note 207, at 137 (“SMOs that choose to become officially registered with the US Federal government as nonprofit organizations are expected to adopt certain standard operating procedures and may, as a result, adopt ways of doing things that constrain their choice of certain mobilizing technologies and encourage others.”); see also SKOCPOL, supra note 50, at 206–07 (discussing how “U.S. tax rules encourage foundations,” a type of organization that, in turn, encourages the development of “advocacy groups with expert professional staffs”); Daniel M. Cress, Nonprofit Incorporation Among Movements of the Poor: Pathways and Consequences for Homeless Social Movement Organizations, 38 SOC. Q. 343, 357–58 (1997) (arguing that the relationship between moderation and nonprofit incorporation by homeless social-movement organizations is complicated and context-dependent); John D. McCarthy, David W. Britt & Mark Wolfson, The Institutional Channeling of Social Movements by the State in the United States, in 13 RESEARCH IN SOCIAL MOVEMENTS, CONFLICTS AND CHANGE 45, 52 (Louis Kriesberg & Metta Spencer eds., 1991) (explaining how regulations on tax-exempt organizations “channel the activities of many modern SMOs”).

239. SKOCPOL, supra note 50, at 206–07; Edwards & McCarthy, supra note 207, at 121.

240. See Abu El-Haj, supra note 18, at 135 n.368; see also Dana Brakman Reiser, Dismembering Civil Society: The Social Cost of Internally Undemocratic Nonprofits, 82 OR. L. REV. 829, 831–32, 892–93 (2003) (discussing the significant social costs of a trend away from member-driven organizations and suggesting tax benefits for membership organizations as one of several potential responses to mitigate these costs).


CONSTRUCTING COUNTERVAILING POWER

priorities shaped by elites. Ultimately, such organizations become less likely to challenge structural inequalities that put elite interests at risk.

Reliance on charitable donations also tends to shift organizational priorities and tactics. Elite donors tend to show more interest in supporting litigation and policy campaigns and show less interest in funding membership mobilization, new-member organizing, and protest or other confrontational tactics. As a result, organizations develop extensive professional fundraising mechanisms, shifting resources and time away from organizing members and engaging them in collective action. That is not to say that charitable donations are wholly unhelpful or that elites have fully captured social-movement organizations. Rather, such donations have long provided critical funding to struggling, low-income groups. Research also suggests that donations provide donors influence rather than full control. Research does suggest, however, that sources of funding influence an organization’s capacity for effective collective action.

243. See KAREN FERGUSON, TOP DOWN: THE FORD FOUNDATION, BLACK POWER, AND THE REINVENTION OF RACIAL LIBERALISM 3 (2013) (exploring how the Ford Foundation’s effort to reforge a national consensus on race had the effect of remaking Black-power ideology and accommodating inequality); Francis, supra note 235, at 278 (arguing that private funders “operate like interest groups or private firms, to buy influence over the goals and strategies of activists and cause lawyers,” and that, in the case of the NAACP, the Garland Fund shifted the organization’s “agenda away from racial violence,” criminal justice, and labor rights “to education,” with both positive and negative consequences); Benjamin Marquez, Mexican-American Political Organizations and Philanthropy: Bankrolling a Social Movement, 77 Soc. Serv. Rev. 329, 330 (2003) (showing that gifts and grants underwrite Mexican American groups, but only when they pursue political activities favored by corporations, foundations, and wealthy individuals); cf. RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 190 (2007) (highlighting the indeterminate nature of the NAACP’s legal agenda in the mid-twentieth century and the initial focus on economic justice, subsequently lost).

244. Sameer M. Ashar & Catherine L. Fisk, Democratic Norms and Governance Experimentalism in Worker Centers, 82 L.A.W & CONTEMP. PROBS. 141, 182-83 (2019) (discussing this problem in the context of worker centers and labor unions); Francis, supra note 235, at 276-281 (discussing the dynamic of movement capture). A potential solution would be to impose more stringent caps on charitable donations, but this would result in an overall decline in funding and in an additional investment in fundraising rather than organizing.

245. Edwards & McCarthy, supra note 207, at 138-40; see also PIVEN & CLOWARD, supra note 41, at 5 (arguing that professionalized social-movement organizations deradicalized the movements from which they were created and led them to adopt less confrontational and more conventional tactics in social-change campaigns); Jenkins & Eckert, supra note 242, at 819, 826-27 (showing that elite patronage professionalized the Black movement, which may have accelerated movement decay but did not transform movement goals or tactics).

246. Ashar & Fisk, supra note 244, at 156 (noting that “foundation funding has been, and remains, essential to the operations of worker centers”).

247. See id. at 157, 182-83 (noting that worker-center leaders reported that “foundations have not dictated their agenda” but that they “can impact priorities”).
Finally, it is worth noting that not all tax-exempt contributions carry the same level of capture risk. Daniel Cress and David Snow have found that when low-income groups receive a significant portion of their donations from “social gospelite” organizations or related social movements (e.g., religious institutions or labor unions), the risk of elite capture is reduced. In such cases, the institutions that are providing resources are themselves membership organizations, often part of the same social movement. Thus, homeless organizations have been successful by partnering with churches, while worker centers representing poor, vulnerable workers have been successful by partnering with unions. The more resource-rich social-movement organizations have enabled organizing among their impoverished counterparts. Still, overall resources available are limited under this model.

b. Self-Funding Facilitated by Law

The previous Section shows that donations are unlikely, alone, to sustain mass-membership organizations that effectively counterbalance the power of the wealthy in our democracy. There may be good reasons to maintain the flow of donations to nonprofit organizations, but a mechanism for organizations to engage in what sociologists refer to as “indigenous” funding—that is, dues or membership-based funding—is a critical supplement.

248. Cress & Snow, supra note 212, at 1106.
249. Id. at 1098-99, 1105-07.
250. See Ashar & Fisk, supra note 244, at 141-44, 186.
251. Notably, in recent years, some nonprofits have begun to de-emphasize their reliance on tax-exempt charitable donations. See Pozen, supra note 81. One reason is that, under the recent overhaul of the tax code, most taxpayers will no longer itemize deductions, reducing the incentive to donate to 501(c)(3) and rendering public-charity status less relevant to fundraising. Tax Cut and Jobs Act of 2017, Pub. L. No. 115-97, § 11021, 131 Stat. 2054, 2072-73 (codified in scattered sections of 26 U.S.C.) (increasing the standard deduction substantially for single and joint filers); see Joseph Rosenberg & Philip Stallworth, The House Tax Bill Is Not Very Charitable to Nonprofits, TAX POL’Y CTR. (Nov. 15, 2017), https://www.taxpolicycenter.org/taxvox/house-tax-bill-not-very-charitable-nonprofits [https://perma.cc/L9CS-5WXA] (predicting a substantial decline in itemized deductions). In addition, social-justice organizations have begun to question whether a 501(c)(3) model, and its required focus on litigation and courts over politics and grass-roots organizing, is capable of producing lasting social change, and have created new 501(c)(4) branches that can engage in political action. Pozen, supra note 81. Although the shift to 501(c)(4) “social-welfare” organizations might enable organizations to change their tactics, the change will not necessarily weaken the influence of elite donors on these organizations. Indeed, social-welfare organizations, like charitable nonprofits, are likely to derive much of their funding from elites. David S. Miller, Social Welfare Organizations as Grantmakers, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 413, 417 (2018).
A dues model has the advantage of aligning an organization’s funding stream with basic commitments to democracy and self-governance. Organizations that are self-funded tend to be more accountable to their members, more democratically governed, and less at risk of a decline in funding due to changes in donor-giving patterns or foundation priorities. The labor movement, in particular, has achieved independence and relative financial stability through a dues model. Numerous grassroots-organizing groups have recently begun to experiment with dues systems in order to reduce their reliance on philanthropic donations.

In order for a dues model to sustain an organization, however, the Mancur Olson collective-action problem must be overcome. Absent a legal mechanism to mandate or facilitate dues, constituents are likely to free-ride, either for self-interested (albeit rational) reasons or simply because of the logistical difficulty of contributing. Indeed, low-income individuals who, in principle, are willing to pay to support their organization frequently cannot do so easily because of limited access to banking or formal financial services.

The most direct way to remedy the collective-action problem is through legal reforms that mandate contributions. However, a legal requirement that landlords transfer a mandatory tenant fee to a membership-based tenant organization, or that public-benefits providers transfer a mandatory recipient fee to welfare-rights organizations, would likely be deemed unconstitutional, even if tenants or beneficiaries were given the option not to become organization members. In *Janus v. AFSCME, Council 31*, the Supreme Court concluded that a public-sector employer cannot require that all workers covered by a collective-bargaining agreement pay an agency fee to a labor organization to cover the cost of collective bargaining and grievance handling; such payment constitutes impermissible compelled speech. Under *Janus’s* logic, a government requirement that individuals contribute to a representative housing, welfare-rights, or debtors organization would also likely violate the First Amendment.

---


254. See Strom, *supra* note 252, at 6 (describing dues efforts of such groups as National Domestic Workers Alliance, the Restaurant Opportunities Centers United, and Kentuckians for the Commonwealth, as well as other innovative mechanisms of fundraising by grassroots organizing groups).


In separate articles, each of us has argued that the Janus majority’s First Amendment analysis is incorrect. But accepting the doctrine as binding, there are still several ways law can facilitate self-funding. First, the law could permit private entities and social-movement organizations to enter into contracts that require fees and that facilitate the fee transfers, as is permitted under the NLRA for private-sector employers and unions. For example, the law could enable membership-based tenant organizations of low-income renters to negotiate contracts with private landlords that require tenants to pay a small percentage of their monthly rent to their tenant organization in exchange for services provided by that organization. Because the state itself would not be compelling fees under this approach, state action would not be sufficient to trigger the First Amendment.

A second approach would be for the law to require private entities to facilitate the transfer of voluntary dues. This approach is unlikely to solve fully the collective-action problems discussed above. Comparative data on labor unions strongly suggest that voluntary dues, even when paired with services available only to members, result in a significant free-rider dynamic. But a facilitative model does vastly improve upon the status quo, solving some of the logistical hurdles that exist when organizations seek to fundraise internally. One promising example is the recently enacted New York City law that gives employees the option of deducting contributions to qualified nonprofit organizations that will advocate for nonunion workers; if employees exercise this option, the law requires employers to facilitate such transfers. Another example is the voluntary-dues campaigns that many unions have engaged in the aftermath of Janus, where unions obtain dues authorization and the public employer subsequently transfers money to the union. In order to ensure stability, many states allow

257. Andrias, supra note 91, at 29–30; Benjamin I. Sachs, Agency Fees and the First Amendment, 131 HARV. L. REV. 1046, 1076 (2018); see also, e.g., William Baude & Eugene Volokh, Compelled Subsidies and the First Amendment, 132 HARV. L. REV. 171, 171 (2018) ("The better view, we think, is that requiring people only to pay money, whether to private organizations or to the government, is not a First Amendment problem at all.").


259. See Janus, 138 S. Ct. at 2486 (reserving the question whether private-sector agency fees violate the Constitution).


262. Ian Kullgren & Aaron Kessler, Unions Fend Off Membership Exodus in 2 Years Since Janus Ruling, BLOOMBERG L. (June 26, 2020, 6:15 AM), https://news.bloomberglaw.com/daily-labor-
revocation of authorization only during designated windows. A similar model could facilitate transfers to tenant organizations, debtors' unions, and organizations of public-benefits recipients. Finally, to encourage membership, organizations can combine the voluntary-dues model with provision of benefits and services, such as insurance, education, discount cards, and legal assistance; the National Rifle Association and the American Association of Retired People have both successfully used this approach. Indeed, government could empower organizations to serve as providers of social-welfare benefits, as in the Ghent system in Europe, where unions administer unemployment insurance, thereby providing organizations additional opportunities to recruit voluntary-dues payments.

To be sure, self-funding models are not a panacea, particularly when members can afford only minimal donations. Self-funding models can also have demobilizing effects, creating a transactional model in which members pay dues in exchange for services but do not engage in the broader movement work. Nonetheless, even movement organizations skeptical of a transactional-dues approach recognize that a membership-funding system helps safeguard against elite domination and, if combined with other organizational commitments, builds a more participatory and effective organization. The model should thus be one part of a multipronged approach to facilitating resource aggregation.

c. Cost-Shifting

A variation on a self-funding model would shift costs to the entity around which the social-movement organization is organizing. That is, the law could require those entities to pay for a portion of the organizing activity. For example, landlords of low-income residents could be required to contribute a small percentage of monthly gross rents to the representative tenant organizations.

---

263. See Fisk & Malin, supra note 222, at 1858-60.
266. See Ashar & Fisk, supra note 244, at 182-83 (reporting that dues requirements for worker-center members were thought to be "terribly onerous"); Cress & Snow, supra note 212, at 1094-1107 (demonstrating that for homeless social-movement organizations to be viable, external resources are essential, and explaining that homeless organizations have been particularly successful where their external funders were "social gospelite" organizations, not elites).
267. Ashar & Fisk, supra note 244, at 166, 183.
Public-benefits programs could contribute a small percentage of their budget to the representative welfare-rights organizations. Lenders could be required to contribute a percentage of profits to debtor organizations.

One problem with this approach is that, as applied to private payors, it would likely face constitutional challenge under the Supreme Court's evolving compelled-speech doctrine. A potential alternative would permit social-movement organizations to bargain for such transfers without mandating them by law. Still, skeptics might worry that if a social-movement organization's funding comes from one of its targets and opponents, the organization may be more likely to curb its tactics and demands. The organization could even become dependent on the entity with whom it negotiates and against whom it advocates. However, this concern can be mitigated by ensuring that only a portion of funds are from this stream and, to the extent constitutionally permitted, by making cost transfers mandatory by law, or bargained through arms-length transactions, rather than at the discretion of the funder.

d. State Subsidies

Another helpful (and constitutionally permissible) legal intervention would be to provide for government funding of social-movement organizations as a supplement to self-funding and charitable donations. Public funding has historically been an important part of social movements' funding base. For example, since the 1960s, a large number of women's movement groups have taken


269. See Fisk & Malin, supra note 222, at 1350-57.

270. See Cress & Snow, supra note 212, at 1094-1107 (demonstrating that for homeless social-movement organizations to be viable, external resources are essential and explaining that homeless organizations have been particularly successful where their external funders were "social gos-pelite" organizations, not elites); Edwards & McCarthy, supra note 207, at 118, 135 (emphasizing the importance of multiple funding streams).

CONSTRUCTING COUNTERVAILING POWER

on social-service functions in exchange for funding from the government. 272

Also during the mid-1960s, as part of President Lyndon Johnson’s War on Poverty, Congress established the Community Action Program, charged with helping the poor develop “autonomous and self-managed organizations which are competent to exert political influence on behalf of their own self-interest.” 273

Government-funded Community Action Agencies (CAA) recruited “issue-oriented community organizers” and provided “financial assistance to indigenous community organizations.” 274 More recently, worker centers representing low-wage workers have “collaborat[ed] with government agencies, particularly on enforcement campaigns in progressive jurisdictions with expansive, but under-enforced legal protections for workers,” which has “generated . . . financial support” for the centers “in the form of government grants to facilitate investigation and enforcement . . . and training in know-your-rights programs.” 275

A challenge is that state subsidies usually come with strings attached. Thus, an organization “seeking affirmative state assistance invites a political debate over whether or how much such assistance is justified” and “about the conditions


274. Peterson & Greenstone, supra note 273, at 264.

that should be attached to the assistance."\textsuperscript{276} This debate is one worth having and should become less burdensome as mass-membership organizations grow. Moreover, while relying exclusively on state funding would leave organizations vulnerable to changes in the political climate, state funding can be one important part of a mixed-funding regime and can help serve as "seed" money while organizations build their indigenous funding. Improving upon past efforts, state funding could be targeted to organizations that meet particular criteria. For example, grants could take into account organizational mission, leadership-development practices, and whether the organization is governed by members, federated in structure, and inclusive.\textsuperscript{277}

2. Physical and Virtual Spaces

In addition to funding, physical and virtual spaces for organizing are essential to the success of mass-membership organizations. As Daniel Cress and David Snow write, "A regular place to meet and adequate supplies are requisites for doing regular organizational business."\textsuperscript{278} They quote a supporter of the Detroit Union of the Homeless, who observes that "[t]here is a kind of franticness when you don't really have a place where you can invite anybody into. But when you do, people can find you. Strategies can be developed. You can get a sense of your own identity."\textsuperscript{279}

Sociologists have demonstrated that natural gathering spaces, where people are in close proximity, are the most fruitful locations for social-movement building.\textsuperscript{280} Yet many of the spaces in which poor people naturally congregate are controlled not by those people themselves, nor by their social-movement organizations, but rather by governmental or corporate entities. Providing access to these

\textsuperscript{276} Eskridge, Channeling, supra note 29, at 524. On the clash between the state and rape-crisis providers, see Nancy Matthews, Feminist Clashes with the State: Tactical Choices by State-Funded Rape Crisis Centers, in FEMINIST ORGANIZATIONS, supra note 272, at 291-92. On the backlash against legal-aid lawyers and their advocacy on behalf of the poor, see John Kilwein, The Decline of the Legal Services Corporation: 'It's Ideological, Stupid!,' in THE TRANSFORMATION OF LEGAL AID: COMPARATIVE AND HISTORICAL STUDIES 41, 41-42 (Francis Regan, Alan Paterson, Don Fleming, & Tamara Goriely eds., 1999); and Deborah M. Weissman, Law as Largess: Shifting Paradigms of Law for the Poor, 44 WM. & MARYL. REV. 737, 754-55 (2002).

\textsuperscript{277} On the duties that might be imposed on organizations in conjunction with state funding, see infra note 384 and accompanying text.

\textsuperscript{278} Cress & Snow, supra note 212, at 1098.

\textsuperscript{279} Id.

spaces can be particularly helpful for organization building: access communicates acquisition and control of a space in which poor and working people typically have little authority and thereby helps legitimize the social-movement organization.281

In the contemporary era, the availability of digital—that is, internet-based—“space” can be just as important as the availability of physical space. In the labor context, for instance, workers often no longer share a common workplace and thus simply have no shared physical space in which to congregate, discuss, and organize. The same is true for debtors, who may live dispersed across the entire nation and for whom no feasible central physical meeting location exists.282 In these settings, access to email, text, social media, and other “digital meeting spaces” can be critical,283 and, in fact, access to such digital resources for organizing purposes is a hotly contested question in NLRB law.284 This is true for the simple reason that digital resources can be powerful substitutes for physical spaces. Take, for example, the recent Google walkouts—protest actions engaged in by workers across the globe whose only contact with one another was through online forums and tools.285 It is also the case that teachers involved in organizing the RedforEd movement gathered on a Facebook page, as well as in person.286

Indeed, digital spaces can be important to organizing even where physical space is available, especially in contexts where meeting online is more practicable

---

281. See Cress & Snow, supra note 212, at 1098.
or advantageous than gathering together in a single physical location.\textsuperscript{287} This principle has been most apparent in the era of COVID-19, when the need for social distancing means that in-person meetings, especially large ones, are a public-health threat. Unions are recommending that workers who can no longer organize in person gather on Zoom instead.\textsuperscript{288} And tenant activists are turning to the internet to organize rent protests and strikes during the economic crisis that the pandemic has produced. According to one organizer, “If you’re bringing new people into your movement right now, you’re doing it online.”\textsuperscript{289}

The potential for legal intervention to provide access to both physical and digital spaces is significant. The law could provide a legal right for both paid organizers and organization members to access the relevant constituency groups in person and online. It could grant the right to come onto employer property, to enter building lobbies and common areas, and to hold meetings in welfare centers. The law could also provide access to digital meeting spaces, requiring employers, landlords, benefit providers, and lenders to provide digital resources to workers, tenants, benefit recipients, and borrowers for organizing purposes.\textsuperscript{290} We discuss some of these options in more detail below when we take up the need for “free” associative spaces.\textsuperscript{291}

3. Information

Another critical resource for social-movement organizations is information, particularly information about the organization’s constituency.\textsuperscript{292} Organizers need to know who the relevant constituency is and where they can be contacted: Who are the workers in a given firm, the tenants in a given building, or the recipients of a given welfare benefit?


\textsuperscript{288} 5 Steps to Organizing for Protection at Work, UE UNION, \url{https://fight.ueunion.org/five-steps} [\url{https://perma.cc/GZR6-64K7}].

\textsuperscript{289} Dougherty & Eligon, supra note 287.

\textsuperscript{290} See, e.g., Block & Sachs, supra note 283, at 53. But see Mark Engler, \textit{The Limits of Internet Organizing}, \textit{Dissent Blog} (Oct. 5, 2010), \url{https://www.dissentmagazine.org/blog/the-limits-of-internet-organizing} [\url{https://perma.cc/457L-LCTJ}] (emphasizing that the internet is a useful tool but no substitute for in-person organizing).

\textsuperscript{291} See infra Section III.C.

\textsuperscript{292} Cress & Snow, supra note 212, at 1095 tbl.3, 1098-99 (dividing information into strategic support, technical support, and referrals).
The NLRA again provides a partial model. It requires employers to provide an *Excelsior* list of bargaining-unit members to a union that makes a showing of employee interest in being represented by that union. The list includes both names and contact information. Similar informational rights exist under several states’ public-sector bargaining systems, requiring, for example, that unions be notified when new members join the bargaining unit and afforded the opportunity to meet with new unit members (on the clock). Statutes could create parallel rights for tenant organizations, debtor organizations, public-benefits organizations, and so on.

In addition to information about the constituency, organizations also need information about the broader political and economic context in which they are organizing. To some extent, the internet has made such information more accessible, facilitating movement activity. Yet, much information remains proprietary and inaccessible to workers, tenants, debtors, welfare beneficiaries, and their social-movement organizations. For example, a recent study found that only four percent of workers have access to information about compensation of senior executives, managers, supervisors, and colleagues, as well as information about how well their organization is doing.

Here, legal intervention could again be valuable. Law could require the disclosure of relevant information about the relevant entity, industry, or program to inform the strategic work of the social-movement organization. For example, the NLRA has been interpreted to require that employers provide information to unions about their finances to the extent such information is relevant to the employer’s bargaining positions. Law could impose similar obligations in the context of housing, public benefits, and education debt. Or, even better, it could require more expansive disclosure that does not hinge on bargaining positions or organizational requests. Washington, D.C.’s tenant law provides a partial model: it provides tenant organizations the right to information about new

---


development and the right to an appraisal during any sale process. Ultimately, disclosure of information is critical not only to engaging with the private entity but also to social-movement organizations’ engaging in the political process in an informed way.

4. Human Resources

A final category of resources that is essential to organization success is human resources— including labor, leadership, and expertise. Yet a movement’s ability to deploy human resources is limited by the time and skill available to its constituents. Poor and working-class people tend to have less leisure time to donate to organizations; they also frequently have fewer technical skills to provide (though no less potential).

Here too, law could make a significant difference. It could guarantee paid time off for individuals to participate in the organization and to attend leadership or technical training, possibly reimbursing employers, or allowing them to deduct from taxes the amount of wages they pay to people for participation. Jury-duty laws provide one model. Eight states require an employer to pay employees while serving on jury duty. Labor law also provides some examples. Under numerous private collective-bargaining agreements and under several public-sector labor-relations statutes, employees are permitted to perform organization functions on official time (i.e., release time with pay from their regular duties). The Federal Service Labor-Management Relations Statute, for example, requires that union representatives who are also employees of the agency be granted

300. A significant literature in sociology examines the importance of both leadership development and rank-and-file militancy and participation in poor people’s organizations. See, e.g., Stuart Eimer, The Crisis of New Labor and Alinsky’s Legacy: Some Questions, Comments, and Problems, 43 POL. & SOC’Y 444, 444-45 (2015); Paul Osterman, Building Progressive Organizations: An Alternative View, 43 POL. & SOC’Y 447, 449 (2015); see also Paul Osterman, Evading the Iron Law: Culture and Ritual in Social Movement Organizations, MASS. INST. TECH. 22-27 (Mar. 2004), http://web.mit.edu/osterman/www/Evading-Iron-Law-Osterman.pdf [https://perma.cc/Y2RV-KZ44] (arguing that successful social-movement leadership potentially requires an adversarial culture within the organization and an enhanced sense of capacity and agency within the membership). We recognize that the legal interventions we propose do little to build leadership or rank-and-file militancy directly beyond creating the time and funds for development. That is not because we believe those goals are unimportant but rather because we are skeptical the law has much to offer.
official time for negotiating a collective-bargaining agreement, including participation in impasse proceedings.\textsuperscript{302} Numerous state systems, even those that are "right-to-work," similarly mandate paid release time.\textsuperscript{303} Other collective-bargaining agreements provide education funds so that workers can increase their skills.\textsuperscript{304}

The precise design of a release-time requirement would vary depending on the context. For example, a tenant-related law could require unpaid release time for workers to participate in tenant-organizing efforts and in training programs, with the member able to recoup lost wages up to a designated amount from the landlord. In the public-benefits context, to the extent states require public-benefits recipients to work, labor performed for movement organizations could count as qualified work.\textsuperscript{305}

C. Free Spaces

Another prominent strand of social-movement theory suggests that successful political organizing depends on the availability of "free spaces" open to and suitable for organizational work.\textsuperscript{306} The literature takes a capacious view of what such spaces may consist of, and it includes discussion of both literal physical

\begin{flushright}
\textsuperscript{303} See, e.g., Fisk & Malin, supra note 222, at 1846 n.124 (citing Cheatham v. DiCioccio, 379 P.3d 211, 213 (Ariz. 2016)) (describing the cited case as "holding that a provision in Phoenix police collective bargaining agreement granting official time to employees to perform representational functions, including 100 percent official time to several, did not violate the Gifts Clause of the Arizona Constitution"); Martin H. Malin, Life After Act 10?: Is There a Future for Collective Representation of Wisconsin Public Employees?, 96 MARQ. L. REV. 623, 657 (2012) (discussing union-release practices in Tennessee).
\textsuperscript{305} Cf. Noah D. Zatz, Get to Work or Go to Jail: State Violence and the Racialized Production of Precarious Work, 45 LAW & SOC. INQUIRY 304, 328-30 (2020) (addressing the coercive nature of state-mandated work).
\textsuperscript{306} See SARA M. EVANS & HARRY C. BOYTE, FREE SPACES: THE SOURCES OF DEMOCRATIC CHANGE IN AMERICA 18 (1986) ("Democratic action depends upon these free spaces, where people experience a schooling in citizenship and learn a vision of the common good in the course of struggling for change.").
\end{flushright}
spaces—for example, churches, mosques, student dormitories, and union halls—but also more abstract figurative spaces including linguistic codes and artistic performance. Despite the breadth of concepts encompassed in the definition of free space, however, there is some agreement on core elements of the definition. In summarizing work on the question, for example, Rick Fantasia and Eric L. Hirsch conclude that “on the most basic level” free spaces are

meeting places where communication can be facilitated without deference to those in power, representing “liberated zones” to which people can retreat, spatial “preserves” where oppositional culture and group solidarity can be nourished, tested, and protected. It is in such relatively “free” social spaces that members of subordinate groups discover their common problems, construct a collective definition of the sources of their oppression, and note the limits of routine means of redressing grievances, where collective identity and solidarity are cultivated in practices, values, and social relations.

Similarly, William A. Gamson writes that free spaces are “limited access public spaces that permit the development of an oppositional culture.” And Francesca Polletta, although critical of aspects of the free-space literature, concludes that there is broad agreement among scholars that in identifying the unifying characteristic of a free space, “freedom from the surveillance of authorities is essential.” In sum, then, the free-space literature suggests that political organizing requires space in which groups can assemble to discuss their grievances and

309. See Zhao, supra note 280, at 1502-09.
313. Fantasia & Hirsch, supra note 308, at 146 (citations omitted).
develop their objectives and in which they are free of interference from those in power who would oppose their organizational efforts.

The theoretical work on free space is complimented by historical analysis of the role that such spaces have played in social-movement mobilization. Perhaps the central animating example is the role played by Black churches, both in the struggle against slavery and in the Civil Rights movement. Thus, Sara M. Evans and Harry C. Boyte write that successful political mobilization requires “community places . . . where [movement participants] can think and talk and socialize, removed from the scrutiny and control of those who hold power over their lives. The black church especially has played this crucial role as a free space in black history.” 316 Aldon D. Morris, in examining the origins of the Civil Rights movement, observes that the church played a central role by providing “a safe environment in which to hold political meetings” 317 and “an institutional alternative to, and an escape from, the racism and hostility of the larger society. Behind the church doors was a friendly and warm environment where Black people could be temporarily at peace with themselves while displaying their talents and aspirations before an empathetic audience.” 318 Gamson, summarizing Morris’s historical work, put it more bluntly: “Morris shows the centrality of the Black churches in the building of the Southern civil rights movement. . . . [T]hey provided a place where Blacks could assemble without whites being present.” 319

Critically, and obviously, the church was more than a “space” for organizational activity: it was, among other things, a rich source of spiritual tradition, deep community ties, and leadership. The point here is simply that the church played a crucial role by providing a free space for political organizing.

Similar to the church’s role as a safe space for civil-rights organizing, Fantasia and Hirsch document the role played by the mosque—and the Casbah—in Algerian resistance to French colonization. 320 Dingxin Zhao writes about the importance of the physical structure of Beijing university campuses to the mobilization of students during the 1989 democracy movement, noting that “the existence of campus walls”—which separated student living space from the public road system—“was important for the development of the movement,” and concluding that “the simple existence of walls . . . created a low-risk environment and facilitated student mobilization.” 321 And Hirsch stresses the importance of so-called Turner halls as “havens where the Chicago working class . . . could

---

317. Morris, supra note 280, at 748.
319. Gamson, supra note 314, at 32 (citation omitted).
321. Zhao, supra note 280, at 1495.
develop their politics in relative isolation from the intrusions of the city's political and business elite. 322

Of course, the existence of free spaces is neither necessary nor sufficient for political organization. To state the obvious, much more is required for successful political organizing than a physical location for meetings free of surveillance. 323 But the literature provides a solid basis for concluding that the presence of free spaces can be an important contributing factor to the success of political-organizing efforts.

Accordingly, the question for us is what the law might plausibly do to facilitate the creation of free spaces for political organizing. We see two basic categories of possible interventions: (1) the provision of space and (2) prohibitions on surveillance. Labor law, again, provides an incomplete but important model for these types of intervention. Under the rules set out in the Supreme Court's Republic Aviation opinion, employers must allow employees to discuss unionization efforts in the workplace, so long as those discussions occur during nonworking time. 324 Moreover, in certain narrow circumstances—in fact, extremely narrow circumstances under current law—employers must allow nonemployee union organizers to access company property for the purpose of discussing union-organizing with employees. 325 Coupled with these grants of rights to use employer property for organizational purposes is a ban on employer surveillance of employee-organizing activity. Thus, "[s]ince the earliest days of the Act, surveillance of employees by an employer, whether with supervisors, rank-and-file employees, or outsiders, has consistently been held to" constitute an unfair labor practice. 326 Accordingly, federal labor law creates a legal requirement that

322. HIRSCH, supra note 310, at 159 (emphasis omitted). In the contemporary context, the internet may also provide opportunities for the construction of free spaces for organizational development. For example, Rosemary Clark-Parsons studied Girl Army—a Philadelphia-based feminist group—which used a closed Facebook group (one open only to Facebook users invited by current members of the organization and approved by one of six moderators) in an attempt to construct a space safe for political discourse. Rosemary Clark-Parsons, Building a Digital Girl Army: The Cultivation of Feminist Safe Spaces Online, 20 NEW MEDIA & SOCY 2125, 2128-31 (2018).

323. See Polletta, supra note 315, at 19-20. James Tracy notes, for example, that certain elements of the radical pacifist movement during World War II emerged from organizing done inside federal prisons. See JAMES TRACY, DIRECT ACTION: RADICAL PACIFISM FROM THE UNION EIGHT TO THE CHICAGO SEVEN 3 (1996).


325. See Lechmere, Inc. v. NLRB, 502 U.S. 527, 539 (1992) (discussing an exception to the general rule restricting nonemployee access "wherever nontrespassory access to employees may be cumbersome or less-than-ideally effective," which has been interpreted narrowly).

employers cede part of their property rights to the organizational efforts of their workers and prohibits employers from engaging in surveillance of those efforts. Still, "only slightly over half of workers report having access to physical spaces" to meet with other workers (let alone organizers), "and access is more likely for higher-income and more highly educated workers."

Building on the partial precedent provided by labor law, a law of political organizing could require the provision of space within the property of the dominant party. As the above discussion anticipates, moreover, this might be space within the physical property of the dominant party, or it might be "space" within the digital resources of the dominant party. Thus, for example, tenants and tenant organizations could be entitled to access space within buildings where they are organizing, or have organized, tenants. Public-benefits recipients could be provided space in welfare centers. Workers and their organizations—in an expansion of current rights—could be entitled to space on company property. Similarly, the law could mandate that employers, landlords, lenders, or welfare agencies provide workers, tenants, debtors, and benefits recipients the right to use the dominant party's online resources (such as email lists, websites, and chat rooms) for organizing purposes. In addition, or alternatively, the law could require the creation of public spaces—political meeting halls, essentially—funded by tax dollars and made available to political organizations for organizational purposes. Here, again, the public spaces could be physical or digital. Finally, the law might subsidize the cost of procuring such space on the private market: political organizations could receive tax credits for reasonable costs incurred in securing space for organizational efforts.

It is worth noting that there are costs and benefits to each of these approaches. With respect to a legal requirement that organizations be granted space within the property—physical or digital—of the targets of their organizational activity, the downside is that preventing surveillance may be more


328. Indeed, a few localities already provide some access rights for tenant organizers. For example, Washington, D.C. provides tenant organizers the right to canvass in multifamily housing. D.C. CODE § 42-3505.06(b)-(c) (2020). For a discussion of tenant-organizing laws, see Christopher Bangs, Note, A Union for All: Collective Associations Outside the Workplace, 26 GEO. J. ON POVERTY L. & POL'Y 47 (2018). Access rights, however, raise various First Amendment issues. See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44-54 (1983) (allowing the teachers’ union exclusive-bargaining representative access to teacher mailboxes and the interschool mail system, rejecting that such access violated a rival union’s rights under the First Amendment, and holding that the access granted to the exclusive bargaining representative was reasonable because it enabled the union to perform its obligation to represent all of the district’s teachers).
difficult. Moreover, even absent actual surveillance, participants may be more wary of surveillance in these settings and thus, whether or not they are actually being surveilled, feel less free to "question the rationalizing ideologies of the dominant order."\[^{329}\] and organize. On the other hand, there can be significant symbolic value in allowing organizing to take place on the physical property or the digital resources of the opposition. For one thing, such access signals to participants that the organizations in question are not outsiders to the relationship around which organizing is taking place: for example, a worker organization that meets in a company break room—or a company chat room or listserv—can come to seem a more natural part of the work relationship than one that meets only off-site in a union hall. More important from an organizing perspective, granting on-site space to organizations can signal the vulnerability of the opposing party in a way that can be critical to success.

The political-process model of social-movement emergence helps illuminate this point.\[^{330}\] As Doug McAdam shows, successful collective action—in our context, successful political organizing—depends on, among other things, the "collective assessment [by participants] of the prospects for successful insur­gency."\[^{331}\] This assessment, in turn, depends on participants holding two interrelated views: first, they must believe that the organizations they are forming have the potential to exercise effective power, and, second, they must believe that the status quo—the forces they are contesting—are "vulnerable to challenge."\[^{332}\] This perception of vulnerability is accordingly a prerequisite to successful organizing. The point makes intuitive sense. If participants believe that the current regime is invincible, they are unlikely to participate in an organizing campaign designed to change those conditions. On the other hand, if individuals can be shown that the current structure is subject to challenge—that it is vulnerable to the efforts of an organized opposition—then participation becomes more plausible. As Francis Fox Piven and Richard Cloward put it, "The social arrangements that are ordinarily perceived [to be] ... immutable must come to seem ... mutable."\[^{333}\]

The employer's control over the workplace, like the landlord's control over the building, can be an important means for communicating power and thus for signaling to workers and tenants that neither the employer nor the landlord is vulnerable to challenge. This suggests, however, that by enabling organizers to

---

\[^{329}\] Fantasia & Hirsch, \textit{supra} note 308, at 145.

\[^{330}\] For a more developed version of this argument, see Benjamin I. Sachs, \textit{Law, Organizing, and Status Quo Vulnerability}, 96 \textit{Tex. L. Rev.} 351 (2017).

\[^{331}\] \textit{Id.} at 49.

\[^{332}\] \textit{Id.} at 49.

\[^{333}\] PIVEN & CLOWARD, \textit{supra} note 41, at 12.
access workplaces and buildings, the law can disrupt these projections of invincibility and communicate that employers and landlords may in fact be vulnerable to challenge. As one of us explained previously,

As vigorous as employers are when it comes to attempts to prohibit their own employees from talking union at work, they are even more adamant when it comes to the ability of full-time union organizers to come onto employer property to discuss unionization. . . . This opposition stems in part from the fact that physical presence of union organizers on company property marks a major incursion into the employer's control over the workplace. Excluding union organizers thus reinforces a perception of employer control. By the same token, a legal requirement that employers admit union organizers conveys to workers management's susceptibility to the law of union organizing.\(^{334}\)

Indeed, a classic scene from the film *Norma Rae* captured this dynamic cinematically. At the outset of that movie—which involved a union-organizing drive at a textile mill in the southern United States—the union organizer is barred from the factory by a locked, barbed-wire fence. This exercise of employer property rights clearly conveys employer power and dominance vis-à-vis the union. But later in the film, the organizer is permitted—through the operation of a contempt sanction imposed under federal labor law—to walk through the factory in order to inspect a company bulletin board. The scene of a union representative physically present in what had previously been a site of unchallenged employer authority communicates to workers on the shop floor a new sense that perhaps the employer is vulnerable to union challenge.\(^{335}\)

Thus, because perceptions of vulnerability can contribute to the success of organizing efforts, a legal requirement that organizations be granted on-site "free spaces" has significant virtue. But whether organizing space is granted on-site or off, a note is in order about the challenges of making sure such space is genuinely free—the challenges of preventing surveillance in the modern era. Much of the free-space literature examines social-movement development that occurred prior to the proliferation of smartphone, internet, and modern surveillance technology. Although, of course, state actors possessed electronic-surveillance capabilities during the Civil Rights era, those technologies were relatively less available to nonstate actors like employers and landlords. This is no longer the case. The proliferation of cybertechnology means that nongovernment actors—including employers and landlords—have access to affordable means for surveilling challengers, should they wish to do so. In today's environment, an

\(^{334}\) Sachs, *supra* note 330, at 375.

\(^{335}\) *Norma Rae* (Twentieth Century Fox Film Corp. 1979); see Sachs, *supra* note 330, at 375 n.134.
employer or landlord could purchase a device that looks like a cockroach or a
dragonfly and provides high-quality video and audio recordings of any organiz­
ing meeting.\footnote{336} Surveillance capabilities are certainly as great in cyberspace and thus the challenge of ensuring surveillance-free digital organizing is also a
daunting one.

For our purposes, this means that if the legal regime is to provide free space for political organizing it must also protect against sophisticated forms of sur­veillance. At a minimum, the law should establish meaningful sanctions for any type of surveillance carried out against political-organizing efforts. These sanc­tions should include punitive damages. Beyond sanctions, the law also could provide for public funding of antisurveillance technologies, either through direct provision or tax credits for organizations that incur reasonable expenses pur­chasing such technologies.

\section{D. Removing Barriers to Participation}

Legal reforms to facilitate aggregation of resources and access to spaces are essential, but they are not sufficient to enable organization building among vul­nerable populations. As sociologists have documented, a movement organization’s vitality and longevity are dependent on its ability to attract and retain members.\footnote{337} Yet, even when participants are motivated and sufficient resources exist, several barriers to recruitment and retention remain.

A chief obstacle for many individuals is fear of reprisal. As sociologists have demonstrated, fear of retaliation can jeopardize collective action, particularly in high-risk environments.\footnote{338} Among low-income populations, the risk is high. For workers, tenants, debtors, and benefit recipients, retaliation might mean the loss of livelihoods, shelter, future creditworthiness, and emergency support.

Retaliation and repression do not always defeat organization. Movement identity, solidarity, and social bonds can help individuals resist and challenge authority. Rick Fantasia, for example, illuminates how organizing and strikes foster a culture of solidarity that makes it possible for workers to persist, even in

\footnotesize
\begin{itemize}
\item \footnote{336}{Len Calderone, \textit{Is That a Bug or a Robotic Spy?}, ROBOTICS TOMORROW (Dec. 5, 2017, 8:15 AM), https://www.roboticstomorrow.com/article/2017/12/is-that-a-bug-or-a-robotic-spy/11089 [https://perma.cc/65AA-ZMN3].}
\item \footnote{337}{See, e.g., Sharon Erickson Nepstad, \textit{Persistent Resistance: Commitment and Community in the Plowshares Movement}, 51 SOC. PROBS. 43, 43 (2004).}
\item \footnote{338}{See Jeff Goodwin & Steven Pfaff, \textit{Emotion Work in High-Risk Social Movements: Managing Fear in the U.S. and East German Civil Rights Movements}, in \textit{Passionate Politics: Emotions and Social Movements} 282, 284-85 (Jeff Goodwin, James M. Jasper & Francesca Polletta eds., 2001).}
\end{itemize}
CONSTRUCTING COUNTERVAILING POWER

the face of antiunion campaigning, intimidation, and arrests. 339 Jeff Goodwin and Steven Pfaff show that intimate social networks, mass meetings, collective identities, shaming, and appeals to divine protection all helped mitigate fears of police repression and encouraged movement participation during both the Civil Rights movement and the East German Opposition movement. 340 At the same time, the literature highlights the extent to which repressive action by state and private actors frequently prevails, impeding successful organizing and even leading to organizational collapse. 341

A second barrier to joining and remaining part of a movement organization is life responsibility, which can render people, in sociologist Sharon Nepstad’s terms, “biographically unavailable.” 342 Numerous sociologists observe that full-time employment, family obligations, lack of transportation, and other material obstacles can pose significant barriers to movement participation. 343 Some individuals overcome these barriers because of deep motivation and allegiance to the cause or because of connections to other organization members. 344 Yet, sociologists have demonstrated that overcoming barriers need not only be a personal, individual-level effort. Some social movements have had success by providing material assistance and family support so that members are free to participate. Nepstad, for example, has documented how the Catholic Left Plowshares


340. Goodwin & Pfaff, supra note 338, at 282-301; see also McAdam, supra note 41, at 218-29 (describing state efforts to repress Black-power groups).

341. See, e.g., RICK FANTASIA & KIM Voss, HARD WORK: REMAKING THE AMERICAN LABOR MOVEMENT 38, 69-75 (2004) (describing the defeat of the Knights of Labor after violent state and employer repression in the early twentieth century as well as the successful use of antiunion threats, discipline, strike breaking, and capital flight to defeat organized workers in the late twentieth century); FORBATH, supra note 159, at 105-18 (describing the use of state coercion and violence against strikers in the United States in the early twentieth century); CHARLES TILLY, FROM MOBILIZATION TO REVOLUTION 98-115 (1978) (explaining that repression may make participation too costly); WINDHAM, supra note 90, at 3, 8 (describing the effects of employer resistance to union organizing in the late twentieth century).

342. Nepstad, supra note 337, at 56.


movement provided stable childcare so protesters could go to prison if needed; the organization also provided housing, legal support, transportation, and other assistance. 345

Law may not be able to increase individual motivation, build social networks, or foster solidarity, but it can help remove barriers to participation – both by protecting those engaged in organizing work from retaliation and by removing material obstacles to participation.

First and foremost, the law must protect all those involved in organizing efforts from retaliation: no worker may be fired, no tenant evicted, and no welfare recipient deprived of benefits because they are active in or supportive of the organization’s efforts. Penalties and enforcement mechanisms must be strong enough to deter violations of law. Indeed, several regimes protect organizing rights, including the NLRA and several states’ tenant laws, but lack sufficient penalties or enforcement mechanisms to ensure consistent compliance. 346 Private rights of action, compensatory and punitive damages, class relief, prohibitions on mandatory arbitration, and other strong remedies are necessary to truly remove this barrier to participation. 347

In addition, the law could provide just-cause protections. Under this model, no worker could be fired, no tenant evicted, no welfare recipient deprived of benefits without the employer, landlord, or benefit provider demonstrating just cause. 348 The victim would not need to show antiorganizing animus or that opposition to organization was a motivating factor in the adverse action. The advantage of this approach is that it could create a more secure environment, shifting the burden to the authority figure when a dispute about retaliation exists. Yet, even just-cause provisions are no panacea. General due-process protections

345. Nepstad, supra note 337, at 57.


already exist in several of these areas—in public benefits, for example— and power dynamics still create fear of reprisal. Antiretaliation and just-cause protections, while helpful, must be part of a broader regime enabling organizing.

To that end, law should also work to remove material barriers. Here, the literature on resources is again instructive. As discussed above, the law could require paid time off from work; it could also provide subsidized childcare or other material support for participation in qualified organization activities.

**E. Material Changes, Incremental Victories, and Structural Power**

Another facilitator of organizing success is success itself. That is, the ability of people to build powerful organizations depends on their ability, first, to win smaller-scale, incremental victories along the way, and, second, to operate in structures that enable meaningful large-scale victories.

The origins of the insight about incremental victories can be traced to Saul Alinsky, a community organizer and author of *Rules for Radicals*. In that book, Alinsky lays out a program for building mass political organizations based on his own experience as an organizer and educator. Alinsky stresses the importance of winning small-scale victories this way:

The organizer knows . . . that his biggest job is to give the people the feeling that they can do something, that while they may accept the idea that organization means power, they have to experience this idea in action. The organizer’s job is to begin to build confidence and hope in the idea of organization and thus in the people themselves: to win limited victories, each of which will build confidence and the feeling that “if we can do so much with what we have now just think what we will be able to do when we get big and strong.”

Alinsky’s thesis is borne out by both sociological accounts of organizing campaigns and the theoretical literature on collective efficacy. Thus, for example, in his seminal study of the union campaign at Springfield Hospital, Rick Fantasia reports that workers’ successful engagement in what he calls “mini-insurrections” —small-scale collective actions—increased the likelihood that they would

350. For a discussion of how organizers ensure access to, and mobilization of, resources crucial to the success of social movements, see, for example, Edwards & McCarthy, supra note 207, at 131-43.
351. See supra text accompanying notes 301-305.
352. ALINSKY, supra note 179, at 113-14.
participate in more full-scale union organizing efforts. Fantasia concludes that workers gained a “courageousness” from their experience with small-scale organizing success and that this courageousness was a “crucial component of union formation, especially in the face of sharp employer resistance.” Similarly, in her study of the contemporary labor movement, Rachel Meyer concludes that organizers can increase the prospects for ultimate success by making it “possible for people to first succeed at small collective actions so that they become aware of their power to make change.”

The theoretical literature on efficacy also confirms Alinsky’s insight. This literature suggests that people decide what actions to take in the face of obstacles based on perceptions of their efficacy in overcoming those obstacles. Crucially, according to Albert Bandura’s work, people learn to assess their efficacy based on past experiences: when we succeed at one task, we come to believe that we are capable of performing similar, but more difficult, tasks in the future. Thus, “partial mastery experiences” facilitate “subsequent performance of threatening tasks that [one has] never done before.” This form of “efficacy learning,” moreover, applies at both the individual and the collective levels, suggesting that participation in successful collective endeavors—however modest—increases the prospects for participation in more robust forms of collective activity.

What might the law do to facilitate efficacy learning in organizing? In a sense, all of our recommendations further this goal. After all, all of our recommendations are geared to increase the likelihood of organizational success, and thus all will hopefully make it more likely for participants to experience the kind of victories that fuel further organizing. But there are specific things law might do to make early-stage, tangible, and small-scale organizing victories possible.

First, the law can make small-scale tangible gains more likely by imposing bargaining obligations in each of our areas of focus. Thus, landlords could be legally required to bargain with tenants’ unions, welfare agencies with benefit-recipient unions, and employers with workers’ unions. The scope of the obligation should be crafted explicitly to allow unions to bargain for a wide range of

353. Fantasia, supra note 339, at 121-80.
354. Id. at 121, 145.
357. See Albert Bandura, Self-Efficacy: The Exercise of Control 478 (1997) (stating that “efficacy beliefs have similar sources, serve similar functions, and operate through similar processes” and that perceptions of self-efficacy “affect how well group members work together and how much they accomplish collectively”).

624
goals. Thus, in the tenant context, the obligation could cover rent, terms of eviction, environmental standards, and the like, but it could also require landlords to bargain over details that tenants would find meaningful if not transformational. Similarly, in the labor context, the obligation should enable workers’ organizations to bargain over wages, hours, and working conditions, but also over other aspects of the work relationship that matter to the workers—say, the availability of a water cooler or a coffee station.

This suggestion tracks, in part, the current obligation to bargain in good faith that federal labor law imposes on employers when a union represents that employer’s employees. Unfortunately, the NLRA’s good-faith requirement has proven insufficient as a means of encouraging the parties to reach actual agreement. Thus, a law designed to facilitate small-scale victories might need to go further than this requirement. The suggestions contained in this Article aimed at strengthening the right to protest and strike are one avenue to explore. Another direction worth considering would be to couple the bargaining obligation with the so-called “interest arbitration” of first agreements. Under an interest-arbitration procedure, the parties would attempt to conclude negotiations of a first agreement, but in the event they are not successful, the dispute would be resolved by a neutral arbitrator who could shape the contours of the first agreement. This process would thus help ensure that some gains for tenants, benefit recipients, or workers emerged from the bargaining process. The magnitude of those gains would depend on how much power the union had built, but since the goal is to enable participants to have a first experience with organizing success, the fact of progress matters more than the degree of it.

While incremental small-scale victories are essential, a system designed to build countervailing political power among organizations of the poor and working class must also create structures that enable those groups to exercise effective economic and political power. Thus, the scope of the bargaining obligation ought to be crafted to track the relevant economic and political system in which the organizations operate. In the labor context, this approach would mean that bargaining would be required to occur at a sectoral level in addition to the

358. See 29 U.S.C. § 158(a)(5) (2018) (providing that it shall be an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees”); id. § 158(d) (providing that, in order to satisfy § 158(a)(5)’s collective-bargaining requirement, the employer and the employees’ representative must, inter alia, “confer in good faith with respect to wages, hours, and other terms and conditions of employment”).

359. See, e.g., Catherine L. Fisk & Adam R. Pulver, First Contract Arbitration and the Employee Free Choice Act, 70 LA. L. REV. 47, 56 (2009) (“Although . . . the NLRA imposes a duty to bargain in good faith, the United States Supreme Court long ago decided that the Board lacks the authority to force a recalcitrant—even an illegally recalcitrant—party to reach agreement.”).

360. See id. at 64 (noting that mandatory arbitration of first collective-bargaining contracts aids the weaker bargaining party and thus “would strengthen nascent unions”).
worksite level, and with entities that exercise financial power in a given industry or over a given supply chain, as well as with direct employers.\footnote{361}{See, e.g., Andrias, supra note 26, at 79 (advocating for “state-supported sectoral bargaining”); Mark Barenberg, Widening the Scope of Worker Organizing: Legal Reforms to Facilitate Multi-Employer Organizing, Bargaining, and Striking, ROOSEVELT INST. 3 (Oct. 2015), https://rooseveltinstitute.org/wp-content/uploads/2015/10/RI-Widening-Scope-Worker-Organizing-201510-2.pdf [https://perma.cc/ET48-9NQ2] (noting the "decentralization and fragmentation of collective bargaining;' and canvassing the "four patterns of contractual interconnection among multiple employers" that characterize that decentralized environment); Block & Sachs, supra note 283, at 3 (laying out the “three profound shortcomings" of “[o]ur current system of decentralized bargaining”).}

For student debtors, for example, bargaining would be required with for-profit colleges with exploitative debt practices, lenders, and government regulators.\footnote{362}{See Hannah Appel, Sa Whitley & Caitlin Kline, The Power of Debt: Identity and Collective Action in the Age of Finance, SHUTTLEWORTH FOUND. & UCLA INST. ON INEQ. & DEMOCRACY 51-72 (2019), https://challengeinequality.luskin.ucla.edu/wp-content/uploads/sites/16/2019/03/Appel-Hannah-THE-POWER-OF-DEBT.pdf [https://perma.cc/B7JN-TPX3] (describing and drawing lessons from a movement of debtors to for-profit colleges who organized and achieved over one billion dollars in debt discharge as of early 2019).} And the topics of bargaining would not be limited by law to exclude, for example, entrepreneurial issues or broader political concerns; instead, these conditions would be reworked to allow organizations to bargain expansively and for the “common good.”

A related type of legal intervention would grant policymaking power to organizations of poor and working-class Americans through administrative processes at the local, state, or federal levels of government.\footnote{363}{For existing and historical examples of such administrative initiatives, see Andrias, supra note 67, at 683-92, which details the conflict over, and eventual demise of, industry committees established under the Fair Labor Standards Act; and Rahman, Power-Building, supra note 23, at 340-50, which provides the dual examples of post-2008 financial regulation at the national level and community-development commissions at the local level. See also Johnson, supra note 137, at 1369 (stating that attaching equality directives to numerous federal spending programs causes those spending programs to “continuously operate in ways that promote the robust participation and inclusion of varied groups").} Beyond simply encouraging group participation, the law could give organizations the right to appoint representatives to public administrative bodies based on membership levels relative to the constituency as a whole. For example, housing law could require that housing authorities or rent-control boards add seats for each tenant union that meets a certain threshold number of members. The tenant union’s membership would then be entitled to elect a representative to the new seat. And labor law could require that workers’ compensation boards and occupational-health boards include members from unions that reach a certain density. Federal, state, or local government could also facilitate sectoral and regional bargaining using a tripartite approach, enabling worker organizations and employer
organizations — or tenant organizations and landlord organizations, debtors and banks — to establish employment conditions — or housing or lending standards — jointly throughout a given sector, subject to governmental oversight as required by constitutional delegation and due-process doctrines. 364

Such administrative mechanisms would provide organizations concrete power in policymaking. To the extent the law conditioned participation on membership levels, it might also have the effect of encouraging organizations to establish federated membership structures in ways that enhance their long-term ability to exercise political power. 365 Moreover, in providing meaningful interim victories, such processes could contribute to members’ sense of collective efficacy and thus to further organizing. 366

F. Contestation and Disruption

Almost everyone agrees that when a political system offers a nondisruptive means for accomplishing change, such methods are preferable. In theory, the American pluralist system implies that everyone can engage through nondisruptive means. But a substantial body of sociology work suggests that a degree of disruption is necessary for movement success, particularly among poor people. As William A. Gamson observes, “Unruly groups, those that use violence, strikes, and other constraints, have better than average success” at achieving the movement’s goals. 367 Charles Tilly has reached similar conclusions, studying movement actions dating back to food riots in Burgundy, France in the seventeenth century. Tilly explains that repertoires of contention vary depending on legal and social context—ranging from tax revolts to strikes to mass public meetings—but his study underlines the importance of contention over time and

---

364. For discussions of contemporary and historical efforts at sectoral bargaining and the constitutional constraints on such efforts, see Andrias, supra note 67, at 659-95, which discusses early New Deal attempts at fostering sectoral bargaining through the Fair Labor Standards Act; and Andrias, supra note 26, at 46-70, 89-92, which discusses efforts of contemporary worker movements to engage in social bargaining in low-wage industries.

365. See SKOCPOL, supra note 50, at 92-93 (discussing the importance of federated membership organizations in a federal political system).

366. Government-authorized service provision, discussed in Section III.B.1, also has been shown to build organization. By providing critical services and benefits, such as unemployment insurance, organizations build connections with members while also demonstrating efficacy and value. See Dimick, supra note 265, at 356-59.

across contexts. In work studying the Civil Rights movement, Doug McAdam similarly finds that movement success depended on disruptive tactics, though he finds that the most effective forms of disruption were temporary and involved constant innovation to respond to segregationist reprisals.

In perhaps the most famous study of poor people’s movements, Frances Fox Piven and Richard Cloward highlight how insurgent and defiant action is critical to movement success. Protest takes different forms depending on institutional context and the ways in which individuals can withhold cooperation or services—workers can withhold labor, and tenants can withhold rent, whereas the unemployed must sometimes occupy workplaces and demonstrate en masse. Protest is more likely to be effective if three conditions exist: (1) Protestors are central to institutions’ functioning; (2) Powerful groups have a stake in those institutions; and (3) Protesters are able to protect themselves from reprisal.

Research from historians and political scientists confirms the account offered in the sociological literature about the role of disruptive action in movement success. From the early- and mid-twentieth-century industrial-worker strikes and rent strikes to the 1960s student movements and civil-rights protests and boycotts, disruptive concerted action has been critical to movement success. Contemporary examples tell a similar story. In the spring of 2012, for example, hundreds of thousands of students in Quebec protested a proposed seventy-five percent increase in tuition at public universities. Organized by their student unions, over 300,000 students went on strike, with several hundred thousand

368. See, e.g., Charles Tilly, Getting It Together in Burgundy, 1675-1975, 4 THEORY & SOC’Y 479, 485 (1977) (discussing the manner in which the “collective action of Burgundy’s ordinary people [was] changing,” including the seventeenth-century rise of food riots and eighteenth-century revolution).

369. Doug McAdam, Tactical Innovation and the Pace of Insurgency, 48 AM. SOC. REV. 735, 752 (1983).

370. See generally PIVEN & CLOWARD, supra note 41 (examining protest movements among the poor and working class in the United States in the middle of the twentieth century). According to Piven and Cloward, the hope for poor people’s movements lies primarily in moments when large-scale changes undermine political stability, and the poor engage in insurgency. Following such protest, concessions are often withdrawn, but some become permanent. Id. at 34-35. This phenomenon does not mean, however, that formal organization is antithetical to movement success or that protest is the only means to achieve movement goals. Rather, there is a contingent relationship between protest politics and conventional political engagement. See Sanford F. Schram, The Praxis of Poor People’s Movements: Strategy and Theory in Dissensus Politics, 1 PERSP. ON POL. 715, 716-18 (2003).

371. PIVEN & CLOWARD, supra note 41, at 21-22.

372. See id. at 24-26. Thus, poor people are in a weaker position to use disruption as a tactic for influence because they frequently do not perform roles on which major institutions depend, or those who manage their institutions often have little to concede. They also have less ability to protect themselves from reprisal. Id. at 25-26.

373. See id. at 222.
remaining on strike for months. By September, the government abandoned its proposed increase.\(^{374}\) In Los Angeles, in recent years, incidents of tenant rent strikes have increased in the face of rising rents and deplorable housing conditions, with tenants, organized by the Los Angeles tenants’ union, winning some significant victories in both local policy and private rent arrangements.\(^{375}\) Meanwhile, in the last few years, hundreds of thousands of public-school teachers in the United States have engaged in mass strikes, winning substantial improvements in salaries, benefits, and education funding even in states with Republican legislatures and no formal union rights.\(^{376}\) During the COVID-19 pandemic, strikes by essential workers at Amazon, Whole Foods, Target, FedEx, and elsewhere, and protests by nurses and other healthcare workers, forced attention to urgent health and safety concerns.\(^{377}\)

Law can facilitate effective protest through several mechanisms. First, it can affirmatively provide the right to strike across domains. That is, law can and should explicitly grant the right of workers, tenants, and public beneficiaries to engage in concerted action, including protests and strikes. Simply creating a right is not enough, however. Second, law must also provide protection from both private and state reprisal—and protection must be meaningful and broad in scope. Thus, the law must not only prohibit employers from firing workers for striking (as private-sector labor law does, but much public-sector law does not); it also must prohibit permanent replacement of those who strike and

---

\(^{374}\) See Bangs, supra note 328, at 48.


provide strong penalties and enforcement mechanisms. Similarly, the law must prohibit tenants from being evicted or harassed and beneficiaries from being cut off or having their benefits reduced.

Third, the law must protect the right to engage in effective concerted action, even when such action is disruptive. For example, the law should not only provide workers at a single employer the right to strike and to demonstrate peacefully in front of their employer, nor should it only provide tenants the right to protest their particular landlord. Rather, and in contrast to current labor law, the law could also offer some protection for secondary boycotts and sympathy strikes across multiple domains, and it could permit nontraditional strikes short of full or indefinite stoppages. To be sure, limits ought to exist on the right to engage in disruptive protest. Protests must be peaceful, eschewing both destruction of property and violence against individuals. But the right to protest becomes ineffective if it is cabined to prevent disruption.

Finally, the law should protect protests and strikes that have the political process as a target and the “common good” as a goal. Current labor law achieves this to a point: the Supreme Court has held that the NLRA protects workers’ concerted activity that occurs through political channels, but only insofar as the activity relates to employment issues. The NLRB has also concluded that workers may not be protected if they strike for an exclusively political cause. Despite these restrictions—and others present in public-sector labor law—workers have frequently struck to advance the common good and to influence political decisionmaking. Consider the 2019 Chicago Teachers’ strike, during which teachers demanded not only better wages and benefits and smaller class sizes, but also housing assistance for new teachers, staff to help students and families in danger of losing housing, and other steps to advance affordable housing in

378. See supra Section III.D.
380. See, e.g., McCartin, supra note 175.
382. Memorandum from Ronald Meisburg, Gen. Counsel, NLRB, to All Reg’lDirs., Officers-in-Charge, and Resident Officers, Memorandum GC 08-10, at 2 (July 22, 2008).
CONSTRUCTING COUNTERVAILING POWER

the city. 383 A law designed to reduce political inequality would grant protection to this kind of collective action.

For many, the preceding recommendations regarding strikes will be controversial, if not entirely objectionable. In a liberal society, traditional paths of political power—voting, lobbying, participation—remain preferred. Our recommendations aim to strengthen those channels and to make disruption and contestation less likely. But history and social-science research leaves little doubt that disruptive concerted action is also essential for working-class and poor people to have a reasonable chance of success at achieving a redistribution in political (and economic) power. 384

CONCLUSION

Skeptics will object that none of this is possible. If elites wield so much power in the political sphere, why would they ever permit reforms that would


384. When law creates and empowers organizations, it also typically imposes duties and constraints on those organizations. Corporate law imposes duties of care, loyalty, and faith, as well as disclosure obligations. Charitable nonprofits operate under various disclosure and governance obligations; they are also constrained from engaging in political activity. Labor law imposes a duty of fair representation on unions, as well as significant disclosure requirements; obligations of democratic governance and nondiscrimination; restrictions on expression; and an obligation of independence from the employer, in what Cynthia Estlund has termed a quid pro quo. Estlund, supra note 153, at 171-77, 193-334. A discussion of what duties law should impose on newly empowered social-movement organizations is beyond the scope of this Article. Different contexts will warrant different specific designs, and the question of constraints and duties implicates a vast body of organizational literature and difficult choices. But, at the very least, social-movement organizations ought to be independent from—in other words, free from domination by—those with whom their members bargain; they ought to be inclusive (i.e., prohibited from discriminating on the basis of race, sex, sexual orientation, gender identity, national origin, disability, religion, or other protected status); their leaders ought to operate under basic fiduciary duties to their members, with obligations of financial disclosure; and organizations ought to be required to maintain democratic governance structures. These requirements are consistent with good-governance guidelines generally. They also may help facilitate the organizational strength of social movements over time by minimizing “oligarchization, co-optation, and the dissolution of indigenous support.” McAdams, supra note 41, at 56. At the same time, it is essential that duties imposed by law not work to defeat the very purpose of a law of organizing: to enable poor and working-class individuals to form organizations that can exercise effective political power. Cf. Estlund, supra note 153, at 235-38 (describing restrictions on labor picketing as indefensible under a quid pro quo analysis).
fundamentally weaken their power while strengthening countervailing forces.\footnote{Cf. Adrian Vermeule, Self-Defeating Proposals: Ackerman on Emergency Powers, 75 FORDHAM L. REV. 631, 637 (2006) ("[A] self-defeating proposal is one whose diagnosis and prescription make inconsistent assumptions about agents’ desires, beliefs, or opportunities .... [I]t might offer a prescription that is motivationally inconsistent with the diagnosis. Given the diagnosis, the actors who have the ability to adopt the prescription have no desire to do so.").} The point is well taken. Reforms suggested in this Article will be difficult to achieve, particularly at the national level in the short term.

Yet the obstacles are not insurmountable. The power of the wealthy ebbs depending on circumstance and alignments, and several factors can enable economically progressive legislative change. First, government tends to respond to the concerns of poor and working-class voters when those concerns become particularly salient. Second, divisions among elites can create openings for redistributive reform, as can elite sympathy with the cause of less affluent fellow citizens—or worry that failure to act will produce even more radical change.\footnote{See GILENS, supra note 11, at 81 (describing the responsiveness of officials when elite and low-income preferences overlap).} In addition, the federalized nature of our government creates openings for legislative change at the state and local level that can, in turn, increase the likelihood of reform at the national level.\footnote{See ANDRIAS, supra note 26, at 51-57 (describing how the Fight for $15 campaign leveraged early gains in progressive states to spread the campaign in other states).} Crucially, moreover, the growth facilitated by supportive laws in one locality can enable federated organizations to export their power to other localities and ultimately to the national level.\footnote{See JAMILA MICHENER, FRAGMENTED DEMOCRACY: MEDICAID, FEDERALISM, AND UNEQUAL POLITICS 1-83 (2018) (describing federalism dynamics of Medicaid expansion); Jamila Michener, Medicaid and the Policy Feedback Foundations for Universal Healthcare, 685 ANNALS, AM. ACAD. POL. & SOC. SCI. 116, 125-30 (2019) (showing that well-designed laws enacted in progressive states and localities can demonstrate the efficacy and plausibility of reform, create administrative capacity, and expand supportive constituencies in ways that increase the likelihood of reform both in other states and at the national level).}

There is reason to believe that several of these dynamics are present today. To state the obvious, the COVID-19 pandemic has made the economic plight of poor and working-class Americans highly politically salient. The resurgence of organizing among workers, tenants, and debtors that has occurred in response to the pandemic—and that has highlighted the inequities of how the pain of the pandemic is distributed—has only increased this salience, as have the extraordinary protests organized by Movement for Black Lives.\footnote{See Appel, supra note 26, at 51-57 (describing how the Fight for $15 campaign leveraged early gains in progressive states to spread the campaign in other states).} Voters are clearly
CONSTRUCTING COUNTERVAILING POWER

concerned about these issues and increasingly support bold policy initiatives to
address them. For example, a huge majority of voters now say they would prefer
the federal government take "major, sweeping action" — rather than "modest ac-
tion" — to address the economic impact of the pandemic.390 There is also strong
support for the proposition that "[t]he devastation triggered by coronavirus
means we have to both address the immediate economic needs and work to fix
problems in our economy—like inequality and poverty—that made us all more
vulnerable."391

These trends extend political shifts that have been developing since the re-
cession of 2008. Thus, majorities in both red and blue states now express sup-
port for minimum wage increases and for labor unions.392 Elite opinion shows

workcollaborative.org/wp-content/uploads/2020/04/Groundwork-Collaborative-Topline-
Results-042920.pdf [https://perma.cc/N4X8-Y3AU].

391. Id.

392. Leslie Davis & Hannah Hartig, Two-Thirds of Americans Favor Raising the Federal Minimum
Wage to $15 an Hour, PEW RES. CTR. (July 30, 2019), https://www.pewresearch.org/fact-
tank/2019/07/30/two-thirds-of-americans-favor-raising-federal-minimum-wage-to-15-an-
hour [https://perma.cc/F4SX-S4FC]; see also Alexia Fernández Campbell, Missouri Voters Just
Blocked the Right-to-Work Law Republicans Passed to Weaken Labor Unions, VOX (Aug. 7, 2018,
similar changes: economists, once largely skeptical of both worker-organization and minimum-wage laws, are now increasingly expressing support. From Medicare for All to a $15 minimum wage, from student-debt relief to fundamental labor-law reform, redistributive policies are being seriously discussed by national political leaders in a way they have not been for at least a generation.

This shift in opinion is already reflected in policy changes in progressive state and local jurisdictions. In California, for example, the governor has extended union-negotiated terms to the entire grocery industry to ensure that safety and health standards reach all the grocery workers in the state. It is safe to say that such a move, with its suggestion of European-style tripartite sectoral bargaining, would have been unthinkable a short time ago. In fact, numerous progressive reforms—ranging from new rights for workers excluded from federal labor law to enhanced protections for tenants—have been enacted at the state and local level in jurisdictions with progressive majorities and active organizations among low- and middle-income residents. The extent to which experimentation at the local level is legally permissible will vary based on the organizing context. In some cases, like labor law, significant federal-preemption hurdles exist. In other areas, like tenant rights, preemption is not an obstacle. But in both contexts, and in others as well, some local and state experimentation is both possible and imperative, laying the groundwork for future federal reform.

Of course, once legislative majorities exist, backlash is a concern, as is conservative judicial resistance. Particularly in recent years, where progressive localities have engaged in innovative economic policymaking, conservative states have clamped down through aggressive preemption rules, and courts have a...
long history of interpreting ambiguity in law against the interests of the poor and working class. To some extent, legislation can be designed with this history in mind—for example, through the inclusion of clear purpose statements, unambiguous text, and provisions that limit courts’ injunctive power. And with respect to political backlash, as E. E. Schattschneider famously argued, “New policies create a new politics.” That observation will have particular relevance in our context. After all, laws designed to enable organizing will be particularly effective at generating their own political durability precisely because they will—explicitly and intentionally—build constituencies with the power to ensure the laws’ survival.

None of this is to suggest that enacting laws to facilitate organizing among the poor and middle class would be easy; none of it is to predict that such enactment would be likely. Of course, the kinds of laws we propose here would face intense opposition. Those who currently wield unrivaled power will vigorously object to laws that enable their power to be countervailed. Those who have had disproportionate—sometimes unfettered—influence over our politics will object to the diminishment of that influence. But, in a democracy, these objections must be overcome. And that is exactly what the reforms we propose are meant to enable.

399. FORBATH, supra note 150, at 150–54; Kate Andrias, Building Labor’s Constitution, 94 Tex. L. Rev. 1591, 1594 (2016); Kate Andrias, The Fortification of Inequality: Constitutional Doctrine and the Political Economy, 93 Ind. L.J. 5, 10–12, 18–23 (2018); Klare, supra note 90, at 268–70.


Legislative approaches to nondiscrimination at work: a comparative analysis across 13 groups in 193 countries

Jody Heymann, Bijetri Bose, Willetta Waisath, Amy Raub and Michael McCormack

Department of WORLD Policy Analysis Center, University of California Los Angeles, Los Angeles, California, USA

Abstract

Purpose – There is substantial evidence of discrimination at work across countries and powerful evidence that antidiscrimination laws can make a difference. This study examines the extent of protections from discrimination at work in countries around the world and which groups were best covered.

Design/methodology/approach – This study assesses legal protections in hiring, pay, promotions/demotion, terminations and harassment for 13 different groups across 193 countries using a database the authors created based on analysis of labor codes, antidiscrimination legislation, equal opportunity legislation and penal codes. Differences in levels of protection were examined across social groups and areas of work, as well as by country income level using Chi-square tests.

Findings – Protection from gender and racial/ethnic discrimination at work was the most common, and protection across migrant status, foreign national origin, sexual orientation and gender identity was among the least. For all groups, discrimination was more often prohibited in hiring than in promotion/demotion. There was inconsistent protection from harassment and retaliation.

Research limitations/implications – Addressing discrimination at work will require a broad range of synergistic approaches including guaranteeing equal legal rights, implementation and enforcement of laws and norm change. This study highlights where legislative progress has been made and where major gaps remain.

Originality/value – This article presents findings from an original database containing the first data on laws to prevent discrimination in the workplace in all 193 countries around the world. The study analyzes legal protections for a wide range of groups and considers a full range of workplace protections.

Keywords Discrimination, Antidiscrimination legislation, Employment legislation, Workplace, Comparative policy analysis

Paper type Research paper

Introduction

Background

There is international agreement on the fundamental importance of ending discrimination at work, with commitments to ending discrimination at work embedded in the Sustainable Development Goals (United Nations, 2016), the Universal Declaration of Human Rights and other UN human rights conventions (United Nations General Assembly, 1948, 1965; 1966, 1979; 2008) and fundamental conventions of the International Labour Organization (ILO, 1951). Yet, evidence continues to show that discrimination is a persistent problem around the world that
impacts individuals at all stages of their working lives (ILO, 2011). Ending discrimination at work is imperative in its own right and because of the impact work has on income, social network, the nature and quality of individuals’ daily experiences and opportunities for individuals to have impact on the communities and societies in which they live. Research suggests that an important first step to ending discrimination at work is by legally banning it (Bassanini and Saint-Martin, 2008). This paper uses a novel data set to identify whether countries have taken this first step to ending discrimination and highlights how data can be used to improve monitoring and accountability around advancing people’s opportunities at work.

Existing discrimination in the workplace
There is substantial evidence on the persistence of discrimination in the workplace. Employment discrimination is found across demographic groups and across national borders, affects the ability of individuals to get a job in the first place, to receive adequate pay, to be promoted and to keep a job (Bassanini and Saint-Martin, 2008). Further, we focus on two areas with the most robust literature examining discrimination in countries around the world: hiring and pay. For hiring, researchers have been able to conduct callback studies, sending out large numbers of resumes that vary only based on demographic characteristics and assessing whether there are statistically significant differences in whether applicants are invited to interview for a job (Bertrand and Mullainathan, 2004). For pay, large data sets enable researchers to analyze disparities in pay using regression analysis that allows them to control for confounding factors (Mincer and Polachek, 1974).

Discrimination in hiring
Callback studies have identified discrimination in hiring based on race/ethnicity, religion, gender, age and class. Baert reviewed 37 callback studies in 18 countries across Europe (12 countries), the Americas (Mexico, Peru and the United States) and Asia Pacific (Australia, China and Malaysia) that had a focus on racial/ethnic discrimination [1]. 34 of these studies found discrimination in callback rates for interviews when the person did not have a racial/ethnic majority population name (2018).

Studies in France have found discrimination against Muslim applicants (Adida et al., 2010; Pierne, 2013), but religious discrimination is not limited to any one religion and depends on which group is in the minority. For example, a Greek study found that Pentecostal men and women were 18.7 and 27.2% respectively, less likely to receive a callback (Drydakis, 2010), and a US study found discrimination against not only Muslims but also atheists, Catholics and pagans (Wright et al., 2013).

Evidence of sex discrimination in hiring affects both men and women. Studies show that women receive fewer callbacks in male-dominated professions (which are commonly higher paid), and men receive fewer callbacks in female-dominated professions (Riach and Rich, 2006; Booth and Leigh, 2010). Callback studies have documented lower callback rates for older women in administrative and sales jobs (Neumark et al., 2019).

Studies have also demonstrated discrimination and lower callback rates based on class. Caste-based studies in India have demonstrated that identical CVs with lower-caste names receive fewer callbacks for call center or entry-level jobs (Banerjee et al., 2009; Thorat et al., 2009). Similarly, a US-based study using combinations of items that signaled social class, such as different sports or personal interests (e.g. polo vs soccer), a financial-aid-based award or extracurricular activities that referenced status as a first-generation college student, found upper-class male applicants were the most likely to receive callbacks (Rivera and Tilcsik, 2016).

Discrimination in pay
Rigorous research has also found discrimination in pay across gender, race/ethnicity, class and sexual orientation. The International Labour Organization has found that globally
women earn 60–80 cents on the man’s dollar (International Labour Office, 2017). A study released in 2018 found that after human capital differences including education and experience were accounted for, women in Brazil still earned 24% less than men in the formal economy and 20% less in the informal economy – due largely to discrimination (Ben Yahmed, 2018). A growing body of literature has also examined intersectionality in the gender pay gap. That is whether the pay gap is not related to gender alone, but rather the intersection of gender and other identities. In this case, research has focused on whether the gender pay gap is driven by women’s marital or family status. Evidence of a motherhood pay gap has been frequently found in higher-income countries (Waldfogel, 1998; Budig and England, 2001; Phipps et al., 2001; Anderson et al., 2003; Sigle-Rushton and Waldfogel, 2007), as well as evidence suggesting pay gaps in urban China driven by marital and motherhood status (Zhang et al., 2008) and a working paper finding a negative relationship between family size and female earnings looking across 21 developing countries (Agüero et al., 2012).

Because of the wide array of racial and ethnic groups around the world and the differences in who experiences discrimination in different countries, there is no single global estimate of wage disparities by race/ethnicity. However, there are country-specific studies. For example, in the United States, Rodgers and Spriggs estimated that 10–14% of the racial and ethnic wage gap for men was due to labor discrimination (Rodgers and Spriggs, 1996), which has been confirmed by numerous other studies (Darity et al., 1996; Neumark, 1998; Coleman, 2003). This is after considering other factors including parental investment in children’s education and individual skills, education, tenure, age and metropolitan area.

A UK study found that “class ceiling” contributed to professionals and managers whose parents were working-class earning less than professionals and managers whose parents also worked in managerial or professional jobs (Laurison and Friedman, 2016). Drydakis used data on labor market outcomes in eight OECD countries to find a pay gap between gay and heterosexual men with comparable education and experience (2014).

**Discrimination beyond hiring and pay**

While the most rigorous evidence has been built around hiring and pay, these are not the only areas of the work where discrimination can negatively impact equal opportunities. Discrimination in promotions and demotions limits workers’ abilities to progress in their careers over time. It can also lead to an underreporting of gaps in wages as workers who are otherwise qualified fail to progress to higher paying jobs. In addition to the immediate job and income loss associated with terminations, discrimination in terminations can also have longer-term impacts on career trajectories by increasing workers’ time outside the labor force and in some cases reducing future employers’ likelihood of hiring a worker due to short tenures at a particular job or too much time between jobs.

Similarly, harassment at work can limit workers’ opportunities to reach their full potential. Among both black and white women, general harassment was the second most common claim reported to the EEOC in the United States from 1998 to 2003 (Ortiz and Roscigno, 2009). Studies in Colombia and the United States have also found a high prevalence of harassment for sexual minorities, particularly compared to their heterosexual peers (Konik and Cortina, 2008; Álvarez et al., 2013). While few studies fully disentangle harassment from other forms of discrimination, evidence of harassment has also been found to be prevalent for workers with intersecting marginalized identities (Berdahl and Moore, 2006; Shaw et al., 2012).

**Impact of antidiscrimination laws**

While antidiscrimination laws alone do not eliminate discrimination in hiring, pay, promotions or firing, there are studies both across countries and across populations that demonstrate antidiscrimination laws make a difference. In the United States, studies have

---

**Approaches to nondiscrimination at work**

---

969
EDI

found that antidiscrimination laws contributed to wage and income increases for African Americans (Donohue and Heckman, 1991; Collins, 2003) and a narrowing of the racial/ethnic pay gap (Chay, 1999). Studies in the United Kingdom and Ireland have also found reductions in the gender pay gap that are attributable to equality in employment legislation (Zabalza and Tzannatos, 1985; Cassidy et al., 2002). Beller found that the equal employment opportunity laws led to a reduction in the gender pay gap of 9.6% over the period of 1967–1974 (1980). Moreover antidiscrimination legislation focused on sexual orientation has been shown to increase work and earnings (Klawitter, 2011; Martell, 2014).

Antidiscrimination legislation has not always been found to be effective. Studies of the Employment Standards Act in Ontario identified gaps in compliance and implementation, particularly for small firms, and did not show any significant impact (Gunderson, 1985; Baker and Fortin, 2004). This highlights the importance of implementation and enforcement alongside legal protections.

Ensuring implementation of strong legislative guarantees to nondiscrimination requires that these guarantees be linked to prohibitions of retaliation against employees who report experiences of workplace discrimination. Evidence shows that having legal protections in place against retaliation may increase reporting rates by reassuring workers that their careers will be protected if they report discrimination (Keenan, 1990; Bergman et al., 2002; Gorod, 2007; Pillay et al., 2018).

Currently, rigorous studies of the impact of antidiscrimination legislation on employment outcomes has been largely limited to higher income countries. More research is needed to assess the impact of these laws in other settings, particularly countries where a large proportion of workers work in the informal economy.

This study
Given the substantial evidence of discrimination across countries and given the powerful evidence that antidiscrimination laws can make a difference, we carried out a study to examine how common antidiscrimination laws were and which groups were best covered. We used international agreements as a framework.

International agreement on ending discrimination at work
As a global community, all UN member states have agreed to the principle of equal opportunities at work for all. The Universal Declaration of Human Rights (UDHR), which was passed in 1948 and binds all UN members clearly specifies that “everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (United Nations General Assembly, 1948). Among the rights guaranteed in the UDHR is the right to work. The UDHR was followed by detailed guarantees of equality at work in the International Covenant on Economic, Social and Cultural Rights (United Nations General Assembly, 1966) and a series of conventions delineating in greater detail equal rights and prohibitions of discrimination based on race/ethnicity (United Nations General Assembly, 1965), sex/gender (United Nations General Assembly, 1979) and disability status (United Nations General Assembly, 2008), among others.

Ending discrimination at work is also a core labor standard of the International Labour Organization. All countries agreed in 1998 to four overriding core labor standards to ensure decent work and social justice, including the elimination of discrimination at work (International Labour Organization, 1998), building on prior conventions to eliminate sex discrimination and broader protections from discrimination in any aspect of employment or occupation on the basis of “race, color, sex, religion, political opinion, national extraction or social origin” (International Labour Organization, 1951).
For all 193 UN countries, we examined the extent of antidiscrimination legislation covering hiring, pay, promotions/demotions, terminations and harassment and protections from retaliatory action for reporting harassment. We examined each area for 13 groups. These included those groups explicitly covered by the UN Declaration of Human Rights (gender, race/ethnicity, religion, nationality, social class and political affiliation) and further specific agreements, those covered by separate human rights conventions (disability, migration), and associated areas where there is compelling research evidence of discrimination; sexual orientation and gender identity (addressed under CEAW general comments), marital and family status (associated with gender discrimination) and age (for which a convention is under consideration).

We examined differences in legal framework across region and country income level. In assessing differences across income level, we empirically examine the question of whether legislative differences are due to constraints affecting anticipated ability to implement. This data provides a new tool to monitor national action toward fulfilling international commitments to equal rights and nondiscrimination at work.

Methods
To assess the extent of protections from discrimination at work in countries around the world, we created and analyzed a database of legislative protections from discrimination at work in all 193 UN member states. We examined the quality of protections across six core areas to determine which groups are most protected and which groups are least protected. This systematic assessment across income level required the development and validation of a coding framework and its application to all countries by our multilingual research team. For each country, two researchers read full-text legislation independently in the original language or a translation to an official UN language and answered questions about policy features. Answers were then compared before being entered into a final database. When disagreements arose as to how to interpret legislative provisions, questions were discussed across the coding team to arrive at a consistent coding method across all 193 countries.

Data source
The database was created using labor codes, antidiscrimination legislation, equal opportunity legislation and penal codes covering private sector workplaces in force as of August 2016. Relevant original, full-text national-level legislation was identified using the International Labour Organization (ILO)'s NATLEX database. This database focuses on national-level legislative protections; in countries where antidiscrimination measures are legislated subnationally, we examined legislation for each subnational unit and captured the minimum level of protection when provisions varied across subnational units.

Defining social groups
Terminology used to describe protected groups varies across legislation. We captured protections based on 13 different statuses. Protection from discrimination based on gender was coded when there were protections based on “gender” or “sex” or specific protections for “female” or “women” employees. Protections based on race or ethnicity includes references to “color,” “clan,” “ethnic origin,” “indigenous,” “aboriginal,” “tribe” or “ethnic groups.” Religion includes protections based on “creed,” “religious belief,” “religious opinion,” “religious adherence” or “confession.” Sexual orientation includes references to “sexual preference” and “homosexuality.” Gender identity was coded when legislation referenced “gender expression,” “gender reassignment,” “transgenderism” or “Hijra/Kothi.” Age includes broad references to age and specific nondiscrimination protections for minors, the elderly or individuals above a
certain age. Marital status was captured when legislation referenced “civil status,” “married,” “relationship status,” “personal status” or whether employees have a husband or wife. Family status includes references to “parenthood,” “having children,” “single parents,” workers with “family responsibilities” and gender specific references to both “motherhood” and “fatherhood” or “maternity” and “paternity.” Migrant status includes references to “internal migrants,” “foreign migrant workers,” “immigrant status” and “economic migrants.” Foreign national origin includes “ancestry,” “citizenship or origin of parents,” “country or place of birth,” “homeland,” “national descent” or “national origin.” Social class includes references to “caste,” “social background,” “economic standing,” “economic status,” “social condition,” “social origin,” “socioeconomic status” or “disadvantaged.” Political affiliation was coded when legislation referenced “political beliefs,” “political convictions” or “political party affiliation.” Disability includes references to general disability (“handicap,” “impaired” or “special needs”) or specific to mental or physical disabilities.

**Defining areas of work**

We examined legal protections across five areas to ensure comprehensive protection from discrimination at work: hiring, pay, promotions/demotions, terminations and harassment. Our measure of protection from discrimination in hiring includes whether there are specific guarantees for protection from discrimination for job applicants. Our measure of protection from discrimination in pay includes whether workers are guaranteed equal remuneration, compensation, pay, salary or wages for equal work or equal pay for work of equal value. Our measure of protection from discrimination in promotions/demotions includes whether countries explicitly protect from discrimination in promotions or career advancement or whether there are protections from discrimination in discipline or demotions. Our measure of protection from discrimination in terminations includes guarantees of equal job stability, job security and continuance of employment. Our measure of harassment captures whether workers are protected from actions or behaviors that create a hostile, intimidating or humiliating work environment.

We separately analyzed whether workers are protected from retaliatory action for reporting discrimination at work. Our measure of protection from retaliation captures whether or not laws prohibit of any form of retaliation linked to reporting. This often, but not exclusively, takes the form of prohibitions of dismissal as reprisal for reporting workplace discrimination or harassment.

**Defining types of protection**

To assess the prevalence of protection for each social group, we first assessed whether there was at least some form of protection for each social group. This measure captured whether workers were explicitly protected from discrimination in any of the aforementioned five specific areas (hiring, pay, promotions/demotions, terminations and harassment) or were broadly protected from discrimination in the workplace based on their social group. Broad protection includes provisions that broadly protect individuals from discrimination based on a particular status in the workplace, but do not explicitly provide protection in any of the areas listed earlier. For example, “there shall be no discrimination on the basis of gender in employment.”

We then assessed the comprehensiveness of protections by counting the number of specific areas for which a group was explicitly protected from discrimination. Countries were categorized as having protections in one of the five specific areas (hiring, pay, promotions/ demotions, terminations and harassment) if they explicitly protected the group from discrimination in that specific area. Countries were categorized as having “no protections” if there was no broad protection for the specific group or no explicit protection for the specific
group in any of the five areas. For example, “no employer shall discriminate against any prospective employee on the grounds or gender, race, religion, or any other grounds” would be captured as having no protections on the basis of age. In some countries case law or regulations may play an important role in extending coverage to more groups in practice. However, not only does absence of a global repository of relevant case law preclude such a systematic assessment for all countries, these protections are likely to be less permanent and more likely to change than explicit legislative protection.

Analysis
Differences in levels of protection were examined across social groups and areas of work, as well as by country income level and region. We used the McNemar’s Chi-square test to assess whether there were statistically significant differences in the percentage of countries with protections for each pair of social groups or each pair of work area. For example, we tested whether there were differences in the proportion of countries guaranteeing at least some protection from discrimination at work based on gender compared to disability status. We separately compared each social group to the other 12 social groups in this paper. We also calculated the percentage of countries that protect workers from retaliation when reporting discrimination at work and used the McNemar’s Chi-square test of significance to test for differences across social groups. Finally, we examined differences in protection for each social group by country income level, using the Pearson’s Chi-square statistics to test for significance. For example, we tested whether there were differences in protection based on gender for low-income, middle-income and high-income countries.

Country income level and region were categorized according to the World Bank’s country and lending groups as of 2016 (World Bank, 2016) [3]. All analyses were conducted in Stata 14.

Results
Some form of protection against discrimination
Nearly all (89%) countries guarantee some protection from discrimination in the workplace on the basis of gender, a significantly greater percentage than countries with some protection for the other social groups (p < 0.01). Around three-quarters legislate some protection on the basis of disability (79%), religion (77%) and race/ethnicity (76%), with no significant difference between the proportions of countries offering some protection to these three groups (Figure 1).

Legal protections from discrimination at work based on migrant status, foreign national origin, gender identity or sexual orientation are significantly less common (p < 0.01). Less than 40% of countries in the world provide any form of protection from discrimination at work for migrants (38%, p < 0.01) and workers of different foreign national origins (38%, p < 0.01). Less than a third of countries (32%, p < 0.01) provide at least some protection from discrimination at work on the basis of sexual orientation and far fewer (10%) do so on the basis of gender identity. Protections from discrimination based on gender identity are significantly lower than protections for every other group (p < 0.01).

While the majority of countries provide at least some protection against discrimination based on gender in the workplace (89%), significantly fewer provide some protection on the basis of identities that often intersect with gender: marital status (49%, p < 0.01) and family status (38%, p < 0.01).

Comprehensive protection from discrimination
While a majority of countries provide at least some protection from discrimination at work, only a minority of countries provided comprehensive protections by explicitly protecting all five work areas (hiring, pay, promotions/demotions, terminations and harassment) to any
Figure 1.
Percentage of countries guaranteeing some protection from discrimination at work by social group

Note(s): Mongolia has missing data for Migrant Status, N = 192, N = 193 for all other groups

Here too, the groups that were most likely to receive comprehensive protections from discrimination were those based on gender (23%), disability (19%), religion (17%) and race/ethnicity (17%). Although the prevalence of at least some protection from discrimination at work based on sexual orientation was among the lowest, it is among the most comprehensively protected with 16% of countries guaranteeing protections in all five work areas. Together these findings indicate that while countries are less likely to protect from discrimination based on sexual orientation, those that do are more likely to provide comprehensive protections (Table 1).

Table 1.
Number of countries with guaranteed protections from discrimination at work by number of areas protected

Note(s): Mongolia has missing data for Migrant Status, N = 192, N = 193 for all other groups
Areas most likely to receive protection

While 65% countries guarantee nondiscrimination based on gender in hiring, significantly more, 82%, guarantee equal pay for equal work or equal pay for work of equal value \( (p < 0.01) \). Workers with disabilities are protected from discrimination in hiring (61%) significantly more often than pay (46\%, \( p < 0.01 \)) or terminations (55\%, \( p = 0.05 \)). However, no statistically significant differences are seen between protections for hiring and pay or hiring and terminations for discrimination based on religion, political affiliation, social class or migrant status (Table 2).

For each social group, significantly fewer countries protect from discrimination in promotion and/or demotion and from workplace harassment than countries with protection in hiring \( (p < 0.02) \). The only exception is for sexual orientation and gender identity based discrimination where only a few countries guarantee protection, but those that do are likely to provide widespread protection.

Protection from discrimination and country income

For most social groups, low-, middle- and high-income countries offered similar levels of protection, suggesting that legally protecting individuals from discrimination at work is not a question of a country’s available resources. For example, 93% of high-income countries explicitly protect from gender discrimination in at least one work area compared to 87% of low-income and 87% of middle-income countries. High-income countries, however, were significantly more likely to protect against discrimination based on sexual orientation (58% compared to 25% of middle-income and 6% of low-income, \( p < 0.01 \) for both) and gender identity (25% compared to 5% of middle-income and 3% of low-income, \( p < 0.01 \) and \( p = 0.01 \), respectively). The reverse was true in the case of social class and political affiliation, where significantly more low- and middle-income countries have protections from discrimination than high-income countries (social class: 71% of low-income and 70% of middle-income compared to 35% of high-income, \( p < 0.01 \); political affiliation: 77% of low-income and 65% of middle-income compared to 51% of high-income, \( p = 0.02 \) and \( p = 0.07 \), respectively). For marital status, low-income countries were less likely to explicitly protect at least one area (39%) compared to high-income countries (58\%, \( p = 0.09 \) (Table 3).
**Protection from discrimination and country region**

Differences in levels of protections were more evident across country region than by income. When looking at how many groups countries prohibited discrimination for in at least one area, protections were most common in Europe and Central Asia. No country in Europe and Central Asia failed to protect all groups compared to 2% in the Americas, 4% in Sub-Saharan Africa, 11% in the Middle East and North Africa, 12% in South Asia and 19% in East Asia and Pacific (see Plate 1). However, in every region, at least one country protected the vast majority of groups (10–13), suggesting that more comprehensive protections from discrimination at work are feasible across a range of settings. More than half of countries in Europe and Central Asia protected 10–13 groups compared to 31% in the Americas, 21% in Sub-Saharan Africa, 16% in East Asia and Pacific, 12% in South Asia and 11% in the Middle East and North Africa.

Looking at protections for specific groups by region, while all or nearly all countries prohibited gender discrimination in at least one work area in the Americas (97%), Europe and Central Asia (100%), the Middle East and North Africa (89%) and Sub-Saharan Africa (92%),
<table>
<thead>
<tr>
<th>Groups</th>
<th>Americas</th>
<th>East Asia and Pacific</th>
<th>Europe and Central Asia</th>
<th>Middle East and North Africa</th>
<th>South Asia</th>
<th>Sub-Saharan Africa</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender</td>
<td>34(97%)</td>
<td>19(63%)</td>
<td>53(100%)</td>
<td>17(89%)</td>
<td>46(50%)</td>
<td>44(92%)</td>
</tr>
<tr>
<td>Disability</td>
<td>28(80%)</td>
<td>20(67%)</td>
<td>51(96%)</td>
<td>13(68%)</td>
<td>5(63%)</td>
<td>15(73%)</td>
</tr>
<tr>
<td>Religion</td>
<td>32(91%)</td>
<td>14(47%)</td>
<td>48(91%)</td>
<td>10(53%)</td>
<td>3(38%)</td>
<td>4(88%)</td>
</tr>
<tr>
<td>Race/ethnicity</td>
<td>32(91%)</td>
<td>12(40%)</td>
<td>48(91%)</td>
<td>11(58%)</td>
<td>3(38%)</td>
<td>4(85%)</td>
</tr>
<tr>
<td>Political affiliation</td>
<td>26(74%)</td>
<td>9(30%)</td>
<td>38(72%)</td>
<td>8(42%)</td>
<td>2(25%)</td>
<td>3(81%)</td>
</tr>
<tr>
<td>Social class</td>
<td>22(63%)</td>
<td>10(33%)</td>
<td>35(66%)</td>
<td>7(37%)</td>
<td>3(38%)</td>
<td>3(91%)</td>
</tr>
<tr>
<td>Age</td>
<td>23(66%)</td>
<td>12(40%)</td>
<td>46(87%)</td>
<td>6(32%)</td>
<td>1(13%)</td>
<td>2(50%)</td>
</tr>
<tr>
<td>Marital status</td>
<td>22(63%)</td>
<td>11(37%)</td>
<td>33(62%)</td>
<td>5(26%)</td>
<td>2(25%)</td>
<td>1(4%)</td>
</tr>
<tr>
<td>Family status</td>
<td>11(31%)</td>
<td>8(27%)</td>
<td>33(62%)</td>
<td>5(26%)</td>
<td>1(13%)</td>
<td>1(3%)</td>
</tr>
<tr>
<td>Migrant status</td>
<td>12(34%)</td>
<td>6(21%)</td>
<td>32(60%)</td>
<td>6(32%)</td>
<td>1(13%)</td>
<td>1(3%)</td>
</tr>
<tr>
<td>Foreign national origin</td>
<td>18(51%)</td>
<td>7(23%)</td>
<td>18(34%)</td>
<td>4(21%)</td>
<td>0(0%)</td>
<td>2(54%)</td>
</tr>
<tr>
<td>Sexual orientation</td>
<td>9(26%)</td>
<td>5(17%)</td>
<td>38(72%)</td>
<td>1(5%)</td>
<td>0(0%)</td>
<td>1(3%)</td>
</tr>
<tr>
<td>Gender identity</td>
<td>1(3%)</td>
<td>1(3%)</td>
<td>17(32%)</td>
<td>0(0%)</td>
<td>0(0%)</td>
<td>1(2%)</td>
</tr>
</tbody>
</table>

**Note(s):** Mongolia has missing data for Migrant Status, N = 192, N = 193 for all other groups. Some protections mean countries guarantee broad protection from workplace discrimination for the group in focus and/or specifically prohibit discrimination in at least one of the work areas for the group in focus.

Approaches to nondiscrimination at work

<table>
<thead>
<tr>
<th>Groups</th>
<th>Protections from discrimination and retaliation</th>
<th>Protection from discrimination only</th>
<th>No protection</th>
<th>Total countries with data</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender</td>
<td>109(57%)</td>
<td>61(32%)</td>
<td>22(11%)</td>
<td>192</td>
</tr>
<tr>
<td>Disability</td>
<td>74(39%)</td>
<td>76(40%)</td>
<td>41(21%)</td>
<td>191</td>
</tr>
<tr>
<td>Religion</td>
<td>94(49%)</td>
<td>55(28%)</td>
<td>44(23%)</td>
<td>193</td>
</tr>
<tr>
<td>Race/ethnicity</td>
<td>94(49%)</td>
<td>52(27%)</td>
<td>46(24%)</td>
<td>192</td>
</tr>
<tr>
<td>Political affiliation</td>
<td>74(38%)</td>
<td>48(25%)</td>
<td>71(37%)</td>
<td>193</td>
</tr>
<tr>
<td>Social class</td>
<td>69(36%)</td>
<td>47(24%)</td>
<td>77(40%)</td>
<td>193</td>
</tr>
<tr>
<td>Age</td>
<td>68(35%)</td>
<td>46(24%)</td>
<td>78(41%)</td>
<td>192</td>
</tr>
<tr>
<td>Marital status</td>
<td>71(37%)</td>
<td>22(11%)</td>
<td>99(52%)</td>
<td>192</td>
</tr>
<tr>
<td>Family status</td>
<td>59(31%)</td>
<td>14(7%)</td>
<td>119(62%)</td>
<td>192</td>
</tr>
<tr>
<td>Migrant status</td>
<td>46(24%)</td>
<td>26(14%)</td>
<td>120(62%)</td>
<td>192</td>
</tr>
<tr>
<td>Foreign national origin</td>
<td>48(25%)</td>
<td>25(13%)</td>
<td>120(62%)</td>
<td>193</td>
</tr>
<tr>
<td>Sexual orientation</td>
<td>47(24%)</td>
<td>14(7%)</td>
<td>132(68%)</td>
<td>193</td>
</tr>
<tr>
<td>Gender identity</td>
<td>19(10%)</td>
<td>1(1%)</td>
<td>173(90%)</td>
<td>193</td>
</tr>
</tbody>
</table>

**Note(s):** Due to rounding, percentage totals may not always add to 100%.

Protections were significantly less in other regions. Only half of countries banned gender discrimination in South Asia (p < 0.01 compared to Europe and Central Asia) and only three-fifths did so in East Asia and Pacific (63%, p < 0.01 compared to Europe and Central Asia) (see Table 4). While gender discrimination was generally the most commonly protected status, in East Asia and Pacific and South Asia, protections based on disability were more common (67 and 63%, respectively). Other regional exceptions to global trends included social class and political affiliation being covered nearly as frequently in Sub-Saharan Africa (81%) as protections based on race/ethnicity (85%).

<table>
<thead>
<tr>
<th>Groups</th>
<th>Protections from discrimination and retaliation</th>
<th>Protection from discrimination only</th>
<th>No protection</th>
<th>Total countries with data</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender</td>
<td>109(57%)</td>
<td>61(32%)</td>
<td>22(11%)</td>
<td>192</td>
</tr>
<tr>
<td>Disability</td>
<td>74(39%)</td>
<td>76(40%)</td>
<td>41(21%)</td>
<td>191</td>
</tr>
<tr>
<td>Religion</td>
<td>94(49%)</td>
<td>55(28%)</td>
<td>44(23%)</td>
<td>193</td>
</tr>
<tr>
<td>Race/ethnicity</td>
<td>94(49%)</td>
<td>52(27%)</td>
<td>46(24%)</td>
<td>192</td>
</tr>
<tr>
<td>Political affiliation</td>
<td>74(38%)</td>
<td>48(25%)</td>
<td>71(37%)</td>
<td>193</td>
</tr>
<tr>
<td>Social class</td>
<td>69(36%)</td>
<td>47(24%)</td>
<td>77(40%)</td>
<td>193</td>
</tr>
<tr>
<td>Age</td>
<td>68(35%)</td>
<td>46(24%)</td>
<td>78(41%)</td>
<td>192</td>
</tr>
<tr>
<td>Marital status</td>
<td>71(37%)</td>
<td>22(11%)</td>
<td>99(52%)</td>
<td>192</td>
</tr>
<tr>
<td>Family status</td>
<td>59(31%)</td>
<td>14(7%)</td>
<td>119(62%)</td>
<td>192</td>
</tr>
<tr>
<td>Migrant status</td>
<td>46(24%)</td>
<td>26(14%)</td>
<td>120(62%)</td>
<td>192</td>
</tr>
<tr>
<td>Foreign national origin</td>
<td>48(25%)</td>
<td>25(13%)</td>
<td>120(62%)</td>
<td>193</td>
</tr>
<tr>
<td>Sexual orientation</td>
<td>47(24%)</td>
<td>14(7%)</td>
<td>132(68%)</td>
<td>193</td>
</tr>
<tr>
<td>Gender identity</td>
<td>19(10%)</td>
<td>1(1%)</td>
<td>173(90%)</td>
<td>193</td>
</tr>
</tbody>
</table>

**Note(s):** Number of countries with some protections from discrimination at work by region.
EDI
40,3

Retaliation
For most social groups, a majority of countries do not pair protection from discrimination with a prohibition of retaliation for reporting workplace discrimination (Table 5). For example, 79% of countries protect workers from discrimination based on disability; however, among these countries that make discrimination on the basis of disability illegal, less than half (49%) protect workers who report discrimination from retaliation. In contrast, for the group with the lowest level of protection from discrimination (gender identity), nearly all countries that extend protection from discrimination pair this protection with a prohibition against retaliation for reporting.

Discussion
It is fundamental to the success of national economies as well as to the lives of individuals and their families that every human being has an equal chance to succeed in the workplace. For this to happen we need to ensure that there is no discrimination in hiring, pay, promotion, demotion or firing. Everyone needs to be protected from bullying and harassment that hinder or discourage opportunities to succeed.

Legal protections against discrimination provide an essential foundation for these equal opportunities. When discrimination occurs, laws provide a means of redress. When the laws have mechanisms to encourage preventing discrimination, the laws can lower rates of discrimination by setting requirements that employers will work to prevent discrimination. Laws also help set norms. When discrimination against a group is illegal, it sends a clear message that all should be treated equally.

This article presents the first data on laws to prevent discrimination in the workplace in all countries around the world. We document evidence of strong legal protections but also important gaps. While three-quarters or more of countries guarantee at least some protection from discrimination on the basis of gender (89%), disability (79%), religion (77%) and race/ethnicity (76%), only a minority of countries do so on the basis of marital status (49%), family status (38%), migrant status (38%), foreign national origin (38%), sexual orientation (32%) or gender identity (10%). Even among social groups where the prevalence of protections is relatively high, comprehensive protection from discrimination at work is rare. Less than a quarter of countries explicitly protect any group from discrimination at work in hiring, pay, promotions/demotions, terminations and harassment. Moreover, protection from retaliation in reporting discrimination is far from universal, despite its importance to ensuring workers exercise their protections from discrimination. A third of countries protect from discrimination, but fail to protect from retaliation, based on gender (32%), religion (28%) and race/ethnicity (27%) and 40% do so for disability.

The data also highlight that legal protections from discrimination at work are feasible across a range of different settings. For most social groups, there was no statistically significant difference in protection based on country income level, suggesting that taking the first step to legally protecting groups from discrimination is not a question of a country’s resources, but of political will. Similarly, while differences in protections were observed across regions, countries in all regions legally prohibit discrimination for nearly every social group. By highlighting countries in every region that are providing more comprehensive protections from discrimination, this data supports the identification of peer countries that might serve as models for legislative reform.

Global agreements and policy implications
While further research is needed that focuses on implementation mechanisms, this study highlights a series of areas that are important for policy action. It is important to work toward
universal protections. 187 UN member states have ratified the Convention on the Elimination of Discrimination Against Women (United Nations General Assembly, 1979), yet 19 countries that are parties still do not have national laws preventing gender discrimination in the workplace. The same can be said for the Convention on the Rights of Persons with Disabilities (United Nations General Assembly, 2008). 157 countries had ratified the convention by the end of 2015, yet 26 states parties did not have laws prohibiting discrimination on the basis of disability of the workplace in 2016. This disparity between commitments countries have made through international agreements and the extent to which they have passed the national laws to put these commitments into practice needs to be addressed. Moreover, countries that provide partial protection (covering only certain aspects of work) should move to full protection.

Economy-wide benefits
There is strong evidence that reducing discrimination also benefits the economy as a whole. Discrimination violates fundamental principles that all people should be treated equally and violates all global human rights agreements; it is also economically inefficient. Discrimination leads to having fewer people in the workforce and leads to selection for positions on bases other than merit. Both reduce productivity. These principles hold across groups.

The most work estimating the size of the economic loss due to discrimination has occurred in the area of gender. A series of studies have been carried out by leading consulting firms such as McKinsey, by banks including Goldman Sachs and by academics. These studies have found that gender differences in labor force participation cost the global economy as much as $28 trillion (Woetzel et al., 2015, p. 2).

Further steps
While legal protections against discrimination are the first step, it is crucial that laws contain mechanisms that support successful implementation. Important areas for future study include among others: examining the mechanisms that laws around the world contain regarding implementation, responding to cases of discrimination and monitoring. Understanding whether legislation and enforcement mechanisms protect workers from discrimination on the basis of two or more intersecting identities is also critical to ensuring that the most marginalized workers have full protection under the law. Evaluating the extent to which different legal approaches taken by countries influence their effectiveness is also greatly needed.

Transparency can play an important role in accelerating equality in the workplace. Each global agreement should be linked to maps that allow citizens around the world to readily see whether their country has not only ratified the relevant international agreements to prevent discrimination on the basis of gender, disability, race ethnicity religion or other characteristics, but also whether their country has passed the national laws that prevent discrimination from being experienced in central areas of life such as work or education.

The global agreements containing guarantees of equal rights for all human beings have the potential to be transformational but only if they are linked to clear action within countries. That action is far more likely to occur if transparency supports citizens and civil society alike rewarding policymakers who act in concordance with these agreements and holding accountable those policymakers who have yet to take the needed steps.

Notes
1. Baert also notes that no studies were identified in six of the ten most populous countries in the world: Bangladesh, Brazil, Indonesia, Nigeria, Pakistan and Russia.
2. For purposes of this comparative study, we omitted language because ability to communicate in a specific language is often a core job requirement. However, linguistic discrimination is also an important consideration for individuals who speak more than one language.

3. While Malta is classified as part of the Middle East and North Africa by the World Bank, it is also a member of the European Union (EU) and therefore more likely to have legislation reflecting the EU’s principles and directives. Thus, we classified Malta as a part of Europe and Central Asia. All other countries retained their WB classifications.

References


Corresponding author
Jody Heymann can be contacted at: jody.heymann@ph.ucla.edu
Where do Women Stand? New Evidence on the Presence and Absence of Gender Equality in the World’s Constitutions

Adèle Cassola
University of California, Los Angeles

Amy Raub
University of California, Los Angeles

Danielle Foley
Johns Hopkins University

Jody Heymann
University of California, Los Angeles

Since the passage of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1979, the international community has remained committed to the goal of gender equality. The
187 States Parties to the Convention pledged to ban gender discrimination and promote women’s equality in all spheres and agreed to incorporate these principles in their national legal frameworks (UN General Assembly 1979, Art. 1 and 2). World leaders reaffirmed these commitments at the Fourth World Conference on Women (1995) in Beijing. Fifteen years later, representatives from all United Nations (UN) states declared achieving women’s equality and empowerment to be a top priority for the new millennium (UN General Assembly 2000). In 2010, the UN General Assembly created UN Women, an entity devoted to accelerating the achievement of this goal (UN General Assembly 2010).

These international agreements and declarations have repeatedly emphasized the need for women’s rights to be protected at the national level. As the fundamental documents outlining countries’ political and socioeconomic organization, values, and goals, it is particularly important that constitutions guarantee equality. Although provisions that promote gender equality may be delineated in national legislation and policy documents, including these protections in constitutions carries both symbolic and practical weight. Constitutions are typically more difficult to repeal or amend than other legislative or policy commitments, which can help to guard against reversal when political administrations change. Most significantly where women’s rights are concerned, constitutional protections can be a catalyst for action and provide a legal foundation for citizens to advance equality and combat discrimination. Although the discrepancy between rights protections and implementation has raised concerns about the extent to which the commitments entrenched in constitutions and amendments are translated into outcomes on the ground (Cross 1999; Davenport 1996; Keith 2002; Keith, Tate, and Poe 2009; Pritchard 1986; Strauss 2001), evidence from around the world demonstrates that the constitutional framework or “building blocks” in place can significantly bolster or hinder movements to promote gender equality (Scribner and Lambert 2010; Waylen 2007, 203).

This article provides the first detailed global assessment of the status, strength, scope, and evolution of constitutional gender protections across the spheres of general equality and nondiscrimination, political participation, social and economic rights, family life, and customary and religious law. The rest of this section reviews the evidence that constitutions are important tools for advancing women’s rights in each of these areas. We go on to explain the methodology we used to collect and analyze data on the constitutional rights entrenched in 191 countries as
of June 2011. We then describe the status of equal rights across gender in the world’s constitutions, analyze how these protections differ according to the decade in which a country’s constitution was adopted and last amended, and examine regional variation in the status of customary and religious law. Finally, we discuss the implications of our findings and next steps for future research. This study provides an assessment of the progress that has been made — and the gaps that persist — following the introduction of various international commitments to gender equality. It also aims to provide researchers, policy makers, and civil society leaders with better tools to introduce gender protections where they are lacking and to leverage them where they are not being implemented.

LEVERAGING CONSTITUTIONS TO PROMOTE EQUAL RIGHTS

Around the world, citizens have leveraged constitutional protections to oppose the passage of discriminatory legislation, litigate against existing laws and practices that violate women’s rights, challenge customary and religious traditions that restrict gender equality, and encourage the passage of new legislation that promotes equal rights for women. The following summary of landmark women’s rights cases that drew on constitutional protections is not exhaustive, and it can be argued that some cases represent important steps forward while others primarily prevent costly retrenchment. Nonetheless, these examples illustrate the significant ramifications of including or omitting gender protections in constitutions.

Constitutions’ Role in Limiting the Passage of Discriminatory Laws

Constitutional provisions have provided an important rallying point for those opposing the enactment of discriminatory legislation. In 2009, the government of Afghanistan passed the *Shiite Personal Status Law*, which would affect the lives of the estimated 15% of the population who identified as Shiites (Mackey 2009). Several provisions of the law violated Afghanistan’s constitutional guarantee of women’s equal rights: it compelled wives to submit to their husbands’ requests for sex, restricted women’s ability to leave the house or be employed without their husbands’ permission, and gave fathers automatic custody of their children after they reached a certain age (*Shiite Personal Status Law*)
WHERE DO WOMEN STAND?

Women’s groups and other members of civil society were vocal about the law’s incompatibility with Afghanistan’s constitutional guarantee of gender equality (Gebauer and Najafizada 2009). Following intense domestic and international pressure, President Karzai asked the country’s Parliament to remove any unconstitutional provisions (Radio Free Europe/Radio Liberty 2009). Although the amended bill still contained several problematic clauses, it omitted the articles prohibiting women from leaving the house without permission and mandating that women have sex with their husbands at least once every four days (Vogt 2009).

When Egypt’s Council of States voted to ban women from serving as judges, women’s rights activists protested that the decision violated the constitutional guarantee of equality. Despite heated opposition and threats of legal action from his peers, the head of the Council also characterized the vote as unconstitutional and vowed to ignore it (Zayan 2010). In light of these events, the prime minister asked the Constitutional Court for clarification regarding the legitimacy of the Council’s decision; the court ruled that there was no legal basis for the ban and reaffirmed the right of all citizens to be equal before the law (ElSaed 2010; The Guardian 2010).

Constitutions as a Basis for Challenging Laws or Actions that Violate Women’s Rights

When discriminatory laws are already in place or state actions violate gender equality, litigation provides one of the most effective channels through which women can advance their rights. In Botswana, Kenya, and Zimbabwe, constitutional provisions prohibiting gender discrimination were used to challenge regulations that banned pregnant female students from attending school (Center for Reproductive Rights 2005). In Swaziland, constitutional protections of women’s equal economic rights and equality before the law were effectively leveraged against the 1968 Deeds Registry Act, which prevented married women from registering property in their own names (IRIN 2010). When Kuwait’s Justice Ministry stated that only male applicants would be considered for an entry-level position, six female law graduates successfully challenged the restriction as unconstitutional (Human Rights Watch 2012). In Malaysia, the High Court ruled that the Ministry of Education violated the constitutional prohibition of gender
discrimination when it retracted an employment contract upon discovering the candidate was pregnant (Noorfadilla Binit Ahmad Saikin v. Chayed Bin Basirun and Others 2011).

The impact of such rulings often extends beyond the individual litigants. A far-reaching court case found Uganda’s Divorce Act, which imposed stricter conditions under which women could file for divorce compared to those that applied to men, to be in direct contravention of women’s constitutional rights to equality and nondiscrimination. The Court encouraged litigants to challenge other laws that violated the constitution’s protection of gender equality, and subsequent rulings overturned discriminatory provisions of the Penal Code and the Succession Act (Ssenyonjo 2007).

As well as setting precedents for future litigation, court victories can catalyze women’s rights movements. In Botswana, Unity Dow successfully leveraged the constitution’s sole protection of equal rights based on sex to challenge the Citizenship Act of 1982. The Act stipulated that female citizens whose husbands were noncitizens could not pass citizenship onto their children, whereas male citizens married to noncitizens did not face the same restriction (Scribner and Lambert 2010). The High Court and the Court of Appeals ruled that the Citizenship Act was unconstitutional because it discriminated on the basis of gender. Botswana’s Parliament amended the Citizenship Act in 1995, and Unity Dow’s children, along with numerous others, were granted citizenship (Dow 2001). The case mobilized a broader movement to overturn laws that discriminated against women (Maluwa 1999).

Constitutions as a Basis for Overturning Discriminatory Customary Laws

While Unity Dow’s challenge succeeded in overturning a piece of formal legislation, Botswana’s constitution offers little leverage against discriminatory customary laws (Scribner and Lambert 2010). Indeed, the constitution specifies that customary law can prevail over the right to nondiscrimination. In contrast, provisions outlining the superiority of constitutional law over customary or religious law have been used to challenge discriminatory traditions. In South Africa, where the constitution explicitly prevails over custom, advocates have mounted successful challenges against laws that prevented women from owning
property, excluded them from holding traditional leadership positions, and granted a husband legal guardianship over his wife (Center for Reproductive Rights 2005; Scribner and Lambert 2010; Thakali and Gerardy 2008).

Although explicit provisions declaring the supremacy of the constitution are ideal, even countries whose constitutions do not address the status of customary law have seen successful court cases leveraging gender protections against discriminatory traditions. Nigeria’s 1979 constitution prohibited laws from discriminating on the basis of sex but did not specify whether customs that violated the constitution were permitted (Ewelukwa 2002). The nondiscrimination clause was successfully used in the case of Mojekwu v. Mojekwu to oppose a custom that denied inheritance rights to female children (Center for Reproductive Rights 2005). In this landmark decision, the Court ruled that all discrimination on the basis of sex was unconstitutional (Ewelukwa 2002). The Nigerian Supreme Court upheld the decision, and a subsequent case in the Court of Appeal reaffirmed the right of female children to inherit property (Center for Reproductive Rights 2005).

Constitutions’ Role in Passing New Laws that Protect Equality

Constitutional provisions have also been used to pressure governments to pass laws that promote women’s equality. In India, women’s groups argued successfully for a legal prohibition of sexual harassment in the workplace based on the government’s constitutional and international obligations to protect gender equality. Recognizing that it would take time for the ruling to be translated into legislation, the Supreme Court issued guidelines on the prevention and redress of sexual harassment, which employers were required to implement immediately (Vishaka and Others v. State of Rajasthan and Others 1997).

During the 1990s, the women’s movement in Turkey campaigned for a reformed civil code that would reflect the country’s constitutional protection of gender equality (Turquet et al. 2011). When a draft law incorporating their demands was opposed by some legislators on the basis that gender equality in the division of spousal property was incompatible with the country’s traditions, the movement increased public awareness of women’s constitutionally and internationally recognized rights in their fight to keep the bill alive. They succeeded: the new Civil Code protected women’s equal rights to inheritance and
matrimonial property and instituted an equal age of marriage for men and women (Turquet et al. 2011).

The cases reviewed above make it clear that, although it takes more than the presence of rights in a constitution to make them real on the ground, constitutional protections are a valuable tool to promote gender equality. The sections below examine the extent to which these protections are present or absent in the constitutions of the world.

METHODS

In order to obtain the information on gender protections necessary for this study, we reviewed the national constitutions of 191 UN member states as amended to June 2011. At that time, the state of South Sudan did not yet have a constitution, and Fiji’s constitution was suspended (Government of Fiji 2009). Constitutions were acquired from government websites where possible. If an official version was not available, we consulted three additional resources: Constitutions of the Countries of the World Online (Blaustein and Flanz 2007); Constitution Finder, a database of world constitutions sourced by the University of Richmond School of Law (2012); and HeinOnline’s (2012) World Constitutions Illustrated.

In the case of UN member states that did not have a written codified constitution or that had multiple constitutional documents, we reviewed any laws considered to have constitutional status. Finally, we collected and coded any other national legislation that the constitution itself designated as part of the constitutional order. A coding team fluent in several UN languages read all constitutions in their entirety and classified provisions into individual rights categories. The subsequent sections outline how we defined gender protections for the purpose of this study, how we categorized the rights included in constitutions, and how we coded different levels of protection for each right.

Capturing Gender-specific And Universal Protections

Gender-Specific Protections

We considered a right to be granted to women if the constitution referred to sex or gender, mentioned women specifically, or used both masculine and feminine language. For example, the following were all considered protections of women’s right to work: (a) Women have the right to work;
(b) Citizens of both sexes have the right to work; (c) The right to work is protected regardless of gender; and (d) Everyone is entitled to exercise his or her right to work. Articles that granted a right solely in masculine language, such as by stating that “all men have the right to work,” were neither coded as protections nor as denials of women’s rights. These provisions were interpreted to reflect language in common use at the time of drafting rather than explicit exclusions based on gender.

**Universal Protections**

Constitutions often protected rights in universal terms, with or without specifying additional protections for women. For instance, a provision might state that “everyone has the right to education.” We categorized such articles as universal protections. We believe that either a gender-specific or a universal guarantee of a right offers better protection to women than not having any constitutional commitment to the right at all. Therefore, while this study focuses on rights that are explicitly granted to women, we also present results for countries that only guaranteed rights in universal terms.

**Constitutional Protections Analyzed**

We identified five broad spheres of relevant rights that constitutions addressed: general equality and nondiscrimination, equality in political life, equality in social and economic rights, equality within the family, and the status of customary and religious law. This section details the individual rights provisions that we included within each of these categories.

**General Equality and Nondiscrimination**

Our first measure of women’s rights assessed whether the constitution contained any protections against discrimination. We identified four relevant types of provisions: (1) those prohibiting discrimination; (2) those protecting equality before the law; (3) those guaranteeing formal equality or equality of opportunities; and (4) those entrenching the equality of rights. Articles that permitted or promoted state action to advance women’s rights or equality were also included in this category.
Equality in Political Life

We analyzed gender equality in two spheres of political life: (1) voting and (2) eligibility for public office. We also captured references to special measures in place for women to attain equal political representation.

Equality in Social and Economic Rights

This study captured five measures of gender equality in the spheres of education and work: (1) the right to education, which includes the rights to primary, free and/or compulsory education; (2) protection from discrimination in education; (3) the right to work; (4) broad protection from discrimination in work; and (5) protection from discrimination in hiring, promotion, working conditions, or pay.

Equality in Family Rights

We measured women’s equality in family life across three stages: (1) when entering marriage; (2) during marriage; and (3) when dissolving a marriage. For this category, a gender-based protection was coded if the provision referred to spouses, women, or wives.

Status of Customary and Religious Law

Because women’s constitutional rights can be jeopardized when customary or religious laws prevail over the constitution, this study also identified the status of these laws. Countries were categorized according to whether (1) legislation could contravene customary or religious law; (2) customary or religious laws could specifically prevail over all or some constitutional provisions; and (3) customary or religious laws were explicitly subordinate to the constitution. When a constitution was declared to be the supreme law of the state but contained no provisions expressing where customary and religious law stood in relation to it, we did not make assumptions about the status of customary and religious law.

Categorizing Levels of Protection

In order to evaluate the level of constitutional protection afforded to women globally, we recorded the quality of the language used to describe constitutional rights.

Guaranteed Rights

Constitutional articles that unambiguously protected a right or phrased its implementation as a duty or obligation of the state were coded as
guaranteed rights. For example, the Dominican Republic “guarantees the equality and equity of women and men in the exercise of the right to work” (Const. Dominican Republic 2010, Art. 62), and in Ecuador, “[e]ducation is a right of persons throughout their lives and an unavoidable and mandatory duty of the State” (Const. Republic of Ecuador 2008, Art. 26). We also coded a guarantee when constitutions declared violations of particular rights to be prohibited or illegal.

**Aspirational Protections**

Rights phrased in nonauthoritative language or described as state objectives were categorized as aspirational protections. Examples of this occurred when the enforcement of a right was limited by the state’s resources or the constitution specified that the right could not be claimed in court. If the constitution only granted a right in the preamble and did not specify that the preamble was an integral part of the constitution, we coded the right as an aspiration.

**Denied Rights**

We also reviewed constitutions for any clauses that explicitly denied rights to women. These included any disqualifications for elected office, statements restricting rights on the basis of gender, or provisions that specifically denied women’s freedom of choice within marriage.

**Rights with Exceptions**

When a constitution granted a right to women but allowed for possible restrictions on the basis of gender in specific circumstances, we categorized the relevant provisions as rights with exceptions.

**Affirmative Protections**

Finally, we captured cases where constitutions permitted, promoted, or mandated positive measures to advance equality in general or in family, economic, social, or political life. Provisions included those committing the state to prioritize women’s education and articles that reserved a minimum number of seats for women in the legislature.

**Classifying Constitutions By Era**

This study examines how likely constitutions were to protect women’s rights as of June 2011, either because these protections were included at the time the constitution was introduced or were added through amendments. In
addition to assessing the current state of gender protections in all of the world’s constitutions, we compared the status of gender protections across constitutions’ year of adoption and year of last amendment. In light of the international community’s emphasis on translating global commitments into national guarantees, we would expect those constitutions written and/or amended after CEDAW to include stronger protections of women’s rights. In examining the evolution of constitutional gender equality protections, we therefore asked the following questions:

- Among all constitutions passed in a given decade, what percentage address gender equality?
- Among all constitutions that were last amended in a given decade, what percentage address gender equality?

Most constitutional provisions are written at the time of adoption. Constitutions are typically difficult to amend, and they tend to change infrequently. Furthermore, amendment processes vary considerably across countries, and substantive changes to constitutions can be extremely difficult to initiate and approve. Because the adoption of a new constitution is virtually always a landmark event, this study focuses on protections by year of constitutional adoption.

Although substantive changes to constitutions are infrequent, constitutions do evolve. Because there is no readily available way to compare the difficulty of amendment processes across countries, we use the date of most recent amendment as a proxy for the last time a country had the opportunity to add gender protections to its constitution. This is an imperfect indicator because the most recent amendment may have been procedural or substantive, and it is not possible to determine whether those constitutions that have had only minor recent amendments were minimally amended because the political will to make more substantive changes was lacking, or because the structure of the constitution made the barriers to substantive amendments particularly high.

When analyzing gender protections by the year a constitution was originally enacted, we categorized constitutions into six time periods: those introduced before 1960 and those adopted in each subsequent

---

1. If a constitution was not amended after its passage, we used the date of adoption as the year of last change.
WHERE DO WOMEN STAND?

decade (Table 1). This categorization allowed us to examine women’s rights in constitutions after the adoption of CEDAW in 1979 and the Millennium Development Goals (MDGs) in 2000. While several other significant political events occurred across these time periods, the historical markers that impacted different countries’ constitutional development most significantly are likely to vary and overlap. For example, the Latin American constitutional revolution (1983–1994) overlaps partially but not completely with the emergence of new democracies from the former USSR (1989–present). This would make it difficult and potentially misleading to categorize our data according to dominant historical narratives other than global agreements.

Our examination of trends in gender protections based on year of last amendment revealed that most of the world’s constitutions have been amended since 1980. Due to a small sample size of constitutions last changed prior to 1980, we categorized the timing of most recent amendment according to those constitutions last amended before CEDAW was passed in 1979 and in subsequent decades. When we categorized the data in this way, the patterns of rights protections over time were similar to those observed when the data were categorized by year of adoption. This pattern is clearest when it comes to protections of broad equality for women, as demonstrated in Tables 2 and 3. Due to the lower levels of overall protection in other specific rights spheres, it is more difficult to draw comparisons about the trends by year of adoption and by year of most recent amendment. In order to avoid duplicating these tables in this article, we have made them available online at http://worldpolicyforum.org/public/gendertables.pdf.

RESULTS

General Equality and Nondiscrimination

Countries took diverse, but often overlapping, approaches to protecting gender equality in their constitutions. In a typical formulation, Colombia’s constitution guaranteed that all individuals will “receive equal protection and treatment from the authorities, and will enjoy the same rights, freedoms, and opportunities without any discrimination on account of gender” and went on to specify that “[w]omen and men have equal rights and opportunities. Women cannot be subjected to any type of discrimination” (Political Const. Republic of Colombia 1991 [amended to 2009], Art. 13 and 43). Austria’s constitution both protected
Table 1. Regional and global distribution of constitutions by year of adoption

<table>
<thead>
<tr>
<th>Year of Adoption</th>
<th>Americas</th>
<th>East Asia and Pacific</th>
<th>Europe and Central Asia</th>
<th>Middle East and North Africa</th>
<th>South Asia</th>
<th>Sub-Saharan Africa</th>
<th>Globally</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before 1960</td>
<td>5 (16%)</td>
<td>7 (23%)</td>
<td>14 (45%)</td>
<td>4 (13%)</td>
<td>1 (3%)</td>
<td>0 (0%)</td>
<td>31 (100%)</td>
</tr>
<tr>
<td>1960–69</td>
<td>3 (27%)</td>
<td>3 (27%)</td>
<td>3 (27%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>2 (18%)</td>
<td>11 (100%)</td>
</tr>
<tr>
<td>1970–79</td>
<td>8 (26%)</td>
<td>7 (23%)</td>
<td>5 (16%)</td>
<td>5 (16%)</td>
<td>3 (10%)</td>
<td>3 (10%)</td>
<td>31 (100%)</td>
</tr>
<tr>
<td>1980–89</td>
<td>12 (52%)</td>
<td>5 (22%)</td>
<td>2 (9%)</td>
<td>2 (9%)</td>
<td>0 (0%)</td>
<td>2 (9%)</td>
<td>23 (100%)</td>
</tr>
<tr>
<td>1990–99</td>
<td>4 (6%)</td>
<td>4 (6%)</td>
<td>25 (40%)</td>
<td>5 (8%)</td>
<td>0 (0%)</td>
<td>24 (39%)</td>
<td>62 (100%)</td>
</tr>
<tr>
<td>2000–11</td>
<td>3 (9%)</td>
<td>3 (9%)</td>
<td>4 (12%)</td>
<td>3 (9%)</td>
<td>4 (12%)</td>
<td>16 (48%)</td>
<td>33 (100%)</td>
</tr>
<tr>
<td>Total</td>
<td>35 (18%)</td>
<td>29 (15%)</td>
<td>53 (28%)</td>
<td>19 (10%)</td>
<td>8 (4%)</td>
<td>47 (25%)</td>
<td>191 (100%)</td>
</tr>
</tbody>
</table>
Table 2. Constitutional protection of gender equality and nondiscrimination by year of constitutions’ adoption

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitution does not include any relevant provision</td>
<td>10 (5%)</td>
<td>4 (13%)</td>
<td>3 (27%)</td>
<td>2 (6%)</td>
<td>0 (0%)</td>
<td>1 (2%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>Constitution guarantees equality generally, but not specifically to women</td>
<td>22 (12%)</td>
<td>9 (29%)</td>
<td>3 (27%)</td>
<td>3 (10%)</td>
<td>2 (9%)</td>
<td>5 (8%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>Constitution aspires to grant women equality</td>
<td>3 (2%)</td>
<td>2 (6%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>1 (4%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>Constitution protects women’s equality, but permits exceptions</td>
<td>1 (1%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>1 (3%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>Constitution guarantees equality to women</td>
<td>155 (81%)</td>
<td>16 (52%)</td>
<td>5 (45%)</td>
<td>25 (81%)</td>
<td>20 (87%)</td>
<td>56 (90%)</td>
<td>33 (100%)</td>
</tr>
<tr>
<td>Constitution allows for affirmative measures to promote equality</td>
<td>47 (25%)</td>
<td>8 (26%)</td>
<td>2 (18%)</td>
<td>10 (32%)</td>
<td>6 (26%)</td>
<td>12 (19%)</td>
<td>9 (27%)</td>
</tr>
</tbody>
</table>
Table 3. Constitutional protection of gender equality and nondiscrimination by year of constitutions’ most recent amendment

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitution does not include any relevant provision</td>
<td>3 (43%)</td>
<td>0 (0%)</td>
<td>3 (11%)</td>
<td>4 (3%)</td>
</tr>
<tr>
<td>Constitution guarantees equality generally, but not specifically to women</td>
<td>1 (14%)</td>
<td>2 (18%)</td>
<td>2 (7%)</td>
<td>17 (12%)</td>
</tr>
<tr>
<td>Constitution aspires to grant women equality</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>1 (4%)</td>
<td>2 (1%)</td>
</tr>
<tr>
<td>Constitution protects women’s equality, but permits exceptions</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>1 (1%)</td>
</tr>
<tr>
<td>Constitution guarantees equality to women</td>
<td>3 (43%)</td>
<td>9 (82%)</td>
<td>22 (79%)</td>
<td>121 (83%)</td>
</tr>
</tbody>
</table>

and promoted gender equality by stating that “[t]he Federation, Laender and municipalities subscribe to the de facto equality of men and women. Measures to promote factual equality of women and men, particularly by eliminating actually existing inequalities, are admissible” (Federal Const. Laws of Austria 1920 [amended to 2009], Art. 7).

Constitutional provisions were often explicit about the need for positive measures to rectify past discrimination and present inequality based on gender. For example, in Greece “[t]he State shall take measures for the elimination of inequalities actually existing, in particular to the detriment of women” (Const. Greece 1975 [amended to 2008], Art.116). Ethiopia’s constitution promised that “[t]he historical legacy of inequality and discrimination suffered by women in Ethiopia taken into account, women … are entitled to affirmative measures. The purpose of such measures shall be to provide special attention to women so as to enable them to compete and participate on the basis of equality with men in political, social and economic life” (Const. Federal Democratic Republic of Ethiopia 1994, Art. 35). In Paraguay, “[m]en and women have equal civil, political, social, and cultural rights. The State will foster the conditions and create the mechanisms adequate for making this equality real and effective by removing those obstacles that prevent or curtail its realization, as well as by promoting women’s participation in every sector of national life” (Political Const. Republic of Paraguay 1992 [amended to 2011], Art. 48).
The four approaches to gender equality that we identified in this study — prohibition of discrimination, equality before the law, equality of rights, and broad equality provisions — all address important aspects of social equity and provide different tools for advancing women’s rights on the ground. In Tables 2 and 3, we considered countries to protect women if they took at least one of these approaches to gender equality and nondiscrimination in their constitutions.

Globally, 81% of countries took at least one approach to guaranteeing equality specifically for women in their constitutions. Of the four rights included in the category of “equality and nondiscrimination” in Tables 2 and 3, the most common gender-based protection was prohibition of discrimination, with 63% of constitutions guaranteeing this right specifically to women, compared to 38% protecting equality of rights, 27% granting equality before the law, and just 9% guaranteeing broad equality. Additionally, a quarter of constitutions around the world permitted, encouraged, or mandated measures to promote gender equality.

There was a strong trend toward constitutional protection of women’s rights from the 1970s through to 2011, when equality for women became entrenched in a majority of constitutions. Of the constitutions adopted in the 30 years after the passage of CEDAW, only Saudi Arabia’s did not include either a universal equality clause or one specific to women. Furthermore, all of the constitutions passed between 2000 and 2011 included specific guarantees of gender equality. Table 3 demonstrates that when constitutions are categorized according to the year of last change, there is a similar trend toward the increased inclusion of gender protections over time. Whereas a minority of constitutions that were last changed before 1980 guaranteed some aspect of equality for women, a strong majority of those last amended in subsequent decades did so.

We did not identify any constitutional provisions that explicitly denied women’s equality, but constitutions did place gender equality at risk indirectly. Worldwide, 5% of countries did not provide either a gender-specific or universal protection of equality in their constitutions. Furthermore, several countries implicitly jeopardized this right by according customary or religious law superiority over constitutional protections against discrimination (as discussed in more detail below). Finally, Zimbabwe’s constitution prohibited discrimination on the basis of sex but permitted exceptions based on “physiological differences
between persons of different sex or gender” (Const. Zimbabwe 1979 [amended to 2009], Art. 23).

Equality in Political Life

As a foundational document outlining a country’s political structure, a constitution can be an important channel for entrenching women’s equal right to vote and access positions of leadership in government. Several countries in this study did so either by broadly protecting gender equality in political rights or by specifying that women were equally eligible to participate in specific aspects of political life. For example, Guyana provided the broad guarantee that “[w]omen and men have equal rights and the same legal status in all spheres of political . . . life” (Const. Co-Operative Republic of Guyana 1980 [amended to 2001], Art. 29), while in Italy, “[a]ll citizens, men or women, who have attained their majority are entitled to vote,” and “[c]itizens of one or the other sex are eligible for public office and for elective positions under equal conditions” (Const. Italian Republic 1947 [amended to 2007], Art. 48 and 51).

Measures to ensure women’s participation in political life took three broad forms in the constitutions we examined, each with different implications for gender equality in this sphere. Firstly, some countries made nonspecific promises of action to ensure women’s political representation or assured women a presence in elected bodies but did not specifically reserve seats for them. While such provisions may influence electoral policies, they do not by themselves prescribe specific actions that governments must take. For example, Argentina’s constitution provides that “actual equality of opportunities for men and women to elective and political party positions shall be guaranteed by means of positive actions in the regulation of political parties and in the electoral system” (Const. Argentine Republic 1853 [amended to 1994], Art. 37). In contrast, a second group of constitutions required governments to undertake specific actions, such as reserving a minimum number of seats for women in their legislatures. Nepal’s constitution stipulated that “at least one-third of such total number of candidates nominated [to the Constituent Assembly] shall be women,” (Interim Const. Nepal 2006 [amended to 2008], Art. 63). A third group of countries reserved a specific (rather than a minimum) number of seats for women in the legislature. For example, Uganda’s constitution
specified that “the Parliament shall consist of — (a) members directly elected to represent constituencies; (b) one woman representative for every district,” (Const. Republic of Uganda 1995 [amended to 2005], Art. 78) and in Pakistan, 60 seats out of a total of 342 in the National Assembly are reserved for women (Const. Islamic Republic of Pakistan 1973 [amended to 2011], Art. 51). This approach may restrict rather than promote women’s representation in political bodies.

The majority of countries globally did not address gender when determining eligibility for or exclusions from political participation (Table 3). Of the constitutions, 32% explicitly guaranteed gender equality in both access to voting and elected office (23%) or in one of these spheres (9%). Across all decades, 17% of constitutions allowed affirmative measures or quotas for women. Nonspecific measures to ensure women’s participation in political life were included in 11% of constitutions, while 4% of constitutions reserved a minimum number of seats for women in the legislature, and 2% reserved a specific number of seats for women.

Explicit protection of gender equality in political life was most pronounced in recently adopted constitutions. The 2000s were the only decade when a majority of countries (53%) protected women’s equality in voting, eligibility for office, or both. Constitutions introduced between 2000 and June 2011 were also considerably more likely to include affirmative measures (39%) or nonrestrictive quotas (12%) for women.

**Equality In Social And Economic Rights**

**Equality in Education**

Equal access to education and work is fundamental to women’s long-term social and economic well-being. Constitutions varied considerably in the scope and specificity of their protection of women’s rights in these spheres. Provisions on education included general promises about gender equality in access to schooling, articles mandating a minimum level of schooling for boys and girls, and guarantees of gender equality at all levels of education. For instance, Senegal’s constitution guaranteed that “[a]ll children, boys and girls, throughout the national territory, shall have the right to attend school,” (Const. Republic of Senegal 2001 [amended to 2009], Art. 22) while in Cuba, “all citizens, regardless of … sex, … have a right to education at all national educational institutions, ranging from elementary schools to the universities, which
are the same for all” (Const. Republic of Cuba 1976 [amended to 2002], Art. 43). As indicated in Table 5, countries more commonly protected universal access to education without mentioning gender. This was the case in Bolivia, where “[e]very person has the right to receive an education at all levels” and “[t]he State shall guarantee access to education and continuing education to all citizens under conditions of full equality” (Political Const. of the State [Bolivia] 2009, Art. 17 and 82).

Provisions encouraging or mandating state action to support equality in education typically took the form of vague references rather than specific policies. Kenya’s constitution stipulated that “[t]he State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups … are provided special opportunities in educational and economic fields” (Const. of Kenya 2010, Art. 56). The constitution includes those disadvantaged by discrimination on the grounds of sex in its definition of marginalized groups.

On a global scale, 64% of constitutions protected educational equality in universal terms, but only 9% included gender-specific protections. A majority of constitutions adopted in all periods except the 1960s contained universal or gender-based guarantees of equality in this sphere, including 70% of those adopted after 1980, 85% of those introduced in the 1990s, and 88% of constitutions adopted in the 2000s. The 4% of constitutions that encouraged measures to eliminate gender inequalities in education were adopted after 1970. The Middle East and North Africa was the only region where constitutions across all time periods up to June 2011 contained no explicit goals, guarantees, or affirmative measures regarding gender equality in education.

Equality in Work

As with education, constitutions adopted a wide range of approaches to protecting gender equality in work. In Timor-Leste, “[e]very citizen, regardless of gender, has the right and the duty to work” (Const. Democratic Republic of Timor-Leste 2002, Art. 50); similarly, Venezuela’s constitution “guarantees the equality and equitable treatment of men and women in the exercise of the right to work” (Const. Bolivarian Republic of Venezuela 1999 [amended to 2009], Art. 88). Other countries addressed specific aspects of employment equality. Haiti’s constitution stipulated that “[t]he State guarantees workers equal working conditions and wages regardless of their sex …” (Const. Haiti 1987, Art. 35), while Portugal specified that the State was “charged with promoting … the conditions needed to avoid the gender-based
Table 4. Constitutional protection of gender equality in political life by year of constitutions’ adoption

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>No universal suffrage or elected legislature and executive</td>
<td>3 (2%)</td>
<td>1 (3%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>2 (3%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>Gender not explicitly mentioned when determining eligibility for voting and holding office</td>
<td>108 (57%)</td>
<td>17 (55%)</td>
<td>8 (73%)</td>
<td>19 (66%)</td>
<td>19 (83%)</td>
<td>34 (55%)</td>
<td>11 (34%)</td>
</tr>
<tr>
<td>Constitution aspires to equality for women in voting or holding office</td>
<td>15 (8%)</td>
<td>2 (6%)</td>
<td>1 (9%)</td>
<td>4 (14%)</td>
<td>1 (4%)</td>
<td>3 (5%)</td>
<td>4 (13%)</td>
</tr>
<tr>
<td>Constitution guarantees equality for women in voting, holding office, or both</td>
<td>62 (32%)</td>
<td>11 (36%)</td>
<td>2 (18%)</td>
<td>6 (21%)</td>
<td>3 (13%)</td>
<td>23 (37%)</td>
<td>17 (53%)</td>
</tr>
<tr>
<td>Constitution allows for affirmative measures to promote equality</td>
<td>21 (11%)</td>
<td>3 (10%)</td>
<td>0 (0%)</td>
<td>2 (7%)</td>
<td>0 (0%)</td>
<td>3 (5%)</td>
<td>13 (39%)</td>
</tr>
<tr>
<td>Country reserves a specific number of seats for women in legislature</td>
<td>3 (2%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>1 (3%)</td>
<td>0 (0%)</td>
<td>1 (2%)</td>
<td>1 (3%)</td>
</tr>
<tr>
<td>Constitution reserves a minimum number of seats for women in legislature</td>
<td>7 (4%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>2 (6%)</td>
<td>0 (0%)</td>
<td>1 (2%)</td>
<td>4 (12%)</td>
</tr>
</tbody>
</table>

Note: Results by date of last amendment are available at [http://worldpolicyforum.org/public/gendertables.pdf](http://worldpolicyforum.org/public/gendertables.pdf).
Table 5. Constitutional protection of gender equality in education by year of constitutions’ adoption

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitution does not include any relevant provision</td>
<td>45 (24%)</td>
<td>11 (35%)</td>
<td>7 (64%)</td>
<td>13 (42%)</td>
<td>6 (26%)</td>
<td>6 (10%)</td>
<td>2 (6%)</td>
</tr>
<tr>
<td>Constitution guarantees equality generally, but not specifically to women</td>
<td>122 (64%)</td>
<td>16 (52%)</td>
<td>4 (36%)</td>
<td>16 (52%)</td>
<td>14 (61%)</td>
<td>49 (79%)</td>
<td>23 (70%)</td>
</tr>
<tr>
<td>Constitution aspires to grant women equality</td>
<td>6 (3%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>1 (4%)</td>
<td>3 (5%)</td>
<td>2 (6%)</td>
</tr>
<tr>
<td>Constitution guarantees equality to women</td>
<td>18 (9%)</td>
<td>4 (13%)</td>
<td>0 (0%)</td>
<td>2 (6%)</td>
<td>2 (9%)</td>
<td>4 (6%)</td>
<td>6 (18%)</td>
</tr>
<tr>
<td>Constitution allows for affirmative measures to promote equality</td>
<td>7 (4%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>1 (3%)</td>
<td>1 (4%)</td>
<td>2 (3%)</td>
<td>3 (9%)</td>
</tr>
</tbody>
</table>

Note: Results by date of last amendment are available at http://worldpolicyforum.org/public/gendertables.pdf.
preclusion or limitation of access to any position, work or professional category” (Const. Portuguese Republic 1976 [amended to 2005], Art. 58). On the other hand, Angola took a universal approach by granting “[e]qual opportunities in the choice of profession or type of work and conditions which prevent preclusion or limitation due to any form of discrimination” (Const. Republic of Angola 2010, Art. 76). Nepal’s general promise that “[t]he State shall pursue a policy of making women participate, to the maximum extent, in the task of national development, by making special provisions for their [...] employment” (Interim Const. Nepal 2006 [amended to 2008], Art. 35) was typical of the nonspecificity of provisions on affirmative measures in work.

Globally, 9% of constitutions guaranteed women’s equality both in work in general and in at least one additional aspect of employment (wages, working conditions, hiring, or promotion) (Table 6). Another 17% protected gender equality in one of these areas (either work in general, pay, working conditions, hiring, or promotion), while 34% of constitutions protected at least one general or specific aspect of employment on a universal basis without explicitly protecting women. As with education, protection was lowest in constitutions that were adopted during the 1960s: only one constitution from this decade guaranteed universal equality in some aspect of work, and none did so in gender-specific terms. Explicit protection in work for women occurred most frequently in the constitutions introduced after the adoption of CEDAW. Of the constitutions introduced in this period, 34% guaranteed women’s protection in at least one aspect of employment, compared to 14% of those adopted earlier. When considering universal and gender-specific clauses, 74% of post-1980 constitutions and 38% of those adopted earlier protected some aspect of equality in work. Furthermore, of the 8 (4%) constitutions globally that mentioned affirmative measures for women in employment, 7 (88%) were enacted after 1980. Finally, gender-specific protection in work also generally increased with time: 42% of constitutions adopted after 2000 specifically protected gender equality in some aspect of work, compared to 30% of those adopted in the 1990s, 34% in the 1980s, and 19% in the 1970s.

Equality In Family Rights

Several constitutions protected women’s equality at various stages of marital life. Armenia’s constitution affirmed that “[m]en and women of
marriageable age have the right to marry and found a family according to their free will. They are entitled to equal rights as to marriage, during marriage and divorce” (Const. Republic of Armenia 2005, Art. 35). Ecuador additionally protected parental and property rights: “[t]he State shall guarantee equal rights and equal opportunity to men and women in access to property and decision-making in the management of their common marital estate,” and “the mother and father shall be obliged to take care, raise, educate, feed, and provide for the integral development and protection of the rights of their children” (Const. Republic of Ecuador 2008, Art. 324 and 69).

Importantly, a few countries protected women from losing any rights upon changing their civil status. In a typical provision, Equatorial Guinea guaranteed that “[w]omen, irrespective of their civil status, shall have the same rights and opportunities as her male counterpart at the political, economic, social and cultural levels, and at all levels of life; public, private or family” (Const. Republic of Equatorial Guinea 1991 [amended to 1995], Art. 13). Malawi’s constitution guaranteed that “women . . . have the right not to be discriminated against on the basis of their gender or marital status, which includes the right . . . to acquire and maintain rights in property, independently or in association with others, regardless of their marital status; to acquire and retain custody, guardianship and care of children and to have an equal right in the making of decisions that affect their upbringing; and to acquire and retain citizenship and nationality” (Const. Republic of Malawi 1994 [amended to 1999], Art. 24). Conversely, the constitution of Cyprus specified that “a married woman shall belong to the Community to which her husband belongs,” which suggests that a woman does not have full equality of status upon marriage (Const. Republic of Cyprus 1960 [amended to 1996], Art. 2). In Table 7, we considered equal rights during marriage to be granted when the constitution protected spousal equality and did not deny or attach any exceptions to the retention of equal rights during marriage, the equality of property rights, or the equality of parental rights.

Even using this broad definition, only 25% of constitutions around the world guaranteed the equal right to freely enter marriage, 27% protected equality within marriage, and 5% granted equality in exiting marriage. All but one of the ten constitutions that protected equality in ending a marriage were introduced during the last two decades before June 2011. None of the constitutions introduced in the 1960s protected gender equality within marriage or in divorce. Across all decades through to
Table 6. Constitutional protection of gender equality in work by year of constitutions’ adoption

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitution does not include any relevant provision</td>
<td>67 (35%)</td>
<td>15 (48%)</td>
<td>9 (82%)</td>
<td>18 (58%)</td>
<td>7 (30%)</td>
<td>13 (21%)</td>
<td>5 (15%)</td>
</tr>
<tr>
<td>Constitution guarantees equality in pay, hiring, promotion, working conditions, or work in general, but not specifically to women</td>
<td>65 (34%)</td>
<td>10 (32%)</td>
<td>1 (9%)</td>
<td>7 (23%)</td>
<td>7 (30%)</td>
<td>26 (42%)</td>
<td>14 (42%)</td>
</tr>
<tr>
<td>Constitution aspires to protect gender equality in pay, hiring, promotion, working conditions, or work in general</td>
<td>9 (5%)</td>
<td>2 (6%)</td>
<td>1 (9%)</td>
<td>0 (0%)</td>
<td>1 (4%)</td>
<td>5 (8%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>Constitution guarantees gender equality in pay, hiring, promotion, working conditions, or work in general</td>
<td>32 (17%)</td>
<td>1 (3%)</td>
<td>0 (0%)</td>
<td>4 (13%)</td>
<td>7 (30%)</td>
<td>12 (20%)</td>
<td>8 (24%)</td>
</tr>
<tr>
<td>Constitution guarantees gender equality in work as well as in pay, hiring, promotion, and/or working conditions</td>
<td>18 (9%)</td>
<td>3 (10%)</td>
<td>0 (0%)</td>
<td>2 (6%)</td>
<td>1 (4%)</td>
<td>6 (10%)</td>
<td>6 (18%)</td>
</tr>
<tr>
<td>Constitution allows for affirmative measures to promote equality in work</td>
<td>8 (4%)</td>
<td>1 (3%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>2 (9%)</td>
<td>1 (2%)</td>
<td>4 (12%)</td>
</tr>
</tbody>
</table>

Note: Results by date of last amendment are available at [http://worldpolicyforum.org/public/gendertables.pdf](http://worldpolicyforum.org/public/gendertables.pdf).
Table 7. Constitutional protection of gender equality in family life by year of constitutions’ adoption

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitution does not include any relevant provision</td>
<td>143 (75%)</td>
<td>29 (94%)</td>
<td>9 (82%)</td>
<td>27 (87%)</td>
<td>22 (96%)</td>
<td>38 (61%)</td>
<td>18 (55%)</td>
</tr>
<tr>
<td>Constitution aspires to grant women equality</td>
<td>1 (1%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>1 (3%)</td>
</tr>
<tr>
<td>Constitution guarantees equality to women</td>
<td>47 (25%)</td>
<td>2 (6%)</td>
<td>2 (18%)</td>
<td>4 (13%)</td>
<td>1 (4%)</td>
<td>24 (39%)</td>
<td>14 (42%)</td>
</tr>
</tbody>
</table>

Equality within Marriage

| Constitution does not include any relevant provision | 138 (72%) | 27 (87%) | 11 (100%) | 24 (77%) | 16 (70%) | 38 (61%) | 22 (67%) |
| Constitution aspires to grant women equality | 2 (1%) | 0 (0%) | 0 (0%) | 1 (3%) | 1 (4%) | 0 (0%) | 0 (0%) |
| Constitution guarantees equality to women | 51 (27%) | 4 (13%) | 0 (0%) | 6 (19%) | 6 (26%) | 24 (39%) | 11 (33%) |

Equality in Exiting Marriage

| Constitution does not include any relevant provision | 181 (95%) | 30 (97%) | 11 (100%) | 31 (100%) | 23 (100%) | 57 (92%) | 29 (88%) |
| Constitution aspires to grant women equality | 0 (0%) | 0 (0%) | 0 (0%) | 0 (0%) | 0 (0%) | 0 (0%) | 0 (0%) |
| Constitution guarantees equality to women | 10 (5%) | 1 (3%) | 0 (0%) | 0 (0%) | 0 (0%) | 5 (8%) | 4 (12%) |

Constitution guarantees women equal right to enter and exit marriage as well as equal rights within marriage

Note: Results by date of last amendment are available at http://worldpolicyforum.org/public/gendertables.pdf.
June 2011, no provisions on equality at any stage of marriage were present in the constitutions of South Asian, Middle Eastern, and North African states.

**Status Of Customary And Religious Law**

Each of the constitutional protections outlined above is affected by the status of other forms of law in relation to the constitution. Of the constitutions in this study that protected some aspect of gender equality, 5% also stated that traditional laws could prevail over antidiscrimination provisions or the constitution as a whole. In contrast to the rights examined in this study, variation in the status of customary and religious law appears to be more influenced by regional than temporal factors. *Table 8* categorizes constitutional provisions on customary and religious law by region.

In 12 countries (6%), including eight in sub-Saharan Africa and four in East Asia and the Pacific, customary and religious laws were explicitly permitted to prevail over all or some constitutional provisions. Among these, customary and religious laws could supersede antidiscrimination clauses or personal law in 10 countries (5%). This was the case in Zambia (Const. Zambia 1991 [amended to 2009], Art. 23), where constitutional prohibition against discrimination “shall not apply to any law so far as that law makes provision . . . for the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter, which is applicable in the case of other persons.”

Worldwide, an additional 10 countries (5%) specified that legislation could not contravene customary or religious principles (five in the Middle East and North Africa, three in South Asia, and two in sub-Saharan Africa.) In Afghanistan, “[n]o law shall contravene the tenets and provisions of the holy religion of Islam” (Const. Islamic Republic of Afghanistan 2004, Art. 3), and in Maldives, “[n]o law contrary to any tenet of Islam shall be enacted . . .” (Const. Republic of Maldives 2008, Art. 10). To the extent that customary or religious laws may be used to limit women’s rights, such provisions restrict the degree to which gender equality can be protected and promoted in a country.

At the other end of the spectrum, 25 constitutions (13%) specified that customary and/or religious laws were subordinate to the constitution. Several of these constitutions contained provisions similar to Namibia’s
Table 8. Constitutional provisions on the status of customary and religious law by region

<table>
<thead>
<tr>
<th>Level of Protection</th>
<th>Globally</th>
<th>Americas</th>
<th>East Asia and Pacific</th>
<th>Europe and Central Asia</th>
<th>Middle East and North Africa</th>
<th>South Asia</th>
<th>Sub-Saharan Africa</th>
</tr>
</thead>
<tbody>
<tr>
<td>No relevant provisions</td>
<td>144 (75%)</td>
<td>29 (83%)</td>
<td>22 (76%)</td>
<td>53 (100%)</td>
<td>14 (74%)</td>
<td>3 (38%)</td>
<td>23 (49%)</td>
</tr>
<tr>
<td>Legislation cannot contradict customary or religious law</td>
<td>10 (5%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>5 (26%)</td>
<td>3 (38%)</td>
<td>2 (4%)</td>
</tr>
<tr>
<td>Customary and/or religious law can prevail over some or all constitutional provisions</td>
<td>12 (6%)</td>
<td>0 (0%)</td>
<td>4 (14%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>8 (17%)</td>
</tr>
<tr>
<td>Customary and/or religious law are subordinate to the constitution</td>
<td>25 (13%)</td>
<td>6 (17%)</td>
<td>3 (10%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>2 (25%)</td>
<td>14 (30%)</td>
</tr>
</tbody>
</table>
stipulation that “[b]oth the customary law and the common law . . . in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution” (Const. Republic of Namibia 1990 [amended to 2010], Art. 66).

DISCUSSION

Considerable progress has been made in the protection of gender-specific constitutional rights in the three decades since CEDAW’s passage. However, the majority of constitutions that protected equality in politics, education, and employment as of June 2011 still did so in the form of universal guarantees rather than explicit guarantees of gender equality. How one evaluates the status of women’s rights therefore depends largely on the potential for these universal clauses to protect gender equality. To the extent that universal protections can be leveraged to advance equality for women, there is reason for cautious optimism. When including both universal and gender-specific protections, a majority of constitutions globally guaranteed equality in general (93%), in education (73%), and in some aspect of work (60%). Similarly, 89% of countries either specifically protected women’s right to vote or hold office or did not mention gender in determining eligibility. As discussed in more detail below, however, universal protections do not always offer consistent and permanent protection to women. Furthermore, it is problematic that a substantial proportion of countries offered no universal protection in education, work, and marriage, and the picture worsens when considering the global status of gender-specific protections. Women are explicitly guaranteed some aspect of equality in 81% of constitutions, some aspect of political equality in 32%, marital equality in 27%, some aspect of work equality in 26%, and educational equality in just 9% of constitutions.

Over the past 30 years, however, constitutional protection of women’s rights has increased substantially, both when categorizing constitutions by year of adoption and by year of last amendment. Only one constitution introduced between 1980 and June 2011 contained neither a universal nor a gender-specific protection of general equality. Whereas 57% of constitutions that were last changed before CEDAW was passed in 1979 included a universal or gender-specific guarantee of equality, 94% of those last amended in subsequent decades did so. Of the constitutions introduced after 1979, 83% included a universal or gender-
specific protection of equality in education, compared to 58% of those adopted earlier. Similarly, 74% of post-CEDAW constitutions protected equality in work specifically for women or universally, compared to 38% of those adopted before then. Moreover, gender-specific protection is on the rise: 87% of constitutions enacted in the 1980s, 90% in the 1990s, and 100% in the 2000s guaranteed general equality explicitly for women. Of the constitutions that protected gender equality within marriage, 80% were enacted between 1980 and June 2011, and 19% of constitutions introduced in that period included affirmative measures or quotas for women in political life, compared to 11% of those adopted in previous decades.

There are several possible explanations for this progress. The adoption of CEDAW in 1979 and the reaffirmation of its goals by the global community in subsequent decades both reflected and bolstered the rising prominence of women’s rights organizations in international forums. The increasingly visible and effective mobilization of organized women’s rights movements has also been critical in securing the inclusion of gender protections in constitutions around the world — through sustained pressure and incremental change in some contexts and by seizing opportunities for rapid transformation during times of marked political change in others. The recent increase in participatory constitution making has further enabled domestic women’s rights advocates to push for the protection of gender equality at the constitutional level as participants in the constitution-drafting process. These strong domestic movements for women’s rights are often bolstered by the international community’s powerful support for constitutionalizing gender equality, particularly in contexts where international advisors are actively involved in the constitution-making process.

At the same time, the diverse political contexts in which post-1980 constitutions were drafted partially explain the incremental and uneven nature of gender protections. Constitutions adopted after the fall of communism, in the wake of ethnically based civil wars, or during a transition to democracy after military or one-party rule were drafted within different time frames and driven by diverse visions of the nation’s future and the role of the constitution. These factors influence the scope and detail of constitutional rights across all spheres (Brandt et al. 2011).

Variations in protection took on regional patterns as well. No country in the Middle East and North Africa guaranteed gender-specific protection in education, in work, or at any stage of marriage, and there were no
protections of marital equality in South Asian constitutions. One in five states in sub-Saharan Africa permitted customary or religious law to prevail over laws or constitutional provisions. In the Middle East and North Africa, and in South Asia, legislation cannot contradict religious or customary law in 26% and 38% of constitutions, respectively. The explicit subordination of constitutional rights to customary law severely weakens women’s constitutional protection and their potential for recourse through litigation, as illustrated in the introduction.

These findings come with certain limitations. Constitutional rights are not the only measure of a country’s commitment to gender equality. Several countries with older constitutions that lack gender-specific provisions have strong national legislation protecting women’s equality. For example, Denmark’s constitution, which has not been changed since 1953, does not contain gender-specific protections of, among others, general equality or employment rights. However, the country has extensive legislation protecting women’s equality in hiring, working conditions, and remuneration; the country’s Gender Equality Act further prohibits discrimination on the basis of sex in all spheres that are not protected by specific laws (Prechal and Burri 2010). As mentioned in the introduction, litigation also plays an important role in creating a body of jurisprudence that can further extend women’s constitutional protections beyond what is contained in the text itself. Including national legislation and case law in future analyses would therefore create a more in-depth picture of how individual rights are protected.

Furthermore, daily accounts of rights violations and persistent gender inequities demonstrate that the level of protection that women enjoy on paper does not translate neatly into outcomes on the ground. Countries with sparse constitutional protections of women’s rights may have excellent records in practice, and the opposite is certainly true. The cases reviewed in the introduction are testaments to both the potential of constitutional protections as well as their inadequacy: for example, Afghanistan’s women were able to leverage the constitutional protection of their rights against the Shiite Personal Status Law, but they continue to face violence and discrimination in education, marriage, employment, and political life (Cortright and Wall 2012; Human Rights Watch 2013). While Afghanistan may represent an extreme case due to the ongoing conflict, constitutional litigation in countries around the world illustrates the gap between rights on paper and in practice.

Future research should therefore examine the relationship between constitutional protections and gender equality on the ground in order to
develop a more nuanced picture of women’s rights around the world. These studies should pay particular attention to the specific mechanisms that enhance and accelerate the translation of constitutional rights into policies and outcomes that promote gender equality. Important questions are raised by this study but are beyond its scope: Is there an empirical difference between the protection offered by universal and gender-specific constitutional clauses? How does the wording of provisions, such as those reserving minimum percentages of legislative positions for women or requiring an affirmative promotion of gender equality in education, impact gender equality in the relevant spheres? Are there measures that reduce the time lag between the adoption of rights in constitutions, their consolidation into policies, and their implementation in practice? Do specific rights guarantees in political life, education, employment, and family life offer greater protection than broad guarantees of gender equality? Do international agreements influence countries’ inclusion of gender protections in their constitution, and if so, in what ways? For example, are countries that have ratified particular conventions more likely to include corresponding protections in their constitutions? The answers to these questions are likely to differ considerably depending on national political and legal contexts, and these differences are also worthy of investigation.

Despite these limitations, understanding which rights are granted in constitutions is the first step to introducing those that are not protected and claiming those that are not implemented. The first place to start is with countries drafting new constitutions. Constitution building can be a contentious process, but it also presents a unique opportunity for previously excluded or marginalized groups to have their rights recognized at the highest level. Women should be meaningfully involved in the constitution-making process, and their rights must be fully protected and defendable and must not be subordinate to customary or religious laws. Knowing which rights are protected in contemporary constitutions, how they are phrased, and how they have been used to further women’s rights can provide crucial information at this formative stage.

Second, countries lacking gender protections in their constitutions should consider drafting amendments that explicitly protect women’s equality. Broad equality clauses that do not specify gender are preferable to no constitutional protection. However, to the extent that they require interpretation from the judiciary to determine which groups they include, such articles may not always protect women’s rights. For example, the 14th amendment to the United States’ constitution contains a universal clause that grants “any person within its jurisdiction
the equal protection of the laws” (Const. United States of America 1787 [amended to 1992], Sec. 1). In Reed v. Reed (1971), the clause was interpreted to prohibit discrimination on the basis of sex, and subsequent rulings have upheld this interpretation. But without an explicit constitutional prohibition of gender-based discrimination, these decisions do not prevent the courts from reversing the initial interpretation (Harrison 2004; Terkel 2011). For this reason, women’s groups in the United States spent decades mobilizing for an Equal Rights Amendment to the constitution in order to ensure explicit and permanent protection from discrimination on the basis of sex at the federal level that “would not be subject to the vagaries of changing political winds or even court personnel” (Harrison 2004, 162).

Thirdly, countries with gender protections in their constitutions should look carefully at how thoroughly these rights are being implemented in practice. Governments must combine legislation with legal, economic, and social resources to ensure true gender equality. If women do not have access to courts or legal support, gender protections may remain mere goals. Constitutional rights should therefore be accompanied by mechanisms making enforcement accessible to all. Governments should take measures to make citizens aware of their rights and the means available to claim them, with special attention to ensuring that women in particularly vulnerable positions are aware of their legal rights and avenues for claiming them.

Finally, policy makers and civil society advocates should take stock of the status of women’s rights in other countries to see where theirs could improve in comparison. With the global scope of communication, transportation, employment, and immigration, it is now increasingly the case that when a law is passed in one country, it will affect people from other states. Thus from a practical as well as a legal and ethical standpoint, every country that does not protect equal rights presents a problem for all of us, and every step forward spells progress for everyone. The slow but steady advancement in gender protection in constitutions therefore presents both a challenge and a promise for the future of women’s rights.

Adele Cassola is a Ph.D. student in Urban Planning at Columbia University, New York, NY, and was a Research Associate at the UCLA Fielding School of Public Health, Los Angeles, CA: mrc2186@columbia.edu; Amy Raub is a Principal Research Analyst at the WORLD Policy Analysis Center at the UCLA Fielding School of Public Health, Los Angeles, CA:
araub@ph.ucla.edu; Danielle Foley is a Research Assistant in the Department of International Health at Johns Hopkins University, Baltimore, MD: dfoley@jhsph.edu; Jody Heymann is Dean of the UCLA Fielding School of Public Health and is a distinguished professor of Epidemiology, Political Science, and Medicine at UCLA, Los Angeles, CA: jody.heymann@ph.ucla.edu

REFERENCES


Constitution of the Argentine Republic. 1853 (amended to 1994).


Reed v. Reed. 1971. 404 U.S. 71, Appeal from the Supreme Court of Idaho, November 22.


Protections of Equal Rights Across Sexual Orientation and Gender Identity: An Analysis of 193 National Constitutions

Amy Raub,† Adèle Cassola,‡ Isabel Latz,§ and Jody Heymann¶

ABSTRACT: This article provides the first detailed global assessment of the ways in which constitutions protect equal rights based on sexual orientation and gender identity across the spheres of general equality and discrimination, employment and marriage rights. Drawing on global data from 193 U.N. member states, we examined how constitutional protections of equal rights varied according to the decade of constitutional adoption as well as the year of the most recent constitutional amendment as of May 2014. Regional variation and a comparison with constitutional protections on the basis of sex, race or ethnicity, religion, and disability are also conducted.

INTRODUCTION................................................................................................ 150

I. METHODS .................................................................................................... 153
   A. Data Source ........................................................................................ 153
      1. Capturing Sexual Orientation and Gender Identity in Constitutions ................................................................. 154
      2. General Equal Rights Protections that Do Not Explicitly Address Sexual Orientation .................................... 155
      3. Constitutional Rights Examined ................................................. 155
         i. General Equality and Non-Discrimination .......................... 155
         ii. Equal Protection in Employment Rights ........................... 155
         iii. Restrictions on Same-Sex Marriage ................................. 156
   B. Data Analysis .................................................................................... 156

II. RESULTS..................................................................................................... 157
   A. General Equality and Non-Discrimination ................................. 157

†. Amy Raub is a Principal Research Analyst with the WORLD Policy Analysis Center at the Fielding School of Public Health, University of California, Los Angeles.
‡. Adèle Cassola is a Ph.D. Candidate at the Graduate School of Architecture, Planning and Preservation at Columbia University, New York.
§. Isabel Latz is a Policy Analyst with the WORLD Policy Analysis Center at the Fielding School of Public Health, University of California, Los Angeles.
¶. Jody Heymann, M.D., Ph.D., is the Dean of the Fielding School of Public Health, University of California, Los Angeles and Founding Director of the WORLD Policy Analysis Center.
INTRODUCTION

In recent years, the legal rights of lesbian, gay, bisexual, and transgender (LGBT) persons have received increased attention at the international and national levels. Although explicit international recognition of equal rights on the basis of sexual orientation and gender identity has occurred much more recently than protections based on characteristics such as sex, race, ethnicity, and religion, considerable progress has been made in a short period of time.1 During the 1990s, United Nations (U.N.) human rights bodies began to express concern with widespread discrimination against LGBT individuals and criminalization of same-sex relationships at the national level.2 Even though sexual orientation is not specifically listed as a prohibited basis of discrimination in the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights, the U.N. Human Rights Committee has ruled repeatedly that states have an obligation under international law to protect individuals from differential treatment on this basis.3

In 2007, a group of international human rights experts drafted the Yogyakarta Principles on the Application of International Human Rights Law

---

1. See U.N. General Assembly, Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity, U.N. Doc. A/HRC/29/23 3–4 (May 4, 2015); Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights, art. 2, ¶ 2, U.N. Doc. E/C.12/GC/20 (May 25, 2009), https://www1.umn.edu/humanrts/gencomm/escgencom20.html. In section III, B 32, the Committee on Economic, Social and Cultural Rights refers to the legal duties of state parties to guarantee non-discrimination and equality under Article 2(2) of the International Covenant on Economic, Social and Cultural Rights to the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Committee notes that: “Other status” as recognized in article 2(2) includes sexual orientation. States parties should ensure that a person’s sexual orientation is not a barrier to realising Covenant rights, for example, in accessing survivor’s pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the work place.

Id. ¶ 32.


in relation to Sexual Orientation and Gender Identity, which outlined states’ obligations to protect the equal rights of LGBT individuals in all spheres of life.\(^4\) A year later, the General Assembly’s Statement on Human Rights, Sexual Orientation and Gender Identity, which was supported by sixty-eight countries, recognized that “human rights apply equally to every human being regardless of sexual orientation or gender identity.”\(^5\) In 2011, the Human Rights Council reaffirmed this principle in a statement that was signed by eighty-five countries representing every region of the world.\(^6\) A few months later, the Human Rights Council adopted the first U.N. resolution to address human rights based on sexual orientation and gender identity. Resolution 17/19 passed by a narrow vote, but received endorsement from countries in all regions.\(^7\) As requested by Resolution 17/19, the Office of the High Commissioner for Human Rights released a report documenting discriminatory laws and rights violations on the basis of sexual orientation and gender identity. The report reaffirmed that LGBT persons were entitled to exercise the rights, and enjoy the protections, enshrined in international human rights law on an equal basis with others.\(^8\) A year later, the Human Rights Council adopted a resolution condemning killings of individuals because of their sexual orientation or gender identity, among other characteristics.\(^9\)

There has been a similar wave of legal activity at the national level. Thirteen countries and several sub-national jurisdictions have legalized same-sex marriage since the Netherlands became the first to do so in 2001.\(^10\) Between 1990 and 2013, fifty-nine countries passed laws prohibiting discrimination in employment on the basis of sexual orientation.\(^11\) During the past decade,\(^\text{1022}\)
historic Supreme Court rulings recognizing legal rights based on gender identity were issued in Nepal and Pakistan;\textsuperscript{12} the U.S. Equal Employment Opportunity Commission ruled that discrimination in employment based on gender identity violated the 1964 Civil Rights Act;\textsuperscript{13} and a District Court in South Korea ruled that transgender individuals could change their gender on official documentation whether or not they had undergone surgery, among other legal milestones.\textsuperscript{14}

While LGBT rights are receiving increased legal protection in some countries, a divergent trend is occurring in others. Seventy-six countries, including thirty-six in Africa, still had laws that criminalized consensual sexual activity between same-sex adults as of 2013; in five of these countries, such acts are punishable by death.\textsuperscript{15} In 2009, the government of Burundi passed a law that criminalized consensual homosexual activity for the first time in the history of the country.\textsuperscript{16} In 2012, Liberia’s Senate approved a bill that would legally ban same-sex marriage, and the government was additionally considering laws that would increase the penalties for homosexual activity.\textsuperscript{17} A year later, the government of Nigeria passed a law that prohibited same-sex marriage and outlawed homosexual clubs and organizations.\textsuperscript{18} Several Eastern European jurisdictions have recently enacted or proposed laws restricting freedom of expression and assembly on the basis of sexual orientation or gender identity.\textsuperscript{19}

The increased international and national attention that has been paid to LGBT rights in recent years has inspired numerous efforts to track rights protections on paper and monitor implementation on the ground. To our knowledge, however, there has been no detailed study examining the status and evolution of constitutional protections based on sexual orientation and gender identity in the spheres of equality and non-discrimination, employment, and marriage. Although governments may use a variety of legislative and policy channels to address rights in these areas, constitutions are particularly

\begin{itemize}
\item \textsuperscript{12} David W. Austin, \textit{Sexual Orientation and Gender Identity}, 47 INT’L LAW. 469 (2013).
\item \textsuperscript{13} Macy v. Holder, EEOC DOC 0120120821, 2012 WL 1435995 ( Apr. 20, 2012).
\item \textsuperscript{15} See ITABORAHY & ZHU, supra note 10, at 22.
\end{itemize}
important tools. The symbolic and legal weight of constitutional rights can be leveraged to oppose or encourage the introduction of legislation. Because constitutions are typically more difficult to repeal or amend than other laws and policies, they may also be more resistant to reversal when governments change. Furthermore, constitutions often include specific mechanisms for redress when provisions are violated by states or private actors.

This article examines constitutional protection of equal rights across sexual orientation and gender identity as of May 2014. The methods section outlines the methodology used to build a quantitatively comparable data source that captures constitutional protections of equal rights for specific social groups across different spheres and the analyses conducted. The results section examines the prevalence of constitutional protections of general equality and non-discrimination and equal rights in employment based on sexual orientation and gender identity and compares these rights to protections for other groups. It goes on to examine how constitutions address equality in marriage. The variation in constitutional protections of equal rights is analyzed by region, year of constitutional adoption, and year of the last constitutional amendment.

I. METHODS

A. Data Source

To assess constitutional protections, a quantifiable database of constitutional rights was created by reviewing the national constitutions and amendments of 193 U.N. member states as of May 2014. We obtained constitutions from official government websites where possible. Constitutions were also collected from three additional resources: *Constitutions of the Countries of the World Online*; *Constitution Finder*, a database of world constitutions sourced by the University of Richmond; and HeinOnline’s *World Constitutions Illustrated*. When secondary sources were used to retrieve constitutional texts, we prioritized documents that were made available by the U.N., universities, and legal institutes. In cases where constitutions specified that additional legislation was part of the constitutional order, we obtained and reviewed those texts as well. For countries that do not have written codified constitutions or have several constitutional documents, such as the United Kingdom, Canada, New Zealand, and Israel, we reviewed any laws that are considered to have constitutional status.

---

A coding framework was developed to assess the strength of constitutional provisions for fourteen specific social groups across fifty-one rights. The rights framework was based on internationally endorsed norms established by conventions and agreements of the United Nations and covers education, health, labor, family, and civil and political rights. These include the U.N. Universal Declaration of Human Rights;\textsuperscript{23} International Covenant on Civil and Political Rights;\textsuperscript{24} U.N. Convention on Economic, Social, and Cultural Rights;\textsuperscript{25} and conventions that guarantee non-discrimination and equality to specific groups, such as the Convention on the Elimination of All Forms of Discrimination Against Women,\textsuperscript{26} among others. Constitutional provisions were classified according to the type of right, social group protected,\textsuperscript{27} and strength of constitutional protection\textsuperscript{28} in a Microsoft Access database. Constitutional texts were read in their entirety in the original language or an English, Spanish, or French translation. Constitutional text was read and classified by at least two team members to ensure consistency. Systematic quality checks were conducted to reduce inconsistencies in coding across countries.

1. Capturing Sexual Orientation and Gender Identity in Constitutions

For this article, we examined constitutional protections of equal rights based on sexual orientation and gender identity. We considered provisions to refer to sexual orientation when they mentioned homosexuality, sexual orientation, or sexual preference. We categorized provisions that referenced gender identity, gender reassignment, or transsexuals as protecting gender identity.

For example, Portugal’s constitution stipulates that “[n]o one may be . . . deprived of any right . . . for reasons of . . . sexual orientation”\textsuperscript{29} and goes on to state that “[e]veryone has the right to work.”\textsuperscript{30} In these cases where constitutions granted a right universally and separately guaranteed the enjoyment of rights regardless of sexual orientation or gender identity, we considered the universally-granted right to be specifically protected based on sexual orientation or gender identity. For this study, we coded Portugal’s

\begin{itemize}
  \item These are age, citizenship, sex/gender, race/ethnicity, religion, language, social position, national origin, sexual orientation/gender identity, parental, physical disability, intellectual disability or mental health condition, social disability, and prisoner status.
  \item Measures of strength assessed whether rights were denied, permitted exceptions to guarantees, used non-authoritative language, were guaranteed, or allowed for potential or guaranteed positive action for the group.
  \item CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION], Aug. 12, 2005, art. 13 (Port.).
  \item Id. art. 58.
\end{itemize}
protection as a specific guarantee of the right to work based on sexual orientation.

2. General Equal Rights Protections that Do Not Explicitly Address Sexual Orientation

Some constitutions protected the rights examined in this study using universal language, without specifying separate protections or restrictions on the basis of sexual orientation or gender identity. While such provisions may not address the specific circumstances of these groups, universal guarantees should offer better protection than an absence of constitutional protection of these rights. We therefore present results in the tables for universal guarantees of constitutional rights as well as those specifically based on sexual orientation and gender identity.

3. Constitutional Rights Examined

We identified three key areas of rights for constitutional protections based on sexual orientation or gender identity: general equality and non-discrimination, equal rights in employment, and the right to marry.

i. General Equality and Non-Discrimination

Constitutions were considered to protect general equality and discrimination if they guaranteed at least one of the following: prohibition of discrimination, equality before the law, general equality, or equal rights. Our prohibition of discrimination variable encompassed the right to be protected from discrimination, to receive equal treatment, and not to be subject to any disadvantages because of sexual orientation or gender identity. Our second measure of constitutional protection included references to equal protection of, or equal treatment under, the law. Our third variable captured broad references to equality. Articles that guaranteed equal opportunities or formal equality were included under this right. Equal rights clauses were those that specified that everyone enjoys the same rights regardless of sexual orientation or gender identity.

ii. Equal Protection in Employment Rights

Equal protection in employment rights in this study encompasses broad protections from discrimination in work; provisions granting equal treatment in hiring, promotion, pay or working conditions; and cases where the right to work is specifically guaranteed based on sexual orientation. Provisions that
allowed for the freedom of employment, the free choice of employment, or the right to practice professions were not captured.

iii. Restrictions on Same-Sex Marriage

Our measure of constitutional restrictions on same-sex marriage included references to both the right to marry and definitions that marriage is between a man and woman. We did not consider the right to found a family to be an equivalent term for marriage. We considered the right to marry to be explicitly denied to same-sex couples when the constitution stated that marriage is limited to only one man and only one woman, marriage is prohibited between persons of the same sex, or marriage is only permitted to a member of the opposite sex.

Many constitutions did not explicitly deny the right to marry to same-sex couples, but used gendered wording when discussing marriage, such as by stating that “the family is founded on the freely consented marriage of husband and wife” or “men and women of marriageable age have the right to marry.” We categorized these provisions as not explicitly denied, but as using gendered language. We did not include references to husbands and wives being equal before the law or having a duty to practice family planning.

We considered the right to marry to be generally guaranteed, although not specifically to same-sex couples, when the constitution guaranteed the right to marry using inclusive language, such as “everyone” or “any person.” Provisions that stated that “marriage shall be based on the equality of spouses” but did not universally guarantee a right to marry were not included. Similarly, provisions that guaranteed everyone the right to marry, but then outlined the rights of “husband and wife” were coded as not explicitly denying marriage, but as using gendered language.

B. Data Analysis

For the purpose of this study, we constructed comparable measures of the strength of protections of equal rights based on sexual orientation and gender identity in constitutions across countries, as outlined in detail in the previous section. We first measured the prevalence of explicit guarantees of equal rights based on sexual orientation and gender identity. We also examined differences according to the time period in which constitutions were adopted and last amended in order to account for the possibility that constitutional protections of equal rights based on sexual orientation became more prevalent with increased global recognition. We also analyzed region-specific constitutional provisions to reveal any variations that may be due to regional trends. We then assessed how equality protections based on sexual orientation and gender identity compared to other groups, specifically equal rights based on sex, race or
ethnicity, religion, and disability. Finally, we investigated constitutional restrictions on the right to marry for same-sex couples by region and by constitutional adoption and last amendment date. All analyses were conducted in Stata 14.

II. RESULTS

A. General Equality and Non-Discrimination

Increased global recognition of the equal rights of LGBT individuals has been reflected in recent constitutional developments. South Africa’s post-apartheid constitution prohibited discrimination on “one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” In Portugal, “[n]o one may be privileged, favoured, prejudiced, deprived of any right or exempted from any duty on the basis of ancestry, sex, race, language, territory of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation.” Bolivia’s 2009 constitution specified that “[t]he State prohibits and punishes all forms of discrimination based on sex, color, age, sexual orientation, gender identity, . . . and any other discrimination that attempts to or results in the annulment of or harm to the equal recognition, enjoyment or exercise of the rights of all people.”

Globally, ten constitutions (five percent) specifically guaranteed equality or prohibited discrimination on the basis of sexual orientation as of May 2014 and five constitutions (three percent) guaranteed some aspect of equality or non-discrimination on the basis of gender identity. In comparison, eighty-four percent of countries explicitly guaranteed equality or banned discrimination on the basis of sex, seventy-six percent on the basis of race or ethnicity and religion, and twenty-four percent on the basis of disability. The constitutions that protected equality and non-discrimination on the basis of sexual orientation were adopted during different decades (five before 1980, one each in the 1980s and 1990s, and three between 2000 and 2014). However, all of these constitutions were last amended after 2000, and all of the protections were introduced to these countries’ constitutions during the 1990s or later.
Of the ten countries that constitutionally prohibited discrimination or guaranteed equal rights on the basis of sexual orientation, three are in the Americas (Bolivia, Ecuador, and Mexico), four in Europe and Central Asia (Malta, Portugal, Sweden, and the United Kingdom), two in East Asia and the Pacific (Fiji and New Zealand), and one in Sub-Saharan Africa (South Africa). Among these, Bolivia, Ecuador, Fiji, Malta, and the United Kingdom additionally prohibited discrimination based on gender identity. None of the constitutions of South Asia or the Middle East and North Africa contained any guarantees of equality or non-discrimination based on sexual orientation or gender identity.

1. Equal Rights in Employment

Five of the constitutions that took an approach to equality or non-discrimination based on sexual orientation (Bolivia, Ecuador, New Zealand, Portugal, and the United Kingdom) additionally guaranteed equal treatment in some aspect of employment on this basis, either directly or indirectly. New Zealand’s Human Rights Act makes it illegal to “refuse or omit to employ [an] applicant on work of that description which is available; or [t]o offer or afford the applicant or the employee less favorable terms of employment, conditions of work, superannuation or other fringe benefits, and opportunities for training [or] promotion” based on the prohibited grounds of discrimination, which include sexual orientation. Ecuador’s constitution bans discrimination in the “recognition, enjoyment or exercise of rights” on the basis of, among other characteristics, “gender identity” and “sexual orientation,” and goes onto guarantee that “work is a right and a social duty, as well as an economic right.” In comparison to the infrequent protection of LGBT rights in employment, forty-five percent of constitutions included such protections on the basis of sex, twenty-three percent on the basis of race or ethnicity, twenty-two percent on the basis of religion, and twelve percent on the basis of disability.

2. Marriage Rights

Constitutions also addressed sexual orientation in the realm of marriage. None of the constitutions in our study explicitly protected the right to same-sex marriage, while thirteen (seven percent worldwide) prohibited same-sex marriages or permitted legislation to do so. Eight of these countries are in

39. Id. at tbl.1.1
41. CONSTITUCIÓN POLITICA DE LA REPÚBLICA DEL ECUADOR, Oct. 20 2008, art. 11, 33.
42. Appendix 1, at tbl.3.
43. Id. at 4.1.
Sub-Saharan Africa (seventeen percent of constitutions in the region), three in the Americas (nine percent of constitutions in the region), one in East Asia and Pacific (three percent of constitutions in the region), and one in Europe and Central Asia (two percent of constitutions in the region). For example, Uganda’s constitution explicitly stated that “marriage between persons of the same sex is prohibited.”

In Honduras, “[m]atrimony and the common law union between persons of the same sex is prohibited. Matrimonies or common law unions between persons of the same sex celebrated or recognized under the laws of other countries will have no validity in Honduras.”

The constitution of Seychelles “recognises . . . the right of everyone to form a family” but goes on to state that this right “may be subject to such restrictions as may be prescribed by law and necessary in a democratic society including the prevention of marriage between persons of the same sex or persons within certain family degrees.”

Prohibitions of same-sex marriage were concentrated in constitutions adopted after 1980, and all of the constitutions containing these prohibitions were last amended during after 2000. Each of the denials was introduced to the respective country’s current constitution after 2000, while the one provision that permitted future legislation to establish such a denial was introduced in 1993.

An additional twenty-two percent of constitutions did not directly address same-sex marriage but defined or referred to marriage in gendered terms. Such language was found in thirty-one percent of the constitutions of the Americas, thirty percent of the constitutions of Europe and Central Asia, twenty-three percent of Sub-Saharan African constitutions, and thirteen percent of those in East Asia and the Pacific (Table 4.1). For instance, the Bulgarian constitution specified that “[m]atrimony shall be a free union between a man and a woman,” and in Nicaragua, “[m]arriage and stable de facto unions are protected by the State; they rest on the voluntary agreement between a man and a woman.” In Ethiopia, “[m]en and women, without any distinction as to race, nation, nationality or religion, who have attained marriageable age as defined

---

47. Appendix 1, tbls.4.2, 4.3.
48. KONSTITUTSIA NA REPUBLIKA BULGARIA [CONSTITUTION], July 13, 1991, art. 46 (as amended Feb. 6, 2007).
by law, have the right to marry and found a family.” 50 Similarly, Turkmenistan’s constitution states that “[m]en and women having reached the marriageable age have the right, by mutual consent, to marry and create families.” 51

Another eight countries (four percent) guaranteed the right to marry using universal terms. In Albania, for example, “[e]veryone has the right to get married and have a family.” 52 Among the ten constitutions that prohibited discrimination or guaranteed equality on the basis of sexual orientation, six did not address the right to marry in their constitutions (Fiji, Malta, Mexico, New Zealand, South Africa, and Sweden), one defined marriage in universal terms (Portugal), and three referred to marriage in gendered terms (Bolivia, Ecuador, and the UK). 53

CONCLUSION

Rising international affirmation of the rights of LGBT individuals has been paralleled by an increase in constitutional provisions addressing these rights. Ten countries introduced protections of equality or non-discrimination based on sexual orientation to their constitutions between 1990 and 2014, the first such guarantees at the constitutional level. Overall, however, constitutional provisions that explicitly address rights based on sexual orientation or gender identity remain rare, particularly in comparison to provisions against discrimination based on sex, race or ethnicity, religion, and disability. For example, although the UN Convention on the Rights of Persons with Disabilities was adopted only recently, in 2006, forty-seven constitutions (twenty-four percent worldwide) guaranteed some aspect of equality or non-discrimination based on disability in May 2014, compared to five percent protecting this right based on sexual orientation and three percent based on gender identity.

Moreover, the increase in constitutional protections based on sexual orientation and gender identity does not signal a growing global consensus on the rights of LGBT individuals. Countries’ divergent reactions to the rising international awareness of LGBT rights are clearly reflected in constitutional developments. While ten countries have introduced constitutional protections against discrimination or guarantees of equality based on sexual orientation since 1990, thirteen have introduced constitutional prohibitions of same-sex marriage or provisions allowing legislation to prohibit same-sex marriage

during this time. These different trajectories often take place across sub-national jurisdictions within countries, as demonstrated by the virulent debate over same-sex marriage in the United States.

The very recent nature of global recognition of LGBT rights and the few protections that exist at the constitutional level preclude us from drawing strong conclusions on the trajectory of rights in this area. Moreover, this study has only considered explicit constitutional protections or prohibitions based on sexual orientation and gender identity. As illustrated in the introduction, national and sub-national laws as well as litigation and case law are also critical to consider when evaluating the legal protection of LGBT individuals at the national level. However, the symbolic and practical weight of constitutional protections makes them powerful legal tools for advancing equality in practice. Constitutional provisions, either universal or specific to sexual orientation, have formed the basis of successful court cases to decriminalize consensual homosexual activity in Ecuador; 54 to strike down provisions of Colombia’s Standards for the Exercise of the Teaching Profession and Peru’s Military Justice Code that discriminated on the basis of sexual orientation; 55 to extend marital rights to same-sex couples in Canada and South Africa; 56 to extend equal inheritance rights to same-sex couples in Slovenia; 57 and to recognize the equal rights of transgender individuals in Pakistan, 58 among other examples. Constitutional cases addressing discrimination on the basis of other characteristics have also demonstrated the power of constitutional rights to effect broad societal change; for example, these have been used to end de jure racial segregation in schools in the United States and to overturn laws that discriminated against women in the realms of property ownership in Swaziland, citizenship in Botswana, and family law in Uganda. 59

58. See Austin, supra note 12.
Just as each successful court case can be a building block for future success, however, each new restriction can deal a critical blow to equality. Continued mobilization at the national and international levels for the explicit protection of rights based on sexual orientation and gender identity, and for the repeal of laws that discriminate on these bases, will therefore be essential to reverse the setbacks and leverage the successes that have emerged in parallel during the past two decades.

Table 1.1: Constitutional Protection of Equality and Non-Discrimination Based on Sexual Orientation by Region

<table>
<thead>
<tr>
<th>Level of Constitutional Protection</th>
<th>Globally</th>
<th>Americas</th>
<th>East Asia and Pacific</th>
<th>Europe and Central Asia</th>
<th>Middle East and North Africa</th>
<th>South Asia</th>
<th>Sub-Saharan Africa</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitution does not include any relevant protections</td>
<td>20 (10%)</td>
<td>7 (20%)</td>
<td>6 (20%)</td>
<td>1 (2%)</td>
<td>2 (11%)</td>
<td>0 (0%)</td>
<td>4 (8%)</td>
</tr>
<tr>
<td>Constitution guarantees equality generally, but does not explicitly address sexual orientation</td>
<td>163 (84%)</td>
<td>25 (71%)</td>
<td>22 (73%)</td>
<td>48 (91%)</td>
<td>17 (89%)</td>
<td>8 (100%)</td>
<td>43 (90%)</td>
</tr>
<tr>
<td>Constitution guarantees equality based on sexual orientation</td>
<td>10 (5%)</td>
<td>3 (9%)</td>
<td>2 (7%)</td>
<td>4 (8%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>1 (2%)</td>
</tr>
</tbody>
</table>
Table 1.2: Constitutional Protection of Equality and Non-Discrimination Based on Sexual Orientation by Year of Constitution’s Adoption

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitution does not include any relevant protections</td>
<td>20 (10%)</td>
<td>16 (24%)</td>
<td>1 (!2%)</td>
<td>3 (5%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>Constitution guarantees equality generally, but does not explicitly address sexual orientation</td>
<td>163 (84%)</td>
<td>47 (69%)</td>
<td>20 (91%)</td>
<td>57 (93%)</td>
<td>39 (93%)</td>
</tr>
<tr>
<td>Constitution guarantees equality based on sexual orientation</td>
<td>10 (5%)</td>
<td>5 (7%)</td>
<td>1 (5%)</td>
<td>1 (2%)</td>
<td>3 (7%)</td>
</tr>
</tbody>
</table>

Table 1.3: Constitutional Protection of Equality and Non-Discrimination Based on Sexual Orientation by Year of Most Recent Constitutional Amendment

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitution does not include any relevant protections</td>
<td>20 (10%)</td>
<td>2 (40%)</td>
<td>3 (38%)</td>
<td>3 (18%)</td>
<td>12 (7%)</td>
</tr>
<tr>
<td>Constitution guarantees equality generally, but does not explicitly address sexual orientation</td>
<td>163 (84%)</td>
<td>3 (60%)</td>
<td>5 (63%)</td>
<td>14 (82%)</td>
<td>141 (87%)</td>
</tr>
<tr>
<td>Constitution guarantees equality based on sexual orientation</td>
<td>10 (5%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>10 (6%)</td>
</tr>
</tbody>
</table>
Table 2: Constitutional Protection of Equality and Non-Discrimination for Other Groups

<table>
<thead>
<tr>
<th>Level of Constitutional Protection</th>
<th>Sexual Orientation</th>
<th>Gender Identity</th>
<th>Sex</th>
<th>Race or Ethnicity</th>
<th>Religion</th>
<th>Disabilities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitution does not include any relevant protections</td>
<td>20 (10%)</td>
<td>22 (11%)</td>
<td>9 (5%)</td>
<td>7 (4%)</td>
<td>8 (4%)</td>
<td>21 (11%)</td>
</tr>
<tr>
<td>Constitution guarantees equality generally, but does not explicitly address the group</td>
<td>163 (84%)</td>
<td>166 (86%)</td>
<td>21 (11%)</td>
<td>39 (20%)</td>
<td>39 (20%)</td>
<td>125 (65%)</td>
</tr>
<tr>
<td>Constitution guarantees equality for the group</td>
<td>10 (5%)</td>
<td>5 (3%)</td>
<td>163 (84%)</td>
<td>147 (76%)</td>
<td>146 (76%)</td>
<td>47 (24%)</td>
</tr>
</tbody>
</table>
Table 3: Constitutional Protection of Equal Rights in Employment

<table>
<thead>
<tr>
<th>Level of Constitutional Protection</th>
<th>Sexual Orientation</th>
<th>Gender Identity</th>
<th>Sex</th>
<th>Race or Ethnicity</th>
<th>Religion</th>
<th>Disabilities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitution does not include any relevant protections</td>
<td>80 (41%)</td>
<td>81 (42%)</td>
<td>73 (38%)</td>
<td>79 (41%)</td>
<td>79 (41%)</td>
<td>76 (39%)</td>
</tr>
<tr>
<td>Constitution guarantees equal rights in employment generally, but does not explicitly address the group</td>
<td>108 (56%)</td>
<td>109 (56%)</td>
<td>34 (18%)</td>
<td>69 (36%)</td>
<td>71 (37%)</td>
<td>94 (49%)</td>
</tr>
<tr>
<td>Constitution guarantees equal rights in employment for the group</td>
<td>5 (3%)</td>
<td>3 (2%)</td>
<td>86 (45%)</td>
<td>45 (23%)</td>
<td>43 (22%)</td>
<td>23 (12%)</td>
</tr>
</tbody>
</table>
Table 4.1: Constitutional Treatment of Right to Marry for Same-Sex Couples by Region

<table>
<thead>
<tr>
<th>Level of Constitutional Protection</th>
<th>Globally</th>
<th>Americas</th>
<th>East Asia and Pacific</th>
<th>Europe and Central Asia</th>
<th>Middle East and North Africa</th>
<th>South Asia</th>
<th>Sub-Saharan Africa</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitution explicitly denies or allows for legislation to deny the right to marry to same-sex couples</td>
<td>13 (7%)</td>
<td>3 (9%)</td>
<td>1 (3%)</td>
<td>1 (2%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>8 (17%)</td>
</tr>
<tr>
<td>Constitution does not explicitly deny the right to marry to same-sex couples, but uses gendered language to describe marriage</td>
<td>42 (22%)</td>
<td>11 (31%)</td>
<td>4 (13%)</td>
<td>16 (30%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>11 (23%)</td>
</tr>
<tr>
<td>Constitution does not explicitly address right to marry or definition of marriage</td>
<td>130 (67%)</td>
<td>21 (60%)</td>
<td>25 (83%)</td>
<td>31 (58%)</td>
<td>19 (100%)</td>
<td>7 (88%)</td>
<td>27 (56%)</td>
</tr>
<tr>
<td>Constitution does not explicitly address right to marry for same-sex couples, but guarantees the right to marry universally without gendered language</td>
<td>8 (4%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>5 (9%)</td>
<td>0 (0%)</td>
<td>1 (13%)</td>
<td>2 (4%)</td>
</tr>
<tr>
<td>Constitution explicitly guarantees the right to marry to same-sex couples</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
</tr>
</tbody>
</table>
Table 4.2: Constitutional Treatment of Right to Marry for Same-Sex Couples by Year of Constitution’s Adoption

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitution explicitly denies or allows for legislation to deny the right to marry to same-sex couples</td>
<td>13 (7%)</td>
<td>2 (3%)</td>
<td>2 (9%)</td>
<td>4 (7%)</td>
<td>5 (12%)</td>
</tr>
<tr>
<td>Constitution does not explicitly deny the right to marry to same-sex couples, but uses gendered language to describe marriage</td>
<td>42 (22%)</td>
<td>7 (10%)</td>
<td>2 (9%)</td>
<td>22 (36%)</td>
<td>11 (26%)</td>
</tr>
<tr>
<td>Constitution does not explicitly address right to marry or definition of marriage</td>
<td>130 (67%)</td>
<td>57 (84%)</td>
<td>18 (82%)</td>
<td>32 (52%)</td>
<td>23 (55%)</td>
</tr>
<tr>
<td>Constitution does not explicitly address right to marry for same-sex couples, but guarantees the right to marry universally without gendered language</td>
<td>8 (4%)</td>
<td>2 (3%)</td>
<td>0 (0%)</td>
<td>3 (5%)</td>
<td>3 (7%)</td>
</tr>
<tr>
<td>Constitution explicitly guarantees the right to marry to same-sex couples</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
</tr>
</tbody>
</table>
Table 4.3: Constitutional Treatment of Right to Marry for Same-Sex Couples by Year of Most Recent Constitutional Amendment

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitution explicitly denies or allows for legislation to deny the right to marry to same-sex couples</td>
<td>13 (7%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>13 (8%)</td>
</tr>
<tr>
<td>Constitution does not explicitly deny the right to marry to same-sex couples, but uses gendered language to describe marriage</td>
<td>42 (22%)</td>
<td>1 (20%)</td>
<td>0 (0%)</td>
<td>2 (12%)</td>
<td>39 (24%)</td>
</tr>
<tr>
<td>Constitution does not explicitly address right to marry or definition of marriage</td>
<td>130 (67%)</td>
<td>4 (80%)</td>
<td>8 (100%)</td>
<td>15 (88%)</td>
<td>103 (63%)</td>
</tr>
<tr>
<td>Constitution does not explicitly address right to marry for same-sex couples, but guarantees the right to marry universally without gendered language</td>
<td>13 (7%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>13 (8%)</td>
</tr>
<tr>
<td>Constitution explicitly guarantees the right to marry to same-sex couples</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
</tr>
</tbody>
</table>