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GIVING THE EQUAL RIGHTS AMENDMENT TEETH: A PROPOSAL FOR GENDER EQUALITY LEGISLATION MODELED AFTER THE CIVIL RIGHTS ACT OF 1964

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INTRODUCTION

Contrary to the belief of eighty percent of Americans,[1] the U.S. Constitution does not prohibit discrimination on the basis of sex.[2] The effect of this lack of protection can be seen in every corner of our society, including economic inequalities and a lack of representation in leadership.[3] For almost one hundred years, women's organizations and activists have attempted to rectify this by advocating for the inclusion of an Equal Rights Amendment (ERA) in the Constitution.[4] In the past few years, there has been a revived push for the ERA due to the amendment's first congressional hearing in thirty-six years,[5] its ratification by three states since 2017,[6] and public support from

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[1] Press Release, ERA Coal., Americans—by 94%—Overwhelmingly Support the Equal Rights Amendment (ERA) (June 17, 2016).

[2] *See* Ann Bartow, *An Equal Rights Amendment to Make Women Human*, 78 TENN. L. REV. 839, 842–44 (2011).

[3] *See* WORLD ECON. FORUM, THE GLOBAL GENDER GAP REPORT 25 (2018), http://www3.weforum.org/docs/WEF_GGGR_2018.pdf [https://perma.cc/P85C-8H75].

[4] *See* Jenna Barnett, *The Equal Rights Amendment Inches Forward: A 100-Year Fight for Gender Equality*, SOJOURNERS (Apr. 30, 2019), https://sojo.net/articles/equal-rights-amendment-inches-forward-100-year-fight-gender-equality [https://perma.cc/DC95-E2NZ].

[5] *See Equal Rights Amendment Proposals: Hearing on H.J. Res. 79 and H.J. Res. 35 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 116th Cong. (Apr. 30, 2019) (statement of Rep. Jackie Speier).

[6] ERA COALITION, http://www.eracoalition.org/ [https://perma.cc/6KUP-J62E] (last visited June 20, 2021).

high-profile politicians, celebrities, and activists.[7] However, the ERA is only the first step.

Part I of this Note will explain the current sources of protection against sex discrimination in the Constitution and outline the historical background necessary for understanding how this level of protection was achieved.[8] Part II will illustrate why the status of women in the United States today still calls for stronger constitutional protections, including why the current measures are insufficient. Part III will then discuss how, even though the ERA is a vital first step, states' equal rights amendments and Fourteenth amendment jurisprudence teach us that its passage alone will not remedy the gender inequality in our country. Finally, Part IV will recommend legislative measures necessary to give the ERA "teeth," modeled after the Civil Rights Act of 1964.[9]

I. AMERICAN WOMEN HAVE ALWAYS NEEDED THE ERA

A. The Original Push for the ERA

The Founders of the United States never intended to extend the rights guaranteed in our Constitution to women. During the drafting of our founding document, Abigail Adams wrote to her husband, John Adams, asking that he remember the women of the colonies when establishing the new nation.[10] John Adams, our future second president, responded that the Founders "kn[ew] better than to repeal our Masculine systems."[11] While some argue that women were later guaranteed equality in the

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[7] *See* Mary Harris, *What Next: An Equal Rights Amendment True Believer on Why She's Optimistic*, SLATE (May 7, 2019, 5:00 AM), https://slate.com/news-and-politics/2019/05/equal-rights-amendment-congress-hearing-2019.html [https://perma.cc/SFW7-MN37]; *see also* Barnett, *supra* note 4.

[8] Throughout this Note, the author uses both "sex" and "gender" interchangeably because, while the ERA language uses the word "sex," "gender" is usually more appropriate when describing the inequalities that persist in our country.

[9] *See generally* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (legislating voting rights, discrimination in places of public accommodation, the desegregation of public facilities, the desegregation of public schools, discrimination in federally assisted programs, and equal employment opportunities).

[10] *See Abigail and John Adams Converse on Women's Rights, 1776*, THE AM. YAWP READER, https://www.americanyawp.com/reader/the-american-revolution/abigail-and-john-adams-converse-on-womens-rights-1776/ [https://perma.cc/PZM3-3YG7] (last visited June 20, 2021).

[11] *Id.*

Constitution in the form of the Fourteenth Amendment,[12] former Supreme Court Justice Antonin Scalia put that theory to rest in 2011 when he acknowledged that the Constitution does not bar sex discrimination.[13]

Following the procurement of the right to vote in 1919, women's rights organizations worked quickly to introduce the first ERA in Congress in 1923.[14] For almost fifty years, the ERA was reintroduced in every session of Congress but continually received immense pushback, particularly from labor unions who sought to protect women from harsh work conditions.[15] Finally, in 1972, due in large part to the passage of the Civil Rights Act of 1964 and the dawn of the second wave of feminism,[16] the ERA was finally sent to the states for ratification, reading very simply:

> Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex . . . . The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article . . . . This amendment shall take effect two years after the date of ratification.[17]

Proponents of the ERA articulated two principal benefits of this language. "First, it would impel federal and state legislatures to undertake long overdue statutory reform; second, it would provide a firm conceptual foundation for judicial development of a coherent opinion pattern."[18]

To become an official amendment to the Constitution, thirty-eight state legislatures needed to ratify the ERA within seven

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[12] *See* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1333 (2006).

[13] *See* Interview by Calvin Massey with Justice Antonin Scalia, in S.F., Cal. (Mar. 21, 2011) ("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 called laws.").

[14] *See* Barnett, *supra* note 4; *see also* S.J. Res. 21, 68th Cong. (1923).

[15] *See* JANE J. MANSBRIDGE, WHY WE LOST THE ERA 9 (1986); Alex Cohen & Wilfred U. Codrington III, *The Equal Rights Amendment Explained*, BRENNAN CTR. (Jan. 23, 2020), https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained [https://perma.cc/63BS-7TYW].

[16] *See* MANSBRIDGE, *supra* note 15 at 10; *see also* Cohen & Codrington, *supra* note 15.

[17] H.R.J. Res. 208, 92nd Cong. (1972).

[18] Ruth Bader Ginsburg, *The Equal Rights Amendment Is the Way*, 1 HARV. WOMEN'S L.J. 19, 21 (1978).

years.[19] During the first year, twenty-two states ratified the ERA.[20] Unfortunately, momentum soon slowed due to conservative pushback and a campaign of misinformation, both led by Phyllis Schlafly, the ERA's most formidable opponent.[21] As president of the National Federation of Republican Women, Schlafly organized conservative, religious women from across the country to form a single-issue national campaign known as STOP (Stop Taking Our Privileges) ERA.[22] By meeting individually with their state legislators, STOP ERA members planted seeds of doubt about the supposed legal and social consequences of constitutionally mandated sex equality.[23] As a result, even after the deadline for ratification was extended to 1982, it came and went with only 35 states on board[24] despite nationwide polls at the time indicating fifty-seven percent of Americans supported the ERA.[25]

B. Finding a New Path Towards Equality

Following this defeat, women's rights organizations shifted their focus to fighting for a guarantee against sex discrimination within the Constitution's existing language.[26] This strategy led to an initial victory in 1976, due in large part to Ruth Bader Ginsburg's work as an attorney.[27] In *Craig v. Boren*, Ginsburg

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[19] The sunset date, a rare provision for constitutional amendments, was the result of a compromise between the House and Senate. *See* Jeffrey Rosen, *We the People Podcast: Can the Equal Rights Amendment be Revived?*, NAT'L CONSTITUTION CTR. (Feb. 7, 2019), https://constitutioncenter.org/debate/podcasts [https://perma.cc/8W4P-LN54].

[20] THOMAS NEALE, CONG. RESEARCH SERV., R42979, THE PROPOSED EQUAL RIGHTS AMENDMENT: CONTEMPORARY RATIFICATION ISSUES 14 (2019).

[21] *See* Phyllis Schlafly, *What's Wrong with "Equal Rights" for Women?*, PHYLLIS SCHLAFLY REP. (Feb. 1972), https://eagleforum.org/wp-content/uploads/2017/03/PSR-Feb1972.pdf [https://perma.cc/QB9X-KBS6] (debuting many of her infamous talking points, including that "[w]omen[ ] libbers . . . are promoting abortions instead of families"); *see also* Douglas Martin, *Phyllis Schlafly, 'First Lady' of a Political March to the Right, Dies at 92*, N.Y. TIMES (Sept. 5, 2016), https://www.nytimes.com/2016/09/06/obituaries/phyllis-schlafly-conservative-leader-and-foe-of-era-dies-at-92.html [https://perma.cc/N3C3-BQPF].

[22] *See* DONALD T. CRITCHLOW, PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM: A WOMAN'S CRUSADE 219–20 (2nd prtg. 2008).

[23] *See id.*

[24] THOMAS NEALE, CONG. RESEARCH SERV., R42979, THE PROPOSED EQUAL RIGHTS AMENDMENT: CONTEMPORARY RATIFICATION ISSUES 15–16 (2019).

[25] *See* MANSBRIDGE, *supra* note 15, at 14.

[26] *See* ROSEMARY C. SALOMONE, EQUAL EDUCATION UNDER LAW 116–17 (1986).

[27] *See* S.M., *How Ruth Bader Ginsburg Became a Trailblazer for Gender Equality*, ECONOMIST (May 14, 2018), https://www.economist.com/democracy-in-

argued that a law which set a higher legal drinking age for men was an unconstitutional sex classification because the state's law did little to further the stated interest in decreasing drunk driving incidents.[28] The Supreme Court agreed with Ginsburg and, as a result, ruled that the Fourteenth Amendment's Equal Protection Clause required that laws which distinguish on the basis of sex must be subject to intermediate, rather than minimal, scrutiny.[29] This meant that any law that was applied differently on the basis of sex had to further "important governmental objectives" by means "substantially related" to those objectives.[30] Prior to *Craig*, a sex classification only had to be rationally related to a legitimate government interest—a much lower standard.[31]

Twenty years later, Justice Ginsburg's opinion in *United States v. Virginia* slightly strengthened the standard of review for sex classifications.[32] In holding that the Virginia Military Institute could not bar women from attending if it accepted state funds, the Court determined that a sex classification will only be upheld if the justification for such classification is "exceedingly persuasive" and does not rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females."[33] Reaching this milestone was the result of a hard-fought, strategic battle by women's rights organizations after the apparent failure of the ERA.[34] And, while some view the holdings in *Craig* and *Virginia* as establishing a de facto ERA,[35] Section II.B will explain why this is not the case.[36]

C. A Newfound Hope for ERA Proponents

Despite it being almost thirty years since the ratification deadline passed, supporters are currently exploring two divergent but harmonious avenues for removing this deadline:

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america/2018/05/14/how-ruth-bader-ginsburg-became-a-trailblazer-for-gender-equality [https://perma.cc/CEH3-583A].

[28] *See* 429 U.S. 190, 204 (1976).

[29] *See id.* at 218–19 (Rehnquist, C.J., dissenting).

[30] *Id.* at 197 (majority opinion).

[31] *See* Reed v. Reed, 404 U.S. 71, 76 (1971).

[32] *See generally* 518 U.S. 515 (1996).

[33] *Id.* at 532–33.

[34] *See* Christina Gleason, United States v. Virginia*: Skeptical Scrutiny and the Future of Gender Discrimination Law*, 70 ST. JOHN'S L. REV. 801, 802 n.5 (1996).

[35] *See* Siegel, *supra* note 12, at 1333 (quoting Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 984–85 (2002)).

[36] *See infra* Section II.B.

one legislative and the other judicial.[37] First, the House of Representatives passed a bill in February 2020 which, if it became law, would retroactively remove the ratification deadline of the 1972 ERA.[38] In January 2020, Virginia became the thirty-eighth state to ratify the ERA, rounding out the three-quarters of the states needed for constitutional ratification.[39] Consequently, upon Congress's removal of the deadline, the ERA could immediately become the twenty-eighth amendment to our Constitution.[40] Second, a coalition of states, led by Illinois, Nevada, and Virginia—the three most recent states to ratify the ERA—are challenging the validity of the ratification deadline in court.[41] In an Amici Curiae Brief, New York Attorney General Letitia James, joined by nineteen states' attorneys general, argues Article V did not authorize Congress to impose such a deadline in the first place.[42] If the District Court for the District of Columbia agrees, it could require the national archivist to publish and certify the ERA as our Constitution's twenty-eighth amendment.

As the ERA's history illustrates, every inch of progress towards gender equality has been an uphill battle. Despite this, the progress has been significant enough that political pundits and legal scholars alike have questioned whether American women still need the ERA.[43] The answer to this question should

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[37] This Note proceeds under the assumption that the ratification of the ERA is, or will shortly be, politically feasible as the result of one of these paths.

[38] *See* H.R.J. Res. 79, 116th Cong. (2020); *see also* Danielle Kurtzleben, *House Votes to Revive Equal Rights Amendment, Removing Ratification Deadline*, NPR (Feb. 13, 2020, 12:35 PM), https://www.npr.org/2020/02/13/805647054/house-votes-to-revive-equal-rights-amendment-removing-ratification-deadline [https://perma.cc/7EN2-A7TY].

[39] *See* ERA COALITION, *supra* note 6.

[40] *See* Kurtzleben, *supra* note 38 (also mentioning that some, including Justice Ruth Bader Ginsburg, have doubts about the legality of states ratifying the ERA after 1982, even if Congress votes to remove the deadline).

[41] *See* Ryan W. Miller, *3 State Attorneys General To Sue To Recognize ERA as 28th Amendment*, USA TODAY (Jan. 30, 2020), usatoday.com/story/news/nation/2020/01/30/era-virginia-illinois-nevada-attorneys-general-announce-lawsuit/4618804002/ [https://perma.cc/Z6U9-J2KR].

[42] *See* Brief for the States of New York, et al. as Amici Curiae Supporting Petitioners at 5, 21, Virginia v. Ferriero, No. 1:20-cv-242-RC (D.D.C. June 29, 2020) (also arguing the attempts of states to rescind their ratifications are invalid).

[43] *See* Susan Chira, *Do American Women Still Need an Equal Rights Amendment?*, N.Y. TIMES (Feb. 16, 2019), https://www.nytimes.com/2019/02/16/sunday-review/women-equal-rights-amendment.html [https://perma.cc/JA4S-T24S]; *see also* Siegel, *supra* note 12, at 1334.

be the same as the answer to the question of whether gender inequality persists in this country.

II. AMERICAN WOMEN STILL NEED THE ERA

A. The State of Gender Inequality in the United States

Put quite simply: gender equality is far from a reality. Women are paid less than their male counterparts,[44] but pay more for consumer goods and services.[45] Women constitute about 51% of the population[46] but are a minority in governmental bodies,[47] executive positions,[48] the news media,[49] and the tech world.[50] Women are also disproportionately victims of violence in the public and private sphere.[51] Despite incremental

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[44] *See* Nikki Graf, Anna Brown & Eileen Patten, *The narrowing, but persistent, gender gap in pay*, PEW RSCH. CTR. (Mar. 22, 2019), https://www.pewresearch.org/fact-tank/2019/03/22/gender-pay-gap-facts/ [https://perma.cc/CC5G-KJ2R].

[45] *See* Candice Elliot, *The Pink Tax: What's the Cost of Being a Female Consumer in 2020?*, LISTEN MONEY MATTERS, https://www.listenmoneymatters.com/the-pink-tax/ [https://perma.cc/W8UN-7CQG] (last updated Jan. 25, 2020).

[46] *See Percent of Female Population in United States Labor Force*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/LFE046217 [https://perma.cc/5SJQ-LEJM] (last visited June 20, 2021) (reporting that women comprise 50.8% of the United States population).

[47] *See* Claire Hansen, *116th Congress by Party, Race, Gender, and Religion*, U.S. NEWS (Dec. 19, 2019), https://www.usnews.com/news/politics/slideshows/116th-congress-by-party-race-gender-and-religion (noting that women make up 25% of the Senate and 23% of the House).

[48] *See* Claire Zillman, *The Fortune 500 Has More Female CEOs than Ever Before*, FORTUNE, (May 16, 2019), https://fortune.com/2019/05/16/fortune-500-female-ceos/ [https://perma.cc/9LSV-HGZ5] (reporting only 6.6% of companies are led by female CEOs).

[49] *See* Press Release, Women's Media Ctr., The Status of Women in the U.S. Media 2019 (Feb. 21, 2019) (reporting that women make up 41.7% of the overall workforce in newsrooms but are owners of only 7.4% of commercial TV stations and managers of only 17.4% of AM and FM stations).

[50] *See* Kasee Bailey, *The State of Women in Tech 2020*, DREAMHOST, Mar. 6, 2020, https://www.dreamhost.com/blog/state-of-women-in-tech/ [https://perma.cc/NXN9-ZVAE].

[51] *See* CYNTHIA HESS ET AL., INST. FOR WOMEN'S POLICY RESEARCH, THE STATUS OF WOMEN IN THE STATES: 2015 237 (2015), https://iwpr.org/wp-content/uploads/2020/08/R400-FINAL-8.25.2015.pdf [https://perma.cc/E28Q-FWU4] ("[N]early one in three women [ ] experiences physical violence by an intimate partner at some point in her lifetime."); *see also* Terence Monmaney, *New Poll of U.S. Troops and Veterans Reveals Their Thoughts on Current Military Policies*, SMITHSONIAN MAG. (Jan. 2019), https://www.smithsonianmag.com/arts-culture/new-poll-us-troops-veterans-reveals-thoughts-current-military-policies-180971134/ [https://perma.cc/MFC7-DDE6] (reporting that 66% of women in the military have

improvements, in 2018, the United States dropped from 49th to 51st out of 149 countries in terms of gender equality.[52] The coronavirus pandemic only exacerbated these disparities.[53]

While the gender gap permeates every corner of our society, from gender-based violence to representation in political and leadership positions, this Note will focus primarily on women's economic health and opportunity. For example, in 2014, the median woman earned only 82.9% of the median man's hourly wages—a statistic that is even more stark for women of color and affects even the most educated workers.[54] Several factors contribute to this pay inequity, including the undervaluation of jobs overwhelmingly held by women,[55] the tendency of the majority of family responsibilities to fall on women, [56] and the fact that, even when a woman continues to work after having children, she will likely "earn[ ] [three] percent less than women who do not have children [while] fathers . . . earn on average [fifteen] percent *more* than men without children."[57]

This pay inequity has a glaring effect on families. The majority of children in poverty—56.1%—live in female-headed households.[58] Even "average American middle-class families

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personally experienced sexual assault or sexual harassment compared to 6% of men).

[52] *See* WORLD ECON. FORUM, *supra* note 3, at 25 (explaining that the United States made modest improvements toward economic equality but experienced a "directional reversal in education and virtually no change" in terms of political empowerment).

[53] *See e.g.* Amanda Taub, *Pandemic Will "Take Our Women 10 Years Back" in the Workplace*, N.Y. TIMES (Sept. 26, 2020), https://www.nytimes.com/2020/09/26/world/covid-women-childcare-equality.html [https://perma.cc/28NA-3ADS]; Megan L. Evans, Margo Lindauer & Maureen E. Farrell, *A Pandemic within a Pandemic—Intimate Partner Violence during Covid-19*, 383 NEW ENG. J. MED. 2302 (2020).

[54] *See* Alyssa Davis & Elise Gould, *Closing the Pay Gap and Beyond: A Comprehensive Strategy for Improving Economic Security for Women and Families* 5–7 (Econ. Policy Inst., Briefing Paper No. 412, 2015), https://files.epi.org/2015/closing-the-pay-gap.pdf [https://perma.cc/4T8D-WXNW].

[55] JOINT ECON. COMM., 114TH CONG., GENDER PAY INEQUALITY: CONSEQUENCES FOR WOMEN, FAMILIES AND THE ECONOMY 17–18 (Apr. 2016) ("Women tend to work in professions that overwhelmingly employ females, including nursing, teaching and office and administrative support positions. These professions have traditionally paid lower wages than male-dominated professions.") (footnote omitted).

[56] *See id.* at 13 ("39 percent of mothers report having taken a significant amount of time off to care for a child or family member, and 27 percent report having quit their job" compared to 24 and 10 percent, respectively, for fathers.).

[57] *See id.* at 14 (emphasis added).

[58] *See* Catharine A. MacKinnon, *Toward a Renewed Equal Rights Amendment: Now More Than Ever*, 37 HARV. J.L & GENDER 569, 573 n.19 (2014).

cannot afford housing, education, healthcare, and other basic costs unless both parents work."[59] So, the achievement of economic equality would not just benefit women, but it would also lift up children and families. Additionally, advancing women's economic equality would boost the entire country's economy.[60] For example, a 2016 study found that "[c]losing the . . . gender gap [in the workplace] could deliver $2.1 trillion to $4.3 trillion of additional GDP in 2025."[61] As these numbers only begin to show, our devaluation of women and women's work has massive consequences.

B. Current Remedial Paths Are Insufficient

The persistence of these inequalities is proof that the current system of piecemeal statutes and Fourteenth Amendment jurisprudence is not sufficient. Current statutory measures and subsequent court interpretations are insufficient for several reasons. First, legislation is easily repealed because no Congress is bound by the laws of a prior Congress.[62] Second, Congress is limited in the affirmative steps it may take under the Fourteenth Amendment to promote gender equality. For example, in *United States v. Morrison*, the Supreme Court struck down part of the Violence Against Women Act that placed civil penalties on gender-motivated crimes.[63] The Court determined that Congress exceeded its power under the Fourteenth Amendment by attempting to reach purely private conduct based on the disparate impact of such conduct.[64]

Third, legal challenges to sex discrimination brought under the Fourteenth Amendment's Equal Protection Clause have

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[59] Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 YALE J.L. & FEMINISM 381, 428 (2017).

[60] *See generally* MCKINSEY GLOB. INST., THE POWER OF PARITY: ADVANCING WOMEN'S EQUALITY IN THE UNITED STATES (2016) (explaining that the wide range in possible GDP growth depends on whether all states matched the current standards set by the highest performing states in gender equality or whether all states achieved true gender parity).

[61] *See id.* at 2.

[62] *See When Does Congress Repeal Legislation? A New Dataset of Major Repeals from 1877–2012 Provides Answers*, LEGBRANCH (Oct. 19, 2015), https://www.legbranch.org/2015-10-19-when-does-congress-repeal-legislation-a-new-dataset-of-major-repeals-from-1877-2012-provides-answers/ [https://perma.cc/RJT7-A5YM] ("Congress regularly voids its own statutes via repeals.").

[63] *See* 529 U.S. 598, 627 (2000).

[64] *See id.* at 621.

reached their limit.[65] This is, in large part, because "[m]ost sex discrimination is done not by people thinking bad thoughts about women, as the Fourteenth Amendment now requires in order for discrimination to be proven, but by people following schemas and routines and habits and biases ingrained for centuries."[66] Four primary factors have limited the Equal Protection Clause's protections against sex discrimination:

> (1) the requirement of state action; (2) the failure of the Supreme Court to subject claims of sex discrimination to the "strict scrutiny" standard of review applied to claims of race discrimination; (3) the Supreme Court's application of a formal equality model of analysis that further reduces the protection afforded claims of sex discrimination when men and women are deemed not similarly situated; and (4) the unwillingness of the Supreme Court, absent proof of intentional discrimination, to closely scrutinize facially neutral governmental regulations or policies that disparately impact women.[67]

Finally, piecemeal legislation does little to remedy societal inequalities when they are grounded in a broken system. "Legal equality guarantees have been in effect in the United States for a long time without producing equality in social life."[68] The ERA would provide the opportunity for a more permanent, comprehensive, aggressive, and coherent approach to achieving gender equality in the United States.

As mentioned above, the ERA would fill these gaps through two primary avenues.[69] First, the ERA would provide the foundation for courts to closely scrutinize and invalidate current discriminatory laws and practices that they have been unwilling or unable to reach through the Equal Protection Clause.[70] But, merely battling out the limits of the ERA in courts will not bring about the lasting change required for the realization of gender equality.[71] So, second, and more importantly, the ERA's enforcement clause would create the opportunity for Congress to

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[65] *See* Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1211 (2005).

[66] *See* MacKinnon, *supra* note 58, at 572.

[67] *See* Wharton, *supra* note 65, at 1205.

[68] *See* MacKinnon, *supra* note 58, at 570.

[69] *See supra* Section I.A.

[70] *See* Ginsburg, *supra* note 18, at 21, 25–26.

[71] *See* SALOMONE, *supra* note 26, at 57 ("Using courts to make things happen in the real world ultimately pits the victorious litigant against those who are inclined to resist.").

undertake significant statutory reform.[72] The effectiveness of the ERA is dependent on Congress seizing this opportunity.

III. THE ERA CANNOT STAND ALONE

A. Lessons from State Equal Rights Amendments

While the ERA is a vital next step towards equality, it cannot be the only step. "Constitutional sex equality provisions are neither necessary nor sufficient to reducing gender gaps."[73] Consider that, in 2016, Norway, which does not explicitly guarantee sex equality in its constitution, was found to consistently rank in the top three countries succeeding at closing the gender gap while Chad, which does have a sex equality provision in its constitution, ranked 140th for gender equality.[74] Similarly, Maine does not provide for sex equality in its constitution while Utah does and they are, respectively, ranked first and fiftieth for gender equality in the United States.[75] Nevertheless, this does not mean that state constitutional ERAs have been wholly ineffective.[76]

Currently, twenty-five states have express protections against sex discrimination in their constitutions.[77] Some scholars argue "that state ERAs have been used to benefit men at the expense of women and that they have ultimately been ineffective 'except as symbols' in advancing women's equality."[78] Others argue, more persuasively, that state ERAs are effective because

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[72] *See* Ginsburg, *supra* note 18, at 23, 26.

[73] Suk, *supra* note 59, at 399.

[74] *See id.* (exploring the structure and effect of various countries' constitutional gender equality provisions).

[75] *See* Adam McCann, *Best & Worst States for Women's Equality*, WALLETHUB (Aug. 20, 2019), https://wallethub.com/edu/best-and-worst-states-for-women-equality/5835/ [https://perma.cc/FU8L-QDX3]; Suk, *supra* note 59, at 437 (noting that Maine ratified the Federal ERA but not a State Constitutional ERA); Paul Benjamin Linton, *State Equal Rights Amendments: Making a Difference or Making a Statement?*, 70 TEMP. L. REV. 907, 908–09, 909 n.2 (1997) (indicating which states have passed a State Constitutional ERA).

[76] *See generally* Wharton, *supra* note 65. *But see* Linton, *supra* note 75, at 940.

[77] *See Frequently Asked Questions*, ERA, https://www.equalrightsamendment.org/faq [https://perma.cc/4K4N-XUCQ] (last visited June 20, 2021) (indicating that the following states' constitutions contain sex discrimination protections: Alaska, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, and Wyoming).

[78] *See* Wharton, *supra* note 65, at 1203 (quoting Linton, *supra* note 75, at 940–41).

they often go further than the current Federal Equal Protection standard, even if they are not being used to their full potential.[79] State ERAs have been used to minimize the financial burdens of divorce, invalidate laws that "assign child support obligations only to fathers," strengthen protections against pregnancy discrimination, and "have prompted major legislative reforms in employment law."[80] Further, these amendments have not been used, as opponents suggested they would be, to undermine affirmative action efforts.[81] Any apparent ineffectiveness of state ERAs can be attributed to the uneven application of these amendments across states and any actual ineffectiveness can be attributed to a state's "[u]nexamined [r]eliance on [f]ederal [p]recedent."[82] Both of these factors illustrate the need for a Federal ERA in order to create consistency and strengthen the standard of review for sex classifications.[83]

B. Lessons from the Fourteenth Amendment, Brown*, and the Civil Rights Act of 1964*

The Fourteenth Amendment is a perfect example of how a constitutional amendment cannot be successful on its own, particularly when viewed in light of public school segregation.[84] In 1868, the requisite states ratified the Fourteenth Amendment.[85] Eighty-six years later, the Court in *Brown v. Board of Education* determined that, under the Fourteenth Amendment, racially segregated public schools were unconstitutional and mandated that all public schools be integrated.[86] However, public schools would not be successfully

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[79] *See id.* at 1270.

[80] Judith Avner, *Some Observations on State Equal Rights Amendments*, 3 YALE L. & POL'Y REV. 144, 155–57, 165 (1984) (outlining both legislative and judicial reforms made possible because of state ERAs); Wharton*, supra* note 65, at 1248–49.

[81] *See* Avner, *supra* note 80, at 165.

[82] *See* Wharton, *supra* note 65, at 1270.

[83] *See* Avner, *supra* note 80, at 145 ("Certainly the federal amendment is the only means of assuring equality for women and men under law irrespective of geography.").

[84] *See* Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 946 (2005).

[85] *See 14th Amendment to the U.S. Constitution: Civil Rights (1868)*, WWW.OURDOCUMENTS.GOV, https://www.ourdocuments.gov/doc.php?flash=false&doc=43 (last visited June 20, 2021) [https://perma.cc/A6XD-MUMG].

[86] 347 U.S. 483 (1954); *see* Zietlow, *supra* note 84, at 954–56; *see also* SALOMONE, *supra* note 26, at 43 ("What equal protection of the laws meant in the society of 1896 as compared with that of 1954 and as applied to the social

integrated for another decade.[87] It took "a shift in congressional membership and a change in Presidential leadership to put some 'teeth' into the *Brown* mandate."[88] "[B]y virtually every indicator, the [Civil Rights Act of 1964] was more effective than *Brown* and the lower courts' enforcement of *Brown*" in desegregating public schools.[89]

This congressional Act would have undoubtedly been impossible without the ratification of the Fourteenth Amendment.[90] Nevertheless, despite numerous lawsuits filed pursuant to the Fourteenth Amendment's Equal Protection Clause,[91] widespread change was not realized until it was properly enforced by Congress. "[I]n the years after passage of the 1964 Civil Rights Act, the federal government made more substantial progress toward [desegregation] than had been made by litigation in the ten years following the *Brown* decision."[92] The success of the Civil Rights Act can be attributed to both its "carrot[ ] and stick[ ]" approach and its delegation of enforcement powers.[93] Title IV was the carrot, Title VI was the stick, and each gave the attorney general and federal agencies vast power to enforce the respective provisions.[94]

To enforce the *Brown* mandate and desegregate public education, Title IV provided for technical assistance, training programs, and "grants to state and local agencies to assist them in eliminating school segregation."[95] In addition, Title IV gave the Attorney General power to bring suits against state and local governments on behalf of individuals who filed a written complaint if the action would "materially further the orderly achievement of desegregation."[96] Title VI, on the other hand, authorized federal agencies to withdraw or refuse to grant

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understandings, sensibilities, and perspectives of the time apparently had changed in the intervening years.").

[87] *See* SALOMONE, *supra* note 26, at 58.

[88] *Id.* at 57.

[89] *See* Zietlow, *supra* note 84, at 947.

[90] *See id.* at 984–88 (describing the Civil Rights Act of 1964 as a "constitutional milestone" because it clarified the constitutional issue surrounding segregation for the courts and the public).

[91] *See* SALOMONE, *supra* note 26, at 40–56.

[92] *Id.* at 58.

[93] *See* Emily Bogle et al., *Behind the Civil Rights Act: How It Was Made and What It Means Today*, NPR (July 2, 2014), https://apps.npr.org/behind-the-civil-rights-act/#/annotation-22 [https://perma.cc/D3AP-72M5]

[94] *See* 42 U.S.C. §§ 2000c-6, 2000d-1 (2018).

[95] SALOMONE, *supra* note 26, at 58; Bogle et al., *supra* note 93.

[96] 42 U.S.C. § 2000c-6(a) (2018).

federal financial assistance to any program or activity that excluded individuals on the basis of race, color, or national origin.[97] "The joint impact of Titles IV and VI helped move the South toward desegregation in the late 1960s."[98]

Ultimately, the Civil Rights Act was a more effective tool for social change than *Brown* because "when the legislative branch creates rights of belonging, it represents a decision within the community to effectuate a more inclusive vision of that community" unlike the imposing nature in which the judicial branch creates these rights.[99] And thankfully, "[t]he success of the 1964 Civil Rights Act created a precedent for Congress to actively legislate to enforce equality norms."[100] Following the ratification of the ERA, Congress should take an equally active role in enforcing gender equality.

IV. INVOKING THE POWER OF THE ENFORCEMENT CLAUSE

Congress should spend the years following the ratification of the ERA enacting the "Equal Rights Act"[101] pursuant to the ERA's enforcement clause. It should be modeled after the Civil Rights Act of 1964 and should legislate on topics ranging from violence against women to economic health and opportunity. The recommendations in the following sections will focus on the latter because "[e]conomic power is potentially both the most important component of gender equality and the one that requires policy intervention for the creation of opportunities and sustainability over time."[102] Similar to the Civil Rights Act's carrot and stick approach, economic policy in the Equal Rights Act should come in two forms: the particular, or the stick, and the structural, or the carrot.

A. The "Stick Approach" to Achieving Economic Gender

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[97] *See* 42 U.S.C. §§ 2000d, 2000d-1 (2018) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

[98] SALOMONE, *supra* note 26, at 58 ("In 1964, only 2.3 percent of southern blacks attended desegregated schools; in 1965 that figure grew to 7.5 percent, and in 1966 to 12.5 percent.").

[99] Zietlow, *supra* note 84, at 946.

[100] *Id.* at 988.

[101] This is a hypothetical title created by the author.

[102] THE REGENTS OF THE UNIV. OF CAL., GENDER IN THE TWENTY-FIRST CENTURY: THE STALLED REVOLUTION AND THE ROAD TO EQUALITY 249 (Shannon N. Davis, Sarah Winslow & David J. Maume eds., 2017).

Equality

Particular policies should include measures such as requiring equal pay for equal work and banning the "pink tax." Measures to enforce these policies should be similar to those prescribed in Title VI of the Civil Rights Act. Between the ages of sixteen and seventy, the typical woman will make approximately $590,000 less than a man makes in that time span because, despite existing federal legislation, women are still paid less than men.[103] By the age of seventy, a woman will also have paid over $90,000 more than a man on basic goods such as shampoo and shaving cream simply because the "woman's version" is marked up with what has been coined a "pink tax."[104] Banning practices such as these could theoretically put more than $650,000 directly back in the pockets of an individual woman during her lifetime which would tangibly increase women's economic power.

These are not novel ideas and, in fact, have already been pursued by Congress and state legislatures to varying degrees. The Lilly Ledbetter Fair Pay Act of 2009 sought to address the wage gap issue by making it easier for employees to sue their employers over discriminatory pay practices.[105] While this legislation was an incredible victory, it did not solve the pay gap problem because, for one thing, lawsuits can be costly and risky.[106] Putting an end to the pay gap will require a focus on preventative measures in addition to these remedial measures. To address the disparate impact of the "pink tax," the New York State Assembly passed a bill during the 2019 legislative session that would prohibit businesses from charging different prices for substantially similar men's and women's products.[107] An Equal

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[103] *See* Chris Wilson, *Just How Bad Is the Gender Pay Gap? Brutal, When You Look at a Lifetime of Work*, TIME (Apr. 2, 2019, 6:00 AM), https://time.com/5562269/equal-pay-day-women-men-lifetime-wages/ [https://perma.cc/XC2M-MLPV].

[104] *See* AX THE PINK TAX, https://axthepinktax.com/#support (last visited June 20, 2021) [https://perma.cc/5HNK-R5P2]; *see also* Elliot, *supra* note 45.

[105] *See* Michel Martin, *Lilly Ledbetter And the Fight for Gender Equality*, NPR (Feb. 11, 2009, 12:00 PM), https://www.npr.org/templates/story/story.php?storyId=100557186 [https://perma.cc/47GZ-S9AL].

[106] *See* Kay Steiger, *Closing the Gender Gap*, THE GUARDIAN (Jan. 27, 2009), https://www.theguardian.com/commentisfree/cifamerica/2009/jan/27/obama-lilly-ledbetter-fair-pay [https://perma.cc/4B3D-5B42].

[107] *See* N.Y.A. 629, Reg. Sess. (2019); *see also* Leah Dunlevy, *New York Advances a Bill to End Gender Discrimination in Product Pricing*, PAC. STANDARD (June 14,

Rights Act could, among other things, focus both on preventative pay discrimination measures and eliminating the "pink tax" nationally.

These particular policy changes would be enforced similarly to the provisions of Title VI of the Civil Rights Act, or the stick approach.[108] That is, agencies would be given the authority to issue rules and regulations to enforce the Act and, further, would have authority to terminate or refuse to grant federal benefits to any program engaging in these discriminatory practices. The Equal Rights Act should also go one step further and authorize the cancellation of any federal tax benefits for any company that engages in these practices. The stick approach is most appropriate to enforce these measures because there would be little ambiguity when it comes to determining whether an organization is in compliance. And where there is ambiguity, federal agencies would be able to exercise their discretion.

B. The "Carrot Approach" to Achieving Economic Gender Equality

Structural changes in law would include "policies that support worker flexibility and contemporary family life."[109] Measures to enforce these policies should be similar to those prescribed in Title IV of the Civil Rights Act. An Equal Rights Act should follow states' leads in focusing efforts on three central areas of legislation: accommodation of pregnancy in the workplace, primary school education designed for the children of two breadwinners and single parents, and employment designed for coequal and single parents.[110] The first of these, accommodation of pregnancy in the workplace, can be difficult to conceptualize under an equality framework because not everyone in the workplace can be pregnant. Congress took a step in the right direction, however, when it passed the Pregnancy

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2019), https://psmag.com/news/new-york-advances-a-bill-to-end-gender-discrimination-in-product-pricing [https://perma.cc/A549-SB44] (reporting that the bill must still be passed by the State Senate).

[108] *See* 42 U.S.C. § 2000d-1 (2018).

[109] THE REGENTS OF THE UNIV. OF CAL., *supra* note 102, at 249.

[110] *See* Suk, *supra* note 59, at 429–30; *see also* Gretchen Livingston, *About one-third of U.S. children are living with an unmarried parent*, PEW RSCH. CTR. (Apr. 27, 2018), https://www.pewresearch.org/fact-tank/2018/04/27/about-one-third-of-u-s-children-are-living-with-an-unmarried-parent/ [https://perma.cc/XN8D-LM6P] (noting twenty-one percent of children under eighteen were living with a solo mother in 2017).

Discrimination Act which requires employers to provide the same benefits provided to any employee who, because of a disability, is restricted in their ability to work.[111] But, like the Fair Pay Act of 2009, the Pregnancy Discrimination Act has substantial limitations because of the enforcement burden it places on employees.[112]

The second of these policies would remedy the disparate impact that school schedules have on women's opportunities for professional gain.[113] In general, children cannot start public school until the age of five, the school day ends well before the workday does, and school abruptly stops during the summer while work does not. During these times, a parent has to be available to the child, and that parent is usually the mother.[114] Policies including universal pre-kindergarten, longer school days, and government- or employer-subsidized childcare would alleviate this burden and equalize women's opportunities in the workplace.[115] Local governments have already started to see the success of such policies. For example, since Washington D.C. started offering two years of universal, full-day preschool about ten years ago, "the city's maternal labor force participation rate has increased by about 12 percent[ ]."[116]

The biggest part of achieving equality for women in the public sphere, however, will be allowing and encouraging men to

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[111] *See* Deborah A. Widiss, *The Interaction of the Pregnancy Discrimination Act and the Americans with Disabilities Act After Young v. UPS*, 50 U.C. DAVIS. L. REV. 1423, 1427–28 (2017) ("The PDA came on the heels of a dramatic growth in employer support for other kinds of health conditions . . . . [T]he Congressional record makes clear that the PDA was intended to ensure that comparable benefits were extended to pregnant employees.").

[112] *See* Steiger, supra note 106; Liz Elting, *Why Pregnancy Discrimination Still Matters*, FORBES (Oct. 30, 2018, 2:19 PM), https://www.forbes.com/sites/lizelting/2018/10/30/why-pregnancy-discrimination-still-matters/#5f2e636763c1 [https://perma.cc/4W4J-TBH2] ("Sadly, forty years after the PDA became law, discrimination is still quite common. . . . The number of charges filed hasn't changed very much since [2011].").

[113] *See* Suk, *supra* note 59, at 433–34.

[114] *See id.* at 433.

[115] *See id.* at 431–34.

[116] Rasheed Malik, *The Effects of Universal Preschool in Washington, D.C.*, CTR. FOR AM. PROGRESS (Sept. 26, 2018, 9:30 AM), https://www.americanprogress.org/issues/early-childhood/reports/2018/09/26/458208/effects-universal-preschool-washington-d-c/ [https://perma.cc/WJ5Y-52DV].

share in private sphere work.[117] This means, among other things, requiring gender-neutral policies for paid parental leave and incentivizing the implementation of flexible work schedules. First, "[p]aternity leave benefits women in the workplace, not only by leading toward more equal divisions of labor at home—making it more likely that the mother will engage more fully in her career—but also in that it de-genders and destigmatizes the taking of leave during one's career."[118] In order for these benefits to be realized, employers must both offer fathers the same amount of parental leave as mothers and encourage a culture where neither parent is penalized upon their return for taking advantage of the policy.[119] Second, "lack of flexible work arrangements . . . makes it difficult for many workers, especially women, to meet both their caregiving and work responsibilities."[120] In a 2014 survey, nearly three-quarters of women who identify as homemakers "said they would consider going back [to work] if a job offered flexible hours or allowed them to work from home."[121] Incentivizing employers to allow for more flexible work arrangements would therefore increase the maternal workforce and, consequently, families' earning capacities.

Policies to implement these structural changes would be enforced similarly to the provisions of Title IV of the Civil Rights Act, or the carrot approach.[122] States and companies would have access to training, technical assistance, and grants to aid in the implementation of these policies. Additionally, the Attorney General would be granted authority to bring a suit on behalf of individuals if doing so would materially further the achievement of gender equality. This would take the burden off employees while rewarding employers for taking preemptive measures. The carrot approach is most appropriate to enforce these measures

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[117] *See* THE REGENTS OF THE UNIV. OF CAL., *supra* note 102, at 23–25 (basing policy recommendations around the belief that "the desire to blend satisfying work with a rich family life is not selfish and should not be out of reach.").

[118] Elana Lyn Gross, *How Paid Paternity Leave Can Help Close the Gender Pay Gap*, FORBES (May 14, 2019), https://www.forbes.com/sites/elanagross/2019/05/14/how-paid-paternity-leave-can-help-close-the-gender-pay-gap/#749911f850c1 [https://perma.cc/H75G-N2CV].

[119] *See id.*

[120] DAVIS & GOULD, *supra* note 54, at 21.

[121] Claire Cain Miller & Liz Alderman, *Why U.S. Women are Leaving Jobs Behind*, N.Y. TIMES (Dec. 12, 2014), https://www.nytimes.com/2014/12/14/upshot/us-employment-women-not-working.html [https://perma.cc/696E-N5T6].

[122] *See* 42 U.S.C. § 2000c-4 (2018).

because there is no one-size-fits-all version of these policies. So, providing positive incentives will encourage organizations to find what works for them while still advancing gender equality.

Ratifying the ERA could result in these sweeping changes because it would give Congress the constitutional foundation to pass comprehensive, cohesive legislation aimed at equalizing the role of men and women in our economy and society. Without the ERA, such legislation would likely be struck down by the Supreme Court as an unconstitutional exercise of Congress' power under the Fourteenth Amendment.[123] But, by relying on the ERA's enforcement provision, the constitutionality of such sweeping congressional action to remedy gender inequalities would be much harder to deny.

CONCLUSION

To echo a sentiment of Justice Ruth Bader Ginsburg, at the very least, "I would like to be able to take out my pocket Constitution and say that the equal citizenship stature of men and women is a fundamental tenet of our society like free speech."[124] The ratification of the ERA would undoubtedly be a priceless symbol of women's inherent, but not yet realized, equality. What our political leaders do next could turn it into a reality.

The fight for the ERA's ratification has been almost a century in the making. A side effect of this fight has been incredible progress for women's equality at all levels. But women deserve more than slow and occasional progress. Persistent gender inequality permeates every corner of our society, and it hurts more than just women. Children, families, companies, and our country all do better when women do better. Unfortunately, existing legal protections are not sufficient to remedy these inequalities. Gender equality will never be realized if it is dependent on Equal Protection Clause lawsuits, piecemeal legislation, and the inconsistent applications of state equal rights amendments. Achieving gender equality in our society will require an explicit constitutional guarantee against discrimination on the basis of sex, and it will require that Congress give this guarantee "teeth."

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[123] *See, e.g.*, United States v. Morrison, 529 U.S. 598, 617–19 (illustrating Congress's limited ability to pass remedial gender equality legislation pursuant to their current constitutional powers).

[124] *See* Chira, *supra* note 43.

As evidenced by the fight for public school desegregation, constitutional amendments and Supreme Court mandates can only change society so much. In the case of desegregation, the Civil Rights Act of 1964 was the essential final push needed to give teeth to the Fourteenth Amendment and the *Brown* mandate. When it comes to remedying gender inequality, similarly comprehensive legislation that focuses on a carrot-and-stick approach and enforcement mechanisms will be necessary to give the ERA teeth. Accomplishing such momentous statutory reform will be no small feat, but the Civil Rights Act is proof that it is possible.