

TOWARD A RENEWED EQUAL RIGHTS AMENDMENT: NOW MORE THAN EVER¹

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The sexes are human equals. Yet women, on the whole, are not men's legal equals² or, by most any standard, men's social equals.³ The laws that guarantee against discrimination—mainly the Fourteenth Amendment Equal Protection Clause⁴ and Title VII of the Civil Rights Act of 1964⁵—have, I argue, gone about as far as they will or can to produce equality of the sexes in life. An Equal Rights Amendment (ERA) is urgently needed, now as much as or more than ever.

The provisions we have can, of course, still be used, including more creatively, in litigation and as the basis for legislation. But the way sex equality has been approached under U.S. law has, I think, essentially run its course. Most of the issues that were the focus of the last ERA debate in the 1960s and 1970s have been largely addressed, in some cases solved, under the Fourteenth Amendment, by executive or legislative action, or through social change.⁶ Two major issues that were not central to the prior ERA discussion remain basic in women's second-class status: economic inequality and violence against women. Both the 1972 ERA language, prohibiting discrimination "on account of sex,"⁷ and Carolyn Maloney's bill's proposed

¹ © Catharine A. MacKinnon, 2013, 2014. This brief introduction was delivered as opening remarks on September 28, 2013 to the New ERA Brainstorming Session at Harvard Law School's conference "Celebrating 60 Years of Alumnae," together with Jessica Neuwirth, Chair of the ERA Coalition, and Congresswoman Elizabeth Holtzman, who was instrumental in the most recent previous ERA effort, particularly the time extension. Some of my prior thoughts on this question can be found in CATHARINE A. MACKINNON, *Not by Law Alone: From a Debate with Phyllis Schlafly* (1982), in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 21 (1987), and CATHARINE A. MACKINNON, *Unthinking ERA Thinking, in WOMEN'S LIVES, MEN'S LAWS* 13 (2005). Lisa Cardyn is warmly thanked for her superb assistance on the footnotes.

² See generally Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L.J.* 1281 (1991).

³ See, e.g., U.N. DEV. PROG., *HUMAN DEVELOPMENT 2013: THE RISE OF THE SOUTH: HUMAN PROGRESS IN A DIVERSE WORLD* 156–59, tbl.4 (2013); U.N. DEP'T OF ECON. & SOC. AFFAIRS, *THE WORLD'S WOMEN 2010: TRENDS AND STATISTICS*, U.N. DOC. ST/ESA/STAT/SER/K/19, U.N. Sales No. E.10.XVII.11 (2010).

⁴ U.S. CONST. amend. XIV, § 1.

⁵ Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2006).

⁶ Prominent examples are the combat exclusion, see, e.g., Press Release, U.S. Dep't of Def., Defense Department Rescinds Direct Combat Exclusion Rule; Service to Expand Integration of Women into Previously Restricted Occupations and Units (Jan. 24, 2013), archived at <http://perma.cc/TW3Z-Z5EV>, and gay and lesbian rights, see, e.g., *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

⁷ Equal Rights Amendment, H.R.J. Res. 208, 92d Cong. § 1 (1972) ("Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.").

addition of “Women shall have equal rights,”⁸ could, if correctly interpreted, remedy the effective shut-out from the legal system most women still face today on these two fundamental engines of sex inequality in a way that existing law, interpreted as it has been, is intrinsically incapable of doing.

The existing legal interpretation of the sex equality principle guides both its Fourteenth Amendment application, where sex is given “intermediate scrutiny”⁹ in the rationality review structure, and its Title VII usage. On my analysis, even if sex was granted strict scrutiny¹⁰—long the Holy Grail of constitutional sex equality litigation—this approach is not, has not been, and will not be enough to provide what women need. Even at its apex, rationality review with this content, at whatever level of scrutiny, inherently reflects the status quo because the operative meaning of “rational” is “reflects sex as it is.” That is, to see if a law or policy is equal, this method looks around at “sex” as it socially exists to see if the distinction being challenged reflects present reality. Apart from the fact that “rational” is not in the Constitution and “equal protection” is, this approach does not grasp that reality may be systemically and systematically sex-biased. It is asking the wrong question. The “sex” this method finds is sex inequality, but it is legally considered the sex difference, essentializing sex discrimination. On this logic, the more sex-unequal social reality is, the more sex-unequal law can be, and be considered equal, because the law reflects the reality.

Legal equality guarantees have been in effect in the United States for a long time without producing equality in social life. Suppose that the existing legal approach, predicated on Aristotle’s formulation of equality that calls for treating “likes alike, unlikes unlike,”¹¹ is consistent—determinately connected—with the outcomes it produces or fails to produce. Perhaps, then, it is the approach itself, rather than a failure to apply it, that is responsible

⁸ H.R.J. Res. 56, 113th Cong. § 1 (2013).

⁹ *Craig v. Boren*, 429 U.S. 190, 211 n.* (1976) (“[Our] decision today will be viewed by some as a ‘middle-tier’ approach.”) (Powell, J., concurring). Since *VMI, United States v. Virginia*, 518 U.S. 515, 557 (1996) (finding exclusion of women from military academy unconstitutional although very few women would be qualified: “Women seeking and fit for a VMI-quality education cannot be offered anything less, under the Commonwealth’s obligation to afford them genuinely equal protection”), it might be observed that sex is being strictly scrutinized, even if “strict scrutiny” has not been so declared.

¹⁰ “Strict scrutiny” originated in *Korematsu*, in which, over the announcement that “legal restrictions which curtail the civil rights of a single racial group” must be subjected to “the most rigid scrutiny,” *Korematsu v. United States*, 323 U.S. 214, 216 (1944), people of Japanese ancestry were permitted to be interned in concentration camps by military order. With race the paradigm for constitutional strict scrutiny from the outset, the Court has come to apply “intermediate” or “second-tier” scrutiny to gender, with the *Frontiero* plurality momentarily mandating strict scrutiny of sex-based classifications based on the premise that ERA would succeed in ratification. *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (concluding that “classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny”).

¹¹ See ARISTOTLE, *THE NICOMACHEAN ETHICS*, 1131a–1131b, at 112–17 (J.L. Ackrill & J.O. Urmson eds., David Ross trans., 1980) (1925).

for the tenacious persistence of inequality? Most people who need equality aren't empirically "the same" as, or in doctrinal terms "similarly situated" to, those who already have it. The damage of inequality ensures that "difference." Moreover, requiring sameness with a comparator who dominates is inegalitarian, frequently odious, and arguably undesirable, as well as usually impossible. But the result of this approach is that imposed inequalities, reconfigured as unalikehood or dissimilarity based on the damage they do, are at best ignored or are denigratingly compensated for, in order to try to produce equal results.

The notion that people can be different from one another yet still be equals, entitled to be treated equally, simply does not compute in the Aristotelian equality framework used in U.S. law.¹² Far less does affirmative diversity: treating people alike based on their unalikehood. The point is not that there are no sex differences. The point is that they are virtually irrelevant to sex inequality. Women are not inferior to men, men superior to women; yet that is how the two are socially ranked. Sex itself is neutral so far as inferiority and superiority are concerned. But society is organized (in general, and among other ways) by gender hierarchy: less and more, better and worse, above and below, valued and devalued, with the male (sex), masculine (gender) and men (people) superior, the female (sex), feminine (gender), and women (people) inferior. Sex inequality, as socially organized, is not and never has been based on sex differences but on hierarchical orderings of gender supported by ideological rationalizations that naturalize it as difference. The resulting theory, turning on sameness and difference, observably resists transforming entrenched hierarchical rankings of material resources and social status that have been systemically socially entrenched. Aristotelian equality—regarded in U.S. law as equality's common sense meaning—has thus not generally been useful in situations in which social equality does not already exist, which is where an equality law is needed most.

This analysis explains why women largely already have to have achieved equality before they have a legally assertable claim to equal treatment. It is why existing law, pursuing this method—particularly under the Fourteenth Amendment—works best for men, who are the equal sex, next best for elite women—those who, due in part to some form of privilege usually, have been most able to achieve an exceptional status more similar to men than to other women—and not at all for problems like sexual violence, the victims of which are overwhelmingly women and girls, or for reproductive rights. It is also why the existing approach tends to invalidate affirmative action: the use of the classification, especially one that fits the social reality, is prohibited, not the disadvantage predicated on it. And when it is permitted, it is stigmatic for those who benefit from it because it is seen as treating unlikes unalike—second-class equality. Combined with the lack of

¹² The deployment of the Aristotelian model throughout U.S. equality law is exhaustively demonstrated in CATHARINE A. MACKINNON, *SEX EQUALITY* (2d ed. 2007).

an explicit sex equality guarantee, this analysis explains why the Constitution has neither required nor permitted the initiatives women need most. It is also why the Fourteenth Amendment has achieved most of the gains sought under the prior ERA: the two adopt essentially the same approach to the equality problem. And it is why existing law has gone as far as it can go, which is not far enough, because it cannot produce equality.

If this approach were not sufficient to make equality unachievable by current law, on top of it there are intent requirements.¹³ Other than under Title VII's disparate impact dimension—which is in the process of being demolished by burden of proof standards, the requirement to specify the exact practice causing the disparity, and any other technique imaginable to make it unworkable—intent under the Fourteenth Amendment, and motive and purpose under Title VII do not address how discrimination mostly works in the world. The vast majority of sex inequality is produced by structural and systemic and unconscious practices in a context of the absence or abdication of laws against them. Most 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, seldom challenged and never yet changed. The existing market and the present norms of sexual interaction were created when women were chattel who could not even vote. It is unnecessary for anyone to consciously intend anything to keep those biases operative, legally and socially. And even when discrimination is intentional, it is very difficult to prove, because the challenged activity occurred within the mind of the defendant(s), and its revelation as evidence is almost always in their complete control. The invention of the intent requirement under the Fourteenth Amendment, as it has operated in constitutional sex equality law since 1979, and its devastating result for effective redress for most sex discrimination, of which domestic violence is one crucial instance,¹⁴ was unforeseen and unforeseeable at the time the prior Equal Rights Amendment was proposed to be interpreted.¹⁵

¹³ See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976) (originating the constitutional intent requirement under the Fourteenth Amendment); *Pers. Adm'r v. Feeney*, 442 U.S. 256 (1979) (applying a constitutional intent requirement to sex).

¹⁴ For example, the plaintiff/appellee in *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) had no remedy, and the case was not even brought as sex discrimination, perhaps for the reasons mentioned above. See also, e.g., *Soto v. Flores*, 103 F.3d 1056 (1st Cir. 1997) (affirming no intentional sex discrimination by police in failure to respond effectively to domestic violence calls); *Hynson v. City of Chester Legal Dep't*, 864 F.2d 1026 (3d Cir. 1988) (finding no equal protection violation absent clear evidence that intent to discriminate against women motivated differential treatment by police to victims of domestic versus nondomestic violence).

¹⁵ See generally Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971). Intent, as a constitutional requirement, was nowhere on the minds or in the field of vision of these authors because it had yet to be invented and imposed by the Supreme Court.

Two key areas—economic inequality and violence against women—were not central to the legal debate then either but have come into sharp focus since. When the Equal Rights Amendment was introduced, its companion Economic Equity Act proposed to legislate economic equality with it as a package.¹⁶ Some of the contents have been legislated; most have not. Doubtless largely also because of the perception that the Constitution addresses state action while economic inequality is mainly produced by (what is regarded as) private action, the Equal Rights Amendment debate was not clearly centered on economic inequality.

The large sex-based pay difference of around one quarter has remained essentially stable since 2002.¹⁷ Although it has been smaller at certain points in time, that has been largely because men's wages have risen at a slower rate.¹⁸ Women's pay on average remains largely stagnant at around three-quarters of comparable men's income and is unlikely to move without further intervention. Most people in poverty are women and their children, with households headed by single mothers being especially vulnerable.¹⁹ Forty-one percent of adult women live in households that are economically insecure at this time, meaning they face falling below the poverty line within the next year.²⁰

¹⁶ Economic Equity Act, H.R. 3117, 97th Cong. (1981); Economic Equity Act, S. 888, 97th Cong. (1981); see also Patricia A. Seith, *Congressional Power to Effect Sex Equality*, 36 HARV. J.L. & GENDER 1 (2013).

¹⁷ See AM. ASS'N OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 3, 3 fig.1 (Fall 2013).

¹⁸ See *id.* at 3; NAT'L P'SHIP FOR WOMEN & FAMILIES, FACT SHEET: AMERICA'S WOMEN AND THE WAGE GAP (Apr. 2013); see also JESSICA ARONS, CTR. FOR AM. PROGRESS ACTION FUND, LIFETIME LOSSES: THE CAREER WAGE GAP 2 (Dec. 2008) (relying on data from 2007, when women were earning 78 cents to every dollar earned by a man, to conclude that "the average full-time female worker loses approximately \$434,000 in wages over a 40-year period as a direct result of the gender pay gap").

¹⁹ Data from 2012 show that 56.1% of poor children lived in female-headed households, while 13.2% of single mothers employed year-round in full-time jobs were living in poverty. JOAN ENTMACHER ET AL., NAT'L WOMEN'S LAW CTR., INSECURE AND UNEQUAL: POVERTY AND INCOME AMONG WOMEN AND FAMILIES 2000–2012 4 (2013). Additionally,

The poverty rate for female-headed families with children was 40.9 percent, compared to 22.6 percent for male-headed families with children, and 8.9 percent for families with children headed by a married couple.

Poverty rates were about one in two for black female-headed families with children (46.7 percent), Hispanic female-headed families with children (48.6 percent), foreign-born female-headed families with children (47.1 percent), and Native American female-headed families with children (56.9 percent).

Id. This pattern is also borne out in research on the extreme poor. See H. LUKE SHAEFER & KATHRYN EDIN, NAT'L POVERTY CTR., POLICY BRIEF NO. 28, EXTREME POVERTY IN THE UNITED STATES, 1996 TO 2011 I, 4 tbl.1 (2012) (finding that the percentage growth in extreme poverty—defined as those living on \$2.00 or less per person, per day—between 1996 and 2011 was highest among single female households (190.6%)).

²⁰ SHAWN MCMAHON & JESSICA HORNING, WIDER OPPORTUNITIES FOR WOMEN, LIVING BELOW THE LINE: ECONOMIC INSECURITY AND AMERICA'S FAMILIES 5 (2013).

The cause of a vast amount of economic inequality is the structurally segregated workforce: women remain locked into lower paying jobs filled overwhelmingly by women.²¹ Many women in elite, professional, and blue collar jobs are paid less than their male counterparts and are otherwise discriminated against based on sex,²² but a substantial portion of the wage gap is accounted for by women doing what is called “different work.”²³ Gender neutrality, the main standard in the existing standard of constitutional review, will not fix this problem because gender neutrality means same treatment for sameness, on the assumption that this will get women what we need. But women who are segregated into lower-paying job categories are not in the same situation as men. Often, there are few, if any, men there for comparison. The rationality review of the Supreme Court’s equality jurisprudence, with its gender neutrality, could work in a more equal world. But it will not get us to that world. If the workplace is segregated, producing unequal results—that is, “differences” in work and pay and respect—and that inequality is assimilated with “sex” per se, as if poverty is a sex-linked trait, this legal tool will not produce equality. If rationality is the standard for equality, and rationality is mobilized by seeing if the law reflects the reality, and if the reality is unequal, the law will be unequal too, while meeting the legal equality standard. The status quo is so far built into the baseline of existing equality doctrine that employers are permitted to predicate women’s

²¹ A recent study by the National Equal Pay Task Force, while noting progress over the past half century, underscored the persistence of occupational sex segregation despite efforts aimed to eliminate it. NAT’L EQUAL PAY TASK FORCE, FIFTY YEARS AFTER THE EQUAL PAY ACT: ASSESSING THE PAST, TAKING STOCK OF THE FUTURE 24 (2013) [hereinafter FIFTY YEARS AFTER THE EQUAL PAY ACT]. Among the illustrative data set forth in support of this assertion is the striking finding that 44% of working men are employed in occupations that are over three-quarters male, compared to a mere 6% of women working in those same occupations. *Id.*; see also ARIANE HEGEWISCH ET AL., INST. FOR WOMEN’S POLICY RESEARCH, BRIEFING PAPER: SEPARATE AND NOT EQUAL? GENDER SEGREGATION IN THE LABOR MARKET AND THE GENDER WAGE GAP 13 (2010) (analyzing occupational data showing that “after a steady trend towards a more even distribution of men and women across occupations during the 1970s and 1980s, there has been no further progress since the late 1990s . . . [T]he data clearly confirm that gender is the predominant factor in occupational segregation in all major race and ethnic groups.”); Jan Diehm & Margaret Wheeler Johnson, *Gender Wage Gap Heavily Influenced by Occupation Segregation (INFOGRAPHIC)*, HUFFINGTON POST (June 11, 2013, 8:41 PM), http://www.huffingtonpost.com/2013/06/11/gender-wage-gap_n_3424084.html, archived at <http://perma.cc/FR2J-4FR8> (providing a visual representation of sex segregation in the contemporary U.S. workforce).

²² The Center for American Progress attributes 41% of the wage gap to “gender-based discrimination,” in which they do not include occupational segregation. SARAH JANE GLYNN, CNTR. FOR AM. PROGRESS, FACT SHEET: THE WAGE GAP FOR WOMEN 3 (2012).

²³ See FIFTY YEARS AFTER THE EQUAL PAY ACT, *supra* note 21, at 24 (stating that “occupational segregation has important implications for closing the pay gap, because women are segregated into low-paying occupations and also typically earn less than men in the same field”); INST. FOR WOMEN’S POLICY RESEARCH, THE GENDER WAGE GAP BY OCCUPATION 1 (2010) (arguing that the pay differential that exists between male-dominated occupations and those that are predominantly female make “tackling occupational segregation . . . an important part of tackling the gender wage gap”).

present unequal pay on their past unequal pay, terming this an acceptable reason for accomplishing business objectives under the Equal Pay Act.²⁴ Put another way, equal opportunity does not address structural inequality.

Childrearing is another major engine for impoverishing women up and down the wage scale, producing the endless “work-life balance” discussion. So is the treatment of pregnancy in the paid workforce. Given the different-treatment-for-differences view of equality, nothing requires accommodation for pregnancy-related needs, such as temporary lighter duty assignments that are available for other reasons,²⁵ or something as simple as a water bottle to maintain hydration.²⁶ No paid pregnancy leaves are legally guaranteed, and new mothers often do not receive comparable jobs on return from unpaid leaves, not to mention the subtler discrimination against the possibility of pregnancy. Divorce, a process controlled by courts, also remains a major driver of the mass impoverishment of women in many states.²⁷ Attempts to address all this by law have not succeeded. Women, especially mothers, are being kept poor as a result.

Providing women equal pay for work of comparable worth is one essential: economic equality in place. Title VII has been interpreted not to require it.²⁸ Where divorce systematically disadvantages women economically through state action, however legally unintentional, it must be rectified.

²⁴ *Rexroat v. Ariz. Dep’t of Educ.*, No. CIV. 11-1028-PHX-PGR, 2013 WL 85222, at *6 (D. Ariz. Jan. 7, 2013) (discussing *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876–77, 878 (9th Cir. 1982)), *appeal dismissed*, 2013 WL 85222 (9th Cir. Jan. 13, 2014).

²⁵ *See, e.g., Young v. United Parcel Serv., Inc.*, No. DKC 08-2586, 2011 WL 665321 (D. Md. Feb. 14, 2011), *aff’d*, 707 F.3d 437 (4th Cir. 2013), *petition for cert. filed*, No. 12-1226, 2013 WL 1462041 (U.S. Apr. 8, 2013). The line of cases finding denial of alternative job assignments for pregnant women not a violation of the Pregnancy Discrimination Act includes *Arizanovska v. Wal-Mart Stores, Inc.*, 682 F.3d 698 (7th Cir. 2012), *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540 (7th Cir. 2011), *Reeves v. Swift Transp. Co.*, 446 F.3d 637 (6th Cir. 2006), *Spivey v. Beverly Enterprises, Inc.*, 196 F.3d 1309 (11th Cir. 1999), and *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204 (5th Cir. 1998).

²⁶ *See, e.g., Wiseman v. Wal-Mart Stores, Inc.*, No. 08-1244-EFM, 2009 WL 1617669, at *1 (D. Kan. June 9, 2009) (holding pregnant plaintiff’s claim that firing due to “insubordination” for drinking from a water bottle to prevent urinary and bladder problems from dehydration not discriminatorily based on pregnancy and attendant medical conditions).

²⁷ *See, e.g., Greg J. Duncan & Saul D. Hoffman, Economic Consequences of Marital Instability*, in *HORIZONTAL EQUITY, UNCERTAINTY, AND ECONOMIC WELL-BEING* 449–50 (Martin David & Timothy Smeeding eds., 1985) (illustrating how the movement of women and children in and out of marriage parallels their entrance to and exit from poverty); Saul D. Hoffman & Greg J. Duncan, *What Are the Economic Consequences of Divorce?*, 25 *DEMOGRAPHY* 641, 644 (1988) (concluding that creditable “estimates suggest a decline in [divorced women’s] economic status of about one third”); Richard R. Peterson, *A Re-evaluation of the Economic Consequences of Divorce*, 61 *AM. SOC. REV.* 528, 534 (1996) (finding a 27% decline in women’s post-divorce standard of living as compared to a 10% increase in men’s).

²⁸ *See, e.g., Cnty. of Washington v. Gunther*, 452 U.S. 161 (1981); *Am. Fed’n of State, Cnty., & Municipal Emps. v. Washington*, 770 F.2d 1401, 1407 (9th Cir. 1985); *Lemons v. City of Denver*, No. 76-W-1156, 1978 WL 13938, at *13 (D. Colo. Apr. 17, 1978).

Pregnancy, although its treatment has been improved by the Pregnancy Discrimination Act (PDA)²⁹ and is further addressed by the Affordable Care Act,³⁰ raises a serious series of issues that affect women's economic status, yet reproduction is constitutionally treated as a "difference" for which different treatment is not considered to be sex-based, so cannot produce discrimination.³¹ An ERA could give women a fighting chance in all these areas in ways no existing law, or laws based on existing constitutional provisions, have or are likely to.

The physical security issues have a similar structure. Violence against women was for the most part invisible in the prior ERA debate. Rape and prostitution were discussed to some extent but were not fully developed as sex equality issues, nor have they been resolved since. Without additional legal tools, one doubts they will be. Domestic violence vividly demonstrates the prevailing unequal protection of the laws not recognized as such.³² When the failure to effectively enforce laws against violence because it occurs between intimate partners is brought to the attention of the courts, women are told either that their neglect is not based on sex, usually because it is not proven intentionally so based, or there is otherwise no valid constitutional claim. Women have been shut out of the legal system on this issue. So, since the criminal justice system was not providing it, women decided to try to get justice ourselves through the passage of the civil remedy provision of the Violence Against Women Act (VAWA).³³ We did finally get it passed by Congress; zero tolerance for gender-motivated violence became the legal standard for the first time and rape and domestic violence were recognized as practices of sex discrimination. The Supreme Court then invalidated the

²⁹ Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2006)).

³⁰ Patient Protection and Affordable Care Act, 42 U.S.C. § 711 (Supp. V 2011) (establishing maternal, infant, and early childhood home visiting programs); *id.* § 712 (providing funds for research on post-partum conditions and programs for women and families of women experiencing post-partum conditions); *id.* §§ 18202–18203 (funding both pregnancy assistance programs at educational institutions and services for pregnant women who have been subjected to sexual or domestic violence).

³¹ *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

³² See MAJORITY STAFF OF S. COMM. ON THE JUDICIARY, 102D CONG., VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA (Comm. Print 1992); see also *Okin v. Village of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 442 (2d Cir. 2009) (upholding victim's right to sue police on due process but not equal protection grounds when they did not respond to reports of ongoing domestic violence); *Soto v. Flores*, 103 F.3d 1056, 1072 (1st Cir. 1997) (*supra* note 14); *McKee v. City of Rockwall*, 877 F.2d 409, 416 (5th Cir. 1989) (rejecting claim of gender-based discrimination in officers' refusal to arrest as insufficient to prove policy in domestic violence cases); *Watson v. City of Kansas City*, 857 F.2d 690, 696–97 (10th Cir. 1988) (holding insufficient evidence of sex as motive for discrimination in police failure to provide equal protection of the law in rape and stabbing of wife of police officer).

³³ Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of the U.S. Code).

VAWA—not because it did not address sex discrimination, but because Congress assertedly had no authority to pass it.³⁴

As things stand now, neither rape nor domestic violence are remotely redressed in any proportion to their occurrence. Systemic rape attrition begins with non-reporting: only 9.5% of rapes committed outside marriage are ever reported.³⁵ This happens because women know that their reports of sexual assault will likely not be taken seriously and they are more likely to be punished than vindicated. Further fall-off occurs in prosecution decisions, fewer still result in convictions, fewer yet receive more than token sentences. Depending on the study, 0.1, 0.5, or 5% of reported rapes that fall within the ambit of the legal definitions result in a conviction.³⁶ And there is no relief in sight and no sex equality oversight on this process at all—even though once there is a report to an official, every bit of what happens is indisputably state action. This is massive unequal protection of the laws. It occurs because rape plain doesn't matter under this legal regime. Even as tens of thousands of rape kits sit untested in jurisdictions throughout the country,³⁷ probably nobody is consciously deciding that women will be raped and nothing will be done about it because they are women and men want to keep doing it, or whatever a showing that this malignant neglect is intentional, constitutionally, would look like. Systematically not caring if women get raped with impunity apparently does not meet the intent standard, far less provably so,

³⁴ United States v. Morrison, 529 U.S. 598, 627 (2000).

³⁵ See, e.g., DIANA E. H. RUSSELL, RAPE IN MARRIAGE 303 (expanded & rev. ed., Indiana University Press 1990) (1982) (finding that 9.5% of extramarital rapes committed were ever reported to authorities); MICHAEL PLANTY ET AL., U.S. DEP'T OF JUSTICE, NCJ 240655, SPECIAL REPORT: FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994–2010 6 (2013) (identifying significant fluctuations in rates of rape reporting over time, with 29% of victims reporting the crime to police in 1995, 56% in 2003, and 35% in 2010).

³⁶ For a range of outcomes, see Rebecca Campbell, *The Psychological Impact of Rape Victims' Experiences With the Legal, Medical, and Mental Health Systems*, 63 AM. PSYCHOLOGIST 702, 704 (2008) (reporting that “overall, case attrition is staggering: For every 100 rape cases reported to law enforcement, on average thirty-three would be referred to prosecutors, sixteen would be charged and moved into the court system, twelve would end in a successful conviction, and seven would end in a prison sentence”), and Patricia A. Frazier & Beth Haney, *Sexual Assault Cases in the Legal System: Police, Prosecutor, and Victim Perspectives* 20 LAW & HUM. BEHAV. 607, 622 (1996) (finding that “substantial attrition continues to occur in the prosecution of rape cases” with most “occur[ring] in the initial stages of the process” such that fewer than twenty-five percent of reported cases are referred for prosecution). See also Sharon B. Murphy et al., *Exploring Stakeholders' Perceptions of Adult Female Sexual Assault Case Attrition*, 3 PSYCHOL. VIOLENCE 172 (2013) (examining potential causes of and remedies for persistently high levels of rape case attrition).

³⁷ See, e.g., *Backlog of Untested Rape Kits Drawing Attention of U.S. Legislators*, THE GUARDIAN (Feb. 24, 2014, 11:39 AM), <http://www.theguardian.com/world/2014/feb/24/untested-rape-kits-backlog-us-legislators>, archived at <http://perma.cc/V45Q-YV89> (reporting that around 400,000 untested rape kits have been counted nationwide); Mario Garcia et al., *Prosecutor Leads Effort to Test Long-Abandoned Rape Kits, Brings Justice to Victims*, NBC NEWS (Feb. 15, 2013, 4:30 AM), http://rockcenter.nbcnews.com/_news/2013/02/15/15848051-prosecutor-leads-effort-to-test-long-abandoned-rape-kits-brings-justice-to-victims?lite, archived at <http://perma.cc/T9UK-CMR3>.

because the disparity in numbers sure is sex discriminatory. And it has never been said that rape is not sex-based.

A new ERA can be a new departure. An ERA, as a constitutional amendment, would expand the congressional authority to legislate. Both versions of an Equal Rights Amendment, the original one and the proposal adding Carolyn Maloney's new first sentence to it, have the possibility of being interpreted in new ways. Since so much of the older interpretation has either been achieved by law—the older interpretation being essentially the same as the Fourteenth Amendment approach—or changed by life—we have not been sitting still—there is an opening to go farther. Carolyn Maloney's proposal has as its second sentence the 1972 Equal Rights Amendment: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex,"³⁸ a fabulous sentence. Her new proposal has, in addition, a new first sentence, which provides that "Women shall have equal rights in the United States and every place subject to its jurisdiction."³⁹ Women begin the amendment, with the second sentence on "sex" as backup and floor. The second sentence, of course, applies to everybody: men, transgender persons of whatever sex, on my analysis to gay and lesbian issues,⁴⁰ as well as to women for whatever "sex" does to them.

From a legal standpoint, Carolyn Maloney's formulation offers certain additional benefits. Her new proposed text, "women shall have equal rights," addresses a concrete group of people, not an abstract right. It heightens the possibility of guaranteeing rights to all women even when the discrimination against them isn't exclusively based on sex. With the phrase alone "on account of sex," the comparative abstraction, discrimination against women of color could be said to be based on their sex but also on their race,⁴¹ as it actually often is, thus possibly evading coverage of women of color by the ERA. Substantively, women of color are obviously "women," so this proposed sentence indisputably covers them, whatever the grounds for discrimination against them.

There is no state action requirement in this new sentence. One could say that "rights" by definition look to the state. But that only says who has to provide the rights, not who has to deprive the victim of such rights in order for plaintiffs to have a viable constitutional claim. Nothing in the text makes this guarantee exclusively vertical.

The new sentence is a positive guarantee. It does not direct that states stay out, so society will automatically provide equality for women unless

³⁸ H.R.J. Res. 56, 113th Cong. § 1 (2013).

³⁹ *Id.*

⁴⁰ See generally MACKINNON, *supra* note 12, at ch. 8; Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081 (2004).

⁴¹ On the intersection of race and sex, see generally Kimberle 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 (1989), and Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

government intervenes to prevent it—the concept of the negative state. Our Constitution is largely a negative one, and would remain so, except for this sentence in Carolyn Maloney’s proposed ERA. This positive right to equality is, I think, what we have meant and needed all along, given that society and law have combined to the present to bias legal and social entitlements against women. By its language, it encourages legislation for equality rights. This sentence provides directly what an equal rights amendment can help give women: freedom from sex discrimination.

Neither ERA has an intent requirement. A lot of noise would be needed on this during ratification to make clear that a key reason existing law is inadequate, and a new departure needed, is the existing constitutional and statutory intent requirements. Our possibilities for real equality under the Fourteenth Amendment were decisively blown in 1976 when the intent requirement was first explicitly attached to race, then later to sex.⁴²

On my count and analysis, gender equality exists in some form in some 184 out of the 200 written constitutions in the world.⁴³ Of those, only eight have the U.S. model. One hundred thirty-nine have express sex or gender equality or express non-discrimination provisions on the basis of sex—the word “sex,” or “gender,” or women and men are in them.⁴⁴ At least in language, most other countries have legal guarantees of sex equality that are far superior to ours. Its absence in the United States provides such basis as exists for traditional literalists like Justice Antonin Scalia to opine, “Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn’t.”⁴⁵

Whatever can be said against this as things stand, his reading needs to be made an explicit textual nullity. At least as importantly, an ERA would provide an inspiration and impetus for public policy and a powerful symbolic support for women’s equality at all social levels at the apex of the legal system in a culture in which law has power and meaning, and sometimes leads. It is long past time for the United States to join the world and high time American women became full citizens under our own law.

⁴² See *supra* note 13.

⁴³ Catharine A. MacKinnon, *Gender in Constitutions*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 397, 404 (Michel Rosenfeld & András Sajó eds., 2012).

⁴⁴ *Id.* at 405.

⁴⁵ *The Originalist: Justice Antonin Scalia*, CALIFORNIA LAWYER, Jan. 2011, archived at <http://perma.cc/X7Z4-MTQ6>. In response to a question posed by Sen. Dianne Feinstein in a hearing before the Senate Judiciary Committee, he later said his remarks were meant only to apply to private discrimination. See Ian Millhiser, *Justice Scalia Appears to Back Off His Claim That The Constitution Does Not Prevent Gender Discrimination*, THINKPROGRESS (Oct. 7, 2011, 9:50 AM), <http://thinkprogress.org/justice/2011/10/07/337419/scalia-and-women>, archived at <http://perma.cc/W2V3-XD63>. Such a statement, as well as its purported clarification, reveals (inter alia) the presuppositions of the negative state in full force.

