Justice Ginsburg's Cautious Legacy for the Equal Rights Amendment

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History will remember the late Justice Ruth Bader Ginsburg (RBG) as the "founding mother" of constitutional gender equality in the United States. This Article unpacks her legacy for inclusive constitutional change, unearthing her lifelong commitment to the Equal Rights Amendment (ERA), which was adopted fifty years ago by Congress in 1972. It took nearly half a century for the Amendment to be ratified by the thirty-eight states required by Article V, with Virginia becoming the last state to ratify it in 2020—the year of Justice Ginsburg's death. Because the last three ratifications occurred decades after congressionally imposed time limits, RBG publicly expressed doubts about the viability of the ERA, as it was being disputed in Congress and in the courts. This Article unpacks RBG's ambivalent stance toward the ERA, tracing it to her understanding of the process of constitutional change toward greater inclusion, located in her legal scholarship of the 1970s. As a scholar, RBG focused not only on sex discrimination but also on legal procedure. She was keenly aware that the procedural paths taken toward important socio-legal changes, including women's equal citizenship, would shape their potential to endure as law. This Article puts the spotlight on RBG's often-neglected writings as a scholar before her judicial career. RBG's transformative vision of constitutional gender equality had an institutional and procedural dimension that accompanied its ambitious substantive ideals. A modern constitutional democracy would fully include women in the rights and responsibilities of citizenship and power, by eliminating gender stereotypes from the law and by implementing public policies to enable the participation of people of all genders. Legislatures, rather than courts, are best equipped to complete this project. To legitimize such large-scale constitutional change, RBG viewed Congress as the appropriate institutional driver of the constitutional

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amendment process. Accordingly, Congress had plenary power over the procedural incidents of constitutional amendments such as the ERA, including ratification time limits and rescissions. RBG's legislative constitutionalism on both the substance and procedure of the ERA point to cautiously viable paths forward for both the resurgent ERA and future amendments aiming to secure the inclusion of previously disempowered people in our democracy.

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INTRODUCTION

History will remember the late Justice Ruth Bader Ginsburg (RBG) as America's "founding mother" of constitutional gender equality,[1] who in 2020 died an immortal feminist and pop culture icon.[2] This Article unpacks RBG's legacy for the future of women's constitutional rights.

The year 2022 marks the fiftieth anniversary of Congress's adoption of the Equal Rights Amendment (ERA), the Amendment that would have guaranteed that equal rights could not be abridged on account of sex, an ideal RBG embraced while litigating the sex discrimination cases that made her famous. In recent years, however, she criticized recent efforts to revive the ERA ratification process.[3] RBG's seemingly ambivalent stance toward the ERA has deep roots in her thinking as a legal scholar whose work focused not only on sex discrimination but also on civil procedure. She had a heightened appreciation for the challenges of establishing the procedural legitimacy of important socio-legal changes. A constitutional transition toward a more inclusive democracy faced enormous procedural barriers, and thus necessitated exceptional paths whose legitimacy would be questioned. Months after Justice Ginsburg's death, her landmark sex equality opinion in *United States v. Virginia*[4] reached its twenty-fifth anniversary while a global pandemic eroded a generation of women's progress toward equal participation in the workforce and the nation's economy.[5] As efforts to add the ERA to the Constitution continue in Congress and the courts,[6] RBG's body of work as a

1. *See 'The Most Important Woman Lawyer in the History of the Republic:' How Did Ruth Bader Ginsburg Change America? More Than 20 Legal Thinkers Weigh In.*, POLITICO (Sept. 18, 2020, 11:59 PM), https://www.politico.com/news/magazine/2020/09/18/ruth-bader-ginsburg-legacy-418191 [https://perma.cc/LG6U-YPVD] (compiling opinions of twenty legal thinkers, including Kenji Yoshino, who called her the "founding mother – or simply founder – of our nation's sex equality jurisprudence"). Throughout RBG's career, the laws that advanced women's rights used the term "sex," such as the Nineteenth Amendment of the U.S. Constitution (guaranteeing that the right to vote would not be abridged "on account of sex"), U.S. CONST. amend. XIX, Title VII of the Civil Rights Act of 1964 (prohibiting discrimination in employment "because of . . . sex"), 42 U.S.C. § 2000e-2(a)(1), and Title IX of the Education Amendments Act of 1972 (prohibiting exclusion from educational opportunities in federally funded institutions "on the basis of sex"), 20 U.S.C. § 1681(a). Justice Ginsburg explained decades later that she chose to use the term "gender" in lieu of "sex" in her briefs, in part to deflect male audience attention away from the ordinary associations with the word "sex." *See Columbia Law School Honors Justice Ginsburg*, C-SPAN, at 41:25–42:15 (Nov. 19, 1993), https://www.c-span.org/video/?53194-1/columbia-law-school-honors-justice-ginsburg [https://perma.cc/S9D6-CLJ8].

2. *See* Linda Greenhouse, *Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87*, N.Y. TIMES (Sept. 24, 2020), https://www.nytimes.com/2020/09/18/us/ruth-bader-ginsburg-dead.html.

3. *See* sources cited *infra* note 12.

4. 518 U.S. 515 (1996).

5. *See generally* Titan Alon, Sena Coskun, Matthias Doepke, David Koll & Michèle Tertilt, *From Mancession to Shecession: Women's Employment in Regular and Pandemic Recessions* (Nat'l Bureau of Econ. Rsch., Working Paper No. 28632, 2021).

6. *See* 166 CONG. REC. H1140 (daily ed. Feb. 13, 2020) (statement of Rep. Scott) (discussing the House floor vote on H.J. Res. 79, removing the deadline for the ratification of the ERA); Virginia v. Ferriero, 525 F. Supp. 3d 36 (D.D.C. 2021) (hearing lawsuit by three states seeking declaratory judgment that the ERA is part of the Constitution, with five intervening states seeking declaration that ERA has expired). New resolutions have been introduced in the 117th Congress to remove the deadline

legal scholar crucially sheds light on the unfinished project of constitutional gender equality as well as the role of courts and constitutional amendments in constraining or facilitating it.[7]

Although RBG spent the last forty years of her career as a judge, including as a Justice of the highest court of the land, her legacy for women's rights was made in the decade before she became a judge—through her transformative work as a lawyer and law professor in the 1970s. As a legal scholar, her 1970s writings created an intellectual architecture to support constitutional gender equality, featuring a strong case for the ERA.[8] RBG's background as scholar of comparative law and civil procedure[9] shaped her approach to gender equality under the law, both what it could mean substantively, as well as how it could be achieved procedurally.[10] Despite her ardent support of the ERA for half a century,[11] Justice Ginsburg publicly expressed doubts about the process by which the ERA was

for ERA ratification. *See* H.R.J. Res. 17, 117th Cong. (2021); S.J. Res. 1, 117th Cong. (2021). For a narrated account of the ERA's legislative history from its introduction in 1923 through its ratifications by Nevada, Illinois, and Virginia, see JULIE C. SUK, WE THE WOMEN: THE UNSTOPPABLE MOTHERS OF THE EQUAL RIGHTS AMENDMENT (2020).

7. Surely, the future of law and policy around gender justice will be concerned with the gendered economic effects of the COVID-19 pandemic, especially on working mothers. *See* Eleni X. Karageorge, *COVID-19 Recession Is Tougher on Women*, U.S. BUREAU OF LAB. STAT. (Sept. 2020), https://www.bls.gov/opub/mlr/2020/beyond-bls/covid-19-recession-is-tougher-on-women.htm [https://perma.cc/DR6A-HRBN].

8. *See, e.g.*, Ruth Bader Ginsburg, Comment, *The Equal Rights Amendment Is the Way*, 1 HARV. WOMEN'S L.J. 19, 25–26 (1978) [hereinafter Ginsburg, *Equal Rights Amendment Is the Way*]; Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 27 (1975) [hereinafter Ginsburg, *Gender and the Constitution*]; Ruth Bader Ginsburg, *The Need for the Equal Rights Amendment*, 59 A. B.A. J. 1013, 1013 (1973); Ruth Bader Ginsburg, *Let's Have E.R.A. as a Signal*, 63 A.B.A. J. 70, 70 (1977) [hereinafter Ginsburg, *ERA as a Signal*].

9. *See* RUTH BADER GINSBURG & ANDERS BRUZELIUS, CIVIL PROCEDURE IN SWEDEN (1965). For an account of the influence of Swedish developments in gender equality on Ruth Bader Ginsburg during this period, see Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 97–105 (2010).

10. *See* Ruth Bader Ginsburg, *The Status of Women: Introduction*, 20 AM. J. COMPAR. L. 585, 585–86 (1972); Ruth Bader Ginsburg, Observation, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919, 920 (1979) [hereinafter Ginsburg, *Ratification of the Equal Rights Amendment*].

11. *See* sources cited *supra* note 8. In the last decade of her life, Justice Ginsburg gave many public interviews and speeches in which she said that the ERA is the first amendment she would choose to add to the Constitution if she could. *See, e.g.*, *Justices Scalia and Ginsburg on the First Amendment and Freedom*, C-SPAN (Apr. 17, 2014), https://www.c-span.org/video/?404745-1/radio-justices-scalia-ginsburg-amendment-freedom [https://perma.cc/HZ5R-RFHR]; *Justice Ruth Bader Ginsburg Discusses* Roe v. Wade*, Her Legal Career, and Women on the Supreme Court*, NYU L. NEWS (Feb. 20, 2018), https://www.law.nyu.edu/news/Ruth-Bader-Ginsburg-Kenji-Yoshino-Center-for-Diversity-Inclusion-and-Belonging [https://perma.cc/6PKR-RCYX]; *Video Clip: Justice Ruth Bader Ginsburg and the Equal Rights Amendment*, C-SPAN, at 2:46–2:54 (Feb. 1, 2018), https://www.c-span.org/classroom/document/?8979 [https://perma.cc/VER9-KZLF] ("And so I would like to see an Equal Rights Amendment in our Constitution . . . ."). She has argued that the interpretation of the Fourteenth Amendment to include sex equality has gotten "almost" to an ERA but cannot substitute for the ERA because of the importance of being able to see the principle of equal citizenship stature between women and men in the text of one's pocket constitution. *See What Ginsburg Wants to Tell Her Granddaughters*, CNN, at 00:40–00:45, https://www.cnn.com/videos/us/2018/02/11/rbg-on-equal-rights-amendment.cnn/video/playlists/supreme-court-justice-ruth-bader-ginsburg/ [https://perma.cc/

returning to the political hopper in 2020.[12] As the ERA's viability is being considered by Congress and courts, this Article unites the contrasting dimensions of RBG's gender equality legacy—one substantive, the other procedural—to chart a viable, if unprecedented, path for the ERA and for inclusive constitutional change under a constitution made exclusively by white men in the eighteenth century.

Popular books[13] and acclaimed films[14] have made the American public well aware of RBG's contributions as an advocate for women's rights throughout the 1970s. She pursued, to great success, a strategy of incremental litigation that expanded the Fourteenth Amendment's guarantee of equal protection of the laws, one case at a time, to invalidate governmental sex discrimination.[15] As a law professor, she brought courses on women and the law, including sex discrimination, into the law school curriculum, authoring the first textbook on the subject.[16] As a scholar, she imagined a constitutional landscape beyond incremental litigation, and she justified an amendment to the Constitution, the ERA, as "a clear statement of the nation's moral and legal commitment to a system in which women and men stand as full and equal individuals before the law."[17] She brought her intuitions about procedural fairness to her testimonies as a scholarly expert in congressional hearings on extending the deadline on ERA ratification, urging that "[i]t would be the bitterest of ironies if the equal rights amendment were to become the first proposed amendment in this Nation's history to die because [of] a procedural time bar. . . . No amendment to date has failed for that reason."[18] Although the ERA ratification deadline expired in 1982, she continued to say in public interviews and speeches in the past decade that the ERA was the amendment that she most hoped would be added to the Constitution one day. RBG believed it was important for future generations to see the ERA in their pocket constitutions, to be assured of our polity's fundamental commitment to the inclusion of women as fully equal citizens. Making such a commitment in a constitution was as important, in her view, to

9PAY-7MF6] (last visited May 2, 2022) ("But it's important to have an Equal Rights Amendment in the Constitution . . . .").

12. *See* Searching for Equality: The Nineteenth Amendment and Beyond, A Conversation Between United States Supreme Court Justice Ruth Bader Ginsburg and Ninth Circuit Court of Appeals Judge M. Margaret McKeown (Feb. 10, 2020), *in* 108 GEO. L.J. 5, 11 (2020) [hereinafter Searching for Equality]; *see also infra* note 45 and accompanying text.

13. *See, e.g.*, IRIN CARMON & SHANA KNIZHNIK, NOTORIOUS RBG: THE LIFE AND TIMES OF RUTH BADER GINSBURG (1st ed. 2015); REBECCA GIBIAN, THE RBG WAY: THE SECRETS OF RUTH BADER GINSBURG'S SUCCESS (2019); POCKET RBG WISDOM: SUPREME QUOTES AND INSPIRED MUSINGS FROM RUTH BADER GINSBURG (2019).

14. RBG (CNN Films 2018); On the Basis of Sex (Focus Features 2018); RUTH: Justice Ginsburg in Her Own Words (Sanders and Mock Productions 2019).

15. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Califano v. Goldfarb, 430 U.S. 199 (1977).

16. *See* KENNETH M. DAVIDSON, RUTH BADER GINSBURG & HERMA HILL KAY, TEXT, CASES AND MATERIAL ON SEX-BASED DISCRIMINATION (1974).

17. Ginsburg, *Gender and the Constitution*, *supra* note 8.

18. *See Equal Rights Amendment Extension: Hearings on S.J. Res. 134 Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 95th Cong. 262–71 (1978) [hereinafter *Equal Rights Amendment Extension Senate Hearings*] (testimony and written statement of RBG).

enshrining other human rights, such as free speech.[19] But as the ERA appeared to inch closer to inclusion in the Constitution by way of post-deadline ratifications, Justice Ginsburg questioned the irregularity of the process as threatening the ERA's legitimacy.

Part I provides an overview of the ERA's procedural history: its adoption by Congress, its failed ratification in the 1970s, and the ongoing legal and political controversies about recent efforts to revive it. The ERA's resurrection has been met with opposition on the grounds that it is no longer needed because the Supreme Court's sex equality jurisprudence, mostly achieved because of RBG's advocacy under the Fourteenth Amendment, now functions as the ERA was intended to. Part II identifies the more ambitious goals of the ERA that have not been fully achieved through Equal Protection sex equality jurisprudence to date. The ERA's framers, and RBG, intended the ERA to trigger transformative legislation to fully realize women's stature as equal citizens. Women's second-class status resulted from the disadvantages and dangers they faced because they were mothers, actual or potential. Robust policies to secure women's equal participation in the rights and duties of citizenship would be needed. Part III turns to Justice Ginsburg's sex equality opinions on the Supreme Court including *United States v. Virginia*,[20] to highlight her awareness of the secondary role of courts in making equality real. Part IV turns to RBG's contributions to the ERA deadline extension debates in the late 1970s, which affirmed the power of Congress—rather than courts—not only to implement the substance of the ERA but also to drive the ERA's procedural path to legitimacy. Of particular importance is RBG's identification of the unique challenges facing human rights amendments pursued under the rigid Article V process. This Article proposes that the resurgent ERA can be saved by a synthesis of RBG's revolutionary vision of constitutional gender equality with her incremental approach to the process of transformative constitutional change.

I. THE FALL AND RISE OF THE EQUAL RIGHTS AMENDMENT

The ERA has taken a strange procedural path across a century, with recent events raising unprecedented constitutional questions. Although an ERA proposal was introduced in every Congress since 1923, it did not win the two-thirds vote of both houses of Congress necessary under Article V until 1972.[21] Thirty-five states ratified the Amendment between 1972 and 1977.[22] But the congressional

19. *See What Ginsburg Wants to Tell Her Granddaughters*, *supra* note 11.

20. 518 U.S. 515 (1996)

21. Article V of the U.S. Constitution provides, in relevant part, "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . which . . . 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 . . . ." U.S. CONST. art. V; *see* H.R.J. Res. 208, 92d Cong. (1972) (proposing the Equal Rights Amendment). There were hearings from 1925 through 1971, and the Senate voted twice by a two-thirds vote on a different version of the ERA in 1950 and 1953, but the House did not follow. *See generally* SUK, *supra* note 6 (compiling this history).

22. Julie C. Suk, *The Trump Administration Says the ERA Is Dead on Arrival. It Isn't.*, WASH. POST (Jan. 21, 2020), https://www.washingtonpost.com/outlook/2020/01/21/trump-administration-says-era-is-dead-arrival-it-isnt/.

resolution adopting the Amendment included a time limit on ratification, anticipating that the ERA would "be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress."[23]

Although Congress often imposed seven-year time limits on the ratification of constitutional amendments since 1918, such provisions were not a necessary feature of amendment proposals. The Nineteenth Amendment, proposed in 1919 and ratified in 1920, had no ratification deadline because its proponents feared that an amendment procuring suffrage for women would be unduly stymied if a deadline were included.[24] For most of its history, the ERA was introduced without a ratification deadline; it was adopted by one chamber of Congress without a deadline in 1950, 1953, and 1970.[25] But the seven-year ratification deadline was included in the preamble of the resolution proposing the ERA in 1971, mostly to quiet the small but vocal opposition in the Senate, which included a segregationist who had filibustered the Civil Rights Act.[26] Thus, the ERA that both houses of Congress adopted in 1972—by over ninety percent of the vote in both chambers—included the language declaring that the Amendment would be valid "when ratified . . . within seven years."[27]

In 1978, the seventh year, Congress extended the deadline to 1982.[28] But no additional states ratified the Amendment between 1977 and 1982. Because thirty-eight states are needed to make three-fourths of the states, the ERA was three states short of the three-fourths required for ratification as of both the 1979 and 1982 deadlines. Furthermore, five states that ratified the ERA from 1972 to 1977 took further action intending to rescind their prior ratifications.[29] After the extended deadline elapsed in 1982, the ERA was presumed dead.[30]

Over three decades later, three additional states—Nevada, Illinois, and Virginia—ratified the ERA, in 2017, 2018, and 2020 respectively.[31] The

23. H.R.J. Res. 208.

24. *See* SUK, *supra* note 6, at 18–20.

25. *See id*. at 55, 58–61 (detailing the 1950, 1953, and 1970 adoptions in one chamber).

26. *See id*. at 62–66, 84 (quoting Martha Griffiths' explanation for why she accepted the seven-year time limit).

27. H.R.J. Res. 208.

28. H.R.J. Res. 638, 95th Cong., 92 Stat. 3799 (1978).

29. The legislatures of Nebraska, Kentucky, Tennessee, Idaho, and South Dakota took action to rescind their prior ratifications. Idaho brought a federal lawsuit seeking a judicial declaration of the validity of rescission. Although a district court validated rescission, Idaho v. Freeman, 529 F. Supp. 1107, 1155 (D. Idaho 1981), and the Supreme Court granted certiorari, the Supreme Court dismissed the case as moot after the June 30, 1982 ratification deadline expired, Nat'l Org. for Women, Inc. v. Idaho, 459 U.S. 809, 809 (1982).

30. Assuming that ratification of the ERA adopted by Congress in 1972 could not continue past the prior deadline, the ERA was reintroduced in both houses of Congress in 1983. For an account of the debates surrounding these new ERA proposals in the 1980s, see generally Serena Mayeri, *A New E.R.A. or a New ERA? Amendment Advocacy and the Reconstitution of Feminism*, 103 NW. U. L. REV. 1223 (2009).

31. For a detailed account of the legislative debates leading up to these states' ratifications, see SUK, *supra* note 6, at chs. 10–12.

ratification count stands at thirty-eight, if rescissions are ignored.[32] After Virginia became the thirty-eighth state to ratify the ERA in January 2020, a majority of the House voted to remove the deadline immediately and to recognize the ERA as part of the Constitution "whenever ratified by the legislatures of three-fourths of the several States."[33] But the Senate did not follow.[34] In the 117th Congress, the House voted again to remove the deadline for ERA ratification in March 2021.[35] A bipartisan resolution to the same effect was introduced again in the Senate.[36] Although it appears that a Democratic majority in the Senate would vote for these resolutions,[37] the Senate filibuster rule[38] prevents a vote on the resolution unless a supermajority of sixty senators supports it. As of this Article's writing, there have been no Senate hearings, floor debates, or votes on the deadline removal resolution.

A few months before her death, and over forty years after she testified before Congress to keep the ERA alive, Justice Ginsburg surprised legal observers and media commentators by publicly questioning the wisdom of these recent efforts to resurrect the ERA.[39] She expressed her preference for a "new beginning" for

32. One federal district court concluded that states may rescind their ratifications up until the time of the amendment's ultimate certification and addition to the Constitution. *Freeman*, 529 F. Supp. at 1155. Virginia, Nevada, and Illinois argue that the text and history of Article V prohibit states from rescinding their ratifications. *See* Complaint at 15, Virginia v. Ferriero, 525 F. Supp. 3d 36 (D.D.C. 2021) (No. 1:20-cv-00242).

33. H.R.J. Res. 79, 116th Cong. (2020).

34. S.J. Res. 6, 116th Cong. (2019) had forty-eight cosponsors, but the Senate Judiciary Committee did not hold hearings or report the resolution. *See S.J. Res. 6 (116th): A Joint Resolution Removing the Deadline for the Ratification of the Equal Rights Amendment*., GOVTRACK.US, https://www.govtrack.us/congress/bills/116/sjres6/cosponsors [https://perma.cc/4BB7-H2DF] (last visited May 2, 2022) (listing cosponsors).

35. H.R.J. Res. 17, 117th Cong. (2021).

36. S.J. Res. 1, 117th Cong. (2021).

37. The 2020 House vote was 232–183 in support of removing the deadline. *See* 166 CONG. REC. H1142–43 (daily ed. Feb. 13, 2020). No Democrat opposed it, and five Republicans voted in favor of it. *See id.* In the Senate, no Democrat opposed the ERA deadline removal in the 116th Congress; there were forty-four Democratic cosponsors and two Republican cosponsors. *See S.J.Res.6 - A Joint Resolution Removing the Deadline for the Ratification of the Equal Rights Amendment*., CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/senate-joint-resolution/6/cosponsors?searchResultViewType=expanded (last visited May 2, 2022). Vice President Kamala Harris explicitly supported passing the ERA as a presidential candidate, and the Biden presidential campaign's women's agenda explicitly supported congressional removal of the time limit. *See The Biden Agenda for Women*, BIDEN HARRIS DEMOCRATS, https://joebiden.com/womens-agenda/ [https://perma.cc/6DPW-HVJ5] (last visited May 2, 2022).

38. S. Doc. No. 113-18, at 16 (2013). For an account of the emergence of the "stealth filibuster," see generally Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997).

39. *See* David G. Savage, *Ratification of Equal Rights Amendment Runs into Opposition — from Trump, Sure, but Ruth Bader Ginsburg?*, L.A. TIMES (Feb. 13, 2020, 4:00 AM), https://www.latimes.com/politics/story/2020-02-13/ratification-of-era-looks-doubtful-ginsburg-skepticism; Ian Millhiser, *Ruth Bader Ginsburg Probably Just Dealt a Fatal Blow to the Equal Rights Amendment*, VOX (Feb. 11, 2020, 12:30 PM), https://www.vox.com/2020/2/11/21133029/ruth-bader-ginsburg-equal-rights-amendment-supreme-court [https://perma.cc/YH46-KTZN]; Russell Berman, *Ruth Bader Ginsburg Versus the Equal Rights Amendment*, ATLANTIC (Feb. 15, 2020), https://www.theatlantic.com/politics/archive/2020/02/ruth-bader-ginsburg-equal-rights-amendment/606556/; Joseph Guzman, *Did Ruth Bader Ginsburg Just Kill the Equal Rights Amendment?*, HILL (Feb. 12, 2020), https://thehill.com/changing-america/respect/equality/482744-ginsburg-says-process-to-ratify-equal-rights-amendment [https://perma.cc/Z4AF-MFSG].

the ERA.[40] At a public event commemorating the centennial of women's suffrage at the Georgetown University Law Center in February 2020, Judge Margaret McKeown brought Virginia's recent ratification to Justice Ginsburg's attention and asked for her prognosis on when we would obtain an ERA on the federal level.[41] Justice Ginsburg replied, "I would like to see a new beginning. I'd like it to start over."[42] She was concerned that there was "too much controversy about a latecomer [like] Virginia ratifying long after the deadline passed."[43] Pointing out that several states had rescinded their ratifications, she invoked a basic intuition about treating opposing sides fairly: "If you count a latecomer on the plus side, how can you disregard states that said, 'We've changed our minds'?"[44] These comments sounded in concerns about procedural fairness and public acceptance of the Amendment's legitimacy. She made such suggestions a year before, also at a Georgetown event, when she said, "I hope someday [the ERA] will be put back in the political hopper, starting over again collecting the necessary number of states to ratify it."[45]

But moments prior to questioning the procedural legitimacy of the ERA's recent resurrection, at the event with Judge McKeown, Justice Ginsburg unequivocally supported the substance of an Equal Rights Amendment:

> The Constitution's Preamble says, "We the People . . . in Order to form a more perfect Union." The Union will be more perfect if we added this clarion statement to our fundamental instrument of government: Men and women are persons of equal-citizenship stature. . . . Why should the rest of the world have the equivalent of an ERA while the United States lags behind?[46]

Nonetheless, the ERA's opponents embraced Justice Ginsburg's remarks questioning the ERA revival on the House floor three days later during the floor debate on the resolution, *Removing Deadline for Ratification of Equal Rights Amendment*, which the House Judiciary Committee had reported out in January 2020.[47] Doug Collins of Georgia quoted Justice Ginsburg's reference to "too much controversy" about the late ratifiers such as Virginia and about the rescissions.[48] But beyond these concerns about procedural legitimacy, he and others voting against the deadline removal registered their substantive opposition to the ERA, stating, "[i]f ratified, the ERA would be used by pro-abortion groups to

40. Berman, *supra* note 39.
41. Searching for Equality, *supra* note 12.
42. *Id*.
43. *Id*.
44. *Id*.
45. Georgetown Law, *Justice Ginsburg to Address New Georgetown Law Students*, FACEBOOK, at 1:03:42–1:03:54 (Sept. 12, 2019), https://www.facebook.com/georgetownlaw/videos/2325195750861807 [https://perma.cc/W73G-RSL8].
46. Searching for Equality, *supra* note 12.
47. 166 CONG. REC. H1129 (daily ed. Feb. 13, 2020).
48. *Id*. at H1129–30 (remarks of Rep. Doug Collins).

undo pro-life legislation."[49] Nonetheless, a majority of the House voted to remove the deadline in 2020 and 2021.[50] The resolution would recognize the ERA as valid to all intents and purposes as part of the Constitution "whenever ratified" by three-fourths of the states.[51] Notwithstanding any time limits imposed by the 1972 resolution introducing the ERA, the 2020 resolution—upon Senate adoption of the same—would render the ERA part of the Constitution consequent to Virginia becoming the thirty-eighth state to ratify it.[52]

Before the House voted to remove the deadline, Virginia, Nevada, and Illinois—the states that recently ratified—filed a lawsuit against the National Archivist seeking mandamus relief requiring the Archivist to publish and certify the ERA as part of the Constitution immediately.[53] These states contended that Congress's deadline on ERA ratification could not bind the states under Article V.[54] Invoking their power to ratify amendments under Article V and their sovereignty under the Tenth Amendment, these states contended that their ratifications completed the Article V process of making an Article V amendment, and that enforcing the deadline would be unconstitutional. [55] The district court dismissed the suit for lack of standing, holding that the Archivist's failure to publish the ERA was not an injury in fact to the late-ratifying states, because the Constitution assigns no legally significant role to the Archivist in the amendment process.[56] If the ERA has been validly ratified, it is part of the Constitution regardless of whether the Archivist acts. If it has not been validly ratified, the Archivist's publication could not make the ERA part of the Constitution.

Two never-ratified states (Alabama and Louisiana) and three states that attempted to rescind or sunset their ratifications of the ERA in the 1970s (Nebraska, Tennessee, and South Dakota) intervened in the litigation. [57] The district court granted their summary judgment motion, agreeing that Congress's legally binding seven-year deadline expired in 1979.[58] The court explicitly

49. *Id*. at H1130 (remarks of Rep. Debra Lesko).

50. In floor debates in 2021, opponents of the ERA deadline removal again quoted RBG's wish for a "new beginning" to argue that it was too late to revive the ERA legally. *See* 167 CONG. REC. H1421 (daily ed. Mar. 17, 2021) (remarks of Rep. Debra Lesko).

51. H.R.J. Res. 79, 116th Cong. (2020).

52. *See id.*

53. *See* Complaint, *supra* note 32, at 16.

54. *See id*. at 13.

55. *See* Virginia v. Ferriero, 466 F. Supp. 3d 253, 254 (D.D.C. 2020) (order granting motion to intervene). Alabama, Louisiana, and South Dakota brought an earlier action against the National Archivist in an Alabama federal court before Virginia's ratification of the ERA, seeking a declaratory judgment rejecting late ratifications and seeking return of the rescinding state's ratification documents. *See* Complaint, Alabama v. Ferriero, No. 7:19-cv-02032, 2019 WL 6894418 (N.D. Ala. Dec. 16, 2019). The plaintiff states voluntarily dismissed that suit in February 2020 and filed a motion to intervene in the ratifying states' lawsuit in the D.C. federal court. *See id*.; Partially Opposed Motion to Intervene and Supporting Statement of Points and Authorities, Virginia v. Ferriero, No. 1:20-cv-00242-RC (D.D.C. filed Feb. 19, 2020).

56. Virginia v. Ferriero, 525 F. Supp. 3d 36, 47 (D.D.C. 2021).

57. *See* Intervenors' Motion for Summary Judgment and Supporting Memorandum of Points and Authorities, *Ferriero*, 525 F. Supp. 3d 36 (No. 1:20-cv-00242-RC).

58. Virginia v. Ferriero, 466 F. Supp. 3d 253, 254 (D.D.C. 2020).

declined to rule on the validity of rescissions. In addition, the court stated, in no uncertain terms, that its judgment did not determine the validity of past or future congressional action to extend the ratification deadline: "In light of its decision on the deadline issue, the Court does not reach the question of whether states can validly rescind prior ratifications. Nor does the Court make any statement on whether Congress's extension of the ERA deadline was constitutional."[59] Because Congress had not yet passed legislation in both chambers "to revive the ERA despite both deadlines' expirations," the district court was "not confronted with that difficult issue either," and therefore there was no holding on it.[60]

Throughout this litigation and debates in Congress about the ERA, it is the ERA's opponents, not its proponents, who invoke and embrace Justice Ginsburg, quoting her Georgetown interview in their briefs, hearings, and floor proceedings.[61] ERA opponents have relied not only on Justice Ginsburg's doubts about the procedural fairness of removing the deadline while ignoring states' efforts to rescind their ratifications but also on her past achievements as an advocate for women's rights, to make their case against the ERA. Indeed, Representative Debra Lesko (R-AZ), one of several Republican Congresswomen opposing the ERA deadline removal in the House, argued that the bill was "not necessary," again relying on Justice Ginsburg's words. "The ACLU women's rights director wrote: 'It has been clearly understood that the 14th Amendment prohibits discrimination based on sex.'"[62] During the Nevada Senate's debates leading to its ratification vote in 2017, opponents argued that the ERA was no longer needed because the Equal Protection Clause had achieved the ERA's goals. Nevada Senator Roberson quoted Justice Ginsburg's acknowledgment, shortly after *United States v. Virginia* was decided, that "[t]here is no practical difference between what has evolved and the ERA."[63]

The "de facto ERA," as the legal scholars that he cited call it, is the body of Supreme Court precedents that have outlawed governmental sex discrimination under the Fifth and Fourteenth Amendments, largely resulting from RBG's successful litigation strategy of the 1970s. It began with her brief for *Reed v. Reed* in 1971, which persuaded the Supreme Court to strike down a state statutory

59. *Ferriero*, 525 F. Supp. 3d at 61.

60. *Id.*

61. *See* Partially Opposed Motion to Intervene and Supporting Statement of Points and Authorities, *supra* note 55, at 5.

62. 166 CONG. REC. H1130 (daily ed. Feb. 13, 2020) (remarks of Rep. Debra Lesko).

63. S. 2017-024, 79th Sess., at 12 (Nev. 2017) (remarks of Sen. Roberson). Senator Roberson was quoting at length from Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1333–34 (2006) (discussing David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001); CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER (2004); and quoting Justice Ginsburg in Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. TIMES (Oct. 5, 1997), https://www.nytimes.com/1997/10/05/magazine/the-new-look-of-liberalism-on-the-court.html.

preference for men in appointing the administrator of a deceased person's estate,[64] and culminated in her 1996 opinion as a Justice on behalf of a Supreme Court majority in *United States v. Virginia* in 1996, invalidating the Virginia Military Institute's longstanding policy of excluding women from admission.[65] These cases now firmly require courts to scrutinize governmental use of sex classifications and to strike down those that perpetuate gender stereotypes or women's inferior status, and lack an "exceedingly persuasive" justification.[66]

Are twenty-first century ERA opponents correct that the ERA is no longer necessary because of RBG's successes in establishing gender equality as a requirement of the constitutional equal protection guarantees in the Fifth and Fourteenth Amendments? Independently of procedural fairness, is a guarantee of sex equality in the Constitution's text *substantively* obsolete, unnecessary, and illegitimate? Yes, the Equal Protection Clause now requires the equal protection of women under the law. But RBG's early writings on the ERA, consistent with its legislative history and her sex equality jurisprudence as a Justice, show that there is much more to constitutional sex equality than what the Supreme Court has established through its sex-equality decisions.

Nonetheless, the equal protection cases RBG litigated, and her landmark opinion in *United States v. Virginia*, were monumental achievements for women's rights that should not be diminished. A steady line of Supreme Court decisions applied heightened scrutiny to laws that treated men and women differently.[67] This jurisprudence would not have been made without the momentum generated by the ERA as it was making its way through Congress and the states. The House of Representatives adopted the ERA on October 12, 1971 by a vote of 354–24,[68] just one week before the Supreme Court heard oral arguments in *Reed v. Reed*, the first Supreme Court decision to strike down a sex-discrimination law based on the Equal Protection Clause of the Fourteenth Amendment.[69] During hearings on the ERA in March 1971,[70] as well as in floor debates that October,[71] Congresswoman Martha Griffiths, the primary sponsor of the ERA in the House, sharply criticized the Idaho statute that gave a preference to men over women as executors of estates and pointed out that the ERA was necessary because the Supreme Court had, to date, never ruled in favor of a woman challenging a sex-

64. *See* Brief for Appellant, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4), 1971 WL 133596; *Reed*, 404 U.S. at 77.

65. United States v. Virginia, 518 U.S. 515, 519–58 (1996).

66. *Id.* at 533.

67. *See, e.g.*, *Reed*, 404 U.S. 71; Frontiero v. Richardson, 411 U.S. 677 (1973); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Califano v. Goldfarb, 430 U.S. 199 (1977).

68. *See* 117 CONG. REC. 35,815 (1971).

69. *Reed*, 404 U.S. 71, was argued on October 19, 1971, and decided on November 22, 1971.

70. *Equal Rights for Men and Women 1971: Hearings on H.R.J. Res. 35,208, and Related Bills and H.R. Res. 916 and Related Bills Before the Subcomm. No. 4 of the H. Comm. on the Judiciary*, 92d Cong. 1–310 (1971) [hereinafter *1971 House Judiciary Committee ERA Hearings*].

71. *See* 117 CONG. REC. 35,298 (1971) (document submitted by Rep. Martha Griffiths).

discriminatory law under the Equal Protection Clause.[72] Griffiths had joined an amicus brief for the National Organization of Women Legal Defense and Education Fund for Mrs. Reed in the pending Supreme Court case.[73]

The primary brief attacking the Idaho law was RBG's brief for the ACLU. It was the first of her several meticulously researched and thoroughly reasoned Supreme Court briefs arguing that sex discrimination violated the Equal Protection Clause. The *Reed* brief detailed the history of sex discrimination in equal protection jurisprudence, the long movement for women's suffrage, and the Nineteenth Amendment.[74] It cited the West German Constitutional Court's decisions within the last decade striking down similar laws preferring sons to daughters in property inheritance.[75] RBG also cited the U.N. Charter and a lecture on gender emancipation by the Swedish Prime Minister.[76] Her brief situated the constitutional sex-equality principle in a global context, invoking two bodies of law—the West German Constitution and the U.N. Charter—that had been discussed in the congressional ERA hearings of decades past.

RBG also listed pioneering Black civil rights attorney Pauli Murray and the ACLU women's rights lawyer Dorothy Kenyon as coauthors of the brief, even though neither of them had written any part of it.[77] RBG wanted to acknowledge her intellectual debt to ideas they had developed in earlier briefs and law review articles.[78] A month after the House's October 1971 adoption of the ERA, the Supreme Court decided the case in Mrs. Reed's favor, striking down the Idaho law that had favored her ex-husband as the executor of their deceased son's estate. The Senate then adopted the ERA and sent it to the states for ratification three months after the Supreme Court's decision in *Reed*. *Reed*'s trajectory illustrated the dialogue between Congress and the Court about the constitutional status of sex discrimination, beginning with members of Congress opining on a pending case and the Court producing a judgment that appeared responsive. The ERA's support in Congress nudged the Court toward scrutinizing patriarchal

72. *1971 House Judiciary Committee ERA Hearings*, *supra* note 70, at 36 (statement of Rep. Martha Griffiths).

73. *See* Joint Brief of Amici Curiae American Veterans Committee, Inc. & Now Legal Defense and Education Fund, Inc., *Reed*, 404 U.S. 71 (No. 70-4), 1971 WL 133600.

74. *See* Brief for Appellant, *supra* note 64, at 24–41.

75. *Id*. at 55.

76. *Id*. at 55 n.52.

77. *See id*. at 68.

78. *See id*. Pauli Murray was invited to testify before the Senate Judiciary Committee's ERA hearings, and she submitted written testimony arguing that Black women had the most to gain from an ERA. *See Equal Rights 1970: Hearings on S.J. Res. 61 and S.J. Res. 231 Before the S. Comm. on the Judiciary*, 91st Cong. 427–33 (1970) [hereinafter *Equal Rights 1970 Senate Hearings*] (statement of Pauli Murray). For an assessment of Murray's written testimony and its resonances with the debates surrounding the ERA's resurgence nearly five decades later, see Julie C. Suk, *A Dangerous Imbalance: Pauli Murray's Equal Rights Amendment and the Path to Equal Power*, 107 VA. L. REV. ONLINE 3 (2021). Serena Mayeri details Pauli Murray's development, with Dorothy Kenyon, of a Fourteenth Amendment strategy, and how they both came to support the ERA after initial skepticism. *See* Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 797–98, 798 n.203 (2004).

laws, and the Court's first step toward sex equality signaled to Congress its receptiveness to further development. The significant social and political change that the ERA entailed could not be achieved by one of these bodies alone.

Frontiero v. Richardson was RBG's first Supreme Court oral argument, leading the Court to invalidate a rule that automatically allowed male military personnel to receive dependent benefits for their wives, while requiring female military personnel to prove that the husband was actually dependent on her for over a year and a half to qualify for the same benefits.[79] *Frontiero* repudiated the nineteenth-century Supreme Court cases that reinforced sexist attitudes toward women. A four-Justice plurality concluded: "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."[80] The Justices' responsiveness to congressional support for the principle of sex equality became more explicit in these decisions. Justice Brennan invoked Congress's adoption of the ERA as a partial justification for scrutinizing laws that treated the sexes unequally:

> And § 1 of the Equal Rights Amendment, passed by Congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares 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." Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.[81]

The Supreme Court developed its skepticism of laws that discriminated against women with awareness that a democratically elected Congress supported such an approach as evidenced by both houses' votes for the ERA by overwhelming majorities. Justice Brennan affirmed the ERA's democratic political legitimacy and relied on it to bring the ERA's normative aspirations into judicial interpretation of existing constitutional guarantees. A partially completed amendment was sufficient, at least for Justice Brennan, to take the principle of sex equality seriously in interpreting the Fifth and Fourteenth Amendments.[82]

Although the majority of Justices agreed to invalidate the sex classification in the military benefits scheme in *Frontiero*, they could not agree on the standard of review for sex classifications in the law. In contrast to Justice Brennan's reliance on the ERA as authority to regard sex classifications as inherently invidious, Justice Powell, writing for three Justices, refrained from approaching sex as a

79. *See* 411 U.S. 677 (1973) (plurality opinion).

80. *Id.* at 684 (footnote omitted).

81. *Id.* at 687–88 (alteration in original) (footnote omitted) (citation omitted).

82. *See generally* Rosalind Dixon, *Partial Constitutional Amendments*, 13 U. PA. J. CONST. L. 643 (2011) (arguing that proposed amendments carry positive significance and should be used in common law constitutional interpretation).

suspect classification because the ERA was pending ratification in the states and therefore could not yet be relied upon as a full constitutionalization of sex equality:

> The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.[83]

Justice Powell warned that a judicial attempt to enshrine sex equality as a constitutional principle would weaken democratic institutions and usurp the role of representatives elected by the people in deciding "sensitive issues of broad social and political importance."[84] The Court's enforcement of ERA principles in equal protection cases made the ERA itself less necessary to challenge sex-discriminatory laws.[85]

Additional cases that RBG argued before the Court throughout the 1970s reinforced sex equality as an equal protection principle.[86] Those cases developed the intermediate scrutiny standard,[87] restyled as "skeptical scrutiny" to invalidate the Virginia Military Institute's (VMI) policy of excluding women in 1996.[88] RBG argued six cases before the Supreme Court from 1972 to 1978. Each case had a male plaintiff, and four of these cases involved governmental benefits schemes that treated men and women differently on the assumption that men were breadwinners and women were their caregiving dependents.[89] As Cary Franklin has detailed, RBG's vision of emancipation from gender stereotypes was shaped by her time in Sweden, where she began her career as a legal scholar of comparative

83. *Frontiero*, 411 U.S. at 692 (Powell, J., concurring).

84. *Id.*

85. It is noteworthy that, decades later, state legislators such as Senator Roberson in Nevada, and congressional opponents such as Representative Collins, have pointed to the evolution of the Supreme Court's sex-equality jurisprudence under the Equal Protection Clause as evidence the ERA is no longer necessary, echoing the scholars who celebrate the "de facto" ERA. *See* S. 2017-024, 79th Sess., at 11–12 (Nev. 2017) (statement of Sen. Roberson); 166 Cong. Rec. H1129–30 (daily ed. Feb. 13, 2020) (remarks of Rep. Doug Collins, R-GA).

86. Reed v. Reed, 404 U.S. 71 (1971); *Frontiero*, 411 U.S. 677; Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Califano v. Goldfarb, 430 U.S. 199 (1977).

87. *See* Craig v. Boren, 429 U.S. 190, 199 (1976) (recognizing an "important governmental objective" that was "substantially related to achievement of that goal").

88. United States v. Virginia, 518 U.S. 515, 518 (1996).

89. *See, e.g.*, *Reed*, 404 U.S. 71; *Frontiero*, 411 U.S. 677; *Weinberger*, 420 U.S. 636; *Califano*, 430 U.S. 199; Kahn v. Shevin, 416 U.S. 351 (1974); Duren v. Missouri, 439 U.S. 357 (1979).

civil procedure.[90] On June 8, 1970, Olof Palme, then Swedish Prime Minister, gave a speech called "The Emancipation of Man"[91] at the Women's National Democratic Club in Washington, D.C.—a speech that RBG quoted in her landmark *Reed* brief.[92] Palme said, "The greatest disadvantage with the male sex-role is that the man has too small a share in the upbringing of the children."[93] This increased the burdens for women—who often had two roles, one in the home and one in the labor market, whereas men only had one—and also harmed men; Palme—and RBG—argued that such gendered expectations constrained men's opportunities to lead fulfilling lives in the home and family. In *Weinberger v. Wiesenfeld* and *Califano v. Goldfarb*, the Supreme Court struck down provisions of the Social Security Act that allowed widows, but not widowers, to collect survivors' benefits accrued by their wives who worked prior to their deaths.[94] These cases established, as a rule of constitutional law, that the government may not distribute benefits and burdens based on stereotyped assumptions about men's and women's proper roles in the family.[95]

Nonetheless, the Court stopped short of striking down all gender classifications based on assumptions about men's and women's proper roles. *Rostker v. Goldberg* upheld the Military Selective Service Act,[96] which required all men, but not women, to register for the military draft. Although the draft has not been utilized since 1973, the male-only registration requirement continued to be contested in litigation and in Congress, relying mostly on the Supreme Court's landmark sex equality decision, *United States v. Virginia*, authored by Justice Ginsburg. [97]

In *United States v. Virginia*, the Supreme Court required the state's premier military academy to open its doors to females.[98] The VMI's longstanding policy of excluding women was premised on the rationale that fundamental differences between women and men made men, and not women, suited for the "adversative"

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90. *See* Franklin, *supra* note 9.

91. Olof Palme, Swedish Prime Minister, Address at the Women's National Democratic Club: The Emancipation of Man (June 8, 1970).

92. Brief for Appellant, *supra* note 64, at 55 n.52.

93. Palme, *supra* note 91, at 7.

94. 420 U.S. 636, 638–39 (1975); 430 U.S. 199, 201–02 (1977).

95. *See Califano*, 430 U.S. at 205–06.

96. 453 U.S. 57, 83 (1981). The Supreme Court reasoned that, in the event of a military draft, the military primarily needed persons eligible for combat roles, and because women were not included in combat roles at the time, treating men and women the same for the purposes of registration for the military draft would fail to meet military needs. *See id*. at 80–82.

97. 518 U.S. 515 (1996). The Department of Defense ended its exclusion of women from combat roles in 2013. *See* Ernesto Londoño, *Pentagon Removes Ban on Women in Combat*, WASH. POST. (Jan. 24, 2013), https://www.washingtonpost.com/world/national-security/pentagon-to-remove-ban-on-women-in-combat/2013/01/23/6cba86f6-659e-11e2-85f5-a8a9228e55e7_story.html. The male-only draft registration statute was challenged again in litigation, but the Fifth Circuit upheld it in 2020, Nat'l Coal. for Men v. Selective Serv. Sys., 969 F.3d 546 (5th Cir. 2020), and the Supreme Court declined to review it, deferring to Congress. Nat'l Coal. for Men v. Selective Serv. Sys., 141 S. Ct. 1815, 1816 (2021) (mem.).

98. 518 U.S. 515, 518 (1996).

training for military combat that the school required of its students.[99] The Supreme Court, in a 7–1 judgment authored by Justice Ginsburg, held that Virginia had no "exceedingly persuasive justification" for excluding all women from the "citizen-soldier training afforded by VMI."[100]

Excluding women from an opportunity violated equal protection when premised on "generalizations about 'the way women are.'"[101] At the same time, Justice Ginsburg's opinion leaves space for the law to generalize about women's experience of subordination and disadvantage. For over a century since the Founding, "women did not count among voters composing 'We the People,'" she noted.[102] She declared, "Sex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered," or "to advance full development of the talent and capacities of our Nation's people," citing, among others, the *Cal Fed* case of 1987 which validated a gender-differentiated maternity leave policy.[103] But *United States v. Virginia* made clear that the Fourteenth Amendment prohibited the use of gender lines to "create or perpetuate the legal, social, and economic inferiority of women."[104]

II. THE UNFINISHED BUSINESS OF EQUAL PROTECTION

Did *United States v. Virginia* achieve the ERA's goals? It did invalidate laws that excluded women from benefits and opportunities on the basis of sex, while preserving the possibility of laws designed to overcome women's disadvantages.[105] Old male bastions of power, such as VMI, were opened up to women. But the ERA's framers and founders in Congress demanded more governmental action to overcome women's second-class status in society.[106] The fundamental problem was women's lack of power in a legal order that assumed they were not entitled to any and presumed that their place was in the home. Solving it would require addressing the burdens women sustained because of their traditional role within the family, beyond merely declaring sex equality under the law. As Florence Dwyer, a Republican from New Jersey, put it, "[W]omen want only what is their due. They want to be treated as whole citizens. They want to be

99. An expert testified at the district court level, "'[m]ales tend to need an atmosphere of adversativeness,' while '[f]emales tend to thrive in a cooperative atmosphere.'" *Id.* at 541.

100. *Id.* at 534.

101. *Id.* at 550.

102. *Id.* at 531.

103. *Id.* at 533–34 (citing Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 289 (1987). Reva Siegel argues that the citation to *Guerra* in *United States v. Virginia* recognized the regulation of pregnancy as a sex-based classification worthy of heightened scrutiny. Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 19 GEO. L.J. 167, 205 (2020).

104. 518 U.S. at 534.

105. Professor Thomas Emerson of Yale Law School, along with several students, authored an article that was quoted extensively throughout the 1971–1972 legislative debates about the ERA detailing the ERA's intended and likely effects on the law. *See* 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 (1971).

106. *See* SUK, *supra* note 6, at 78–82; *see also infra* text accompanying notes 134–38.

recognized as having a full stake in the life of our nation. Consequently, they also want the means necessary to fulfill this role. . . ."[107]

A. MOTHERHOOD AND THE ERA

Congresswomen from both political parties converged in their concern for the economic security of mothers. Martha Griffiths, a Democrat from Michigan and the primary sponsor of the ERA in the House, invoked the needs of wives, abandoned wives, and widows for equal opportunities to support their families.[108] Florence Dwyer predicted that the ERA would "give new dignity" to the roles of homemaker and mother.[109] By guaranteeing non-abridgment of equal rights based on sex, the ERA would strike at inequalities attributable to government action *and* inaction on issues that shaped women's prospects for political and economic power, especially in light of the disadvantages women faced because of motherhood. The disadvantages stemming from women's role within the family—beyond legal discrimination and exclusion—were not addressed adequately by the Supreme Court's equal protection jurisprudence.

These disadvantages shaped RBG's personal and professional life as she began litigating against sex discrimination.[110] At her Supreme Court confirmation hearings in 1993, RBG drew attention to her brief in *Struck v. Secretary of Defense*,[111] a case which the government settled before the Supreme Court could issue a decision.[112] Captain Susan Struck was an Air Force officer who was discovered to be pregnant while stationed in Vietnam.[113] The Air Force fired her, giving her the option of remaining employed if she terminated her pregnancy.[114] Struck refused to have an abortion, hoping instead to use the disability leave she had earned to give birth and "surrender [the] child[] for adoption" and arguing that her leave of absence would be no different from those taken by temporarily disabled men.[115] RBG's brief argued that pregnancy discrimination violated equal protection of the laws under the Fifth Amendment. [116] But the Air Force rehired Struck and the

107. 116 CONG. REC. 27,770 (1970) (statement of Rep. Florence Dwyer). Pauli Murray gave a full account in her September 1970 written testimony to Congress on the ERA as being really about equal power for women. *See Equal Rights 1970 Senate Hearings*, *supra* note 78, at 433.

108. 116 CONG. REC. 27,999 (1970) (statement of Rep. Martha Griffiths).

109. 116 CONG. REC. 28,004 (1970) (statement of Rep. Florence Dwyer).

110. *See* CARMON & KNIZHNIK, *supra* note 13, at 33, 39.

111. *See Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 205–06 (1993) [hereinafter *Ginsburg Confirmation Hearings*]; Brief for the Petitioner at *3, Struck v. Sec'y of Def., 409 U.S. 1071 (1972) (No. 72-178), 1972 WL 135840. For a commentary on the *Struck* case as it concerned gender stereotyping, see generally Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771 (2010).

112. *Struck*, 409 U.S. at 1071.

113. *See Ginsburg Confirmation Hearings*, *supra* note 111, at 206; Brief for the Petitioner, *supra* note 111.

114. Brief for the Petitioner, *supra* note 111, at *4, *14.

115. *Id.* at *4, *8.

116. *Id.* at *12–14.

case became moot.[117] Thus, RBG's opportunity to anchor the unfair treatment of pregnancy and maternity within equal protection jurisprudence was lost.

A few years later, in 1974, the Supreme Court held in *Geduldig v. Aiello* that a governmental temporary disability benefits scheme that excluded normal pregnancy and childbirth from coverage was consistent with equal protection.[118] Two years later, in *Gilbert v. General Electric*, the Court additionally held that Title VII's prohibition of discrimination because of sex did not prohibit discrimination because of pregnancy, and upheld the legality of a private employer's temporary disability benefits scheme that covered all temporary work-disabling conditions except pregnancy and childbirth.[119] RBG's scholarly writings were critical of these decisions.[120] Her criticism of the Supreme Court's reluctance to recognize pregnancy discrimination as a constitutional violation pointed her to the conclusion that the Equal Rights Amendment was needed.[121]

Working with sparse text in the Equal Protection Clause, an all-male Supreme Court could not agree to the standard of scrutiny for sex classifications in *Frontiero*, nor could these Justices fully grasp pregnancy discrimination as sex discrimination. RBG read these decisions as evidencing a weak and disorganized doctrinal development of a principle—sex equality—in part because it was not clearly enshrined in the eighteenth- and nineteenth-century constitutional text. The ERA and its legislative history would provide judges with the direction to build sex equality doctrine. In expressing her views about what the ERA would do as law, including doctrinal changes that would occur, RBG often cited the

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117. *Ginsburg Confirmation Hearings*, *supra* note 111, at 206.

118. *See* 417 U.S. 484, 497 (1974).

119. 429 U.S. 125, 139–40 (1976). For a history of this litigation, see Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 423–24 (2011).

120. *See, e.g.*, Ruth Bader Ginsburg, *From No Rights to Half Rights to Confusing Rights: For Women, the Supreme Court's Decisions Are a Study in Male Hesitation and Legal Timidity*, 7 HUM. RTS. 12, 14 (1978) [hereinafter Ginsburg, *From No Rights*] ("It may be that the woman disabled by pregnancy is not trusted by the Justices. (Is she really sick or does she just want to malinger and stay at home with the baby?)"); Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1, 11 [hereinafter Ginsburg, *Gender in the Supreme Court*] (proposing "rigorous review of employment practices which place women at a disadvantage in the labor market, not the restrained equal protection review applied in *Aiello*"); Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 461 (1978) ("Decisions relating to other problems encountered by pregnant women have taken a meandering course.")

121. *See* Ginsburg, *From No Rights*, *supra* note 120, at 47. RBG explained the pregnancy cases as the Court's hesitation about making new doctrine without firm textual authority for constitutional sex equality:

> The historic fact that our 18th- and 19th- century Constitution-makers had women's emancipation nowhere on their agenda is an obvious source of the Justices' uneasiness, and their reluctance to provide the firmer guidance lower courts seek.
>
> The Equal Rights Amendment probably would relieve the Court's anxiety and end its hesitancy to shape new constitutional doctrine, for the E.R.A. would provide a firm root for that doctrine in the nation's fundamental instrument of government.

Id.; *see also* Ginsburg, *Gender in the Supreme Court*, *supra* note 120, at 10 n.59 (explaining that the ERA would alter the Title VII holding in *Aiello*).

ERA as discussed in Congress,[122] rather than her own normative views, as the main source. She did not argue that the ERA would necessitate specific outcomes on specific doctrinal questions—rather, her argument for the ERA was mostly process-based. Its presence in the Constitution would signal to judges and legislatures that they must think hard about what it means for the law to treat women as fully equal citizens.[123] Existing sex equality law—including Title VII—was built more tentatively on the deliberate doctrinal development of race equality.[124]

Even in 2021, the United States remained one of the few countries in the world that lacks a legal guarantee of paid maternity leave[125] for the majority of working mothers, as only sixteen percent of American workers in the private industry have access to paid leave.[126] In the early 1970s, one avenue to paid maternity leave was coverage under temporary disability benefit programs, but a California statute excluded pregnancy and childbirth from its disability scheme.[127] The lack of paid leave causes economic detriment to working mothers who typically need to take some time off to give birth and care for a newborn. But *Geduldig* insisted that the Equal Protection Clause did not protect pregnant women from discrimination,[128] and the Supreme Court has not invoked the de facto ERA to otherwise scrutinize inequalities women face because of childbearing and childrearing.

In the years following the ERA's adoption by Congress, the number of women elected to Congress doubled, and they formed a bipartisan Congresswomen's Caucus in 1977, which organized efforts to advance legislation on women's issues,[129] including pregnancy discrimination and the ERA deadline extension. Congress overruled *Gilbert v. General Electric* by adopting the Pregnancy Discrimination Act in 1978,[130] in the same month that it voted to extend the ERA

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122. *See, e.g.*, Ginsburg, *Ratification of the Equal Rights Amendment*, *supra* note 10, at 937 (arguing that the "congressional history" did not suggest ERA would authorize homosexual marriage); Ginsburg, *Equal Rights Amendment Is the Way*, *supra* note 8, at 22 ("Yes, there will be some work in this for the judiciary, but most jurists seem reliable enough to interpret the ERA in the spirit of its legislative history.").

123. *See* Ginsburg, *ERA as a Signal*, *supra* note 8, at 73 ("It would serve as a forthright statement of our moral and legal commitment to a system in which neither sons nor daughters are pigeonholed by government because of their sex.").

124. On race-sex analogies, see generally SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION (2011).

125. *See* ORG. FOR ECON. CO-OPERATION & DEV., FAM. DATABASE: PARENTAL LEAVE SYSTEMS 3, 7 (2021), https://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf [https://perma.cc/L37R-TF8V].

126. This number is current as of March 2018. *See Access to Paid and Unpaid Family Leave in 2018*, U.S. BUREAU OF LAB. STAT.: ECON. DAILY (Feb. 27, 2019), https://www.bls.gov/opub/ted/2019/access-to-paid-and-unpaid-family-leave-in-2018.htm [https://perma.cc/R86T-LP3M]. At that time, seventeen percent of all civilian employees and twenty-five percent of state and local government workers had access to paid family leave. *Id.*

127. *See* Geduldig v. Aiello, 417 U.S. 484, 488–89 (1974) (citation omitted). A generation later, in 2002, California became the first state in the United States to pass legislation guaranteeing paid family leave. *See* S.B. 1661, 2002 Reg. Sess. (Cal. 2002).

128. *See supra* note 118 and accompanying text.

129. *See* IRWIN N. GERTZOG, CONGRESSIONAL WOMEN: THEIR RECRUITMENT, TREATMENT, AND BEHAVIOR 182–85 (1984).

130. *See* Pub. L. No. 95-555, 92 Stat. 2076.

deadline.[131] The statute provided that discrimination because of sex under Title VII encompassed discrimination because of pregnancy, childbirth, or related medical conditions.[132] But the statutory intervention did not change the status of pregnancy discrimination under the Equal Protection Clause. Meaningfully addressing disadvantages women face because of childbearing and childrearing requires more than a judicially enforceable right against the government's unequal treatment of women and men. RBG's reading of the text and legislative history of the ERA pointed to legislatures, rather than judges, as primary actors in eradicating these disadvantages.

B. THE FRAMERS' INSTITUTIONAL VISION FOR LEGISLATURES

The ERA's congressional framers hoped the ERA would reduce the barriers women faced because they were mothers, mothers-to-be, or potential mothers. But these barriers resulted from a range of complex social, cultural, and institutional dynamics. Thus, no constitutional provision, whether it was the Equal Protection Clause or the ERA, would sufficiently address these problems if courts and judges were the primary enforcers. Public policies at both the federal and state levels were needed, and they would have to do more than any remedy courts could order. That's why the ERA's framers envisioned Congress and state legislatures tackling gender inequalities in the first instance, not the Supreme Court.

Congresswoman Patsy Takemoto Mink, a Japanese-American from Hawaii and the first nonwhite woman elected to Congress in 1964,[133] advanced this legislative vision of the ERA, while centering her work as a legislator on the employment opportunities of working mothers.[134] In floor debates on the ERA in 1970 and 1971,[135] Judiciary subcommittee hearings in 1971,[136] and a law review article published that same year,[137] Mink emphasized the need for robust legislation, beyond the ERA, to make equality a reality for women. The ERA would provide clear constitutional authority for Congress to regulate the sources of women's

131. H.R.J. Res. 638, 95th Cong. (1978).

132. 42 U.S.C. § 2000e(k).

133. *See* Judy Tzu-Chun Wu, *The Dead, the Living, and the Sacred: Patsy Mink, Antimilitarism, and Reimagining the Pacific World*, 18 MERIDIANS 304, 305 (2019).

134. Patsy Mink actively opposed the nomination of Judge Harrold Carswell for a seat on the Supreme Court in 1970 because of his refusal to grant a rehearing en banc in the Fifth Circuit's decision in Phillips v. Martin Marietta Corp., 416 F.2d 1257 (5th Cir. 1969), which had declined to recognize discrimination against the mother of young children as sex discrimination under Title VII. *See Nomination of George Harrold Carswell, of Florida, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 91st Cong. 81–88 (1970) (statement of Rep. Patsy T. Mink). Betty Friedan argued that Carswell was unfit to be on the Supreme Court because his decision went against "4 million working mothers" in the United States. *Id.* at 89 (testimony of Betty Friedan, Nat'l President, Nat'l Org. for Women).

135. *See* 117 CONG. REC. 35,318–19 (1971). For a narrative account of Mink's contribution to the floor debates on the ERA, see SUK, *supra* note 6, at 68–82.

136. *See 1971 House Judiciary Committee ERA Hearings*, *supra* note 70, at 521 (statement of Rep. Patsy T. Mink).

137. *See* Patsy T. Mink, *Federal Legislation to End Discrimination Against Women*, 5 VAL. U. L. REV. 397, 410–11 (1971).

disadvantage, independently of the limited powers that the Supreme Court attributed to Congress in the Commerce Clause and the Fourteenth Amendment. The ERA would also serve as a political catalyst for such legislation. In the House Judiciary Committee's 1971 hearing on the ERA, Mink said that there were three general approaches to remedy injustice: "(1) adoption of an equal rights amendment to the U.S. Constitution . . . (2) judicial attack[s] on discriminatory laws . . . under the fifth and 14th amendments; and (3) passage of Federal and State legislation to prohibit overt discrimination and to eliminate situations which are discriminatory in effect."[138] Mink noted, "While these approaches are not mutually exclusive—and, indeed, could be attempted simultaneously—it is my belief that the most immediate progress is attainable through the third alternative, direct legislative enactments."[139] In floor debates about the ERA, Mink described the Amendment as constitutional "backing"[140] for these legislative projects, and the legislatures would be looking not only to repeal laws that distinguished by sex overtly but also to change situations where women were disparately impacted or burdened.

Mink, like RBG, was one of few women of their generation who graduated from one of the nation's best law schools. Mink graduated from the University of Chicago School of Law in 1951,[141] and like RBG, faced discrimination in her quests for law firm employment, not only because she was a woman, and a nonwhite one no less, but also because she was a mother of a young child.[142] Concerns about working motherhood animated Mink's leadership on comprehensive childcare legislation concurrent with her vocal support for the ERA. The childcare bill—which would have created federally funded childcare options for all regardless of ability to pay—was passed with bipartisan support by both houses of Congress, but was vetoed by Nixon in 1971.[143] In a law review symposium piece published in 1971, Mink argued that "[l]ack of child care facilities is a major tool of discrimination."[144] She noted that "[t]he lack of day care facilities is a major obstacle to an overwhelming number of women who are employed or who, more importantly, desire employment."[145]

RBG contributed to the same symposium. So did pioneering African-American civil rights attorney Pauli Murray, whom RBG has often recognized as the intellectual architect of the sex equality litigation strategies that succeeded in

138. *1971 House Judiciary Committee ERA Hearings*, *supra* note 70, at 521 (statement of Rep. Patsy T. Mink).

139. *Id.*

140. 117 CONG. REC. 35,319 (1971).

141. *See* Interview by Michael J. Murphy, Office of the Historian, U.S. House of Representatives, with Gwendolyn Mink (March 14, 2016), https://history.house.gov/Oral-History/Women/Gwendolyn-Mink/ [https://perma.cc/3PXV-CXM8].

142. *Id.*

143. *See generally Comprehensive Preschool Education and Child Day-Care Act of 1969*: *Hearings on H.R. 13520 Before the Select Subcomm. on Educ. of the H. Comm. on Educ. And Lab.*, 91st Cong. 8 (1970) (testimony of Patsy T. Mink).

144. Mink, *supra* note 137, at 411.

145. *Id.*

the 1970s.[146] RBG's symposium contribution criticized the lack of attention in law school curricula to sex-based discrimination in the law, noting specifically, *inter alia*, that "the proposed Equal Rights Amendment, although it has been in the congressional hopper for decades, is not mentioned"[147] in courses on constitutional law. Pauli Murray's contribution analyzed the barriers to equal opportunity for women in employment and education and emphasized that "congressional action with adequate funding"[148] was necessary to overcome them. Among her proposals was the bill that became Title IX, which goes beyond prohibiting discrimination and requires recipients of federal funding to eliminate disparities.[149]

Patsy Mink sponsored Title IX, and the statute was named for her after her death in 2002, recognizing that she was the "[m]other of Title IX."[150] Pauli Murray had testified in writing to support the ERA in the Senate Judiciary Committee hearing in 1970, arguing that the ERA could go beyond the concerns of litigation under the Equal Protection Clause: "Quite apart from the legal implications discussed in the various statements by attorneys, there are strong policy considerations which impel support of the Equal Rights Amendment in 1970."[151] She also described Congress as "a political body which must be responsive to rapid social change."[152] The ERA would engender legislative transformation. It would establish 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."[153] Murray, like Mink, saw the ERA as the political catalyst that would legitimize ambitious legislation creating the actual conditions of equal opportunity.[154] Judicial doctrines developed under the Equal Protection Clause were more limited, in part because the precedents requiring state action to conceptualize a violation[155] (also textually enshrined in the ERA) would make it difficult for litigation to challenge private institutions' exclusions of women. Also, "the traditional attitude of judges in the federal

146. RBG famously included Pauli Murray as a coauthor on her landmark brief in *Reed*. *See* Brief for Appellant, *supra* note 64.

147. Ruth Bader Ginsburg, *Treatment of Women by the Law: Awakening Consciousness in the Law Schools*, 5 VAL. U. L. REV. 480, 484 (1971) (footnote omitted).

148. Pauli Murray, *Economic and Educational Inequality Based on Sex: An Overview*, 5 VAL. U. L. REV. 237, 277 (1971).

149. *See generally Discrimination Against Women: Hearings on Section 804 of H.R. 16098 Before the Special Subcomm. on Education of the H. Comm. on Education and Labor, Parts I & II*, 91st Cong. 434 (1971) (statement of Patsy Mink); 20 U.S.C. § 1681.

150. *See The 14th Amendment and the Evolution of Title IX*, U.S. COURTS, https://www.uscourts.gov/educational-resources/educational-activities/14th-amendment-and-evolution-title-ix [https://perma.cc/WV65-9XHS] (last visited May 7, 2022).

151. *See Equal Rights 1970 Senate Hearings*, *supra* note 78, at 431.

152. *Id.*

153. *Id.* at 433.

154. In another law review article about African-American women and the ERA, Murray argued, "Consideration of the amendment by state legislatures would stimulate a detailed review of all state laws and policies affecting women. No comparable political activity would focus nationwide attention upon the need to modernize and extend state labor standards." Pauli Murray, *The Negro Woman's Stake in the Equal Rights Amendment*, 6 HARV. C.R.-C.L. L. REV. 253, 258 (1971).

155. Murray, *supra* note 148, at 270–71.

courts"[156] limited the possibilities of change through adjudication. Thus, the more ambitious goals of constitutional sex equality would be implemented by legislation rather than litigation.

In later scholarly work, RBG embraced and defended the primacy of legislatures as implementers of the ERA. On her reading, Section 3 of the ERA, which creates a two-year delay between the date of ratification and the effective date of the Amendment, "gives our legislators a two-year period to update laws now lagging behind social change."[157] While acknowledging that legislators could update laws without the ERA, "history strongly suggests that the task will continue to be relegated to a legislative back burner absent the propelling force supplied by the Amendment."[158]

The ERA "should end legislative inertia that retards social change by keeping obsolete laws on the books, so the Amendment should relieve judicial uneasiness in the gray zone between interpretation and amendment of the Constitution."[159] This article, in the inaugural issue of the *Harvard Women's Law Journal*, concluded with an explicit understanding of legislatures as the first movers of equal rights, and with a role for judges only in the event of legislative failure:

> With the Equal Rights Amendment, we may expect Congress and the state legislatures to undertake in earnest, systematically and pervasively, the law revision so long deferred. And in the event of legislative default, the courts will have an unassailable basis for applying the bedrock principle: All men and all women are created equal.[160]

It is noteworthy that before these words were published in a law journal, RBG had delivered them as a speech to judges and lawyers at the Second Circuit Judicial Conference in 1976,[161] essentially asking the bench and bar to defer to elected lawmakers and to step in only if they defaulted in their duties. Legislatures should repeal laws that treated men and women differently and make the policy judgment about whether to abolish a burden imposed on one gender, such as the military draft, or to impose the same burden on both genders equally. The substantive goals of the ERA could not be fulfilled by litigation and judicial interpretation alone.[162] Judges could invalidate legislation but could not

156. *Id*. at 271.

157. Ginsburg, *Equal Rights Amendment Is the Way*, *supra* note 8, at 23 (referencing Section 3 of the ERA).

158. *Id.*

159. *Id*. at 25.

160. *Id*. at 26.

161. *See id*. at 19 n.*.

162. *See* Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 173 ("Framed as a basic human rights norm, the ERA has two offices. First, it directs federal and state legislatures to undertake conforming legislative revision. The Amendment stipulates a two-year period for this mop, broom, and paint operation. Second, it directs the judiciary to a clear source for the constitutional principle, men and women are equal before the law." (footnotes omitted)).

rewrite it. So even if it can be said that *United States v. Virginia* achieved the ERA's goals, such a view would only encompass the negative goals of dismantling discrimination, not the positive goals of establishing a gender-equal legal order.

The legislative project of the ERA was partially realized while the ERA was being ratified in the 1970s, even without its complete ratification: Title IX was adopted by Congress and signed into law in June 1972.[163] Congress passed comprehensive federal childcare legislation, but President Nixon vetoed it in 1971.[164] Despite Patsy Mink's declaration that same year that "[t]his decade must and will see the child care situation resolved,"[165] five decades have gone by without federal childcare policy.

This history seems to confirm RBG's prediction that, absent the ERA, the task of legislating equality policy would remain on a "legislative back burner."[166] Viewing the ERA's function as similar to international human rights norms, RBG noted that even when an international human rights norm lacked clear force of law and judicial enforcement, it still shaped the law's development: "Authoritative formulation of the basic norm is an 'indispensable step toward defense and fulfillment of [a] human right," she argued. "Only upon official commitment to the norm can we proceed securely to 'measures of implementation,' arrangements designed to promote effective application of the norm."[167] In invoking the human rights model, RBG suggested that "we"—the people and lawmaking bodies—needed the ERA as a guiding principle as much as courts needed it to anchor a more comprehensive doctrinal development.

The twenty-first century resurrection of the ERA that took its first significant step when Nevada ratified it in 2017 paid homage to RBG's legislative constitutionalism. State senator Pat Spearman, the leading cosponsor of the ratification bill, opened the floor debate and quoted RBG's concluding paragraph from the *Harvard Women's Law Journal* above:

> With the Equal Rights Amendment, we may expect Congress and the State legislatures to undertake in earnest, systematically and pervasively, the law revision so long deferred. And in the event of legislative default, the courts will have an unassailable basis for applying the bedrock principle: All men and all women are created equal.[168]

In the same legislative session, the legislators who sponsored and defended the ERA also passed legislation guaranteeing reasonable accommodations for

163. 20 U.S.C. § 1681.

164. Jack Rosenthal, *President Vetoes Child Care Plan as Irresponsible: He Terms Bill Unworkable and Voices Fear It Would Weaken Role of Family*, N.Y. Times, Dec. 10, 1971, at 1.

165. Mink, *supra* note 137, at 411.

166. Ginsburg, *Equal Rights Amendment Is the Way*, *supra* note 8, at 23.

167. *Id.*

168. S. 2017-024, 79th Sess., at 5 (Nev. 2017) (statement of Sen. Pat Spearman).

pregnant workers[169] and nursing mothers,[170] as well as legislation protecting domestic violence victims from adverse employment actions.[171]

Shortly after *United States v. Virginia*, the Supreme Court's Fourteenth Amendment jurisprudence diminished Congress's power to legislate aggressively against some of the manifestations of women's unequal status. In *United States v. Morrison*, the Supreme Court held, over a four-Justice dissent joined by Justice Ginsburg, that Section 5 of the Fourteenth Amendment limited Congress's power to legislate remedies for sexual assault and other forms of gender-based violence.[172] *Morrison* relied on a long history of interpreting Section 5 of the Fourteenth Amendment narrowly since the *Civil Rights Cases* in 1883.[173] With the Fourteenth Amendment alone, the legitimacy of Congress's power to regulate the broad range of dynamics that abridge women's equal status would be in question. Because the ERA's framers explicitly referenced the need for equality-promoting legislation, the ERA would go beyond Fourteenth Amendment precedent to legitimize such legislation. Patsy Mink characterized the ERA as a reaction to the "lack of action by our executive, legislative, and judicial bodies to put into effect the equal rights safeguards already in the Constitution"; therefore, "[a]doption of the amendment would . . . leave us the formidable task of seeking extensive legislation and judicial actions."[174]

III. FURTHER LIMITS OF ADJUDICATING SOCIO-LEGAL CHANGE

A. A SILENCE OF EQUAL PROTECTION LAW: SESSIONS V. MORALES-SANTANA

Congress's power to legislate gender equality under the ERA is crucial in light of RBG's understanding that courts, as compared to legislatures, are constrained in their ability to deliver full equality. In *Sessions v. Morales-Santana*, the Supreme Court invalidated the different treatment of men and women under the Immigration and Nationality Act's provisions on the acquisition of U.S. citizenship for a child born abroad.[175] If the child was born to unmarried parents and the mother was a U.S. citizen, the statute required the mother to live continuously in the United States for one year before the child's birth for the child to obtain citizenship.[176] If the father was the U.S. citizen, he must have lived in the United States for at least ten years before the child's birth, at least five of which had to be after the age of fourteen, to pass on his citizenship to the child.[177] The case grew

169. S.B. 253, 2017 Leg., 79th Sess. (Nev. 2017).
170. Assemb. B. 113, 2017 Leg., 79th Sess. (Nev. 2017).
171. S.B. 361, 2017 Leg., 79th Sess. (Nev. 2017).
172. 529 U.S. 598, 617–27 (2000).
173. *See generally* The Civil Rights Cases, 109 U.S. 3 (1883).
174. 117 CONG. REC. 35,318 (1971).
175. 137 S. Ct. 1678, 1700–01 (2017). For an account of the remedy in this case, see Cary Franklin, *Biological Warfare: Constitutional Conflict Over "Inherent Differences" Between the Sexes*, 2017 SUP. CT. REV. 169, 202–04; and Kristin A. Collins, *Equality, Sovereignty, and the Family in* Morales-Santana, 131 HARV. L. REV. 170, 171, 176 (2017).
176. *Morales-Santana*, 137 S. Ct. at 1687 (citing 8 U.S.C. § 1401(a)(7)).
177. *Id.*

out of a deportation proceeding against a criminal defendant who claimed that he was a U.S. citizen despite being born abroad because his father, though unmarried to his mother, was a U.S. citizen.[178] Because the defendant's father had not met the statute's residency requirement, whether Morales-Santana was a U.S. citizen was in question, with direct implications for his deportability.

Justice Ginsburg, writing for the Supreme Court majority, held that the gender line Congress drew was incompatible with the Fifth Amendment's requirement that the government accord all persons "equal protection of the laws."[179] The Court concluded that gender-differentiated treatment in the statute was based on "overbroad generalizations about the way men and women are"[180] and could not be sustained under *United States v. Virginia*.[181] At the same time, the Court refrained from thus concluding that Morales-Santana was a U.S. citizen, as he would have been under the statute if the parent with U.S. citizenship had been his mother rather than his father.[182] Justice Ginsburg acknowledged that, although "the equal protection infirmity" in treating unwed fathers and mothers differently was "clear, this Court is not equipped to grant the relief Morales-Santana seeks."[183] The Court could not extend to his father, and derivatively to him, the benefit that an unwed mother enjoyed.

The Court could invalidate unequal treatment; but it was not free to make the policy choice between two radically different ways of treating men and women equally. Ending unequal treatment could mean requiring the longer physical-presence requirement for unwed mothers to make them equal to unwed fathers or shortening the physical presence requirement for unwed fathers to make them equal to unwed mothers. Quoting precedent, Justice Ginsburg wrote, "How equality is accomplished . . . is a matter on which the Constitution is silent."[184] Furthermore, how equality was accomplished was a matter for Congress rather than the Court, and in this case, the Court's job was to guess, based on available legislative evidence, the path to equality that Congress would likely choose.

Congress's role in making a policy decision to extend, rather than to extinguish, a benefit enjoyed by one gender to achieve equal treatment was a subject of ERA discussion, both in congressional debates as well as in RBG's scholarly writings. One of the most contentious questions about the ERA was whether it would require women to be drafted, just like men.[185] It was related to the question of protective labor legislation for women only. If there were laws that protected women from overtime work, for instance, would women lose such protections

178. *Id.*
179. *Id.* at 1689.
180. *Id.*
181. 518 U.S. 515 (1996).
182. *Morales-Santana*, 137 S. Ct. at 1701.
183. *Id.* at 1698.
184. *Id.* at 1698 (alteration in original) (quoting Levin v. Com. Energy, Inc., 560 U.S. 413, 426–27 (2010)).
185. *See* 117 CONG. REC. 35,296 (1971) (statement of Martha Griffiths).

under the ERA or would men gain them?[186] Patsy Mink, along with Shirley Chisholm, the first African-American woman elected to Congress,[187] at various moments advanced the view that the ERA would require leveling up.[188] Women were exempt from compulsory military service; extending that exemption to men would mean eliminating the draft and moving toward the policy of relying on volunteer-only military service.[189] If women were protected from certain forms of overwork, men, too, would get those protections under the ERA.[190] Martha Griffiths, the primary sponsor of the ERA in the House, argued that it would be Congress, rather than the courts, that would decide how to replace laws that discriminated on the basis of sex while acting to repeal them.[191] Legislatures, rather than courts, could thoughtfully redesign policy, taking many competing priorities into account, beyond the interests of parties to a litigation. If real equality requires thoughtful and data-driven public policy that is responsive to the needs of many, courts are ill-equipped for the systematic revision of the law that the ERA intended to bring about.

It is worth taking a moment to consider seriously how RBG's account of Section 3 of the ERA, which created a two-year delay between the ERA's ratification and legal effect, would have worked and what difference it might have made to the statute at issue in *Morales-Santana*. Congress and state legislatures would use the time—before the ERA could be enforced in courts—to review all the laws on the books that might deny or abridge equal rights on account of sex. Indeed, RBG herself had compiled these laws into a volume titled *Sex Bias in the U.S. Code* in 1977 for the U.S. Commission on Civil Rights.[192] The Introduction to that compilation noted that Congresswoman Martha Griffiths, the ERA's chief sponsor, called for every standing committee of Congress to examine the laws in force within their respective jurisdictions for their effects on women.[193] Studying

186. For decades, social reformers and labor unions had opposed the ERA out of fear that it would erode labor protections for women. That fear was expressed by union leader Myra Wolfgang even in the 1970 hearings. *See Equal Rights 1970 Senate Hearings*, *supra* note 78, at 31 (statement of Myra Wolfgang).

187. Jennifer Steinhauer, *2019 Belongs to Shirley Chisholm*, N.Y. TIMES (July 6, 2019), https://www.nytimes.com/2019/07/06/sunday-review/shirley-chisholm-monument-film.html.

188. 116 CONG. REC. 28,028–29 (1970). Initially, Mink argued that the ERA should specifically state that any rights, benefits, or privileges conferred on one sex should be construed to apply to both sexes equally. However, she later voted for the ERA without such clarifying language, trusting that legislative history would make the framers' intentions clear.

189. *See* Wu, *supra* note 133, at 327.

190. *See* 116 CONG. REC. 28,029 (1970).

191. *1971 House Judiciary Committee ERA Hearings*, *supra* note 70, at 51 (statement of Martha Griffiths) ("[E]ven if the 14th amendment is determined to apply at last to women, I still think it would be a good idea to pass this amendment because you will have to go time and time and time again to the Supreme Court to make that 14th amendment really function where women are concerned. But if you pass this amendment, you are going to have every legislature in this country looking at their own laws to determine how they distinguish between men and women, and you will have this body doing something about it and it should do something about it.").

192. *See* U.S. COMM'N ON C.R., SEX BIAS IN THE U.S. CODE: A REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS, at iii (1977).

193. *See id*. at 7.

the laws' operation through this lens, legislators would have to assess whether they abridged equal rights, including whether sex inequality would be exacerbated by the law's repeal. With legislative power at its disposal, a legislature could then replace the repealed law with one respectful of equal rights, in consideration of the resources available and competing policy priorities. If a ratified ERA had triggered a legislative process of systematic review, repeal, and replacement of the laws that abridged equal rights on account of sex, judicial review would likely operate differently in enforcing the ERA as compared to equal protection. RBG had suggested that judges should only act in the event of legislative default.[194] Although she did not spell out what that meant, a reasonable approach would be for courts to defer to Congress's judgments as to whether an existing law was worth repealing because of its sex-discriminatory effects as well as to Congress's policy choices with regard to replacing any laws rendered obsolete by the ERA. What might emerge from the ERA is a more collaborative dialogue between Congress and the Supreme Court over the meaning of sex equality and what it requires.

B. RBG'S DIALOGUE WITH CONGRESS

Justice Ginsburg's dissenting opinions in statutory sex discrimination cases reveal her efforts at a dialogue with Congress. In 2007, Justice Ginsburg read her dissent in *Ledbetter v. Goodyear Tire & Rubber Co.* from the bench.[195] In a 5–4 decision, the Supreme Court rejected a female retiree's Title VII and Equal Pay Act claims on the grounds that they were time-barred.[196] She alleged pay discrimination over the course of an entire career, but the Supreme Court held that only the allegedly discriminatory paychecks within 180 days of her filing at the EEOC were timely.[197] Justice Ginsburg viewed the Court's interpretation of Title VII as straying far away from fidelity to the statute's core purpose: "This is not the first time the Court has ordered a cramped interpretation of Title VII, incompatible with the statute's broad remedial purpose. Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII."[198] Congress listened, and in 2009, passed the Lilly Ledbetter Fair Pay Act, overruling the Supreme Court majority and establishing that every discriminatory paycheck can keep the claims of past violations timely.[199]

In 2009, Justice Ginsburg dissented in yet another sex discrimination case, this one involving pregnancy discrimination. Again, she criticized her colleagues' highly constrained interpretation of Congress's intent in adopting the Pregnancy Discrimination Act of 1978 (PDA).[200] In *AT&T Corp. v. Hulteen*, female employees

194. Ginsburg, *Equal Rights Amendment Is the Way*, *supra* note 8, at 25.

195. *See* Linda Greenhouse, *In Dissent, Ginsburg Finds Her Voice at Supreme Court*, N.Y. TIMES (May 31, 2007), https://www.nytimes.com/2007/05/31/world/americas/31iht-court.4.5946972.html.

196. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 632 (2007).

197. *Id.* at 628.

198. *Id.* at 661 (Ginsburg, J., dissenting) (citations omitted).

199. Pub. L. No. 111-2, 123 Stat. 5.

200. Pub. L. No. 95-555, 92 Stat. 2076.

challenged their employer's retirement credit policies, adopted before the PDA, which awarded fewer pension credits for pregnancy leave than for medical leave generally.[201] Although the employer equalized the pension credits between pregnancy and disability leave following the enactment of the PDA, the female employees argued that the employer's failure to correct the credits awarded under the old pre-PDA formula for the purposes of pension payments years later violated the statute.[202] The Court allowed the old, pre-PDA formula to be used, finding no PDA violation and viewing it as a bona fide seniority system under Title VII.[203] Justice Ginsburg noted:

> [The PDA] does not oblige employers to make women whole for the compensation denied them when, prior to the Act, they were placed on pregnancy leave, often while still ready, willing, and able to work, and with no secure right to return to their jobs after childbirth. But the PDA does protect women, from and after April 1979, when the Act became fully effective, against repetition or continuation of pregnancy-based disadvantageous treatment.[204]

Justice Ginsburg's dissent focused on the Supreme Court's prior insistence that pregnancy discrimination was not sex discrimination in *Gilbert* while "disregarding the opinions of other courts [and] of the agency that superintends enforcement of Title VII."[205] Eventually Congress recognized that pregnancy was the root cause of discrimination against women in the paid labor force.[206] There was a certain outlandishness to the Court's insistence—despite other institutional voices to the contrary—that pregnancy discrimination was distinct from sex discrimination. Perhaps it revealed the limits of the legal reasoning at which courts excel, as compared to the political branches. Justice Ginsburg quoted a district court judge in a pregnancy discrimination case from 1974:

> [I]t might appear to the lay mind that we are treading on the brink of a precipice of absurdity. Perhaps the admonition of Professor Thomas Reed Powell to his law students is apt; "If you can think of something which is inextricably related to some other thing and not think of the other thing, you have a legal mind."[207]

For Justice Ginsburg, the majority of the Justices in *Hulteen* "erred egregiously," while Congress "made plain its view" that it "intended no continuing reduction of women's compensation, pension benefits included, attributable to

201. 556 U.S. 701, 704 (2009).
202. *Id.* at 705–07.
203. *Id.*
204. *Id.* at 719 (Ginsburg, J., dissenting) (footnote omitted).
205. *Id.* at 723.
206. *Id.* at 719.
207. *Id.* at 727 (alteration in original) (quoting Wetzel v. Liberty Mut. Ins. Co., 372 F. Supp. 1146, 1157 (W.D. Pa. 1974), *aff'd*, 511 F.2d 199 (3d Cir. 1975), *vacated and remanded*, 424 U.S. 737 (1976)).

their placement on pregnancy leave."[208] She wrote the *Ledbetter* and *Hulteen* dissents during the time when she was the only woman on the Supreme Court, when it appeared that her colleagues on the Court could not see the dynamics of gender inequality that were more visible to Congress—a political and democratically elected branch.

RBG appreciated the comparative institutional competence of legislatures versus courts in implementing the socio-legal changes that came along with fully integrating women in citizenship and power. From her ERA scholarship in 1978 to her judicial opinions and writings forty years later, her belief in the limited ability of courts to order social change is clear.[209] While she criticized the Supreme Court's decisions on pregnancy, it was surely not lost on her that those cases involved benefits schemes, about which Justices expressed reluctance to rewrite policies in a manner that would increase expenditures of public resources—a function more suited to the legislature.[210] Just before she was nominated to the Supreme Court, RBG publicly criticized *Roe v. Wade* for rewriting policy, beyond merely invalidating one abortion law. *Roe* endeavored "to fashion a regime blanketing the subject, a set of rules that displaced virtually every state law."[211] The *Roe* Court "invited no dialogue with legislators," and "seemed entirely to remove the ball from the legislators' court." [212] RBG believed that *Roe* halted state legislatures' marked trend toward the liberalization of abortion statutes, and incited a backlash in the form of a successful right-to-life movement. A more restrained judicial role, she suggested, might have resulted in state legislative action with greater long-term stability in legitimizing access to abortion.[213]

Her cautionary criticism of *Roe* points to the possibility of courts nudging Congress and state legislatures, without displacing their norm-implementing role. In this vein, the Supreme Court has recently declined to resolve the ERA's most hotly contested issue, denying a cert petition challenging the Military Selective Service Act's male-only draft registration requirement, suggesting that it is for Congress, not the Court, to specify how the genders should be treated equally.[214] As the parties challenging the law acknowledged, gender-equal treatment can mean requiring everyone to register regardless of gender, abolishing the draft registration requirement altogether, or replacing the draft registration requirement

208. *Id.* at 723.

209. *See* Ruth Bader Ginsburg, Address, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301, 301, 303 (1979) (recognizing difficulties courts face in ordering inclusion of persons left out by a legislature, due to courts' lack of power over the purse).

210. *See* Geduldig v. Aiello, 417 U.S. 484, 494 n.18, 495–96 (1974) (noting the increased cost of covering normal pregnancy, deferring to the state's policy judgment, and that the "courts will not interpose their judgment" on these resource-allocation decisions).

211. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199 (1992).

212. *Id.* at 1205.

213. *See id.* at 1186, 1191.

214. *See* Nat'l Coal. for Men v. Selective Serv. Sys., 141 S. Ct. 1815 (2021) (Sotomayor, J., respecting the denial of certiorari) (acknowledging the "deference to Congress on matters of national defense and military affairs . . . while Congress actively weighs the issue").

with a nonmilitary and nondiscriminatory national service scheme.[215] Congress has wide latitude, whereas the Court's role would be limited to striking down a gender-unequal scheme without replacing it with a regime of gender equality.

Furthermore, in the twenty-first century, the public meaning of the phrase "on account of sex" has evolved since the ERA's introduction and adoption. When the ERA was adopted by Congress in 1972, the abridgment of equal rights on account of sex was mostly understood to mean discrimination against women in favor of men.[216]A generation later, as the legislative debates in the Nevada and Virginia ratifications make clear, discrimination against LGBTQ and gender nonconforming people is understood to be a form of sex discrimination.[217] However, as the economic disadvantages faced by working mothers differ from homophobia and the forms of exclusion experienced by trans people, a range of policies sensitive to the complex and evolving dynamics of inequality is required to implement equal rights for all genders. That, too, is more suited to legislatures rather than courts. Courts could pull the brakes on discriminatory laws, but the equality of women and disfavored sexual minorities would require further interventions that only a lawmaking body could deliver.

IV. CONGRESS'S LEGITIMIZING ROLE IN THE AMENDMENT PROCESS

A. RBG ON THE 1978 ERA DEADLINE EXTENSION

RBG's appreciation of Congress as the primary guardian of the ERA's *substance* in her 1970s scholarly writings was also reflected in her vision of Congress's role in the *process* of making the ERA part of the Constitution. Her heightened concern for the process by which the ERA became part of the Constitution explains her most recent remarks in 2020 favoring "a new beginning" for the ERA. These remarks should be read in the context of her more thoroughly reasoned account of the Article V amendment process in her written and oral testimony before the House and Senate Judiciary Committees in 1977 and 1978, supporting the extension of the ERA's ratification deadline.[218] In those hearings, she argued that Congress had the authority to extend the ratification

215. *See* Petition for a Writ of Certiorari at 36–37, *Nat'l Coal. for Men*, 141 S. Ct. 1815 (No. 20-928).

216. *See* SUK, *supra* note 6, at 57–82.

217. *See id.* at chs. 10, 12; *see also id.* at 161–62 (describing efforts like those led by Danica Roem, "Virginia's first transgender delegate," to recognize "the equal rights of all sexes and genders, beyond male and female"). The Supreme Court affirmed this meaning of discrimination because of "sex" in Title VII in Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020).

218. *See Equal Rights Amendment Extension: Hearings on H.R.J. Res. 638 Before the Subcomm. on Civ. & Const. Rts. of the H. Comm. on the Judiciary*, 95th Cong. 121–30 (1978) [hereinafter *Equal Rights Amendment Extension House Hearings*] (testimony of RBG); *Equal Rights Amendment Extension Senate Hearings*, *supra* note 18, at 262–71. RBG testified in support of congressional action to extend the ratification deadline, as did constitutional law experts Professor Thomas I. Emerson of Yale Law School, Professor Laurence H. Tribe of Harvard Law School, and Professor Jules Gerard of the Washington University in St. Louis Law School. *See Equal Rights Amendment Extension Senate Hearings*, *supra* note 18, at 114, 144, 238. Patricia Wald, who went on to be RBG's judicial colleague on the D.C. Circuit, also testified in favor of the deadline extension in her capacity as an Assistant Attorney General in the Justice Department. *Id.* at 54. Former Harvard Law School Dean and Solicitor General Erwin Griswold testified against the deadline extension. *Equal Rights Amendment Extension House Hearings*, *supra*, at 108. Griswold is familiar to the fans of Notorious RBG and the biopic On the

deadline and to reject states' efforts to rescind.[219] But she did not argue that Congress was legally required by Article V to act one way or another on these political questions. Although RBG's 1970s scholarly publications and congressional testimonies on the ERA deadline are seldom read or quoted today, they represent her last work as a publicly engaged scholar before she became a judge on the D. C. Circuit and reflect her efforts to balance procedural fairness with substantive equality in a constitutional democracy.

This synthesis is directly relevant to the forward trajectory of the ERA. The question of whether the ERA ratification deadline *can* be changed by Congress as a legal matter is distinct from the question of whether the ERA ratification deadline *should* be changed by Congress as a political or moral matter. Though RBG did not articulate a position on whether the ERA *must* start over, or whether the Constitution *permits* late ratifications or rescissions *as a matter of law*, RBG did make public extemporaneous remarks that she would "*like* to see a new beginning" for the ERA and she questioned: "If you count a latecomer on the plus side, how can you disregard states that said, 'We've changed our minds'?"[220] At that moment, states filed federal lawsuits in Alabama[221] and D.C.[222] raising precisely those legal questions, so a seasoned and cautious judge like RBG could not possibly be offering her legal opinion in a public speech, on pending litigation initiated with the intention of eventually landing in the Supreme Court. Thus, her remarks must be understood as the expression of her personal wishes for how history might unfold, having been asked for a "prognosis,"[223] rather than a reasoned legal opinion. Her personal preference for a "new beginning" is consistent with the reasoned legal position she advanced in a 1979 *Texas Law Review* article that built on her 1977 and 1978 ERA deadline testimonies: She proffered that Congress had the constitutional authority to reasonably set and revisit ratification timelines as part of its Article V power to "propose amendments."[224] Congress, she urged, was also the body best positioned to determine whether rescissions should be effective, with an eye to establishing the ERA's procedural legitimacy.[225]

Basis of Sex as the law dean who asked all the women in RBG's law school class to justify their taking the law school spots of men. *See* CARMON & KNIZHNIK, *supra* note 13, at 34.

219. *See Equal Rights Amendment Extension House Hearings*, *supra* note 218, at 128; *Equal Rights Amendment Extension Senate Hearings*, *supra* note 18, at 265, 267–68.

220. Searching for Equality, *supra* note 12 (emphasis added).

221. Alabama and Louisiana—two unratified states—and South Dakota, a rescinding state, sued the National Archivist in anticipation of Virginia's ratification of the ERA, seeking a judicial declaration that the ERA had expired. Complaint, *supra* note 55. After Virginia, Nevada, and Illinois brought suit in D.C. district court, Alabama, Louisiana, and South Dakota voluntarily dismissed their action in Alabama, and moved to intervene in the D.C. litigation. *See* Joint Stipulation & Plaintiffs' Notice of Voluntary Dismissal, State v. Ferriero, No. 7:19-cv-02032-LSC (N.D. Ala. Feb. 27, 2020); Partially Opposed Motion to Intervene and Supporting Statement of Points and Authorities, *supra* note 55.

222. *See* Complaint, *supra* note 32.

223. Searching for Equality, *supra* note 12.

224. Ginsburg, *Ratification of the Equal Rights Amendment*, *supra* note 10, at 929.

225. *See id*. at 941.

B. "THE IDEA GENERATES FEARS": THE CASE FOR MORE TIME

In her careful reading of the history of constitutional amendments, RBG suggested that seven-year ratification windows may be inappropriate for amendments proposing human rights guarantees involving significant social transformations.[226] Prior rights amendments were added to the Constitution as a consequence of violent revolution and war. The Bill of Rights grew out of the American Revolution, and the Thirteenth, Fourteenth, and Fifteenth Amendments grew out of the Civil War. Without waging a violent armed conflict, the drive for women's right to vote took much longer, having been launched in 1848 and succeeding with the Nineteenth Amendment's ratification some seventy-two years later.[227] In addition, unlike the rights protections that emerged from violent revolution and war, the Nineteenth Amendment succeeded only after its goals were already partially met, as a significant number of states had already extended the right to vote to women.

The women's suffrage amendment took generations of local campaigns to succeed. Placing the ERA within this historical context, RBG noted that, although the ERA was first introduced in 1923, it was not even taken seriously for several decades, because "[t]he idea generates fears and attracts resistance of a kind that the vote for eighteen-year-olds and proposals concerning the structure and powers of government do not encounter."[228] No amendment that had successfully been added to the Constitution had taken more than four years to ratify after congressional proposal, but perhaps short time frames skewed constitutional amendments away from transformative human rights provisions, she suggested. [229]

How much time is reasonable? Relying on the Supreme Court's decision in *Coleman v. Miller*, RBG argued that "Congress is uniquely equipped to decide the timeliness question," because ultimately, it required political, rather than legal, judgments.[230] The determination of how much time the states should take to ratify an amendment and therefore legitimize its place in the Constitution, *Coleman v. Miller* acknowledged, required "full knowledge and appreciation . . . of the political, social and economic conditions which have prevailed during the period since the submission of the amendment."[231] Furthermore, fundamental human rights guarantees like the ERA tended, in RBG's view, to generate confusion, misunderstanding, and contestation, which Congress should take into account in setting a ratification timeline.[232] RBG acknowledged that "[o]ur grandest constitutional guarantees, like the ERA, would make soft targets for fear campaigns, because they are stated at the level of majestic generality."[233] Because of this problem, it made sense for Congress to propose an amendment with an

226. *Id.* at 922.
227. *Id.*
228. *Id.* (footnote omitted).
229. *Id.* at 221–22 ("Acceptance of a broad human rights norm that breaks with tradition takes time to achieve.").
230. *Id.* at 924.
231. *Id.* (quoting Coleman v. Miller, 307 U.S. 433, 454 (1939)).
232. *Id.* at 932–33.
233. *Id.* at 933.

"initial judgment" as to the ratification timeline, acknowledging the possibility of miscalculation and retaining the option of revisiting and extending the timeline, informed by the initial experience of the ratification debates.[234] A key question for Congress to consider, in deciding whether to change its initial judgment about the ratification timeline, was whether the time that had elapsed had allowed for full and fair debate to address the complex issues raised by the amendment proposal.

RBG parsed both the text of Article V as well as the text of the ERA resolution to show how Congress had proceeded in this way with regard to the ERA. As Virginia, Nevada, and Illinois have argued in litigation, Article V is silent about timelines for ratification.[235] While they argue that this silence precludes Congress from imposing ratification deadlines that would bind the states, RBG read this silence through the lens of Article V's delegation of the power to "propose" amendments to Congress. Congress elected to impose seven-year deadlines on state ratification of the Eighteenth, Twentieth, Twenty-First, Twenty-Second, Twenty-Third, Twenty-Fourth, Twenty-Fifth, and Twenty-Sixth Amendments, and RBG posited that Congress's power to "propose" amendments under Article V gave it plenary power to regulate the amendment process. She described the ratification deadline as a "casual, procedural measure," the functional equivalent of a legislative measure imposing a statute of limitations.[236]

Unlike the deadlines Congress imposed on the ratification of constitutional amendments in the first half of the twentieth century, the ERA deadline could be revisited and extended. RBG was one of several witnesses that supported this argument as a textual matter during the 1977 and 1978 congressional hearings on the ERA deadline extension. The first constitutional amendment that Congress proposed with a ratification deadline was the Eighteenth—prohibiting the sale and manufacture of alcoholic beverages.[237] The deadline was inserted into the text of the constitutional amendment itself; Section 3 of the Eighteenth Amendment provides, "This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."[238]

The same language, "inoperative unless" ratified within seven years, was inserted into the text of the Twentieth, Twenty-First, and Twenty-Second Amendments.[239] RBG pointed out, as did a few other witnesses during the ERA extension hearings, that Congress changed its practice with regard to the seven-

234. *See Equal Rights Amendment Extension Senate Hearings*, *supra* note 18, at 268.

235. *See* Complaint, *supra* note 32, at 13–14.

236. *Equal Rights Amendment Extension Senate Hearings*, *supra* note 18, at 266.

237. The deadline was introduced by then-Senator Warren Harding of Ohio, as a subtle attempt to derail the Prohibition Amendment. For an account of the Prohibition deadline's origins, see David E. Kyvig, *Historical Misunderstandings and the Defeat of the Equal Rights Amendment*, PUB. HISTORIAN, Winter 1996, at 45, 55–56.

238. U.S. CONST. amend. XVIII, § 3 (repealed 1933).

239. U.S. CONST. amend. XX, § 6; *id*. amend. XXI, § 3; *id*. amend. XXII, § 2.

year deadline beginning with the Twenty-Third Amendment, which provided for the representation of non-state districts (such as the District of Columbia) by electors in presidential elections.[240] When Congress proposed that Amendment, it responded to concerns that seven-year deadlines would "clutter up" the text of the Constitution, by placing the ratification time limit in the resolution proposing the Amendment rather than in the Amendment text.[241] Therefore, it was not part of the Amendment that was ratified, and thus would not be subject to the procedural requirements for proposing a constitutional amendment under Article V if a change in deadline were to be proposed.

Nonetheless, Congress used similarly conditional language in the resolutions introducing the Twenty-Third and Twenty-Fourth Amendments. Those resolutions provided that the Amendments would be valid "only if" ratified within seven years.[242] Congress changed the language of the deadline clause in the resolutions introducing the Twenty-Fifth and Twenty-Sixth Amendments, which adopted the same language used in the 1972 resolution adopted to propose the ERA. These resolutions stipulated that the proposed Amendment would be effective "when ratified" by three-fourths of the states within seven years,[243] not "only if." "When ratified" meant that if the Amendment were ratified within that time frame, Congress was agreeing in advance that the Amendment would be valid. But if the Amendment were not ratified, the consequence had not been spelled out. RBG read this language as Congress reserving its authority to revisit the issue of timeliness in the event that the Amendment took longer than seven years to ratify. She invoked the well-established "general rule that extensions [of] statutes of limitation may be directed by the legislature."[244]

Coleman v. Miller explained why, as a normative matter, Congress is best placed to judge the timeliness of an amendment.[245] It was a political judgment about the political, social, and economic conditions pertinent to whether the amendment was necessary.[246] Indeed, with regard to Congress's Article V power to propose amendments that it deems "necessary," the Supreme Court already held that the necessity of an amendment was a purely political question for

240. U.S. CONST. amend. XXIII.

241. *Equal Rights Amendment Extension House Hearings*, *supra* note 218, at 42, 247. The text and history of the seven-year deadlines in the Twentieth, Twenty-Second, and Twenty-Third Amendments are discussed in an Office of Legal Counsel memo that was submitted during the House Judiciary Subcommittee on Civil and Constitutional Rights's deadline extension hearings in 1977. *See id.* at 11 (reprinting Memorandum from John M. Harmon, Assistant Att'y Gen., DOJ, to Robert J. Lipshultz, Couns. to the President (Oct. 31, 1977)).

242. *Id.* at 12.

243. *Id.*

244. *Id.* at 129 (statement of RBG).

245. 307 U.S. 433, 454 (1939).

246. *Id.*

Congress, not subject to judicial scrutiny or review.[247] Legislators elected by the people, rather than judges appointed for life, were likely to be more in touch with the lived political, social, and economic conditions experienced by their constituents.

In her statements to the House and Senate Judiciary Subcommittees in 1977 and 1978, RBG described Congress as the "director of the amendment process" under our constitutional scheme.[248] Thus, Congress was free to take a range of approaches to any time limits for ratification, which was "the functional equivalent of a statute of limitations associated with a legislative measure," an "incidental, procedural facet of the amendment process."[249] Congress could choose to have no time limit whatsoever, or specify a tight time frame, such as seven years expressed in the amendment text itself. The middle course, according to RBG, was to approach time limits as "a procedural facet of the amendment process."[250] By phrasing it in tentative language, "when ratified," Congress expressed an "initial judgement as to time."[251]

But putting that judgment into the resolution rather than into the amendment text, in light of the option to choose the latter, indicated an intent to separate that initial judgment from the text submitted to the states for ratification, so that Congress could retain its authority to extend the time period, "should 'the public interests' and 'relevant conditions' so warrant."[252] In RBG's view, Congress was wise to extend the deadline in 1978 because "[t]he debate on the equal rights amendment, far more complex than those attending other recent amendments, has not run its course and should be allowed to continue."[253] Finally, RBG also argued that it would be up to Congress after the thirty-eighth state ratification to decide, in its political discretion, whether to count the rescinding states as ratified states.[254] The question was premature until then, when only Congress could decide, as it had with the Fourteenth Amendment. As RBG noted, "An informed judgment cannot be made by crystal ball, but only by focusing on the precise situation existing when the ratification process is completed."[255]

Consider Justice Ginsburg's spontaneous 2020 remarks in the context of her account of Congress's role: "[i]f you count a latecomer on the plus side, how can you disregard states that said, 'We've changed our minds'?" and "[t]here's too much controversy about a latecomer [like] Virginia ratifying long after the deadline passed."[256] These are political controversies that Congress must resolve, not courts. Congress may have reasons to make a different determination in 2022

247. Laurence Tribe cautioned against judicial supervision of Article V, because amendments are independent from normal legal processes. *See* Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 444 (1983).

248. *Equal Rights Amendment Extension Senate Hearings*, *supra* note 18, at 265.

249. *Id.* at 268.

250. *Id.*

251. *Id.*

252. *Equal Rights Amendment Extension House Hearings*, *supra* note 218, at 128.

253. *Id.* at 129.

254. *See* Ginsburg, *Ratification of the Equal Rights Amendment*, *supra* note 10, at 941.

255. *Equal Rights Amendment Extension Senate Hearings*, *supra* note 18, at 271.

256. Searching for Equality, *supra* note 12.

than it might have made at earlier historical moments about whether more time for debate about the ERA was needed, or whether it is fair to ignore states' wishes to withdraw their approvals. Congress may also develop more thorough understandings, with historical hindsight, of both the substantive need for the ERA, and the procedural barriers that prevented its full and proper consideration within the original time limit in the past. Congress's political assessment of the political pros and cons of starting anew may be different from Justice Ginsburg's hope for a brand-new ERA. But RBG believed, from the 1970s to 2020, that Congress, not the judiciary, was the primary driver of constitutional equality and the director of the amendment process.

V. THE SPECIAL PROCEDURAL CHALLENGES OF CONSTITUTIONAL INCLUSION

A. THE DIFFICULTY OF AMENDMENT UNDER ARTICLE V

RBG's thinking about the ERA deadline extension also shed light on the special challenges facing amendments related to significant social change. Indeed, the U.S. Constitution has not been amended since 1992. In fact, the Amendment that was ratified in 1992 was adopted by two-thirds of both houses of Congress in 1789. It was written by Founding Father James Madison and proposed to the states with the original Bill of Rights.[257] When ratifications by thirty-eight states, accumulated over 203 years, were completed, each chamber of Congress passed a concurrent resolution affirming the Twenty-Seventh Amendment (prohibiting Congress from giving itself a raise before an election cycle has run its course).[258]

The lack of amendments in nearly three decades may speak more to Article V's obsolescence than it does to the Constitution's perfection or suitability to twenty-first century conditions.[259] The last time both houses of Congress voted by a two-thirds majority to adopt a constitutional amendment was in 1978, when it sent the D.C. voting rights amendment to the states for ratification.[260] That amendment would have provided the District of Columbia with the same representation in Congress that it would have had if it were a state—one representative and two Senators.[261] Adopted by Congress in August 1978, between the House and Senate votes to extend the deadline on ERA ratification in 1978, Congress placed the seven-year ratification deadline in the text of the proposed D.C. amendment itself,[262] rather than in the resolution introducing the amendment, as it had done with the ERA and the Twenty-Fifth and Twenty-Sixth Amendments. Section 4 of the D.C. voting rights amendment mirrored the conditional language of the deadline in the Eighteenth, Twentieth, Twenty-First, and Twenty-Second

257. *See Madison Amendment Surprises Lawmakers*, 48 CONG. Q. ALMANAC 58, 58–59 (1992).

258. *See* 138 CONG. REC. 11,869 (1992) (Senate); 138 CONG. REC. 12,052 (1992) (House).

259. *See* Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029, 1031–32, 1073 (2014).

260. Proposing an Amendment to the Constitution to Provide for Representation of the District of Columbia in Congress, H.R.J. Res. 554, 95th Cong., 92 Stat. 3795 (1978).

261. *Id.* § 1.

262. *Id.* § 4.

Amendments, reading, "[t]his article shall be inoperative, unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission."[263]

RBG, testifying in ERA deadline hearings in the Senate Judiciary Committee just three weeks before the Senate's vote on the D.C. amendment, had argued that the different language used for the ERA deadline language, "valid 'when ratified . . . within seven years,'" reserved Congress's power to change it.[264] This contrast supported RBG's view that the ERA deadline could be changed by Congress, whereas the strong language placed in the text of an amendment could not be. Because only sixteen states ratified the D.C. voting rights amendment by August 1985,[265] it, too, was presumed dead. But Congress's choice of the within-amendment conditional deadline language for the only amendment it adopted after adopting the ERA affirms RBG's understanding, that different language gives rise to different legal consequences for the possibility of changing the deadline. The text of the D.C. amendment supports RBG's Article V theory, that Congress chose language in the ERA deadline that retained the power of a future Congress to revisit and change the deadline.

B. LESSONS FROM THE NINETEENTH AMENDMENT

The political process by which three additional states ratified the 1970s ERA decades after the deadline should be understood as a different kind of new beginning for the ERA, one that responds pragmatically to the exclusionary barriers Article V imposes, by design, on any constitutional amendments to empower the disempowered. This new beginning renews the work of past generations without discarding the necessary political power that past generations accumulated incrementally under conditions of second-class citizenship. For people who have had to participate in our constitutional democracy without fully equal rights, building the consensus necessary to change the constitution *asynchronously* across generations has been the only plausible path. The women constitution makers who laid the groundwork for the ERA did not live to see the ERA ratified by thirty-eight states.[266] One explanation for why it took so long is that the very problem that the ERA was designed to correct—the long and unfortunate history of women's second-class citizenship thoroughly chronicled in RBG's *Reed v. Reed* brief—was made difficult to correct through the procedures specified by Article V. [267] The long history of the Nineteenth Amendment, the first step toward correcting women's second-class status as citizens, illustrates this as well.

Article V requires the mobilization of large supermajorities of Congress (two-thirds of both houses) and the state legislatures (three-fourths)—a far greater consensus than that required to amend most state constitutions and constitutions

263. *Id.*

264. *See Equal Rights Amendment Extension Senate Hearings*, *supra* note 18, at 268.

265. *See* Jessie Kratz, *Unratified Amendments: DC Voting Rights*, NAT'L ARCHIVES: PIECES OF HIST. (June 17, 2020), https://prologue.blogs.archives.gov/2020/06/17/unratified-amendments-dc-voting-rights/ [https://perma.cc/525S-DNH8].

266. *See generally* SUK, *supra* note 6, at 2–3 (describing the century-long ongoing effort across generations to enshrine the ERA in the U.S. Constitution).

267. Brief for Appellant, *supra* note 64.

around the world.[268] Article V entrusts amendments to Congress and the states, rather than to "We the People."[269] The people who are excluded from voting for representatives have no say in the amendment process. Therefore, any amendment seeking to end the disfranchisement of such people is subject to the power and generosity of the people who are already rightsholders, and who may benefit from the continued exclusion of others. Given Article V's design, it is not surprising that the constitutional amendments that sought to overcome past exclusions of African-Americans and women, and to integrate them into the equal rights of citizenship, have faced real difficulties meeting the requirements of Article V. The Thirteenth, Fourteenth, and Fifteenth Amendments required a civil war, and many commentators have suggested that these Amendments did not clearly meet the requirements of Article V.[270] Indeed, any understanding of the Fourteenth Amendment as an Article V amendment must assume that Article V authorizes Congress to disregard ratifying states' subsequent efforts to rescind their ratifications.[271] Without such flexible readings of Article V, in the direction of making it easier rather than harder to amend the Constitution to include the disempowered, it is hard to consider the constitutional amendments that have included African-Americans in full citizenship as Article V amendments.

The Nineteenth Amendment met the requirements of Article V with congressional adoption in 1919 and ratification by three-fourths of the states by 1920.[272]

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268. *See* RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS 96 (2019) (noting that comparative constitutional scholars identify the U.S. Constitution as the world's most difficult to amend). As for state constitutions, the New York state constitution, for instance, requires identical versions of a proposed constitutional amendment to be passed by a majority of each house in two consecutive legislative sessions before it is placed on the ballot for a statewide referendum. When a majority of voters approve, it becomes an amendment. N.Y. CONST. art. XIX, § 1. Although this procedure is fairly common, some states require the legislature to vote by three-fifths supermajority only once before the measure goes on the ballot for a voter referendum. In some states, the voters must vote by a three-fifths supermajority to approve an amendment. Forty-nine states reserve some role for voters in the amendment process, and some states provide a procedural option for voters to propose amendments through ballot initiatives. *See* Jennie Drage Bowser, *Constitutions: Amend with Care*, STATE LEGISLATURES, Sept. 2015, at 14, 16.

269. Article V names four paths to amendment. A proposal by Congress, a two-thirds vote in both houses, ratification by three-fourths of the state legislatures, or by state ratifying conventions in three-fourths of the states. All the amendments, except the Twenty-First Amendment, have followed the first path, with the Twenty-First Amendment being the sole amendment that has been ratified by ratifying conventions. *See* KENNETH D. ROSE, AMERICAN WOMEN AND THE REPEAL OF PROHIBITION 1 (1996). Article V also allows for amendments to be proposed by a convention formed by Congress upon petition by two-thirds of the state legislatures. Such amendments also then have to be ratified either by state legislatures or by state ratifying conventions, the mode being determined by Congress. Amendments that alter the representation of the states in the Senate must be approved by every state whose representation is reduced. In addition, the slave trade was made unamendable until 1808. *See* U.S. CONST. art. V.

270. *See, e.g.*, 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 110–13 (1998); David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2347–51 (2021); John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 456–57 (2001). Others suggest that constitutional amendment validity need not be judged solely by adherence to Article V. *See generally* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).

271. *See* ACKERMAN, *supra* note 270, at 111.

272. Ginsburg, *Ratification of the Equal Rights Amendment*, *supra* note 10, at 921.

And even when it did, people with legal training filed a lawsuit claiming that it violated Article V. In *Leser v. Garnett*, a male voter who had been a state judge in Maryland argued that extending suffrage to women radically enlarged the electorate so as to alter the representation of the states in the Senate.[273] Under Article V, any reduction of the equal representation of the states in the Senate must be consented to individually by each state.[274] The Supreme Court rejected this theory, but the very making of a colorable argument regarding the Nineteenth Amendment's procedural validity under Article V suggests tensions, real and perceived, between Article V and inclusive constitutional change. A fully ratified amendment under Article V actually took generations, nearly a century, after suffragists first demanded women's right to vote. Neither Elizabeth Cady Stanton nor Susan B. Anthony, the women widely acknowledged to be the "founding mothers" of women's suffrage, lived to see the women's suffrage amendment adopted and ratified,[275] even though they testified in Congress when the amendment was proposed for the first time in 1878.[276]

In supporting the extension of the ERA deadline in the late 1970s, RBG pointed out that suffragists had resisted a seven-year deadline for the Nineteenth Amendment, and that those who survived to the 1970s argued against a time limit for the ERA.[277] The seven-year ratification deadline on the women's suffrage amendment was proposed in Congress but rejected.[278] Suffrage leader Carrie Chapman Catt testified in Congress against the seven-year deadline, urging that such a deadline was "two amendments bound up in one"[279]—it amended Article V by making it even harder to change the Constitution than it was already. One congressman during floor debates predicted that a ratification deadline would prolong the fight for the suffrage amendment.[280] Many states imposed waiting periods between a failed vote on a federal constitutional amendment and the next reintroduction of that same amendment.[281] A ratification deadline would wipe out the ratifications achieved within seven years and require the process to start all over again in Congress, which could delay a women's suffrage amendment for decades more.

RBG appreciated how long it took for the transgenerational process of making the Nineteenth Amendment part of the Constitution to succeed. Thomas I. Emerson, a

273. 258 U.S. 130, 133 (1922).

274. U.S. CONST. art. V.

275. *See* CARRIE CHAPMAN CATT & NETTIE ROGERS SHULER, WOMAN SUFFRAGE AND POLITICS: THE INNER STORY OF THE SUFFRAGE MOVEMENT 107–08 (1923).

276. *See Prohibiting the Several States from Disfranchising United States Citizens on Account of Sex and Protest Against Women's Suffrage: Arguments Before the S. Comm. on Privileges & Elections*, 45th Cong. 4–17 (1878) (statement of Elizabeth Cady Stanton).

277. Ginsburg, *Ratification of the Equal Rights Amendment*, *supra* note 10, at 921.

278. *Id.* at 921 n.7.

279. *Extending the Right of Suffrage to Women: Hearings on H.R.J. Res. 200 Before the H. Comm. on Women Suffrage*, 65th Cong. 36 (1918) [hereinafter *Extending the Right of Suffrage to Women*] (statement of Carrie Chapman Catt, President, National American Women's Suffrage Association).

280. 56 CONG. REC. 808 (1918) (statement of Rep. French).

281. *See Extending the Right of Suffrage to Women*, *supra* note 279, at 154–58 (reprinting MARY BEARD & FLORENCE KELLEY, WHY WOMEN DEMAND A FEDERAL SUFFRAGE AMENDMENT—DIFFICULTIES IN AMENDING STATE CONSTITUTIONS—A STUDY OF THE CONSTITUTIONS OF THE NONSUFFRAGE STATES (1916) (pamphlet)).

professor at Yale Law School, also testified in the deadline extension hearings before the House and Senate Judiciary Committees.[282] Complementing RBG's view that human rights guarantees simply took longer than other kinds of amendments, Emerson argued that "a long period of time is necessary for the nation to make up its mind with respect to fundamental changes in the status of large groups in the population."[283] Both Emerson and RBG referenced the distortions in the debate about the ERA that warranted a congressional change in the ratification timeline. Distortions occurred, according to Emerson, because of high levels of discomfort and resistance to the fundamental social change that the Amendment represented, akin to the Fourteenth Amendment and going beyond the Nineteenth Amendment.[284] Such significant changes gave rise to "scare stories" and misunderstandings about what the Amendment would do.[285] RBG believed that Congress would have to consider all this in determining whether to change the deadline or accept rescissions.[286] And surely, as she acknowledged toward the end of her life, Congress would also have to consider the perceptions of unfairness arising not only from these "scare stories," but also from the unique procedural irregularities of the ERA's trajectory, including exceedingly late ratifications and rescissions.[287] These are serious questions about the ERA that must be fought out in the political sphere.

The ground-zero "new beginning" for the ERA is a path for the ERA that would be consistent with RBG's broader theory, developed as an academic rather than as a judge. But it is not the only path consistent with her approach. RBG's body of work as a scholar and a Justice put Congress, rather than courts, at the forefront of constitutional change. Congress can decide whether to pursue an absolute new beginning or to forge a new beginning by changing the deadline once again, retroactively. Justice Ginsburg's public statements wishing for "a new beginning" for the ERA did not opine on whether Congress could legitimately lift the ratification deadline. Whereas Justice Ginsburg's ideal procedural path for the ERA was to start over, that preference does not negate less ideal, more viable paths. The logic of her 1978 deadline extension testimony, synthesized with her scholarship and jurisprudence on sex equality, would allow Congress to save the ERA by changing the deadline again. However, because a retroactive deadline change a generation after it elapsed raises obvious doubts about procedural fairness, adding the ERA to the Constitution through this unprecedented path would require significant public debate to clarify the ERA's twenty-first century purpose and public meaning, including its relationship to the Equal Protection Clause, to be accepted by the people as legitimate.

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282. *See Equal Rights Amendment Extension House Hearings*, *supra* note 218, at 61 (statement of Thomas I. Emerson); *Equal Rights Amendment Extension Senate Hearings*, *supra* note 18, at 114 (statement of Thomas I. Emerson).

283. *Equal Rights Amendment Extension House Hearings*, *supra* note 218, at 64.

284. *See id.*

285. *Equal Rights Amendment Extension Senate Hearings*, *supra* note 18, at 118.

286. Ginsburg, *Ratification of the Equal Rights Amendment*, *supra* note 10.

287. *See* Searching for Equality, *supra* note 12.

VI. THE ERA'S VIABLE PATH FORWARD

In 2019, a subcommittee of the House Judiciary Committee held a hearing on the resolution lifting the ERA ratification deadline, which eventually led the resolution to be reported favorably[288] and embraced by a majority on the House floor.[289] Congressional hearings and floor debates are opportunities to create new legislative history for the ERA.[290] The text of the ERA includes words and phrases whose public meaning has changed since the 1970s, when the ERA was adopted by Congress and ratified by most of the states. These evolving phrases include "equality of rights," "shall not be denied or abridged," and "on account of sex." The records of hearings and floor debates from 1970–1972 indicate that a primary (though not exhaustive) purpose of the ERA was to eradicate sex classifications in the law.[291] That is the purpose that became the focal point of the equal protection cases successfully litigated by RBG in the 1970s. If the twenty-first century ratifiers of the ERA want the Amendment to do more than the equal protection jurisprudence, that vision may not be apparent in the text or original legislative history. New legislative history is needed to update the meaning of the ERA. Without a legislative history providing guidance, these abstract words will be handed over to judges, inviting many plausible interpretations. Congress and state legislatures are best placed to determine what more needs to be done to achieve "equality of rights," beyond what the Supreme Court has achieved through the de facto ERA.

The process leading up to the House's vote to remove the deadline during the 116th Congress provides ample illustration. At the hearing before the House Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Liberties on removing the deadline for the ERA's ratification, constitutional law expert Kathleen Sullivan testified that it was a "national embarrassment" that the United States remained one of the few constitutions that lacked a guarantee of sex equality.[292] In its report on the resolution, the House Judiciary Committee presented a twenty-first century vision of the ERA, going beyond what was explicitly advanced by the ERA's 1970s proponents and framers.[293] The report

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288. H.R. Rep. No. 116-378, at 1 (2020); *see also Markup of H.R.J. Res.79, Removing the Deadline for the Ratification of the Equal Rights Amendment, Before the H. Comm. on the Judiciary*, 116th Cong. 64 (2019) [hereinafter *House Markup of Removing the Ratification Deadline of the ERA*], https://docs.house.gov/meetings/JU/JU00/20191113/110212/HMKP-116-JU00-Transcript-20191113.pdf [https://perma.cc/YW82-R7AS].

289. 166 CONG. REC. H1142 (daily ed. Feb. 13, 2020).

290. *See* Julie C. Suk, *Who Decides the Future of the Equal Rights Amendment?*, TAKE CARE BLOG (July 6, 2020), https://takecareblog.com/blog/who-decides-the-future-of-the-equal-rights-amendment [https://perma.cc/2WSW-3N4L].

291. *See* SUK, *supra* note 6, at 57–82 (narrating the legislative debates about the ERA in 1971–1972).

292. *See Equal Rights Amendment: Hearing Before the H. Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary*, 116th Cong. 18 (2019) (statement of Kathleen M. Sullivan, Partner, Quinn Emanuel Urquhart & Sullivan). *See generally* Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 YALE J. L. & FEMINISM 381 (2017) (discussing countries that have gender-equality amendments and their development in addressing gender inequalities in cross-national comparison).

293. *See* H.R. REP. NO. 116-378, at 6 (2020).

suggested that the ERA, if added to the Constitution in the twenty-first century, could outlaw governmental practices that had a disparate impact on women, and might also legitimize legislative efforts at the state and federal level to promote gender balance in decisionmaking positions.[294]

The House report illustrates how the legislature's serious consideration of these procedural considerations like the time bar has not only forged a procedural path forward for the ERA; it has created the forum for discussing the ERA's meaning today and expanding its meaning to make the ERA speak to disparate impact as well as gender-equal power-sharing. Indeed, at the House Judiciary Committee's markup hearing on the deadline removal bill, Representative Pramila Jayapal (D-WA) highlighted the persistence of pay gaps between women and men, which were more pronounced for women of color.[295] Representative Zoe Lofgren (D-CA) recounted the history of the ERA in Congress, pointing to the way men in the past wielded their power within the House Judiciary Committee to stop and delay the ERA procedurally.[296] "[W]e are fixing process," said Representative Sheila Jackson Lee (D-TX), explaining why removing the deadline after all these years was justified.[297]

Women lawmakers embraced twenty-first century commitments to eradicating pay inequity, overcoming disadvantages faced by working mothers and pregnant women, and addressing the needs of women of color, immigrant women, and low-wage workers in the House floor debates leading to a vote to remove the ERA's deadline. A wide array of congresswomen of diverse race and ethnic backgrounds, geographical districts, and ages devoted their short floor speeches to these themes. The bill's sponsor, Representative Jackie Speier (D-CA), said, "The ERA is about equality. The ERA is about sisterhood, motherhood, survival, dignity, and respect."[298] Congresswoman Jackson Lee noted the "nonexistent mandatory standards for workplace accommodations for pregnant women, post-natal mothers and persons with care responsibilities," and the disproportionate representation of women in poverty.[299] Speaker Nancy Pelosi highlighted that "[w]omen face discrimination as they raise families," citing the unfair treatment of pregnant women under the law.[300] Congresswoman Lucy McBath (D-GA), invoked Black suffragist Frances Ellen Watkins Harper and the long struggle of women "fighting tooth and nail for decades to be recognized as equal under the eyes of the law."[301]

Congresswoman Suzanne Bonamici (D-OR) pointed out that "[w]omen continue to face many barriers to true equality, including pregnancy and gender discrimination, unequal pay, and a lack of access to a full range of reproductive healthcare

294. *Id.*

295. *House Markup of Removing the Ratification Deadline of the ERA*, *supra* note 288, at 35 (statement of Rep. Pramila Jayapal).

296. *Id.* at 26 (statement of Rep. Zoe Lofgren) (recalling Judiciary Committee Chairman Emanuel Celler's opposition to the ERA in 1971, when she was an intern to Rep. Edwards).

297. *Id.* at 28 (statement of Rep. Sheila Jackson Lee).

298. 166 CONG. REC. H1130 (daily ed. Feb. 13, 2020) (statement of Rep. Jackie Speier).

299. *Id.* at H1134 (statement of Rep. Sheila Jackson Lee).

300. *Id.* at H1136 (statement of Speaker Nancy Pelosi).

301. *Id.* (statement of Rep. Lucy McBath).

services."[302] Congresswoman Judy Chu (D-CA) said, "true equality is still a goal, not a reality" because of unequal pay and because "we still have men passing laws that dictate our choices about our bodies."[303] Congresswoman Barbara Lee (D-CA) pointed out "women have been relegated to the sidelines and left out of the Constitution, especially Black women and women of color."[304] Congresswoman Rashida Tlaib (D-MI) noted that she was proud to be the first Muslim woman in Congress and said, "this is about women of color, women with disabilities, transgender women, immigrant women. These women are affected by issues such as unequal pay, sexual violence, lack of access for healthcare, and poverty."[305]

The new meanings created by new legislative history can give guidance to the Supreme Court as it grapples with gender equality, both under the Equal Protection Clause and under the ERA, should it be legitimized through the process of lifting the deadline. If the Equal Protection Clause has become a de facto ERA, surely lawmakers' efforts to revive the ERA should inform how the sex-equality jurisprudence under Equal Protection develops. And, should the ERA be added to the Constitution, the new legislative history indicates to courts what "equality of rights . . . not denied or abridged . . . on account of sex" means today. The ERA empowers Congress and state legislatures to implement a more robust vision of equality than that enforced by courts under Equal Protection.

CONCLUSION

RBG did not live to show her granddaughter an ERA in her pocket Constitution. Will we?

She often recounted the wisdom of her mother-in-law on the eve of her wedding. Handing her a pair of earplugs, RBG's mother-in-law advised, "'In every good marriage,' . . . 'it helps sometimes to be a little deaf.'"[306]

In judging, too, earplugs are often essential. The rule of law requires judicial independence, and that often requires judges to filter out the noise of politics. Justice Ginsburg would hear nothing of the political pressure to retire in 2013 to ensure that a Democratic president would name her successor.[307] And her wish that the ERA process would "start over," free of the controversies about late ratifications and rescissions, was stated notwithstanding the recent political realities of

302. *Id*. at H1137 (statement of Rep. Suzanne Bonamici).

303. *Id*. at H1138 (statement of Rep. Judy Chu).

304. *Id*. at H1138–39 (statement of Rep. Barbara Lee).

305. *Id*. at H1140 (statement of Rep. Rashida Tlaib).

306. *See* Debra Cassens Weiss, *Marriage Advice from Justice Ginsburg's Mother-in-Law Has Helped Her in the Workplace*, A.B.A. J. (Oct. 4, 2016, 7:50 AM), https://www.abajournal.com/news/article/marriage_advice_from_justice_ginsburgs_mother_in_law_has_helped_her_in [https://perma.cc/C57S-QWZW].

307. *See* Joan Biskupic, *Exclusive: Supreme Court's Ginsburg Vows to Resist Pressure to Retire*, REUTERS (July 4, 2013, 8:04 AM), https://www.reuters.com/article/us-usa-court-ginsburg/exclusive-supreme-courts-ginsburg-vows-to-resist-pressure-to-retire-idUSBRE9630C820130704 [https://perma.cc/52VM-JG4Q].

partisan hardball, which make it tragically infeasible for two-thirds of both Houses of Congress to agree to anything, much less an ERA, if the process were to start over.

Justice Ginsburg's other "most fervent wish" on the eve of her death—that she not be replaced until after the winner of the 2020 presidential election was inaugurated[308]—also indicates the presence of political earplugs in her final moments. Senate Republicans—having insisted in 2016 that Justice Scalia not be replaced until a new president was inaugurated eight months later—moved quickly to confirm Justice Amy Coney Barrett to replace Justice Ginsburg days before the November election[309] and only five weeks after Justice Ginsburg's death, 52–48,[310] without persuading a single Democratic colleague to support it.

With her death, let us respectfully remove the political earplugs that RBG had to wear as a living Justice. We can excavate and hear the voice of her scholarly, pragmatic account of Article V and human rights, developed as a law professor and advocate. We can listen to her account of Congress as the proper decisionmaker on the ERA's future, including its meaning. Under Article V, the consequences of ratifying an amendment past a congressionally created deadline are for Congress to determine, as is the effect of rescissions, as the historical precedent of the Fourteenth Amendment establishes. The process of making new legislative history in Congress's consideration of the deadline removal could unplug the ERA's path to constitutional legitimacy and reaffirm its most ambitious goals, updated for the twenty-first century.

RBG's vision for the ERA was as much about a healthy constitutional democracy as it was about women. She hoped for a dialogue and collaboration between courts and legislatures as well as more fulfilling relationships, unconfined by gender roles and expectations, between people at home and at work. While RBG's fans turned her into an icon and a diva, she took the spotlight off herself as a judge and shone it on the people and the representatives they elected in our nation's constitutional democracy. At the end of the day, she believed it was not lawyers or judges who most needed the ERA, but the people themselves, and the legislators they elected to make our constitutional values a lived reality. The ERA belonged in every modern constitution, including ours, to empower the people, including RBG's granddaughters, with the promise of women's fully equal stature in a legitimate constitutional democracy. Although RBG's legacy for the ERA might appear ambivalent, there is an unambiguous arc of wisdom to be gleaned from her passion and caution about it: how we strive for a "more perfect union" will shape how perfect it can be.

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308. *See* Matthew Choi & Josh Gerstein, *Ginsburg's Wish: 'I Will Not Be Replaced Until a New President Is Installed*,' POLITICO (Sept. 18, 2020, 11:26 PM), https://www.politico.com/news/2020/09/18/ginsburg-rbg-dying-wish-418108 [https://perma.cc/9KE8-BEZ5].

309. Adam Liptak & Sheryl Gay Stolberg, *Shadow of Merrick Garland Hangs Over the Next Supreme Court Fight*, N.Y. TIMES (June 11, 2021), https://www.nytimes.com/2020/09/19/us/ginsburg-vacancy-garland.html.

310. 166 CONG. REC. S6449–50 (daily ed. Oct. 25, 2020) (recording 51–48 cloture vote on Oct. 25); *id*. at S6588 (recording 52–48 confirmation vote the next day).