The Apparition Amendment:

The Potential Effects of the Addition of a Federal Equal Rights Amendment to the United States Constitution in a Post-Dobbs United States

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INTRODUCTION

It is not a novel observation that in its changing composition, the Supreme Court of the United States has undergone a shift in the sensibilities and constitutional interpretation styles of its members. In June of 2022, the Court, in deciding *Dobbs v. Jackson Women's Health Organization*[1], overturned *Roe v. Wade*[2] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[3]. *Roe* and *Casey* had enjoyed fifty and thirty years respectively as precedent of the Supreme Court. These cases upheld the right to terminate a pregnancy with caveats, both predicated in part on the right to privacy derived at least in part from the Fourteenth Amendment to the Constitution and its Equal Protections Clause.[4]

Americans can, no doubt, through the *Dobbs* opinion, appreciate just how fragile the rights and privileges conferred on us through the Constitution can be, with some constantly teetering on a precipice. The fact that one vote of a nine-person body can and has both conferred rights upon and stripped rights from an entire population, demonstrates this fragility. These cases are sometimes decided by a five-Justice majority, resulting in decisions which could very well have been decided

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[1] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). *Dobbs* put pregnancy squarely into the realm of "rational basis" review", as I discuss

[2] Roe v. Wade, 410 U.S. 113 (1973)

[3] Planned Parenthood of S.E. Pennsylvania v. Casey, 505 U.S. 833 (1992)

[4] US Const. Amend. XIV, *See* Roe, 142 S. Ct. 2228. *See* Casey 505 U.S. 833

in a non-prevailing party's favor on another day, or even plurality decisions in which less than a majority of the sitting Justices join in the prevailing decision. Various other cases bolstering women's liberties also find their basis in the protections afforded by the Fourteenth Amendment. These cases deal with issues such as access to contraception[5], disparities in financial spousal support[6], preference based on sex in administration of estates[7], among others.

Regardless of the makeup of the highest court in the land, an Equal Rights Amendment to the Constitution would be a useful tool in helping to finally secure equal protection under the law for American women. Its inclusion could encourage the Supreme Court to uphold laws codifying this protection by providing a textual avenue for interpretation as opposed to just a functional avenue. These protections could and should not only be extended to women, but all Americans. Other fundamental rights based in the fourteenth amendment include, but are not limited to, the right to marry[8], the right to keep the family together[9], and the right to travel.[10]

This Note will explore the feasibility of amending the federal Constitution to add an Equal Rights Amendment, and will outline previous attempts to pass such an amendment. It will also explore the potential ramifications of the additions of such an amendment. This Note will also inspect the language of Equal Rights Amendments within State constitutions and discuss what language ought to be included should a federal amendment be published in light of the United States Supreme Court's decision in Dobbs. Part one will consider the legal viability of the Equal Rights Amendment of 1972 today. Part two will explore the levels of judicial scrutiny applied to laws which call for disparate treatment of Americans and how an ERA might be interpreted and explore the effects that an Equal Rights Amendment could have on Supreme Court decisions post-Dobbs. Finally, part three will consider the legitimacy an ERA might enjoy and explore the language which should be included within the amendment.

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[5] Griswold v. Connecticut, 381 U.S. 479 (1965), Eisenstadt v. Baird, 405 U.S. 438 (1972)
[6] Frontiero v. Richardson, 411 U.S. 677, 682 (1973)
[7] Reed v. Reed, 404 U.S. 71 (1971)
[8] Loving v. Virginia, 388 U.S. 1 (1967)
[9] Moore v. E. Cleveland, 431 U.S. 494 (1977)
[10] Saenz v. Roe, 526 U.S. 489 (1999)

THE APPARITION AMENDMENT:
THE POTENTIAL EFFECTS OF A FEDERAL EQUAL RIGHTS AMENDMENT TO THE UNITED STATES CONSTITUTION IN A POST-DOBBS UNITED STATES

PART I: A FEDERAL EQUAL RIGHTS AMENDMENT: A CENTURY IN THE MAKING OR FIFTY YEARS OF STEADY DECLINE?

There is no provision in the United States Constitution explicitly securing equal protection under the law for women. The Constitution has consistently had to be interpreted to confer equal protection to women.[11] However, since the 1920s, advocates have looked to an Equal Rights Amendment (ERA) to the federal Constitution that would undisputedly extend these protections regardless of sex. Although in Dobbs, Justice Samuel Alito, writing for the majority, stated that a "…State's regulation of abortion is not a sex-based classification and thus is not subject to the "highest scrutiny" that applies to such classifications"[12], an ERA would finally explicitly extend the rights enshrined in the Constitution and the subsequent interpretations thereof to women throughout the United States.

Should an ERA be incorporated into the United States Constitution, these protections and more would be enshrined in the Constitution. The Court could begin to apply a judicial review through a new avenue of interpretation which is not based in the Fourteenth Amendment, but predicated on a new basis which will be built on the Equal Rights Amendment. Through the ERA's language, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex"[13], members of the Court would no longer have to rely on the non-explicit language to ensure that the protections in the Constitution are extended to all citizens. The amendment would finally provide to the Court an anchor to which to tie their interpretation of laws which treat citizens differently based on sex.

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[11] Dobbs, 142 S. Ct. 2228
[12] Id. at
[13] DocsTeach. The online tool for teaching with documents, from the National Archives. *Joint Resolution Proposing the Equal Rights Amendment*. https://www.docsteach.org/documents/document/equal-rights-amendment

(i) BACKGROUND AND HISTORY OF THE FEDERAL EQUAL RIGHTS AMENDMENT

The federal ERA was initially introduced to the United States Congress in 1923 by the National Woman' Party and was subsequently introduced in every Congressional session until 1972.[14,15] Only then did the amendment pass in both the Senate and the House of Representatives during the ninety-second Congress.[16] However, despite apparently meeting the criteria to be adopted, the ERA is still shrouded in controversy and has not been officially incorporated into the United States Constitution.[17] The proposing clause of the proposed amendment includes the provision that once it passes both houses of Congress, the amendment must then be ratified by "…three fourths of the several states…"; thirty-eight.[18] The proposing clause also implemented a seven-year deadline for ratification "…from the date of its submission by the Congress."[19] The original ratification deadline was to be March 22, 1979. By this deadline, only thirty – five states had ratified the amendment.[20] Despite a joint resolution in Congress to extend the deadline to June 30, 1982, no other states ratified by this new deadline.[21]

Though popular thought considered the federal ERA defeated, in 2017, Nevada voted to ratify the amendment, to be joined by Illinois in 2018, and finally by Virginia in 2020. Virginia's ratification should

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[14] Howard University Law School. Vernon E. Jordan Law Library. A Brief History of Civil Rights in the United States: The Equal Rights Amendment https://library.law.howard.edu/civilrightshistory/women/era

[15] National Archives Catalogue, *Proposing an Equal Rights Amendment to the Constitution*. H.J.R. 75, 68th Cong. (1923). https://catalog.archives.gov/id/7452156. The text of the 1923 ERA read "[m]en an[d] women shall have equal rights throughout the United States and every place subject to its jurisdiction. Congress shall have power to enforce this article by appropriate legislation."

[16] Id.

[17] Alice Paul Institute. *ERA. Frequently Asked Questions*, https://www.equalrightsamendment.org/faq

[18]DocsTeach. The online tool for teaching with documents, from the National Archives, *Proposing an amendment to the Constitution of the United States relative to equal rights for men and women*. H. J. R. 208, 92nd Cong. (1972). https://www.docsteach.org/documents/document/equal-rights-amendment

[19] Id.

[20] Id.

[21] Alice Paul Institute. *ERA. Frequently Asked Questions*, https://www.equalrightsamendment.org/faq

have constituted the crucial thirty-eighth ratification of the ERA.[22] The amendment is written to take effect two years after satisfying the votes needed for ratification.[23] However, continued challenges to the validity of states' ratification of the amendment after the original deadline remain. Questions as to the validity of rescissions of ratifications made by Nebraska, Tennessee, Idaho, Kentucky, and South Dakota in the 1970s also persist.[24] The loss of these states' votes through rescission, if valid, sets the total of states which have ratified the amendment back to thirty-three if the later ratifications of Nevada, Illinois, and Virginia are held valid, and thirty if not.[25]

(ii) CAN A STATE RESCIND ITS RATIFICATION OF A PROPOSED CONSTITUTIONAL AMENDMENT?

There is technically no standing Supreme Court precedent for recognizing a State's rescission of ratification of the federal Equal Rights Amendment. However, the United States District Court for the District of Idaho held in 1981 in deciding *State of Idaho v. Freeman*[26], that Idaho's rescission of its prior ratification of the then potential twenty-eighth amendment was proper, "effectively nullif[ying] its prior

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[22] Alice Paul Institute. *ERA. Ratification Info by State*. https://www.equalrightsamendment.org/era-ratification-map

[23] DocsTeach. The online tool for teaching with documents, from the National Archives Proposing an amendment to the Constitution of the United States relative to equal rights for men and women. H. J. R. 208, 92nd Cong. (1972). https://www.docsteach.org/documents/document/equal-rights-amendment

[24] Alice Paul Institute. ERA. Ratification Info by State. https://www.equalrightsamendment.org/era-ratification-map

[25] Alice Paul Institute. ERA. Ratification Info by State. https://www.equalrightsamendment.org/era-ratification-map. The states which have not ratified the ERA are Alabama, Arkansas, Arizona, Florida, Georgia, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, and Utah.

[26] State of Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho 1981), vacated sub nom. Nat'l Org. for Women, Inc. v. Idaho, 459 U.S. 809, 103 S. Ct. 22, 74 L. Ed. 2d 39 (1982), and vacated sub nom. Nat'l Org. for Women, Inc. v. Idaho, 459 U.S. 809, 103 S. Ct. 22, 74 L. Ed. 2d 39 (1982), and vacated sub nom. Carmen v. Idaho, 459 U.S. 809, 103 S. Ct. 22, 74 L. Ed. 2d 39 (1982), and vacated sub nom. Carmen v. Idaho, 459 U.S. 809, 103 S. Ct. 22, 74 L. Ed. 2d 39 (1982)

ratification[.] Idaho [could] not be counted as a ratifying state"[27]. The Court recognized that rescission was proper until the required three-fourths of the States, as is stated in Article V of the United States Constitution.[28] The Court held in high regard the political process, emphasizing the importance of "local sentiment" and the need for the State legislatures to be responsive to such sentiment, even if it changes between the State's initial ratification and the ratification of the amendment by three-fourths of the states.[29]

The Court's judgment was later vacated, though, by *National Organization for Women, Inc. v. Idaho*[30], and *Carmen v. Idaho*[31], both appeals to the Supreme Court of the United States from the District Court's *Freeman* decision; the Court dismissed these complaints as moot, thus vacating the judgment in *Freeman,* including the nullification of both Idaho's ratification and the Congressional timeline extension. National Organization for Woman v. Idaho and Carmen v. Idaho remain good law, though, so the question remained, then, only the slightest bit open procedurally as to whether the United States Congress could have extended the deadline for states to ratify the federal ERA, and as to whether the States which have attempted to rescind their ratifications had the authority to do so.

Later, in 2021, shortly after Virginia, the scale-tipping thirty-eighth state, ratified the ERA, the United States District Court for the District of Columbia, in *Virginia v. Ferriero*, was asked to review whether the Archivist of the United States was compelled to publish the federal ERA as an amendment to the United States Constitution.[32] The Court held that the plaintiffs, the main plaintiff being the state of Virginia, did not have standing because the plaintiffs did not articulate any actual injury incurred from the Archivist not publishing the federal ERA.[33] The Court never reached the question of whether a State can

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[27] Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho 1981)
[28] Freeman, 529 F. Supp. 1107, USCS Const. Art. V
[29] Id.
[30] Nat'l Org. for Women, Inc. v. Idaho, 459 U.S. 809, 103 S. Ct. 22, 74 L. Ed. 2d 39 (1982)
[31] Carmen v. Idaho, 459 U.S. 809, 103 S. Ct. 22, 74 L. Ed. 2d 39 (1982)
[32] "Equally significant as the Court's holding is what it does not hold. 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. It does not need to." Virginia v. Ferriero, 525 F. Supp. 3d 36 (D.D.C. 2021).
[33] Ferriero, 525 F. Supp. 3d 36

validly rescind its ratification of a constitutional amendment.[34] However, contextually, it seems extremely likely that the rescissions would have been held valid.

(iii) CAN CONGRESS EXTEND A TIMELINE IT SET FOR RATIFICATION WHEN IT PROPOSED A CONSTITUTIONAL AMENDMENT?

The Supreme Court of the United States has decided that Congress may set a deadline for the ratification of an amendment within the text of that amendment.[35] question arises as to the Equal Rights Amendment because the seven-year deadline does not appear in the text of the amendment itself, but in the proposing clause of the amendment.[36] The Court also decided that in the absence of a deadline in the text of an amendment, the decision as to what amount of time is reasonable between proposal and ratification of an amendment is a political one and not for the Courts to decide nor would the courts be granted jurisdiction to review such a decision.[37]

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[34] Id.

[35] "Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertion no doubt." The Supreme Court of the United States affirmed this holding in *Coleman v. Miller.* Coleman v. Miller, 307 U.S. 433, 59 S. Ct. 972 (1939). Dillon v. Gloss, 256 U.S. 368, 41 S. Ct. 510 (1921).

[36] "… [that] the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the States within seven years from the date of its submission by the Congress…" DocsTeach. The online tool for teaching with documents, from the National Archives, *Proposing an amendment to the Constitution of the United States relative to equal rights for men and women*. H. J. R. 208, 92nd Cong. (1972). https://www.docsteach.org/documents/document/equal-rights-amendment

[37] "… the question, what is a reasonable time, lies within the congressional province. If it be deemed that such a question is an open one when the limit has not been fixed in advance, we think that it should also be regarded as an open one for the consideration of the Congress when, in the presence of certified ratifications by three-fourths of the States, the time arrives for the promulgation of the adoption of the amendment. The decision by the Congress, in its control of the action of the Secretary of State, of

Although a proposed amendment to the United States Constitution is allowed a "reasonable time" to be ratified, there is not a consensus. Congress has not set forth a bright line rule as to what amount of time is reasonable. The twenty-seventh amendment, initially proposed by James Madison, was ratified in 1992, nearly two hundred twenty-three years after being passed by Congress in 1789.[38] The amendment addresses compensation for members of Congress, which is no doubt a contentious issue. The twenty-seventh amendment has no deadline within its text, and neither does the ERA because the text resides in the proposing clause. In discussing the scope of the twenty-seventh amendment, Congress itself has opined that "the National Archivist's certification of the Twenty-Seventh Amendment more than 200 years after it was proposed suggests that, if Congress does not specify a deadline for ratification, an amendment remains pending before the states until the requisite number of states have ratified it." [39] The issue of the passage of time between the proposal and passing in Congress of a Constitutional amendment and the subsequent ratification of that amendment by thirty-eight States, seems quite flexible. It would not at first glance seem shocking, then, for the Archivist to publish the ERA as the twenty-eighth amendment forty years after a date set in the proposal clause, not the text of the amendment itself. The Alice Paul Institute also posited in 2018 that the rescission of a ratification and even the initial rejection before ratification of a Constitutional amendment by a State would be deemed inoperative, invoking the example of the fourteenth amendment's ratification. The Institute posited that

> "[t]he official tally of ratifying states for the 14th Amendment … included … states which had passed resolutions to rescind their ratifications. Also included in the tally were … states which had originally rejected and later ratified the amendment. In … promulgating the 14th Amendment, therefore, Congress determined

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the question whether the amendment had been adopted within a reasonable time would not be subject to review by the courts." Coleman, 307 U.S. 433, 59 S. Ct. 972

[38] US Const. Amend. XXVII. The twenty-seventh amendment reads in its entirety: "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."

[39]Congress.gov. Constitution Annotated: Analysis and interpretation of the US Constitution. *Amdt27.4 Implications for the Article V Amendment Process*. https://constitution.congress.gov/browse/essay/amdt27-4/ALDE_00013837/

> that both attempted withdrawals of ratifications and previous rejections prior to ratification had no legal validity. Therefore, it is most likely that the actions of the five states that voted to rescind their ratification of the ERA … are a legal nullity."[40]

The *Freeman* Court, though the decision was later vacated, also held that the three-year extension of the ratification deadline for the federal ERA was null and void.[41] The Court emphasized here the separation of Federal and State powers, stating that Congress may only act within its powers as derived from Article V of the United States Constitution, which grants Congress the power to propose an amendment.[42] Article V reads:

> "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress…"[43]

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[40] Alice Paul Institute. *ERA. Two Modes of Ratification*. https://www.equalrightsamendment.org/pathstoratification

[41] Freeman, 529 F. Supp. 1107

[42] "…it is more than clear that in this instance Congress' promulgation of the extension resolution was in violation of the constitutional requirement that Congress act by two-thirds of both Houses when exercising its article V powers." Idaho v. Freeman, 507 F. Supp. 706 (D. Idaho 1981)

[43] Congress.gov. *Constitution Annotated: Analysis and interpretation of the US Constitution. ArtV.1 Overview of Article V, Amending the Constitution*. https://constitution.congress.gov/browse/essay/amdt27-4/ALDE_00013837/, USCS Const. Art. V

[T]he "congressional determination of a reasonable period once made and proposed to the stated cannot be altered."[44]

However, in *Virginia v. Ferriero*, The United States District Court for the District of Columbia did decide that "the ERA's ratification deadline is effective despite its location in the introductory clause of the amendment's proposing resolution".[45] Hence, "the ERA's deadline barred Plaintiffs' late-coming ratifications."[46] This decision or this issue could still be reviewed by the United States Supreme Court and the question itself has been brought before several federal courts. The First Circuit Court of Appeals declined to find standing and to address the question of post-deadline recission in *Equal Means Equal v. Ferriero,* in which the plaintiff also demanded the Archivist record post-deadline ratifications and that the ERA be deemed the twenty-eighth amendment.[47] The plaintiff was denied certiorari by the United States Supreme Court. The United States District Court for the District of Rhode Island in *Elizabeth Cady Stanton Trust. v. Neronha* found that the plaintiff lacked standing as well.[48] These decisions were post-*Virginia.* Further judicial review, however, would seem a desperate effort.

In light of these decisions, it seems likely that the federal ERA proposed in 1972 has taken its last gasp and is extremely unlikely to be revived. We can continue to bolster the 1972 ERA and its support where possible to, but it will likely fall to this current generation to redraft and repropose a federal ERA.

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[44] Freeman, 529 F. Supp. 1107
[45] Ferriero, 525 F. Supp. 3d 36
[46] Id.
[47] Equal Means Equal v. Ferriero, 3 F.4th 24 (1st Cir. 2021)
[48] Elizabeth Cady Stanton Tr. v. Neronha, No. 122CV00245MSMLDA, 2023 WL 5835874 (D.R.I. Sept. 8, 2023)

PART II: HOW MIGHT AN EQUAL RIGHTS AMENDMENT BE SCRUTINIZED?

(i) BRIEF HISTORY OF TREATMENT OF LAWS WHICH DISCRIMINATE BASED ON SEX AND THE LEVELS OF SCRUTINY TODAY

In the Court's decision in *Frontiero v. Richardson*, a plurality of the Court treated sex as a "suspect" classification, much like race or national origin.[49] The court refers to these classifications as "immutable characteristics".[50] Law based on these characteristics, such as the law challenged in *Frontiero*, which barred a service member from claiming her husband as a financial dependent based solely on her status as a woman, were to be reviewed under "strict judicial scrutiny" according to the *Frontiero* Court's plurality.[51] Strict scrutiny is the highest standard of judicial review granted to different classes. In the application of strict scrutiny, the law in question must be shown to further a "compelling" government interest and the means of achieving that interest must be "necessary".[52] This is to say that there is no less restrictive or discriminatory way for the government to achieve the purpose, and the government has the burden of proving that its chosen mean was the only way to meet that goal.[53] The onus is on a government to prove that the application of such a seemingly discriminatory law actually fulfills some broader purpose.[54] Until the government can meet its burden, such a law is presumed unconstitutional, and this is a

[49] Frontiero v. Richardson, 411 U.S. 677, 682 (1973)
[50] Frontiero, 411 U.S. 677, 686
[51] Id. at 688
[52] Congressional Research Service. *Equal Protection: Strict Scrutiny of Racial Classifications*. https://crsreports.congress.gov/product/pdf/IF/IF12391
[53] Congressional Research Service. *Equal Protection: Strict Scrutiny of Racial Classifications*. https://crsreports.congress.gov/product/pdf/IF/IF12391
[54] Frontiero, 411 U.S. 677, 689

very high burden to meet.[55] The application of strict scrutiny removes much discretion from the Court in deciding these cases.

However, when the Court decided *Craig v. Boren* just three years later, a majority introduced a new level of scrutiny, nestled between rational basis review and strict scrutiny review, under which it would from that point on review laws which discriminate on the basis of sex/gender; "intermediate" scrutiny[56]. Sex/gender exists under the law as a "quasi-suspect" classification. Under intermediate scrutiny, the government has the burden of proving that the discriminatory law in question serves an "important" government purpose and the means by which it serves that purpose is "substantially" related.[57] *Craig* involved discrimination against males ages 18-20, as the law in question prohibited them from purchasing beer with a 3.2% alcohol level but did not prohibit females of the same age range from purchasing this beer. [58] The Court explicitly found that the disparate treatment under the statute at issue toward males and females of the same age range did constitute discrimination based on gender and held that "…the gender-based differential contained in Okla. Stat., Tit. 37, §245 (1976 Supp.) constitutes a denial of the equal protection of the laws to males aged 18-20… [under the fourteenth amendment]". [59]

Today, though, only laws which discriminate on the basis of race or national origin or protect certain fundamental rights are reviewed under strict scrutiny and only laws which discriminate based on sex/gender or illegitimacy of birth are reviewed under the intermediate scrutiny standard.[60,] On the other end of the spectrum from strict scrutiny is "rational basis" analysis, on which laws based on "non-suspect" classifications are evaluated.[61] On a rational basis review, the onus is on the challenger of the government's action, the plaintiff, to show that that there is no "rational" relation between the law created and the

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[55]Congressional Research Service. *Equal Protection: Strict Scrutiny of Racial Classifications*. https://crsreports.congress.gov/product/pdf/IF/IF12391

[56]Craig v. Boren, 429 U.S. (1976) (Rehnquist, J., Dissenting)

[57]Craig, 429 U.S

[58]Id. at

[59]Id. at Attempts to find the language of the Oklahoma statute at issue in *Craig* were fruitless as it has been repealed.

[60]Erwin Chemerinsky, Constitutional Law, 686 (6th ed., 2020); Cornell Law School, Legal Information Institute, *Intermediate Scrutiny,* https://www.law.cornell.edu/wex/intermediate_scrutiny#:~:text=Intermediate%20scrutiny%20is%20only%20invoked,detail%20in%20the%20next%20section).

[61] Cornell Law School, *Legal Information Institute, Rational Basis Test*, https://www.law.cornell.edu/wex/rational_basis_test

"legitimate" interest of the government.[6263] The courts are extremely deferential to the government entities under this level of review.[64] Any laws which discriminate on any basis beside those of race, national origin, sex/gender, or illegitimacy of birth are reviewed under this most deferential standard.

One must also consider, though, whether it is preferable to have sex/gender reviewed under strict scrutiny due to the implications on disparate treatment based on sex/gender concerning affirmative action and implementing policies which benefit women in their application. The Supreme Court has struck down affirmative action in state run educational institutions in terms of race, finding that the defendant universities' policies did not meet the strict scrutiny standard[65]. This decision has the potential to be used in striking down affirmative action benefiting women if sex/gender-based laws were interpreted under strict scrutiny. However, the current Court may still put an end to affirmative action in the favor of women. The Harvard Court repeats that race cannot be used as a stereotype, as the Court in *United States v. Virginia* warned against the same for gender.[66] While this is a concern we must contend with in discussion of a federal ERA, this current generation, nearly half a century after its proposal, if it so choses can draft and propose a new ERA in a way providing for affirmative action programs.

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[62] Cornell Law School. *Legal Information Institute. Rational Basis Test*. https://www.law.cornell.edu/wex/rational_basis_test

[63] Erwin Chemerinsky, Constitutional Law, 687 (6th ed., 2020)

[64] Id.

[65] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023)

[66] United States v. Virginia, 518 U.S. 515 (1996) (further discussion thereof in next section), Students for Fair Admissions, Inc., 600 U.S. 181

(ii) DOBBS' DIFFERENCES AND POSSIBLE CONSEQUENCES

Justice Alito's assertion in the *Dobbs* decision that abortion restrictions are not interpreted as based on sex[67], and therefore cannot be reviewed under this strict scrutiny standard, signals the need for stronger language applying the protections of the law equally to women. The decisions based on the notions of substantive due process and equal protection are not rooted in any concrete language in the Constitution, but a method of interpretation. This leaves other liberties which have been finally extended to American women under the Equal Protection Clause of the Fourteenth amendment and the notion of the right to privacy vulnerable to attack in the Supreme Court. These liberties extend far beyond the decision to terminate a pregnancy, and could have far reaching effects on the finances, medical autonomy, family responsibilities, and educational opportunities of women.

Section 1 of the Fourteenth Amendment reads:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[68]

Other cases decided based on these standards are now even more vulnerable to being overturned. The majority in *Dobbs* is very careful to assert that the decision applies to nothing but restrictions on pregnancy termination, citing the competing, compelling interests previously discussed in the *Casey* decision between the interests in the autonomy, health, and safety of pregnant women, and the interest in the potential life resulting from such pregnancies, and how those should be evaluated by voters in the political arena.[69] However, reviewing the issues

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[67] Dobbs, 142 S. Ct. 2228

[68] US Const. Amend. XIV § 1

[69] "*Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed "potential life." *Roe*,

of the case on rational basis, the lowest standard of Constitutional judicial review, opens cases like *Loving v. Virginia*, deeming state bans on interracial marriage unconstitutional, *United States v. Virginia*, holding the Virginia Military Institute's policy of admitting only men unconstitutional, and, specifically named in Justice's Thomas' concurrence, *Obergefell v. Hodges*, *Lawrence v. Texas*, and *Griswold v. Connecticut*, which were decided under heightened scrutiny through the lens of substantive due process, to reinterpretation via new causes of action.[70] Thomas' concurrence not only welcomes but encourages this possibility.[71] Thomas does agree that the *Dobbs* holding does not apply outside of the context of pregnancy termination. However, he invites the Court to revisit these cases and any others based in substantive due process and since he describes any case decided on such grounds as "demonstrably erroneous".[72]

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410 U.S., at 150, 93 S. Ct. 705, 35 L. Ed. 2d 147; *Casey*, 505 U.S., at 852, 112 S. Ct. 2791, 120 L. Ed. 2d 674. But the people of the various States may evaluate those interests differently." "The Court emphasizes that this decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion." Dobbs, 142 S. Ct. 2228, 2236, 2239

[70] Loving, 388 U.S. 1, Virginia, 518 U.S. 515, Obergefell v. Hodges, 574 U.S. 1118 (2015) (same-sex marriage), Lawrence v. Texas, 539 U.S. 558 (2003) (holding state "sodomy laws" unconstitutional), Griswold, 381 U.S. 479 (1965) (access to contraception)

[71] (Thomas, J., Concurring). "I agree that "[n]othing in [the Court's] opinion should be understood to cast doubt on precedents that do not concern abortion." Ante, at 2277 – 2278. For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including Griswold, Lawrence, and Obergefell. Because any substantive due process decision is "demonstrably erroneous," Ramos v. Louisiana, 590 U.S. ——, ——, 140 S.Ct. 1390, 1424, 206 L.Ed.2d 583 (2020) (THOMAS, J., concurring in judgment), we have a duty to "correct the error" established in those precedents, Gamble v. United States, 587 U.S. ——, ——, 139 S.Ct. 1960, 1984-1985, 204 L.Ed.2d 322 (2019) (THOMAS, J., concurring)." Dobbs., 142 S. Ct. 2228

[72] Dobbs., 142 S. Ct. 2228 (Thomas, J., concurring)

PART III: REWORKING THE ERA AND EXPLORING ITS FORCE OF LAW

(i) QUASI – LEGISLATION

The majority in Dobbs refers to the Roe decision as being tantamount to legislation made by the Court.[73] The Dobbs Court champions the idea of state legislatures separately acting on the issue of termination of pregnancy, but an amendment would require just that; working among and between state and federal legislatures beholden to the political process. Justice Alito wrote that "[our] decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office."[74]

There is no doubt that legislation is a useful, necessary tool in working toward the goal of all individuals in the United States attaining equality as promised, and the protection of that equality. Title VII of the Civil Rights Act of 1964 bars employers from discriminating based on classes subject to the strict scrutiny standard.[75] Title VII makes it unlawful for an employer, employment agency, or employee training program to discriminate based on "race, color, religion, sex, or national origin".[76] It also took federal legislation, the Equal Opportunity Credit Act[77], to ensure that American women might hold credit

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[73] Id.

[74] Id.

[75]Civil Rights Act of 1964, Title VII, 42 USC 2000 https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964#:~:text=Title%20VII%20prohibits%20employment%20discrimination,Pay%20Act%20of%202009%20(Pub.

[76] Id. § "(a) (1) It shall be unlawful…for an employer… to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of [the same], (b) … for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, [or to] classify or refer for an employment, any individual [because of] [the same]"

[77] 15 U.S.C. §1691, FDIC Consumer Compliance Examination Manual — March 2022, *Equal Credit Opportunity Act (ECOA)*, 12 C.F.R. § 1002.

in their own right.[78]. Title XI of the Education Amendments of 1972, 20 USC §1981, protects against discrimination based on sex/gender in education.[79] For example, Title IX's admissions provision regulation states that:

> "In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies shall not:
>
> (i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;
>
> (ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or
>
> (iii) Otherwise treat one individual differently from another on the basis of sex."[80]

Also, In December 2022, the United States Congress and President Biden codified some of these decisions' holdings via the Respect for Marriage Act[81], compelling all states to legally recognize same sex and interracial marriages, regardless of the state in which these marriages

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https://www.fdic.gov/resources/supervision-and-examinations/consumer-compliance-examination-manual/documents/5/v-7-1.pdf

[78] 12 C.F.R. § 1002.4(b) "A creditor shall not refuse to grant an individual account to a creditworthy applicant on the basis of sex, marital status, or any other prohibited basis."

[79]20 U.S.C. 1681, https://www.hhs.gov/civil-rights/for-individuals/special-topics/needy-families/requirement-d/index.html#:~:text=Title%20IX%20prohibits%20discrimination%20on,benefit%20from%20Federal%20financial%20assistance.

[80] 45 C.F.R.86 https://www.ecfr.gov/current/title-45/subtitle-A/subchapter-A/part-86

[81] H.R.8404 - *Respect for Marriage Act*, Pub. L. No. 117-228. https://www.congress.gov/bill/117th-congress/house-bill/8404

were performed.[82] This signals that the federal legislature and the President believe that, after the *Dobbs* decision, decisions such as *Loving*, *Obergefell*, *Lawrence*, and *Griswold* are not as safe as once presumed.

However, a Constitutional amendment is an infinitely more powerful tool. The language in the Federal ERA prohibiting Sates from "deny[ing] or abridg[ing]" "equality of rights under the law"[83], cuts any question of incorporation of the amendment against the States. This is extremely protective as many Constitutional amendments only prohibit discriminatory action by the Federal government and are only applied to State governments through incorporation through the Due Process clause of the Fifth Amendment via the Equal Protection Clause of the 14th amendment.[84] These include every right outlined in the Bill of Rights beside the seventh amendment right to indictment by a grand jury.[85] The American debate on abortion, which Alito in Dobbs is so concerned with, would be all but settled, as many thought it had been in the time between Roe and Dobbs[86], through the political process if a federal ERA were passed.

A federal Constitutional amendment is also much more difficult to pass than State legislation.[87] Dobbs relies on the States enacting legislation based on the preferences of its citizens. A State legislature's ratification of a Constitutional amendment also relies on the preferences and sentiment of the citizens of that state; and three-quarters of the states must agree to ratify. Ratification thus requires approval or acquiescence of a vast array of ideologues in state legislatures. Thus, enshrining a federal ERA into the federal Constitution would require massive political support which would then garner tremendous political legitimacy for Supreme Court cases decided with support from the fourteenth amendment. The passing of a federal ERA seems to be a

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[82] Id. "(a) In General.—No person acting under color of State law may deny (1) full faith and credit to any public act, record, or judicial proceeding of any other State pertaining to a marriage between 2 individuals, on the basis of the sex, race, ethnicity, or national origin of those individuals; or (2) a right or claim arising from such a marriage on the basis that such marriage would not be recognized under the law of that State on the basis of the sex, race, ethnicity, or national origin of those individuals."

[83] DocsTeach. The online tool for teaching with documents, from the National Archives. *Joint Resolution Proposing the Equal Rights Amendment*. thttps://www.docsteach.org/documents/document/equal-rights-amendment

[84] Erwin Chemerinsky, Constitutional Law, 687 (6th ed., 2020)

[85] Erwin Chemerinsky, Constitutional Law, 532 (6th ed., 2020)

[86] Dobbs, 142 S. Ct. 2228 at

[87] USCS Const. Art. V

rational response to the concerns of the *Dobbs* court as to how the United States approaches pregnancy termination as well as other issues concerning laws which discriminate based on sex/gender because not only did the majority of both houses of Congress have to agree to pass the amendment; each state legislature had to independently decide whether to ratify; the amendment process explicitly reflects the will of the majority of Americans. Also, the previously discussed twenty-seventh amendment, concerning compensation of members of Congress, also approaches a political issue. This issue lingered for two centuries, and the amendment essentially behaves as an incredibly forceful federal statute; statute that cannot be struck down without passing yet another amendment.

(ii) LOOKING TO THE STATES: A SPECTRUM OF PROTECTION AND DEVELOPMENT

Many States have incorporated ERAs into their Constitutions; many to great success. Some States are currently working to ratify an ERA to their Constitution. However, some State ERAs are more similar to the Federal ERA than others and more protective than others.[88] With the "…or by any State" language included in the Federal ERA, the same protections can be afforded to women uniformly throughout the United States.[89]

For instance, some states with ERAs do not explicitly enshrine equality under the law regardless of sex. The California ERA reads "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color,

[88]Brennan Center for Justice *State Level Equal Rights Amendments: majority of state constitutions have gender equality provisions,* (updated Dec. 6, 2022) https://www.brennancenter.org/our-work/research-reports/state-level-equal-rights-amendments#

[89] DocsTeach. The online tool for teaching with documents, from the National Archives. *Joint Resolution Proposing the Equal Rights Amendment*. thttps://www.docsteach.org/documents/document/equal-rights-amendment

or national or ethnic origin."[90] While certainly a positive addition to the California State Constitution, this amendment does not do the weighty work which the language of the proposed Federal ERA does. Should the proposed Federal ERA as it stands fail to become an amendment, sooner rather than later, the US Congress could and should re-propose the amendment with additional language to put proverbial meat on the bones of Supreme Court decisions based on substantive due process, not only pursuant to sex, but race, ethnicity, sexuality, and religious affiliation.

One State Supreme Court case from which proponents of the federal ERA might find support in bolstering the argument for protection of the right to terminate pregnancy after the decision in *Dobbs* is *New Mexico Right to Choose/NARAL v. Johnson*, decided by the Supreme Court of New Mexico.[91] Medical providers were granted standing in this case[92]. The Court held that the New Mexico Human Services Department could not restrict use of Medicaid funds for Medicaid recipients receiving "medically necessary abortions."[93] Article II, Section 18 of the New Mexico State Constitution, included in its Bill of Rights, contains New Mexico's ERA.[94] Article II, Section 18 states

> "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person."[95]

The New Mexico Supreme Court, unlike the United States Supreme Court, decided that the appropriate standard of review for the case at issue was strict scrutiny.[96] Although the United States Supreme Court evaluates laws which discriminate on the basis of sex/gender under intermediate scrutiny, this is not the case for every high State court.

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[90]Brennan Center for Justice *State Level Equal Rights Amendments: majority of state constitutions have gender equality provisions, California* (updated Dec. 6, 2022) https://www.brennancenter.org/our-work/research-reports/state-level-equal-rights-amendments#california

[91] New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841 (N.M. 1998)

[92] New Mexico Right to Choose/NARAL 975 P.2d 841

[93] Id.

[94] N.M. Const. art. II, § 18

[95] Id.

[96] New Mexico Right to Choose/NARAL, 975 P.2d 841

State courts may adopt more stringent standards of review than the United States Supreme Court as the United States Supreme Court's decisions only set the minimum standard for scrutiny in review. "Federal law, whether based upon statute or constitution, establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights."[97] The Supreme Court of the United States agreed that "'state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." [98] In fact, the New Mexico Supreme Court in *New Mexico Right to Choose/NARAL* explicitly stated that adhering to the federal standard of review on this question would be "inapposite" to the claims of the case and that New Mexico may "diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics."[99] The New Mexico state ERA's language is reminiscent of the Federal ERA's language; "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex"[100]. This suggests that the addition of this language into the federal Constitution might lead to similar interpretation by the Supreme Court. Perhaps only Colorado's state ERA is more similar in language.[101]

New York State currently has a state ERA pending in the state legislature. The language of the New York State ERA is extremely comprehensive, specifically mentioning "… sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy

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[97] Cologne v. Westfarms Assocs., 192 Conn. 48, 469 A.2d 1201 (1984)
[98] Florida v. Powell, 559 U.S. 50, 130 S. Ct. 1195, PG # (2010). The Court is quoting the petitioner's brief and asserts that the petitioner is "right in this regard."
[99] New Mexico Right to Choose/NARAL, 975 P.2d 841
[100] https://www.govinfo.gov/content/pkg/STATUTE-86/pdf/STATUTE-86-Pg1523.pdf
[101] Colo. Const. Art. II, Section 29. "Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex."

outcomes, and reproductive healthcare and autonomy…" [102] This very specific language regarding pregnancy and pregnancy outcomes leaves little, if any, ambiguity or room for interpretation as to whether the language of the amendment applies to decisions concerning pregnancy termination, regardless of whether the *Dobbs* Court viewed pregnancy as a "sex-based classification." [103] Thus, the addition of the pending New York language into a Federal ERA could prime the Supreme Court of the United States to apply heightened scrutiny, whether to intermediate or strict, to laws discriminating based on the characteristics explicitly listed within, as it does already to "race, ethnicity, [and] national origin."[104]

CONCLUSION

To conclude, a federal Equal Rights Amendment would be a net positive addition to the federal Constitution. The question is still only the slightest open, if not all but decided, as to whether the attempted rescissions of ratification attempted by Nebraska, Tennessee, Idaho, Kentucky, and South Dakota are valid. The question does seem to be decided, though, as to whether the deadline in the proposing clause of the amendment; although, the decision could still be appealed to higher federal courts, however unlikely that may be. Since the ERA in its current iteration has already garnered the political support it would need, setting aside momentarily the questions of rescission and post-deadline ratification, it may seem strategic, then, to continue to advocate for the current version of the ERA. The attempted rescissions

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[102] N.Y.S.B. S51002, https://legislation.nysenate.gov/pdf/bills/2021/S51002. Brennan Center for Justice *State Level Equal Rights Amendments: majority of state constitutions have gender equality provisions, New York* https://www.brennancenter.org/our-work/research-reports/state-level-equal-rights-amendments#new_york.
The proposed amendment reads: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, ethnicity, national origin, age, disability, creed (or), religion, or sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy, be subjected to any discrimination in [his or her] civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state, pursuant to law."
[103] Dobbs, 142 S. Ct. 2228 (2022)
[104] Congressional Research Service. *Equal Protection: Strict Scrutiny of Racial Classifications*. https://crsreports.congress.gov/product/pdf/IF/IF12391

took place in the 1970s and 1980s and sentiments in these states may now be in favor of a federal ERA; although, it is worth noting that of these states, only Nebraska has implemented a state level ERA.[105] If this current generation chooses to draft and propose a twenty-first century federal ERA, which seems the most judicious and realistic course of action its language must be updated to be more expansive in its protections in the wake of the *Dobbs* decision. This is especially emergent since the decision casts doubt on all other cases based in substantive due process.

[105]Brennan Center for Justice *State Level Equal Rights Amendments: majority of state constitutions have gender equality provisions, Nebraska* (updated Dec. 6, 2022) https://www.brennancenter.org/our-work/research-reports/state-level-equal-rights-amendments#nebraska