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The Pedestal and the Cage: The Feminist Mobilization and the Debate Over the Meaning of the Constitution in the United States in the 1960s and 1970s

El pedestal y la jaula: movilización feminista por la igualdad y la disputa por los significados constitucionales en los Estados Unidos de América en las décadas de 1960 y 1970

NICOLÁS DANIEL ZARA*
University of Buenos Aires (Argentina)

I ask no favors for my sex. I surrender not our claim to equality. All I ask of our brethren is, that they will take their feet from off our necks, and permit us to stand upright

SARAH MOORE GRIMKE

Abstract: This paper proposes a reframing of certain aspects of the feminist mobilization in the United States in the 1960s and 1970s, from the perspective of social movement theory and democratic constitutionalism. I analyze the various ways in which the narrative employed by legal feminists, supported by the dual strategy of constitutional litigation and social mobilization, managed to permeate the constitutional culture of the United States and alter the accepted interpretation of parts of the Constitution. I focus on the strategies used by legal feminists in their constitutional litigation and the efforts to have the Equal Rights Amendment (ERA) added to the Constitution, as well as on the interaction between these processes. I also discuss the recent revival of the ERA and the limitations of its text. Finally, I offer a number of arguments based on this analysis regarding the need for proposals for a new and improved version.

Keywords: Equality, democratic constitutionalism, feminism, social movements, Equal Rights Amendment, strategic litigation, legal mobilization, constitutional interpretation, constitutional culture, popular constitutionalism

Resumen: El presente trabajo propone una relectura de ciertos aspectos de la movilización feminista por la igualdad en los Estados Unidos de América en las décadas de los años sesenta y setenta, a la luz de elementos de la teoría de los movimientos sociales y del constitucionalismo democrático. Este analiza las formas en las que la narrativa utilizada por el feminismo legal, en su doble estrategia de litigio constitucional y movilización social, ha logrado permear en la cultura constitucional de los Estados Unidos, cambiando a

* Bachelor of Laws from the University of Buenos Aires (Argentina), Master of Laws from Tulane University (United States), and Master in Constitutional Law and Human Rights from the University of Palermo (Argentina). Professor of Elements of Constitutional Law at the University of Buenos Aires. ORCID iD: 0000-0003-2890-2295. E-mail: nicolaszara@derecho.uba.ar

través de ella algunos significados constitucionales. Para ello, se enfoca en las estrategias utilizadas por el feminismo legal en el litigio constitucional y en los esfuerzos por la sanción de la Equal Rights Amendment (ERA), así como en la interacción entre ambos procesos. Asimismo, se analiza el reciente resurgimiento de la ERA y las limitaciones de su texto. Finalmente, se brindan algunos argumentos en torno a la necesidad de una nueva propuesta alternativa y superadora, a la luz de los procesos analizados.

Palabras clave: Igualdad, constitucionalismo democrático, feminismo, movimientos sociales, Enmienda de Igualdad de Derechos, litigio estratégico, movilización legal, interpretación constitucional, cultura constitucional, interpretación popular de la constitución

I. INTRODUCTION

In the early 1960s, in *Hoyt v. Florida* (1961), the Supreme Court of the United States of America unanimously held that

> Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life[1].

Fifty years later, the situation in this country is very different, largely due to the feminist mobilization of the 1960s and 1970s, the central focus of which was the Equal Rights Amendment (hereinafter, the ERA). This paper proposes a reframing of certain aspects of that mobilization, from the perspective of social movement theory and democratic constitutionalism.

According to democratic constitutionalists, interpretation of the Constitution should not be the exclusive domain of the legal system, i.e., the courts, public officials and legal professionals; on the contrary, all citizens interpret the Constitution. Its text articulates consensuses and practices by virtue of which "ordinary citizens understand themselves as authorized to make claims about the Constitution's meaning" (Siegel, 2001, p. 345). In plural societies, then, it is to be expected that different

1 In this case, the Supreme Court upheld the constitutionality of a law that required women to register in order to be eligible for jury service in criminal trials in Florida.

groups of citizens will make divergent claims about the meaning of the Constitution.

Given the authoritative nature of the Constitution as a legal text, its interpretation is regularly the subject of dispute between groups which seek to take control of the symbolic violence it contains (Bourdieu, 2001, p. 171). For Bourdieu, the legal system consists of "hierarchical bodies which are authorized to resolve conflicts between interpreters and interpretations" (p. 171). Hence, different social actors seek to express their political assertions in constitutional language so that their claims will be looked upon favorably by the legal system and will thus acquire the status of being "correct" interpretations of the law, through which they will derive authority. From the point of view of democratic constitutionalism, the existence of fundamental disagreements about the meaning of the Constitution, far from undermining confidence in the Constitution, actually endows it with greater authority, since people with diametrically opposed convictions can feel equally identified with it (Post & Siegel, 2013, pp. 33-35).

The narrative dimension of the law plays a key role in these hermeneutic debates; according to Robert Cover (1984, p. 5), laws acquire meaning and purpose from the discourse in which they are located. Similarly, the "normative universe" is based on interpretative commitments of officials and citizens alike (p. 7). Siegel (2001) calls this universe "constitutional culture", and defines it as a "network of understandings and practices that structure our constitutional tradition, including those that shape law but would not be recognized as 'lawmaking' according to the legal system's own formal criteria" (p. 303).

Constitutional culture is situated at the intersection between the political and legal fields and informs all institutional practices, including constitutional review. Social movements seek to impose their narrative on constitutional culture in order to assert their influence in the legal field and ultimately have their narrative recognized as the correct interpretation by the legal system (Bourdieu, 2001, p. 171). In the pursuit of this objective they engage in a variety of actions, which may include—but are not limited to—legal mobilization. The success of a social movement in imposing its narratives depends to a large extent on its numbers (magnitude), commitment, unity and the value of its claims (Tilly, 2015, p. 17).

Section II of this paper focuses on the feminist legal mobilization in the fight for equal rights in the United States during the 1960s and 1970s. Firstly, I focus on the narratives employed by the movement in their strategic litigation in the fight for equal rights. Secondly, I discuss the efforts to enact the Equal Rights Amendment, which was passed by Congress in 1972 but failed to garner the required number of ratifications

by state legislatures to make it to the Constitution. I show how the narrative put forward by feminists, supported by the dual strategy of constitutional litigation and social mobilization, managed to permeate the constitutional culture of the United States, altering the accepted interpretation of certain elements of the Constitution. In Section III I discuss the recent revival of the ERA which is, according to a number of scholars, close to being added to the Constitution. I analyze the merits of the strategy behind its revival and present an alternative proposal in light of my analysis in section II, the current situation with regard to U.S. Supreme Court jurisprudence and the emergence of new social movements fighting for racial and gender equality. Section IV outlines the conclusions of the paper.

The paper is based on qualitative analysis of primary sources including the Constitution of the United States, proposed amendments to the Constitution, federal laws, U.S. Supreme Court and lower court precedents, records of oral hearings and written submissions to the Supreme Court. I also refer to secondary sources such as scientific articles, books and newspaper publications.

In terms of its scope, it is important to note that this paper deals with a series of specific events which occurred in the 1960s and 1970s concerning constitutional litigation related to the Fourteenth Amendment and the efforts of the feminist movement to have the ERA ratified, events which had concrete consequences for constitutional interpretations of the amendment in question. It is in no way intended to be a review of the social struggles and the gains achieved by the feminism movement in the United States during this period. Section III goes on to discuss particular issues regarding the current situation which are relevant to the theoretical framework analyzed in section II and a number of the partial conclusions reached therein. Section III also contains references to case law from different periods of history which are essential to an understanding of the laws in force today.

II. THE LEGAL MOBILIZATION

II.1. Background

The first Equal Rights Amendment was drafted in 1923 by Alice Paul, an American suffragist and one of the founders of the National Woman's Party (hereinafter, the NWP)[2]. By 1944, the ERA was included in both the major political parties' platforms.

2 The original text stated that "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

In the 1960s, the feminist movement found itself at a crossroads. There was no consensus among feminist groups as to which mobilization strategy was best suited to advance the goal of equal rights. Certain groups believed that the way forward was to emulate the strategy of the Civil Rights Movement: to press forward with constitutional litigation in order to convince the courts to interpret the Fourteenth Amendment to the Constitution in such a way that its anti-discrimination protections would be extended, through case law, to gender-based discrimination. The Equal Protection Clause of that amendment had been the banner raised by Thurgood Marshall and the National Association for the Advancement of Colored People (hereinafter, the NAACP) in their still resonating legal victories. It represented an opportunity for feminist groups to build bridges with the Civil Rights Movement, and to signal their concerns for black women and working women.

These groups rejected the ERA as elitist and associated it with white feminism. Specifically, they believed that, if ratified, it would establish total formal equality before the law and put an end to special protections for working women under labor laws. Meanwhile, other groups within the feminist movement advocated for the ERA to be added to the Constitution: they were skeptical of the chances of success of litigation strategies, which they found closely linked with the Civil Rights Movement, which they perceived as a competitor (Mayeri, 2004, p. 762).

In 1964, an important change in the movement's legal frames of reference took place: the enactment of a new Civil Rights Act. Although this law had originally been conceived with the goal of prohibiting racial discrimination by private entities—protections against discrimination on the basis of race by state institutions were already enshrined in the Equal Protection Clause—, its Title VII specifically prohibited discrimination on the basis of sex in the workplace. The inclusion of Title VII in the Civil Rights Act cleared the resistance of some groups within feminism that had previously been opposed to the ERA, since the amendment would no longer represent a threat to working women, whose right to non-discrimination in the workplace would henceforth be enshrined in law. Furthermore, inclusion of women as a legally protected class, alongside African Americans, convinced the faction of feminism most reluctant to pursuing the litigation strategy that building on the legacy of the Civil Rights Movement was an opportunity worth pursuing (Mayeri, 2004, pp. 770-775).

During the years following the enactment of the Civil Rights Act of 1964 the federal government did not rigorously enforce Title VII. This disillusioned the feminist movement. This dissatisfaction was expressed in a statement drafted at the Third National Conference on the Status

of Women in 1966 (Eskridge, 2001, p. 456). It was at this conference that the National Organization for Women (hereinafter NOW) was founded. NOW was intended to be more pragmatic than Alice Paul's NWP, and had a broader agenda and younger membership. NOW took the lead in a legal mobilization focused on simultaneously pursuing a litigation strategy based on the Equal Protection Clause and advocating for the passage of the ERA (Mayeri, 2004, pp. 783-785). This strategy was eventually supported by the NWP.

II.2. Strategic litigation

The constitutional litigation strategy faced two significant challenges in connection with the constitutional culture. First, the widespread belief that the Constitution did not prohibit discrimination on the basis of gender. Second, the system of beliefs, gender stereotypes and unconscious biases prevalent in society in general, and among actors within the legal system in particular, which meant that existing inequalities in the treatment of men and women were not perceived as unjust by the judges who had to rule on them.

II.2.1. The race-sex analogy

In order to tackle the first of these challenges, the movement needed to develop a constitutional argument to persuade judges that sex should be considered one of the categories protected from discrimination under the Equal Protection Clause, along with others such as ethnicity and nationality. To that end, they argued that sex discrimination was comparable, in nature and operation, to racial discrimination. This analogy had already been used by suffragists in their fight for the right to vote (Mayeri, 2001, p. 1054). Pauli Murray, an African American lawyer and activist who had been involved in shaping the NAACP's strategy in *Brown v. Board of Education* (1954), decided to make it the central narrative of the strategic litigation plan. In doing so, she sought to capitalize on the political opportunity presented by the victories of the Civil Rights Movement and the widespread recourse to the Equal Protection Clause in constitutional arguments during that period.

As mentioned previously, constitutional culture operates at the intersection between the political and the legal fields, and laws acquire different meanings depending on the narratives through which they are articulated. The race-sex analogy was the narrative that allowed the feminist movement to express the political demand for equality in the constitutional language of the 1960s. Feminists sought to foster, through arguments which were already prevalent and considered valid in the constitutional culture of the time, an understanding that classifications based on sex were unconstitutional because they were based on the same reasoning as those based on race. If this was

accepted as true, then it followed that related cases deserved a more rigorous level of constitutional scrutiny by the courts than the so-called "rational basis test", which legal distinctions based on gender had so far successfully passed[3].

To emphasize her position, Murray used the term "Jane Crow" to describe the prejudice against women in the United States at the time (Murray & Eastwood, 1965)[4]. In her view, race and sex

> are comparable classes, defined by physiological characteristics, through which status is fixed from birth. Legal and social proscriptions based upon race and sex have often been identical, and have generally implied the inherent inferiority of the proscribed class to a dominant group. Both classes have been defined by, and subordinated to, the same power group—white males (Murray, 1971, p. 257).

According to this view, both minorities constituted politically underrepresented groups whose subordination was justified on the basis of supposed "natural" differences. The narrative linking gender and racial discrimination was well-received in U.S. constitutional culture and grew in influence in the legal field, where it began to be accepted that the Fourteenth Amendment prohibited gender discrimination.

The first test for the litigation strategy based on the race-sex analogy was *White v. Crook* (1965) in the United States District Court for the Middle District of Alabama. There, Murray represented the American Civil Liberties Union (hereinafter, the ACLU), which sought to overturn the acquittal of those accused of the murder of two civil rights movement activists by a jury composed exclusively of white males, on the basis of the "systematic exclusion of black citizens and of female citizens of both races" from the jury (Chiappetti, 2017, p. 491). The case was viewed as an ideal test case for this new strategy because both forms of discrimination (racial and sex) were simultaneously involved. It should be noted that Alabama was one of only three states which still prohibited women from serving on juries (p. 491). Although the exclusion of citizens from juries because of their race had been declared unconstitutional almost a century before (*Strauder v. West Virginia*, 1880), it persisted in practice there. Given this background, the Court of Appeals for the Middle District of Alabama ruled that "women in

3 See, for example, *Goesaert v. Cleary* (1948), in which the Supreme Court decided that a Michigan state law which prohibited women from working as bartenders unless they were the wife or daughter of the owner of the establishment was constitutional according to the rational basis test; the court considered it rational for the state legislature to hold that women carrying out this activity could 'give rise to moral or social problems, against which it may devise preventive measures'.

4 This name alludes to the notorious Jim Crow laws in force in various states (principally, but not exclusively, in the South) between 1877 and the mid-20th century, which provided for the compulsory segregation of people on the basis of their race. For a detailed history of race relations in the United States during that period, see Woodward (1974).

Alabama have a constitutional right not to be arbitrarily excluded from jury service" (*White v. Crook*, 1965). The victory was not complete: as the State of Alabama did not appeal the decision, the Supreme Court never ruled on the case.

The movement had to wait until 1971 to present arguments based on the race-sex analogy before the highest court in the land. In *Reed v. Reed* (1971) Ruth Bader Ginsburg—founder and then-director of the ACLU Women's Rights Project—condensed the arguments of Pauli Murray and other feminists in Sally Reed's written brief to the Supreme Court (Ginsburg *et al.*, 1971). The strategy was partially successful: the unanimous ruling declared that an Idaho law establishing automatic preference for men over women with regard to the administration of inherited estates was unconstitutional as it represented "exactly the kind of arbitrary legislation prohibited by the Equal Protection Clause" (Ginsburg *et al.*, 1971). Despite the victory on the merits, the court did not explicitly embrace the race-sex analogy and declared the law unconstitutional using the rational basis test[5].

The fate of Murray and Ginsburg's constitutional litigation strategy in the Supreme Court was decided two years later in *Frontiero v. Richardson* (1973). The case involved a challenge to the constitutionality of a law which established different requirements, depending on the sex of the applicant, for certain economic benefits granted to employees of the armed forces. Sharon Frontiero, an Air Force employee, applied for these benefits, which were provided under law to military personnel with family members who were financially dependent on them, which her husband Joseph was. Although the application was automatically approved in the case of her male colleagues, Sharon was denied the benefit because she could not prove that her husband was more than 50% dependent on her economically. Frontiero complained that the law required women to prove this, while it was presumed in the case of male applicants.

The ACLU took an interest in the case and pressured Frontiero's attorneys to allow them to represent her; however, her attorneys were adamant that they would present her case before the Court. They disagreed with the ACLU's proposed litigation strategy, which focused on equating gender discrimination with racial discrimination in order that the court declare gender a suspect classification. In the end, Frontiero's lawyers yielded a few minutes of their allotted time before the Supreme Court to the ACLU, which appeared as amicus curiae and argued, as it had previously done in *Reed v. Reed* (1971), that the appropriate standard

5 Justice Warren Berger, in a unanimous court ruling, held that the question to be resolved was "whether a difference in the sex of competing applicants for letters of administration *bears a rational relationship to a state objective*" (emphasis added).

of review for gender discrimination cases was strict scrutiny, which the court had already applied in cases of racial discrimination. Frontiero's lawyers, on the other hand, asked the Court to apply an "intermediate" level of scrutiny, previously unheard of. Frontiero's attorneys employed a narrow approach, asking the Court to focus on that specific case, while the ACLU, represented by Ginsburg, focused on the expansive nature of the case, employing the race-sex analogy, and asked the Court to rule that strict scrutiny should henceforth be applied to all gender-based classifications[6].

The Court's ruling showed the different levels of scrutiny that could be applied to laws that establish gender-based classifications. The plurality opinion, signed by four justices[7], made explicit mention of the analogy between race and sex, arguing that both classifications should be analyzed using strict scrutiny. The justices held that both race and sex are immutable characteristics not chosen by individuals, that classifications based on these characteristics effectively relegated an entire class of individuals to an inferior legal status, and that that subordination was unrelated to their ability to contribute to society. Moreover, the justices considered that Congress had already decided, when it passed the ERA in 1972 and in other anti-discrimination laws, that sex, like race, was a suspect classification. However, this opinion fell short of the five votes needed for it to represent a majority vote and become precedent.

Justice Powell's concurring opinion[8] also accepted Frontiero's claim; however, he refused to consider sex a suspect classification, arguing that this was unnecessary since application of the *Reed* (1971) precedent was sufficient to resolve the case. In justifying his opinion, he considered —as did the plurality opinion—the social mobilization behind the ERA, but his interpretation contrasted with that of the other justices. He argued that since the ERA had been passed by Congress and was in the process of being ratified by state legislatures, the Court would be acting prematurely if it adopted the strictest standard of review for gender-based classifications. Such a decision, Powell argued, would detract from the constitutional amendment mechanism and undermine the democratic process which was in progress.

From the beginning, the members of the Court knew which way they would rule; they understood, however, that what was truly important was the reasoning used, since this was what would determine the level of scrutiny that would henceforth be applied to cases involving gender-based classifications (Graetz & Greenhouse, 2016, p. 169). "Sex" was

6 The audio and transcript of the Supreme Court hearing are available at Oyez.org (n.d.).
7 The opinion was authored by Justice Brennan, who was joined by Justices Douglas, White and Marshall.
8 Justices Berger and Blackmun joined this opinion.

only one vote short from being declared a suspect classification by the Supreme Court. This would have made all laws based on such classifications to be analyzed under the most rigorous standard of constitutional scrutiny. Despite this, it was clear that the narrative proposed by Murray and advanced by Ginsburg and other feminists had already managed to permeate the constitutional culture, to the extent that four Supreme Court justices viewed it as the correct interpretation of the constitution.

The ruling in *Frontiero* (1973) raises some interesting questions. The first, of course, relates to what might have happened had Frontiero's attorneys closed ranks behind the ACLU's argument. Another, concerning the justices' mentions of the ERA ratification process in their opinions, is to what extent the "dual strategy" advanced the feminist movement's goals. The plurality vote seems to reflect a belief that interpretation of the constitution is informed by happenings in the political field and that it is not the exclusive purview of the courts. Viewed in this light, it can be argued that the campaign for the ratification of the ERA was key to the process of strategic litigation and vice versa. However, the concurring vote demonstrated the limits of the "dual strategy", as it saw the simultaneous pursuit of the same objective through both avenues as contradictory. According to this view, the progress achieved regarding ratification of the ERA through the constitutional amendment process was a barrier to success in the courts.

In summary, the opinions of the courts in the cases reviewed in this section demonstrate two simultaneous processes at work. One one hand, they reveal the central role that social mobilisation plays in shaping constitutional culture. At the same time, they reflect how the changes in constitutional understandings brought about by social mobilization can have an impact on constitutional adjudication

II.2.2. Gender stereotypes

Pauli Murray (1962) was sure that the problem of gender discrimination was particularly severe because "the courts which pass upon this issue are overwhelmingly male and have little understanding of the problem" (p. 32). In a similar vein, Ruth Bader Ginsburg reflected about her participation in the oral hearings in the Supreme Court in the *Frontiero* case (1973):

> I felt a sense of empowerment because I knew so much more about the case, the issue, than they did. So I relied on myself as kind of a teacher to get them to think about gender. [...] Most men of that age, they could understand race discrimination, but sex discrimination? [...] To get them to understand that this supposed pedestal was all too often a cage for women -that was my mission in all the cases in the 70s. To get

> them to understand that these so-called protections for women were limiting their opportunities (Graetz & Greenhouse, 2016, p. 174)[9].

To address this bias, feminist lawyers turned to a concept already familiar to the justices: stereotyping. The civil rights movement had invoked this concept to question the dynamics of racial prejudice, and the feminists now used it to challenge the normalization of unequal treatment of women (Franklin, 2010, pp. 106-107). Such stereotypes, Murray (1971) argued, "treat all women as a single class, and make distinctions based solely on their sex. They disregard the fact that women vary in physical structure, strength, and intellectual and emotional capacities, just as men do" (p. 255).

Gender stereotypes were not just one component of the movement's overall narrative; they were an integral feature of the constitutional culture of the time. They lived in the minds of legislators who passed discriminatory laws, as well as in the beliefs of the justices, who had not so far ago upheld the constitutionality of laws which assigned women subordinate social roles. The movement's challenge was to make these stereotypes visible to those who held them and echoed them.

If the judges' own biases made them incapable of empathizing with the fate of women subordinated by the legal system, then perhaps they could empathize with men who were harmed by laws which imposed stereotypical gender roles on them. This reasoning led the leaders of the movement to take on a series of cases involving men who were harmed by laws which discriminated against them because of their gender.

The first of these cases was *Weinberger v. Wiesenfeld* (1975). The ACLU, again represented by Ginsburg, convinced the Supreme Court to strike down a provision of the Social Security Act which granted welfare benefits to widows with children after the death of their spouse, but not to widowers in the same position. In her oral argument before the Supreme Court, referring to the effects of laws based on gender stereotypes, Ginsburg explained that "laws of this kind don't put women on a pedestal, but in a cage" (Oyez.org, n.d., min. 34)[10]. The Court ruled unanimously in favor of Stephen Wiesenfeld and held that the distinction in the law was "based on an 'archaic and overbroad' generalization not tolerated under the Constitution, namely, that male workers' earnings are vital to their families' support, while female workers' earnings do not significantly contribute to families' support" (*Weinberger v. Wiesenfeld*, 1975).

9 Excerpt from Jessica Weisberg's interview with Ruth Ginsburg, which appeared in issue 359 of *Elle* magazine, published in October 2014. Reproduced in Graetz and Greenhouse (2016, p. 174).

10 The audio and transcript of the hearing are available at the source referenced.

The most significant of this series of cases was undoubtedly *Craig v. Boren* (1976), in which the Supreme Court declared an Oklahoma law that permitted women to buy beer at age 18 and men at age 21 to be unconstitutional. In this case the ACLU filed an amicus brief supporting the arguments of the attorneys for Mr. Craig, a man over 18 but under 21 to whom a store had refused to sell beer.

The importance of this case lays in the fact that the Supreme Court ruled, for the first time, that the constitutionality of laws involving classifications on the basis of gender should be evaluated using a more rigorous standard of scrutiny than the rational basis test. Based on this precedent, such classifications were to be subjected to "intermediate scrutiny", which required the statute to serve "important governmental objectives" and to be "substantially related to achievement of those objectives".

Thus, through Supreme Court litigation of what seemed a rather trivial court case on the surface, the legal feminist movement achieved a constitutional transformation. Until *Reed v. Reed* in 1971, no law which included classifications on the basis of gender had been declared unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. By 1975, following *Craig v. Boren* (1976), such classifications were receiving a particularly rigorous treatment in the courts.

In *Califano v. Goldfarb* (1977), the Supreme Court declared the unconstitutionality of a federal social security program, which granted benefits to widows based on the incomes of their deceased husbands while widowers received benefits only if they could show that they were at least 50% economically dependent on their spouse's earnings. The plurality vote[11] held that the law, while evidently disadvantaging men, also discriminated against women insofar as it "deprive[d] them of protection for their families which men receive as a result of their employment".

Similarly, in *Wengler v. Druggists Mutual Insurance Company* (1980), the Supreme Court struck down a Missouri state law which automatically granted pensions to widows, while requiring men in the same situation to prove their physical or mental incapacity to work, or their economic dependence on their deceased wife, in order to be eligible for the same benefit. This ruling shows how the concept of gender stereotypes was being consolidated in the constitutional culture; the Supreme Court, by eight votes to one, accepted the narrative of the feminist movement regarding the pernicious effects that such stereotypes had

11 Authored by Justice Brennan, joined by Justices White, Marshall and Powell.

on both genders, notwithstanding the fact that this particular law only harmed men.

This can be most clearly demonstrated by comparing the Court's opinion with the brief submitted in the case by Ginsburg (on behalf of the ACLU as *amicus curiae*), in which she wrote that "a family stereotype—the dominant, independent man/the subordinate/dependent woman—provides the basis for allocating workers' compensation death payments in Missouri" (Ginsburg & Field, 1980, p. 24), and that "the statute under analysis discriminates against men, only as a collateral effect of discriminates against women (and that 'the law at issue, to the extent that it does so only as a by-product of an offensive albeit traditional way of thinking about women—as inferior to and therefore dependent on men'" [p. 2]). Similarly, the majority opinion of the Supreme Court emphasized that "this law discriminates against both men and women," and that "it is this kind of discrimination against working women that our cases have identified and, in the circumstances, found unjustified" (*Wengler v. Druggists Mutual Insurance Company*, 1980).

As discussed in section II.2.1 above, in order to convince the courts to strike down laws that established classifications based on sex, the feminist movement had to express its demands in a language already familiar to the courts, likening them to the constitutional arguments of another group whose claims had already permeated through the constitutional culture and into the legal field. Moreover, in order for the overwhelmingly male judiciary to overcome its unconscious biases and fully appreciate the problem of discrimination against women, the feminist lawyers' selection of cases focused on the concept of stereotyping, already familiar to those working in the legal field, and on demonstrating how its effects harmed both genders.

II.3. Mobilization in favor of a new constitutional amendment

Huge numbers of women mobilized in the 1960s and 1970s to fight for the enactment of the ERA. In addition to strategic litigation, the range of actions taken by the feminist movement included lobbying, forming groups both within and outside the party system, devising media visibility strategies, and holding large rallies (Siegel, 2001, p. 309). In parallel, those decades saw feminist legal theory become established as an academic discipline in law schools throughout the United States. This resulted in numerous researchers and activists making contributions to the study of the relationship between the law and women's position in society, initially from a liberal perspective and later drawing on stronger conceptions of equality.

In 1972, after the ERA was passed by both houses, Congress sent it to state legislatures for ratification, as provided for by Article V of the U.S. Constitution[12]. Feminist mobilization reached its peak in the following years. At the same time, other women who opposed ratification also organized themselves into an influential counter-movement called STOP ERA, led by lawyer and anti-feminist activist Phyllis Schlafly (Graetz & Greenhouse, 2016, p. 137)[13]. The bill proposing the amendment, which was presented in Congress in 1971 and eventually passed by both houses in 1972, read as follows:

- Section 1: Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.
- Section 2: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
- Section 3: This amendment shall take effect two years after the date of ratification.

Section 1 had been drafted by Alice Paul in 1943. Section 2 did not differ substantially from the 1943 text, with the exception of the 1943 text empowering state legislatures to enact legislation to enforce the provisions of the amendment.

However, fifty years after its original drafting in 1923, and thirty years after the 1943 update, the text of the bill no longer satisfied all of the various sectors of the feminist movement. Several modifications were proposed by NOW, which were rejected one by one by the inflexible National Women's Party, who refused to support a modified amendment (Mayeri, 2004, pp. 785-789).

Rather than an agreement among different factions, NOW's decision to support the old text was the price it had to pay to preserve the political unity of the movement. However, fractures soon developed: Pauli Murray, one of the founders of NOW, broke ties with the organization and joined the ACLU, which by then had a broader agenda. She felt that the text of the ERA, as passed by Congress, which did not reference the struggles of other groups, forced her to fragment her identity: "Negro at one time, woman at another, or worker at another" (Mayeri, 2004, p. 791).

12 Article V of the Constitution states that: "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."

13 Siegel (2006) discusses the powerful influence of this counter-mobilization on the legal discourse and constitutional culture of the time.

Although the ERA did not obtain the number of ratifications in state legislatures required by the Constitution for it to be incorporated into the text of the Constitution, the numbers, commitment, unity and values of the feminist mobilization during the 1960s and 1970s led to their narrative permeating the constitutional culture and altering fundamental perceptions regarding gender equality among citizens, politicians and judges. Several states amended their constitutions with their own ERAs. In addition, Congress enacted other laws prohibiting gender discrimination[14] and federal courts, including the Supreme Court, considered aspects of the Equal Protection Clause as interpreted by the feminist movement its rulings, something which would have been unthinkable even a few years before (Amar, 2012, pp. 295-296)[15].

II.4. The end of an ERA

The early 1970s saw a shift to the right in the American political landscape. The retirement of the iconic Earl Warren from the Supreme Court in 1969 coincided with the election of Richard Nixon as president, who succeeded in replacing him with the conservative Warren Burger. Nixon was also able to appoint three more justices to the Court: Harry Blackmun replaced Abe Fortas in 1970 and, the following year, Lewis Powell and William Rehnquist succeeded Hugo Black and John Marshall Harlan II, respectively. This was the panorama by the mid 1970s when, despite having achieved a number of important victories in the courts, feminists' best hope for advancing towards the goal of equality between the sexes seemed to rest on the ratification of the ERA.

In order to be incorporated into the constitutional text, the proposed amendment needed to be ratified by 38 of the 50 states by March 1979. In 1978 Congress extended the deadline for receiving the ratifications until 1982; nevertheless, by then it had only been ratified by 35 states, of which 5 had already withdrawn their ratifications. Several authors attribute the failure in those years to the powerful mobilization and counter-movement led by Phyllis Schlafly[16].

III. REVIVAL OF THE ERA

III.1. The situation today

On January 15, 2020, Virginia became the 38th state to ratify the ERA. It joined Nevada and Illinois, which had done so in 2017 and 2018

14 The Equal Pay Act of 1963 and the abovementioned Title VII of the Civil Rights Act of 1964 are notable examples.

15 It is interesting to compare the language used by the Supreme Court in the excerpt of *Hoyt v. Florida* (1961) transcribed in the introduction with that used less than two decades later in the excerpts from *Califano v. Goldfarb* (1977) and *Wengler v. Druggists Mutual Insurance Company* (1980), transcribed in section II.2.2.

16 These include Graetz and Greenhouse (2016, p. 173).

respectively. These ratifications were driven by the national and local chapters of a number of feminist associations in what they called the *three-state-strategy*; this was the number of ratifications still required in order to reach the 38 stipulated in Article V of the Constitution[17]. This renewed support for the ERA comes at a time of heightened awareness of the feminist cause in the United States in the aftermath of the #MeToo campaign[18], which seeks to raise awareness of the sexual violence suffered by women every day in many different settings, and to unify and help victims. A recent survey found that a majority of American citizens from both major parties support the ERA, with 90% of Democrats and 60% of Republicans in favor of the amendment[19], and 75% of the overall population.

Despite this overwhelming approval, the path to full ratification is still fraught with challenges; the deadline for the ERA to obtain the 38 ratifications required by Article V of the Constitution expired in 1982 and was not extended by Congress. Consequently, in order for the ratifications of Virginia, Nevada and Illinois to be considered valid today, Congress would have to retroactively alter that deadline. The debate about whether Congress has the power to do so has not yet been settled. Additionally, in order for the ERA to be incorporated into the Constitution, Congress would have to count the ratifications by those states which subsequently withdrew them as valid, which is also controversial[20].

Away from these procedural issues, which are beyond the scope of this paper, it is worth noting the shortcomings of the text which this strategy seeks to revive. The version drafted of Alice Paul, fundamental in the mobilizations of the last century, suffers from several limitations and would not be enough to ensure substantive standards of equality. If the ERA were passed today, all laws which entail classifications based on sex would be subjected to strict scrutiny in the courts. However, although the intermediate scrutiny standard currently applied has become almost as demanding as strict scrutiny through case law (*United States v. Virginia*, 1996)[21], social inequality persists. This suggests that existing gender

17 Among the associations which participated in the campaign were NOW, ERA Summit, ERA Coalition, the Fund for Women's Equality and Equality Now.

18 #MeToo has its origins in 2007, when activist Tarana Burke founded Just Be Inc., an NGO aimed at helping victims of sexual abuse and harassment (The New York Times, 2017). The movement exploded in the United States and around the world following a tweet by actress Alyssa Milano on October 15, 2017, encouraging victims of sexual harassment and abuse to share their experiences.

19 See The Hill (2020) and The Guardian (2020).

20 The arguments in favor of the ratification of the ERA, as well as the main obstacles to be overcome, were addressed in depth by Held *et al.* (1997) and by Magliocca (2019).

21 The majority opinion in this Supreme Court case was written by Justice Ruth Bader Ginsburg. Following this precedent, gender-based classifications by the state must be deemed to pursue "important governmental objectives," and the means employed must be "substantially related to the achievement of those objectives" (*United States v. Virginia*, 1996). Some authors understand the courts to have *de facto* passed the ERA. See, for example, Strauss (2001).

disparities would remain if the ERA as it stands were incorporated into the text of the Constitution[22].

III.2. Towards a new ERA

There are currently multiple gender equality issues in the United States. A number of legal feminist authors have argued for the need for a renewed amendment which reflects current needs and includes more substantive conceptions of equality[23]. Below I explore some of the shortcomings of the 1972 bill which could be remedied in the light of the experience accumulated since then.

The main structural limitation of the ERA is its wording. Alice Paul's draft is analogous to that of other amendments, such as the First and Fourteenth, in that it only protects against discrimination involving action by the state; the version of the ERA passed by Congress in 1972 does not apply to private parties. Clearly, however, gender inequalities extend far beyond the sphere of activity of public institutions. The requirement of "state action" in certain local ERAs has been interpreted by courts in several states rather broadly (at least compared to how it was historically interpreted by federal courts). As a result, more and more situations have been deemed to fall under the umbrella of state actions and, consequently, were covered by the ERA (Avner, 1984, pp. 151-152).

However, federal courts have generally interpreted the scope of the state action doctrine in matters of discrimination much more narrowly, and this interpretation has strong foundations in case law. The state action doctrine made its first appearance in the infamous Civil Rights Cases of 1883[24]. Since then, the concept of "state action" has been narrowly interpreted by federal courts, as has Congress's ability to enact laws to combat private discrimination under the authority of this amendment. It is imperative, then, that a new amendment be drafted which removes the requirement of state action, or at least significantly alters its scope. In addition, it is important that activists continue in their efforts to

22 This is the position of feminists such as McKinnon, who argues that judicial analysis reflects the status quo: evaluation of the rationality of laws (even under the most rigorous level of scrutiny) reflects the prevailing sociological—and hence patriarchal—conceptions. See MacKinnon (2014, p. 570) for further analysis.

23 See, by way of example, MacKinnon y Crenshaw (2020), who discuss some of the issues outlined here.

24 In 1883 the U.S. Supreme Court issued a joint ruling on several cases involving racial discrimination against African Americans by private individuals in lodgings, theaters, and railroads. Based on the Fourteenth Amendment, the Court ruled that Section 1 of the Civil Rights Act of 1875, which prohibited discrimination on the basis of race or skin color by private parties, along with the associated fine stipulated in Section 2, were unconstitutional, The Court interpreted the amendment to mean that "until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity, for the prohibitions of the amendment are against State laws and acts done under State authority" (*Civil Rights Cases*, 1883).

persuade more state courts to interpret the "state action" concept of their own ERAs flexibly. This is essential, firstly in order to secure more rights for more people until a federal ERA is enacted, and secondly, in order to pursue a medium-term goal related to the constitutional culture: to prepare the ground for the eventual passing of a federal ERA, so that when the time comes for this to be interpreted by the federal courts, they will find a strong body of state court case law and precedent which has favored a loose interpretation of the state action requirement in ERAs.

Just as it is essential to expand the scope of the ERA's anti-discrimination protection with respect to that of the Fourteenth Amendment, it is also vital that the ERA provides Congress with an independent constitutional foundation for the enactment of legislation prohibiting violence and discrimination against women and sexual minorities by private parties, without it being necessary to rely on other provisions in the Constitution which have already proven insufficient in that respect. The Civil Rights Cases limited the scope of application of the Fourteenth Amendment to instances involving state action—which was interpreted narrowly—and, as a consequence, severely curtailed the ability of Congress to enact laws to prevent discrimination by private entities based on Section 5 of the Fourteenth Amendment[25]. It is important to clarify at this point that the Civil Rights Act of 1964 (mentioned in Section II), which prohibited racial and various other forms of discrimination among private entities, was enacted by Congress based on its authority to regulate commerce[26], since the state action doctrine prevented it from doing so based on the authority derived from the Fourteenth Amendment.

More recently, however, when Congress voted to enact a domestic violence law (the Violence Against Women Act) in 1994, the Supreme Court declared it unconstitutional on the grounds that Congress had no authority to enact such a law under either the Commerce Clause or Section 5 of the Fourteenth Amendment (*United States v. Morrison*, 2000).

In addition, a newly drafted ERA should allow Congress to enact wide-ranging measures which directly address structural problems such as the glass ceiling and the feminization of poverty. Such powers should explicitly include affirmative action measures. Although the U.S. Supreme Court held that these are permissible in the employment context under Title VII of the Civil Rights Act of 1964 (in *Johnson v. Transportation Agency of Santa Clara County,* 1987), to date it has not

25 This clause states that "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

26 The Commerce Clause of the U.S. Constitution gives Congress the power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes" (Art. 1, Section 8, Clause 3). The Supreme Court confirmed the constitutionality of the Civil Rights Act based on Congress' power to regulate interstate commerce in *Heart of Atlanta Motel, Inc. v. United States* (1964).

ruled on any cases regarding the validity of gender-based affirmative action plans under the Fourteenth Amendment. There is good reason to believe that such plans would be evaluated using the intermediate scrutiny test created in *Craig v. Boren* (1976)[27], which became more demanding following the Supreme Court's decision in *United States v. Virginia* (1996)[28]. As a consequence, the chances that measures such as gender quotas would be deemed unconstitutional under the Fourteenth Amendment are high[29]. A constitutional clause specifically authorizing Congress to establish this type of measures would nullify this risk.

A new draft of the ERA should consider the impact of public policies which create or further entrench inequalities. In the current context, "the vast majority of sex inequality is produced by structural and systemic and unconscious practices in a context of the absence or abdication of laws against them" (MacKinnon, 2014, p. 572). However, in current anti-discrimination laws based on the Equal Protection Clause, *facially neutral* state actions which have a disparate impact on different population groups do not, by themselves, trigger the application of the strict scrutiny standard[30]. Under this standard, recourse to the Fourteenth Amendment is no longer as useful a tool for achieving change as it was half a century ago.

Although equality between men and women was debated in binary terms in the 1960s and 1970s, the reality today is more complex. A new ERA should protect all people who are discriminated against because of their sex, gender, gender expression or sexual orientation. However, not all people who suffer discrimination due to their sex, gender, gender expression or sexual orientation face the same challenges. Social class, race, disability, migrant status, and membership of indigenous communities or religious minorities intersect with the sex and gender

27 See section II.2.1.

28 According to this precedent, gender-based classifications made by the State must pursue "important governmental objectives" and the means employed must be "substantially related to the achievement of those objectives."

29 The Supreme Court found in *Regents of the University of California v. Bakke* (1978) that racial quotas violate the Fourteenth Amendment, and that they should be subject to strict scrutiny. Under this test, a measure is constitutional if its purpose is the pursuit of a "compelling state interest" and the means used are "narrowly tailored" to the pursuit of that interest. On that occasion, it was decided that the purpose of "remedying the effects of social discrimination" did not meet the first requirement of the test as specific instances of discrimination by the state were not clearly identified. Given the similarity between this standard and the "important governmental objectives" that regulations must satisfy under the intermediate scrutiny test since *United States v. Virginia* (1996), the likelihood of gender-based affirmative action being deemed to satisfy the first requirement of the test is low. Even if a gender quota were deemed to satisfy the first requirement of intermediate scrutiny, it would be unlikely to satisfy the second requirement, which would lead the Supreme Court to rule—as it had in *Bakke* with respect to race—that gender cannot be used as an exclusive basis for a decision on whether to hire a particular candidate for a position.

30 In order for a case to merit strict scrutiny, a person claiming to have been discriminated against must prove that the legislature operated with "discriminatory intent" when enacting the law (*Washington v. Davis*, 1976) and that it chose to do so, at least in part, "because of" and not merely "in spite of" its adverse effects upon an identifiable population group (*Personnel Adm'r of Massachusetts v. Feeney* (1979).

dimensions of discrimination (MacKinnon & Crenshaw, 2020, pp. 119-121). It is essential that the new ERA incorporates this reality. This dimension of the issue was recognized by feminists such as Pauli Murray, who believed that Alice Paul's ERA did not sufficiently address the specific challenges faced by black women and women workers (Mayeri, 2004, p. 791).

Just like the period discussed in section II, the United States is currently marked by the presence of two social movements that strive for the elimination of racial and gender inequalities. The huge numbers of followers of the Black Lives Matter and #MeToo movements, the value of their claims and their commitment to mobilization represent a historic political opportunity for an intersectional ERA. The demands of both groups are closely related and overlap. As noted in Section II, demands for equality do not necessarily compete with each other; on the contrary, they can be interrelated and strengthen each other.

Finally, the ERA represents an opportunity for enshrining victories in the area of sexual and reproductive rights in the Constitution. The constitutional rights to contraception[31] and abortion[32] were legally recognized by the Supreme Court as components of the right to privacy, part of the guarantee of liberty under the Due Process Clause of the Fourteenth Amendment, and not based on the principle of equality. Conservative groups reject this interpretation and have long sought to erode it. The explicit inclusion of these rights in the Constitution would constitute an important step forward in that the life plans of pregnant women would no longer be at the mercy of oscillating Supreme Court majorities. Strong arguments in favor of these rights are based on equality, which is why they would merit inclusion in a new version of the ERA. The sex equality argument in favor of reproductive rights "opposes laws restricting abortion or contraception to the extent that such laws presuppose or entrench customary, gender-differentiated norms concerning sexual expression and parenting" (Siegel, 2007, p. 821)[33].

IV. CONCLUSIONS

Today, as in the 1970s, the conservative majority on the U.S. Supreme Court makes it unlikely that the strategy of advancing the cause of gender equality by broadening the scope of anti-discrimination protection under the current text of the Constitution will succeed. The current text has reached its limit in terms of gender equality. At the same time,

31 See *Griswold v. Connecticut* (1965) and *Eisenstadt v. Baird* (1972).
32 See *Roe v. Wade* (1973), *Doe v. Bolton* (1973) and *Planned Parenthood v. Casey* (1992).
33 For a detailed analysis of the egalitarian argument for reproductive rights, see also Law (1984), Ginsburg (1985) y Karst (1977).

the prevailing climate of social unease over the treatment of women and sexual, racial and other minorities by the state and the society represents a political opportunity for a new legal mobilization. Despite—or due to—their diverse and decentralized natures, the current iterations of movements fighting for the rights of women and racial minorities—#MeToo and Black Lives Matter, among others—have enormous potential in terms of their numbers and levels of commitment. This energy could be harnessed to foster widespread vocal support for a renewed constitutional amendment, or at least for the introduction of new state ERAs, the modification of existing versions through legislative means or changes to legal interpretations. The huge level of popular approval for the ERA suggests that potential counter mobilisations would not significantly dent the chances of success. As noted in Section II, the fact that women's social standing in the United States today is incomparable to that of fifty years ago is due in no small measure to the gains achieved by the feminist movement in the battle over the meaning of the Constitution in the 1960s and 1970s. As also discussed in section II, this experience shows that sustained social mobilization over time has a long-term influence on constitutional culture, and that when accompanied by legal mobilization strategies it is a key driver of change in society. Although its supporters have not yet seen the ERA incorporated into the text of the Constitution, the widespread acceptance of the principles and narratives on which it is based are part of the constitutional culture today and explains the changes in the interpretation of the Constitution with regard to gender that have taken place over the last half century.

Despite the achievements to date, profound inequality still pervades the American society. The interpretation of the current text of the Constitution in case law hinders rather than facilitates the potential for substantial change in relation to gender equality, and it is unlikely that the Supreme Court in its current guise will adopt more progressive interpretations. In addition, and as many feminists warned in the 1960s and 1970s, Alice Paul's ERA would not be enough to foster lasting change. A democratic debate on the foundations of a new amendment aimed at guaranteeing true, pluralistic and intersectional equality is necessary.

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