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The American Dream for Women: Freedom, Equality and Opportunity – when will it arrive?

Women are not protected by the Equal Protection Clause of the Fourteenth Amendment

Women like slaves had no rights in this country when it was founded. As late as 2010, then Supreme Court Justice Scalia said we still don't. [1] While Scalia could find no protection for women in the Fourteenth Amendment because no one at the time it was passed thought it would apply to women, no one thought it would apply to corporations either [2] but Scalia not only voted in favor of the Fourteenth Amendment covering corporations in *Citizens United,* he even wrote a concurring opinion.[3]

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[1] The following exchange appears in the January 2011 issue of *California Lawyer* Magazine:
[Question:]In 1868, when the 39th Congress was debating and ultimately proposing the 14th Amendment, I don't think anybody would have thought that equal protection applied to sex discrimination, or certainly not to sexual orientation. So does that mean that we've gone off in error by applying the 14th Amendment to both?
[Scalia:] Yes, yes. Sorry, to tell you that. ... But, you know, if indeed the current society has come to different views, that's fine. You do not need the Constitution to reflect the wishes of the current society. Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things called laws. You don't need a constitution to keep things up-to-date. All you need is a legislature and a ballot box. You don't like the death penalty anymore, that's fine. You want a right to abortion? There's nothing in the Constitution about that. But that doesn't mean you cannot prohibit it. Persuade your fellow citizens it's a good idea and pass a law. That's what democracy is all about. It's not about nine superannuated judges who have been there too long, imposing these demands on society.
[2] *Paul v. Virginia*, 8 Wall. 168, 19 L.Ed. 357, 75 U.S. 168 (1868), corporations are not citizens under Article IV of 14th Amendment.
[3] *Citizens United v. Fed. Election Comm'n*, 557 U.S. 961, 130 S.Ct. 42, 174 L.Ed.2d 626, 78 USLW 3097 (2009)

In fact, corporations were covered by the equal protection and due process clauses of the Fourteenth Amendment, passed in 1868, long before women were. After the *Paul* case, two other cases ruled that corporations were not covered under the Fourteenth.[4] But that changed by 1889 when in *Minneapolis v. St. Louis Railroad & Beckwith* [5] the court ruled that corporations are persons for purposes of application of the equal protection and due process clauses of the Fourteenth Amendment. That was followed by *Louis A. Ligget Co. v. Lee* [6] finding that the equal protection and due process clauses of the Fourteenth mean that chain stores cannot be taxed differently and W*heeling Steel Corp v. Glander* [7] that corporations have the same rights as natural persons under the equal protection clause of the Fourteenth Amendment.

On the other hand, the court made it perfectly clear in 1874 that women are not covered under the Fourteenth Amendment. [8] It took 82 years after corporations were protected for the court to rule that women – actual persons – were covered under that amendment. [9] After *Reed*, a plethora of cases followed in quick succession along two tracks: Fourteenth Amendment equal protection and due process and Fifth Amendment due process as applied to the federal government.

Fifth Amendment Due Process Cases were Winners.

The Fifth Amendment due process cases focused on the military, social security and AFDC. In *Frontiero v. Richardson* [10] both husband and wife sued because she, as the military officer, was receiving less value for her pension than a male officer would and he, the husband, received a smaller pension than a woman would. In *Schlesinger v. Ballard* [11] a male officer who was not promoted and so was "up or out" in nine years complained that it was discrimination against men because women had fourteen years to be "up or out." The court ruled that women had fewer opportunities in the military to show leadership i.e. they were historically discriminated against so there was a rational relation for the regulation that gave women more time to show their merit i.e. positive action for women to make up for historic discrimination was allowed.

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[4] *Slaughterhouse Cases* (1873) 77 U.S. 273, 19 L.Ed. 915, 10 Wall. 273 (1869); *Munn v. Illinois* 94 U. S. 113, 126, 24 L. Ed. 77 (1877)
[5] 9 S.Ct. 207, 129 U.S. 26, 32 L.Ed. 585 (1889)
[6] 278 U. S. 105 (1933)
[7] 337 U.S. 562, 69 S.Ct. 1291, 93 L.Ed. 1544 (1949)
[8] *Minor v. Happersett,* 88 U.S. 162, 22 L.Ed. 627, 21 Wall. 162 (1874)

[9] *Reed v. Reed,* 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971)

[10] 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973)

[11] 419 U.S. 498, 95 S. Ct. 572, 42 L. Ed. 2d 610 (1975)

Discrimination in government benefits fared no better. In *Weinberger v. Weisenfeld* [12] the social security system gave death benefits to both wife and children when a man died but only to the children if the woman worker died assuming that the man was gainfully employed and the main provider. Using rational relation the court said that such assumptions could not be used. Likewise, a husband did not get death benefits for his wife though she did for him (*Califano v. Goldfarb*[13]*).* Again the court said, rational relation was enough to void those actions.

An AFDC program paid the family money if the man was unemployed but not if the woman was *(Califano v. Westcott*[14]*).* The court said that legislatures can no longer rely on the old stereotype about women as fit only for home and not the workforce and ruled that the statute was unconstitutional.

In the five cases under the Fifth Amendment due process clause from 1973 to 1979, all against federal government programs, the plaintiffs (males in three cases) prevailed in four of them. The fact of historic discrimination against women and the legality of positive action to correct that discrimination doomed the one male officer who lost.

This track record continued in 2017 in *Sessions v. Morales-Santana* (No. 15–1191. Argued November 9, 2016—Decided June 12, 2017). In this citizenship challenge, the plaintiff argued that equal protection was violated when his citizenship was denied based on his unmarried mother who was not a citizen rather than his father who was but had left the U.S. five days before his nineteenth birthday, which was the requirement to settle citizenship for a man who had a child born out of the U.S. For an unwed woman who had a child born out of the U.S., the requirement was having lived in the U.S. one year at any time in her life. Justice Ginsberg said that since it was federal law, the Fifth Amendment due process analysis applied, but it was treated the same as equal protection analysis.

That analysis used the same test as outlined in the *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 724 (1982) case i.e. the government must show "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." However, Ginsberg added a new requirement that the important governmental interest be based on today's lived reality because "new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged." *Obergefell* v. *Hodges*, 576 U. S. ___, ___. Pp. 9–14. In other words, the Constitution is a living document and has to change with the times.

[12] 420 U.S. 636, 95 S. Ct., 43 L. Ed. 2d 514 (1975)
[13] 430 U.S. 199, 97 S. Ct. 1021, 51 L. Ed. 2d 270 (1977)
[14] 443 U.S. 76, 99 S. Ct. 2655, 61 L. Ed. 2d 382 (1979)

The Fourteenth Amendment Cases Had a Different Trajectory.

From 1869 to 2000, nineteen cases were brought about women's rights under the Fourteenth Amendment. The *Bradwell*[15] challenge brought one year after the amendment was passed focused on privileges and immunities not equal protection. The court found that being a woman was sufficient reason to disqualify her from being licensed as an attorney and the privileges and immunities language changed nothing. As mentioned above, *Minor v. Happersett* found that women are citizens but that has nothing to do with voting and the passage of the Fourteenth Amendment changes nothing in that respect either. Fortunately, women were found to be persons and therefore citizens under the Fourteenth and though they can't vote, they can sit on a jury (*State v. Fairlamb* [16]). In the last of the early cases, *Goesaert v. Cleary,*[17] the court said that a law that refused to license women to be bartenders unless they were the wife or daughter of the owner of the bar could withstand the rational relation test because that familial relationship might protect the women from some of the harm that could come to women bartenders. Of course that did not protect women who were waitresses in the same joints that they could not be bartenders in. It did of course protect the better paying jobs for men.

Then came a twenty-three year hiatus in legal action on women's rights during the "Nifty Fifties." Not until 1971 did *Reed* hold that women were covered under the equal protection clause of the Fourteenth Amendment. The challenged law held that fathers were preferred over mothers for the administrator of a child's estate. The court ruled that the law was based solely on discrimination prohibited by and therefore violative of the equal protection clause. The court said such laws required scrutiny but used only a "reasonable" standard.

Roe v. Wade[18] was next up where the court found that state criminal abortion laws violate the due process clause of the Fourteenth Amendment. In a case litigated by Ruth Bader Ginsberg, *Kahn v. Shevin*, [19] a Florida statute granted widows but not widowers an annual $500 property tax exemption. Justice Douglas said it was protective legislation to help make up for economic discrimination against women and since it was "reasonably" designed to help the sex who bears a disproportionate burden, it was founded on a reasonable distinction and the law was upheld.

Geduldig v. Aiello[20] caused many of us to suggest that Supreme Court justices need a solid grounding in biology as they ruled that the refusal to cover normal pregnancy under disability insurance though other short term conditions were covered was not discrimination because the two classes involved were not men and women but pregnant

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[15] 55 Ill 535, 1869 WL 5503 (Ill) (1869)
[16] 25 S.W. 895, 121 Mo. 137, Supreme Court of Missouri, Div. 2, March 13, (1894)
[17] 335 U.S. 464, 69 S. Ct. 198, 93 l. Ed. 163 (1948)
[18] 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973)

[19] 416 U.S. 351, 94 S. Ct. 1734, 40 L. Ed. 2d 189 (1974)

[20] 417 U.S. 484, 94 S. Ct. 2485, 41 L. Ed. 2d 256 (1974)

persons and non-pregnant persons, which class included some women. Furthermore, the reason for the exclusion was to keep down costs and maintain fund self-sufficiency and that was rationally related to the purpose of the statute.

This is one problem of requiring "equal" to mean "exactly the same" as opposed to "similarly situated." Men with a short-term disability were covered but not women. Men and women can never be "exactly the same" as men do not give birth – not yet anyhow.

Stanton v. Stanton,[21] was not too difficult because fathers had to pay child support for girls only to 18 and boys to 21. The court said this was based on old ideas of women only being for the home and men for the workplace and market of ideas. These stereotypes were no longer sufficient to bear a rational relation to the purpose of the statute so were discriminatory. The court specifically refused to say whether a classification based on sex was inherently suspect.

That was decided in the next case, *Craig v. Boren*.[22] Here females could drink 3.2% beer at 18 but males had to wait until they were 21. The reason given by the state was that boys had bad driving records and that preventing accidents was an important government objective. While the court conceded that was true, the differences in the driving arrests were not large enough to justify the distinction so it was a violation of equal protection.

The new "intermediate scrutiny" test was birthed in this case when the court said, "previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." So rational relation was out and intermediate scrutiny in.

The next two cases presented little drama. *Orr v. Orr*[23] concerned an Alabama statute that said husbands had to pay alimony but not wives. Repeating the idea that the female is no longer just for the home and not the marketplace, the court ruled that individualized hearings based on facts are required. In *Caban v. Mohammed*[24] an unwed mother could block adoption of the child but the unwed father could not. The court said such a rule bore no substantial relation to any important state interest and ruled it a violation of the Equal Protection Clause.

However, this train rolling downhill came to an abrupt halt with *Personnel Administrator of Massachusetts v. Feeny*. [25] *Feeny* was a challenge to the absolute lifetime preference in job allocation for veterans. The court held that such a preference did not violate the Fourteenth Amendment because it was gender neutral, based on service not sex and included women in both groups. The two groups were veterans and non-veterans not men and women (as in *Geduldig*). In this case, both groups had men and women in them. Some women did serve in the military (nurses were specifically named in the statute) and

[21] 421 U.S. 7, 95 S. Ct. 1373, 43 L. Ed. 2d 688 (1974)
[22] 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976)
[23] 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 306 (1978)
[24] 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 197 (1979)
[25] 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979)

so were eligible for the benefit. Some men did not serve in the military so were not eligible. The difference from *Geduldig* of course was that here, men and women are in both groups, but in *Geduldig*, no men existed in the "pregnant persons" group.

The court admitted that the rule did have an adverse effect on women but that did not make it a violation because men were also disadvantaged. This illustrates the problem with sex classifications not being held to the level of strict scrutiny. In *Yick Wo v. Hopkins*[26] the Supreme Court said that race classifications are presumptively invalid and imply antipathy. Therefore, even "neutral" statutes that are a pretext for race discrimination are invalid.

However, using *Washington v. Davis* [27] the court reversed itself and began to require that even if a neutral law has a disproportionately adverse effect upon a racial minority, the impact must be traced to a discriminatory purpose. The requirement of discriminatory purpose makes it much more difficult for the plaintiff to prevail because rather than the court assuming it is pretext and the state having to show it isn't, the presumption is reversed.

The court did however, for the first time, state that, "Classifications based upon gender, **not unlike those based upon race,** (emphasis added) have traditionally been the touchstone for pervasive and often subtle discrimination." Yet the court found that since the distinction involves men too i.e. non-veterans, no discriminatory purpose is evident and therefore no violation exists.

The court did recognize that women are discriminated against in the military but unlike the cases under the Fifth Amendment due process clause, they did not apply any positive actions to make up for past discrimination but simply said, "But the history of discrimination against women in the military is not on trial in this case."

The next two cases were quickly dispatched. In *Wengler v. Druggists Mutual Insurance Co*.[28] the Missouri workers compensation system paid widow death benefits automatically but paid widower's benefits only if the man was mentally or physically incapacitated or proved that he was dependent on his wife's earnings. The court held that structure violated the equal protection clause of the Fourteenth Amendment and the men prevailed.

In *Kirchberg v. Feenstra*[29] the Louisiana law gave the husband the right to dispose of community property without the wife's consent. The court held that no important government interest justified the law, and it violated the equal protection clause.

The *Mississippi University for Women v. Hogan*[30] case held that prohibiting men from enrolling in a woman-only school of nursing violated the equal protection clause In

[26] 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886)
[27] 426 U.S. 229, 96 S. Ct. 2040, 48 L.Ed.2d 597 (1976)
[28] 446 U.S. 142 (1980)
[29] 450 U.S. 455, 101 S. Ct. 1195, 67 L. Ed. 2d 428 (1981)

addition, the court added an even stronger burden to uphold the classification. The state now had to show an "exceedingly persuasive justification" for the exclusion of men.

The School of Nursing used the rationale that the woman-only school was a positive action for women because it compensated for past discrimination. The court responded that limiting nursing school to women in fact harms women by endorsing the stereotyped view that nursing is a woman's job. Thus males were admitted to the school.

After a twelve-year hiatus, *J.E.B. v. Alabama,*[31] another jury case harkening back to 1874, arrived at the Supreme Court. Here, rather than excluding women, the prosecutor empaneled only women in a paternity case. The court held that the equal protection clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case solely because that person happens to be a woman or a man.

Again the court mentioned that the standard was "an exceedingly persuasive justification" in order to survive constitutional scrutiny. Again they mentioned that gender was like race: "Today we are faced with the question whether the Equal Protection Clause forbids intentional discrimination on the basis of gender, just as it prohibits discrimination on the basis of race. We hold that **gender, like race, is an unconstitutional proxy** (emphasis added) for juror competence and impartiality." It seemed as if the court was inching closer to finding that sex classifications – like race classifications - required a strict scrutiny standard.

That hope came tumbling down a scant two years later in *U.S. v. Virginia*[32] written by Justice Ruth Bader Ginsberg. The U.S. argued and the court agreed that restricting entrance to the Virginia Military Institute to males violated the equal protection clause. The "exceedingly persuasive justification" standard was used for the third time, the first time for women. But Ginsberg completely reversed the movement toward considering sex as a suspect category like race by saying:

> "**The heightened review standard our precedent establishes does not make sex a proscribed classification.** (emphasis added) Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. See *Loving v. Virginia*, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967). Physical differences between men and women, however, are enduring: "The two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both."

Justice Ginsberg did endorse the concept that positive action could be taken to remedy past discrimination:

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[30] 458 U.S. 718, 102 S. Ct. 3331, 73 L. Ed. 2d 1090, (1982)
[31] 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994)
[32] 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996)

> Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," to "promote equal employment opportunity," to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women."

But the movement for women toward a strict scrutiny standard was over. Only the Equal Rights Amendment will get us there now which increases the urgency of its passage.

Four years later, the *Morrison* case[33] dashed any hopes that when states fail to uphold women's rights, civil rights remedies could be fashioned at the federal level. Under the Violence Against Women Act[34] Congress had established a civil rights remedy for women who could not find justice in the state courts similar to African-Americans who have often not been able to find justice in the courts especially, but not exclusively, in the South. The Congressional record was replete with voluminous testimony that pervasive bias existed in the state justice systems against victims of gender-motivated violence. As

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[33] *U.S. v. Morrison,* 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000)

[34] Section 13981 was part of the Violence Against Women Act of 1994, §40302, 108 Stat. 1941_1942. It states that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b). To enforce that right, subsection (c) declares:

"A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate."

Section 13981 defines a "crim[e] of violence motivated by gender" as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." §13981(d)(1). It also provides that the term "crime of violence" includes any

"(A) _ act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

"(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken." §13981(d)(2).

Further clarifying the broad scope of §13981's civil remedy, subsection (e)(2) states that "[n]othing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c) of this section." And subsection (e)(3) provides a §13981 litigant with a choice of forums: Federal and state courts "shall have concurrent jurisdiction" over complaints brought under the section.

with African-Americans, when the state criminal justice system failed, the new provision gave women the right to sue for civil rights violations in the federal courts.

Morrison was raped at school and after the failure of the state prosecution, she filed under the VAWA provisions. The court held that the civil remedy was unconstitutional because Congress could not sustain the law under the Commerce Clause since such crime was not commerce or economic related and because violent crime and victims are local. As the dissent, written by Ginsberg, pointed out, such crime against women does in fact have notable nationwide economic implications, as did *Heart of Atlanta Motel v. U.S.* though it was a case about renting hotel rooms in Georgia. [35]

The court also held that Congress could not sustain the law under the Fourteenth Amendment because the Fourteenth Amendment applies only to state action but the law did not allow victims to sue state-actors but the perpetrator i.e. a private actor. Since the *Morrison* case, we have had a seventeen-year hiatus without a case about women's rights under the Fourteenth Amendment.

Only the Equal Rights Amendment remains as a Path to Women's Constitutional Equality.

From 1869 to 2000, a period of 131 years, women brought ten cases under the Fourteenth Amendment and men brought nine. Of the ten that women brought, they won six and lost four; thus women have a 60% chance of winning and a 40% chance of losing. Of the nine that men brought, they won seven and lost two; thus men have a 78% chance of winning and a 28% chance of losing. Even the fight for women's rights benefits men more than women.

It is abundantly clear, especially since *U.S. v. Virginia*, that litigation and the Fourteenth Amendment will not bring equality to women under the Constitution. The U.S. is one of the few developed (now regressed to "developing" [36]) countries absent a guarantee of women's equality in its Constitution. In fact, most countries in the world have such guarantees. As of 2011, 35 countries had an equality provision for women in their constitution; 49 had a non-discrimination provision in their constitution for women, and

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[35] 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 258 (1964)

[36] Temin, Peter, The Vanishing Middle Class: Prejudice and power in a dual economy, The MIT press, 2017, https://theintellectualist.co/study-mit-economist-u-s-regressed-third-world-nation-citizens/
https://www.rt.com/usa/385659-temin-vanishing-middle-class/
http://www.independent.co.uk/news/world/americas/us-developing-nation-regressing-economy-poverty-donald-trump-mit-economist-peter-temin-a7694726.html
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29 countries had both.[37] Many of these countries have such provisions because of U.S. intervention (either military or aid related), while we remain the outlier.

The Equal Rights Amendment (ERA) is the only method left to ensure women's constitutional equality. With the ratification of the ERA by Nevada on March 20, 2017, only two states remain to obtain the needed 38 state ratifications. Sandra Day O'Connor was the first legislator to introduce the ERA in AZ. A ratification resolution has been introduced in the Arizona House or Senate or both every year since 1982. Yet it has not been heard. On April 27, the sponsor of the bill, Rep. Pamela Powers Hannley (D-Tucson) moved for it to be heard on the full House floor because it had been buried in committee without a hearing. To avoid a public vote, the Speaker of the House quickly held a recess vote that was passed along party lines and scurried out.

On May 1, it was moved in the Arizona Senate to suspend the rules and vote on the ERA but that procedural move was also defeated along party lines. The ERA has enjoyed massive public support for decades; yet in Arizona, it can't even get a hearing. As lawyers, we have an obligation to ensure that the Constitution applies equally to all.

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[37] The Law Library of Congress, Global Legal Research Center
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