

## Reconstituting the Future: An Equality Amendment

Catharine A. MacKinnon & Kimberlé W. Crenshaw

**ABSTRACT.** A new constitutional amendment embodying a substantive intersectional equality analysis aims to rectify the founding U.S. treatment of race and sex and additional hierarchical social inequalities. Historical and doctrinal context and critique show why this step is urgently needed. A draft of the amendment is offered.

“unto the Seventh Generation . . . ”  
Iroquois Law of Peace<sup>1</sup>

A new constitutional amendment offers a new beginning. The equality paradigm proposed here recognizes the failures of what is, turns away from

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1. This phrase is considered common to multiple traditions. Though it does not appear exactly in the Iroquois Great Law of Peace, the notion of fealty to future generations is written there in symbols on wampum. See Terri Hansen, *How the Iroquois Great Law of Peace Shaped U.S. Democracy*, PBS (Dec. 17, 2018, 10:48 AM), <https://www.pbs.org/native-america/blogs/native-voices/how-the-iroquois-great-law-of-peace-shaped-us-democracy> [<https://perma.cc/7JX6-QLTJ>]; see also Gerald Murphy, *Modern History Sourcebook: The Constitution of the Iroquois Confederacy*, FORDHAM U. (Apr. 12, 2019), <https://sourcebooks.fordham.edu/mod/iroquois.asp> [<https://perma.cc/BQ8E-79JR>]. The most widely cited iteration of the Seventh Generation concept was expressed by the former head of the Six Nations of the Iroquois Confederacy, Leon Shenandoah (d. 1996): “Look behind you. See your sons and your daughters. They are your future. Look farther and see your sons’ and your daughters’ children and their children’s children even unto the Seventh Generation. That’s the way we were taught. Think about it: you yourself are a Seventh Generation.” Gina Boltz, *Words from the Circle: Native American Quotes*, NATIVE VILLAGE (2016), <https://www.nativevillage.org/Libraries/Quote/Native%20American%20Quotes%2034.htm> [<https://perma.cc/3RC2-XH9Z>]. Fealty to subsequent generations is deeply rooted in Iroquois civilization, as evidenced by its inclusion in the constitution of the Iroquois Confederacy. See CONST. IROQUOIS NATIONS art. 28 (“Look and listen for the welfare of the whole people and have always in view not only the

language and interpretive canons rooted in an unjust past, and imagines a fully functioning democracy as the inheritance of future generations. This proposal reenvisioning constitutional equality from the ground up: it centers on rectifying the founding acts and omissions of race and sex, separately and together, and incorporates similar but distinct inequalities.<sup>2</sup> It is informed by prior efforts to integrate equality into the constitutional landscape that have been decimated by political reversals and doctrinal backlash. It aggregates the insights, aspirations, and critiques of many thinkers and actors who have seized this moment to breathe new life into the nation's reckoning with inequality. It neither looks back to celebrate amendments whose transformative possibilities have been defeated nor participates in contemporary hand-wringing over equality's jurisprudential limitations. It seeks to make equality real and to matter now. We argue that a new equality paradigm is necessary and present one form it could take.

### I. WHY REAL EQUALITY MATTERS NOW

Equality is the foundational problem of the American Republic. White supremacy and male dominance, separately and together, were hardwired into a proslavery and tacitly gender-exclusive Constitution from the beginning. All enslaved people, Native people, and women were consciously and purposely

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present but also the coming generations, even those whose faces are yet beneath the surface of the ground—the unborn of the future Nation.”); *id.* art. 57.

2. This proposal reflects insights, aspirations, and critiques of many thinkers and actors—activists, lawyers, theorists, humans with a stake in taming illegitimate power. The Equality Amendment presented here is the joint product of two intensive meetings convened by the ERA Coalition and the African American Policy Forum at Columbia Law School, cochaired by the authors on November 19, 2016 and December 20, 2016, in which Charles Lawrence, Mari Matsuda, Gloria Steinem, Carol Jenkins, Jessica Neuwirth, Terry O’Neill, and Carol Robles Roman participated. Their acumen, insights, and erudition contributed greatly to the final draft, which we have since modified slightly. While the discussions were collective, the authors are solely responsible for any errors in the content of the proposal and the arguments herein.

excluded.<sup>3</sup> White men of property<sup>4</sup> intentionally designed the constituting document to ensure the continued institutional existence of the enslavement of Africans and people of African descent,<sup>5</sup> the exclusion of women from full

3. As Kathleen Sullivan observed,

[T]he U.S. Constitution, in its original text, never referred to women at all. The only known use of the pronoun ‘she’ in the framing deliberations concerned a later-rejected clause that would have referred to the rendition of fugitive slaves. . . . The Constitution provided no explicit protection . . . against laws that disenfranchised women, excluded them from juries, barred married women from owning property or suing in their own capacity, and the like.

Kathleen M. Sullivan, *Constitutionalizing Women’s Equality*, 90 CALIF. L. REV. 735, 735-36 (2002). The tension between women seeking constitutional representation and men resisting it can be seen in letters between Abigail and John Adams in 1776. Abigail Adams pled:

I long to hear that you have declared an independency – and by the way in the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favourable to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could. If particular care and attention is not paid to the Ladies we are determined to foment a Rebellion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation.

Letter from Abigail Adams to John Adams (Mar. 31, 1776), in 1 ADAMS FAMILY CORRESPONDENCE (1761-1776) 369, 370 (L. H. Butterfield et al. eds., 1961) (original spelling retained). John Adams’s reply, combined jocularly and denial with a threatening bottom-line common to the language of misogyny then and now:

Depend upon it, We know better than to repeal our Masculine systems. Altho they are in full Force, you know they are little more than Theory. We dare not exert our Power in its full Latitude. We are obliged to go fair, and softly, and in Practice you know We are the subjects. We have only the Name of Masters, and rather than give up this, which would compleatly subject Us to the Despotism of the Peticcoat, I hope General Washington, and all our brave Heroes would fight.

Letter from John Adams to Abigail Adams (Apr. 14, 1776), in 1 ADAMS FAMILY CORRESPONDENCE (1761-1776), *supra*, at 381, 382 (original spelling retained).

4. Among the property-owning white men generally recognized as “Founding Fathers,” the following owned slaves: Charles Carroll; Samuel Chase; Benjamin Franklin, who eventually manumitted his slaves and became an abolitionist; Button Gwinnett; John Hancock; Patrick Henry; John Jay; Thomas Jefferson; Richard Henry Lee; James Madison; Charles Cotesworth Pinckney; Benjamin Rush; Edward Rutledge; and George Washington. See Anthony Iaccarino, *The Founding Fathers and Slavery*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/The-Founding-Fathers-and-Slavery-1269536> [<https://perma.cc/4Q9C-HDA9>].
5. “[O]f the 11 clauses in the Constitution that deal with or have policy implications for slavery, 10 protect slave property and the powers of masters. Only one, the international slave-trade clause, points to a possible future power by which, after 20 years, slavery might be curtailed . . . .” David Waldstreicher, *How the Constitution Was Indeed Pro-Slavery*, ATLANTIC (Sept. 19, 2015), <https://www.theatlantic.com/politics/archive/2015/09/how-the-constitution-was-indeed-pro-slavery/406288> [<https://perma.cc/SNX5-NHK9>]; see also DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC* 15-47 (Ward M. McAfee ed., 2001) (describing the role of ‘slavery in the founding of the United States and how the Constitution

citizenship, and the silencing of all of their voices in authoritative forums.<sup>6</sup> Enslaved Africans were counted as three-fifths of a person to give political weight to slave-owning states;<sup>7</sup> the Electoral College was configured to assure the power of slave states in electing the federal executive officer;<sup>8</sup> no woman or enslaved person was permitted to vote. Equality was not mentioned in either the debates in Philadelphia or the resulting document. This raced and gendered institutionalization of power was, and has been, presented as the epitome of freedom and independence.

Since the Founding, constitutional amendments and legislation—impelled by armed struggle and urgent organizing—have guaranteed equality based on race and sex to some degree. This progress has emerged from cataclysmic upheavals and decades-long agitation to address the raw expression of subordination built into the Constitution. Limited equality rights have, at times, been

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protects slavery); DAVID WALDSTREICHER, *SLAVERY'S CONSTITUTION* 107-52 (2009) (describing how the Constitution protects slavery); Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123, 1123-25 (2012) (same).

6. It is said that the Iroquois Confederacy's structures influenced Franklin and the Framers, but the Iroquois's recognition of women's equality and their requirement that every decision be considered for its impact on the Seventh Generation were omitted. See H.R. Con. Res. 331, 100th Cong. (1988) (enacted) (acknowledging the contribution of the Iroquois Confederacy to the U.S. Constitution, noting Franklin's admiration for the Iroquois Confederacy and its influence on the American political system). This position is considered inaccurate by scholars who research written records. See Erik M. Jensen, *The Harvard Law Review and the Iroquois Influence Thesis*, 6 BRIT. J. AM. LEGAL STUD. 225, 225 (2017) (dismissing "the Iroquois influence thesis" as "nonsense"); Elisabeth Tooker, *The United States Constitution and the Iroquois League*, 35 ETHNOHISTORY 305, 305 (1988) ("A number of writers have suggested that the League of the Iroquois provided the model for the United States Constitution and the ideas embodied in it. A review of the evidence in the historical and ethnographic documents, however, offers virtually no support for this contention."); Jack Rakove, *Did the Founding Fathers Really Get Many of Their Ideas of Liberty from the Iroquois?*, HIST. NEWS NETWORK (July 21, 2005), <https://historynewsnetwork.org/article/12974> [<https://perma.cc/H3AH-Q5VE>].
7. U.S. CONST. art. I, § 2, cl. 3.
8. At the Constitutional Convention, James Madison suggested that a direct presidential election "would have been a dealbreaker [sic] for the South" because slaves could not vote and the "slaveholding South would basically lose every time." Akhil Reed Amar, Opinion, *Actually, the Electoral College Was a Pro-Slavery Ploy*, N.Y. TIMES (Apr. 6, 2019), <https://www.nytimes.com/2019/04/06/opinion/electoral-college-slavery.html> [<https://perma.cc/V5ZL-N59D>]. Despite alternative interpretations, there is no disputing that the South "had extra seats in the Electoral College because of its slaves." *Id.* And while the implications of the system were abundantly clear by the time the Constitution was amended to modify the Electoral College, "Jefferson's Southern allies steamrollered over Northern congressmen who explicitly proposed eliminating the system's pro-slavery bias." *Id.*; see also Alan Singer, *Slavery and the Electoral College: One Last Response to Sean Wilentz*, HIST. NEWS NETWORK (Apr. 21, 2019), <https://historynewsnetwork.org/article/171783> [<https://perma.cc/HS75-QHR3>] (agreeing that the Electoral College defended the institution of slavery).

extended to women and people of color by judicial interpretation and legislation.<sup>9</sup> Yet, retraction and resistance to these efforts hollowed out the ground-shifting post-Civil War Amendments, limited the interpretation of the Nineteenth Amendment, blocked ratification of the Equal Rights Amendment (ERA), and dismantled the mid-twentieth century's modest equality infrastructure. Constitutional equality was effectively stripped of its regenerative potential. Their roots in the constitutional landscape now weakened, both gender and race equality have been cast into treacherous seas – with gender hanging onto race like a castaway clinging to a slender piece of doctrinal driftwood.

Each moment of mobilization and democratic participation toward real equality has been met by a reflexive reassertion of the rights, values, and entitlements of a modestly reformed status quo. Courts in particular have dramatically and continuously undermined efforts to rectify race and gender subordination in society by rolling back what legal equality guarantees could have achieved. As a result, prior efforts have not produced real equality in social life, nor can they until the racial and gendered baselines that ground the constitutional order are denaturalized and uprooted.

As a central instance, judicial interpretation has continuously hobbled the Fourteenth Amendment's promising guarantee of equal protection of the laws.<sup>10</sup> Indeed, the Amendment's most far-reaching implications, which could have dismantled the legal infrastructure that constituted and insulated white supremacy, were snuffed out in their infancy. Less than twenty years after the formal end of slavery, the Supreme Court characterized congressional efforts to remedy

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9. Following the Civil War, constitutional amendments aimed to promote racial equality, see U.S. CONST. amends. XIII, XIV, XV, while Congress enacted laws intended to deinstitutionalize Jim Crow, see Civil Rights Act of 1875, Pub. L. No. 43-114, 18 Stat. 335; Third Enforcement Act, Pub. L. No. 42-22, 17 Stat. 13 (1871); Second Enforcement Act, Pub. L. No. 41-99, 16 Stat. 433 (1871); First Enforcement Act, Pub. L. No. 41-114, 16 Stat. 140 (1870); Freedmen's Bureau Act of 1866, Pub. L. No. 39-200, 14 Stat. 173; Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27; and Freedmen's Bureau Act of 1865, Pub. L. No. 38-90, 13 Stat. 507. However, courts quickly restricted these initiatives' potential for greatest impact. *See, e.g.,* *Cumming v. Richmond Cty. Bd. of Educ.*, 175 U.S. 528 (1899) (permitting racial segregation in schools); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (permitting racial segregation in public facilities as consistent with the meaning of constitutional equality); *The Civil Rights Cases*, 109 U.S. 3 (1883) (holding Congress was not empowered to end private racial discrimination); *United States v. Cruickshank*, 92 U.S. 542 (1876) (holding that provisions of the Bill of Rights do not apply to state governments); *United States v. Reese*, 92 U.S. 214 (1876) (narrowly construing the Fifteenth Amendment); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) (holding that the Privileges and Immunities Clause of the Fourteenth Amendment only protected rights of national, not state, citizenship).
10. U.S. CONST. amend. XIV, § 2. The Fifth Amendment's Due Process Clause has been interpreted to apply constitutional equality standards to the federal government, just as the Fourteenth Amendment does to the states. *See* *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

widespread discrimination against Black people as special treatment.<sup>11</sup> A century later, courts brutally truncated the Amendment's mid-twentieth century renaissance<sup>12</sup> by interpreting inequality so narrowly that its reproduction remains largely undisturbed by any meaningful legal imperatives.<sup>13</sup>

Fatally, in *Washington v. Davis*, the Court decreed that nonexplicit discrimination with disparate effects on racial groups must be proven intentional to be unconstitutional.<sup>14</sup> In the Court's view, an overwhelmingly disparate injury inflicted on a disadvantaged racial group was not enough to trigger equal protection concern even in the face of utterly predictable and proven outcomes.<sup>15</sup> Only actions taken with a conscious desire to actively harm a vulnerable group would be held illegal.<sup>16</sup> Discriminatory intent, so defined, is subjective. Evidence of it is thus largely within the control of accused discriminators, making it easy to exercise, easy to deny, and almost impossible to prove. Consequently, prevailing constitutional doctrine effectively insulates countless decisions that actively harm structurally subordinated populations.

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11. See *The Civil Rights Cases*, 109 U.S. at 25 (repudiating the Civil Rights Act of 1875 in part for treating African Americans as the "special favorite" of the law).
  12. Courts' interpreting prior guarantees to end legalized segregation are examples. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (upholding policies to end de facto school segregation); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (upholding Congress's power to bar private racial discrimination in property sales under the Thirteenth Amendment); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding de jure racial segregation in schools unconstitutional); *Sweatt v. Painter*, 339 U.S. 629 (1950) (requiring state law school admit Black students under the Fourteenth Amendment); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding racially restrictive housing covenants judicially unenforceable under the Fourteenth Amendment); *Smith v. Allwright*, 321 U.S. 649 (1944) (holding racial limitations on political party membership unconstitutional under the Fifteenth Amendment); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (holding that states must provide legal education facilities for Blacks that were substantially equal to those for whites). But these efforts have been increasingly stymied.
  13. See, e.g., *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291 (2014) (holding that states may constitutionally ban affirmative action by referendum); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (prohibiting use of race classifications in school-assignment plans); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (invalidating a public university's specific use of race in admissions); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (prohibiting racial quotas in state medical school admissions); *Capacchione v. Charlotte-Mecklenburg Sch.*, 57 F. Supp. 2d 228 (W.D.N.C. 1999) (holding a public magnet school's consideration of race constitutionally impermissible).
  14. 426 U.S. 229, 240-41 (1976).
  15. *Id.*
  16. *Id.* at 240 (holding that the "invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose").

The Court doubled down on the intent requirement in *Personnel Administrator of Massachusetts v. Feeney*, applying it to sex.<sup>17</sup> It held that a preference for veterans in employment that predictably and knowingly advantaged men over women was constitutionally permissible absent proof that the scheme was deployed specifically to hurt women. *Feeney* spelled out with devastating clarity that decision-makers could comfortably rest disparity-producing preferences on the built-in inequalities created by myriad institutions – so long as they could plausibly deny a specific intent to harm women.<sup>18</sup> By depriving women of the right to challenge disadvantages built on preferences for men – even those made possible by the near-complete exclusion of women by law or policy – the Court largely reduced the Equal Protection Clause to a minimalist intervention against some explicitly discriminatory articulations termed “facial.”<sup>19</sup>

Submerged was the deeper obstacle to meaningful gender equality. Sex discrimination is more often accomplished by omission of socially gendered experiences such as pregnancy or sexual assault than explicitly expressed in law. The narrowing of constitutional sex equality jurisprudence to mainly facial discrimination further gutted the Equal Protection Clause of its substantive potential. In much the same way that the Court resisted conceptions of equality that disrupted the existing distribution of white rights and entitlements, *Feeney* – considered a non-facial case – ensured that gendered baselines favoring men, including legal ones, would frame practices that mapped onto them as benign or not gendered at all. This made the inequality these practices imposed difficult or impossible to expose, contest, and change by law.

In the Court’s sense of vindictively motivated acts consciously targeted “because of” group membership, most discrimination is not intentional.<sup>20</sup> But discrimination is no less damaging when built into social norms and structures. Decision-makers, driven by unconscious or implicit bias in favor of the superiority of whites and/or men,<sup>21</sup> may fail to perceive or appreciate the heavy burden

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17. 442 U.S. 256, 274 (1979) (holding that a law’s disparate impact on women must be intentional in order to be deemed sex based and in violation of the Equal Protection Clause).

18. *Id.*

19. There is no doctrinal test for what is facial and what is not.

20. *Id.* at 270.

21. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (noting that most Americans are “unaware” of their racism and fail to acknowledge how cultural experiences influence beliefs about race); see also Charles R. Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection,”* 40 CONN. L. REV. 931, 939-40 (2008) (revisiting his 1987 article and exploring how white supremacy is maintained). In the years since Charles Lawrence’s initial publication, much research has supported his analysis. See, e.g., Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 20 (1995); Christine Jolls & Cass R. Sunstein, *The Law of Implicit*

their actions force on subordinated groups. No conscious intent is required for such bias to animate decision-making; yet existing constitutional doctrine makes its recognition as discrimination extremely difficult, facilitating the reproduction of inequality.

The intent requirement, paired with the formalistic policing of classifications under heightened review, together stabilize rather than dismantle the raced and gendered social order. Racial classifications, under prevailing tiers-of-scrutiny analysis, are subject to strict scrutiny, grounded in the observation that historically they have been vehicles of racial subordination.<sup>22</sup> Yet the history that animates the Court's apoplectic denunciations of racial classifications has been abstracted from its material reality and gentrified with new occupants. Measured against a historical standard, the landmark race cases of the post-Warren Court era have arguably been white-rights cases<sup>23</sup> – largely successful campaigns to arrest legislative and administrative efforts to remedy the contemporary consequences of the very history that justifies heightened scrutiny.<sup>24</sup> The Equal Protection Clause must mean the same thing for everybody, the Court majestically intones. But packaged in its misleading rhetoric equating colorblindness and gender neutrality – so-called same treatment – with constitutional equality are precisely the discordant protections that the Court repudiates. The Court shields the rights and entitlements of those whom the Constitution has historically privileged and disarms the aspirations of those it has historically excluded.

The difficult doctrinal barriers the Court imposed on racially subordinated groups are virtually absent in the jurisprudence developed in response to white grievances against remedial measures. Legal standing, causation, presumptions, and burdens of proof reveal not only a lightened burden for white plaintiffs; they also expose the stubborn baselines against which corrective remedies are repackaged as illegitimate preferences that discriminate against white people. The Court's supposed solicitude for an equality that means the same thing to everyone – "neutrality" – obscures its more reliable role in defending white supremacy.

The gravitational pull of the foundational baselines obscures the discriminatory dimensions of an Equal Protection Clause that protects and insulates gendered as well as racial power, while co-opting the tools that might disrupt the reproduction of such inequality. The elision of gender bias is so deeply entrenched that it is not seen as gender-based at all. Sexual assault, reproductive

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*Bias*, 94 CALIF. L. REV. 969, 971-73 (2006); Justine E. Tinkler, *Controversies in Implicit Bias Research*, 6 SOC. COMPASS 987, 987-88 (2012).

22. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

23. See Luke C. Harris, *Lessons Still Unlearned: The Continuing Sounds of Silence*, 10 DU BOIS REV. 513 (2013).

24. See *id.*



control, and the family, for instance, are all crucial sites of the creation and exercise of male power, yet laws about them are overwhelmingly not assessed by equality standards at all. Even where gender-based equality nominally exists in law, it is constrained by a fixation with classifications and their ranking into tiers of scrutiny.<sup>25</sup> This approach effectively means that the more perfectly a distinction by law fits a distinction in society, the more “rational” – hence, less discriminatory – it is seen to be.

The result is that the more effective a system of inequality is socially, the more “rational” it will be found constitutionally, rendering constitutional law virtually useless in disrupting the conditions that most need changing to end gender inequality.<sup>26</sup> Recognizing “sex” as a suspect classification would not solve this problem but rather would accentuate its effect, given that the Court looks to whether “sex” justifies a sex classification, and what it finds to be “sex” is frequently the reality of social sex (that is, gender) *inequality*. Requiring the sexes to be “similarly situated” before a discrimination claim can be brought also serves to evade the reality that social discrimination often prevents women from being situated similarly to men in the first place. The fundamental strategy of sex equality litigation has been to get rights for men in order to get them for women. Constitutional equal protection law has accordingly worked better for men, whose claims of sex discrimination have provided its foundation,<sup>27</sup> than for women of any color.

This basic approach – a separate and overly vigilant policing of remedial racial classifications, a status-quo-oriented solicitude toward gender, and a failure to recognize sex inequality other than in the facial sense – reinforces rather than remedies cascading social harms across multiple overlapping constituencies. It has not only left victims of combined discrimination in a quandary as to the

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25. See, e.g., *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 438 (1985); *Craig v. Boren*, 429 U.S. 190, 211 (1976) (Powell, J., concurring).

26. *Id.*

27. See, e.g., *Orr v. Orr*, 440 U.S. 268 (1979) (holding that a statute that required husbands but not wives to pay alimony violated the Equal Protection Clause); *Caban v. Mohammed*, 441 U.S. 380 (1979) (striking down as unconstitutional a New York statute that allowed unwed mothers but not unwed fathers a veto over the adoption of that couple’s children); *Craig v. Boren*, 429 U.S. 190 (1976) (holding that a statute that denied the sale of alcohol to individuals of the same age based on their gender violated the Equal Protection Clause); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (striking down a provision of the Social Security Act that permitted widows but not widowers to collect special benefits while caring for children); see also David Cole, *Strategies of Difference: Litigating for Women’s Rights in a Man’s World*, 2 *LAW & INEQ.* 33, 33-35 (1984) (examining effects of several leading sex discrimination cases brought by male plaintiffs).

standard that applies to them;<sup>28</sup> it has drained the blood, sweat, and tears of those who sought to replace the flawed vision of the Founders with a constitutional order that embodies the rhetorical claims made in its defense.

As a result, white and male supremacy continues and is socially resurgent, reinforcing brutal, sometimes lethal, disadvantages. The Founders' handprints are visible across social hierarchies today despite corrective amendments and diligent litigation. The contemporary consequences of the founding formula have not been erased by gradualist improvements and symbolic reforms—and as things stand will not be. Material inequalities between the enslaved and those who benefitted from their enslavement, uncompensated and unremedied, live on in yawning wealth and well-being disparities, conditions that the Court considers uncorrectable societal inequality. Like their enslaved ancestors, African Americans experience greater exposure to racialized surveillance and state-

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28. See Devon W. Carbado & Kimberlé W. Crenshaw, *An Intersectional Critique of Tiers of Scrutiny: Beyond "Either/Or" Approaches to Equal Protection*, 129 YALE L.J.F. 108 (2019) (deploying an intersectional analysis to reveal how the tiers-of-scrutiny analysis obscures the incoherence of the standard particularly with respect to Black women).

sanctioned violence,<sup>29</sup> suffer compromised access to education,<sup>30</sup> housing<sup>31</sup> and health care,<sup>32</sup> and face continuing obstacles to their full political participation.<sup>33</sup>

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29. Young Black men are more likely to be incarcerated, and are less represented in college-student populations, than their white peers. *E.g.*, *Criminal Justice Facts*, SENT’G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts> [<https://perma.cc/89DH-TT3Z>] (noting that one in three Black young men born in the United States in 2001 will become incarcerated, as compared to one in seventeen white young men); *The Condition of Education 2019: College Enrollment Rates*, NAT’L CTR. FOR EDUC. STAT. 2 (2019), [https://nces.ed.gov/programs/coe/pdf/coe\\_cpb.pdf](https://nces.ed.gov/programs/coe/pdf/coe_cpb.pdf) [<https://perma.cc/PEP3-DFPG>]. Black people are terrifyingly vulnerable to unpunished police brutality. *See, e.g.*, Anthony L. Bui et al., *Years of Life Lost Due to Encounters with Law Enforcement in the USA, 2015-2016*, 72 J. EPIDEMIOLOGY & COMMUNITY HEALTH 715, 716 (2018) (highlighting that police violence disproportionately impacts young people of color).

Although vulnerability to violence is frequently understood as male-exclusive, Black women also face disproportionate risks of both lethal state violence and private violence. *See* Kimberlé Williams Crenshaw & Andrea J. Ritchie, *Say Her Name: Resisting Police Brutality Against Black Women*,” AFR. AM. POL’Y F. 4-7 (2015) [http://static1.squarespace.com/static/53f20d90e4bob80451158d8c/t/55a810d7c4bo58f342f55873/1437077719984/AAPF\\_SM\\_Brief\\_full\\_singles.compressed.pdf](http://static1.squarespace.com/static/53f20d90e4bob80451158d8c/t/55a810d7c4bo58f342f55873/1437077719984/AAPF_SM_Brief_full_singles.compressed.pdf) [<https://perma.cc/HK8V-WWS5>].

30. African Americans attend schools that are more racially segregated now than they were when segregation was first prohibited. *See, e.g.*, Valerie Strauss, *Report: Public Schools More Segregated Now Than 40 Years Ago*, WASH. POST. (Aug. 29, 2013, 3:49 PM EST), <https://www.washingtonpost.com/news/answer-sheet/wp/2013/08/29/report-public-schools-more-segregated-now-than-40-years-ago> [<https://perma.cc/M7XE-K2JA>]. *See generally* Erica Frankenberg & Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts*, HARV. U.: C.R. PROJECT (Aug. 2002), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/race-in-american-public-schools-rapidly-resegregating-school-districts/frankenberg-rapidly-resegregating-2002.pdf> [<https://perma.cc/LQ56-F48M>] (describing increasing school segregation since the 1980s).
31. *See, e.g.*, Joseph P. Williams, *Segregation’s Legacy*, U.S. NEWS (Apr. 20, 2018, 6:00 AM), <https://www.usnews.com/news/the-report/articles/2018-04-20/us-is-still-segregated-even-after-fair-housing-act> [<https://perma.cc/MQZ8-Z8WV>] (noting that fifty years after the Fair Housing Act, designed to eliminate housing discrimination, was signed into law, America remains nearly as segregated as when the law was passed). *See generally* Bruce Mitchell & Juan Franco, *HOLC “Redlining” Maps: The Persistent Structure of Segregation and Economic Inequality*, NAT’L COMMUNITY REINVESTMENT COALITION (Mar. 20, 2018), <https://nrcr.org/holc> [<https://perma.cc/9ESA-CVR7>] (describing growing housing segregation).
32. Jennifer Jones, Comment, *Bakke at 40: Remediating Black Health Disparities Through Affirmative Action in Medical School Admissions*, 66 UCLA L. REV. 522, 532-33 (2019) (noting disparities in Black health outcomes, such as shortened life expectancies compared to whites, higher infant mortality rates, and higher death rates from cancer and AIDS).
33. *See, e.g.*, Vann R. Newkirk II, *Voter Suppression is Warping Democracy*, ATLANTIC (July 17, 2018), <https://www.theatlantic.com/politics/archive/2018/07/poll-prri-voter-suppression/565355> [<https://perma.cc/C2T4-9HD2>] (noting deep structural barriers to the ballot for minority voters). White women in slave-owning families and institutions not only benefitted from those systems, but were at times active agents within it, buying and selling enslaved people, exploiting that relation for relative empowerment. *See* STEPHANIE E. JONES-ROGERS,

The material and spiritual dimensions of lives shaped by the theft of land and national integrity from Native Americans and the Mexican State are also framed in sociopolitical discourse as natural and inevitable, rather than as the contemporary manifestations of a ruthlessly constitutionalized colonial and imperial regime. Native peoples and their cultures continue to be subjected to assimilationist pressures and land, resource and child expropriation – contemporary forms of genocidal practices historically inflicted by the U.S. government.<sup>34</sup> Unfettered by meaningful constitutional constraints, Native peoples have been deprived of self-determination, jurisdiction to adjudicate aggression (including sexual) against them, and many treaty rights.<sup>35</sup> Native women are disproportionately trafficked for sex, prostituted, and disappeared.<sup>36</sup> Beyond anti-Black and settler colonialism are institutionalized patterns of xenophobic bias against immigrants of color, which deprive scores of people of basic human rights, including rights to security and family.<sup>37</sup>

The historical foundations upon which male supremacy rests continue to ground conceptions of gender equality that normalize gender hierarchy and frame departures from it as exceptional. Discrimination based on sex and gender, to the limited extent it has been constitutionally prohibited, has been recognized only very recently and merely by interpretation – not originally, textually, or

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THEY WERE HER PROPERTY: WHITE WOMEN AS SLAVE OWNERS IN THE AMERICAN SOUTH (2019).

34. See, e.g., Barbara Perry, *From Ethnocide to Ethnoviolence: Layers of Native American Victimization*, 5 CONTEMP. JUST. REV. 231, 232-33 (2002) (exploring the various forms of institutionalized exploitation and marginalization of Native Americans); Lisa M. Poupart, *The Familiar Face of Genocide: Internalized Oppression Among American Indians*, 18 HYPATIA 86, 87 (2003) (discussing how the consequences of colonialism have created a government-sanctioned systematic genocide of American Indians).
35. For examples of deprivations of treaty rights, see *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (hunting and fishing); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (logging); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955) (timber); and *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543, 588 (1823) (“Conquest gives a title which the Courts of the conqueror cannot deny. . .”). Native peoples have also been deprived of legal jurisdictions in criminal law. See Alex Tallchief Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 ALB. GOV’T L. REV. 49, 49 (2017) (explaining that criminal jurisdiction in Indian Country depends on whether the alleged perpetrator or victim qualifies as “Indian”).
36. See, e.g., Steven W. Perry, *American Indians and Crime 1991-2002*, U.S. DEP’T JUST. 6 (2004); Sarah Deer, *Relocation Revisited: Sex Trafficking of Native Women in the United States*, 36 WM. MITCHELL L. REV. 621, 624-29 (2010) (explaining the relationship between colonization and sex trafficking of Native women).
37. See Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After “9/11?”*, 7 J. GENDER RACE & JUST. 315, 333-37 (2003) (explaining how an “anchor” immigration system like that of the U.S. disfavors people from groups previously excluded from admission, and disproportionately impacts immigrants of color).

historically—making its protection particularly thin and vulnerable.<sup>38</sup> Despite some legal progress for (mostly elite) women, male dominance continues to characterize existing laws and their application.<sup>39</sup> Laws responsive to women’s circumstances and the social order that subordinates them either do not exist or are unenforced.<sup>40</sup> State laws against domestic violence and sexual assault have virtually never been held to equality standards in their design or effect.<sup>41</sup> The federal legislation against violence against women was found to lack constitutional basis.<sup>42</sup> Pregnancy is not constitutionally recognized as sex based,<sup>43</sup> limiting defenses of reproductive rights to those that live under other constitutional rubrics. All women on average are not paid equally to men—largely because they are segregated into work that is valued less because women are doing it, or that is seen as appropriate for women because it is valued less hence paid less.<sup>44</sup> This dynamic is accentuated for women of color.<sup>45</sup> This pervasive social arrangement

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38. Discrimination based on sex and gender was first constitutionally recognized by the Supreme Court in *Reed v. Reed*, 404 U.S. 71, 76 (1971), which held that sex-differential laws must be rationally related to valid legislative purpose.
39. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (holding that an elite military college’s policy of excluding women violates the Equal Protection Clause); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (finding that a firm denying accounting partnership to a woman employee because of sex stereotyping constitutes sex discrimination). *But see Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (recognizing statutory sexual harassment as sex discrimination, a non-elite advance).
40. See, e.g., CATHARINE A. MACKINNON, *SEX EQUALITY* 3 (3d ed. 2016) (noting the “potent combination of social and political mechanisms” that enforce the institutionalized subordination of women).
41. See Andrea B. Carroll, *Family Law and Female Empowerment*, 24 *UCLA WOMEN’S L.J.* 1, 11-22 (2017) (detailing how state laws attempting to help domestic-violence victims actually impair some women’s rights). However, state statutes are held to equality standards when they are said to discriminate facially against men. See, e.g., *Michael M. v. Superior Court*, 450 U.S. 464 (1981), where a state sexual assault statute said to facially apply only to men who had sex with underage girls was upheld. No position is taken here on whether men were discriminated against by the statute, although a substantive equality rationale for the ruling would have been an improvement.
42. *United States v. Morrison*, 529 U.S. 598, 617, 627 (2000) (holding that Congress exceeded its authority under the Commerce Clause and the Equal Protection Clause in enacting the civil remedy provision of the Violence Against Women Act of 1994).
43. *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974).
44. MACKINNON, *supra* note 40, at 253-56. Women also provide most of the unpaid caretaking work for their own families. Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 *YALE J.L. & FEMINISM* 317, 323 (2014).
45. For instance, in 2018, the median income of Black women was only 65.3% of the median income of white men, whereas white women earned 81.5% of what white men earned. Ariane Hegewisch & Heidi Hartmann, *The Gender Wage Gap: 2018 Earnings Differences by Race and Ethnicity*, INST. FOR WOMEN’S POL’Y RES. (Mar. 7, 2019), [https://iwpr.org/wp-content/uploads/2019/03/C478\\_Gender-Wage-Gap-in-2018.pdf](https://iwpr.org/wp-content/uploads/2019/03/C478_Gender-Wage-Gap-in-2018.pdf) [<https://perma.cc/ZG6Y-8HFY>];

has been found not to violate existing equality laws.<sup>46</sup> Women, within and across racial groups, are comparatively impoverished and economically insecure. They are violated with impunity, exploited economically and sexually, and deprived of social stature and human dignity. The intersectional effects of race and gender are facilitated within the U.S. sociolegal system, cumulatively stacking the deck against women of color, depriving them of the most basic means to articulate meaningful claims within existing constitutional doctrine.

The vitiating of equality on the bases of race and gender extends to related forms of hierarchy. Discrimination based on sexual orientation enforces compulsory heterosexuality, a means of maintaining male supremacy. Even in the face of the striking legal progress for lesbian women and gay men in recent years, their rights are restricted to areas in which state or federal statutes have been invalidated by the courts—for example, by prohibiting laws criminalizing sodomy<sup>47</sup> and by requiring recognition of same-sex marriage<sup>48</sup>—or under statutes guaranteeing sex equality.<sup>49</sup> However, in some jurisdictions, same-sex partners can still be married on Sunday and fired on Monday for the same reason.<sup>50</sup>

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see also Katherine Richard, *The Wealth Gap for Women of Color*, CTR. FOR GLOBAL POL'Y SOLUTIONS (Oct. 2014) <http://www.globalpolicysolutions.org/wp-content/uploads/2014/10/Wealth-Gap-for-Women-of-Color.pdf> [<https://perma.cc/JH74-M7F6>] (finding that in 2012, Black women and Latina women earned 64% and 54% of wages of white men, while white women earned 78% of wages of white men).

46. See, e.g., *County of Wash. v. Gunther*, 452 U.S. 161, 179-80 (1981) (allowing a comparable worth claim so long as women prison guards' pay rates are proven intentionally discriminatory); *Am. Fed'n of State, Cty. & Mun. Emps. (AFSCME) v. Washington*, 770 F.2d 1401, 1406-07 (9th Cir. 1985) (holding that Title VII permits Washington to set wages according to historically sex discriminatory market practices).
47. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).
48. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015).
49. 42 U.S.C. § 2000e-2(a) (2018). See, e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112-13 (2d Cir. 2018) (holding that sexual orientation discrimination is a subset of sex discrimination prohibited under Title VII), cert. granted, 139 S. Ct. 1599 (2019); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 345 (7th Cir. 2017) (same).
50. Whether the Title VII prohibition on sex discrimination applies to sexual orientation or transgender status is pending before the Supreme Court, to be decided during the 2019 Term. See *Altitude Express, Inc. v. Zarda*, 139 S. Ct. 1599 (2019) (cert. granted); *Bostock v. Clayton Cty.*, 139 S. Ct. 1599 (2019) (same); *Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019) (same). This issue has particular impact on the intersection of sexual orientation, gender identity, and race. A recent study analyzing over 9,000 sexual-orientation and gender identity discrimination charges found an "overrepresentation of Black charging parties," which, combined with allegations of race discrimination, "suggests that the intersection of these stigmatized identities could shape experiences of employment discrimination for this group." M.V. Lee Badgett et al., *Evidence from the Frontlines on Sexual Orientation and Gender Identity Discrimination*, UNIV. OF MASS. AMHERST: CTR. FOR EMP'T EQUITY (July 2018), <https://www.umass.edu/employmentequity/evidence-frontlines-sexual-orientation-and-gender-identity-discrimination> [<https://perma.cc/8VVF-DQAM>].

Discrimination against transgender people, another kind of gender-based discrimination, is frequently brutal and lethal, causing unemployment,<sup>51</sup> homelessness,<sup>52</sup> and vicious stigmatization without meaningful systemic relief.<sup>53</sup>

Inequality is not inevitable. Indeed, it takes considerable force to maintain, given the fact that all peoples are human equals – meaning, at minimum, that no racial and/or gendered group is actually superior or inferior to another. Human hierarchy based on sex and/or race is not only a political construction created to confer power on some over others. It is predicated on the lie of natural hierarchy: the fiction that the actual basis, origin, and foundation of the present socially tiered status of sex- and race-based groups is sex and/or race itself, rather than the power interests of those who dominate on those grounds – grounds that are themselves constructed by these same politically interested configurations. Failure to order societies to correspond to the reality of equality has resulted in the intensification of inequality over time, making it appear to be “just there” to many, reinforcing the ideology of its natural basis. The law’s participation in obscuring the fact that the existing system is one of imposed social hierarchy rather than natural difference – or, in any event, that such “differences” as exist are equal – has rationalized and legitimated inequality.

As a result, despite the focused and determined efforts of committed movements, communities, organizations, lawyers, and some scholars, led by generations of valiant activists, the United States remains a deeply unequal society. Its laws, against formidable interventions for change, have largely operated to maintain that inequality. This must end.

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51. Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, NAT’L CTR. FOR TRANSGENDER EQUALITY 140-41 (Dec. 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/5RTJ-TKLX>].

52. *Id.* at 110.

53. Some circuits have recognized transgender discrimination as sex discrimination under Title VII. *See, e.g.*, Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004); Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000); Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000). The best decision conceptually is the breakthrough case of Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008). Other courts refuse to cover gender identity discrimination under Title VII’s prohibition on sex discrimination. *See, e.g.*, Oiler v. Winn-Dixie La., Inc., No. 00-3114, 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sept. 16, 2002). Trans individuals continue to face “extraordinary” levels of physical and sexual violence, with more than one in four trans people reporting that they have faced a “bias-driven assault” and even higher rates for trans women and trans people of color. *Issues: Anti-Violence*, NAT’L CTR. FOR TRANSGENDER EQUALITY, <https://transequality.org/issues/anti-violence> [<https://perma.cc/BH5H-ZRMW>].

**II. NEW EQUALITY AMENDMENT DRAFT****The Equality Amendment**

**Whereas all women, and men of color, were historically excluded as equals, intentionally and functionally, from the Constitution of the United States, subordinating these groups structurally and systemically; and**

**Whereas prior constitutional amendments have allowed extreme inequalities of race and/or sex and/or like grounds of subordination to continue without effective legal remedy, and have even been used to entrench such inequalities; and**

**Whereas this country aspires to be a democracy of, by, and for all of its people, and to treat all people of the world in accordance with human rights principles;**

Therefore be it enacted that—

**Section 1. Women in all their diversity shall have equal rights in the United States and every place subject to its jurisdiction.**

This language provides affirmative equality rights to all women, rather than prohibiting states from denying women equal rights, whether intentionally or inadvertently, facially or by impact. Because women are not exclusively, or even principally, made or kept unequal to men by the actions of states, but rather by the social order—its structures, forces, institutions, and individuals acting in concert—this Section has no state-action requirement. The state does not so much act to deny equality of rights through law as it fails to guarantee freedom from these violations, and fails to provide legal claims against them or precludes those claims altogether. Equality is powerfully denied to women through law abdicating an equality role, for example, in domestic violence, sexual abuse and exploitation, and unequal pay for work of comparable worth. Law allows these violations to happen, and to continue to happen, until they form the substrate of the normal. The negative state—the state as embodied in a constitution that supposedly guarantees rights best by intervening in society least—has largely abandoned women to social inequality imposed on them by men. This Section therefore affirmatively envisions equality as a right, permitting legal claims for discrimination against nonstate actors and state actors alike who deny equal rights to women.

Marginal improvements can be made in women's conditions by addressing sex as an abstraction, as in Section 2 of this Amendment. But abstract equality enshrines dominant groups as the standard, failing to rectify discrimination for



those who do not meet it. Inequality, meanwhile, itself denies access to the means of meeting dominant standards and creates the illusion that those standards are neutral or meritocratic, when they are simply dominant. Substantive equality, in contrast, begins with recognizing the concrete historical situation of subjected, violated, and denigrated people, called by name: women in all their diversity.<sup>54</sup> This concrete language is particularly useful for avoiding failures to address the situation of women who are multiply subjected, who under the abstract equality approach are open to the dodge that their discrimination is based on factors other than sex.<sup>55</sup> Here, they are women. Women encompass characteristics of virtually every social group: women's diverse qualities and inequalities substantially make up what a woman is. When used through or with sex or gender to discriminate against them, that is discrimination because they are women, therefore what discrimination against women as such looks like.

**Section 2. Equality of rights shall not be denied or abridged by the United States or by any State on account of sex (including pregnancy, gender, sexual orientation, or gender identity), and/or race (including ethnicity, national origin, or color), and/or like grounds of subordination (such as disability or faith). No law or its interpretation shall give force to common law disadvantages that exist on the ground(s) enumerated in this Amendment.**

Section 2 provides for negative rights that are predicated on discriminatory state action, state or federal. Once rights are provided unequally, a legal claim of discrimination can arise. This Section adapts in its first sentence the basic language of the ERA proposed in 1972, passage of which would itself be an

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54. The first time the idea of substantive equality was spoken in public was 1989. See CATHARINE A. MACKINNON, *BUTTERFLY POLITICS* 110 (2017). See generally MACKINNON, *supra* note 40 (developing the concept of substantive equality across U.S., comparative, and international law and theory); Catharine A. MacKinnon, *Substantive Equality Revisited: A Rejoinder to Sandra Fredman*, 15 INT'L J. CONST. L. 1174 (2017) (arguing that hierarchy of power is the fundamental dynamic of inequality); Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 Minn. L. Rev. 1 (2011) (arguing that reality of substantive inequality should be incorporated into the Fourteenth Amendment's equal protection guarantee).
55. See generally KIMBERLÉ CRENSHAW, *ON INTERSECTIONALITY* (forthcoming 2020); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139-40, 166-67; Kimberlé Crenshaw, *The Urgency of Intersectionality*, TEDWOMEN (Oct. 2016), [https://www.ted.com/talks/kimberle\\_crenshaw\\_the\\_urgency\\_of\\_intersectionality](https://www.ted.com/talks/kimberle_crenshaw_the_urgency_of_intersectionality) [<https://perma.cc/J4V5-E994>]; Kimberlé Crenshaw, *Why Intersectionality Can't Wait*, WASH. POST (Sept. 24, 2015, 3:00 PM EST), <https://www.washingtonpost.com/news/in-theory/wp/2015/09/24/why-intersectionality-cant-wait> [<https://perma.cc/X3LL-GWCH>].

improvement.<sup>56</sup> Notably, the first clause of Section 2 is identical to the Nineteenth Amendment and the 1972 ERA, but for its substitution of “equality of rights” in place of the right to vote.<sup>57</sup> Some of the equality theory animating the Equality Amendment – for instance, its substantive and concrete rather than formal and abstract approach, and its understanding of intersectionality as a necessary component of sex – could be used in interpreting the 1972 ERA, should it be ratified and come into force. The language of the Equality Amendment locks in its distinctive approach, meaning, and application. Providing such explicit instruction to courts makes it less likely that the standard symmetrical approach to equality will be reflexively applied and the asymmetries – that is, the actual social inequalities that need to be remedied – will remain ignored. The express reference to subordination in the Equality Amendment provides more substantive language that otherwise could be reduced to anti-classification (as if classification is the only injury of subordination, when it is merely one tool of it), or to anti-stereotyping (as if being typecast as a member of a group of which one is a member is the essence of inequality, when it is merely one tool of it, and only sometimes). Hierarchy is inequality’s real injury. And, of course, the Equality Amendment applies beyond sex itself.

Pregnancy, gender, sexual orientation, and gender identity are grouped under “sex” because they are all facets of the unified but diverse system of inequality that privileges maleness and masculinity over femaleness and femininity, enforcing sexual rules and gendered myths, roles and stereotypes, and punishing non-compliance. Discrimination against transgender or nonbinary persons based on gender or sex, including nonconformity, would be covered. Similarly, ethnicity, national origin, and color are grouped under “race” because they are complexly but inexorably racialized in the United States, privileging whiteness and punishing as lesser anyone seen as not so-called white.

Adaptability is part of the ingenuity, the genius, of inequality. Section 2’s “like grounds” clause is thus open-ended, while maintaining race and sex as the substantive touchstones for the covered inequalities. The “like grounds” clause permits recognition of as yet unknown or unanticipated forms inequality can take.

This Amendment is designed to cover lacunae in existing law. Disability is expressly covered because of inadequacies in existing legislation and a general failure to recognize that it is social assumptions, not individuals’ particular abilities, that result in the deprivation of resources and dignity and extreme

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56. For the conventional articulation of the interpretation of the 1972 ERA, which may yet be ratified, see generally Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971).

57. U.S. CONST. amend. XIX.

marginalization of disability discrimination. Like every inequality, discriminatory deprivations are distinctive to this ground: distinctively wrenching, extreme, irrational, and cumulatively and systemically disadvantaging.

Although many constitutional and statutory provisions exist to protect spiritual beliefs and practices, including those fundamental to the Founding, failures to protect minority religions make clear the need to include this provision expressly.<sup>58</sup> All groups are entitled to constitutional rights, but dominant religions have less purchase here, as they would need to show subordination, a substantive term relative to evidence, similar to that suffered by women and people of color, who lack adequate coverage by existing law.

One possible like ground, adequately litigated, could be social and economic class. But race and sex discrimination together and separately do a great deal of class work. Just how much of class disadvantage would be left if race and sex inequality were adequately addressed is an open question. In addition, class as a factor, for women especially, is often vicarious and protean, its features calling for full concrete development.

Of course, the Equality Amendment's language does not imply or permit an intent requirement. This is because discrimination is not a moral failing of individuals but a pervasive social practice of power—epistemic, practical, and structural. No one need intend to perpetuate discrimination for it to persist. Therefore, no showing of intent is required to legally undo and remedy it.

The last sentence of Section 2 prohibits interpretive piggybacking on existing long-term discrimination that is built into the common law. Consider that Section 1 would prohibit as a denial of equality much social discrimination that is not now prohibited and is embodied in common law. A cardinal example of denying force to common law disadvantages predicated on inequality is *Shelley v. Kraemer*, in which state court decisions upholding racially restrictive covenants were denied enforcement under the Fourteenth Amendment's equal protection guarantee.<sup>59</sup> This ruling has been largely confined to its facts; its larger animating principle is captured in Section 3.

**Section 3. To fully realize the rights guaranteed under this Amendment, Congress and the several States shall take legislative and other measures to prevent or redress any disadvantage suffered by individuals or groups because of past and/or present inequality as prohibited by this Amendment, and shall take all steps requisite and effective to**

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58. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (upholding the Trump Administration's "Muslim Ban"); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (quashing a Muslim detainee's claims of discrimination and mistreatment). While text matters in interpretation, conflicts between provisions cannot be entirely precluded by drafting.

59. 334 U.S. 1, 23 (1948).

**abolish prior laws, policies, or constitutional provisions that impede equal political representation.**

The word “shall” affirmatively requires legislative and administrative authorities to implement this Amendment. There is no option not to, although the text of the Section leaves its precise implementation open.

The distribution of political power built into the Constitution impedes democratic progress, making it far easier to sustain conditions made unconstitutional by this Amendment than to dismantle them. The undemocratic protection, promotion, and insulation of an unequal socioeconomic order – slavery – continues to structure the political system under which leadership is elected, undermining the capacity for change in accordance with this Amendment. It must be dislodged from the Constitution’s foundation. Section 3 leaves to Congress the task of evaluating the Electoral College, for example, but giving more weight to voters in some states than in others in presidential elections would likely invalidate it. Upon ratification of this Amendment, Congress would be required to take up the question under this Amendment’s approach.

**Section 4. Nothing in Section 2 shall invalidate a law, program, or activity that is protected or required under Section 1 or 3.**

Undoing discrimination is not discrimination. Promoting equality undoes inequality. Section 4 repudiates the premise that classification per se is the injury of inequality and embraces the understanding that group hierarchy is the essence of inequality’s injury.<sup>60</sup> Accordingly, this Section requires that any law, policy, or practice qualifying as protected or required under Sections 1 and 3 may not be eliminated under Section 2. Currently, for example, affirmative-action plans and policies can be constitutionally challenged as discriminatory based on the notion that the Equal Protection Clause prohibits treatment based on categories or classifications rather than imposed relations of superiority and inferiority among groups or precluded opportunities of certain groups.<sup>61</sup> So long as the requirements of Sections 1 and/or 3 are met, and it is recognized that the Equality Amendment supersedes the Equal Protection Clause (and Fifth Amendment Due Process as to the federal government) in the equality arena, as it should, this reverse engineering of inequality into equality guarantees would be over.

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60. This proposed section parallels Section 15(2) of the Canadian Charter of Rights and Freedoms, which states that the equal-rights protection found in Section 15(1) “does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups.” Can. Const. (Constitution Act, 1982) pt. 1 (Canadian Charter of Rights and Freedoms), § 15(2).

61. John Valery White, *What is Affirmative Action?*, 78 TUL. L. REV. 2117, 2124 (2004).

### III. RECONSTITUTING THE FUTURE

The proposed Equality Amendment embraces an intersectional approach to equality, prioritizing race and gender for historical as well as contemporary reasons. This year's Nineteenth Amendment Centennial, commemorating women's right to vote, must not obscure the reality that not all women became full citizens upon the Amendment's passage. As the suffrage struggle for the Nineteenth Amendment demonstrates, the political processes used to change laws deeply influence the substantive changes that those laws can produce. The fight for the vote for all women was intertwined with attempts to repeal the Fifteenth Amendment, which prohibits states from denying the right to vote based on race, color, or prior servitude,<sup>62</sup> because of white racist fears of enfranchising Black women.<sup>63</sup> The suffrage movement often excluded African American women from its marches and speaking platforms, despite their determined support for the right to vote.<sup>64</sup> Historical disempowerment of women of color by some women's suffrage organizers and entities contributed to a demobilization that has undermined their full participation in the political process, and thus real democracy, today. The Equality Amendment is therefore predicated on recognizing the full interconnection between race- and gender-based subordination and is designed to deinstitutionalize it in all of its forms. But in recognition of the relationship between the politics of lawmaking and the law that politics makes, it will be the political mobilization, if pursued by the politics that animate this text, that produces its passage, as much as anything in its wording, that guarantees that the dual erasure of women of color is not replicated.

The Equality Amendment has been needed all along. But it is needed now as much or more than ever. Without equality, democracy is in peril: real equality provides the voting power to break the glass ceiling, guaranteed rights that raise the floor for all citizens, and recognition of the reality that inequalities intersect and overlap, making it impossible to rectify one alone. All Americans deserve equality guarantees that cannot be taken away or disregarded. And in a true democracy, each citizen should have an equal right to vote and have their vote count equally. Only the Constitution can provide this power and protection. But no constitutional amendment alone can guarantee these results. History shows that law is subject to retrenchment as well as advance, particularly when emerging

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62. U.S. CONST. amend. XV, § 1.

63. See Kimberly A. Hamlin, *How Racism Almost Killed Women's Right to Vote*, WASH. POST (June 4, 2019, 6:00 AM EST), <https://www.washingtonpost.com/outlook/2019/06/04/how-racism-almost-killed-womens-right-to-vote> [<https://perma.cc/H7PP-P8A8>].

64. See, e.g., ANGELA Y. DAVIS, *Racism in the Woman Suffrage Movement*, in *WOMEN, RACE, AND CLASS* 70, 70-86 (1981).

from and overlaid upon a nonintersectional power grid. This is not a reason to succumb, but a challenge to create the conditions for change.

Most Americans believe that the Constitution already guarantees equal rights.<sup>65</sup> Unlike most constitutions in the world, it does not.<sup>66</sup> It is the responsibility of “We, the People” to adapt the Constitution to the society we live in; to grow in our recognition of problems and potential solutions; to strengthen our democracy in an intimately interconnected world. Neither too vague nor too prescriptive, this proposal, offered as a beginning, aspires to sketch a path, to clear terrain to open a space for everyone to fill and, finally, to be heard.

Generations past have fought and died for equality, bringing us to this moment. The perceptions, principles, and language of this proposal can be used as a guide to legal and political action in every realm. Having broken the code by which U.S. equality law and theory has been constrained from fulfilling its promise, we are determined to be the last generation to fight for it. We can all be framers.

*Catharine A. MacKinnon is the Elizabeth A. Long Professor of Law, University of Michigan Law School and The James Barr Ames Visiting Professor of Law, Harvard Law School (since 2009). Kimberlé W. Crenshaw is the Promise Institute Chair in Human Rights and Distinguished Professor of Law, UCLA School of Law, and the Isidor and Seville Sulzbacher Professor of Law, Columbia Law School.*

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65. A 2016 poll commissioned by the Equal Rights Amendment Coalition suggests that eighty percent of Americans believe that the Constitution guarantees equal rights to men and women. Nicole Tortoriello, *Making the Case for the Equal Rights Amendment*, ACLU VA. (Jan. 3, 2019, 1:00 PM), <https://acluva.org/en/news/making-case-equal-rights-amendment> [<https://perma.cc/K8JG-Y2YA>].

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