CLASS, CARE, AND THE EQUAL RIGHTS AMENDMENT

KATE ANDRIAS*

INTRODUCTION

With the Supreme Court on the verge of overruling *Roe v. Wade* and *Planned Parenthood v. Casey*—eliminating the constitutional right of women to control their bodies and to stand as equals in our society—the importance of enshrining the principle of sex equality in the Constitution cannot be overstated.[1] It is essential that the Equal Rights Amendment (ERA) be incorporated as the Twenty-Eighth Amendment.[2] Still, any push for

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[1] Alito Draft Opinion, Dobbs v. Jackson Women's Health Org., ___ U.S. ___ (20__) (No. 19-1392) https://www.politico.com/f/?id=00000180-874f-dd36-a38c-c74f98520000 [https://perma.cc/9DJU-6NES]; Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[2] David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2323 (2021) ("[T]he ERA has not, at this writing, been accepted by the legal community as part of the Constitution because several state ratifications occurred after a deadline imposed by Congress, among other complications, even though the amendment seems to have checked all of the boxes for validity indicated on the face of Article V."); Amber Phillips, *The Never-Ending Fight Over Whether to Include the Equal Rights Amendment in the Constitution*, WASH. POST (Jan. 31, 2022), https://www.washingtonpost.com/politics/2022/01/31/never-ending-fight-over-whether-include-equal-rights-amendment-constitution/ [https://perma.cc/TZ3H-DMJZ] (noting that despite having been ratified by the constitutionally required number of states, the ERA has yet to be added to the Constitution by the national archivist).

the ERA ought also to acknowledge its limits, particularly for poor and working-class women, and women of color, who have long confronted the often-hollow promise of formal equality. Indeed, at its inception, the amendment was not a central goal of most working-class women's movements; rather, significant tension existed between the reformers who originally pushed for the ERA, on the one hand, and labor feminists, on the other. Over time, the divide narrowed and non-elite women came to support the ERA, but the amendment continued to represent a limited part of working-class women's aspirations for change. Understanding this history helps illuminate the limits of existing sex equality jurisprudence and offers some inspiration for how we can work not only to ratify the ERA but to transform the Constitution into a source for real equality for all women.

I.

As historians have documented, from the 1920s to the 1960s a great divide existed between "labor union women" and their progressive allies on the one hand and "ERA advocates" on the other.[3] Women in the labor movement opposed the ERA not because they didn't believe in equality but because they thought the ERA was elite-driven and elite-serving.[4] Indeed, many of the original proponents of the amendment *were* elite, and were *not* supportive of broader labor rights.[5] That is, the women who led the National Women's Party (NWP) and who were the driving force behind the amendment rarely favored legislative measures designed to enhance labor standards or union rights.[6] They thought

[3] DOROTHY SUE COBBLE, THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA 60–68 (2004).

[4] *Id.* at 61 (suggesting that women in the labor movement opposed the ERA because they saw it as a "class piece of legislation").

[5] *Id.* at 65 (explaining that ERA supporters were primarily "business and professional women . . . with substantial training and education" who "didn't particularly need labor standards legislation to ensure their own satisfactory working conditions"); *see also* Melissa Murray, *The Equal Rights Amendment: A Century in the Making*, 43 N.Y.U. REV. L. & SOC. CHANGE HARBINGER 91, 94 (2019) ("Middle-class and upper-class women cheered the ERA and welcome the prospect of enabling legislation that would begin to dismantle the various legal and social impediments that subordinated women . . . [w]orking-class women, however, were deeply skeptical of the ERA and the prospect of enabling legislation.").

[6] COBBLE, *supra* note 3, at 61 ("NWP members . . . rarely favored legislative measures designed to enhance labor standards or worker rights to collective representation.").

women, like men, should be allowed to operate in the market without hindrances or protections.[7]

Progressive women's groups and labor groups, like the National Consumers' League (NCL) criticized the NWP for offering "working women an abstract 'theoretical equality' while obstructing progress toward substantive equality for women who faced disadvantages of class as well as of gender." [8] They argued that the NWP program was designed for "an idealized labor market in which women, and workers in general, enjoyed boundless opportunity."[9] On this account, the ERA advanced a *Lochner*-esque approach to sex equality, concerned with women's formal liberty. Indeed, when the Supreme Court struck down the minimum wage for women in the 1923 case *Adkins v. Children's Hospital*,[10] the NWP applauded, arguing that "women were as capable as men in contracting for their jobs."[11]

The NCL, which focused on issues facing working-class and poor women, took a different approach. Its members tried to fashion "solutions aimed at the labor market as it actually was," with the aim of transforming that reality.[12] The NCL was willing to restrict

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[7] *Id.* at 65 (noting that women in male-dominated professions like law and business opposed sex-based labor protections because they put them at a relative disadvantage to the men in their fields); *see also* Deborah Dinner, *Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination*, 91 WASH. U. L. REV. 453, 463 (2014) (explaining that while advocates on both sides of the conflict considered themselves to be advancing economic justice for women, "ERA activists came to understand sex-based protective laws as an injurious group classification of women that would undermine equal access to work opportunities").

[8] LANDON STORRS, CIVILIZING CAPITALISM 58 (2000).

[9] *Id.*

[10] 261 U.S. 525 (1923).

[11] DOROTHY E. MCBRIDE & JANINE A. PARRY, WOMEN'S RIGHTS IN THE USA: POLICY DEBATES AND GENDER ROLES 218 (2016); *see also* Julie C. Suk, *Working Mothers and the Postponement of Women's Rights from the Nineteenth Amendment to the Equal Rights Amendment*, 92 U. COLO. L. REV. 799, 812 (2021) (noting that Alice Paul, a key architect of the ERA, was a consultant to the employer's lawyer in *Adkins* and helped "link equal rights for women to the liberty of contract pronounced by Lochner").

[12] STORRS, *supra* note 8, at 58; *see also* Dinner, *supra* note 7, at 463 (calling advocates for protective legislation "pragmatic" because their proposals were fashioned for "the labor market as then structured," in contrast to "aspirational" ERA proponents who "envision[ed] the labor market as it could be").

the opportunities of some individual workers—women in particular—"in order to win laws that would lay a 'floor' for labor standards."[13] Labor feminists argued that creating wage floors for women would not only improve women workers' lives but would also reduce employers' control over workers.[14] That is, their goals were both to protect women and to transform power dynamics in the political economy. From this vantage point, the ERA was dangerous. Labor feminists and progressive women feared the amendment would be used to eliminate the progress they had made toward more dignity and power in the economic sphere.

II.

Over time, however, the gulf between elite feminists and labor feminists narrowed. This happened for a few reasons. For one, the Fair Labor Standards Act (FLSA), enacted in 1938, provided wage floors for male and female employees alike,[15] while the National Labor Relations Act (NLRA), enacted in 1935, enabled union organizing and collective bargaining for all covered employees.[16] Because these statutes created rights for most private sector employees, they eliminated the need for women-specific protective legislation.[17] Notably, however, both of these statutes excluded domestic and agricultural workers.[18] These shameful exclusions, which were the result of compromises made by

[13] STORRS, *supra* note 8, at 58.

[14] *Id.* (explaining that the NCL thought the floor would reduce employers' ability to pit workers against each other, which would in turn lead to unionization and demands to heighten labor standards).

[15] REBECCA DEWOLF, GENDERED CITIZENSHIP: THE ORIGINAL CONFLICT OVER THE EQUAL RIGHTS AMENDMENT, 1920-1963, at 161 (2021) (arguing that the FLSA "displaced the rational for sex-based labor legislation," allowing emancipationists to "claim with confidence that the ERA would not threaten the health and safety of women workers").

[16] *Id.* at 92–93 (suggesting that the rise in support for the ERA was precipitated by "profound changes in social policies created by the Great Depression," including the NLRA).

[17] Suk, *supra* note 11, at 817 (noting that the conversation around the ERA changed after the FLSA "required employers to pay minimum wages and overtime rates to male and female workers alike").

[18] ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 106 (2001) (noting that "African-American women, more than a third of whom still worked as domestic servants in 1935, and African-American men, who constituted 80 percent of agricultural workers, almost completely lacked [the FLSA's] protections"); Juan F. Perea, *The Echoes of*

President Roosevelt who allowed Southern legislators to write discriminatory provisions into the New Deal programs in order to ensure their passage, left many African American women in particular without legal protection.[19] Nonetheless, the trend of eliminating sex-specific labor protections continued during World War II, at both the state and federal levels. And over the next decades, employment protections expanded for all workers.

As sex-specific employment protections came to be obsolete, ERA proponents could increasingly argue with confidence that the ERA would not threaten the health and safety of women workers.[20] By the late 1960s, many labor activists no longer feared the ERA; many even came to support it.[21] Joining forces with ERA proponents, they agreed to press for the ERA while also pursuing sex equality goals through the Fourteenth Amendment and statutes like Title VII of the Civil Rights Act of 1964.[22]

During this period, Black women also became leaders in the ERA revival. The Fourteenth Amendment litigation strategy was first proposed by civil rights expert and attorney Pauli Murray in her role as a member of the President's Commission on the Status

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Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act, 72 OHIO ST. L.J. 95, 118–26 (2011) (demonstrating that the decision to exclude agricultural and domestic workers from the NLRA was racially motivated).

[19] *See generally* IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME (2013) (examining Roosevelt's willingness to preserve racial discrimination in exchange for support for New Deal legislation from Southern Democrats).

[20] DEWOLF, *supra* note 15, at 161. The Fair Labor Standards Act and World War II "strengthened the growing energy behind the ERA." *Id.* at 129.

[21] Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209, 239–40 (1998) (describing increasing support for the ERA among mainstream leaders, including labor unions and activists, in the late 1960s and early 1970s as a result of the elimination of sex-protectionist legislation); *see also* Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 444–47 (2011) (arguing that this narrative is oversimplified and that the "protective-laws debate is better understood not as an ideological competition between difference and sameness feminism, special and equal treatment, but rather as a strategic conflict about how to remedy the economic costs that the family-wage system imposed on women").

[22] Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. Rev. 757, 761–801 (2004) (detailing feminist convergence around this "dual strategy").

of Women.[23] Murray's advocacy was crucial to building support among different feminist factions for the ERA.[24] Murray also made an intersectional case for the ERA before such language existed. In testimony to the Senate Judiciary Committee in 1970, she articulated the need for a formal constitutional amendment to protect Black women, who were excluded from both the paternalistic legal protections for white women and the proximity to power and status afforded to Black men by virtue of their gender.[25] This laid the groundwork for Black women legislators later to lead the fight in twenty-first-century debates about the ERA's ratification.[26]

The Fourteenth Amendment strategy found success. As is well known, in a series of cases beginning in the 1970s, many of which were litigated by Ruth Bader Ginsburg, equality advocates won the dismantling of most sex-based classifications in the law, effectively limiting the government's ability to enforce sex-role stereotypes.[27] Once on the Supreme Court, Justice Ginsburg encapsulated the approach in *United States v. Virginia*:

> Sex classifications may be used to compensate women for particular economic disabilities [they have] suffered, to promot[e] equal employment opportunity, [and] 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.[28]

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[23] *Id.* at 762–69.

[24] *Id.* at 796–801 (noting that coalition-building by key strategists including Pauli Murray led protectionists and ERA advocates to coalesce around the need for a constitutional amendment).

[25] Julie C. Suk, *A Dangerous Imbalance: Pauli Murray's Equal Rights Amendment and the Path to Equal Power*, 107 VA. L. REV. ONLINE 3, 10–15 (2021) (describing Murray's written statement to Congress).

[26] JULIE C. SUK, WE THE WOMEN: THE UNSTOPPABLE MOTHERS OF THE EQUAL RIGHTS AMENDMENT ch. 10–12 (2020) (documenting the contributions of Black women state legislators in twenty-first-century debates about ERA ratification, including Juliana Stratton in Illinois and Jennifer McClellan in Virginia); *see also* Suk, *supra* note 25, at 4 (arguing that the prominent role played by these legislators "should matter to the ongoing debates about the legitimacy of . . . post-deadline ratifications").

[27] *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 86 (2010).

[28] United States v. Virginia, 518 U.S. 515, 533–34 (1996).

The Court also came to protect women's reproductive rights under the Fourteenth Amendment,[29] although a majority of justices never embraced the connection between reproductive justice, full citizenship, and economic equality pressed by advocates.[30] Meanwhile, in the employment context, Title VII of the Civil Rights Act of 1964 supplemented the Fourteenth Amendment strategy, enabling advocates to dismantle not only formal discrimination, but also employment practices that had a disparate impact on women.[31] By the end of the twentieth century, despite the failure to ratify the ERA, the cause of sex equality had made great progress, including in the workplace.[32]

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[29] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

[30] *See* Reva Siegel, *Equality and Choice: Sex Equality Perspectives on Reproductive Rights in the Workplace*, 25 COLUM. J. GENDER L. 63, 73 (2013) ("[T]he Court has never done what Justice Ginsburg imagined: taken 'abortion, pregnancy, out-of-wedlock birth, and explicit gender-based differentials out of the separate cubbyholes in which they now rest, acknowledge[d] the practical interrelationships, and treat[ed] these matters as part and parcel of a single, large, sex equality issue.'") (second and third alterations in original) (quoting Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 462 (1978)); Cary Franklin, *The New Class Blindness*, 128 YALE L.J. 2, 47–63 (2018) (discussing the development of the Court's abortion jurisprudence and arguing that despite the Court's use of a fundamental rights framework to protect reproductive rights, their decisions were attuned to class-based equality concerns).

[31] In *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), the Court interpreted Title VII to forbid practices having a disparate impact on racial minorities and feminists used this disparate impact logic to win the elimination of many employer practices that negatively affected women. SERENA MAYERI, REASONING FROM RACE 107–08 (2011) ("Feminists embraced disparate impact in the years after Griggs . . . [and] recognized the potential of disparate impact to fight policies that placed working women at a disadvantage because of their family responsibilities."); *see also* Dinner, *supra* note 21, at 457 (noting that after *Griggs*, the Equal Employment Opportunity Commission issued guidelines interpreting Title VII to require employers to treat pregnancy as a temporary disability, which represented a success for legal feminists "who had devised the temporary disability paradigm as a strategy to promote childbearing women's economic security, social wellbeing, and equal employment opportunity").

[32] KRISTEN SWINTH, FEMINISM'S FORGOTTEN FIGHT: THE UNFINISHED STRUGGLE 124–25 (2018) (describing the renewed battle over the ERA in the 1970s and 1980s as centered around the amendment's impact on homemakers' rights).

III.

Despite these successes, however, the challenges facing women, particularly poor and working-class women, women of color, and immigrant women, are significant, and have become more so during the pandemic.[33] Nearly half of all working women—forty-six percent or twenty-eight million—work in jobs paying low wages, with median earnings of only $10.93 per hour. Women work in low-paying occupations at twice the rate men do.[34] The share of workers earning low wages is even higher among Black and Latina women than among white women.[35] Women continue to be paid less than men when working in comparable jobs, despite the Equal Pay Act of 1963's mandate of "equal pay for equal work."[36] In addition, the jobs that have historically been "women's" jobs—jobs in which

[33] Richard Fry, *Some Gender Disparities Widened in the U.S. Workforce During the Pandemic*, PEW RSCH. CTR. (Jan. 14, 2022), https://www.pewresearch.org/fact-tank/2022/01/14/some-gender-disparities-widened-in-the-u-s-workforce-during-the-pandemic/ [https://perma.cc/KE2W-YKCQ]; *see also* Nicole Bateman & Martha Ross, *Why Has COVID-19 Been Especially Harmful for Working Women?*, BROOKINGS INST. (Oct. 2020), https://www.brookings.edu/essay/why-has-covid-19-been-especially-harmful-for-working-women/ [https://perma.cc/7RLZ-NJEH] (describing working class women's pandemic-related struggles with even lower wages, the exacerbated "shortage of affordable, high-quality childcare[,]" and the disruption to childcare, school routines, and employment, which led to a disproportionate number of women leaving their jobs or reducing their working hours).

[34] Ariane Hegewisch & Eve Mefferd, *The Gender Wage Pay Gap by Occupation, Race, and Ethnicity 2020*, at 7 (INST. FOR WOMEN'S POL'Y & RSCH., Briefing Paper No. C497, 2021), https://iwpr.org/wp-content/uploads/2021/03/2021-Occupational-Wage-Gap-Brief-v2.pdf [https://perma.cc/A39E-HCY8].

[35] *See* Mark Paul et al., *Returns in the Labor Market: A Nuanced View of Penalties at the Intersection of Race and Gender* 11–12 (Wash. Ctr. for Equitable Growth, Working Paper No. 080718, 2018), https://equitablegrowth.org/working-papers/intersectionality-labor-market/ [https://perma.cc/THP2-PXPY] (examining the impact of holding multiple socially marginalized identities on wage gaps and finding that "black women face a penalty relative to white men that exceeds the subtractive effect of both their race and gender penalties, relative to white women and black men, respectively").

[36] Earlene K.P. Dowell, *Women Consistently Earn Less Than Men*, U.S. CENSUS BUREAU (Jan. 27, 2022), https://www.census.gov/library/stories/2022/01/gender-pay-gap-widens-as-women-age.html [https://perma.cc/XFP8-7A4V] (noting the overrepresentation of women in low-wage jobs and the fact that women earn eighty-two cents for every dollar earned by men); *see also* André Dua et al., *Achieving an Inclusive U.S. Economic Recovery*, MCKINSEY & CO. (Feb. 3, 2021), https://www.mckinsey.com/industries/public-and-social-sector/our-insights/achieving-an-inclusive-us-economic-recovery [https://perma.cc/UK92-X5WK]

women predominate—receive much lower wages and fewer rights. In fact, domestic work is still fully excluded from many federal and state labor and employment protections.[37]

Women also do a tremendous amount of unpaid work, in the form of caregiving of children and family members and maintaining households.[38] As Professor Nancy Fraser has argued, under financialized capitalism, the work of social reproduction has been divided from economic production and its value and importance obscured; in the context of rising inequality, care work is "commodified for those who can pay for it, and privatized for those who cannot."[39] This is particularly true in the United States. Unlike many of its peer countries, the U.S. has no paid family leave at the federal level,[40] and at the state level, only nine states and the District of Columbia mandate paid family leave.[41] Low-wage workers, who are disproportionately women of color, rarely have paid leave from their employers and often cannot afford to take unpaid leave; they are typically forced back into paid labor soon after giving birth.[42]

(projecting the pandemic's lasting, disproportional effects on low-wage workers, minorities, and women and proposing mitigating policy interventions).

[37] *See supra* notes 16–19, and accompanying text.

[38] *See* DIANA BOESCH & KATIE HAMM, CTR. FOR AM. PROGRESS, VALUING WOMEN'S CAREGIVING DURING AND AFTER THE CORONAVIRUS CRISIS (2020) (noting that women, mothers in particular, bear the vast majority of caregiving duties).

[39] Nancy Fraser, *Contradictions of Capital and Care*, 100 NEW LEFT REV. 99, 102–03 (2016), https://newleftreview.org/issues/ii100/articles/nancy-fraser-contradictions-of-capital-and-care [https://perma.cc/J4AN-2L6Y].

[40] *See* Megan A. Sholar, *The History of Family Leave Policies in the United States*, ORG. OF AM. HISTORIANS (2016), https://www.oah.org/tah/issues/2016/november/the-history-of-family-leave-policies-in-the-united-states/#fn8 [https://perma.cc/88ZD-CSQJ] ("[T]he United States remains the only industrialized country without paid family and medical leave at the national level.").

[41] *State Paid Family Leave Laws Across the U.S.*, BIPARTISAN P'LY CTR. (Apr. 12, 2022), https://bipartisanpolicy.org/explainer/state-paid-family-leave-laws-across-the-u-s/ [https://perma.cc/9XTU-JGRP].

[42] *Cf.* U.S. BUREAU OF LABOR STATISTICS, NATIONAL COMPENSATION SURVEY 299–302 tbl.31 (2020) (showing that paid family leave is accessible to only eight percent of low-wage workers, compared to twenty percent of all workers).

Child care in the United States also remains inaccessible to many. Infant child care costs families an average of $14,117 per year, which amounts to more than the price of public college in thirty-three states.[43] Although some child care subsidies exist, only one in six of the families eligible for subsidies receive them.[44] And the subsidies that do exist for infant and toddler child care usually prove inadequate, covering just a fraction of the cost of care.[45] Despite the high cost of care, the average early educator makes less than $12 an hour,[46] with the educators of infants and toddlers making even less.[47] Home-based child care providers often work far beyond forty hours a week for relatively little take-home pay and limited benefits.[48]

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[43] Jane Thier, *The Cost of Childcare Has Risen by 41% During the Pandemic with Families Spending Up to 20% of Their Salaries*, FORTUNE (Jan. 28, 2022, 9:51 AM), https://fortune.com/2022/01/28/the-cost-of-child-care-in-the-us-is-rising/ [https://perma.cc/2K42-VBQW].

[44] DOUGLAS RICE, STEPHANIE SCHMIT & HANNAH MATTHEWS, CTR. ON BUDGET & P'LY PRIORITIES, CHILD CARE AND HOUSING: BIG EXPENSES WITH TOO LITTLE HELP AVAILABLE (2019).

[45] STEVEN JESSEN-HOWARD, M.K. FALGOUT & RASHEED MALIK, CTR. FOR AM. PROGRESS, COSTLY AND UNAVAILABLE: AMERICA LACKS SUFFICIENT CHILD CARE SUPPLY FOR INFANTS AND TODDLERS (2020).

[46] Jennifer Gioia, *It's Long Past Time Early Childhood Teachers Earned a Worthy Wage*, CHILD CARE SERVS. ASS'N (Apr. 30, 2021), https://www.childcareservices.org/2021/04/30/its-long-past-time-early-childhood-teachers-earned-a-worthy-wage/ [https://perma.cc/7YZF-BALU].

[47] CTR. FOR THE STUDY OF CHILD CARE EMP., U. OF CAL., BERKELEY, THE YOUNGER THE CHILD, THE LOWER THE PAY FOR EARLY EDUCATORS (2018), https://cscce.berkeley.edu/wp-content/uploads/publications/2018-Index-Infographics.pdf [https://perma.cc/BY5B-8R7B] ("[T]here is a wage penalty at every educational level for working with younger children.").

[48] *See* ASHA BANERJEE, ELISE GOULD & MAROKEY SAWO, ECON. P'LY INST., SETTING HIGHER WAGES FOR CHILD CARE AND HOME HEALTH CARE WORKERS IS LONG OVERDUE 22 (2021), https://files.epi.org/uploads/237703.pdf [https://perma.cc/6KZZ-MT8L] (discussing how, despite long hours, low wages leave "millions of care workers [unable to] afford to cover their family's basic needs. . . .").

The Supreme Court's approach to problems of sex equality, modeled on its approach to race equality,[49] is deeply inadequate to address any of these problems.[50] Equal protection doctrine requires that plaintiffs prove that state actors treated them differently on account of sex (or race) and did so with intent to discriminate.[51] This approach relies on a conception of biased governmental perpetrators discriminating against individual victims. But an individualized approach that focuses on rooting out explicit bias does nothing about structural inequality; it is of minimal relevance to the problems facing most women, and poor and working-class women in particular; nor is it a solution to the crisis of care more generally.

IV.

Would the ERA change the picture? Unfortunately, there is little reason to believe this Court would take a more expansive approach to the ERA than it has to the Fourteenth Amendment. If anything, indications are to the contrary. The current right-wing Supreme Court threatens to curb constitutional rights that have been essential to women's equal citizenship and ability to direct their own lives for decades, most notably the right to abortion.[52] Moreover, in the hands of the current Court, equal protection may soon mean that any effort to affirmatively remedy race or sex inequality actually violates equal

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[49] MAYERI, *supra* note 31, at 106–43 (detailing how feminists "used theories developed in race cases to tackle sex inequality").

[50] *See* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 41 (5th ed. 2004); Dorothy Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 85–90 (2019) (arguing that requiring a plaintiff show a policy was enacted with a "discriminatory purpose" to establish an equal protection violation demonstrates a disregard for and inability to address institutionalized racism); Reva Seigel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L REV. 1111, 1141–42 (1997) (arguing that the Court's approach to equal protection is flawed because it requires presuming good faith when confronted with facially neutral laws that disproportionately impact minorities but skepticism when examining "policies that attempt to rectify centuries of discrimination against minorities and women").

[51] Washington v. Davis, 426 U.S. 229 (1976) (holding that a law's disparate impact on different races cannot by itself establish an equal protection violation without evidence of discriminatory purpose); Massachusetts v. Feeney, 442 U.S. 256 (1979) (foreclosing sex-based disparate impact claims under the Fourteenth Amendment).

[52] *See* Alito Draft Opinion, *supra* note 1.

protection.[53] Meanwhile, under the rubric of religious liberty, the conservative majority has increasingly allowed private entities to engage in discrimination on the basis of sex.[54] And the Court has made it harder for democratic legislatures to address problems of inequality. It has advanced narrow interpretations of Congress's power under the commerce clause, the spending clause,[55] and Section 5 of the Fourteenth Amendment;[56] created new obstacles to redistributive legislation under the First Amendment[57] and the Takings Clause;[58] and crafted separation of powers and administrative law doctrines that disempower the government.[59]

Yet, equality's meaning is not fixed. The ERA and the Fourteenth Amendment could yet be vested with a more capacious definition of equality and legislatures could instantiate

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[53] Students for Fair Admissions v. Harvard, No. 20-1199. *See* Adam Liptak & Anemona Hartocollis, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.*, N.Y. TIMES (Jan. 24, 2022), https://www.nytimes.com/2022/01/24/us/politics/supreme-court-affirmative-action-harvard-unc.html [https://perma.cc/T2UL-92PW] (noting that the Court's decision to hear the case "rais[es] serious doubts about the future of affirmative action in higher education").

[54] *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (allowing for-profit companies to deny health care coverage that includes contraception to employees on religious liberty grounds).

[55] NFIB v. Sebelius, 567 U.S. 519 (2012) (striking down the Medicaid expansion of the Affordable Care Act as an unconstitutionally coercive use of Congress's spending power).

[56] United States v. Morrison, 529 U.S. 598 (2000) (holding that Congress exceeded the scope of its Fourteenth Amendment enforcement power by enacting the Violence Against Women Act).

[57] Janus v. AFSCME, 138 S. Ct. 2448 (2018) (holding that requiring non-union workers to pay fees to unions representing them in collective bargaining constitutes a violation of the non-members First Amendment rights of free speech).

[58] Cedar Point Nursery v. Hassid,141 S. Ct. 2063 (2021) (finding that a California regulation allowing physical, temporary access to private property by union organizers constituted a *per se* compensable taking under the Fifth Amendment).

[59] *See* Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 95 (2017) (drawing parallels between the New Deal Era's battles over administrative governance and the present attack on the constitutionality of the administrative state and the agencies' authority); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 287, 367 (demonstrating the lack of originalist basis for the nondelegation doctrine).

that vision through their work. Consider the growing calls for Congress to respond to the Supreme Court's anti-abortion ruling by enacting legislation that prohibits states from imposing undue burdens on women's reproductive choices.[60] These efforts reflect awareness that the Justices are not, and have never been, the sole enforcers or interpreters of the Constitution. Another place to look for hope is to the significant and inspiring organizing activity occurring among women workers—including domestic workers, nail salon workers, teachers, healthcare workers, and other female-dominated workforces.

Social movements have a long history of helping to shape constitutional meaning, including conceptions of sex equality.[61] For the most part, today's contemporary worker movements are not making express constitutional arguments. However, they are attempting to change the web of practices, institutions, norms, and traditions that structure their workplaces and our society, and, in that sense, they are working to transform our constitutional order.[62] These women are speaking out against domination and autocratic power in the workplace and the devaluing of care work.[63] They are demanding that their work be treated with dignity and fairly compensated, and that they have time to spend with

[60] Women's Health Protection Act, H.R. 3755, 117th Cong. (2021).

[61] *See* Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1527 (2005) (arguing that while social movements and judicial decisions are connected, studying the Michigan affirmative action cases demonstrates that moderates and elites have a "disproportionate influence . . . in politics, on legal narratives about equality, and in juricentric constitutionalism," suggesting that "juridical law should be deemphasized in discussions on sociopolitical change"); Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 878 (2013) (reviewing JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011)) (noting that legal scholars have "persuasively demonstrated how the labor, civil rights, and women's movements . . . have shaped constitutional norms and in turn have been shaped by those norms"); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 2005–06 Brennan Ctr. Symposium Lecture, *in* 94 CAL. L. REV. 1323, 1324 (2006) ("Debate over whether to amend the Constitution changed the meaning of the Constitution—in the process forging modern understandings of discrimination 'on account of sex.'").

[62] Kate Andrias, *Peril and Possibility: Strikes, Rights, and Legal Change in the Era of Trump*, David E. Feller Memorial Labor Law Lecture (Apr. 5, 2018), *in* 40 BERKELEY J. EMP. & LAB. L. 135, 148 (2019).

[63] Kate Andrias, *Building Labor's Constitution*, 94 TEXAS L. REV. 1591, 1592 (2016) (noting that unlike earlier rights-based social movements, today's low-wage worker campaigns "do not invoke the Constitution in any serious or systemic way").

their families.[64] And they, along with other workers, including those laboring for the largest, most powerful, and oppressive companies, are demanding democratic rights at work.[65] In short, their organizing suggests a very different vision of equality than the one advanced by the conservative Court.

Following their lead**,** the ERA needs to be—and can be—invested with broader meaning than the meaning the conservative justices give to equal protection, and can be fused with broader efforts to transform the political economy. These battles need to be fought in Congress, in state legislatures, and in the public sphere, not first and foremost in courts, at least not before the very conservative Supreme Court. But a more capacious

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[64] *See* DIANA BOESCH, KAITLIN HOLMES & JOCELYN FRYE, CTR. FOR AM. PROGRESS, DRIVING CHANGE IN STATES TO COMBAT SEXUAL HARASSMENT (2019), https://www.americanprogress.org/article/driving-change-states-combat-sexual-harassment/ [https://perma.cc/E29H-U9R5] (describing worker-led campaigns to improve workplace rights and safety through legislation and social responsibility programs); Lauren Hilgers, *Out of the Shadows*, N.Y. TIMES MAG. (Feb. 21, 2019), https://www.nytimes.com/interactive/2019/02/21/magazine/national-domestic-workers-alliance.html [https://perma.cc/9SRP-PF5R] (documenting the National Domestic Workers Alliance's organizing efforts and progress toward domestic workers' rights legislation); Anna Kaplan, *McDonald's Workers Are Striking Over Continued Sexual Harassment Issues*, FORBES (Oct. 26, 2021, 4:24 PM), https://www.forbes.com/sites/annakaplan/2021/10/26/mcdonalds-workers-are-striking-over-continued-sexual-harassment-issues/?sh=15565a132e43 [https://perma.cc/FZ72-A3Q2] (describing the rampant sexual harassment in the fast food industry and how workers are fighting back); ABBIE LIEBERMAN ET AL., CTR. ON EDUC. & LAB., VALUING HOME AND CHILD CARE WORKERS (Jun. 28, 2021), https://www.newamerica.org/new-practice-lab/reports/valuing-home-child-care-workers/#authors [https://perma.cc/UH2B-YGRS] (studying care worker organizing in California, Illinois, Washington, and New York City); Karen Schwartz, *Deal in San Francisco Ends Nationwide Marriott Strikes*, N.Y. TIMES (Dec. 3, 2018), https://www.nytimes.com/2018/12/03/travel/san-francisco-marriott-strike-over.html [https://perma.cc/8JVN-BSH7] (explaining the vulnerability of hotel workers to sexual harassment and their fight for better working conditions).

[65] *See* Karen Weise & Noam Scheiber, *Amazon Workers Vote to Unionize,* N.Y. TIMES (Apr. 1, 2022), https://www.nytimes.com/2022/04/01/technology/amazon-union-staten-island.html [https://perma.cc/KQE8-KWQA]; *see also* Andrias, *supra* note 63, at 1594 (noting that while "the goal of labor law, at least from the perspective of the most utopian elements of the labor movement, is to democratize control over workers' lives and, more broadly, over the economy and politics," this is rarely accomplished through the courts); Kate Andrias, *The New Labor Law*, 126 YALE L. J. 2, 7–11 (2016) (arguing that recent worker movements offer the possibility of a new labor law regime).

version of equal rights can also be offered in dissent, even within the confines of the current Court.[66]

What might a broader conception of equal rights look like? As scholars have long argued, equal protection and equal rights must mean anti-subordination, not just anti-classification; the goal is not only individual freedom from intentional discrimination, but eliminating the social subordination of historically oppressed groups.[67] More broadly, the goal must be a democratic society in which all people interact as social equals, without systematic forms of domination in the private sphere as well as the public sphere.[68] To achieve this vision requires taking an intersectional approach to equality that bridges the long-standing racial and socioeconomic divides within the United States feminist movement.[69] Valuing social reproduction must be a central part of this project, including through protecting women's ability to control their bodies, as well as through achieving paid parental and family leave and publicly available, high quality, child care, health care, and education.[70] More long term, an equal rights agenda requires fundamentally

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[66] For an example from Justice Ginsburg, *see* Gonzales v. Carhart, 550 U.S. 124, 169 (2007) (Ginsburg, J., dissenting).

[67] *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004); DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108, 157 (1976); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 117 (1979).

[68] *See* Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 288–89 (1999) ("The proper positive aim [of egalitarian justice] is . . . to create a community in which people stand in relations of equality to others."); DANIELLE ALLEN, A NEW THEORY OF JUSTICE: DIFFERENCE WITHOUT DOMINATION, IN DIFFERENCE WITHOUT DOMINATION 27, 38, 41 (Danielle Allen & Rohini Somanathan eds., 2020) (arguing that freedom from domination requires "an equal share of control over the institutions—the laws, policies, procedures—that necessarily interfere with your life . . .").

[69] Serena Mayeri, *After Suffrage: The Unfinished Business of Feminist Legal Advocacy*, 129 YALE L. J. 512, 532 (2020) (noting that Pauli Murray's hope that women's solidarity could overcome ideological divides and the legacy of white supremacy was not borne out by the results of the 2016 election, where a majority of white women voted for Donald Trump).

[70] Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 YALE J.L. & FEMINISM 381, 444 (2017) ("To add something that we don't already have, and that all

reimagining the organization of both economic production and social reproduction. Looking back to the history with which I began, it means learning from and building on the best from both the ERA proponents and the labor feminists and African American leaders of the twentieth century—working towards greater equality in society not only as it is, but envisioning it as it could be.[71]

Americans need, a new ERA should take social reproduction, rather than the problem of individual freedom from discrimination, as its core concern.").

[71] *See* Dinner, *supra* note 7, at 463.