

LADIES: YOU REALLY DO NOT HAVE THE CONSTITUTIONAL RIGHTS YOU THINK YOU HAVE

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INTRODUCTION

Women are equal now.¹ So many young women—and men—assume.² No doubt they learned in high school that women gained constitutional rights in the ancient, groovy, Woodstock 1970s. That narrative is common, but constitutionally false. Soon, because of the impending Supreme Court ruling on abortion in *Dobbs*,³ women will feel this in a visceral way. They should also understand why the Constitution is now believed, by the current Court, to accord them so few rights.

The conventional story of feminist victory is still taught in law school classrooms, but neglects the fact that the vast majority of women’s protections come from legislation—

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¹ I use the word “women” here to be precise. Other areas of gender-related rights, such as sexual orientation, have different kinds of protection, albeit limited.

² Juliana Menasce Horowitz et al., *Wide Partisan Gaps in U.S. Over How Far the Country Has Come on Gender Equality*, PEW RSCH. CTR. (Oct. 18, 2017), <https://www.pewresearch.org/social-trends/2017/10/18/wide-partisan-gaps-in-u-s-over-how-far-the-country-has-come-on-gender-equality/> [<https://perma.cc/F3RY-7W4W>].

³ See Alito Draft Opinion at 9, *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* . . . was remarkably loose in its treatment of the constitutional text.”).

from Congress—not the Constitution.⁴ If the political winds blow hard enough (consider the Trump “grab ’em” revolution), almost all the things that women think are their rights can be repealed. To be protected against politicians’ whims, rights need to be entrenched, and that is what constitutions do. In the American Constitution, women’s rights are almost nowhere to be found, other than in the right to vote.⁵ And precisely for that reason—the absence of words and the Constitution’s silence on women—the new Trump Court is capable of unsettling far more than the right to abortion, based on its new judicial philosophy.

For the legally uninitiated, it is important to differentiate between a law and the Constitution. Laws come from legislatures, like the federal legislature (Congress) or the ones in the states, from politically elected leaders. If a right is in a law, the legislatures can take it back anytime a majority of legislators willing to do so is elected. The only way to entrench rights and protect them from political winds is to find them in the Constitution.⁶ But what if women are not textually recognized in the 1787 Constitution? The new Trump Court, the one created by three Trump appointments, has claimed that the Court’s legitimacy depends upon hewing closely to the Constitution’s fixed text.⁷ If there is no text, the right does not exist. So said Justice Alito’s leaked opinion in *Dobbs*: abortion is not mentioned in the text, ergo it is not protected.⁸ The truth is that it is worse than that. The Constitution does not mention abortion or women at all. Only the Nineteenth Amendment guarantees a right to vote without regard to “sex.”⁹

⁴ See Susan Milligan, *Stepping Through History*, U.S. NEWS (Jan. 20, 2017), <https://www.usnews.com/news/the-report/articles/2017-01-20/timeline-the-womens-rights-movement-in-the-us> [<https://perma.cc/8LYM-T6C2>].

⁵ U.S. CONST. amend. XIX.

⁶ There are some state constitutions that provide protections inconsistent with the claims in this short piece. Of course, your rights then depend upon where you live in the United States.

⁷ Emily Bazelon, *How Will Trump’s Supreme Court Remake America?*, N.Y. TIMES MAG. (Feb. 28, 2020), <https://www.nytimes.com/2020/02/27/magazine/how-will-trumps-supreme-court-remake-america.html> [<https://perma.cc/8GRL-K7Z6>].

⁸ Alito Draft Opinion, *supra* note 3, at 9 (“The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text.”).

⁹ U.S. CONST. amend. XIX.

I. The Constitutional Rights You Do Not Have

So, here is a catalog of rights and privileges many women assume that they hold, but the Constitution does not guarantee. They are pretty basic: the right to work and to live free from discrimination and violence. I take each in turn, attempting to show you that whatever rights women have, they are far more fragile than most young women and men assume.

A. Employment

First: the right to work. There is no right to paid labor in the Constitution—for anyone. Once upon a time, there were attempts to carve out such a right, but the free labor movement is long gone.¹⁰ Let us imagine a scenario where a state passes a “Handmaid’s Tale Employment Act,”¹¹ saying that “men but not women may work outside the home.” While admittedly extreme, the question is whether the Federal Constitution would protect women from this Act. Under the cases decided in the 1970s, given the work that Justice Ginsburg did as a litigator,¹² such a state law would be unconstitutional under the Fourteenth Amendment, because it violates the Amendment’s guarantee of “equal protection of the laws.”¹³ Laws that expressly use gender distinctions are subject to what lawyers call “heightened scrutiny.”¹⁴ That means a court will look for the legislature to

¹⁰ See Leah S. Glaser, *United States Expansion, 1800-1860*, VA. CTR. FOR DIGITAL HISTORY (2005), <http://www.vcdh.virginia.edu/solguide/VUS06/essay06c.html> [<https://perma.cc/LEV7-3V3C>] (providing a brief history of the nineteenth-century free labor movement).

¹¹ Drawing inspiration from MARGARET ATWOOD, *THE HANDMAID’S TALE* (McClelland & Stewart 1985) (envisioning a fictionalized version of a dystopian near-future America controlled by a totalitarian, patriarchal, white supremacist, theocratic government).

¹² Melissa Block, *Pathmarking the Way: Ruth Bader Ginsburg’s Lifelong Fight for Gender Equality*, NPR: ALL THINGS CONSIDERED (Sept. 24, 2020), <https://www.npr.org/2020/09/24/916377135/pathmarking-the-way-ruth-bader-ginsburgs-lifelong-fight-for-gender-equality> [[HTTPS://PERMA.CC/T6LY-J9YK](https://perma.cc/T6LY-J9YK)].

¹³ U.S. CONST. amend. XIV, § 1.

¹⁴ *Craig v. Boren*, 429 U.S. 190, 218 (1976) (Rehnquist, J., dissenting) (describing the majority’s approach as “elevated or ‘intermediate’ level scrutiny”).

justify the distinction with strong, substantially related reasons.¹⁵ This is the true part of the conventional story.¹⁶

Enter the new Trump Court and its “judicial philosophy.” Whatever 1970s precedents say about women and the Fourteenth Amendment, they are in danger due to the Supreme Court’s new approach to constitutional interpretation. Six members of the Trump Court are originalists¹⁷ and originalists say that the constitutional text must mean today what it meant when the Constitution was adopted in 1787, or when it was amended in 1868.¹⁸ Women did not have a public voice at the time of the Founding, and were not considered citizens in 1868 (when the Fourteenth Amendment, which provides for “equal protection of the law,” was adopted).¹⁹ That Amendment was created to end slavery; at the time, it was considered only to provide for Black men, not women, and this was horrifyingly clear because white women resorted to racism to plead their case for female suffrage.²⁰ If women were full citizens in 1868, there would have been no reason for women to picket in front of the White House and go on hunger strikes nearly fifty years later, to win the right to vote in 1920, which gives “sex” its sole mention in the Constitution.²¹

¹⁵ *Id.* at 197.

¹⁶ *See, e.g.*, *Reed v. Reed*, 404 U.S. 71 (1971).

¹⁷ Ian Millhiser, *Originalism, Amy Coney Barrett’s Approach to the Constitution, Explained*, VOX (Oct. 12, 2020), <https://www.vox.com/21497317/originalism-amy-coney-barrett-constitution-supreme-court> [<https://perma.cc/C5UZ-LN95>]; Anthony P. Picadio, *In Scalia’s Wake: The Future of the Second Amendment Under an Originalist Supreme Court Majority*, 92 PA. BAR ASS’N Q 145, 145 (2021); John O. McGinnis, *Which Justices Are Originalists?*, L. & LIBERTY (Nov. 9, 2018), <https://lawliberty.org/which-justices-are-originalists/> [<https://perma.cc/JV7L-NB3Z>].

¹⁸ Steven G. Calabresi, *On Originalism in Constitutional Interpretation*, CONST. CTR., <https://constitutioncenter.org/interactive-constitution/white-papers/on-originalism-in-constitutional-interpretation> [<https://perma.cc/MB9Q-ZHYK>].

¹⁹ *See* Gretchen Ritter, *Gender and Citizenship After the Nineteenth Amendment*, 32 POLITY 345 (2000).

²⁰ *See Voting Rights and the 14th Amendment*, TEACHINGHISTORY.ORG (2018), <https://teachinghistory.org/history-content/ask-a-historian/23652> [<https://perma.cc/X46A-AC3H>].

²¹ *Historical Overview of the National Woman’s Party*, LIBR. OF CONG., <https://www.loc.gov/collections/women-of-protest/articles-and-essays/historical-overview-of-the-national-womans-party/> [<https://perma.cc/2JKK-5DKD>]; U.S. CONST. amend. XIX.

It gets even worse: we have been assuming that our Handmaid's Tale law is a state, not a federal, law. What if the *federal government* passed a law saying that there could be no *federal* employment for women outside the home? Now, the Fourteenth Amendment would not apply. That Amendment only applies to state laws, not to federal laws.²² The only other possible protection left would be the Constitution's Fifth Amendment, which provides for due process of law.²³ Judicial precedent says that "due process" includes an equality component.²⁴ But, according to many originalists, the Fifth Amendment does not say "equal protection," and therefore it does not cover federal laws, meaning the federal government has no constitutional obligation to provide equal protection.²⁵ (Strange, but true, and argued by Justice Thomas last month in his concurrence to an otherwise benign case.²⁶) So, under the current Court's methodological views, the federal government could theoretically enact a perfectly constitutional law barring women, but not men, from work.

This is obviously an extreme hypothetical: I doubt that a "women stay at home" law will be enacted and I confess that there are some theoretical "answers" originalists give²⁷ about why women should now be included within the Fourteenth Amendment's

²² U.S. CONST. amend. XIV, § 1.

²³ U.S. CONST. amend. V.

²⁴ *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1974) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.") (citing *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973)).

²⁵ William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2365 (2002) (asserting *Bolling's* "incompatibility with originalism"); Jeffrey Rosen, *Conservatives v. Originalism*, 19 HARV. J.L. & PUB. POL'Y 465, 471 (1996) (describing *Bolling* as "the Achilles heel of originalism"). Conservative academics have tried various means to justify *Bolling*, but as can be seen, *infra* note 26, this has not necessarily satisfied the originalists on the Supreme Court.

²⁶ See, e.g., *United States v. Vaello Madero*, No. 20-303, 2022 WL 1177499 (U.S. Apr. 21, 2022) (Thomas, J., concurring) (discussing *Bolling* and arguing that the Fifth Amendment does not include an equal protection component).

²⁷ Some originalists do not look to original "intentions," or applications but to the meaning of the words at the relevant time. So they would look to the meaning of "equal" and "protection." Others say that if the "facts" change, that can be used to apply to the constitution in new ways, such as applying it to the internet.

protections. But my point is broader: *Women have gotten used to the assumption that they are protected from all sorts of discrimination in work from harassment and unequal treatment, and they think it comes from the Constitution.* But it does not—the vast majority of protections *come from Congress.* Congress in 1964 opened the world of work to women by passing the 1964 Civil Rights Act and there is nothing in theory that does not prevent the Congress from repealing that law.²⁸ Women’s protections are held at the whim of politics, they are not constitutionally entrenched. And their entrenchment is now subject to arguments by some Justices that such rights are inconsistent with our nation’s constitutional history. As Justice Scalia once explained: “Certainly the Constitution does not require discrimination based on sex. The only issue is whether it prohibits it. It does not.”²⁹ Call this the “Dred Scott” argument for women, as this was the kind of reasoning that led the Court to find that Black persons could not be citizens.)³⁰ We may want to wish it away, but in 1868, the date on which the current Court assesses rights under the Fourteenth Amendment, no one thought women had political rights or the right to vote, much less a right to a job, which would have seemed horrifying at the time.

B. Pregnancy

To see why this is not complete fantasy, consider the problem of a woman fired from her job because of her pregnancy in the year 2022. Surely, this must have gone away with the dark ages. But the truth is that a woman cannot sue her employer under the Constitution if she is fired because of pregnancy. First, private employers are generally not covered by the Constitution’s guarantees. If you are going to sue Apple or Applebees you have to look to Congress and the laws it has enacted to protect against pregnancy discrimination. So, now let us assume that you want to sue a *state employer* because that state employer—a public school—fired you because you were pregnant. *That is covered* by the Fourteenth Amendment, in theory: a state employer that fires a man because of his race is covered by the Constitution because states must provide “equal protection” under the Fourteenth Amendment. But what if the state employer fires a woman because she is pregnant? No luck there. In a case called *Geduldig v. Aiello*, decided in 1978, the Court held that

²⁸ Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e (1964).

²⁹ Max Fisher, *Scalia Says Constitution Doesn’t Protect Women from Gender Discrimination*, ATLANTIC (Jan. 4, 2021), <https://www.theatlantic.com/politics/archive/2011/01/scalia-says-constitution-doesn-t-protect-women-from-gender-discrimination/342789/> [https://perma.cc/ZJ2W-KL3H].

³⁰ *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856).

pregnancy was not a sex-based distinction protected under the Fourteenth Amendment.³¹ According to the Court, the law was not about women; instead, it was about “pregnant” and “nonpregnant” persons.³²

You may ask how this makes sense. How can you separate the pregnancy from sex-based assumptions, when women are the vast majority of pregnant persons? Generations of law students have learned to mock the decision’s reasoning. But *Geduldig* remains good constitutional law. Just this month, in the leaked draft of Justice Alito’s *Dobbs* opinion, it was cited for the proposition that medical procedures linked only to one sex (in that case abortion) did not require “heightened scrutiny” under the Equal Protection Clause.³³ So this is not a fantasy, it is a reality. *Geduldig* says that pregnancy discrimination is not covered by the Constitution, and the Court—or at least some of the Justices—are still willing to agree in 2022.

Any federal protection women have from discrimination based on pregnancy comes from Congress, not from the Constitution. Congress reacted to the *Geduldig* decision by passing legislation against pregnancy discrimination.³⁴ But if the political winds change, Congress could take that away. And, what is worse, the Court can view these statutes narrowly, which it has. In the case of pregnancy, for example, the Court has deployed sovereign immunity to prevent the recovery of damages against state employers.³⁵ Although it is assigned a different doctrinal name (sovereign immunity), the result is consistent with the pattern: in theory, the Fourteenth Amendment is supposed to grant equal

³¹ 417 U.S. 484, 497 n.20 (1974) (“The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.”)

³² *Id.*

³³ See *Dobbs* draft opinion, *supra* note 3, at 10 (“The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a ‘mere pretext[] designed to effect an invidious discrimination against members of one sex or the other.’”) (citing *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974)).

³⁴ Pregnancy Discrimination Act of 1978 (amending § 7, 42 U.S.C. § 2000e (1964)).

³⁵ *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, 43 (2012) (barring suit under the Family and Medical Leave Act against state for money damages, stating that this would apply to cases where women sought leave for pregnancy-related illnesses).

protection, but the litigants in these cases do not get equal protection, even when they try to take family leave due to pregnancy-related illnesses.³⁶

Savvy constitutionalists may claim that I am forgetting great victories, like Justice Ginsburg's opinion in *United States v. Virginia*,³⁷ which permitted women to enroll in the Virginia Military Institute. The *Virginia* decision is renowned for holding that laws barring women from entry into state educational institutions must be scrutinized carefully under the Fourteenth Amendment by the courts and states must use non-gender-based reasons to justify them.³⁸ But that decision simply emphasizes my point. *The new Trump Court's methodology puts that decision in doubt. If the VMI case were to come before the Court today, it would most likely rule the other way.* Justice Scalia dissented and there are six Justices who now claim allegiance to Justice Scalia's methodology.³⁹ Nor does the decision in *Nevada Department of Human Resources v. Hibbs*,⁴⁰ another feminist victory, tell a different story. That case affirmed Congress's power to enact the Family and Medical Leave Act.⁴¹ There is no assurance that the current Court would decide *Hibbs* the same way (Justices Scalia, Kennedy and Thomas dissented in that case).⁴² And, if did revisit the case and come to the opposite conclusion, poof goes the Family and Medical Leave Act. Lest this seem unlikely because of judicial deference to precedent, (even Justice Scalia said he was "an originalist and a textualist, not a nut"),⁴³ consider that the Alito *Dobbs* opinion

³⁶ *Id.* at 39.

³⁷ 518 U.S. 515, 519–58 (1996).

³⁸ *Id.* at 555–56.

³⁹ See Victoria Nourse, *United Philosophy—Divided Court: Interpretive Conflict on the New Supreme Court* 3, n. 1 (presented at the Harvard Legal Theory Workshop, March 2022) (showing that all current Republican-appointed Justices claim to be textualists and originalists, often invoking Justice Scalia as the principal author of this theory) (draft on file with author).

⁴⁰ 538 U.S. 721 (2003).

⁴¹ *Id.* at 737–40.

⁴² *Id.* at 744–60.

⁴³ Nina Totenberg, *Justice Scalia, the Great Dissenter, Opens Up*, NPR (Apr. 28, 2008), <https://www.npr.org/2008/04/28/89986017/justice-scalia-the-great-dissenter-opens-up> [<https://perma.cc/FP6F-HM3A>] (discussing his views on overturning precedent).

as originally drafted would reverse longstanding precedent—forty years of *Roe v. Wade*.⁴⁴ Why should one believe that any other Supreme Court precedent protecting women on the basis of sex (or sexual orientation for that matter) is not subject to reversal? One can only hope that the Supreme Court might be ashamed to admit that its judicial “methodology” leaves out half the American population.

C. Violence and Harassment

Now consider violence, another area where women have continued to find themselves under-protected, as the #MeToo movement attests.⁴⁵ There is no right to be free from violence in the Constitution, either for men or women. If one is to be protected from sex-based violence, it must be by state or federal law. And, here again, we see the pattern. Women’s rights are given by the grace of politics, not hard-wired into the Constitution. Everyone knows about Title VII, but few know that it covers so little, leaving many young women and women of color unprotected (it only covers businesses with more than fifteen employees and much female employment is in small business—think gig workers and day care).⁴⁶ Worse, for every *Virginia* or *Hibbs* decision hailed as feminist victories, there has been a *United States v. Morrison*⁴⁷ or *Castle Rock v. Gonzales* decision,⁴⁸ posing defeat.

Lest you think that a new federal law can fix the abortion question or provide other rights, you must remember that the Court can not only hold that women have no rights under the Constitution, but it can also hold that Congress has no power to provide needed protections. In effect, it can say on the one hand, only legislatures can act, and then it can hold that the legislature cannot act. Ah, the strange logic of judicial supremacy. Up until now, I have tried to explain that women’s rights are fragile and connected to politics. But

⁴⁴ Alito Draft Opinion, *supra* note 3, at 5 (“We hold that *Roe* and *Casey* must be overruled.”).

⁴⁵ Tarana Burke, *History & Inception*, ME TOO. MOVEMENT, <https://metoomvmt.org/get-to-know-us/history-inception/> [<https://perma.cc/EB5N-3DPD>].

⁴⁶ Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e (1964).

⁴⁷ 529 U.S. 598 (2000) (holding that Congress had no power to enact a civil rights remedy to allow survivors to sue their attackers under either the Commerce Clause or the Equal Protection Clause of the Fourteenth Amendment).

⁴⁸ 545 U.S. 748 (2005) (holding that a town and police department could not be sued under the Civil Rights Act of 1871 for failing to enforce a restraining order).

it is more constitutionally complex. Under contemporary views of judicial supremacy, the Supreme Court can in fact overrule politics using the power of “judicial review.”⁴⁹ The Supreme Court may say Congress or the states do not have the power to protect women. And that is precisely what the Court has said about Congress’s limited power in more gender cases than not.

Consider *United States v. Morrison*, decided in 2000.⁵⁰ Congress, thanks in large part to then-Senator Joe Biden, had passed the first Violence Against Women Act.⁵¹ The Act did much, but its heart was a civil rights provision.⁵² That provision gave women the right to sue Harvey Weinstens and Jeffrey Epsteins and any other man that committed sex-based violence or harassment. It was revolutionary at the time—Biden was lambasted as being bamboozled by “feminazis.” The federal judiciary openly lobbied against it, with Chief Justice Rehnquist warning that it would tar the federal courts with trivial cases.⁵³ Almost every lower court found the act constitutional. But the Supreme Court had changed the constitutional law after the Act was passed.⁵⁴ And, so, a man who lobbied against the Act

⁴⁹ *Marbury v. Madison*, 5 U.S. 137 (1803) (holding that the Court has the power to strike down statutes enacted by Congress if they are inconsistent with the Constitution).

⁵⁰ 529 U.S. 598 (2000).

⁵¹ Violence Against Women Act of 1994 (VAWA), Pub.L. No. 103–322, tit. IV, 108 Stat.1902 (codified as amended in scattered sections of 8, 16, 28, and 42 U.S.C.); *S. 11 - Violence Against Women Act of 1993: Cosponsors*, CONGRESS.GOV, <https://www.congress.gov/bill/103rd-congress/senate-bill/11/cosponsors> [<https://perma.cc/RS28-GCTH>] (indicating that then-Senator Joseph R. Biden sponsored the bill).

⁵² 42 U.S.C. §13981.

⁵³ *History of VAWA*, LEGAL MOMENTUM, <https://www.legalmomentum.org/history-vawa> [<https://perma.cc/XUE2-WXMB>].

⁵⁴ See *United States v. Lopez* 514 U.S. 549 (1995) (holding for the first time in sixty years that there were limits on Congress’s power under the Commerce Clause to pass laws regulating non-economic activity). *Lopez* was decided in 1995; the Violence Against Women Act of 1994 was passed the prior year. The 2000 *Morrison* decision relied upon *Lopez* for its Commerce Clause ruling. See *Morrison*, 529 U.S. 598, 617 (2000) (relying on *Lopez*’s non-economic activity test to conclude Congress had no power under the Commerce Clause of the Constitution to enact the Violence Against Women Act’s civil rights remedy). See Sally Goldfarb, *The Violence against Women Act and the Persistence of Privacy*, 61 OHIO ST. L. J. 1 (2000) (describing the litigation on the constitutionality of the Civil Rights Act leading up to *Morrison*). On Justice Rehnquist’s role, see Judith

wrote the opinion striking it down.⁵⁵ In 2000, Chief Justice Rehnquist held that Congress had no power to enact the law; there was no Fourteenth Amendment protection against violence.⁵⁶

The moral of the story is that the Supreme Court has the last word: even if one is satisfied that political actors may protect women's rights, the Court may say that the government has no constitutional power to protect those rights. Lest you think that the problem is Congress, consider that the Court can strike protective *state laws* as well, or render them ineffective. Jessica Lenahan's case is fairly well known; ultimately an international court would find that her rights were violated by the state of Colorado, when police ignored her pleas and failed to enforce a protective order.⁵⁷ Her case reached the United States Supreme Court in *Town of Castle Rock v. Gonzales*.⁵⁸ And, following the pattern, the Supreme Court rejected her claims of right.⁵⁹ She argued that state law required officers to arrest her husband under a protective order which said that the state "must" arrest.⁶⁰ The police ignored her and her children were killed.⁶¹ Justice Scalia wrote that even though the order said that the state "shall" arrest, the order did not mean that; it was not "mandatory."⁶² And because it did not mean that, Lenahan had no constitutional right to be vindicated.⁶³

Resnik, *The Programmatic Judiciary: Lobbying, Judging and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269 (2000).

⁵⁵ 529 U.S. 598, 602–27 (2000).

⁵⁶ *Id.* at 627.

⁵⁷ *Lenahan (Gonzales) v. United States of America*, Case 12.626, Inter-Am. Comm'n. H.R., Report No. 80/11 (2011).

⁵⁸ 545 U.S. 748 (2005).

⁵⁹ *Id.* at 768.

⁶⁰ *Id.* at 756,

⁶¹ *Id.* at 753–54.

⁶² *Id.* at 761.

⁶³ *Id.* at 768–69.

CONCLUSION

This is a sad story, but it is one that must be told. Justice Alito's draft of the *Dobbs* opinion is not unusual, it is part of a pattern. Whatever rights women gained in the 1970s, those rights are now under attack, and the attack has a theoretical and methodological foundation that is far more aggressive than most imagine, and far less well known. The only way to solve this problem is for women to be recognized in the text of the Constitution. The Equal Rights Amendment is long overdue.