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## The Equal Rights Amendment in the Age of #MeToo

Deborah Machalow

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**THE EQUAL RIGHTS AMENDMENT IN THE AGE OF #METOO**

DEBORAH MACHALOW\*

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INTRODUCTION

Originally proposed in the 1920s, the Equal Rights Amendment (ERA) was approved by Congress and signed by President Nixon in 1972, before being referred to the States for ratification. At that point, a coalition of anti-feminists and other conservatives took aim and ultimately halted the ratification process. Over forty years later, Illinois became the thirty-seventh State to ratify in 2018, while other States considered ratifying in 2019.<sup>1</sup> Since the failed ratification process, society has changed drastically, most recently and visibly with the #MeToo Movement, reinvigorating the debate and demonstrating the nation’s need for the amendment. This Article will begin by providing an overview of the ERA’s history and the failed attempt to ratify. Then, it will address societal changes since the 1970s showing that many of the concerns raised by the STOP ERA movement are no longer valid, with a special focus on the #MeToo Movement. Finally, this Article

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<sup>1</sup> See discussion *infra* Part I.

will argue that a constitutional amendment is necessary, but that in light of the constitutional questions surrounding belated ratification, a modified version of the ERA—which explicitly names *women*—should be approved by Congress and resubmitted to the States.

## I. HISTORY OF THE ERA

### A. EARLY HISTORY

Originally proposed by suffragette Alice Paul in 1923 as the “Lucretia Mott Amendment,” the ERA provides that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.”<sup>2</sup> Contrary to popular belief, the ERA has not yet made its way into the United States Constitution.<sup>3</sup> Originally, opposition came from traditionalists and those in favor of legal protections for women.<sup>4</sup> Despite that, in the first half of the twentieth century, male politicians would periodically attempt to use support for the ERA to appeal to female voters.<sup>5</sup> Accordingly, the ERA was first proposed in Congress in December 1923, after which it “was re-introduced into every session of Congress between 1923 and 1972.”<sup>6</sup> Despite regular introductions, it received “little support” and was either tabled or promptly returned to committee.<sup>7</sup> Starting in 1940, the Republican Party included support for the ratification of the ERA in its party

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<sup>2</sup> EQUAL RIGHTS AMEND., <http://www.equalrightsamendment.org/>; Emily Stewart, *The Equal Rights Amendment’s Surprise Comeback, Explained*, VOX (May 31, 2018), <https://www.vox.com/policy-and-politics/2018/5/31/17414630/equal-rights-amendment-metoo-illinois>; Mark Grossman, CONSTITUTIONAL AMENDMENTS VOL. 2, 1099 (2012); *Equal Rights Amendments (1923–1972)*, HANOVER C., <https://history.hanover.edu/courses/excerpts/336era.html> (documenting the evolution of the Lucretia Mott Amendment into the ERA as passed by Congress in 1972) [hereinafter “Hanover College”]. See also David E. Kyvig, *Historical Misunderstandings and the Defeat of the Equal Rights Amendment*, 18 PUB. HISTORIAN 45, 49 (Winter 1996).

<sup>3</sup> In a 2016 poll, 80% of Americans *believed* that the Constitution already requires gender-based protection. Olivia Exstrum, *#MeToo Has Revived the Equal Rights Amendment*, MOTHER JONES (Mar. 5, 2018), <https://www.motherjones.com/politics/2018/03/metoo-has-revived-the-equal-rights-amendment/>.

<sup>4</sup> Kyvig, *supra* note 2, at 50.

<sup>5</sup> Dahlia Lithwick, *The ERA Is Back*, SLATE (Apr. 23, 2018), <https://slate.com/news-and-politics/2018/04/the-equal-rights-amendment-could-be-the-perfect-remedy-for-the-metoo-era.html>.

<sup>6</sup> Sarah M. Stephens, *At the End of Our Article III Rope: Why We Still Need the Equal Rights Amendment*, 80 BROOK. L. REV. 397, 404 (2015).

<sup>7</sup> Grossman, *supra* note 2, at 1099.

platform, with the Democrats following suit in 1944.<sup>8</sup> Ratification remained in the Republican platform until 1980, while the Democratic platform kept it in until 2004, only to have it reappear in 2008.<sup>9</sup>

Between 1940 and 1980, the ERA received significantly more attention. In 1946, the amendment got its first-floor vote with approval by the Senate by a vote of 38-35.<sup>10</sup> In 1950, a modified version of the ERA was passed by the Senate by a vote of 63-19. This version included the “Hayden Rider,” which provided that “[t]he provisions of this article shall not be construed to impair any rights, benefits, or exemptions conferred by law upon persons of the female sex.”<sup>11</sup> Similarly, a Hayden-modified version of the ERA also was approved by the Senate in 1953, this time by a vote of 73-11.<sup>12</sup> Over the next sixteen years, various equal rights amendment resolutions were considered by Senate committees in almost every session, but none got to the floor.<sup>13</sup> By 1964, the Hayden Rider had fallen into disfavor.<sup>14</sup> Meanwhile, the House took no action on the ERA between 1948 and 1970, in no small part due to New York Representative Emanuel Celler who blocked its consideration in the House Judiciary Committee.<sup>15</sup>

The ERA began to gain traction in the 1960s due to the women’s movement.<sup>16</sup> Despite failing to approve the ERA, Congress addressed women’s equality in other ways during this period: the Equal Pay Act of 1963 and the Civil Rights Act of 1964.<sup>17</sup> The National Organization

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<sup>8</sup> Lithwick, *supra* note 5.

<sup>9</sup> *Id.*

<sup>10</sup> Grossman, *supra* note 2, at 1099.

<sup>11</sup> *Id.*; Thomas H. Neale, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues*, CONG. RES. SERV. 3–4 (Apr. 8, 2014).

<sup>12</sup> Neale, *supra* note 11, at 4.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 5; Kyvig, *supra* note 2, at 50–51.

<sup>17</sup> Neale, *supra* note 11, at 5.

for Women (NOW) made passing the ERA its top legislative priority.<sup>18</sup> In April 1970, the United Auto Workers Union endorsed the concept of the ERA.<sup>19</sup> The first public opinion survey on the ERA was conducted in September 1970 and found that 56% of participants were in favor.<sup>20</sup> Presidents Eisenhower to Nixon all endorsed the ERA.<sup>21</sup>

In one notable incident in 1970, NOW members barged into a hearing of the Senate Committee on the Judiciary's Subcommittee on Constitutional Amendments, demanding that the ERA be brought forward before both houses of Congress.<sup>22</sup> Indiana Senator Birch Bayh, the subcommittee's chairman, agreed and in May 1970 began hearings on proposed language.<sup>23</sup> In June 1970, Representative Martha Wright Griffiths of Michigan filed a discharge petition to bring a proposal to the House floor.<sup>24</sup>

A similar proposal died on the Senate floor in the 1970 session.<sup>25</sup> On October 12, 1971, the House approved the ERA—in the form of House Joint Resolution 208—by a vote of 354-23.<sup>26</sup> This resolution provided the familiar language “[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex”.<sup>27</sup> While Resolution 208 had been encumbered by amendments in the House Judiciary Committee, those were stripped on the floor.<sup>28</sup> Sent to the Senate, opponents declared their willingness to kill the ERA.<sup>29</sup> However, mobilized supporters of the proposed amendment forced senators to declare their

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<sup>18</sup> Grossman, *supra* note 2, at 1099.

<sup>19</sup> Neale, *supra* note 11, at 5.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 6.

<sup>22</sup> Grossman, *supra* note 2, at 1099.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> H.R.J. Res. 208, 92d Cong. (1971).

<sup>28</sup> Neale, *supra* note 11, at 6–7. Those amendments addressed labor standards, citizenship, and would have exempted women from selective service.

<sup>29</sup> Grossman, *supra* note 2, at 1100.

position and “peel[ed] off one Senator at a time until the requisite number was in their camp.”<sup>30</sup>

During debate on the floor, North Carolina Senator Sam Ervin proposed a series of amendments, all of which were rejected.<sup>31</sup> Finally, on March 21, 1972, the Senate approved the House bill 84-8, with strong bipartisan support.<sup>32</sup>

### B. RATIFICATION FAILURE<sup>33</sup>

Following bipartisan approval in both chambers of Congress, President Nixon signed the ERA in 1972.<sup>34</sup> The States were given seven years to ratify.<sup>35</sup> In the first year alone, twenty-two States ratified the ERA with broad bipartisan support.<sup>36</sup> Hawaii, the first to ratify the ERA, did so a mere two hours after the ERA was approved by the United States Senate.<sup>37</sup> In 1973, eight more States ratified; in 1974, three more; and one more each in 1975 and 1977.<sup>38</sup> While Congress had originally set the ratification deadline as March 21, 1979, in 1978, Congress voted to extend this

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<sup>30</sup> *Id.*

<sup>31</sup> Neale, *supra* note 11, at 7. These amendments would have exempted women from the draft and combat, preserved existing sex-specific laws and other protections for women. *Id.* Senator Sam Ervin—who had led the opposition two years before—argued that the proposal would “repeal the handiwork of God” and contended that “the women who have been pressing for this are like the majority of the members of the Senate and House in their lack of knowledge about what this would do.” Grossman, *supra* note 2, at 1099–1100.

<sup>32</sup> Grossman, *supra* note 2, at 1100.

<sup>33</sup> Article V of the Constitution outlines two methods for amending the Constitution: (1) Congressional proposal or (2) Constitutional convention. U.S. CONST. art. V. Congressional proposals require two-thirds approval of both Houses of Congress, after which proposals must be ratified by three-quarters of the states. *Id.*

<sup>34</sup> Lithwick, *supra* note 5; Stewart, *supra* note 2. Presidential signature is not required to amend the Constitution. Grossman, *supra* note 2, at 1072.

<sup>35</sup> Stewart, *supra* note 2. Proposed constitutional amendments did not always have ratification deadlines; Congress began imposing deadlines in 1917 with the Eighteenth Amendment. Grossman, *supra* note 2, at 1071. Before that, there was no limit on how long ratification could take. *See id.* For example, the “Madison Amendment” was originally proposed by James Madison in 1789, before finally being ratified in 1992, after 190 years of having only six ratifying States. Stewart, *supra* note 2. After the Twenty-Seventh Amendment, the next-longest ratification—lasting three years, nine months, and four days—was the Twenty-Second Amendment (limiting presidents to two terms). Grossman, *supra* note 2, at 1073. On average, a successful constitutional amendment takes one year, eight months and seven days to ratify. *Id.* at 1071.

<sup>36</sup> Stewart, *supra* note 2. The States can ratify “at any time after final congressional action,” even if “the states have not yet officially been notified.” Grossman, *supra* note 2, at 1072. Official notification comes via registered letter to the governors from the United States Archivist. *Id.* How States ratify proposed constitutional amendments depends on state law. *See id.* at 1072 & nn.3–4.

<sup>37</sup> Grossman, *supra* note 2, at 1100.

<sup>38</sup> Neale, *supra* note 11, at 9.

deadline by thirty-eight months—to January 30, 1982—by large margins: 233-189 in the House and 60-36 in the Senate.<sup>39</sup>

Yet, even following the ratification deadline extension, only thirty-five States had ratified the ERA.<sup>40</sup> For nearly forty years, the last State to ratify was Indiana in 1977.<sup>41</sup> Late in the game, ERA supporters targeted North Carolina, Illinois, and Florida, but in those States the ERA had less than 50% support from white men, who comprised most of the state legislators.<sup>42</sup> In Illinois in 1982, women went on hunger strikes and chained themselves to the statehouse door in support of ratification.<sup>43</sup> Even still, Illinois did not ratify the ERA at the time. This defeat was seen as the death knell of the ratification movement because Illinois’s perception as the liberal bastion in the Midwest.<sup>44</sup> Frustratingly, “[a]t one point or another, a switch of two votes would have produced ratification in the legislatures of North Carolina and Florida, and five would have sufficed in Nevada. Only nine votes in three states stood in the way of the achievement of ERA[.]”<sup>45</sup>

### C. ERA OPPOSITION

Following the expiration of the extended ratification deadline, the ERA was reintroduced in Congress in 1982 and approved by the House 278-147, six votes shy of the requisite

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<sup>39</sup> Grossman, *supra* note 2, at 1072 n.5, 1100; Neale, *supra*, note 11, at 1. Supporters argued that because the time limit was included in the preamble—instead of in the amendment’s body—the timeframe could be extended. *Id.*

<sup>40</sup> Exstrum, *supra* note 3. This total includes South Dakota, which purported to rescind its ratification as of the expiration of the original ratification deadline. See Gerard N. Magliocca, *Buried Alive: The Reboot of the Equal Rights Amendment*, 71 RUTGERS U.L. REV. 638 (2018). See note 218, *infra* and accompanying text.

<sup>41</sup> Stewart, *supra* note 2. To put this in perspective, the next-closest proposed-but-not-ratified constitutional amendment is a proposal that would give Congress the “power to limit, regulate, and prohibit the labor of persons under 18 years of age” which was proposed on June 2, 1924—without a ratification deadline—and has been ratified by only twenty-eight States. Grossman, *supra* note 2, at 1074.

<sup>42</sup> Grossman, *supra* note 2, at 1100.

<sup>43</sup> Lithwick, *supra* note 5; Karen M. Magnuson, *Fifteen Equal Rights Amendment Supporters Chained to the Doorway*, UPI (June 7, 1982), <https://www.upi.com/Archives/1982/06/07/Fifteen-Equal-Rights-Amendment-supporters-chained-to-the-doorway/3484392270400/>.

<sup>44</sup> To be fair, before the 1982 struggle, Illinois had repeatedly failed to ratify the ERA in the 1970s; after 1982, ratification proposals were introduced only “sporadically.” Exstrum, *supra* note 3.

<sup>45</sup> Kyvig, *supra* note 2, at 59.

supermajority.<sup>46</sup> Even so, “public approval of the amendment never dropped below 54% during the ratification period.”<sup>47</sup> Yet, the ERA has not been enshrined in the Constitution. So, what changed?<sup>48</sup> Conservative right-wing evangelicals, led most prominently by Phyllis Schlafly, opposed ratification.<sup>49</sup> Schlafly formed the National Committee to STOP ERA.<sup>50</sup> STOP ERA argued that passing the ERA would: (1) deprive women of the financial support of their husbands, (2) lead to women being drafted, (3) result in the legalization of same-sex marriage, (4) expand abortion rights, (5) mandate co-ed bathrooms, and (6) harm industry.<sup>51</sup> Schlafly basically contended that ratification of the ERA would remove legal distinctions between men and women.<sup>52</sup> While these concerns were enough to halt ratification in the 1970s and 1980s, many of these concerns have come to fruition in the years since.<sup>53</sup>

#### D. RECENT DEVELOPMENTS

Since 1982, the ERA Coalition and state-based groups have focused on what they call the “three-state strategy,” which posits that if three more states ratify the ERA, then Congress could recognize the late ratifications and approve the constitutional amendment.<sup>54</sup> From 1982 to present, the ERA has been reintroduced in Congress most years.<sup>55</sup> Since Indiana ratified the ERA in 1977,

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<sup>46</sup> Grossman, *supra* note 2, at 1100.

<sup>47</sup> Neale, *supra* note 11, at 9.

<sup>48</sup> To be fair, however, opposition originally materialized before the ERA was approved by Congress. *See* Neale, *supra* note 11, at 2. For instance, New York Representative Emanuel Celler—who was chairman of the House Committee on the Judiciary—contended during the final debate that “women ‘represented motherhood and creation’ and that this amendment would force women to be sent into battle alongside men” which was “unthinkable.” Grossman, *supra* note 2, at 1099. Celler lost his seat over his opposition to the ERA. *Id.* at 1100.

<sup>49</sup> Lithwick, *supra* note 5; Exstrum, *supra* note 3. Of course, not all religious Christians opposed the ERA. *See generally*, Kelli N. Morrill, *From Housewives to Protesters: The Story of Mormons for the Equal Rights Amendment* (May 2018), <https://digitalcommons.usu.edu/etd/7056>.

<sup>50</sup> Grossman, *supra* note 2, at 1100.

<sup>51</sup> Lithwick, *supra* note 5; Exstrum, *supra* note 3; Stewart, *supra* note 2. Organized labor and women’s organizations previously opposed the ERA on similar grounds. Neale, *supra* note 11, at 3. While these concerns had been put forward by ERA-opponents before Congressional approval, Schlafly adopted them from North Carolina Senator Sam Ervin. Kyvig, *supra* note 2, at 51.

<sup>52</sup> Stewart, *supra* note 2.

<sup>53</sup> *See* Part II, *infra*.

<sup>54</sup> Exstrum, *supra* note 3.

<sup>55</sup> Lithwick, *supra* note 5.

twenty-four States have added equal rights amendments to their state constitutions; the most recent being Oregon in 2014 and Delaware in 2019.<sup>56</sup> Vermont also considered amending its constitution with an ERA last year and Minnesota's House approved a bill to put a state constitutional amendment on the ballot in 2020, but this initiative stalled in the State Senate.<sup>57</sup>

While state constitutional amendments have had significant success in the past forty-two years, they are not a replacement for an amendment to the Constitution.<sup>58</sup> Accordingly, enshrining the ERA in the Constitution has remained a priority for many supporters. Recent events have renewed interest in the ERA and brought belated ratification into the realm of possibility. Following a three-year campaign, Nevada became the thirty-sixth State to ratify the ERA in 2017.<sup>59</sup> Nevada, where women then comprised 40% of the state legislature, ratified the proposed amendment with votes of 13-8 in the Senate and 28-14 in the Assembly; each chamber's majority was comprised of Democrats and one female Republican.<sup>60</sup> In 2018, Illinois became the thirty-seventh State to ratify the ERA.<sup>61</sup> Looking for the thirty-eighth State, ERA activists have thirteen possibilities.<sup>62</sup>

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<sup>56</sup> Marsha Mercer, *#MeToo Fuels a Comeback for the Equal Rights Amendment*, USA TODAY (Mar. 1, 2018), <https://www.usatoday.com/story/news/2018/03/01/metoo-movement-fuels-1970-s-comeback-era/385667002/>; Sarah Mueller, *State ERA Amendment Now Part of Delaware Constitution*, DEL. PUB. MEDIA (Jan. 16, 2019), <https://www.delawarepublic.org/post/state-era-amendment-now-part-delaware-constitution>.

<sup>57</sup> Renee Wunderlich, *Vermont Senate Introduces Equal Rights Amendment to Constitution*, NBC (Feb. 14, 2018), <https://www.mynbc5.com/article/vt-senate-introduces-equal-rights-amendment-to-constitution/18089292>; *Supporters of Equal Rights Amendment Try Again in Minnesota*, U.S. NEWS (Jan. 24, 2019), <https://www.usnews.com/news/best-states/minnesota/articles/2019-01-24/supporters-of-equal-rights-amendment-try-again-in-minnesota> [hereinafter "U.S. NEWS"]; Jessie Van Berkel, *Minnesota House Passes Equal Rights Amendment*, STAR TRIBUNE (Mar. 7, 2019), <http://www.startribune.com/minnesota-house-passes-equal-rights-amendment/506852572/>; HF 13 Status in the House for the 91st Legislature (2019-2020), Office of the Revisor of Statutes, <https://www.revisor.mn.gov/bills/bill.php?b=House&f=HF0013&ssn=0&y=2019>.

<sup>58</sup> Judith Avner, *Some Observations on State Equal Rights Amendments*, 3 YALE L. & POL. REV. 144, 145 (1984) ("Certainly the federal amendment is the *only* means of assuring equality for women and men under law irrespective of geography." (emphasis added)).

<sup>59</sup> Exstrum, *supra* note 3. For an overview of the Nevada resolution, see Magliocca, *supra* note 40, at 640-41.

<sup>60</sup> Mercer, *supra* note 56.

<sup>61</sup> Stewart, *supra* note 2. For an overview of the Illinois ratifying resolution, see Magliocca, *supra* note 40, at 640-42.

<sup>62</sup> Stewart, *supra* note 2. The States that have not ratified are: (1) Alabama, (2) Arizona, (3) Arkansas, (4) Florida, (5) Georgia, (6) Louisiana, (7) Mississippi, (8) Missouri, (9) North Carolina, (10) Oklahoma, (11) South Carolina,

While Virginia’s GOP-controlled legislature rejected the ERA in the spring of 2018,<sup>63</sup> in November 2018, a bipartisan group of Virginia lawmakers traveled across the state on a bus tour to drum up support and enthusiasm for the proposal.<sup>64</sup> In early 2019, the Virginia Senate voted to ratify the ERA, sending the resolution to the House of Delegates.<sup>65</sup> A subcommittee of the House of Delegates, however, voted against it.<sup>66</sup> Nevertheless, approximately 81% of Virginia voters support ratifying the ERA, so Virginia’s ratification battle is far from over, especially given the November 2019 election results, in which Democrats took control of both legislative houses and have stated they intend to ratify.<sup>67</sup>

However, Virginia is not the only State that considered ratifying the ERA.<sup>68</sup> Arizona, for instance, had a real shot at ratifying the ERA in 2019. Democrats hold the most seats in the Arizona House since 1966 and only required two Republicans to support ratification for approval in the

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(12) Utah, and (13) Virginia. Notably, a majority of these States are southern, which might be the key to any future ratification movement. See Kyvig, *supra* note 2, at 54 (explaining that constitutional amendments with support from southern States were easier to ratify).

<sup>63</sup> Stewart, *supra* note 2.

<sup>64</sup> Whitney Evans, *Virginia Could Be the State to Give Women Equal Rights Nationwide*, NPR (Nov. 18, 2018), <https://www.npr.org/2018/11/18/669036449/virginia-could-be-the-state-to-give-women-equal-rights-nationwide>.

<sup>65</sup> Patrick Wilson, *Virginia Senate Passes ERA Resolution by 26-14 Vote*, RICHMOND TIMES-DISPATCH (Jan. 15, 2019), [https://www.richmond.com/news/virginia/government-politics/general-assembly/virginia-senate-passes-era-resolution-by---vote/article\\_28710c16-3bb1-534d-ab3d-d57dd9b1402e.html](https://www.richmond.com/news/virginia/government-politics/general-assembly/virginia-senate-passes-era-resolution-by---vote/article_28710c16-3bb1-534d-ab3d-d57dd9b1402e.html).

<sup>66</sup> Ben Finley, *Panel Votes Down Equal Rights Amendment in Virginia*, U.S. NEWS (Jan. 22, 2019, 1:12 p.m.), <https://www.usnews.com/news/best-states/virginia/articles/2019-01-22/panel-votes-down-equal-rights-amendment-in-virginia>.

<sup>67</sup> *Id.*; Emily Stewart, *Virginia’s Election Results Are a Big Deal for the Equal Rights Movement*, VOX (Nov. 6, 2019, 11:30 a.m. EST), <https://www.vox.com/policy-and-politics/2019/11/6/20951458/equal-rights-amendment-era-virginia-legislature-elections-results-democrats>. Interestingly, “[a] majority of lawmakers in both the House and the Senate—both narrowly controlled by Republicans—signed on as sponsors of ERA bills this year” and last. Laura Vozzella, *Virginia House Panel Nixes ERA Bills, in a Major Blow for Feminist Groups*, WASH. POST (Jan. 22, 2019 5:14 p.m. CST), <https://www.washingtonpost.com/local/virginia-politics/virginia-house-panel-nixes-era-bills-but-the-fight-goes-on/2019/01/22/>.

<sup>68</sup> See e.g., Jordan Ferrell, *Florida State Lawmakers Reintroduce Bill to Ratify Equal Rights Amendment*, FIRST COAST NEWS (Jan. 10, 2018), <https://www.firstcoastnews.com/article/news/local/florida-state-lawmakers-reintroduce-bill-to-ratify-equal-rights-amendment/77-506676912>; Dustin Gardiner, *On Equal Pay Day, Arizona Republicans Block Vote on Equal Rights Amendment*, THE REPUBLIC (Apr. 10, 2018), <https://www.azcentral.com/story/news/politics/arizona/2018/04/10/equal-rights-amendment-vote-fails-arizona-legislature/504763002/>; *Senate Committee Takes Historic Vote to Support Ratification of the Equal Rights Amendment*, LIFT LOUISIANA (May 31, 2017), <https://liftlouisiana.org/updates/senate-committee-takes-historic-vote-support-ratification-equal-rights-amendment>.

House, while the Arizona Senate was split 15-15, requiring only one moderate Republican to support ratification.<sup>69</sup> Despite bipartisan support, Republicans in the State Senate procedurally blocked a vote on the ERA for the third year in a row.<sup>70</sup> In Georgia, Democratic and Republican State Senators proposed ratification.<sup>71</sup> There is a record number of women serving in the Georgia General Assembly: fifteen in the Senate and fifty-seven in the House. Similarly, suburban women were instrumental in the 2018 election.<sup>72</sup> In March 2019, an Arkansas Senate committee considered and then rejected a resolution by Senator Joyce Elliot to ratify the ERA.<sup>73</sup> In April 2019, a Louisiana legislative panel voted to proceed with ERA ratification, before the State Senate rejected the proposal.<sup>74</sup>

As States get closer to ratification, Congress will need to consider how to address belated ratifications. Meanwhile, the House Judiciary Committee held the *first* hearing on the Equal Rights Amendment in thirty-six years in April 2019.<sup>75</sup> Most of those testifying before Congress's Subcommittee on the Constitution, Civil Rights, and Civil Liberties argued for removing the 1982

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<sup>69</sup> Dustin Gardiner, *Will Arizona Be Crucial 38<sup>th</sup> State to Ratify Equal Rights Amendment?*, ARIZ. REP. (Jan. 19, 2019, 6:00 a.m. MT), <https://www.azcentral.com/story/news/politics/arizona/2019/01/19/equal-rights-amendment-why-arizona-could-state-put-over-top/2605903002/>.

<sup>70</sup> Dustin Gardiner, *Arizona Won't Make History: Republicans Block Vote on Equal Rights Amendment*, ARIZ. REP. (MAR 13, 2019 1:47 P.M. MT), <https://www.azcentral.com/story/news/politics/legislature/2019/03/13/equal-rights-amendment-arizona-democrats-try-force-senate-vote/3146269002/>.

<sup>71</sup> Maya T. Prabhu, *Bipartisan Efforts Push for Georgia to Ratify Equal Rights Amendment*, ATL. J.-CONSTITUTION (Feb. 1, 2019), <https://www.ajc.com/news/state--regional-govt--politics/bipartisan-efforts-push-for-georgia-ratify-equal-rights-amendment/UnGVyFsWgDQbf1zwMdjPXP/>.

<sup>72</sup> *Id.*

<sup>73</sup> Lindsey Millar, *Bid to Ratify Equal Right Amendment Fails*, ARK. TIMES (Mar. 7, 2019 7:57 p.m.), <https://arktimes.com/arkansas-blog/2019/03/07/bid-to-ratify-equal-rights-amendment-fails>.

<sup>74</sup> Emily Peck, *Patricia Arquette Pleads for Women's Rights at Historic Congressional Hearing*, HUFF POST (Apr. 30, 2019 4:57 p.m. ET), [https://www.huffpost.com/entry/patricia-arquette-era\\_n\\_5cc89ddae4b0d123954bb9b1?ncid:](https://www.huffpost.com/entry/patricia-arquette-era_n_5cc89ddae4b0d123954bb9b1?ncid:) Sam Karlin, *Why Louisiana's Chances to Become Last State to Ratify Equal Rights Amendment Look Slim*, THE ADVOCATE (May 8, 2019 4:29 p.m.), [https://www.theadvocate.com/baton\\_rouge/news/politics/legislature/article\\_5ca9303a-71d8-11e9-b113-a3548168e383.html](https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_5ca9303a-71d8-11e9-b113-a3548168e383.html).

<sup>75</sup> Aimee Sala, *Equal Rights Amendment Will Get a Hearing Before House Judiciary Committee Next Week*, ABA J. (Apr. 25, 2019), <http://www.abajournal.com/news/article/equal-rights-amendment-will-get-a-hearing-next-week>; Jacqueline Thomsen, *Congress Holds First Equal Rights Amendment Hearing in 36 Years Amid Ratification Push*, THE HILL (Apr. 30, 2019, 4:15 p.m. EDT), <https://thehill.com/homenews/house/441430-lawmakers-hear-testimony-on-equal-rights-amendment-amid-push-for-ratification?amp>.

deadline.<sup>76</sup> California Representative Jackie Speier proposed legislation accomplishing that goal.<sup>77</sup>

## II. SOCIETAL CHANGES

Society has changed so dramatically since the 1970s that many of the concerns raised by ERA opponents are no longer valid. Further, particularly in light of the #MeToo Movement, the ERA is more necessary than ever. Accordingly, this part will begin by examining significant changes in major aspects of society before turning to the #MeToo Movement.

### A. SOCIAL TRENDS

Education & Professional Advancement: In the past forty years, women have greatly increased their representation in institutions of higher learning. By 2015, women were more likely to have bachelor's degrees than men—overall, 30.2% of women and 29.9% of men held bachelor's degrees.<sup>78</sup> A decade before, 2.5% more men had bachelor's degrees.<sup>79</sup> This change is largely attributable to the segment of the population that is twenty-five to thirty-four years old, in which 37.5% of women compared to 29.5% of men have at least a bachelor's degree.<sup>80</sup> In fact, in the first quarter of 2019, women comprised a majority of the college-educated active workforce.<sup>81</sup> In

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<sup>76</sup> Thomsen, *supra* note 75.

<sup>77</sup> *Id.*; see also e.g., H.R.J. Res. 47, 112th Cong. (2011); H.R.J. 38, 116th Cong. (2019).

<sup>78</sup> Nolan Feeney, *Women Are Now More Likely to Have College Degree than Men*, TIME (Oct. 7, 2015), <http://time.com/4064665/women-college-degree/>. To be fair, this result was a long time coming. See Stacey Jones, *Dynamic Social Norms and the Unexpected Transformation of Women's Higher Education, 1965–1975*, 33 SOC. SCI. HIST. 247, 248 (2009) (“By 1982 women earned the majority of bachelor's degrees and by 1986 the majority of master's degrees.”); *id.* at 261 (“Beginning in the 1950s, however, growth in women's enrollment outpaced that in men's. Women's enrollment in higher education increased at an annual rate of 5.0 percent in the 1950s, compared to an annual rate of 2.3 percent for men, and at an annual rate of 9.6 percent in the 1960s, compared to an annual rate of 7.4 percent for men.”); see also Dani Matias, *New Report Says Women Will Soon Be Majority of College-Educated U.S. Workers*, NPR (June 20, 2019 10:09 p.m. ET), <https://www.npr.org/2019/06/20/734408574/new-report-says-college-educated-women-will-soon-make-up-majority-of-u-s-labor-f> (noting that women received 57% of bachelor's degrees from American institutions in the 2016–2017 academic year).

<sup>79</sup> Feeney, *supra* note 78.

<sup>80</sup> *Id.* The opposite is true for senior citizens: 30.6% of men compared to 20.3% of women have at least a bachelor's degree. *Id.*

<sup>81</sup> Matias, *supra* note 78 (reporting first-quarter findings showed 29.3 million men in the work force had a bachelor's degree, compared to 29.5 million women).

1970, as a comparison, “women made up fewer than 10.0 percent of the graduates in six fields: accounting (9.3 percent), agriculture (4.7 percent), business (9.0 percent), engineering (0.8 percent), forestry (1.2 percent), and military sciences (0.3 percent). By 1990 at least 10.0 percent of the graduates in all of these fields were women.”<sup>82</sup>

In the 1970s, the number of women entering law, medical, and business schools increased.<sup>83</sup> In fact, “female graduates from business, dental, law, and medical schools increased twelvefold between 1970 and 1980, while the total number of graduates only doubled. . . . Having gained a foothold in professional schools by 1970, women increased their representation to unprecedented levels during the rest of the decade.”<sup>84</sup> As a snapshot, women’s enrollment in law school peaked in the early 2000s, with woman making up around 49% of total law school students.<sup>85</sup>

Similarly, women are making gains professionally.<sup>86</sup> For example, in 2016, women comprised 36% of all lawyers in the United States.<sup>87</sup> Following a “steady rise of first-time medical licenses issued to female physicians in past decades,” in 2016, 33.5% of licensed physicians in the United States were women.<sup>88</sup> These are just some examples of professional gender lines disappearing.<sup>89</sup> Over the past four decades of women’s professional gains, the wage gap has

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<sup>82</sup> Jones, *supra* note 78, at 277.

<sup>83</sup> *Id.* at 248.

<sup>84</sup> *Id.* at 277–78.

<sup>85</sup> IILP Review 2017: The State of Diversity and Inclusion in the Legal Profession, INST. FOR INCLUSION IN THE LEGAL PROF. 14 (2017).

<sup>86</sup> Siri Hedreen, ‘Gendered’ Jobs Are on the Decline, But Stereotypes Remain, BUS. NEWS DAILY (Aug. 14, 2019, 8:30 a.m. EST), <https://www.businessnewsdaily.com/10085-male-female-dominated-jobs.html> (listing “the male-dominated jobs where women made the most gains, and the percentage of women filling those roles since 2009”).

<sup>87</sup> IILP Review 2017, *supra* n.85, at 13. This outpaces women’s representation in other professions, including: architects (25.7%), clergy (20.6%), civil engineers (12.6%), and software developers (17.9%). *Id.*

<sup>88</sup> Aaron Young, et al., *A Census of Actively Licensed Physicians in the United States*, 103 J. MED. REG. 7, 10, 19 (2017). “The female physician population tends to be younger (46.4 years, SD = 11.6 years) than the male physician population (53.7 years, SD = 13.7 years).” *Id.* at 14. Similarly, “34% of female physicians are 39 years of age or younger, compared to 19% of male physicians.” *Id.* at 15.

<sup>89</sup> Hedreen, *supra* note 86 (noting that “23 percent of all jobs traditionally held by men are now held by female workers” while “men took 30 percent of the new jobs in positions typically held by women over the past eight years”).

narrowed somewhat.<sup>90</sup> Further, since January 2017, the labor-force participation of women between the ages of twenty-five and fifty-four has increased from 74.5% to 76.3%.<sup>91</sup> Women are now better educated and attaining more professionally than they were in the 1970s.

Marriage & Family Life: Even marriage, which many consider to be the bedrock of society, has changed dramatically since the ERA ratification debacle. Over the past twenty-five years alone, the proportion of American adults who were married dropped nine percentage points, so that in 2016, only half of Americans eighteen and older were married.<sup>92</sup> The decrease in the married population is despite the fact that same-sex marriage—one of the ills forewarned by the STOP ERA Movement—is now legal in all fifty states.<sup>93</sup> The married population is shrinking for a variety of reasons, including: (1) the median age for first marriages increasing to 27.4 years for women and 29.5 years for men, (2) plummeting marriage rates among the least educated segment of society, and (3) increasing cohabitation of unmarried couples.<sup>94</sup> Just as the size of the married population has changed, so has that population's makeup: racial intermarriage has steadily increased since 1967, from 3% to 17% in 2015; likewise, religious intermarriage has increased from 19% of those who married before 1960 to 39% of those who married since 2010.<sup>95</sup>

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<sup>90</sup> *The Wage Gap Over Time: In Real Dollars, Women See a Continuing Gap*, NAT'L COMM. ON PAY EQUITY, <https://www.pay-equity.org/info-time.html> (showing that in 2017, women made 80.5% of what men made, compared to the 58.9% women made in 1977); see also Jonnelle Marte, *Women Gained in Income and Jobs in 2018, U.S. Census Data Shows*, REUTERS (Sept. 10, 2019 2:06 p.m.), <https://www.reuters.com/article/us-usa-economy-census-women/women-gained-in-income-and-jobs-in-2018-us-census-data-shows-idUSKCN1VV2IQ> (noting that median earnings for full-time working women were 82% of the median earnings for men and that women's median incomes increased 5.8% in 2018 compared to 2007).

<sup>91</sup> Mark Whitehouse, *Thank Women for the Healthy U.S. Job Market*, BLOOMBERG OP. (Sept. 6, 2019 8:25 a.m. CDT), <https://www.bloomberg.com/opinion/articles/2019-09-06/thank-women-for-the-healthy-u-s-job-market>; see also Christopher Condon, *Women in U.S. Work Force Climbs to Highest Since 2002*, BLOOMBERG (Sept. 6, 2019 9:25 a.m. CDT), <https://www.bloomberg.com/news/articles/2019-09-06/prime-age-women-in-u-s-work-force-climbs-to-highest-since-2002>.

<sup>92</sup> Abigail Geiger & Gretchen Livingston, *8 Facts about Love and Marriage in America*, PEW RES. CTR. (Feb. 13, 2018), <http://www.pewresearch.org/fact-tank/2018/02/13/8-facts-about-love-and-marriage/>.

<sup>93</sup> *Obergefell v. Hodges*, 576 U.S. \_\_\_ (2015). While previously seen as a social ill, between 2007 and 2017, public support for same-sex marriage has shifted: in 2007, only 37% of Americans supported legalizing same-sex marriage; in 2017, 62% favored same-sex marriage. Geiger & Livingston, *supra* note 92.

<sup>94</sup> Geiger & Livingston, *supra* note 92.

<sup>95</sup> *Id.*

Additionally, educational gains for women have meant that “the share of couples in which the wife is the one ‘marrying down’ educationally is higher than those in which the husband has more education.”<sup>96</sup>

In addition to delaying marriage, Americans are also delaying parenthood. The average age of a first-time mother is twenty-six and the average age of a first-time father is thirty-one, up from twenty-one and twenty-seven, respectively, in 1972.<sup>97</sup> Likewise, the size of nuclear families has decreased. In the United States, an average mother at the end of her childbearing years had more than three children in the late 1970s; by 2014, that average number of children had decreased to 2.4.<sup>98</sup> Similarly, 40% of mothers had four or more children in 1976, compared with the 14% of mothers who had four or more children in 2014.<sup>99</sup> On average, as women become more educated, they have fewer children.<sup>100</sup> Despite this, as of 2016, 86% of women were mothers by the end of their childbearing years—including 55% of never-married women.<sup>101</sup> Between 1970 and 2016, the number of births per 1,000 *unmarried* women had increased from twenty-six to forty-two.<sup>102</sup>

Unsurprising in light of the increased educational and professional attainment of women, during the twentieth century’s last three decades, there was a long-term decline in the proportion

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<sup>96</sup> Wendy Wang, *Record Share of Wives Are More Educated than their Husbands*, PEW RES. CTR. (Feb. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/02/12/record-share-of-wives-are-more-educated-than-their-husbands/>.

This data skews younger: 27% of newlywed women in 2012 had married a spouse with less education. Of college-educated newlyweds, 39% of women had married a spouse without a college degree. *Id.*

<sup>97</sup> Quoc Trung Bui & Claire Caine Miller, *The Age that Women Have Babies: How a Gap Divides America*, N.Y. TIMES (Aug. 4, 2018), <https://www.nytimes.com/interactive/2018/08/04/upshot/up-birth-age-gap.html?nl=top-stories&nlid=58455321&ref=cta>. This is not a phenomenon unique to the United States. *Id.* (“In Switzerland, Japan, Spain, Italy and South Korea, the average age of first birth is 31.”).

<sup>98</sup> Gretchen Livingston, *Family Size among Mothers*, PEW RES. CTR. (May 7, 2015), <http://www.pewsocialtrends.org/2015/05/07/family-size-among-mothers/>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* Although somewhat surprisingly, mothers who have a master’s degree or greater education are having more children since 1994. *Id.*; see also Gretchen Livingston, *They’re Waiting Longer, but U.S. Women Today More Likely to Have Children than a Decade Ago*, PEW RES. CTR. (Jan. 18, 2018), <http://www.pewsocialtrends.org/2018/01/18/theyre-waiting-longer-but-u-s-women-today-more-likely-to-have-children-than-a-decade-ago/>.

<sup>101</sup> Livingston, *supra* note 100.

<sup>102</sup> Gretchen Livingston, *The Changing Profile of Unmarried Parents*, PEW RES. CTR. (Apr. 25, 2018), <http://www.pewsocialtrends.org/2018/04/25/the-changing-profile-of-unmarried-parents/>.

of mothers who stayed at home.<sup>103</sup> In 2012, 28% of children were being raised by a stay-at-home mom; that figure was 48% in 1970.<sup>104</sup> This shift is also reflected in popular opinion polls: in 1977, only 49% of Americans agreed that a working mother could “establish just as warm and secure a relationship with her children” as a stay-at-home mother; since 2008, more than 70% have agreed.<sup>105</sup>

The family unit also has changed significantly in terms of composition and the primary breadwinner. As of 2017, 25% of parents living with a child were unmarried, which is more than double the 11% of unmarried parents in 1977.<sup>106</sup> In 1968, there were nine million children living with a single parent; as of 2017, that number had more than doubled to 24 million.<sup>107</sup> Of single parents, only 53% of them are mothers—down from a high of 88% in 1968.<sup>108</sup> Thirty-five percent of unmarried parents live with a partner.<sup>109</sup>

The primary breadwinner has also changed. In 1960, only 11% of households with children under the age of eighteen had mothers providing the sole or primary source of income.<sup>110</sup> By 2013, however, that ballooned to 40%.<sup>111</sup> Of that 40%, 37% are married mothers with higher incomes than their husbands, with the remainder being single mothers.<sup>112</sup> Interestingly, the median family income was approximately \$2,000 more for families in which the wife was the primary

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<sup>103</sup> D’Vera Cohn, et al., *After Decades of Decline, a Rise in Stay-at-Home Mothers*, PEW RES. CTR. (Apr. 8, 2014), <http://www.pewsocialtrends.org/2014/04/08/after-decades-of-decline-a-rise-in-stay-at-home-mothers/>. Of course, as the article’s title notes, there was a recent uptick in women becoming stay-at-home mothers. However, this population includes mothers caring for their families, those unable to find work, those with disabilities, and those enrolled in school. *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Livingston, *supra* note 102.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Breadwinner Moms*, PEW RES. CTR. (May 29, 2013), <https://www.pewsocialtrends.org/2013/05/29/breadwinner-moms/>.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

breadwinner.<sup>113</sup> This accompanies an increasing trend of mothers working outside the home and a 2013 poll finding that 79% of Americans rejected “the idea that women should return to their traditional roles.”<sup>114</sup>

The American family structure has changed significantly in the past forty years.

Divorce: With increasing recognition that unhappiness was a legitimate reason to end a marriage, divorce rates increased starting in the mid-1800s, spiked after World War II, and finally peaked in 1980.<sup>115</sup> Divorces increased with the spread of no-fault divorce; between 1960 and 1980, the divorce rate jumped from 9.2 to 22.6 divorces out of 1000 married women.<sup>116</sup> This means that approximately 50% of couples who married in 1970—compared to less than 20% of couples married in 1950—got divorced.<sup>117</sup> In 1975, for the first time, the number of divorces in the United States exceeded one million.<sup>118</sup> Since then, the American divorce rate has been on a downward trend.<sup>119</sup> In 2018, experts estimated that only 39% of marriages end in divorce.<sup>120</sup>

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* (noting that in 1968, 37% of married mothers were employed, compared to 65% in 2011).

<sup>115</sup> Joe Pinsker, *The Not-So-Great Reason Divorce Rates Are Declining*, THE ATLANTIC (Sept. 25, 2018), <https://www.theatlantic.com/family/archive/2018/09/millennials-divorce-baby-boomers/571282/>. The oft-repeated statistic that “50% of marriages end in divorce” took root in the 1980s. Belinda Luscombe, *The Divorce Rate Is Dropping. That May Not Actually Be Good News*, TIME (Nov. 26, 2018), <http://time.com/5434949/divorce-rate-children-marriage-benefits/>.

<sup>116</sup> W. Bradford Wilcox, *The Evolution of Divorce*, NAT’L AFFAIRS (Fall 2009), <https://www.nationalaffairs.com/publications/detail/the-evolution-of-divorce>. “Rising from 2.2 per 1,000 population in 1962, the divorce rate had doubled by 1973 and reached 4.9 per 1,000 population by 1975.” Alexander A. Plateris, *Divorces and Divorce Rates: United States*, NAT’L CTR. HEALTH STATS. (Mar. 1978), [https://www.cdc.gov/nchs/data/series/sr\\_21/sr21\\_029.pdf](https://www.cdc.gov/nchs/data/series/sr_21/sr21_029.pdf), at 1. *But see id.* at 2 (“[I]t cannot be said that increases in all States were due to the liberalization of laws. For example, during the 1967–73 period the divorce rates in California and Iowa increased less than the national average, 54 and 45 percent, respectively, as compared with 69 percent for the United States, even though these two States introduced no-fault divorces.”).

<sup>117</sup> Wilcox, *supra* note 116.

<sup>118</sup> Plateris, *supra* note 116, at 2. Needless to say, this was a large increase: between 1961 and 1970, 5,137,000 divorces were granted; between 1951 and 1960, 3,838,000; and between 1941 and 1950, 4,141,000. *Id.*

<sup>119</sup> Ana Swanson, *144 Years of Marriage and Divorce in the United States, in One Chart*, WASH. POST (June 23, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/06/23/144-years-of-marriage-and-divorce-in-the-united-states-in-one-chart/?noredirect=on&utm\\_term=.72d5256301dd](https://www.washingtonpost.com/news/wonk/wp/2015/06/23/144-years-of-marriage-and-divorce-in-the-united-states-in-one-chart/?noredirect=on&utm_term=.72d5256301dd).

<sup>120</sup> Luscombe, *supra* note 115. Millennials were 18% less likely to get divorced compared to their 2008 counterparts. *Id.*

The decrease in the divorce rate is partially caused by fewer people getting married and partially by a change in *who* is getting married.<sup>121</sup> Younger couples are staying married, while older couples have higher rates of divorce.<sup>122</sup> For example, between 1990 and 2015, for people between the ages of fifty-five and sixty-four, the divorce rate doubled; for senior citizens (sixty-five or older), the divorce rate tripled.<sup>123</sup> Further, education is positively correlated with marriage: women with a college degree are nearly twice as likely to have long-lasting marriages as compared to women with no more than a high school diploma.<sup>124</sup>

Additionally, ERA opponents warned that ratification would lead to mothers not presumptively getting custody of their children and possibly having to pay child support in the event of a divorce.<sup>125</sup> Even without the ERA, this concern has come to pass. The “best interest of the child” standard has permeated family courts across the country, often resulting in joint custody arrangements, instead of preferential treatment for mothers.<sup>126</sup> The “best interest of the child” standard requires a trial judge to consider and weigh various factors when deciding custody, such as: (1) the desires of the parents and child; (2) the child’s relationship with relatives and others;

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<sup>121</sup> *Id.* (“Marriage is becoming one of the many institutions from which the poor, less-educated and disadvantaged are excluded.”).

<sup>122</sup> Ben Steverman, *Millennials Are Causing the U.S. Divorce Rate to Plummet*, BLOOMBERG (Sept. 25, 2018 3:00 A.M. CDT), <https://www.bloomberg.com/news/articles/2018-09-25/millennials-are-causing-the-u-s-divorce-rate-to-plummet>.

<sup>123</sup> *Id.*

<sup>124</sup> Wendy Wang, *The Link between a College Education and a Lasting Marriage*, PEW RES. CTR. (Dec. 4, 2015), <http://www.pewresearch.org/fact-tank/2015/12/04/education-and-marriage/>.

<sup>125</sup> See Mercer, *supra* note 56. See also Stewart, *supra* note 2 (noting that Schafly argued that because “women are the ones who bear the babies, and there’s nothing we can do about that, our laws and customs then make it the financial obligation of the husband to provide the support” such that support is “his sole obligation”).

<sup>126</sup> Leigh Ann Wheeler, *Will the #MeToo Movement Lead to the Equal Rights Amendment?*, HOUSTON CHRON. (Dec. 1, 2017), <https://www.houstonchronicle.com/local/gray-matters/article/Will-the-MeToo-movement-lead-to-the-Equal-Rights-12398297.php>. See also Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL’Y REV. 267, 267 (1986–87) (noting that the “best interests of the child” standard “presumably places paramount importance on the child’s physical and psychological well-being” but really “focus[es] on parents rather than children”); Angela Marie Caulley, *Equal Isn’t Always Equitable: Reforming the Use of Joint Custody Presumptions in Judicial Child Custody Determinations*, 27 B.U. PUB. INT. L. J. 404, 406, 411–12 (2018) (noting increasing trend of joint custody determinations).

(3) the child’s life at school, in the community, and at home; and (4) the health of all involved.<sup>127</sup> Joint custody—giving both parents physical and legal custody of the child—is often awarded when the parents can cooperate in making decisions about the child.<sup>128</sup> Courts have already “ruled that there could be no preference or presumption based on gender” in awarding custody of children.<sup>129</sup> That said, however, mothers still are awarded physical custody of their children at much greater rates than fathers.<sup>130</sup>

Accordingly, even divorce has changed since the 1970s.

Military: The United States has not had an active military draft since 1973.<sup>131</sup> At that time, women comprised 8% of the officer corps and 2% of the enlisted forces in the military; since then, those percentages have increased to 18% and 16%, respectively.<sup>132</sup> In 2016, the Department of Defense removed rules restricting the roles women could perform in the armed forces.<sup>133</sup> As to requiring women to register for the draft—the social ill foretold by the STOP ERA Movement—majorities of Democrats and Republicans in Congress have supported that very proposal.<sup>134</sup> There is also a Commission on Military, National, and Public Service studying the issue presently.<sup>135</sup> It released its interim report in January 2019, with a final report expected in March 2020.<sup>136</sup> In late

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<sup>127</sup> Jay M. Zitter, *Child Custody: Separating Children by Custody Awards to Different Parents—Post-1975 Cases*, 67 A.L.R.4th 354, § 2[a]a (1989).

<sup>128</sup> Vitauts M. Gulbis, *Propriety of Awarding Joint Custody of Children*, 17 A.L.R.4th 1013 (1982).

<sup>129</sup> Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. FAM. STUD. 337, 368 (2008).

<sup>130</sup> See Caulley, *supra* note 126, at 418.

<sup>131</sup> George M. Reynolds & Amanda Shendruk, *Demographics of the U.S. Military*, COUNCIL ON FOREIGN REL. (Apr. 24, 2018), <https://www.cfr.org/article/demographics-us-military>.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Wheeler, *supra* note 126.

<sup>135</sup> *Id.* If the United States were to require women to register for the draft, it would not be the only westernized country to do so. See Idit Shafran Gittleman, *Female Service in the IDF: The Challenge of an ‘Integrated’ Army*, LAWFARE (Feb. 28, 2018, 7:00 a.m.), <https://www.lawfareblog.com/female-service-idf-challenge-integrated-army> (noting that Israel has “one of the only armies in the Western world in which women are drafted to military service by law”).

<sup>136</sup> *Interim Rpt.*, NAT’L COMM’N ON MILITARY, NAT’L AND PUB. SERV. 1 (Jan. 2019), <https://inspire2serve.gov/NCOS%20Interim%20Report.pdf>.

February 2019, a federal judge concluded that a male-only draft was unconstitutional following the Department of Defense’s removal of the aforementioned rules restricting women’s roles in the armed forces.<sup>137</sup> Thus, even without the ERA, women’s role in the military has changed since the 1970s.

Political Participation: In the 2018 midterm elections, women ran for and won political office at record rates.<sup>138</sup> Women won primaries in 45% of House races, winning sixty-eight more primary races than the 2016 record of 167.<sup>139</sup> In Senate races, major political parties nominated twenty-two women.<sup>140</sup> The general election resulted in thirty-six new women being elected to the House, beating the record set in 1992.<sup>141</sup> The 116<sup>th</sup> Congress is comprised of 23.6% women—102 women serve in the House and twenty-four in the Senate.<sup>142</sup>

This “pink wave” was not limited to national office: sixteen women ran for governor and 3,379 women ran for state legislatures.<sup>143</sup> The election resulted in a record number of women being elected to state legislatures across the country.<sup>144</sup> In 2019, at least 2,112 women served in state legislatures; of these women, at least 1,834 were elected on November 6, 2018.<sup>145</sup> That said, this record translates to women comprising only 28.6% of state legislatures nationwide.<sup>146</sup> Nevada

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<sup>137</sup> See *Nat’l Coal. for Men v. Selective Service Sys.*, 355 F. Supp. 3d 568 (S.D. Tex. 2019).

<sup>138</sup> Grace Panetta, Shayanne Gal & Michelle Mark, *12 Records the 2018 Midterm Elections Smashed*, BUS. INSIDER (Nov. 7, 2018 4:10 P.M.), <https://www.businessinsider.com/2018-midterm-election-records-early-voting-women-lgbt-candidates-2018-11>.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Denise Lu & Keith Collins, ‘*Year of the Woman*’ Indeed: Record Gains in the House, N.Y. TIMES (Nov. 16, 2018), <https://www.nytimes.com/interactive/2018/11/09/us/women-elected-midterm-elections.html>.

<sup>142</sup> *Results: Women Candidates in the 2018 Elections*, CTR. AM. WOMEN & POL., (Nov. 29, 2018), [http://cawp.rutgers.edu/sites/default/files/resources/results\\_release\\_5bletterhead5d\\_1.pdf](http://cawp.rutgers.edu/sites/default/files/resources/results_release_5bletterhead5d_1.pdf) [hereinafter “CAWP Women”]. As a comparison, in 2018, 20% of Congress was female—twenty-three senators and eighty-five representatives. *Id.*

<sup>143</sup> Panetta et al., *supra* note 138.

<sup>144</sup> *Results: Record Number of Women Elected to State Legislatures Nationwide*, CTR. AM. WOMEN & POL (updated Jan. 8, 2019), <http://cawp.rutgers.edu/sites/default/files/resources/press-release-state-legislatures-results-2018.pdf> [hereinafter “CAWP State”].

<sup>145</sup> *Id.* For comparison, the prior record was 1,879 women, set in 2018. *Id.*

<sup>146</sup> *Id.*

has the nation's *first* female-majority legislature.<sup>147</sup> The next-closest state legislature is Colorado, where 45% of seats are held by women; only Washington, Oregon, and Nevada also have more than 40% of their legislative seats held by women.<sup>148</sup> Iowa, Maine, and South Dakota elected their first female governors, who are joining seven other female governors.<sup>149</sup> As of 2019, twenty states still *never* had a female governor.<sup>150</sup> As a comparison, in the 1970s and most of the 1980s, less than 5% of governors and House representatives were women.<sup>151</sup> To be fair, women began making gains in state legislatures starting in the 1970s.<sup>152</sup> Women's political success has improved dramatically since the 1970s.

Technology: This Article would be remiss if it failed to note the unimaginable changes in technology since the 1970s. As a starting point, personal computers became widely available.<sup>153</sup> “Before 1970, computers were big machines requiring thousands of separate transistors. . . . At the beginning of the 1970s there were essentially two types of computers”: (1) “room-sized mainframes, costing hundreds of thousands of dollars” and (2) “smaller, cheaper, mass-produced minicomputers, costing tens of thousands of dollars.”<sup>154</sup> At the time, “most people had no direct contact with either.”<sup>155</sup> That all changed.<sup>156</sup> With the expanded popularity of personal computers,

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<sup>147</sup> Michelle L. Price, *Nevada Becomes the First U.S. State with a Female-Majority Legislature*, TIME (Dec. 19, 2018), <http://time.com/5483688/nevada-first-state-female-majority-legislature/>. Women also comprise majorities of Nevada's federal delegation and state Supreme Court. Deborah J. Vagins, *Analysis: What the 2018 Midterm Results Mean for Women*, AM. ASSOC. UNIV. WOMEN (Nov. 13, 2018), <https://www.aauw.org/2018/11/13/analysis-what-the-2018-midterm-results-mean-for-women/>.

<sup>148</sup> CAWP State, *supra* note 144.

<sup>149</sup> Lu & Collins, *supra* note 141. Vagins, *supra* note 147. This matches the record number of female governors set in 2004 and matched in 2007. CAWP Women, *supra* note 142.

<sup>150</sup> CAWP Women, *supra* note 142.

<sup>151</sup> Danielle Kurtzleben, *Almost 1 in 5 Congress Members Are Women. Here's How Other Jobs Compare*, NPR (June 11, 2016 6:00 A.M.), <https://www.npr.org/2016/06/11/481424890/even-with-a-female-presumptive-nominee-women-are-underrepresented-in-politics>.

<sup>152</sup> *Id.*

<sup>153</sup> See Paul A. Freiberger & Michael R. Swaine, *History of Computing*, ENCYC. BRIT. (2019) <https://www.britannica.com/technology/computer/History-of-computing>.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> See Virginia Montecino, *History of Computing*, EDUC. & TECH RESOURCES (Nov. 2010) <http://mason.gmu.edu/~montecin/computer-hist-web.htm> (identifying 1986 to present as “the age of networked

the internet, “a new public medium for information,” made URLs and email commonplace.<sup>157</sup> Among other things, the internet gave rise to social media.<sup>158</sup> Social networking sites “used software to facilitate online communities, where members with shared interests swapped files, photographs, videos, and music, sent messages and chatted, set up blogs (Web diaries) and discussion groups, and shared opinions.”<sup>159</sup>

Likewise, mobile technology has changed significantly. In the 1970s, car phones—mobile phones located in automobiles—became mainstream and popular.<sup>160</sup> Cell phones replaced car phones in the 1990s.<sup>161</sup> Smart phones then replaced traditional cell phones, becoming ubiquitous today.<sup>162</sup> In fact, a large majority of time spent on social media is accomplished via mobile devices.<sup>163</sup>

Unsurprisingly, technology, society, and the interpersonal relationships underlying both, have changed drastically since the 1970s. Changes in technology made the recent #MeToo Movement possible, and the Movement has itself changed society.

## B. #METOO MOVEMENT

Modern technology can largely be credited with the rise of the #MeToo Movement, which has brought attention to everyday inequalities faced by women.<sup>164</sup> The Movement began in earnest on October 15, 2017, when actress Alyssa Milano encouraged the victims of sexual abuse on

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computing, the Internet, and the WWW,” as well as 1995 as when “large commercial Internet service providers (ISPs) . . . began offering service to large number of customers”).

<sup>157</sup> See Freiberger & Swaine, *supra* note 153.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Dmitry Rashnitsov, *The History of Car Phones*, TECHWALLA, <https://www.techwalla.com/articles/the-history-of-car-phones>.

<sup>161</sup> *Id.* Although, the first cell-phone call was placed in 1973. *History of Mobile Cell Phones: The First Cell Phone to Present Time*, <https://bebusinessed.com/history/history-cell-phones/> [hereinafter “*History of Mobile Cell Phones*”].

<sup>162</sup> See *History of Mobile Cell Phones*, *supra* note 161.

<sup>163</sup> Greg Sterling, *Nearly 80 Percent of Social Media Time Now Spent on Mobile Devices*, MARKETING LAND (Apr. 4, 2016, 10:38 a.m.), <https://marketingland.com/facebook-usage-accounts-1-5-minutes-spent-mobile-171561>.

<sup>164</sup> Stewart, *supra* note 2.

Twitter to share their stories following the publication of misconduct accusations against Harvey Weinstein.<sup>165</sup> Specifically, Milano tweeted “[i]f you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.”<sup>166</sup> By the next day, over 30,000 people had tweeted using #MeToo.<sup>167</sup> Within one week, versions of #MeToo spread through eighty-five countries.<sup>168</sup> Within a year, the hashtag had been used over 19 million times in English-language tweets—an average usage of 55,319 times per day.<sup>169</sup> Exactly two years since #MeToo began going viral, a new iteration—#MeTooVoter—was introduced to mobilize voters before the 2020 election to bring issues of sexual harassment and violence to the forefront of the campaign.<sup>170</sup>

The October 5, 2017 *New York Times* piece exposing Harvey Weinstein as a serial sexual predator was only the beginning: by the end of October, the list of men accused included Kevin Spacey, an Oscar-winning actor; Mark Halperin, a political analyst; Leon Willetier, a literary critic; the head of Amazon Studios; employees at Fidelity; politicians; journalists; and an influential art publisher.<sup>171</sup> The #MeToo Movement has helped survivors of sexual harassment

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<sup>165</sup> Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RES. CTR. (Oct. 11, 2018), <http://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/>; see also Alyssa Milano (@Alyssa\_Milano), TWITTER (Oct. 15, 2017, 1:21 P.M.) [https://twitter.com/alyssa\\_milano/status/919659438700670976?lang=en](https://twitter.com/alyssa_milano/status/919659438700670976?lang=en) [hereinafter “Milano Tweet”].

<sup>166</sup> Milano Tweet, *supra* note 165.

<sup>167</sup> Stephanie Zachark, et al., *Person of the Year 2017: The Silence Breakers*, TIME, <http://time.com/time-person-of-the-year-2017-silence-breakers/>. The spread of the hashtag should not be surprising, considering 64% of women acknowledged victimization by a “current or former husband, cohabiting partner, boyfriend or date,” since turning 18. Tessa Roy, *Why Doesn’t America Have an Equal Rights Amendment?*, MEDIUM (June 6, 2016), <https://medium.com/the-establishment/why-doesnt-america-have-an-equal-rights-amendment-a50c1dc4f754>.

<sup>168</sup> Zachark, *supra* note 167.

<sup>169</sup> Anderson & Toor, *supra* note 165. The phrase “me too” was initially used by Tarana Burke to build solidarity between young victims of assault and harassment over a decade before. Zachark, *supra* note 167. Burke, herself a survivor of sexual violence, started using the phrase in 2006 when she started Just Be Inc. Cat Lafunte, *Who Is the Woman Behind the #MeToo Movement?*, THE LIST, <https://www.thelist.com/110186/woman-behind-metoo-movement/>.

<sup>170</sup> Errin Haines, *MeToo Leader Launches New Hashtag to Mobilize Voters*, ASSOCIATED PRESS (Oct. 15, 2019), <https://apnews.com/88b6ba0ac8fd4ef08a096dce19bdea6c>.

<sup>171</sup> Zachark, *supra* note 167; see also *#MeToo: A Timeline of Events*, CHI. TRIB. (Dec. 6, 2018), <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html> [hereinafter “Timeline”]. See also Rebecca Beitsch, *The Me Too Movement Has Changed Our Culture. Now It’s Changing Our Laws*, HUFF POST (July 31, 2018 2:26 p.m. ET), <https://www.huffingtonpost.com/entry/metoo-has-changed-our-culture-now-its->

and violence name and take down other prominent men, including: Minnesota Senator Al Franken, Anchorman Matt Lauer, Conductor James Levine, Gymnastics Doctor Larry Nassar, Comedian Bill Cosby, and CBS CEO Leslie Moonves.<sup>172</sup> As such, the Movement continues to have ripple effects.<sup>173</sup>

In fact, the #MeToo Movement was so cataclysmic that *Time Magazine* awarded its 2017 Person of the Year title to the “Silence Breakers” and the Movement is credited with changing society.<sup>174</sup> From October to December 2017, calls to the Rape, Abuse & Incest National Network increased 23% compared to a year before. Likewise, between September and October 2017, 1in6, an LA-based nonprofit supporting male sexual abuse victims, saw an increase in web traffic of 110%.<sup>175</sup> In a poll conducted at the end of November 2017, a whopping 85% of respondents said they believed the women coming forward with sexual harassment allegations.<sup>176</sup> On January 1, 2018, a coalition of over 300 women in Hollywood created the organization Times Up. Less than a week later, at the 75<sup>th</sup> Annual Golden Globe Awards, an overwhelming number of stars wore black in solidarity with the Movement.<sup>177</sup> Time’s Up raised \$21 million within a month to work with the National Women’s Law Center to provide legal assistance for people subjected to abuse,

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changing-our\_us\_5b60a511e4b0eb29100e5998 (noting “at least 32 lawmakers who left office in the face of [credible sexual harassment] accusations).

<sup>172</sup> Timeline, *supra* note 171.

<sup>173</sup> See e.g., Sahil Kapur, *Virginia Democrats Face Triple Scandal Combining Race and #MeToo*, BLOOMBERG (Feb. 6, 2019 12:38 p.m. CST), <https://www.bloomberg.com/news/articles/2019-02-06/virginia-democrats-face-triple-scandal-combining-race-and-metoo>; Madeline Roache, *Russia’s Version of #MeToo Has Struggled to Take Off—Until Now*, TIME (updated Aug. 2, 2019 2:28 p.m. ET), <https://time.com/5636107/metoo-russia-womens-rights/> (noting over 200 high-profile individuals have lost their jobs because of the #MeToo Movement and describing the Movement’s global impact); Claire Zillman, *Have We Reached the Point of #MeToo Malaise*, FORTUNE (June 19, 2019) <https://fortune.com/2019/06/19/have-we-reached-the-point-of-metoo-malaise-the-broadsheet/> (reporting that #MeToo resulted in 613 of 1,227 individuals accused losing their jobs).

<sup>174</sup> Zachark, *supra* note 167. See also note 173, *supra*.

<sup>175</sup> Rebecca Seales, *What Has #MeToo Actually Changed?* BBC NEWS (May 12, 2018), <https://www.bbc.com/news/world-44045291>. Although, to be fair, this has not been a universal good: some survivors of abuse found the renewed focus on sexual abuse to trigger their past trauma.

<sup>176</sup> Zachark, *supra* note 167.

<sup>177</sup> Timeline, *supra* note 171.

assault, or harassment at work.<sup>178</sup> State legislatures have also taken action: six States limited how nondisclosure agreements could be used for harassment claims; some States sought to improve rape-kit testing or to increase the statute of limitations for victims to bring civil lawsuits; most examined their internal harassment policies; and Illinois created a legislative women's caucus.<sup>179</sup> In the past two years, six States have either passed or revamped laws requiring workers to receive sexual harassment training.<sup>180</sup> Major employers have also changed their workplace policies, with many removing mandatory arbitration agreements, at least as to workplace misconduct.<sup>181</sup>

While it is undeniable that the #MeToo Movement has brought sexual harassment and sex discrimination to the forefront, it is equally undeniable that the Movement has limitations and has prompted a backlash. The Kavanaugh confirmation process—including the captivating testimony of Dr. Christine Blasey Ford and the unusual testimony of then-Judge Brett Kavanaugh—is a high-profile example of the Movement's limited reach.<sup>182</sup> Despite serious accusations of sexual misconduct, then-Judge Kavanaugh was confirmed to serve on the High Court.<sup>183</sup> Further, the Kavanaugh confirmation battle energized the Republican base, giving them a large majority in the Senate following the 2018 midterm elections.<sup>184</sup>

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<sup>178</sup> Seales, *supra* note 175.

<sup>179</sup> Beitsch, *supra* note 171; Exstrum, *supra* note 3.

<sup>180</sup> Jeff Green, *Sexual Harassment Training Now Required for 20% of U.S. Workers*, BLOOMBERG (Oct. 10, 2019), <https://www.bloomberg.com/news/articles/2019-10-10/sexual-harassment-training-now-required-for-20-of-u-s-workers>.

<sup>181</sup> See Sara Ashley O'Brien, *Google Eliminating Controversial Forced Arbitration Practice*, CNN (Feb. 21, 2019), <https://www.cnn.com/2019/02/21/tech/google-mandatory-arbitration/> (identifying Google, Facebook, Lyft and Uber as some companies that abandoned forced arbitration agreements for sexual assault and harassment allegations).

<sup>182</sup> See e.g., *Updates from the Riveting Testimonies of Christine Blasey Ford and Brett Kavanaugh*, N.Y. TIMES (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/us/politics/kavanaugh-hearings-dr-ford.html>; Clifton Leaf, *Does Brett Kavanaugh Have the Temperament to Be on the Supreme Court*, FORTUNE (Sept. 28, 2018), <https://fortune.com/2018/09/28/brett-kavanaugh-senate-vote/>.

<sup>183</sup> See Kevin Breuninger & Mike Calia, *Brett Kavanaugh Confirmed by Senate in 50-48 Vote, Ascends to Supreme Court*, CNBC (Oct. 6, 2018), <https://www.cnbc.com/2018/10/06/brett-kavanaugh-confirmed-by-senate-in-50-48-vote.html>.

<sup>184</sup> Kevin Breuninger, *Republicans Credit the 'Kavanaugh Effect' for Senate Wins Against Red-State Democrats*, CNBC (Nov. 7 2018), <https://www.cnbc.com/2018/11/07/gop-credits-kavanaugh-effect-for-senate-wins-against-red-state-democrats.html>. Interestingly albeit unsurprisingly, in this age of partisan divide, Republicans are significantly more likely to be willing to excuse or ignore sexual misconduct within their party: while 71% of Republicans (and

Slightly less high profile, in December 2018, *Bloomberg* reported that the #MeToo Movement caused men to avoid women in professional settings because they are “spooked” and report feeling “uneasy . . . about being alone with female colleagues.”<sup>185</sup> Avoiding women at work or work events—or directly excluding them—obviously can have a negative impact on their careers.<sup>186</sup> That appears to be just the tip of the iceberg. A May 2019 study found that 60% of male managers reported being uncomfortable working one-on-one, socializing, and mentoring women at work.<sup>187</sup> Men also reported being “much more likely to hesitate to travel or have dinner with a junior woman for work.”<sup>188</sup> Likewise, an earlier 2019 poll found that “men were 12 times more hesitant to have a one-on-one meeting with a woman who was junior to them, compared to a more junior man.”<sup>189</sup>

This is not surprising, particularly considering that public opinion has shifted since late 2017.<sup>190</sup> Specifically, (1) more Americans think false sexual assault accusations are a bigger problem than unreported or unpunished attacks, (2) a larger share of Americans thought “men who sexually harassed women at work 20 years ago should keep their jobs,” and (3) a larger share of

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74% of Democrats) agree that a Democratic Congressman should resign if accused of sexual harassment, only 54% of Republicans (compared with 82% of Democrats) thought a Republican Congressman should resign under similar circumstances. Zachark, *supra* note 167.

<sup>185</sup> Gillian Tan & Katia Porzecanski, *Wall Street Rule for the #MeToo Era: Avoid Women at All Cost*, BLOOMBERG (Dec. 3, 2018), <https://www.bloomberg.com/news/articles/2018-12-03/a-wall-street-rule-for-the-metoo-era-avoid-women-at-all-cost>.

<sup>186</sup> *See id.*; but see Jeff Green, *Managers Pick Mini-Me Proteges of Same Gender, Race in New Study*, BLOOMBERG (Jan. 8, 2019), <https://www.bloomberg.com/news/articles/2019-01-08/managers-pick-mini-me-proteges-of-same-gender-race-in-new-study> (explaining that “most company mentors, male or female, chose protégés like themselves” so that there was little progress to be undone in the wake of #MeToo).

<sup>187</sup> Emily Peck, *Me Too Backlash Is Getting Worse*, HUFF POST (May 17, 2019 8:30 a.m. ET), [https://www.huffpost.com/entry/me-too-backlash-getting-worse\\_n\\_5cddd96de4b00e035b8ce786?ncid=newsltushpmsgvoices\\_\\_Information\\_\\_052219](https://www.huffpost.com/entry/me-too-backlash-getting-worse_n_5cddd96de4b00e035b8ce786?ncid=newsltushpmsgvoices__Information__052219).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *After a Year of #MeToo, American Opinion Has Shifted Against Victims*, ECONOMIST (Oct. 15, 2018), <https://www.economist.com/graphic-detail/2018/10/15/after-a-year-of-metoo-american-opinion-has-shifted-against-victims>.

Americans opined that “women who complain about sexual harassment cause more problems than they solve.”<sup>191</sup>

### III. TIME FOR RATIFICATION?

To be clear,

[t]he context that fueled the opposition to the Equal Rights Amendment has been replaced by a context defined by women’s participation in the workplace, defiance of gender norms, and the burgeoning #MeToo movement that contemporaneously highlights the strengths of women as well as how far we still have to go to achieve equality.<sup>192</sup>

Accordingly, women have made remarkable gains in the past four decades, but still face tremendous hurdles to achieving full equality. At this point, it is hard not to recognize that “a constitutional amendment [is] necessary and proper,” as well as “the only realistic and responsible way to guarantee equal rights for men and women.”<sup>193</sup>

A constitutional amendment guaranteeing equal rights to men and women, like the ERA, “remains the best option to overcome the inability of existing equal protection jurisprudence to

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<sup>191</sup> *Id.* To be clear, false allegations are rare. *Id.* (noting estimation that 2–10% of assault cases are falsely reported, while 63% of assaults are not reported to authorities); see also Francie Diep, *What the Research Says About (The Very Rare Phenomenon of) False Sexual Assault Allegations*, PAC. STAND. (Sept. 26, 2018), <https://psmag.com/news/what-the-research-says-about-the-very-rare-phenomenon-of-false-sexual-assault-allegations>; Peck, *supra* note 187 (identifying the career risks and negative attention women receive for speaking up, such as lost jobs, industry-wide blacklisting, homelessness); Claire Zillman & Emma Hinchliff, *What Happens to Women after #MeToo Claims*, FORTUNE (Oct. 1, 2019), <https://fortune.com/2019/10/01/after-metoo-claims/> (excerpting first-person accounts following accusing men of sexual assault or harassment).

<sup>192</sup> Bridget L. Murphy, *Note: The Equal Rights Amendment Revised*, 94 NOTRE DAME L. REV. 937, 944–45 (2018).

<sup>193</sup> Birch Bayh, *The Need for the Equal Rights Amendment*, 48 NOTRE DAME L. REV. 80–81 (1972); see also Catherine A. MacKinnon, *Celebrating 60: Toward a Renewed Equal Rights Amendment: Now More than Ever*, 37 HARV. J. L. & GENDER 569 (2014); UNITED STATES COMM’N ON CIVIL RIGHTS, *THE EQUAL RIGHTS AMENDMENT: GUARANTEEING EQUAL RIGHTS FOR WOMEN UNDER THE CONSTITUTION* 5 (1981) (opining that in 1981 the ERA was needed at least as much as in 1972); Avner, *supra* note 58, at 145 (“Certainly the federal amendment is the only means of assuring equality for women and men under law irrespective of geography.”); Stewart, *supra* note 2 (As Justice Ginsburg explains: “legislation can be repealed, it can be altered. So I would like my granddaughters, when they pick up the Constitution, to see that notion—that women and men are persons of equal stature—I’d like them to see that is a basic principle of our society.”); Rep. Gabbard *Urges Passage of Equal Rights Amendment*, BIG ISLAND NOW (Jan. 29, 2019 8:02 a.m. HST), <http://bigislandnow.com/2019/01/29/rep-gabbard-urges-passage-of-equal-rights-amendment/> (“There are too many examples in our everyday lives where women still do not get equal pay for equal work and where we still face discrimination simply for being a woman.”).

achieve rigorous protection against sex discrimination.”<sup>194</sup> Such an amendment would “extend the scope of protection against sex inequality well beyond that which is currently provided for by the Equal Protection Clause.”<sup>195</sup> First, a constitutional amendment would require a more rigorous standard of review for legal distinctions.<sup>196</sup> Second, a constitutional amendment would remove intent as a consideration when faced with possible discrimination, which “is essential to [a]ffect an absolute ban on gender discrimination.”<sup>197</sup> Third, it would shield statutes seeking to protect the rights of women and prohibit differential treatment based on reproductive capacity.<sup>198</sup> Fourth, the

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<sup>194</sup> See Stephens, *supra* note 6, at 400–01. Of course, this is not to say that a federal ERA would reach all instances of sex inequality or discrimination. See Avner, *supra* note 58, at 149–53 (explaining how state ERAs are not limited by the state action requirement of the federal constitution).

<sup>195</sup> Stephens, *supra* note 6, at 400 (“The application of the Equal Protection Clause to sex discrimination claims is limited by various factors, including the Court’s failure to subject claims of sex discrimination to the ‘strict scrutiny’ standard of review; the Court’s formalistic requirement that men and women must be ‘similarly situated’ for any heightened scrutiny standard to apply, and the Court’s unwillingness to recognize discrimination claims based upon a theory of disparate impact.”); see also Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L. Q. 161, 173 (1979) (“Framed as a basic human rights norm, the ERA has two offices. First, it directs federal and state legislatures to undertake conforming legislative revision. . . . Second, it directs the judiciary to a clear source for the constitutional principle, men and women are equal before the law.”).

<sup>196</sup> See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1013–14 (2002) (explaining “it is appropriate for courts to apply a less rigorous standard of review to questions concerning equal citizenship for women . . . [because] the nation never made a collective constitutional commitment to respect women as equal of men . . .”); Murphy, *supra* note 192, at 950 (explaining that “little could prevent the Court from relaxing the heightened standard [applied to sex discrimination] in its next opinion” because heightened scrutiny was adopted in *United States v. Virginia*, 518 U.S. 515 (1996) in “a rather cavalier manner”); Stephens, *supra* note 6 at 412 (“Passage of the ERA would require that courts use a strict or absolute scrutiny standard . . .”); Avner, *supra* note 58, at 148 (explaining that under absolute scrutiny “[t]here are only three permissible departures . . . : when the constitutional right to privacy is implicated, when the sex-based classification is based on a physical characteristic unique to one sex, and when facially neutral classifications have a disparate impact on women” but that those three departures would then be subject strict scrutiny); see also Lisa Baldez et al., *Does the U.S. Constitution Need an Equal Rights Amendment*, 35 J. LEG. STUDS. 243, 246 (2006) (finding that “the presence of a [state] ERA significantly increases the likelihood of a court applying a higher standard of law, which, in turn, significantly increases the likelihood of a decision favoring the equality claim”).

<sup>197</sup> Stephens, *supra* note 6, at 418 (“Under the ERA, the evidence of a purpose or intent to discriminate would not be required to invalidate governmental action that has a disparate impact on gender. Rather, heightened scrutiny would apply to those laws which reinforce or perpetuate patterns similar to those associated with facial or intentional discrimination.”).

<sup>198</sup> Murphy, *supra* note 192, at 952–54 (explaining that weaknesses in legislative solutions to sex discrimination would be addressed by the ERA); Stephens, *supra* note 6, at 419–21 (providing examples of state courts relying on state ERAs to increase access to reproductive healthcare as a matter of equality); see also Jennifer Rand, *Equal Means Equal: Why Women Need The ERA (Now More than Ever)*, HUFF. POST (Aug. 21, 2017), [https://www.huffingtonpost.com/entry/equal-means-equal-why-women-need-the-era-now-more\\_us\\_5992149ee4b0caa1687a62c2](https://www.huffingtonpost.com/entry/equal-means-equal-why-women-need-the-era-now-more_us_5992149ee4b0caa1687a62c2). Further, countries that are gender-equal are happier, better for business, and less corrupt. See Lani Seelinger, *15 Reasons the Equal Rights Amendment Needs to Be Ratified Now More than Ever*,

ERA would address problems like “pay inequity, violence against women, employers’ failures to accommodate pregnancy, and the general lack of public support for child-rearing,” as well as “women’s underrepresentation in positions of political and economic power.”<sup>199</sup> In sum, requiring legal equality for men and women would help combat insidious sex-based stereotypes that impact people’s day-to-day lives<sup>200</sup> and the ERA “would concretely demonstrate the importance of the norm of sex equality in our country,”<sup>201</sup> as well as continue a trend of nations incorporating equality based on sex into their governing documents.<sup>202</sup>

In light of Illinois becoming the thirty-seventh State to ratify the ERA and renewed interest in ratifying the ERA in Arizona, Georgia, and Virginia, the United States is on the brink of a discussion about what to do if a thirty-eighth State chooses to ratify the ERA.<sup>203</sup> If another State ratifies, the ERA would not *automatically* become the Twenty-Eighth Amendment because of the lapsed ratification deadline and the purported ratification rescissions. The congressionally imposed ratification deadline has long since passed,<sup>204</sup> as the deadline was originally in 1979, before Congress voted to extend it by thirty-eight months.<sup>205</sup> Congress’s decision to extend the

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BUSTLE (Mar. 22, 2017), <https://www.bustle.com/p/15-reasons-the-equal-rights-amendment-needs-to-be-ratified-now-more-than-ever-46139>.

<sup>199</sup> Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 *YALE J. L. & FEMINISM* 381, 388 (2017); *see also id.* at 388–91 (summarizing ERA supporters’ arguments).

<sup>200</sup> *See* Stephens, *supra* note 6, at 413–16 (explaining the “real differences theory” permits courts to approve of “differences in treatment, where they correspond to differences between men and women relating to biology” because men and women are not similarly-situated and arguing that doing so relies on gender stereotypes and reproductive capacity, dictating woman’s place in society); *id.* at 415 (“By relying on the real differences theory, the Court denies the reality of discrimination against women on the basis of biology and, particularly, their reproductive abilities and choices.”). *See generally also* Elizabeth Weingarten, *How to Shake Up Gender Norms*, *TIME* (Jan. 20, 2015), <http://time.com/3672297/future-gender-norms/> (acknowledging staying power of stereotypical gender norms and identifying problems associated therewith).

<sup>201</sup> Murphy, *supra* note 192, at 956.

<sup>202</sup> Suk, *supra* note 199, at 400–07 (identifying examples of constitutions with provisions addressing sex equality or nondiscrimination, substantive equality for women, and pregnancy protections); MacKinnon, *supra* note 193, at 579 (noting “184 out of 200 written constitutions in the world” contain some form of gender equality provision).

<sup>203</sup> Congress may preemptively clarify whether the ERA can still be ratified. *See* S.J. Res. 6, 116th Cong. (2019) (“A joint resolution removing the deadline for the ratification of the equal rights amendment”).

<sup>204</sup> *See e.g.*, Exstrum, *supra* note 3.

<sup>205</sup> H.R.J. Res. 638, 95th Cong. (1978).

ratification deadline back in 1978 was not without controversy: ERA opponent Utah Senator Jake Garn wrote to all state legislators questioning the extension's constitutionality and suggesting they rescind prior ERA ratifications.<sup>206</sup> A dozen state legislatures responded by trying to declare the ERA void after the original ratification deadline, others sought to rescind ratification.<sup>207</sup> In May 1979, several States filed a lawsuit seeking to invalidate the extension.<sup>208</sup> Over two and a half years later, Judge Marion Callister of the Idaho District Court ruled that Congress exceeded its authority by extending the deadline and the States had the power to rescind prior ratifications.<sup>209</sup> NOW and the General Services Administration appealed this ruling to the Supreme Court, which stayed the district court's judgment on January 25, 1982.<sup>210</sup> The Supreme Court then dismissed the appeal as moot and vacated the district court decision at the start of the following October term because the ratification deadline had expired on June 30.<sup>211</sup>

If another State ratifies, Congress could vote to change or remove the ratification deadline,<sup>212</sup> which has been proposed by Senator Ben Cardin and Representative Jackie Speier.<sup>213</sup> The ratifying resolutions from both Nevada and Illinois postulate that ratification is timely. The Nevada resolution posits that “the present political, social and economic conditions demonstrate that constitutional equality for women and men continues to be a timely issue in the United

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<sup>206</sup> Kyvig, *supra* note 2, at 58.

<sup>207</sup> *Id.*

<sup>208</sup> Neale, *supra* note 11, at 11.

<sup>209</sup> *State of Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981).

<sup>210</sup> *NOW, Inc. v. Idaho*, 455 U.S. 918 (1982).

<sup>211</sup> *NOW, Inc. v. Idaho*, 459 U.S. 809 (1982).

<sup>212</sup> *The Equal Rights Amendment and Article V: A Framework for Analysis of the Extension and Rescission Issues*, 127 U. PENN. L. REV. 494, 505 (1978) [hereinafter “ERA & Art. V”] (“Congress must extend the time period, if it has imposed one, when conditions of necessity and effectiveness persist, in order to allow further consideration by the states.”).

<sup>213</sup> Stewart, *supra* note 2; *see also* Magliocca, *supra* note 40, at 634 (contending that “Congress can recognize the ERA as part of the Constitution despite the expiration of the ratification deadline in 1982” but that it “should not do so until there is no doubt that 38 states have voted for ratification.”). In Minnesota, a legislative proposal would seek a ratification extension from Congress for the ERA. U.S. NEWS, *supra* note 57.

States.”<sup>214</sup> Likewise, the Illinois resolution provides that “equality for men and women continues to be timely in the United States and worldwide, and a number of other nations have achieved constitutional equality for their women and men.”<sup>215</sup> Congress alone, however, decides if an amendment is still valid or has “lost its vitality through the lapse of time.”<sup>216</sup> However, if Congress were to extend the deadline so long after it had lapsed, that would likely taint the ERA with an air of illegitimacy, prompting litigation.<sup>217</sup>

Complicating matters further, five States—South Dakota, Kentucky, Tennessee, Nebraska, and Idaho—have purported to rescind their prior ratifications of the ERA through either legislative action or by gubernatorial decree, although whether they legally could do so is an open question, and also a question only for Congress.<sup>218</sup> When Congress previously considered extending the ratification deadline, supporters of the ERA argued that only once the requisite thirty-eight States had ratified, would Congress need to decide if the States could rescind their prior approval.<sup>219</sup> Counting these five States towards ratification also challenges the legitimacy of the ERA.<sup>220</sup> Waiting until forty-three States have ratified to act—thirty-eight States plus the five rescinding

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<sup>214</sup> S.J. Res. 2, 79th Gen. Assem., Reg. Sess. (Nev. 2017).

<sup>215</sup> S.J. Res. 4, 100th Gen. Assem., Reg. Sess. (Ill. 2018). *See also* Prabhu, *supra* note 71 (as one of the Georgia proposal’s sponsors explained: “Women come as members of all parties, of all political stripes and all professions. There’s a broad consensus across this country that women’s rights should be enshrined in the highest laws and the (commanding) documents of our democracy.”).

<sup>216</sup> *Coleman v. Miller*, 307 U.S. 433, 451 (1939).

<sup>217</sup> *See* ERA & Art. V, *supra* note 212, at 509 (“The fundamental nature of the amendatory process requires that its end product be perceived as legitimate. . . . The value of legitimacy suggests that extension should be barred. The passage of the extension resolution may well be perceived as an unprincipled act . . . Congress expressly established a rule of procedure for ratification of the ERA . . . . A congressional modification of that rule of procedure (extension of the time limitation) in the midst of its applicability would raise the spectre of the harms that this value seeks to avoid—delegitimation and the perception of manipulation.”).

<sup>218</sup> Lithwick, *supra* note 5; Mercer, *supra* note 56; Neale, *supra* note 11, at 9 & n.47; Kyvig, *supra* note 2, at 57. *See also* ERA & Art. V, *supra* note 212, at 511 (“Prohibiting rescission prevents those state legislatures that considered a proposed amendment relatively early in the ratification process from taking advantage of subsequent discussion. If rescission were permissible, insights produced by this later discussion might well persuade enough early ratifiers to change their positions and thereby defeat an otherwise ratified amendment.”).

<sup>219</sup> Kyvig, *supra* note 2, at 58.

<sup>220</sup> *But see* ERA & Art. V *supra* note 212, at 510 (“The political value of legitimacy has little impact on the rescission issue because there is no clearly articulated a priori rule for handling rescission in either the Constitution or current statutes. There is a popular historical perception, however, that state rescissions are void.”).

States—is also an unsatisfactory outcome because it would preserve the confusion regarding rescission and allow more time to elapse following the ratification deadline, compounding the timing problem.

In order for the ERA to fulfill its potential and overcome the fundamental challenges that have been made to its legitimacy, the ratification process must begin anew. The process should begin now because changes in society, including the #MeToo Movement, have brought woman’s place in society and her lived experience to the forefront of discussion.<sup>221</sup> The ERA is starting to receive more attention from legislatures and celebrities.<sup>222</sup> Additionally, more women are serving in elective office than ever before, meaning they have a more meaningful say in policy and legislative priorities.<sup>223</sup> Further, the ERA is incredibly popular and has bipartisan support.<sup>224</sup>

While now is the right time, instead of relying on the ERA as originally sent to the States, Congress should modernize the language. In August 2013, Representative Carolyn Maloney and 176 co-sponsors proposed a resolution titled “Proposing an amendment to the Constitution of the United States relative to equal rights for men and women.”<sup>225</sup> It provides that: “[w]omen shall

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<sup>221</sup> See Prabhu, *supra* note 71 (“In the era of #MeToo and a re-energized focus on women’s rights, Georgia’s female senators are joining forces in a renewed effort to approve an equal rights amendment to the U.S. Constitution.”); Zachark, *supra* note 167 (explaining that the #MeToo Movement did not come out of nowhere—“it has actually been simmering for years, decades, centuries. Women have had it with bosses and co-workers who not only cross boundaries but don’t even seem to know that boundaries exist. They’ve had it with the fear of retaliation, of being blackballed, of being fired from a job they can’t afford to lose.”); Kyvig, *supra* note 2, at 62 (explaining that “[t]he ERA battle was far from futile for women, however. Many advances in gender awareness, understanding, and practices resulted from the furor.”).

<sup>222</sup> See *supra* notes 59–74 and accompanying text. In 2017, celebrities including actresses America Ferrara and Lena Dunham promoted ratification of the ERA through a social media campaign by using the hashtag “#EqualRightsNow.” Exstrum, *supra* note 3. In early 2019, Alyssa Milano and Patricia Arquette attended a rally on Capitol Hill in support of the ERA. Sarah Mucha, *Celebrities Join Lawmakers to Back Ratifying the Equal Rights Amendment*, CNN (Jan. 29, 2019 4:06 p.m. ET), <https://www-m.cnn.com/2019/01/29/politics/equal-rights-amendment-capitol-hill/index.html>. The ERA also was front and center at the 2019 State of the Union Address. Anna North, *Why Women Are Wearing “ERA Yes” Buttons at the State of the Union*, VOX (Feb. 5, 2019 9:57 p.m. EST), <https://www.vox.com/2019/2/5/18213072/era-yes-state-of-the-union-equal-rights-amendment>.

<sup>223</sup> See notes 138143–152 *supra* and accompanying text.

<sup>224</sup> See ERA Coalition, *Breaking: Americans—by 94%—Overwhelmingly Support the Equal Rights Amendment (ERA)*, PR NEWSWIRE (Jun. 17, 2016), <https://www.prnewswire.com/news-releases/breaking-americansby-94---overwhelmingly-support-the-equal-rights-amendment-era-300286472.html>.

<sup>225</sup> H.J. Res. 56, 113th Cong. (2013).

have equal rights in the United States and every place subject to its jurisdiction. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”<sup>226</sup>

This proposal clearly is broader than the 1972 ERA text: the first sentence is a declaration that *women* have equal rights without a mention of a State actor.<sup>227</sup> This is analogous to the Thirteenth Amendment,<sup>228</sup> on which the Supreme Court has not imposed a state action requirement.<sup>229</sup> This “opens up the possibility of enforcing the right against private actors, and expanding the scope of legislative enforcement power to reach more broadly across private conduct than does legislative enforcement power under Section Five of the Fourteenth Amendment.”<sup>230</sup> Representative Maloney’s proposal also would create the first concurrent federal and state enforcement power.<sup>231</sup> Accordingly, the additional language can be interpreted more strongly than the 1972 version of the ERA approved by Congress.<sup>232</sup> Finally, this proposal would include the *first* explicit reference to women, the symbolism of which should not be overlooked.<sup>233</sup> Women are now more visible than at any other time in our nation’s history; our Constitution should reflect that.<sup>234</sup>

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<sup>226</sup> *Id.*

<sup>227</sup> Suk, *supra* note 199, at 397.

<sup>228</sup> “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend XIII.

<sup>229</sup> Suk, *supra* note 199, at 397.

<sup>230</sup> *Id.* at 397–98.

<sup>231</sup> *Id.* at 398.

<sup>232</sup> *See id.* at 397; MacKinnon, *supra* note 193, at 579 (Maloney’s proposal provides a “positive right to equality” which is what ERA supporters “have meant and needed all along, given that society and law have combined to the present to bias legal and social entitlements against women”).

<sup>233</sup> *See* Rand, *supra* note 198; *see also* MacKinnon, *supra* note 193, at 578 (noting that Maloney’s proposal “addresses a concrete group of people, not an abstract right”). Of course, there is an argument that expressly tying the ERA to women’s rights may have unintended consequences, such as ignoring individuals who are transgender, intersex, or non-binary, however that concern is addressed by the second sentence: “Equality of rights under the law shall not be denied or abridged . . . on account of sex.” H.J. Res. 56, 113th Cong. (2013).

<sup>234</sup> Of course, by starting the ratification process over, there may be calls for other linguistic changes to the ERA. For instance, the National Right to Life Committee, a conservative organization opposed to the ratification of the ERA as drafted, proposes the addition of abortion-neutral language to the ERA. Specifically, the NRLC proposes adding

## CONCLUSION

Ninety-five years ago—seventy-five years after the Seneca Falls Convention—Alice Paul proposed the Lucretia Mott Amendment, dictating that “[m]en and women shall have equal rights throughout the United States and every place subject to its jurisdiction.”<sup>235</sup> Forty-seven years ago, both houses of Congress and twenty-two States ratified the ERA, which provided that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.”<sup>236</sup> From 1978 until 2017, the ERA remained stalled with thirty-five State ratifications and a lapsed ratification deadline. Since then, the state legislatures of Nevada, Illinois, Virginia, Georgia, Louisiana, and Arizona have shown renewed interest in the ERA, with two choosing to ratify despite the lapsed ratification deadline.

Over the past forty-plus years, American society has changed dramatically, with people delaying major life events such as marriage and parenthood, women increasing their educational and professional attainment and political participation, and the ubiquitous dissemination of technology into our daily lives. These changes mean that many arguments that previously stalled ratification, like those made by STOP ERA, are no longer valid. The changes in society and the #MeToo Movement have brought women’s lived experiences to the forefront, making *now* the time for the ERA to finally be constitutionalized. Because of the lapsed Congressionally-imposed—and extended—ratification deadline and the continuing confusion surrounding

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“Nothing in this article shall be construed to grant, secure, or deny any right relating to abortion or the funding thereof.” See Douglas Johnson, *The ERA and Abortion: Not So Simple*, NAT’L. RIGHT TO LIFE (Apr. 4, 2000), <https://www.nrlc.org/site/federal/era/eraoped/>. Any such amendment is unnecessary and improper. First, a large majority of Americans support constitutionalizing the ERA without the abortion-neutral language. See ERA Coalition, *supra* note 224. Second, a majority—58%—of Americans support abortion being legal “in all or most cases,” compared to 37% who thought “it should be illegal in all or most cases.” See Public Opinion on Abortion, PEW RES. CTR. (Oct. 15, 2018), <http://www.pewforum.org/fact-sheet/public-opinion-on-abortion/>. Third, many supporters would consider the addition of the “neutral” language to limit the equality promised by the ERA.

<sup>235</sup> Hanover College, *supra* note 2.

<sup>236</sup> EQUAL RIGHTS AMEND., *supra* note 2.

purported State rescissions of prior ratifications, the only way to ensure the ERA's legitimacy is to start over. This time, the proposed amendment should specifically name women—a constitutional first—reflecting women's prominence in society and providing additional protections and routes to equality.