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AN EQUAL RIGHTS AMENDMENT TO MAKE WOMEN HUMAN

ANN BARTOW*

I can state with some authority that two times fourteen is twenty-eight, flouting the stereotype that women are inept at mathematics and simultaneously framing my argument in favor of an Equal Rights Amendment (ERA). Though the Fourteenth Amendment¹ provides women with partial legal armament (a dull sword, a small shield), equal protection requires something twice as powerful in the form of a Twenty-Eighth Amendment that would expressly vest women with equal rights under the law. The Fourteenth Amendment has completed only half of the job.

Alice Paul, founder of the National Women's Party, first proposed an Equal Rights Amendment in 1923.² It was finally passed by Congress in 1972, but at its June 30, 1982, deadline the ERA had been ratified by only thirty-five states, three short of the thirty-eight required for ratification.³ The entire text of the so far failed Amendment is:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.⁴

The proposed amendment is surprisingly pithy, given how much pitched opposition it has engendered.⁵ Amending the Constitution to make it clear that government actors cannot disadvantage or oppress people based on a characteristic that the Law generally treats as immutable⁶ is

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1. U.S. CONST. amend. XIV.

2. See Roberta W. Francis, *The History Behind the Equal Rights Amendment*, THE EQUAL RIGHTS AMENDMENT, <http://www.equalrightsamendment.org/era.htm> (last visited May 5, 2011).

3. See *id.*

4. S.J. Res. 10, 110th Cong. (2007); H.R.J. Res. 40, 110th Cong. (2007).

5. See Francis, *supra* note 2.

6. I acknowledge that some people view gender as fluid, and I do not mean to suggest that people cannot change their "official" gender. Nor do I endorse social practices that force

objectionable to people who believe that women as a class need and receive special legal protections linked to sex.⁷ Women have sex, both normatively and descriptively, but are women human? Author Dorothy Sayers posed this query in 1938 as the title of a speech, in which she observed:

A man once asked me—it is true that it was at the end of a very good dinner, and the compliment conveyed may have been due to that circumstance—how I managed in my books to write such natural conversation between men when they were by themselves. Was I, by any chance, a member of a large, mixed family with a lot of male friends? I replied that, on the contrary, I was an only child and had practically never seen or spoken to any men of my own age till I was about twenty-five. “Well,” said the man, “I shouldn’t have expected a woman [meaning me] to have been able to make it so convincing.” I replied that I had coped with this difficult problem by making my men talk, as far as possible, like ordinary human beings. This aspect of the matter seemed to surprise the other speaker; he said no more, but took it away to chew it over. One of these days it may quite likely occur to him that women, as well as men, when left to themselves, talk very much like human beings also.⁸

Sayers asserted that, in her experience, “both men and women are fundamentally human, and that there is very little mystery about either sex, except the exasperating mysteriousness of human beings in general.”⁹ Her view that sex should not be considered a consequential division is appealing, but not one that has yet thoroughly permeated the culture of any existing nation. Professor Catharine MacKinnon repeated the “Are women human?” question in the title of a book she published in 2007.¹⁰ Her conclusion was “no.”¹¹ Not because women lack humanity, but because we are deprived of it.¹²

people to choose an “official” gender permanently, or at all.

7. See Phyllis Schlafly, *A Short History of E.R.A.*, PHYLLIS SCHLAFLY REP., (Eagle Forum, St. Louis, Mo.), Sept. 1986, available at <http://www.eagleforum.org/psr/1986/sept86/psrsep86.html>.

8. Dorothy L. Sayers, *Are Women Human?: Address Given to a Women’s Society, 1938*, 8 LOGOS: J. CATHOLIC THOUGHT & CULTURE 165, 177 (2005).

9. *Id.*

10. CATHARINE A. MACKINNON, *ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES* (2007).

11. *Id.* at 41–42. MacKinnon explained:

The Universal Declaration of Human Rights defines what a human being is. In 1948, it told the world what a person, as a person, is entitled to. It has been fifty years. Are women human yet?

If women were human, would we be a cash crop shipped from Thailand in containers into New York’s brothels? Would we be sexual and reproductive slaves? Would we be bred, worked without pay our whole lives, burned when our dowry money wasn’t enough or when men tired of us,

The status of women differs from country to country, but we do not hold equal power in any of them. The attainment of true equality on a global basis as measured by economic, social, and political power is an aspirational goal that I do not expect women to achieve in my lifetime. But that does not mean that we cannot make forward progress, especially in places where women can hold jobs, own property, and vote.

When the Fourteenth Amendment was added to the Constitution in 1868 to provide for the citizenship of freed slaves,¹³ the words of choice were:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹⁴

Categorically subsumed within Mankind, women are etymologically included within the protected classes of “citizens” and “people.”¹⁵ Nevertheless, it took one hundred years for the United States Supreme

starved as widows when our husbands died (if we survived his funeral pyre), sold for sex because we are not valued for anything else? Would we be sold into marriage to priests to atone our family’s sins or improve our family’s earthly prospects? Would we, when allowed to work for pay, be made to work at the most menial jobs and exploited at barely starvation level? Would our genitals be sliced out to “cleanse” us (our body parts are dirt?), to control us, to mark us and define our cultures? Would we be trafficked as things for sexual use and entertainment worldwide in whatever form current technology makes possible? Would we be kept from learning to read and write?

If women were human, would we have so little voice in public deliberations and in government in the countries where we live? Would we be hidden behind veils and imprisoned in houses and stoned and shot for refusing? Would we be beaten nearly to death, and to death, by men with whom we are close? Would we be sexually molested in our families? Would we be raped in genocide to terrorize and eject and destroy our ethnic communities, and raped again in that undeclared war that goes on every day in every country in the world in what is called peacetime? If women were human, would our violation be *enjoyed* by our violators? And, if we were human, when these things happened, would virtually nothing be done about it?

Id. (footnotes omitted).

12. *See id.*

13. *See* Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment* 1 (Georgetown Pub. Law & Legal Theory Research Paper No. 10-06, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1538862.

14. U.S. CONST. amend. XIV, § 1.

15. *Id.*

Court to decide that sex discrimination could violate the Fourteenth Amendment's guarantee of equal protection.¹⁶ Maybe women are human, at least sometimes, in some contexts, for some purposes?

Since it was incorporated into the organizing principles of the nation, the meaning of the language of the first clause of the Fourteenth Amendment has been extensively debated, and the contours of its protections have significantly evolved.¹⁷ A Supreme Court majority announced in 1996 in *United States v. Virginia* that "neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."¹⁸ Justice Antonin Scalia disagreed,¹⁹ asserting that the Constitution takes no position on the equal protection of women.²⁰ More recently, and with enhanced clarity, Justice Scalia asserted in an interview with University of California Hastings College of the Law professor Calvin Massey that the U.S. Constitution does not prohibit discrimination based on sex:

[Massey:] In 1868, when the 39th Congress was debating and ultimately proposing the 14th Amendment, I don't think anybody would have thought that equal protection applied to sex discrimination, or certainly

16. *See Craig v. Boren*, 429 U.S. 190 (1976) (applying intermediate scrutiny to gender-based classifications for the first time).

17. *See id.* at 190.

18. *United States v. Virginia*, 518 U.S. 515, 532 (1996).

19. *Id.* at 567 (Scalia, J., dissenting). Scalia wrote:

The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: They left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society's law-trained elite) into our Basic Law. Today it enshrines the notion that no substantial educational value is to be served by an all-men's military academy—so that the decision by the people of Virginia to maintain such an institution denies equal protection to women who cannot attend that institution but can attend others. Since it is entirely clear that the Constitution of the United States—the old one—takes no sides in this educational debate, I dissent.

Id.

20. *See id.*

not to sexual orientation. So does that mean that we've gone off in error by applying the 14th Amendment to both?

[Justice Scalia:] Yes, yes. Sorry, to tell you that. . . . But, you know, if indeed the current society has come to different views, that's fine. You do not need the Constitution to reflect the wishes of the current society. Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things called laws. You don't need a constitution to keep things up-to-date. All you need is a legislature and a ballot box. You don't like the death penalty anymore, that's fine. You want a right to abortion? There's nothing in the Constitution about that. But that doesn't mean you cannot prohibit it. Persuade your fellow citizens it's a good idea and pass a law. That's what democracy is all about. It's not about nine superannuated judges who have been there too long, imposing these demands on society.²¹

Current interpretations of the Fourteenth Amendment are unlikely to remain static in the future, as alterations are continuously proposed. For example, Senator Lindsey Graham, who represents my home state of South Carolina in the Senate and is a graduate of my employing law school, argues "that the 14th Amendment no longer serves the purpose it was designed to address and that Congress should reexamine granting citizenship to any child born in the United States."²² If something as

21. Interview by Calvin Massey, Law Professor, University of California Hastings College of the Law, with Antonin Scalia, United States Supreme Court Justice (Sept. 2010), in *Legally Speaking: The Originalist*, CAL. LAW., Jan. 2011, available at <http://www.cal.lawyer.com/story.cfm?eid=913358&evid=1>.

22. Andy Barr, *Graham: 14th Amendment Outdated*, POLITICO (Aug. 4, 2010, 10:53 AM), <http://www.politico.com/news/stories/0810/40635.html>. The following conversation lays out Senator Graham's views:

VAN SUSTEREN: All right, you're getting a lot of controversy, at least you're generating in some corners about the fact that you want to amend the 14th Amendment so that just merely being born in the United States doesn't necessarily make you a citizen. Why are you doing this?

GRAHAM: Well, to me, I'm looking at the laws that exist and see if it makes sense today. The 14th Amendment was passed after the Civil War. Citizenship was awarded before the Civil War based on states giving citizenship. Well, after the Civil War, they were afraid that Southern states may not award citizenship to freed slaves, so they put it in the 14th Amendment that if you're naturally-born American, then you're automatically entitled to citizenship as a constitutional requirement.

That made sense to me then. But now, birthright citizenship doesn't make so much sense when you understand the world as it is. You have found and I've provided you information about groups that are marketing to Chinese, and Mideastern and European families a 90-day visa package, where

fundamental as the precept that “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside”²³ is contestable, the possibility that Scalia’s view of women as neither citizens nor people could gain traction must be taken seriously. Women deserve a permanent and unambiguous instantiation of a commitment to our fundamental equality. Passage of an Equal Rights Amendment would remedy the Constitution’s current failure to articulate a prohibition on sex-based discrimination so explicitly that even Justice Scalia would have to notice it is there.

We need certainty about our constitutional humanity. Though women comprise a majority of the population of the United States,²⁴ we do not have social, political, or economic equality with men. A general, overall preclusion of the denial or abridgement of equal rights on account of sex would be more efficient than the current piecemeal legislative approaches to eliminate the obstacles that prevent women from enjoying the same benefits of citizenship that men do.

Consider Title IX.²⁵ Section 1681(a) of Title IX states in pertinent part: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”²⁶ Title IX was a bold, reasonably comprehensive and

you come to America as a tourist. You come to a resort. You have your child at a hospital within the resort. That child is an American citizen. You turn around and leave.

That to me cheapens American citizenship. That’s not the way I would like it to be awarded. And you’ve got the other problem, where thousands of people are coming across the Arizona/Texas border for the express purpose of having a child in an American hospital so that child will become an American citizen, and they broke the law to get there.

So I want to put on the table fixing immigration so we don’t have a third wave in the future. We went from 3 to 12 million in the last 20 years. Twenty years from now, I don’t want to have 20 million. So I think we ought to have a logical discussion. Is this the way to award American citizenship, sell it to somebody who’s rich, reward somebody who breaks the law? I think we need to look at it really closely.

Interview by Greta van Susteren with Lindsey Graham, U.S. Senator, In Wash. D.C. (Aug. 3, 2010), available at <http://www.foxnews.com/on-air/on-the-record/transcript/sen-graham-039i039m-trying-reward-american-citizenship-i039m-not-penalizing-children039>.

23. U.S. CONST. amend. XIV, § 1.

24. See Denise I. Smith & Renee E. Spraggins, *Gender in the United States*, NATIONALATLAS.GOV, http://www.nationalatlas.gov/articles/people/a_gender.html (last visited Apr. 6, 2011).

25. Title IX, Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2006), available at <http://www.dol.gov/oasam/regs/statutes/titleix.htm> (last visited May 5, 2011).

26. *Id.* § 1681(a).

impressively successful effort to improve women's access to educational opportunities that has been in place for nearly forty years.²⁷ However, it has not brought about true equality even in the context of education. Most school sports are fairly strictly segregated by sex from the time the participants are teenagers. Thanks to Title IX, girls have many (though still numerically fewer) of the same opportunities to participate in athletics as do boys,²⁸ so arguably both genders reap the same benefits: exercise, competition, learning the values of teamwork, tenacity, leadership, and the possibility of athletic educational scholarships. But athletic departments often get around Title IX's requirements through deceptive practices that overstate women's participation in college sports.²⁹

And girls are slighted in other ways. Many girls' high school and women's collegiate teams are coached by men,³⁰ but rare indeed are females found coaching boys' or men's teams.³¹ Female athletes coached by men are further socialized to take orders from men and reminded that coaching jobs may not be accessible to them in the future.³² The perception that only men can be leaders or teammates is also inculcated into males whose sports experiences are woman free. Regardless of their coaches' genders, female athletes are certainly aware that their coaches are paid less, that their contests are less publicized, less often televised, attract far fewer spectators, and that they have very limited opportunities.³³ Some sports competitions, such as Olympic ski jumping, simply are not open to women.³⁴

27. See Am. Ass'n of Univ. Women, *Title IX: Equity in School Athletics* 1 (2010), http://www.aauw.org/act/issue_advocacy/actionpages/upload/TitleIX_111-2.pdf.

28. See *id.*

29. See generally Katie Thomas, *College Teams, Relying on Deception, Undermine Gender Equity*, N.Y. TIMES, Apr. 25, 2011, http://www.nytimes.com/2011/04/26/sports/26titleix.html?_r=2&hp=&pagewanted=all (discussing how athletic departments pad rosters with unqualified participants, misleadingly count women as members of multiple athletic teams, and count as women men practicing with women's teams); Katie Thomas, *Gender Games: Answering Questions About Roster Management and Title IX*, THE QUAD: THE NEW YORK TIMES COLLEGE SPORTS BLOG (Apr. 26, 2011, 3:18 PM), <http://thequad.blogs.nytimes.com/2011/04/26/gender-games-answering-questions-about-roster-management-and-title-ix/> (answering questions posed in response to her original article).

30. See Deborah L. Rhode & Christopher J. Walker, *Gender Equity in College Athletics: Women Coaches as a Case Study*, 4 STAN. J. C.R. & C.L. 1, 12 (2008); see also Sean Gregory, *Where Are the Women Coaches?*, TIME (Aug. 16, 2007), available at <http://www.time.com/time/magazine/article/0,9171,1653648,00.html>.

31. See Rhode & Walker, *supra* note 30, at 12.

32. See Gregory, *supra* note 30.

33. *Pay Inequity in Athletics*, WOMEN'S SPORTS FOUNDATION, <http://www.womenssportsfoundation.org/Content/Articles/Issues/Equity-Issues/P/Pay-Inequity-in-Athletics.aspx> (last visited Jan. 18, 2011).

34. Claire Suddath, *Why Can't Women Ski Jump?*, TIME (Feb. 11, 2010),

Title IX is vulnerable to efforts to diminish its power by all three branches of government.³⁵ Congressional representatives can try to reduce its reach. For example, in 1974, the unsuccessful Tower Amendment proposed to exempt revenue-producing sports from determinations of Title IX compliance.³⁶ Senator Tower tried again in 1977. The executive branch can also manipulate the reach of Title IX. President George W. Bush's administration weakened Title IX in a number of ways.³⁷ Judges can restrict

<http://www.time.com/time/nation/article/0,8599,1963447,00.html>; Ann Bartow, *15 plaintiffs lost their lawsuit against the Vancouver Olympic Games Organizing Committee when the British Columbia Supreme Court ruled that the decision to exclude their sport is out of the organizing committee's control*, FEMINIST LAW PROFESSORS BLOG (July 10, 2009), <http://www.feministlawprofessors.com/?p=11922> (noting that ski jumping is a sport in which women can outperform men).

35. *Legislative Update Special Report: Bush Commission Weakens Title IX in Sports*, NATIONAL ORGANIZATION FOR WOMEN (Feb. 2003), <http://www.now.org/issues/legislat/200302.html> [hereinafter *Legislative Update*].

36. See *The Living Law*, TITLE IX, <http://www.titleix.info/History/The-living-law.aspx> (last visited Feb. 4, 2011).

37. See *Legislative Update*, *supra* note 35. The Secretary of Education's Opportunity in Athletics Commission conducted a study of Title IX and submitted recommended changes. *Id.* The following is critique of some of those recommendations by the National Women's Law Center:

[(1)] While women are now 56% of undergraduates (and in some schools, women are a much larger majority, as much as 70%) one of the Commission's proposals would assume that women are 50% of the student body at all schools—regardless of the facts.

[(2)] Another proposal would not count non-traditional students, who are overwhelmingly women; thus distorting the actual participation rates of men and women.

[(3)] A third proposal would allow schools to pretend that they are giving female students athletic opportunities by counting "ghost slots" on teams—slots never actually filled by any female student. Still another would allow schools to pretend that they are not giving athletic opportunities to men by not counting "walk-ons" (not specifically recruited)—who are actually receiving the benefits of sports participation at the school.

[(4)] The commission would also authorize the establishment of "variances" to permit schools to offer even fewer athletics opportunities to women under current law or new formulas.

[(5)] The commission would allow the use of "interest surveys" to limit women's opportunities by forcing them to prove that they are interested in sports before giving them a chance to play.

[(6)] The commission would authorize private slush funds that increase the financial support for men's teams at the expense of women's teams.

[(7)] The commission gave a blank check to the Secretary of Education to identify "additional ways of demonstrating compliance with Title IX" that could include new ways to weaken Title IX that were not even presented to the commissioners.

the impact of Title IX by interpreting its mandates very narrowly, or by declaring it unconstitutional altogether.³⁸

The educational purview of Title IX provides just one example. Women are still treated as inferior to men by the U.S. military. Women soldiers are less enthusiastically recruited and restricted from higher paying combat positions. What's more, our lesser value is communicated to all females at the cusp of adulthood when, unlike their male counterparts, they are not required to register for the draft.³⁹ Even opportunities for doing legal rather than martial justice are unjustly denied to women. Though we earn law degrees almost in parity with men and have done so for almost three decades,⁴⁰ women are outnumbered in the federal judiciary at every level.⁴¹ A commitment to equality across gender identification, gonads, chromosomes, or any other maker of sex that is specifically articulated in a Twenty-Eighth Amendment to the United States Constitution would productively cut off debates about the Fourteenth Amendment and ignite engagement in projects pitched at increasing substantive equality for all persons.

Id. at 3; see also *Bush Administration Weakens Title IX: League of Fans Calls for Action to Protect Anti-Discrimination Law*, League of Fans (March 25, 2005), <http://www.leagueoffans.org/titleixweakened.html>.

38. See, e.g., Jennifer R. Capasso, *Structure Versus Effect: Revealing the Unconstitutional Operation of Title IX's Athletics Provisions*, 46 B.C. L. REV. 825, 836 (2005).

39. Office of Public and Congressional Affairs, Selective Service System, *Backgrounder: Women and the Draft in America*, SELECTIVE SERVICE SYSTEM (July 1998), <http://www.sss.gov/wmbkgr.htm>.

40. But see Ann Farmer, *Are Young Women Turning Their Backs on Law School?*, 18 PERSP. 4, 4 (2010).

41. See *Women in Federal and State-level Clerkships*, Ctr. For Women in Gov't & Civil Soc'y, Rockefeller College of Public Affairs & Policy, University at Albany, State University of New York (Spring 2010), http://www.albany.edu/womeningov/judgeships_report_final_web.pdf.

