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ESSAY

A DANGEROUS IMBALANCE: PAULI MURRAY’S EQUAL RIGHTS AMENDMENT AND THE PATH TO EQUAL POWER

*Julie C. Suk**

In January 2020, Virginia became the thirty-eighth and final state needed to ratify the Equal Rights Amendment (“ERA”).¹ Because Virginia’s ratification—and those of Nevada² and Illinois³—occurred four decades after Congress’s ratification deadline,⁴ the viability of the ERA remains contested and uncertain.⁵ Opponents raise many procedural and substantive objections to adding the ERA to the Constitution, based largely on the fifty-year delay between its adoption by Congress and

* Professor of Sociology, Political Science, and Liberal Studies, The Graduate Center of the City University of New York; Florence Rogatz Visiting Professor, Yale Law School.

¹ See H.D.J. Res. 1, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

² See S.J. Res. 2, 79th Leg., Reg. Sess. (Nev. 2017).

³ See S.J. Res. Const. Amend. 4, 100th Gen. Assemb., Reg. Sess. (Ill. 2018).

⁴ See H.R.J. Res. 638, 95th Cong. (1978) (enacted) (extending the deadline).

⁵ The three states that recently ratified the ERA have brought litigation against the Archivist of the United States, arguing that the ERA has been validly ratified. See *Virginia v. Ferriero*, No. 1:20-cv-00242, 2020 WL 501207 (D.D.C. Jan. 30, 2020). Two states that never ratified the ERA, and three states that ratified and subsequently voted to rescind their ratifications, have intervened in the lawsuit, arguing that the three most recent ratifications are not valid due to the deadline. See Memorandum Op., *Virginia v. Ferriero*, 466 F. Supp. 3d 253, 255 (D.D.C. June 12, 2020) (order granting intervention). The Trump Administration’s Justice Department Office of Legal Counsel has taken the position that the ERA expired when the seven-year deadline elapsed in 1979, and that Congress cannot revive an expired amendment. See Ratification of the Equal Rights Amendment, 44 Op. O.L.C. 1, 3–4 (2020), <https://www.justice.gov/sites/default/files/opinions/attachments/2020/01/16/2020-01-06-ratif-era.pdf> [<https://perma.cc/KJ8C-238P>].

ratification by the states. Some objectors argue that the ERA is no longer necessary because litigation under the Equal Protection Clause, culminating in *United States v. Virginia* in 1996,⁶ accomplished many of the ERA's goals without a formal amendment.⁷ Others argue that an ERA adopted by Congress in the early 1970s neglects and may exacerbate twenty-first-century gender inequalities, especially those experienced by women engaged in low-wage work and women of color.⁸

This Essay recovers the aspiration of the 1970s ERA to overcome gendered disempowerment, which was most acutely experienced by Black women. That aspiration did not become part of the “de facto” ERA through Fourteenth Amendment litigation. Whether the ERA would sufficiently respond to “intersectional” discrimination, as it later came to be known,⁹ became a point of contention in Illinois’s 2018 ratification debates. This Essay begins by highlighting the leading roles that African American women legislators have played in sponsoring and framing the 1972 ERA in the three states that have ratified it after the statutory deadline. It posits that this should matter to the ongoing debates about the legitimacy of these post-deadline ratifications.¹⁰ These states ratified the

⁶ 518 U.S. 515, 533–34 (1996) (holding that Virginia violated the Equal Protection Clause of the Fourteenth Amendment because it failed to show persuasive justification for gender-based admissions at the Virginia Military Institute).

⁷ See, e.g., H.R. Rep. 116-378, at 20–21 (2020) (dissenting view of Rep. Collins). While not necessarily opposed to the current ERA revival effort, many scholarly commentators, most notably David Strauss, have viewed the failure of ERA ratification as irrelevant, since, in their view, the ERA's goals were achieved through judicial interpretation. See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 Harv. L. Rev. 1457, 1475–76 (2001) (noting that in certain situations, “though the proposed amendment failed, constitutional law changed almost exactly as it would have if the amendment had been adopted” and describing the ERA as “rejected, yet ultimately triumphant”).

⁸ See Joan C. Williams, *The Misguided Push for an Equal Rights Amendment*, N.Y. Times (Jan. 16, 2020), <https://www.nytimes.com/2020/01/16/opinion/sunday/equal-rights-amendment.html> [<https://perma.cc/A3XG-J8SV>]; Kim Forde-Mazrui, *A Liberal Case Against the Equal Rights Amendment*, Rich. Times-Dispatch (Jan. 16, 2020), https://richmond.com/opinion/columnists/kim-forde-mazrui-column-a-liberal-case-against-the-equal-rights-amendment/article_a6356b64-5862-528e-a73f-e900cccf4b8e.html [<https://perma.cc/XAP2-6TMG>].

⁹ See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139, 140.

¹⁰ See generally Julie C. Suk, *We the Women: The Unstoppable Mothers of the Equal Rights Amendment* ch. 10–12 (2020) [hereinafter Suk, *We the Women*] (documenting the individual contributions of African American women state legislators like Pat Spearman of Nevada; Kimberly Lightford, Liseta Wallace, and Juliana Flowers of Illinois; and Jennifer Carroll Foy

ERA long after the deadline imposed by an overwhelmingly white male Congress, but they did so as soon as women—including women of color and LGBTQ women—accumulated the modicum of power necessary to insist on their constitutional inclusion. These legislators’ twenty-first-century vision of the ERA resonates with Pauli Murray’s testimony in favor of the ERA in congressional hearings in the 1970s,¹¹ which built on her work as a member of the President’s Commission on the Status of Women, as a founder of the National Organization for Women in the 1960s, and as a board member of the ACLU.¹² Murray built a strategy for women’s empowerment using the race equality victories under the Fourteenth Amendment as a template.¹³ Her writings laid the intellectual architecture for the gender equality victories won by Ruth Bader Ginsburg throughout the 1970s.¹⁴ Murray argued that African American women had the most to gain from an ERA,¹⁵ which could end their disempowerment, beyond merely winning litigated cases. The quest for empowerment, more so than doctrinal legal change, is driving the ERA’s twenty-first-century resurgence. Women seek empowerment not only to help themselves but also to help save democracy from dangerous abuses of power that threaten its legitimacy.

and Jennifer McClellan of Virginia to the delayed battle for the Equal Rights Amendment’s ratification over the last several years).

¹¹ See Equal Rights 1970: Hearings on S.J. Res. 61 and S.J. Res. 231 Before the S. Comm. on the Judiciary, 91st Cong. 427–33 (1970) (statement of Pauli Murray) [hereinafter Murray ERA Testimony].

¹² For biographical accounts of Murray’s work on the President’s Commission on the Status of Women and the briefs she worked on for the ACLU, see Pauli Murray, *Song in a Weary Throat: Memoir of an American Pilgrimage* 452–67 (1987) [hereinafter Murray, *Song in a Weary Throat*]; Rosalind Rosenberg, *Jane Crow: The Life of Pauli Murray* 241–309 (2017); Patricia Bell-Scott, *The Firebrand and the First Lady: Portrait of a Friendship: Pauli Murray, Eleanor Roosevelt, and the Struggle for Social Justice* 324–34 (2016). For an intellectual and legal history of Murray’s work, which built sex discrimination law on race discrimination law’s successes during this period, see generally Serena Mayeri, *Reasoning from Race: Feminism, Law, and the Civil Rights Revolution* 9–40 (2011) (detailing how Murray developed these strategies).

¹³ See Mayeri, *supra* note 12, at 14–20.

¹⁴ See *id.* at 61–62; see also Brief for Appellant at 5, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4) (analogizing sex to race and arguing that illegitimate legislative differentiations between sexes merit no deference).

¹⁵ See Murray ERA Testimony, *supra* note 11, at 428; see also Pauli Murray, *The Negro Woman’s Stake in the Equal Rights Amendment*, 6 Harv. C.R.-C.L. L. Rev. 253, 253 (1971) (“Negro women as a group have the most to gain from the adoption of the Equal Rights Amendment. Implicit in the amendment’s guarantee of equality of rights without regard to sex is the constitutional recognition of personal dignity which transcends gender.”).

Part I begins in the present, highlighting the leadership and opposition by Black women in the state legislative debates leading to ERA ratification since 2017. Part II analyzes Pauli Murray's 1970 written testimony to the Senate Judiciary Committee, in which she articulated African American women's stake in the ERA for a congressional audience. Part III situates Murray's vision of the ERA in the context of her 1960s writings for the President's Commission on the Status of Women and as a co-founder of the National Organization for Women. Coining the term "Jane Crow" to focus on discrimination faced by Black women, Murray's initial ambivalence about the ERA centered her work on a litigation strategy based on the Fourteenth Amendment. But by the end of the decade, she persuaded ERA skeptics, including colleagues at the ACLU, where she served on the Board, to pivot and support the ERA. Part IV develops the implications of Murray's analysis of equal rights as equal power for contemporary efforts to overcome women's underrepresentation in positions of power. Part V concludes.

I. BLACK WOMEN AND THE ERA'S RESURGENCE

The Nevada legislature took the nation by surprise on March 22, 2017, by ratifying the Equal Rights Amendment on the forty-fifth anniversary of Congress's two-thirds' vote to send it to the states for ratification.¹⁶ The Nevada ratification came forty years after the last state to ratify the ERA (Indiana in 1977) and thirty-five years after Congress's last deadline (1982) for state ratification.¹⁷ The primary sponsor of the ERA ratification resolution in Nevada was state senator Pat Spearman, an African American ordained minister who had given a speech at the 2016 Democratic National Convention advocating for LGBTQ equality.¹⁸ In Nevada, she rallied a coalition of legislators of color and women across generations and political parties to support a post-deadline ERA

¹⁶ See Terry Carter, *Nevada Ratifies Equal Rights Amendment Decades After Deadline*, ABA J. (Mar. 23, 2017), https://www.abajournal.com/news/article/nevada_ratifies_equal_rights_amendment_decades_after_deadline [<https://perma.cc/Y4CW-R2V9>]; Editorial, *Pumping Life into the Equal Rights Amendment*, N.Y. Times (Mar. 25, 2017), <https://www.nytimes.com/2017/03/25/opinion/sunday/pumping-life-into-the-equal-rights-amendment.html> [<https://perma.cc/79UM-HUTA>].

¹⁷ See Jane J. Mansbridge, *Why We Lost the ERA* 13 (1986).

¹⁸ See 2020 Democratic National Convention, State Senator Pat Spearman at DNC 2016, YouTube (July 26, 2016), <https://www.youtube.com/watch?v=orQQhCEFMg> [<https://perma.cc/G36V-AMEN>].

ratification.¹⁹ The ratification resolution stated that it would be up to Congress—who imposed the deadline in the first place—to accept or reject the late ratification, but as far as the Nevada legislature was concerned, the ERA was still “meaningful and needed as part of the Constitution of the United States and 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 States.”²⁰

The Illinois legislature followed in May 2018, and the Virginia legislature in January 2020. Black women legislators were at the forefront of these states’ ratification battles as well. Following Senator Spearman’s leadership in Nevada in 2017, Illinois Representative Juliana Stratton, who went on to become the first African American elected Lieutenant Governor of the state, made extensive floor speeches advancing ERA ratification in 2018.²¹ In Virginia, African American women legislators of three generations—baby boomer (Mamie Locke), gen X (Jennifer McClellan), and millennial (Jennifer Carroll Foy)—were the primary patrons of the ratification resolution, describing themselves as bringing Virginia to the right side of history.²² It is fair to say that the thirty-sixth, thirty-seventh, and thirty-eighth ratifications of the ERA in 2017–2020 would not have occurred without the political efforts of these Black women, who were elected as lawmakers representing the people of their states.

Why did these women make the ERA a twenty-first-century priority? Senator Spearman explained: “Women earn 80 percent of what men earn. African-American women earn 68 percent of what men earn. Latinas earn 60 percent of what their male counterparts earn.”²³ Even if the ERA would not outlaw these pay disparities, she told her Senate colleagues, quoting Ruth Bader Ginsburg’s 1978 law review article during the Nevada ratification debate, “With the Equal Rights Amendment, we may expect Congress and the state legislatures to undertake in earnest, systematically and pervasively, the law revision so long deferred,”²⁴ to legislate more

¹⁹ See Suk, *We the Women*, supra note 10, at 130.

²⁰ S.J. Res. 2, 79th Leg., Reg. Sess. (Nev. 2017).

²¹ See Suk, *We the Women*, supra note 10, at 144–45, 153.

²² See *id.* at ch. 12.

²³ Ratifies the Equal Rights Amendment to the Constitution of the United States: Hearing on S.J. Res. 2 Before the Assemb. Comm. on Legis. Operations and Elections, 2017 Leg., 79th Sess. 4 (Nev. 2017) (statement of Sen. Patricia Spearman, S. District No. 1).

²⁴ *Id.* at 5 (quoting Ruth Bader Ginsburg, *The Equal Rights Amendment Is the Way*, 1 Harv. Women’s L.J. 19, 26 (1978)).

effectively against unequal pay. Similarly, in making Virginia the thirty-eighth and final state needed to ratify the ERA, Senator Jennifer McClellan spoke of her enslaved female ancestors, defined as property and unable to own property, even after their male brethren were emancipated. She continued:

This year we've already made history, with the most diverse General Assembly ever seated [in Virginia]. . . . And yet, in so many areas, we still have a long way to go. Whether it's the boardrooms, whether it's the highest offices, in states, or in the country. Too often, women are not there, because they've had to overcome years of discriminatory laws.²⁵

In Virginia, women constituted nearly one-third of the legislature for the first time in history.²⁶ It was not a coincidence that this was the legislature that finally ratified the ERA. Finding this long-unpaved road to women's empowerment was a purpose of the ERA.

Nonetheless, Black women did not monolithically support the ERA in these three states. In Illinois, ERA ratification squeaked by, winning with only one vote to spare, because of opposition votes by two progressive African American Democratic women in the House of Representatives. Representative Mary Flowers, who has sponsored legislation to reduce maternal mortality, especially among African American women,²⁷ and to require the accommodation of pregnant workers,²⁸ voted against ERA

²⁵ Regular Session, Senate of Va. (Jan. 15, 2020) (statement of Sen. Jennifer McClellan), https://virginia-senate.granicus.com/MediaPlayer.php?view_id=3&clip_id=2860# [<https://perma.cc/28ZA-FLHV>].

²⁶ See generally Robert McCartney, *Virginia's Year of the Woman Produces Historic Package of Liberal Legislation*, Wash. Post (Mar. 2, 2020), https://www.washingtonpost.com/local/virginia-politics/virginias-year-of-the-woman-produces-historic-package-of-liberal-legislation/2020/03/01/4d1177da-599b-11ea-ab68-101ecfec2532_story.html [<https://perma.cc/7U66-JQTK>] (noting the dramatic increase in women legislators, totaling forty-one).

²⁷ See H.R. 2, 101st Gen. Assemb., Reg. Sess. (Ill. 2019); H.R. 1, 101st Gen. Assemb., Reg. Sess. (Ill. 2019); see also Bill Status of H.B. 0002, 101st Gen. Assemb. (Ill. 2020), https://www.ilga.gov/legislation/BillStatus_pf.asp?DocNum=2&DocTypeID=HB&LegID=113805&GAID=15&SessionID=108&GA=101 [<https://perma.cc/W5F8-8GG4>] (detailing bill synopsis and co-sponsors); Bill Status of H.B. 0001, 101st Gen. Assemb. (Ill. 2020), https://www.ilga.gov/legislation/BillStatus_pf.asp?DocNum=1&DocTypeID=HB&LegID=&GAID=15&SessionID=108&GA=101 [<https://perma.cc/F45L-YKGM>] (detailing bill synopsis and co-sponsors).

²⁸ See An Act Concerning Human Rights, Pub. Act No. 98-1050, 2014 Ill. Laws 5269, 5270; see also Bill Status of H.B. 0008, 98th Gen. Assemb. (Ill. 2014), https://www.ilga.gov/legislation/BillStatus_pf.asp?DocNum=8&DocTypeID=HB&LegID=6

ratification.²⁹ During floor debates, she noted that the ERA was the brainchild of Alice Paul, “a very proud racist woman.” Furthermore, she suggested that the Amendment would “put wealthy women against poor working women.” Specifically, she said, “wealthy women . . . don’t have to worry about lifting heavy bags and heavy boxes. They don’t have to worry about having babysitters.”³⁰ Flowers’s objections were joined by Representative Rita Mayfield, another Black legislator who has sponsored legislation to address African American maternal mortality, paid family leave, and other women’s issues.³¹ Mayfield expressed concern that the ERA would work against the acknowledgment of racial inequalities.³²

Although Flowers and Mayfield voted against ERA ratification, the positive vote in Illinois reflected the responses by Juliana Stratton and Litesa Wallace, another African American legislator who affirmed Flowers’s and Mayfield’s concerns about whether the ERA could meet the needs of African American women. Wallace specifically emphasized the importance of childcare, as “a single mother who has survived damn near anything you can think of.”³³ Unlike Flowers and Mayfield, Wallace voted for the ERA. But she simultaneously called for “some serious soul searching about” the fact that “we refuse to recognize intersectionality . . . in damn near every debate that occurs in this Body.”³⁴

Stratton argued that the ERA would require all government employers to examine unequal pay practices and strengthen protections for pregnant workers. Ultimately, Stratton said, “as a black woman in particular, . . . I

8233&GAID=12&SessionID=85&GA=98 [https://perma.cc/GBE4-Q583] (showing co-sponsors and synopsis).

²⁹ See 100th Gen. Assemb., Illinois House of Representatives, Voting Record for S.J. Res. Const. Amend. 4, Equal Rights Amendment (May 30, 2018), https://www.ilga.gov/-legislation/votehistory/100/house/10000SC0004_05302018_076000.pdf [https://perma.cc/SR4U-GUNL].

³⁰ 100th Gen. Assemb., Illinois House of Representatives, Transcription Debate 306–07 (May 30, 2018) [hereinafter Transcription Debate], <https://www.ilga.gov/house/transcripts/htrans100/10000141.pdf> [https://perma.cc/F28G-QG68].

³¹ See, e.g., Bills, Representative Rita Mayfield (D), 60th District, Illinois Gen. Assemb., <https://ilga.gov/house/RepBills.asp?MemberID=2376> [https://perma.cc/YVZ7-MFKN] (last visited Jan. 2, 2020) (listing Mayfield as a sponsor to bills on various women’s issues, including those introduced by Rep. Flowers).

³² See Transcription Debate, *supra* note 30, at 328–29.

³³ *Id.* at 316.

³⁴ *Id.* at 317–19.

have experienced discrimination. Not just from being a woman in America but also from being a woman of color.”³⁵ But this was a reason to embrace the ERA: “I truly do believe that our Constitution, that living, breathing document that guides us and sets forth the ideals of this country, must reflect what we hope to be and serve as our compass.”³⁶ Therefore, the ratification vote in Illinois should not be read as a rejection of Flowers’s and Mayfield’s objections, but as a reflection of how late ratifications have incorporated objections to contribute to a race-conscious meaning of the ERA.

II. PAULI MURRAY’S ERA IN CONGRESS, 1970

Questions about whether the ERA would respond to the needs of poor working women and Black women are not new. They were part of the ERA’s legislative history in 1970. Pauli Murray’s written statement to the Senate Judiciary Committee hearings in September 1970 argued, “Negro women as a group have the most to gain from the adoption of the Equal Rights Amendment.”³⁷ Murray was the intellectual architect of the Fourteenth Amendment litigation strategy that Ruth Bader Ginsburg successfully implemented in the 1970s to challenge laws that discriminated on the basis of sex.³⁸ Ginsburg, who had carefully studied Pauli Murray’s memos, articles, and briefs of the 1960s to write her groundbreaking ACLU brief in *Reed v. Reed*, acknowledged her intellectual debt to Pauli Murray by including Murray’s name as a co-author on the cover sheet of the *Reed v. Reed* brief.³⁹ The late Justice Ruth Bader Ginsburg is recognized as the “founding mother” of modern constitutional sex equality law because of her briefs and arguments in the landmark Supreme Court cases beginning with *Reed*.⁴⁰ But Pauli

³⁵ Id. at 342–43.

³⁶ Id. at 343–44.

³⁷ Murray ERA Testimony, *supra* note 11, at 428.

³⁸ See Mayeri, *supra* note 12, at 61–62.

³⁹ See Brief for Appellant, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4).

⁴⁰ See generally Suk, *We the Women*, *supra* note 10, at ch. 8 (detailing Ginsburg’s briefs in *Reed* and *Frontiero v. Richardson*, 411 U.S. 677 (1973), and tracking the arc of her career in constitutionalizing women’s rights); see also “The Most Important Woman Lawyer in the History of the Republic”: How Did Ruth Bader Ginsburg Change America? More Than 20 Legal Thinkers Weigh In, *Politico Mag.* (Sept. 18, 2020), <https://www.politico.com/news/magazine/2020/09/18/ruth-bader-ginsburg-legacy-418191> [<https://perma.cc/DDD2-K-4K4>] (quoting N.Y.U. Law Professor Kenji Yoshino, deeming Ginsburg “[t]he founding mother—or simply founder—of our nation’s sex equality jurisprudence”).

Murray's theory of constitutional gender equality formed the foundation for the achievements that made Ginsburg famous.

While Murray's ERA testimony is largely forgotten, it articulated original and nuanced arguments about what the ERA could add to the Fourteenth Amendment litigation strategy that went on to be successful, and why Black women would benefit from the ERA. Ginsburg, who also advocated for the ERA throughout the 1970s in her scholarly writings and as a witness in congressional hearings about extending the ERA deadline,⁴¹ achieved success in other parts of the ERA legal agenda, specifically, the eradication of gender classifications in the law that reflected gender stereotypes.⁴² Murray, meanwhile, associated the ERA with an analysis of gendered power that had gotten lost as the anti-classification trajectory of Equal Protection took hold,⁴³ but which remains necessary despite Ginsburg's victories for legal feminism.

In introducing the meaning of the ERA for Black women, Murray's testimony began by telling her own life story in the context of that of her family dating back to slavery: "My parents were born during Reconstruction; my grandmother was born in slavery, the progeny of rape by a white master of his octoroon slave."⁴⁴ With the American legal order beginning with

the ideas that Blacks were inherently inferior to Whites and Women were inherently inferior to Men... [Murray said,] ... I have

⁴¹ See, e.g., Ginsburg, *supra* note 24, at 22–26 (arguing for the legislative and judicial benefits of the Equal Rights Amendment in that it removes any "historical impediment" to women's equality); see also Equal Rights Amendment Extension: Hearings on S.J. Res. 134 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 95th Cong. 262–71 (1979) (statement of Ruth Bader Ginsburg, Professor, Columbia University School of Law) (arguing for congressional extension of the time to ratify the Equal Rights Amendment).

⁴² See, e.g., *Reed v. Reed*, 404 U.S. 71, 76–77 (1971) (holding that arbitrary classifications on the basis of sex and preference of one sex over the other violates the Equal Protection Clause).

⁴³ See, e.g., Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 *Harv. L. Rev.* 1470, 1472–75 (2004) (noting the growth of anti-classification talk in debates post-*Brown v. Board of Education*, 347 U.S. 483 (1954), and arguing that it is unfounded); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 *Calif. L. Rev.* 1323, 1380–81 (2006) (noting how the ERA text incorporated anti-classification principles); see also Cary Franklin, *The Anti-stereotyping Principle in Constitutional Sex Discrimination Law*, 85 *N.Y.U. L. Rev.* 83, 145 (2010) (noting that the anti-classification principle was hard to distinguish from the anti-stereotyping principle that Ginsburg embraced until *United States v. Virginia*, 518 U.S. 515 (1996)).

⁴⁴ Murray ERA Testimony, *supra* note 11, at 428.

experienced numerous delays in my career, not for the traditional reasons given for the failure of women to develop on par with men in our society (marriage, child-rearing, etc.), but by a combination of individual and institutional racism and sexism—Jim Crow and Jane Crow.⁴⁵

Murray struggled throughout her career to find stable employment, finally achieving tenure as a professor of American Studies at Brandeis at the age of 60. She was never hired to be a professor at any law school, including those that recruited RBG during this period, despite her brilliance and groundbreaking legal work that her contemporaries acknowledged.⁴⁶ Murray’s written ERA testimony stated, “[T]he road over which I have travelled is the experience of most Negro women in America. Born in genteel poverty, I have shared the experience of domestic workers, service workers, lower paid clerical workers,” which she combined with her “intimate knowledge of the problems of race and sex discrimination, particularly in employment opportunity.”⁴⁷ Black women experienced “more than the mere addition of sex discrimination to race discrimination”; they experienced “the *conjunction* of these twin

⁴⁵ *Id.*

⁴⁶ Spottswood Robinson, who became a judge on the U.S. Court of Appeals for the D.C. Circuit, and Thurgood Marshall, who became a Supreme Court Justice, used the paper Pauli Murray wrote as a law student to help shape their winning arguments in *Brown v. Board of Education*, 347 U.S. 483 (1954). See Bell-Scott, *supra* note 12, at 215. Ruth Bader Ginsburg relied on Pauli Murray’s law review articles, legal memoranda, and legal briefs when writing her influential brief in *Reed v. Reed*. See Mayeri, *supra* note 12, at 61–63; Irin Carmon & Shana Knizhnik, *Notorious RBG: The Life and Times of Ruth Bader Ginsburg* 53–55 (2015). Pauli Murray also had a decades-long friendship with Eleanor Roosevelt, who long recognized Murray’s brilliance in various collaborations around civil rights and women’s rights. It was Eleanor Roosevelt who invited Murray to join the Civil and Political Rights Subcommittee of President Kennedy’s Commission on the Status of Women, which Roosevelt chaired. See Bell-Scott, *supra* note 12, at 307. Eleanor Roosevelt died shortly after the Commission began its work in 1962. *Id.* at 316. While Murray longed to be a law professor at a school like Yale Law School, she understood that law schools were still “an almost exclusively male preserve,” for which she was “unlikely to receive serious consideration . . . [as] teaching jobs were not readily forthcoming to women of any race. Despite Yale Law School’s enormous prestige and its reputation for successfully placing graduates holding its higher degrees, I was an embarrassment.” Murray, *Song in a Weary Throat*, *supra* note 12, at 469. In 2016, nearly three decades after Murray’s death, Yale University recognized the magnitude of her work by naming a residential college after her. See Lakshmi Varanasi, *Yale Will Name a New Residential College After Awesome Civil Rights Activist Pauli Murray*, *Slate* (Apr. 28, 2016), <https://slate.com/human-interest/2016/04/yale-names-new-residential-college-after-pauli-murray.html> [<https://perma.cc/4JHZ-X63D>].

⁴⁷ Murray ERA Testimony, *supra* note 11, at 428.

immoralities.”⁴⁸ Long before critical race scholars used the term “intersectionality,”⁴⁹ Murray explained that Black men could aspire to the power and status of white men. And white women benefited from the law’s protections. White mothers were placed on a pedestal, though it was really more like a cage, to borrow terminology that Ruth Bader Ginsburg often used.⁵⁰ But pedestal or cage, Black women were excluded from it, as many Black women had no choice but to work outside of their own homes, often working, as Murray pointed out, as “private household workers or service workers outside of the home,”⁵¹ subject to the lowest wages and exposed to the risk of sexual violence.

The Equal Rights Amendment had a role to play because only a formal constitutional amendment could carry the weight of according Black women the respect that they had been deprived of for so long. Murray noted that, “when the dominant white male is afflicted by racism and sexism, albeit unconscious, his hostility toward the Negro female who asserts her rights as a person is unbounded.”⁵² Within this dynamic of domination and resistance to change, “[i]n her struggle for survival with dignity, therefore, the Negro woman stands almost alone and must appeal to the fundamental law of the land to give her a footing upon which to build some semblance of stability for herself and for her children.”⁵³ An explicit constitutional provision carried tremendous symbolic power, consciously affirming the equal status of those who were abused for so long. Decades later, Nevada senator Pat Spearman embraced the ERA’s symbolic importance during Nevada’s ratification debates: “Symbols are not just symbols. They are powerful because they point to what we believe in and what we hold dear.”⁵⁴

Murray also pointed out that efforts to advance women’s rights through the Fourteenth Amendment had, to date, failed. She had argued since 1962 that the Fifth and Fourteenth Amendment prohibition of race

⁴⁸ Id. at 429.

⁴⁹ See Crenshaw, *supra* note 9, at 140.

⁵⁰ See Brief for Appellant at 20–21, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4) (quoting *Sail’er Inn, Inc. v. Kirby*, 485 P.2d 529, 541 (Cal. 1971)).

⁵¹ Murray ERA Testimony, *supra* note 11, at 429.

⁵² Id.

⁵³ Id.

⁵⁴ Ratifies the Equal Rights Amendment to the Constitution of the United States: Hearing on S.J. Res. 2 Before the Assemb. Comm. on Legis. Operations and Elections, 2017 Leg., 79th Sess. 9 (Nev. 2017) (statement of Sen. Patricia Spearman, S. District No. 1).

discrimination should be extended to prohibit sex discrimination,⁵⁵ but until *Reed v. Reed* (decided in 1971, a year after Murray’s ERA testimony),⁵⁶ the Supreme Court had not been responsive to the claims of “Jane Crow.” But more importantly, Murray suggested that, even if the Supreme Court were to expand the Fourteenth Amendment to strike down sex discrimination in the future, the Equal Rights Amendment could still do more. She offered an ambitious vision of equal power for women, decades ahead of the feminists in Europe who put gender parity into their constitutions in the late 1990s. It is worth quoting Murray’s vision at length:

Finally, I appeal to this Committee and to the United States Senate to use the uniquely human gift of vision and imagination in a creative approach to the Equal Rights Amendment. . . . I suggest that what the opponents of the Amendment most fear is not equal rights but equal power and responsibility. I further suggest that underlying the issue of equal rights for women is the more fundamental issue of equal power for women. No group in power has surrendered its power without a struggle. Many male opponents of equal rights for women recognize the more fundamentally revolutionary nature of the changes which a genuine implementation of such an amendment would bring about. A society in which more than half of the population is absent from the formal authority and decision-making processes is a society in dangerous imbalance. Those who argue in support of the idea of fundamental differences between men and women only reinforce the compelling reasons why women should have access to equal power through the implementation of equal constitutional rights.⁵⁷

Murray’s testimony expanded the ERA debate beyond what the Amendment would do as law—and towards whom the Amendment would empower politically. That empowerment, more so than the changes in law, could fundamentally alter men’s lived experience, as white men in particular would have to surrender some of the power and privilege they took for granted. Allowing the continued disproportionate power of

⁵⁵ See Pauli Murray, A Proposal To Reexamine the Applicability of the Fourteenth Amendment to State Laws and Practices Which Discriminate on the Basis of Sex Per Se 1 (Dec. 1, 1962), in *How and Why Was Feminist Legal Strategy Transformed, 1960–1973?* Doc. 3 (Serena Mayeri ed., 2007) [hereinafter Murray 1962 PSW Memo], <https://documents.alexanderstreet.com/c/1000637383> [<https://perma.cc/69F2-RQKB>].

⁵⁶ 404 U.S. 71 (1971).

⁵⁷ Murray ERA Testimony, *supra* note 11, at 432–33.

men, when women were more than half the population, put the nation in a perpetual state of illegitimate government. Murray proposed that democratic government could perform better and be legitimized if Congress were composed of at least one-third women:

A Congress of the United States in which one-third or more are women (if one uses the formula of the percentage of the labor force who are women) and the unique experiences of this untapped resource are likely to accelerate our progress toward the solution of such massive problems as pollution, poverty, racism and war. . . . The adoption of the Equal Rights Amendment and its ratification by the several States could well usher in an unprecedented Golden Age of human relations in our national life and help our country to become an example of the practical ideal that the sole purpose of governments is to create the conditions under which the uniqueness of each individual is cherished and is encouraged to fulfill his or her highest creative potential.⁵⁸

Fifty years after these remarks, the Congress of the United States has more women elected than ever before, but they only constitute twenty-five percent of Congress,⁵⁹ still short of the one-third Murray proposed as an antidote to the “dangerous imbalance” that impaired solutions to “pollution, poverty, racism and war.” Murray ended her 1970 testimony by appealing to the senators’ sense of their “place in history,” a theme that would dominate the Virginia ratification debates in 2020.⁶⁰

III. THE MAKING OF PAULI MURRAY’S VISION FOR THE ERA

Murray’s ERA testimony reveals a proposed amendment that took up the history and continued subordination of women of color as early as

⁵⁸ *Id.* at 433.

⁵⁹ See Jessica Flores, Women Are Making Gains Toward ‘Equal Representation’ in Congress: They’ll Represent About 25% of All Seats in 2021, USA Today (Nov. 10, 2020), <https://www.usatoday.com/story/news/politics/elections/2020/11/05/us-congress-record-number-women-2020-election/6181741002/> [<https://perma.cc/Z9TH-BDNM>].

⁶⁰ Murray ERA Testimony, *supra* note 11, at 433; see Virginia House of Delegates, Regular Session, Va. House of Delegates Video Streaming (Jan. 15, 2020), https://sg001-harmony.sliq.net/00304/Harmony/en/PowerBrowser/PowerBrowserV2/20200115/-1/12915#agenda_ [<https://perma.cc/D5U3-WKQM>] (remarks of Delegates Jennifer Carroll Foy, Vivian Watts, and Hala Ayala at 12:33–1:06); Virginia Senate, Regular Session, Va. Sen. Live Session Video Stream (Jan. 15, 2020), https://virginia-senate.granicus.com/MediaPlayer.php?view_id=3&clip_id=2860# [<https://perma.cc/4PDX-P9CX>] (remarks of Senators Mamie Locke, Jennifer McClellan, and Jen Kiggans at 33:00–45:00, 1:04:45–1:06:55).

1970, much earlier than is often assumed. Murray was often decades ahead of her time in her thinking about what equality under the law could mean—she urged a frontal attack on *Plessy v. Ferguson*'s “separate but equal,”⁶¹ a decade before the men leading civil rights litigation thought it could possibly succeed,⁶² as they tried to challenge specific inequalities without attacking segregation per se. Similarly, Murray's vision of how an ERA could empower Black women, based on their unique experience of legal subordination, speaks directly to the twenty-first-century disagreements among African American women lawmakers about the ERA's responsiveness to intersectional concerns. Murray's account resonates, not only because she explicitly theorized intersectionality, or “Jane Crow” as she called it, but also because her own support of the ERA evolved from a position of initial skepticism.

Murray's doubts about the ERA grew out of the opposition by feminists who defended the interests of working-class women in industry. Social reformers like Florence Kelley and Eleanor Roosevelt, as well as progressive organizations like the National Consumers League and the ACLU, opposed the ERA prior to 1970.⁶³ ACLU lawyer Dorothy Kenyon was, with Murray, the other person that Ruth Bader Ginsburg listed as an

⁶¹ In writing a paper as a third-year law student in 1944 proposing that segregation per se was unequal regardless of whether the separate facilities could be equalized, Murray looked at the work of sociologists and psychologists. See Rosenberg, *supra* note 12, at 147–50; Murray, *Song in a Weary Throat*, *supra* note 12, at 329. That literature included the work of psychologist Mamie Phipps Clark, who had completed a master's degree at Howard University a few years before Murray received her law degree there and who worked with her husband Kenneth Clark on the doll studies that the Supreme Court cited in *Brown v. Board of Education*, 347 U.S. 483, 494 n.11 (1954), as the Court concluded that “[s]eparate educational facilities are inherently unequal.” *Id.* at 495.

⁶² See Rosenberg, *supra* note 12, at 171 (noting that, in 1953, Spottswood Robinson took a second look at Murray's 1944 paper proposing the overruling of *Plessy v. Ferguson*, 163 U.S. 537 (1896), at which point he persuaded Thurgood Marshall to make a frontal attack on *Plessy*).

⁶³ See Equal Rights Amendment, Hearing on S.J. Res. 64 Before a Subcomm. of the S. Comm. on the Judiciary, 70th Cong. 55 (1929) (statement of Florence Kelley, representing the National Consumers' League, New York); Eleanor Roosevelt Papers Project, Eleanor Roosevelt and Women's Rights, Nat'l Park Serv., <https://www.nps.gov/articles/eleanor-roosevelt-and-women-s-rights.htm> [<https://perma.cc/QTQ7-8UX6>] (last updated June 5, 2020); Tracy A. Thomas, From 19th Amendment to ERA: Constitutional Amendments for Women's Equality, ABA (Jan. 22, 2020), https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-20/issue-1/from-19th-amendment-to-era/.

honorary co-author of her *Reed v. Reed* brief,⁶⁴ and Kenyon had testified against the ERA in Congress in 1929.⁶⁵ Kenyon and her allies worried that the conservative male justices sitting on the Supreme Court would use the abstract constitutional guarantee of “equality of rights” to strike down labor legislation that protected women workers from exploitation. Kenyon described the ERA as “a blind man with a shotgun,”⁶⁶ shooting down all sex distinctions under the law, impervious to whether they could help women achieve equality or not. Pauli Murray and other skeptics proposed in 1962 that piecemeal litigation under the Fifth and Fourteenth Amendments would be better suited to invalidate the sex distinctions that kept women down, while preserving those necessary to secure a true “equality of right.”⁶⁷ Kenyon and Murray collaborated on this strategy in one case with some success. In a 1966 decision in *White v. Crook*, a three-judge panel was persuaded by their argument that Alabama’s statutory exclusion of Black and white women from juries, as well as the systematic exclusion of Black men, violated the Equal Protection Clause.⁶⁸ Because the state did not appeal the district court’s decision, the Supreme Court never had the opportunity to weigh in.

As she worked on the brief in *White v. Crook*, Murray published, along with Justice Department Office of Legal Counsel attorney Mary Eastwood, a law review article titled *Jane Crow and the Law: Sex Discrimination and Title VII*.⁶⁹ There, Murray and Eastwood noted that the Commission’s reluctance to endorse the ERA in 1962 was premised on the assumption that the Supreme Court would clarify whether the

⁶⁴ See Linda K. Kerber, *No Constitutional Right To Be Ladies: Women and the Obligations of Citizenship* 199 (1998).

⁶⁵ See Equal Rights Amendment, Hearing on S.J. Res. 64 Before a Subcomm. of the S. Comm. on the Judiciary, 70th Cong. 42 (1929) (statement of Dorothy Kenyon, Attorney at Law, New York City).

⁶⁶ *Id.*

⁶⁷ Murray 1962 PSW Memo, *supra* note 55, at 14. The Supreme Court used this “equality of right” language in *Muller v. Oregon*, 208 U.S. 412, 422 (1908). See Nancy Woloch, *A Class by Herself: Protective Laws for Women Workers, 1890s–1990s*, at 73–76 (2015).

⁶⁸ 251 F. Supp. 401 (M.D. Ala. 1966). Note that Murray and Kenyon also collaborated on an amicus brief in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), in which the NAACP represented a white woman in a Title VII lawsuit challenging an employer’s policy of not hiring mothers of preschool-age children. Although the plaintiff in this case was white, the NAACP and Murray saw that, if the law permitted discrimination against working mothers, African American women would be particularly disadvantaged by it. See Mayeri, *supra* note 12, at 51–52.

⁶⁹ Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 *Geo. Wash. L. Rev.* 232 (1965).

Fourteenth Amendment prohibited sex discrimination.⁷⁰ But by that point, courts had “over-simplified” the question of whether a sex classification was reasonable by generally accepting all such classifications as valid.⁷¹ The Jane Crow article proposed, in the alternative, that courts scrutinize the distinctions.⁷² This did not, however, mean that “equal rights for women is tantamount to seeking identical treatment with men.”⁷³ They recognized that “[t]o the degree women perform the function of motherhood, they differ from other special groups.”⁷⁴ However:

When the law distinguishes between the ‘two great classes of men and women,’ gives men a preferred position by accepted social standards, and regulates the conduct of women in a restrictive manner having no bearing on the maternal function, it disregards individuality and relegates an entire class to inferior status.⁷⁵

Thus, the clarification that they urged courts to provide would interpret the Constitution as prohibiting laws that classified persons by sex, while permitting laws that classified by function, “to give adequate recognition to women who are mothers and homemakers and who do not work outside the home.”⁷⁶ The law ought to “recognize[] the intrinsic value of child care and homemaking.”⁷⁷ Instead, existing laws wrongly assumed that “financial support of a family by the husband-father is a gift from the male sex to the female sex and, in return, the male is entitled to preference in the outside world.”⁷⁸

Although Murray’s Fourteenth Amendment strategy prevailed at the district court in *White v. Crook*, other courts did not follow. In 1967, the Fifth Circuit deferred to a Mississippi Supreme Court decision rejecting the proposition that the statutory exclusion of women from juries violated the Fourteenth Amendment and barred a removal of a state rape prosecution to federal court.⁷⁹ Murray drew on her experience as a civil rights attorney working for racial justice to call for an organization similar

⁷⁰ See *id.* at 236.

⁷¹ *Id.* at 237.

⁷² See *id.* at 238.

⁷³ *Id.* at 239.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 241.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See *Bass v. Mississippi*, 381 F.2d 692, 697 (5th Cir. 1967).

to the NAACP for women's rights—a proposal that evolved into the founding of the National Organization for Women.⁸⁰ Murray's Jane Crow co-author, Mary Eastwood, authored a memo for NOW calling for a dual strategy of simultaneously pursuing Fourteenth Amendment litigation to challenge sex discrimination while advocating for a formal amendment under Article V—the Equal Rights Amendment—to the Constitution.⁸¹ The memo insisted, however, that the ERA would not invalidate “[m]aternity laws,” authorizing maternity leave, for instance, “because such laws are not based on sex;”⁸² they were based on function. Furthermore, “recognizing the value of child care and homemaking would be consistent with the principle of equality of rights under the amendment.”⁸³

By March 1970, Murray urged the ACLU, where she served on the Board, to abandon its longstanding opposition to the ERA. She wrote, “I do not believe today that the alternative of the use of the Fourteenth Amendment is a sufficient basis for strong opposition to the proposed Equal Rights Amendment.”⁸⁴ Whereas Dorothy Kenyon and other social reformers had opposed the ERA in 1929 due to fears of handing it over to a conservative male judiciary, in 1970, Murray argued, to the contrary, that a constitutional amendment could temper the conservative turn likely to be taken by Nixon appointees replacing the Warren Court.⁸⁵ Even Dorothy Kenyon, after opposing the ERA on behalf of working women for decades, wrote in a 1970 letter to a friend that, while she was still committed to the Fourteenth Amendment strategy, “in the meantime it's worth passing the equal rights amendment if only to stir up the men.”⁸⁶

Kenyon's change of heart stemmed in part from frustration that caused her to empathize with the militants in the struggle for racial justice. Two

⁸⁰ Finding Pauli Murray: The Black Queer Feminist Civil Rights Lawyer Priest Who Co-founded NOW, but That History Nearly Forgot, Nat'l Org. for Women (Oct. 24, 2016).

⁸¹ See Mary O. Eastwood, Constitutional Protection Against Sex Discrimination: An Informational Memorandum Prepared for the National Organization for Women (NOW) Regarding the Equal Rights Amendment and Similar Proposals (Nov. 1967), in *How and Why Was Feminist Legal Strategy Transformed, 1960–1973?* Doc. 15 (Serena Mayeri ed., 2007).

⁸² *Id.* at 8.

⁸³ *Id.*

⁸⁴ Pauli Murray, Memorandum from Pauli Murray to ACLU Equality Committee 2 (Mar. 30, 1970), in *How and Why Was Feminist Legal Strategy Transformed, 1960–1973?* Doc. 16 (Serena Mayeri ed., 2007).

⁸⁵ See *id.* at 3.

⁸⁶ Serena Mayeri, Constitutional Choices: Legal Feminism and the Historical Dynamics of Change, 92 *Calif. L. Rev.* 755, 798 & n.203 (2004).

months before she came out in support of the ERA, she wrote to another friend, “I know exactly how the Black Panthers feel, ignored[,] passed over, segregated (intellectually at least), and frustrated until they are ready to kill.”⁸⁷ If a conservative court was reluctant to take an expansive view of the Fourteenth Amendment, the creation of a clear legislative history embracing that expansive view for the ERA could require the courts to enforce women’s equal status. Ultimately, Murray believed that civil rights for Blacks and women were “indivisible”; she warned the ACLU against giving “the impression that it is preoccupied with the demands of Blacks, but opposes the demands of women.”⁸⁸ Within months, Murray submitted her ERA statement to the Senate Judiciary Committee, inserting an ambitious, intersectional vision of the ERA into the Amendment’s legislative history.

IV. LEGITIMIZING EQUAL POWER IN THE TWENTY-FIRST CENTURY

Pauli Murray’s account of why the ERA was necessary (in addition to the Fifth and Fourteenth Amendments) focused on changing power dynamics, beyond changing legal doctrine. An ERA adopted to undo a dangerous imbalance of power could help resolve ongoing conflicts about the constitutionality of affirmative action for women and other groups that have been excluded from power. Since 1978, the Supreme Court has interpreted the Equal Protection Clause of the Fifth and Fourteenth Amendments as constraining, rather than requiring, affirmative action.⁸⁹ Even when the Court has allowed affirmative action programs to survive, it scrutinizes race-conscious action as a potential threat to equal protection that must be overcome;⁹⁰ it does not begin with recognizing unequal power as the starting point that must be overcome, whether by race-conscious action or not.

In 2018, the California legislature adopted a new law in an effort to tip the dangerous gendered imbalance of power in corporations. The 2018

⁸⁷ *Id.* at 798 & n.202.

⁸⁸ Memorandum from Pauli Murray to ACLU Equality Committee, *supra* note 84, at 3.

⁸⁹ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490–91 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995); *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003); *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007); *Fisher v. Univ. of Tex.*, 570 U.S. 297, 307 (2013).

⁹⁰ *Johnson v. Transp. Agency*, 480 U.S. 616, 642 (1987); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 564–65 (1990); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Fisher*, 570 U.S. at 307.

law took a modest step towards reducing gender-unequal power by requiring all corporations registered to do business in California to elect at least one woman to their board of directors, essentially prohibiting corporate boards that consisted exclusively of men.⁹¹ Boards with six or more members must have at least three women, boards with five members must have at least two, and boards with four members or fewer must have at least one woman.⁹²

Imbalance of power is dangerous because it slides easily into abuse of power. The #MeToo movement brought that dynamic into clearer focus as Hollywood power-broker Harvey Weinstein was finally exposed for his decades of abusing women sexually.⁹³ The California law followed over a decade of laws enacted in several European countries requiring gender balance on corporate boards of directors.⁹⁴ Since 2003, a statute in Norway has required publicly traded companies to have gender-balanced boards of directors.⁹⁵ Boards may not have more than sixty percent male or female directors.⁹⁶ This formulation—requiring boards to select women for at least forty percent of its board positions—was adopted in France as well, following constitutional conflicts over similarly framed laws applying to political parties' candidates for elected office.⁹⁷ In

⁹¹ See Cal. Corp. Code § 301.3 (West 2020).

⁹² See *id.*

⁹³ See Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid off Sexual Harassment Accusers for Decades*, N.Y. Times (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/YA4R-PTZ7>].

⁹⁴ For analysis of the comparative constitutional issues raised by these quotas, see Julie C. Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards*, 10 I*CON 449 (2012); Julie C. Suk, *Gender Quotas After the End of Men*, 93 B.U. L. Rev. 1123 (2013); Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 Yale J.L. & Feminism 381 (2017) [hereinafter Suk, *An Equal Rights Amendment for the Twenty-First Century*].

⁹⁵ See Lov 19. desember 2003 nr. 120 om endringer i lov 13. juni 1997 nr. 44 om aksjeselskaper, lov 13. juni 1997 nr. 45 om allmennaksjeselskaper og i enkelte andre lover (likestilling i styret i statsaksjeselskaper, statsforetak, allmennaksjeselskaper mv.) [Act No. 120 of December 19, 2003 Amending Act No. 44 of June 13, 1997 Relating to Limited Liability Companies, Act No. 45 of June 13, 1997 Relating to Public Limited Companies, and Certain Other Acts], Norsk Lovtidend [Official Gazette of Norway], Part I, No. 17-2003, Jan. 13, 2004, p. 2678.

⁹⁶ See *id.*

⁹⁷ See Loi 2000-493 du 6 juin 2000 de favoriser l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives [Law 2000-493 of June 6, 2000 on Tending To Promote Equal Access of Women and Men to Electoral Mandates and Elective Functions], Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 7, 2000, p. 8650. This formula was also used in the 2010 statute requiring gender balance on corporate boards. Loi 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et

France, as in Germany, Italy, and Belgium, constitutional amendments adopted in the 1990s and early 2000s clarified the legitimacy of these gender balance laws for leadership positions in the political and economic spheres.⁹⁸ In France, for instance, a 2008 amendment to the French Constitution reads, “The law shall promote the equal access by women and men to the electoral mandate and to positions of social and professional responsibility.”⁹⁹ That amendment led to the adoption of additional laws requiring gender balance in leadership positions in various institutions, including corporate boards¹⁰⁰ and senior government positions.¹⁰¹

It appears that the French constitutional amendment was effective in overcoming women’s underrepresentation, at least in some domains. The city of Paris was recently fined \$110,000 after mayor Anne Hidalgo, the first woman to be elected to the position, appointed women to more than sixty percent of senior staff positions in 2018.¹⁰² After the long history of women’s underrepresentation was overcome, the legislature amended the quota law applicable to senior government positions in 2019 to eliminate fines, as long as overall gender balance is respected.¹⁰³ It went into effect

des hommes au sein des conseils d’administration et de surveillance et à l’égalité professionnelle [Law 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Administrative and Supervisory Boards and Professional Equality], *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Jan. 28, 2011.

⁹⁸ See Grundgesetz [GG] [Basic Law], art. 3, § 2 (2019), translation at http://www.gesetze-im-internet.de/englisch_gg/index.html; 1958 Const. art. 1 (Fr.); see also Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century*, supra note 94, at 405 (highlighting the use of statutory provisions and constitutional amendments across the globe to combat inequality).

⁹⁹ 1958 Const. art. 1 (Fr.).

¹⁰⁰ See Loi 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d’administration et de surveillance et à l’égalité professionnelle [Law 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Administrative and Supervisory Boards and Professional Equality], *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Jan. 28, 2011.

¹⁰¹ See Loi 2012-347 du 12 mars 2012 relative à l’accès à l’emploi titulaire et à l’amélioration des conditions d’emploi des agents contractuels dans la fonction publique, à la lutte contre les discriminations et portant diverses dispositions relatives à la fonction publique [Law 2012-347 of March 12, 2012 Relating to Access to Permanent Employment and the Improvement of Employment Conditions for Contract Staff in the Public Service, the Fight Against Discrimination and Laying Down Various Provisions Relating to the Public Service], *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Mar. 13, 2012.

¹⁰² See Aurelien Breeden, *City of Paris Fined Nearly \$110,000 for Appointing Too Many Women*, *N.Y. Times* (Dec. 22, 2020), <https://www.nytimes.com/2020/12/16/world/europe/paris-too-many-women-fine.html> [<https://perma.cc/Q4EH-7JZH>].

¹⁰³ See id.

in 2020. In the United States, however, the underrepresentation of women and minorities remains a problem that some states are beginning to address through legislative quotas.

In California, before the ink was dry on the 2018 corporate board law, legislators worried that the law would be challenged on federal or state Equal Protection grounds because it employs a gender classification, which might not survive intermediate scrutiny under existing Equal Protection doctrine.¹⁰⁴ Within months of the law's passage, two lawsuits were brought to challenge the constitutionality of the California law. In the first lawsuit, the conservative thinktank Judicial Watch is representing California taxpayers who would like the law struck down on the grounds that it imposes a "quota system for female representation on corporate boards" that employs "gender classifications,"¹⁰⁵ in violation of the California Constitution's equal protection guarantee. As the complaint points out, California courts have endorsed "strict scrutiny" for gender classifications under the California Equal Protection Clause.¹⁰⁶ Applying that test, the complaint argues that California cannot make the difficult showing required by "strict scrutiny."¹⁰⁷ To meet that legal standard, California would have to identify a compelling state interest and show that treating the sexes differently is the only way to protect that interest.

Another lawsuit challenging the law was filed in November 2019 in a federal court by a shareholder of a California corporation, represented by the Pacific Legal Foundation, the same organization that has supported lawsuits challenging race-conscious affirmative action at many universities.¹⁰⁸ That lawsuit alleges that the California law "is a sex-based classification that violates the Fourteenth Amendment" under the Equal Protection Clause.¹⁰⁹ The district court dismissed the suit, holding that a shareholder who was compelled to vote for a woman candidate for the board of directors lacked standing to challenge the statute.¹¹⁰ Nonetheless,

¹⁰⁴ See Hearing on S.B. 826 Before the Assemb. Comm. on Judiciary, 2018 Leg. 6–7 (Cal. 2018) (analysis prepared by Thomas Clark and Sandra Nakagawa).

¹⁰⁵ Complaint for Declaratory and Injunctive Relief at 4, *Crest v. Padilla*, No. 19STCV27561 (Cal. Sup. Ct. Aug. 6, 2019).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See Complaint for Declaratory and Injunctive Relief, *Meland v. Padilla*, 2020 WL 1911545 (E.D. Cal. Apr. 20, 2020) (No. 2:19-cv-02288).

¹⁰⁹ *Id.* at 5–6.

¹¹⁰ See *Meland v. Padilla*, No. 2:19-cv-02288, 2020 WL 1911545, at *5 (E.D. Cal. Apr. 20, 2020).

the Pacific Legal Foundation has appealed the standing-based dismissal to the Ninth Circuit,¹¹¹ where several amicus briefs jump to the merits and argue that a “Woman Quota” to overcome women’s underrepresentation in corporate power violates the Fourteenth Amendment’s Equal Protection Clause.¹¹² Eventually, whether in this lawsuit or another one with a proper litigant, courts will confront the issue of whether a quota to end a severe imbalance of power between women and men violates the existing constitutional guarantee of equal protection. Meanwhile, the California legislature adopted another law in September 2020 requiring corporate boards to have at least one director from an underrepresented community, defined as “an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.”¹¹³

Pauli Murray’s “equal power” theory of the Equal Rights Amendment could resolve any ambiguity about the constitutional status of gender-based affirmative action in the face of serious power imbalances. The equal power theory of the ERA evolved from a decade-long quest for a constitutional framework that would abolish sex distinctions in the law that perpetuated women’s inferior status, while preserving those necessary to achieve real equality. Murray’s earlier writings on “Jane Crow,” responding to African American women’s experiences from enslavement to domestic work to breadwinning motherhood, elucidated a vision of constitutional equality that concerned itself, first and foremost, with equal status and equal power, rather than equal treatment in all circumstances.¹¹⁴

If added to the Constitution, the ERA could legitimize legislative measures to overcome women’s underrepresentation in positions of power. Such a conclusion is consistent with Murray’s broad and ambitious vision of the ERA, which recognized the compatibility of constitutional equality with maternity benefits and valued childcare and household work. Unlike the Equal Protection Clause, the ERA always

¹¹¹ See, e.g., Appellant’s Opening Brief, *Meland v. Padilla*, No. 20-15762 (9th Cir. July 22, 2020).

¹¹² See, e.g., Brief of Linda Chavez as Amicus Curiae in Support of the Appellant at 8, *Meland v. Padilla*, No. 20-15762 (9th Cir. July 29, 2020); Brief of Amicus Curiae Independent Women’s Law Center at 3, *Meland v. Padilla*, No. 20-15762 (9th Cir. July 30, 2020).

¹¹³ 2020 Cal. Stat. ch. 316, at 92.

¹¹⁴ See Murray & Eastwood, *supra* note 69, at 239.

included the reduction of women's disadvantage. Reasoning from the experience of Black women, the ERA would challenge "a society in dangerous imbalance."¹¹⁵ Because Black women "historically have suffered the most violent invasions of that personal dignity and privacy which the law seeks to protect,"¹¹⁶ their perspective opens up a path for remaking constitutional equality through the critique of power, rather than through the critique of stereotype alone. Today, legislative agendas to overcome women's underrepresentation, to reduce maternal mortality (especially among Black women), to accommodate the needs of pregnant workers on the job, and to lift women out of the low wages that render them vulnerable to sexual abuse and harassment could benefit from the political legitimacy of a constitutional anchor, as well as from the legal immunity should such measures be challenged on other constitutional grounds.

V. CONCLUSION

Some proponents of constitutionalizing gender equality in the twenty-first century have suggested that the 1970s ERA should be abandoned to make way for the introduction of a newly drafted ERA. A few months before her death, Justice Ruth Bader Ginsburg publicly stated that, while the ERA was the Amendment that she most wanted to add to the Constitution, she wished for a "new beginning" for the Amendment, citing the controversy over late ratifications and rescissions in some states of the ERA that Congress adopted in 1972.¹¹⁷ In December 2019, law professors Catharine MacKinnon and Kimberlé Crenshaw proposed in the Yale Law Journal Forum a new equality amendment that would explicitly articulate, in its text, the Amendment's authorization of affirmative action and inclusion of intersectional concerns.¹¹⁸

When any new amendment is proposed, it is fair to assume that its legitimacy would depend on it clearing the process articulated in Article

¹¹⁵ Murray ERA testimony, *supra* note 11, at 433.

¹¹⁶ *Id.* at 428.

¹¹⁷ Justice Ginsburg recently said, "I would like to see a new beginning. I'd like it to start over," because "a number of States have withdrawn their ratification [of the ERA], so if you count a latecomer [like Virginia] on the plus side, how can you disregard States that said, 'We've changed our minds?'" Interview with Supreme Court Justice Ruth Bader Ginsburg, *Searching for Equality: The 19th Amendment and Beyond*, *Geo. L.*, at 43:55 (Feb. 10, 2020), bit.ly/2tUgeUw.

¹¹⁸ See Catharine A. MacKinnon & Kimberlé W. Crenshaw, *Reconstituting the Future: An Equality Amendment*, 129 *Yale L.J.F.* 343, 358–63 (2019).

V of the Constitution, which would mean adoption by two-thirds of both houses of Congress and ratification by thirty-eight states. In these times of polarization, it is difficult to imagine any proposal meeting these requirements. Assuming that the 1972 ERA, now ratified by thirty-eight states, can be legitimized through congressional action to remove the ratification deadline (a contested matter that is the subject of other writings by this author),¹¹⁹ this Essay shows how even the 1970s ERA could respond to the concerns of unequal power and intersectionality that have animated the Amendment's twenty-first-century revival. A close attention to the ERA's deep legislative history reveals a framer in Pauli Murray, who was way ahead of her time. She envisioned a constitutional foundation for the public policies to reverse centuries of women's exclusion from power, which are now finally being enacted. When challenged under nineteenth- and twentieth-century ideas of equal protection, a transgenerational ERA completed in the twenty-first century could provide a crucial shield.

¹¹⁹ See Brief of Amici Curiae Constitutional Law Professors Erwin Chemerinsky, Noah Feldman, Reva Siegel, and Julie C. Suk, in Support of Neither Party, *Virginia v. Ferriero*, No. 1:20-cv-00242 (D.D.C. June 29, 2020); Julie C. Suk, Who Decides the Future of the Equal Rights Amendment? Take Care (July 6, 2020), https://takecareblog.com/blog/who-decides-the-future-of-the-equal-rights-amendment?fbclid=IwAR2BAv6mdicXnIAqByoRfMBqkMJ-Q9mlz-waJ17Ig9O8UPL7c8Qj_y-gODts [<https://perma.cc/BE3D-99JG>]; Julie Suk, In the Battle for the ERA, *Global Constitutionalism and State Sovereignty*, Just Sec. (Aug. 12, 2020), <https://www.justsecurity.org/71974/in-the-battle-for-the-era-global-constitutionalism-and-state-sovereignty/> [<https://perma.cc/9K39-C9E8>].