WLJ WOMEN LAWYERS JOURNAL
2021
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2020: Turning Inwards to Ignite Change

LEGACY

Civil Rights and the Legal Profession by Thelma Furry originally printed in the WLJ in 1948

OUR VOICE

The 2020 Selma Moidel Winning Essay

Facing COVID-19 With Emotional Intelligence: A "Through Her Eyes Perspective"

MEETING THE MOMENT

NAWL's Statement and Call to Action in Response to the Murder of George Floyd

NAWL Supreme Court Committee Statement of Qualification: Judge Amy C. Barrett

Table of Contents

LEGACY

MEETING THE MOMENT

OUR VOICE

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2021
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ABOUT WOMEN LAWYERS JOURNAL

NAWL BOARD LIAISON
Liz Levy

EXECUTIVE EDITOR
Carolyn Rashby

EDITORIAL POLICY
The Women Lawyers Journal (WLJ) is published for the National Association of Women Lawyers (NAWL) members as a forum for the exchange of ideas and information. Views expressed in articles are those of the authors and do not necessarily reflect NAWL's policies or official positions. Publication of an opinion is not an endorsement by NAWL. Articles about current legal issues of interest to women lawyers are accepted and may be edited based on the judgment of the editor. Editorial decisions are based upon potential interest to readers, timelines, goals and objectives of NAWL as well as the quality of the writing. The WLJ also accepts book reviews related to the practice of law. We reserve the right to edit all submissions.

Send submissions via email to iretamoza@nawl.org

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The mission of the National Association of Women Lawyers is to provide leadership, a collective voice, and essential resources to advance women in the legal profession and advocate for the equality of women under the law. Since 1899, NAWL has been empowering women in the legal profession, cultivating a diverse membership dedicated to equality, mutual support, and collective success.

Benefits of Membership

• Access to career development and continuing legal education programs at reduced member rates. Programs include regional and national seminars designed to provide women lawyers with the skills and resources needed for long-term careers, including signature events like our Annual Meeting & Awards Luncheon, Mid-Year Meeting & Awards Luncheon, and General Counsel Institute.

• Opportunities to build a national network via programs that bring women together, both nationally and internationally, opening doors to an array of business development opportunities.

• Leadership development through NAWL committees, affiliations, and strategic partnerships. There are ample opportunities for members to develop and exercise leadership skills.

• Advocacy via NAWL's Amicus Committee, which reviews requests for participation as amicus curiae in cases of interest to NAWL members. A sampling of recent issues includes enforcement of Title IX, employment discrimination, women's health, and domestic violence issues.

• Community outreach through Nights of Giving. Throughout each year NAWL hosts a series of philanthropic networking events across the country to support organizations whose mission is to empower women and children.

• Continued learning with the Women Lawyers Journal®. This national publication provides a forum for the exchange of information and presentation of articles about women in the law and society.

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EDITOR'S LETTER

Written by WLJ Executive Editor, Carolyn Rashby. Carolyn Rashby serves as counsel for Covington & Burling LLP in San Francisco, CA.

2020 was perhaps the most challenging and tumultuous year in modern history. The COVID-19 pandemic, police brutality and violence, and other unsettling and terrifying events illuminated issues of racial, social, and political injustice in the United States. This year, however, also provided us with an opportunity to pause and have honest and sometimes difficult dialogues about our past and how to ignite change and the role that women and NAWL can play in shaping a more just future. Each article in this issue of the Women Lawyers Journal was selected because it provides a glimpse into the dialogue on Legacy, Our Voice, and Meeting the Moment-- and our experiences of 2020.

Legacy

We reprint two articles from past Women Lawyers Journals: *President Wilson's 1918 Address to the Senate of the United States, Asking for the Passage of the Federal Woman Suffrage Amendment* (1918); and *Civil Rights & The Legal Profession* (1948). These pieces showcase NAWL's legacy and remind us that throughout our nation's history women have risen to meet the moment even before they had a seat at the table.

Our Voice

We feature essays and articles that reflect* the thoughts, conversations, and testimonies of our Editorial Board and NAWL members, and leaders: *Facing COVID-19 With Emotional Intelligence: A "Through Her Eyes Perspective"*; and NAWL's Past President Kristin Sostowski's Outgoing Remarks; and the 2020 Selma Moidel Winning Essay, *Equality for Whom? The Future of the Equal Rights Amendment.*

These compositions provide us with deep reflections, hope, and a collective voice.

Meeting the Moment

The COVID-19 pandemic has illuminated and intensified systemic social inequities in the United States. As people took to the streets all across the country in protest of racial and social injustice, NAWL looked inward to have challenging discussions on racial and social inequity, and is charting a path to lead against these inequities now and into the future. We invite you into this conversation, and in this issue, we've collected for you NAWL's published statements in reaction to the events of 2020: *NAWL's Resolution in Support of Racial Equity & Justice*, *NAWL Stands with NNABA & Calls for the Inclusion of Native Americans in Studies of the Legal Profession*, *NAWL's Statement and Call to Action in Response to the Murder of George Floyd*, *NAWL's Supreme Court Committee Statement of Qualification: Judge Amy C. Barrett.*

As we enter 2021, we know that challenging days still lie ahead. NAWL aims to make a bigger table so that together we can amplify our voices and perspectives and-- as women have done throughout history-- work for meaningful and lasting change.

Hogan Lovells

Hogan Lovells is proud to support the National Association of Women Lawyers.

Resolution in Support of Racial Equity and Justice

THE FOLLOWING RESOLUTION WAS APPROVED BY THE BOARD OF DIRECTORS OF THE NATIONAL ASSOCIATION OF WOMEN LAWYERS ON THE 6TH DAY OF OCTOBER, 2020.

WHEREAS, the mission of the National Association of Women Lawyers is to provide leadership, a collective voice, and essential resources to advance women in the legal profession and advocate for the equality of women under the law;

WHEREAS, the National Association of Women Lawyers, as an organization that is over one hundred twenty years old, recognizes systemic racism and injustice have long persisted in our country;

WHEREAS, the National Association of Women Lawyers acknowledges that this country is at an inflection point from which we can and must collectively move forward in recognition that an injustice against one is an affront to all and we must make our organizational commitment to racial equity and justice clear, intentional and explicit;

WHEREAS, the National Association of Women Lawyers acknowledges that creating meaningful change starts within our own organization, by amplifying voices in our community that are unrepresented or silenced by the vestiges of racism and prejudice and implementing an internal accountability system that engages all of the leaders within our organization to work for justice and equality within the organization and beyond;

NOW, THEREFORE, BE IT RESOLVED, the National Association of Women Lawyers commits to actively oppose structural racism and combat the impact of systematic racism by reiterating and reinforcing NAWL's commitment to racial equity and justice as an active priority within our leadership structure, research and data collection, program content and speakers, organizational policies and communications, and the overall mission of our organization;

FURTHER, BE IT RESOLVED, that as the National Association of Women Lawyers continues to restructure with meaningful change within, we will encourage our organizational and corporate partners to also actively prioritize racial equity and justice as a part of their internal structures in order to effect change within the legal profession and beyond;

FURTHER, BE IT RESOLVED, the National Association of Women Lawyers stands steadfast in our commitment to foster an inclusive environment where every member is welcomed, respected, and has a seat at the table;

FINALLY, BE IT FINALLY RESOLVED, the National Association of Women Lawyers recognizes that our commitment to racial equity and justice requires ongoing reflection and continuous learning, and commits to an ever-evolving approach as we encounter new perspectives and gain new insights to effect real and sustainable equality and change in the study and practice of law.

We are proud to support the

National Association of Women Lawyers

Outgoing President Remarks

Kristin Sostowski's Outgoing President Remarks Made During NAWL's 2020 Virtual Annual Meeting

"Welcome to NAWL's first virtual Annual Meeting. My name is Kristin Sostowski and it has been the honor and privilege of my career to serve as NAWL's president for 2019 to 2020. NAWL is now over one hundred and twenty years old. When I started my presidency a year ago, I was very focused on NAWL's history. Having the opportunity to lead an organization that has endured for over a century, I do not think you can help but focus to a certain extent on the past. Particularly, this year as 2020 marks the hundredth anniversary of the 19th Amendment.

I have always had this fascination with history though, I was born in 1975 and as a teenager, I was the girl who thought I'd been born at the wrong time, the wrong decade-- that to have an impact in the world you need to be alive in the 1960s. As I became involved in activism and then entered law school, I realized that I had not missed my window of time because of course the struggle to secure civil rights and social justice never ended and lawyers will always play an important role in these efforts.

Although we all knew 2020 would be a pivotal year, the experience of the last six months has been unlike anything we could have imagined. For NAWL, this has been an important period for strategic planning.

Pictures: Top - NAWL Conference, 1928. Middle - Kristin Sostowski speaking at NAWL Annual Meeting, 2019. Bottom - NAWL Annual Meeting, 1940

For reflecting on who we are as an organization and how we carry out our dual mission: to advance women in the legal profession and women's rights under the law. I'm so proud of what we've accomplished together. More than any one particular event, what stands out in my mind from this past year is the resilience and agility that I have seen from our committees, our staff, and our board.

Pictures: Left- Annual Meeting, 2019. Middle - Virtual Mid-Year Meeting Graphic, 2019. Right - Current NAWL President, Karen Morris, speaking at GCI15.

I think back to March, as stay-at-home orders started in response to COVID-19, we moved our entire Mid-Year Meeting to a virtual format in a matter of days and then continued weekly virtual programming as NAWL's community began to work remotely. I'm extremely grateful to everyone who made this programming come to life, especially NAWL's incredible staff Karen Richardson, Rachel Diamond, Isabell Retamoza, Helena Rogers, Asha Smith, and Ashley Urisman.

In addition to continuing NAWL's programming, we devoted this year to NAWL's strategic plans and vision for the future which is never an easy process. The openness and candor I've experienced in these important and sometimes challenging conversations is a testament to the respect and care our members feel for NAWL and for one another.

As I end my term as NAWL's President, I'm proud to be passing the baton to my dear friend, Karen Morris. Over the years, we have worked together on NAWL's Board, I've learned so much from Karen about leadership, and strategy and under Karen's thoughtful leadership, I know NAWL will continue to grapple with the legacy we are building for the future and what actions we will take to get there.

Before I can conclude, I want to take you back to one of our virtual programs this Spring. Our speakers during #LawyersWellBeingWeek discussed the concept of post-traumatic growth. They explained that post-traumatic growth-- different from resilience-- is positive change experienced as a result of adversity and challenges that results in a higher level of functioning. Our speakers focused on the personal growth experienced by individuals who have navigated traumatic challenges – but as I've reflected on this concept over the last several months, I believe it may apply equally to organizations.

My hope for NAWL's future is that as an association and as women attorneys, we view 2020 as an inflection point from which we go beyond resilience and seek this positive growth to be more diverse, inclusive, anti-racist, innovative, risk-taking, and action-oriented as we continue to pursue NAWL's vision for both our profession and our legal system.

A quotation from Rosa Parks has resonated with me during this time, she said, ***"to bring about change we must not be afraid to take the first step. We will fail when we fail to try."***

This year has been filled with so much adversity and challenge but I continue to feel grateful and optimistic. Beyond grateful for NAWL's community that has given me so much and optimistic that when we look back when this chapter in our history is written, we will view 2020 as the beginning of new growth for NAWL as an organization because together we committed to try. To do that NAWL needs all of you and your continued commitment. So thank you NAWL family until we can be together in person again, please be safe and well."

Picture: NAWL Suffragists, 1915.

President Wilson's 1918 Address to the Senate of the United States, *Asking for the Passage of the Federal Woman Suffrage Amendment*

"I propose it as I would propose to admit soldiers to the suffrage, the men fighting in the field for our liberties and the liberties of the world were they excluded" (WLJ, 1918). "President Wilson's Address to the Senate of the United States, Asking for the Passage of the Federal Woman Suffrage Amendment" was published on the front page of the Women Lawyers' Journal in October 1918. When the National Association of Women Lawyers was founded in 1899 as the Women Lawyer's Club, suffrage and the right to vote were at the forefront of our founders' minds and work.

As we recognize the year 2020, more than a hundred years later, as another inflection point in the United States, individual liberty and human rights remain at the forefront of our minds and work as we recognize and advocate for them. President Wilson's address was selected from the Women Lawyers' Journal archive to be reprinted in this journal issue in light of the current social and economic unrest. This is why we urged all in November, to vote like your rights and liberties are at stake--because they were. And vote we did! Voting for yourself, for your family, and for all those still without a voice in the United States, our government and our nation depend on it. In the spirit of President Wilson's address, *"Without their counseling's, we shall be only half wise,"* for without the right to vote and the protection of basic civil liberties held by all of the people of the United States, *'we shall only be half wise"* (WLJ, 1918).

Gentlemen of the Senate:

The unusual circumstances of a world war in which we stand and are judged in the view not only of our own people and our own consciences but also in the view of all nations and peoples will, I hope, justify in your thought, as it does in mine, the message I have come to bring you.

I regard the concurrence of the Senate in the constitutional amendment proposing, the extension of the suffrage to, women as vitally essential to the successful prosecution of the great war of, humanity in which we are engaged. I have come to urge upon you the considerations which, have led me to that conclusion. It is not only my privilege it is also my duty to apprise you of every circumstance and element involved in this, momentous struggle which seems to me to affect its very processes and its outcome. It is my duty to win the war and to ask you to remove every obstacle that stands in, the way of winning it.

I had assumed that the Senate would concur in the amendment because no disputable principle is involved, but only a question of the method by which the suffrage is, to be extended to women. There is and can be no party issue involved in it. Both of our great national parties are pledged, explicitly pledged, to equality of suffrage for the women of the country.

Neither party, therefore, it seems to me, can justify hesitation as to the method of obtaining it, can rightfully hesitate to substitute federal initiative for state initiative, if the early adoption of, this measure to the successful prosecution of the war and if the method of state action proposed in the party platforms of I9I6 is impracticable, within any reasonable length of time, if practical at all.

And its adoption is, in my judgment, clearly necessary to the successful prosecution of the war and the successful realization of the objects from which the, war is being fought.

That judgment I take the liberty of urging upon you, with solemn earnest for reasons which I shall state very frankly and which I shall hope will seem as conclusive to you as they seem to me.

This is a people's war and the people's thinking constitutes its atmosphere and morale, not the predilections of the drawing room or the political considerations of the caucus. If we be indeed Democrats and wish to lead the world to democracy, we can ask other peoples to accept in proof of our sincerity and our ability to lead them whither they wish to be led nothing less persuasive and convincing than our actions.

Our professions will not suffice. Verification must be for, forthcoming when verification is asked for, and in this case, certification is asked for--asked for in this particular matter. You ask by whom? Not through diplomatic channels. Not by foreign ministers. Not by the intimations of parliaments. It is asked for, by the anxious, expectant, suffering peoples with whom, we are dealing and who are willing to put their destinies in some measure in our hands, if they are sure that we wish the same things that they do.

I do not speak by conjecture. It is not alone the voices of statesmen and of newspapers that reach me, and the voices of foolish and intemperate agitators do not reach me at all. Through many, many channels I have been made aware of what the plain, struggling workaday folk are thinking upon whom the chief terror and suffering of this, tragedy falls.

They are looking to the great, powerful, famous democracy of the west to lead them to the new day for which they have so long waited; and they think, in their logical simplicity, that democracy means that women shall play their part in affairs alongside men and upon an equal footing with them.

If we reject measures like this in ignorant defiance of what a new age has brought forth, of what they have seen but we have not, they will cease to believe in us, they will cease to follow or to trust us.

They have seen their own governments accept this interpretation of democracy seen old governments like that of Great Britain, which did not profess to be democratic, promise readily and, as of course, this justice to women, though they had before refused it; the strange revelations of this war having made many things new and plain to governments as well as to peoples.

Are we alone to refuse to learn, the lesson? Are we alone to ask and take the utmost that our women can give-sacrifice and sacrifice of every kind-- and still say we do not see what title that gives them to stand by our sides in the guidance of the affairs of their nation and ours?

We have made partners of the women in this war. Shall we admit them only to a partnership of suffering and sacrifice and toil and not to a partnership of privilege and right?

This war could not have been fought, either by the other nations engaged or by America, if it had not been for the services of the women----service rendered in every sphere-- not merely in the fields of efforts in which, we have been accustomed to see them work, but wherever men have worked and upon the very skirts and edges of the battle itself.

We shall not only be distrusted but shall deserve to be distrusted if we do not enfranchise them with the fullest possible enfranchisement, as it is now certain that the other great free nations will enfranchise them. We cannot isolate our thought and action in such a matter from the thought of the rest of the world. We must either conform or deliberately reject what they propose and resign the leadership of liberal minds to others.

The women of America are too noble and intelligent and too devoted to be slackers, whether you give or withhold this thing that is mere justice. But I know the magic it will work in their thoughts and spirits if you give it to them.

> *I propose it as I, would propose to admit soldiers to the suffrage, the men fighting in, the field for our liberties and the liberties of the world were they excluded. The tasks of the women lie at the very heart of the war, and I know how much stronger that heart will beat if you do this just thing and show our women that you, trust them as much as you in fact and of necessity depend upon them.*

Have I said that the passage of this amendment is a vitally necessary war measure, and do you need further proof? Do you stand in need of the trust of other peoples and of the trust of our own women? Is that trust an asset, or is it not?

I tell you plainly, as the commander-in-chief of our armies and of the gallant men in our fleets, as the present spokesman of this people in our dealings with the men and women throughout the world who are now our partners, as the responsible head of a great government which stands and is questioned day by day as to its purposes, its principles, its hopes, whether they be serviceable to men everywhere or only to itself, and who must himself answer these questions, or be shamed as, the guide and director of forces caught in the grip of, war and by, the same token in need of every material and spiritual resource this great nation possesses-- I tell you plainly that this measure which I urge upon you is vital to the winning of the war and to the energies alike of preparation and of battle.

And not, to the winning of the war only. It is vital to the right solution of the great problems which we must settle, and settle immediately when the war is over. We shall need them in our vision of affairs, as we have never needed them before, the sympathy and insight and clear moral instinct of the women of the world.

The problems of that time will strike at the roots of many things that we have not hitherto questioned, and I for one believe that our safety in those questioning days, as well as our comprehension of matters that touch society to the quick, will depend upon the direct and authoritative participation of women in our counsels.

We shall need their moral sense to preserve what is right and fine and worthy in our system or life as well as to discover just what it is that ought to be purified and reformed.

> *Without their counseling's, we shall be only half wise.*

That is my case. This is my appeal. Many may deny it's validity if they choose, but no one can brush aside or answer the arguments upon which it is based. The executive tasks of this war rests upon me. I ask that you lighten them and place in my hands instruments, spiritual instruments, which I do not now possess, which I sorely need, and which I have daily to apologize for not being able to employ.

WOMEN LAWYERS' JOURNAL

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VOL. 8. No. 1. NEW YORK CITY, OCTOBER, 1918. 15 Cents a Copy: $1.00 a Year

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"Gentlemen of the Senate:

"The unusual circumstances of a world war in which we stand and are judged in the view not only of our own people and our own consciences, but also in the view of all nations and peoples will, I hope, justify in your thought, as it does in mine, the message I have come to bring you.

"I regard the concurrence of the Senate in the constitutional amendment proposing the extension of the suffrage to women as vitally essential to the successful prosecution of the great war of humanity in which we are engaged. I have come to urge upon you the considerations which have led me to that conclusion. It is not only my privilege, it is also my duty to apprise you of every circumstance and element involved in this momentous struggle which seems to me to affect its very processes and its outcome. It is my duty to win the war and to ask you to remove every obstacle that stands in the way of winning it.

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"I propose it as I would propose to admit soldiers to the suffrage, the men fighting in the field for our liberties and the liberties of the world were they excluded. The tasks of the women lie at the very heart of the war, and I know how much stronger that heart will beat if you do this just thing and show our women that you trust them as much as you in fact and of necessity depend upon them.

"Have I said that the passage of this amendment is a vitally necessary war measure, and do you need further proof? Do you stand in need of the trust of other peoples and of the trust of our own women? Is that trust an asset, or is it not?

"I tell you plainly, as the commander-in-chief of our armies and of the gallant men in our fleets, as the present spokesman of this people in our dealings with the men and women throughout the world who are now our partners, as the responsible head of a great government which stands

Original Printing in Women Lawyers Journal, 1918.

NATIONAL ASSOCIATION OF WOMEN LAWYERS SUPREME COURT COMMITTEE STATEMENT OF QUALIFICATION: JUDGE AMY C. BARRETT

OCTOBER 10, 2020

The National Association of Women Lawyers ("NAWL") [1] Committee for the Evaluation of Supreme Court Nominees ("Committee") has completed an extensive review of the qualifications and background of the Honorable Amy C. Barrett, the Presidential nominee for the United States Supreme Court to fill the vacancy created by the death of Justice Ruth Bader Ginsburg.

Consistent with NAWL's mission to advocate on behalf of women's legal rights, NAWL concludes Judge Barrett is "Not Qualified" because she has failed to demonstrate the requisite commitment to women's rights or issues that have a special impact on women.[2]

Specifically, NAWL is concerned that (i) Judge Barrett's strict judicial philosophy of originalism is fundamentally at odds with a commitment to women's rights and (ii) Judge Barrett's stated personal views on reproductive rights will lead her to support further restrictions, if not elimination, of women's autonomy in their reproductive rights decisions.

1 Founded in 1899, NAWL is the nation's oldest professional organization devoted to the interests and progress of women lawyers and women's legal rights.

2 While we appreciate the President nominating a woman, the Nominee's gender identity does not demonstrate a *de facto* commitment to women's rights or issues that have a special impact on women.

Our Process

NAWL's Committee, which includes a distinguished array of law professors, appellate practitioners, and lawyers, founded its conclusion upon (i) a comprehensive review of Judge Barrett's publicly available writings and decisions and (ii) in-depth personal interviews by Committee members with key individuals having information regarding Judge Barrett, the various roles she has assumed during the course of her professional life, and her treatment of litigants, attorneys, employees, and colleagues, particularly those who are women.[3] Consistent with the stated mission of the Committee, our assessment focused on Judge Barrett's personal integrity, professional competence, judicial temperament, and "demonstrated commitment to women's rights or issues that have a special impact on women."[4] A nominee may meet one or several of the criteria but, in all cases, must meet the last category to be considered "Qualified" pursuant to the Committee's process. A copy of the Committee's Mission and Procedures and its previous statements about nominees to the United States Supreme Court may be found at www.nawl.org/SupremeCourtNominations.

An extensive review of almost 120 opinions, concurrences, and dissents written or joined by Judge Barrett, as well as articles and books she authored or coauthored, our interviews of several dozen litigants, former law clerks, former and current colleagues, and others who have interacted with Judge Barrett persuaded the Committee that Judge Barrett is "Not Qualified" because she has failed to demonstrate the requisite "commitment to women's rights or issues that have a special impact on women."[5]

Specifically, the Committee concluded from this research that (i) Judge Barrett's judicial philosophy of originalism is fundamentally at odds with a commitment to women's rights and (ii) Judge's Barrett's personal views on reproductive rights will lead her to support further restrictions on, if not the elimination of, women's autonomy in their reproductive rights decisions.

Judge Barrett's Judicial Philosophy is Incompatible with a Commitment to Women's Rights

Judge Barrett identifies herself as an originalist and has stated that Justice Scalia's jurisprudence is her jurisprudence.[6] According to Judge Barrett's writings, her judicial philosophy:

> *[M]aintains both that constitutional text means what it did at the time it was ratified and that this original public meaning is authoritative. This theory stands in contrast to those that treat the Constitution's meaning as susceptible to evolution over time. For an originalist, the meaning of the text is fixed so long as it is discoverable.[7]*

A judicial example of Judge Barrett's adherence to originalism is evidenced in her dissent in *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019), in which she delved into "founding-era" history to conclude that non-violent felons would have enjoyed Second Amendment rights at the founding and so they should do so today.[8]

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3 On September 29, 2020, NAWL sent Judge Barrett a letter advising her that the Committee would be evaluating her nomination "with an emphasis on laws and decisions regarding women's rights or that have a special impact on women," and inviting her to participate in an interview as part of the evaluation process. Judge Barrett did not respond to the Committee's request.

4 National Association of Women Lawyers Manual for the Committee for the Evaluation of Supreme Court Nominees is available at www.nawl.org/SupremeCourtNominations.

5 As stated in footnote 2, while we appreciate the President nominating a woman, the Nominee's gender identity does not demonstrate a *de facto* commitment to women's rights or issues that have a special impact on women.

6 In her remarks from the White House Rose Garden upon her nomination on September 26, 2020, Judge Barrett stated, "His judicial philosophy is my judicial philosophy," referring to her mentor, Justice Antonin Scalia. See also "Justice Scalia was the public face of modern originalism." Originalism and Stare Decisis at 1921 (2017).

7 Amy C. Barrett, Originalism and Stare Decisis, 92 Notre Dame L. Rev. 1921 (2017). Available at: https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4734&context=ndlr

8 See *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019) (Barrett, A., dissenting) (arguing that dispossession laws that bar convicted felons from obtaining licenses to carry firearms are unconstitutional). "Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons." "[I]f the challenged law regulates activity falling outside the scope of the right as originally understood, then 'the regulated activity is categorically unprotected.'" (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011).

This opinion demonstrates not only Judge Barrett's adherence to an originalist approach, but her tendency to frame the historical record in ways that favor one outcome over another.

There is no doubt that Judge Barrett believes originalism is the only correct Constitutional analysis in almost every case. The Committee has serious concerns that Judge Barrett's commitment to an originalist approach will interfere with her ability to uphold and apply core constitutional protections embraced by NAWL's mission, but which were not recognized at the time of our nation's founding, when women were deprived of the most basic rights and powers under the law.

The Amicus Brief of the ERA Coalition and Advocates in the Women's Movement in *Virginia v. Ferriero* [9] outlines the Framers' intentional exclusion of women:

> *When our Nation declared its independence and confirmed in 1776 that "all men are created equal," women were not included. A free married woman had no legal identity separate from her husband; she could not vote, make contracts, institute lawsuits, write a will, sell land, or keep her own wages [10] ... The denial of rights for women was no coincidence. Both law and culture at the time regarded women as inferior, weak, and in need of protection [11] .... Against this backdrop, the Framers did not regard women as part of the Constitution's "We the People," despite their use of what now appears to be a gender-neutral term. [12]*

In *U.S. v. Virginia*, [13] we see the application of originalist jurisprudence on women's rights in Justice Scalia's dissent. In addressing whether the refusal of the Virginia Military Institute to accept female candidates was constitutional, Justice Scalia said:

> *[I]t is my view that "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down." Rutan v. Republican Party of Ill., 497 U.S. 62, 95 (1990) (Scalia, J., dissenting).*

Given Judge Barrett's devotion to originalism and the jurisprudence of Justice Scalia, we are left to believe that her starting point for analyzing women's issues would be the same as Justice Scalia. *Stare decisis* is no safeguard against Judge Barrett's originalist philosophy. Judge Barrett has made clear that in her view, originalism trumps *stare decisis* writing:

> *I tend to agree with those who say that a justice's duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it.[14]*

She approvingly highlighted how Justice Scalia "repeatedly argued that the Court should overrule its cases holding that a woman has a substantive due process right to terminate her pregnancy."[15] Judge Barrett has all but stated that she will do the same, even in the face of almost 50 years of precedent.

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9 *Virginia v. Ferriero*, F.Supp.3d at 5-6. (June 2020)
10 See Mary Beth Norton, Liberty's Daughters: The Revolutionary Experience of American Women, 1750–1800, 46 (1980)
11 See Ruth Bader Ginsburg, Remarks on Women Becoming Part of the Constitution, 6 Law & Ineq. 17, 20 (1988); see also *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).
12 Contrast Amicus Br. of Eagle Forum at 17 (relying on what is apparently a post-King-James translation of the Bible as evidence that the 1776 phrase "'all men are created equal'" was meant to recognize the inherent equality of "all of humanity," despite undeniable evidence that the drafters of that phrase did not regard or treat women, Native Americans, or Black people as "equal" to White men in any meaningful sense).
13 518 U.S. 515 (1996).
14 Precedent and Jurisprudential Disagreement at 1728.
15 Originalism and Stare Decisis at 1932.

Judge Barrett has even suggested that the "rigid application" of *stare decisis* "unconstitutionally deprives a litigant of the right to a hearing on the merits of her claim." [16] Judge Barrett has signaled she will not "accept the body of precedent standing for the 'proposition that the Due Process Clause guarantees certain (unspecified) liberties rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty.'"[17] Those unspecified Due Process Clause liberties include the right to abortion, contraception, gay marriage, and others.

Judge Barrett's mechanical application of originalist judicial philosophy, as outlined, demonstrates a lack of understanding and concern for the individuals affected by her decisions, who are often those already disenfranchised and disadvantaged. During numerous interviews, counsel and colleagues expressed concern that Judge Barrett's rigid judicial philosophy and decisions reflect either a lack of understanding of the consequences of her decisions or a serious disregard for how these consequences negatively affected lives. Concern was expressed that Judge Barrett's approach will result in the greatest hardship to women, including immigrant women, Native people, people of color, LGBTQIA+, and other marginalized individuals. Interviewees brought to our attention the perception that Judge Barrett lacks significant and meaningful contact with these communities.

The Committee's concern in this regard is manifest in Judge Barrett's dissenting opinion in the 2020 case of *Cook County v. Wolf* in which the 7th Circuit addressed the current Administration's revised definition of "public charge" and the often-devastating impact on immigrants.[18] Judge Barrett's lengthy dissent reflects a lack of simple compassion, as well as a failure to understand the deep fear that undocumented and documented non-citizens experience and their frequent inability to parse the fine points of public benefits and immigration law. [19]

Judge Barrett's Personal Views on Reproductive Rights

Central to NAWL's mission is the protection of women's rights, including their agency over their own health and wellbeing. Judge Barrett's originalist philosophy, as well as her public opposition to reproductive choice, raise serious concerns that petitioners to the court who are pro-reproductive choice will not obtain a fair hearing before her.

Judge Barrett made her anti-choice position clear when she signed a 2006 advertisement defending the "right to life from fertilization until natural death"[20] and a 2012 letter entitled, "Unacceptable," in opposition to the Obama Administration's religious accommodation to the contraceptive mandate under the Affordable Care Act. The letter opposes the provision of "abortion-inducing drugs, contraception, and sterilization" under insurance plans, and calls the accommodation "morally obtuse," and an "assault on religious liberty and the rights of conscience," and a "grave violation of religious freedom [that] cannot stand."[21]

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16 Amy C. Barrett, Stare Decisis and Due Process, 74 U. Colo. L. Rev. 1011, 1013 (2003). Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/450

17 Originalism and Stare Decisis at 1935. (Barrett quoting Scalia, J., concurring in Albright, 510 U.S. at 275).

18 *Cook Cty. v. Wolf*, (7th Cir. 2020).

19 Today, Department of Justice statistics demonstrate that Native women are more likely to be murdered, abused, and sexually assaulted than any other U.S. population. The Committee notes that Justice Ginsburg authored *United States v. Bryant,* 136 S.Ct. 1954 (2016), wherein the Court confirmed that as pre-constitutional sovereigns that predate the United States, Tribal Nations retain their inherent sovereignty to protect their women citizens from domestic violence and abuse. Justice Ginsburg's replacement, therefore, must carry this same commitment to preserving tribal sovereignty and addressing the epidemic of violence against Native women and girls in this country. The Committee has reviewed Judge Barrett's judicial opinions and orders to date, and unfortunately, during her short time in service on the Court of Appeals, she has yet to adjudicate a case implicating questions of federal Indian law (other than one per curiam that dealt with questions of religious freedom). *Schlemm v. Carr*, 760 Fed. Appx. 431 (7th Cir. 2019). While the Committee makes no assumptions that Judge Barrett would disregard the Constitution's command that treaties with Tribal Nations constitute the "supreme law of the land," history demonstrates that a nominee's commitment to safety for Native woman cannot be assumed—it must be demonstrated. For far too long, it has been overlooked.

20 See two-page ad from 2006 published in the South Bend Tribune of Indiana signed by Judge Barrett.

21 Available at: https://www.afj.org/wp-content/uploads/2020/01/Barrett-Becket-Fund-Letter.pdf

Given her unequivocal public stance on these issues, Judge Barrett would at the very least need to recuse herself from hearings and deliberations that involve an asserted right to life and tensions between religious beliefs and reproductive health choices.

In her 1998 article, *Catholic Judges in Capital Cases*, Barrett (with her co-author) writes, apropos of the Church's teachings, "[t]he prohibitions against abortion and euthanasia (properly defined) are absolute; those against war and capital punishment are not….[A]bortion and euthanasia take away innocent life."[22] Judge Barrett makes a distinction between what she deems as "innocent life" and "others." As Judge Barrett implies, her commitment to life is uneven, carving out exceptions where a crime has been committed. This perspective not only raises serious concerns about her ability to be impartial in matters related to abortion, but also could have a disproportionate impact on Latinx, Blacks, and other people of color who are overrepresented in the criminal system.

The nominee has not yet authored any majority or dissenting opinions [23] on matters of reproductive rights. However, between 2018 and 2019 Judge Barrett elected to join three opinions that strongly indicate her opposition to abortion rights and forecast her approach to reproductive rights matters if elevated to the Supreme Court. [24] The Committee is particularly concerned with what Judge Barrett has described as "vertical" *stare decisis*, whereby lower courts are bound to apply Supreme Court precedent even if the court disagrees with it, but the Supreme Court is not so bound. Judge Barrett has stated in her writings that the Supreme Court is not bound by precedent if the prior case was wrongly decided and in need of "correction." [25] This openness to overruling firmly established Supreme Court precedent where she believes it is wrongly decided leaves significant room for Judge Barrett's previously articulated personal beliefs to guide her judicial analysis.

The Committee is further concerned that Judge Barrett holds strong, pre-formed opinions that interfere with her ability to fairly consider not only matters of abortion rights, but also the rights to contraception, sterilization, in-vitro fertilization, and many other matters of a highly personal nature. Given the nominee's adherence to originalism and her long line of consistent public statements, the Committee believes that the nominee will support additional restrictions on, if not elimination of, women's autonomy in their reproductive rights, which will undoubtedly cripple women's ability to remain equal members of society.

Conclusion

The Committee has found that Judge Barrett has not demonstrated a commitment to women's rights or issues that have a special impact on women, and we, therefore, find that under NAWL's standard, she is **Not Qualified** to assume the position of Associate Justice of the Supreme Court of the United States.

The mission of NAWL is to provide leadership, a collective voice, and essential resources to advance women in the legal profession and advocate for the equality of women under the law. Since 1899, NAWL has been empowering women in the legal profession, cultivating a diverse membership dedicated to equality, mutual support, and collective success.

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22 Amy C. Barrett & John H. Garvey, *Catholic Judges in Capital Cases*, 81 Marq. L. Rev. 303, 307 (1997-98). Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/527

23 Justice Ginsburg details the importance of dissenting opinions, writing about her dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) which led Congress to respond by passing the Lilly Ledbetter Fair Pay Act. See Ginsburg, Ruth Bader, "The Role of Dissenting Opinions" (2010). Minnesota Law Review. 428. https://scholarship.law.umn.edu/mlr/428

24 See *Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner of the Indiana State Department of Health* (Easterbrook dissenting, joined by Barrett)(arguing for rehearing en banc on Indiana law regarding fetal remains after abortion or miscarriage); *Planned Parenthood of Indiana and Kentucky v. Box* (Kanne dissenting, joined by Barrett)(arguing for rehearing en banc on parental notification law); *Price v. City of Chicago* (joining panel that upheld Chicago abortion clinic buffer zone nearly identical to that upheld in *Hill v. Colorado*, but arguing that Hill has been called into question).

25 Amy C. Barrett, Stare Decisis and Due Process, 74 U. Colo. L. Rev. 1011, 1013 (2003), "I argue that in its rigid application-when it effectively forecloses a litigant from meaningfully urging error-correction-*stare decisis* unconstitutionally deprives a litigant of the right to a hearing on the merits of her claims. To avoid the due process problem, I argue that stare decisis must be flexible in fact, not just in theory."

NATIONAL ASSOCIATION OF WOMEN LAWYERS

STANDS WITH THE NATIONAL NATIVE AMERICAN BAR ASSOCIATION & CALLS FOR THE INCLUSION OF NATIVE AMERICANS IN STUDIES OF THE LEGAL PROFESSION

"THE WAY TO RIGHT WRONGS IS TO TURN THE LIGHT OF TRUTH UPON THEM" - IDA B. WELLS

On June 26th, 2020, the National Native American Bar Association (NNABA) wrote The Center for Women in Law and the NALP Foundation in critical response to the 'exclusion of Native American Women Law Students from "Women in Color - Law School Experiences" Study'. The issues raised in NNABA's letter have stirred the National Association of Women Lawyers (NAWL) to reflect and take action. NAWL recognizes and acknowledges our own omission of Native American women in the legal profession in our annual NAWL Survey on the Promotion and Retention of Women in Law Firms that surveys AmLaw 200 firms. Although this omission was unintentional, NAWL recognizes that any exclusion of Native American women perpetuates a 500-year long history of inequity and marginalization. In bringing this truth to light, NAWL sincerely apologizes for the omission of Native American women in our own collection of data in the legal profession.

Of NAWL's membership population, 0.3% have self-identified as Native American/American Indian and or Native Hawaiian. However, NAWL understands that this percentage point does not determine value and does not account for the ever-expanding, vibrant, and diverse pool of NAWL members who actively contribute to the legal profession and serve in NAWL's leadership pipeline. We, as an organization based on empowerment, advocacy, and community, will work to better ensure the representation of Native American women and other underserved and underrepresented groups.

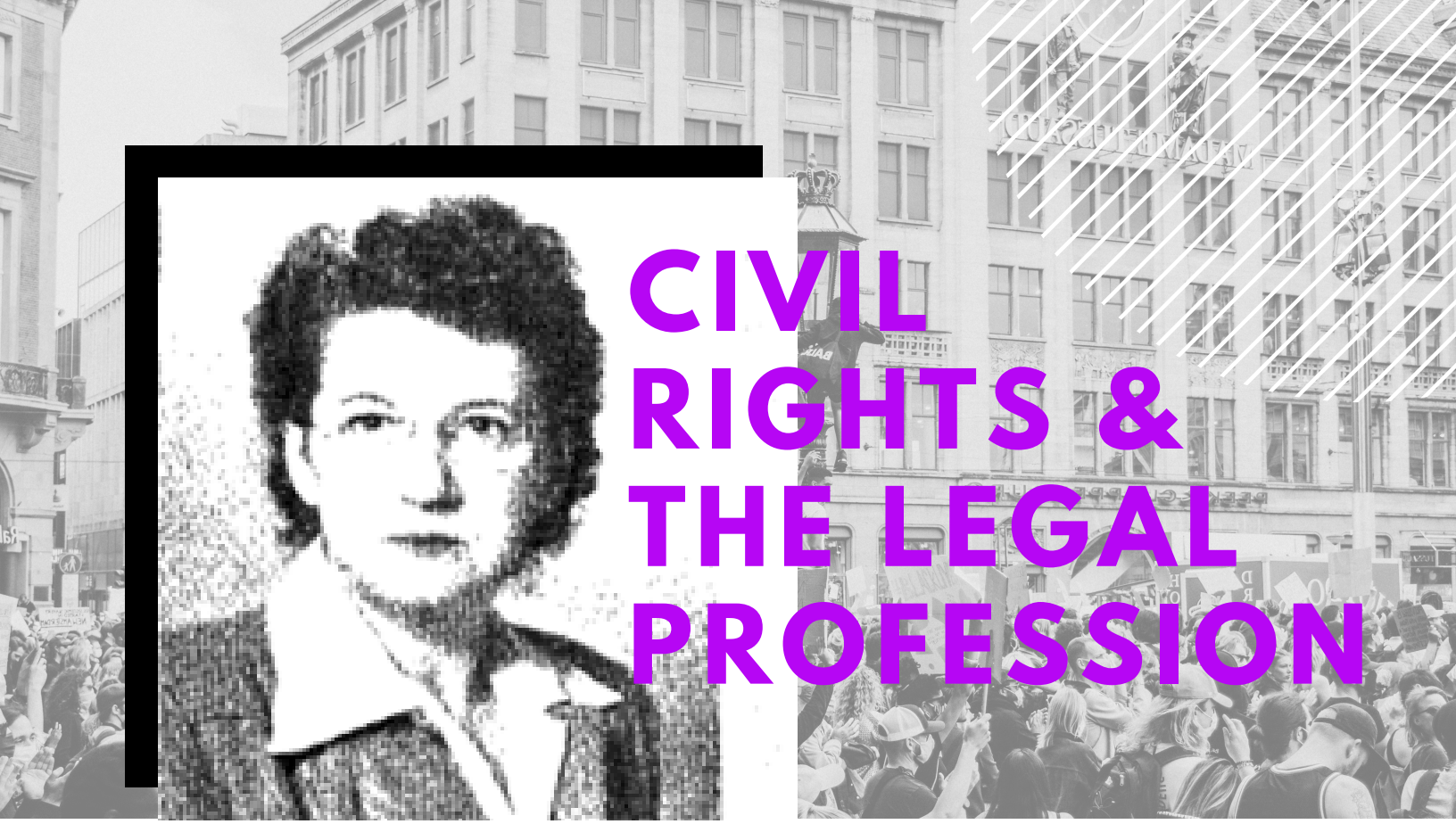
Our plan of action focuses on four issues for which NAWL will hold itself accountable:

- Increase outreach and support for Native American women law students.
- Actively include and empower Native leadership in our organization.
- Evolve our process of data collection to an equitable inclusion and representation of Native American women in the legal profession.
- Advocate and encourage active representation of Native American women across all of our organizational, corporate, and law firm partnerships.

In support and partnership with NNABA, NAWL plans to shift our focus and work to be more impactful and inclusive of Native American women in our on-going efforts to advance all women of color in the legal profession.

In Sincere Allyship,

The National Association of Women Lawyers



CIVIL RIGHTS & THE LEGAL PROFESSION

BY THELMA FURRY

THELMA FURRY WAS A NAWL MEMBER, A MEMBER OF THE OHIO BAR, AND CHAIRMAN OF THE NAWL COMMITTEE ON CIVIL RIGHTS IN 1948.

"Civil Rights and the Legal Profession" was originally published in the Women Lawyers Journal in 1948 by a trailblazing, feminist, communist, and anti-racist attorney named Thelma Furry. Furry, an active NAWL member at the time, writes at the precipice of the Civil Rights era about the proposed legislative threats to civil liberties in the U.S. at the time, and women lawyers' roles in the fight for those rights. Furry writes, "Professional women have demonstrated an extra amount of fortitude by the very fact that they have not stopped at the right to vote, but have persisted in the struggle for equality by entering the professions that were sacred to the men, for too long a period" (WLJ, 1948).

Furry's words remind us all of NAWL's legacy in fighting for women's and other marginalized group's rights, "We can live up to our tradition by meeting the issues of the day" (1948). NAWL continues this work that Furry called for years ago through recent initiatives such as NAWL's Call to Action in Response to the Murder of George Floyd, and through the support and allyship with other diversity bars, such as, the National Native American Bar Association, and the National Asian Pacific American Bar Association. NAWL recognizes the urgency of the issues of today, and like Furry, NAWL knows that despite a global pandemic, women in the legal profession will continue to meet the moment and persist in our collective effort to ensure equality and justice for all under the law.

CIVIL RIGHTS & THE LEGAL PROFESSION BY THELMA FURRY (1948)

This article shall make no attempt to report on the status of civil rights generally. A complete and excellent report on this question was made by the President's Committee and Civil Rights. As was stated in the report, this nation found it necessary to review the state of its civil rights, twice before and had come to a time for a third reexamination. The President's Committee was composed of important and sincere people from all walks of life who spent a great deal of time gathering information on this question before they released their report. They made a thorough examination of our present record on the question of civil rights. What they found not only shocked them but made them angry--justly angry. They found that, "Too many of our people still live under the harrowing fear of violence or death at the hands of a mob or of brutal treatment by police officers." They censored the present red panic in its threat to inhibit the freedom of genuine democrats. After reporting on the dark side of the picture, they made recommendations of what we, the people, can do to make a better record for ourselves, and expressed the conviction that there are those among us who have the courage, imagination, and perseverance to keep faith with the American heritage and its promise.

"The question of civil rights in political freedom seems to be the field where- we as a nation face the greatest danger, and it is also the field where there is the greatest hesitancy to speak out in favor of freedom."

Political Freedom Threatened

The question of civil rights in political freedom seems to be the field where- we as a nation face the greatest danger, and it is also the field where there is the greatest hesitancy to speak out in favor of freedom. Even though the greatest amount of propaganda is directed against the Communists, the purpose of such activities is clearly to go beyond silencing the Communists. Its purpose is to silence all those who fight for progressive legislation, in such fields as housing, health, and education. It attempts to silence all those who fight antisemitism, Jim-Crow, lynchings, and the poll-tax.

Once we lose the freedom guaranteed to us under the Bill of Rights, our survival as a democracy will be quickly doomed. Once freedom of speech, freedom of thought, freedom of the press, freedom of assembly, freedom of religion have been lost, the battle is over. Our concept of government, by the people, of the people, and for the people will be gone. Therefore, our line of battle for the survival of democracy must start with the First Amendment.

Role of the Bar

What response there has been to the Committee's report, not only by the people of the nation but in particular by our profession, which in the past has played such an honorable role in guarding against any violation of the civil rights of our people? The response of the legal profession during the present period is feeble, to say the least. In my opinion, the hysteria over the "red menace" has played too important a role in silencing the voices of those liberals in our profession who should be speaking out today.

It is to the glory of the American bar that the Palmer Raids and other repressive aspects of the period following the first World War called forth some of the most honored voices in our profession. Charles Evans Hughes defended the right of radical minorities to political representation. Twelve of the country's most distinguished lawyers issued a scathing report upon the illegal activities of the United States Department of Justice. Other outstanding lawyers served in individual cases without fee or for nominal fees at a great financial sacrifice and at considerable risk to their political or professional futures. All in all, the lawyers of the country played the important and honorable role which lawyers in a democracy should play.

Silence of the Bar Today

What is the situation today? In the United States during the past year, 158 men and women faced the loss of their liberty because of their political beliefs, some were held without bail until they went on a hunger strike. Other hundreds, reflecting almost every shade of liberal opinion, have been subjected to an attack on their rights to speak, write, and travel freely.

Some of the victims are well-known like the Reverend John Haynes Holmes, pastor of the Community Church of New York City, who was refused permission to visit Japan because he made some "unfortunate speeches". They include the French scientist, Irene Poliot-Curie, jailed overnight at Ellis Island, and Representative Leo Isaacson, who was denied a passport to France. Even a former Vice President, Henry Wallace, has felt the pressure. But it is the little people who are bearing the real brunt of the attack.

There has been practically no response from the so-called leaders of the American bar to the crying need that they rise to the defense of the basic civil liberties of the American people. Aside from some protests from the law schools, particularly the faculty of the Yale Law School, we are faced with an almost complete blackout in this field.

Even persons whose records show some devotion in the past to the cause of civil liberties have apparently withdrawn. Unless there is a change made by the lawyers of our nation, this chapter in the history of the American Bar will be a humiliating one indeed.

Mundt-Nixon Bill

There is still no great outcry from our profession when one of our national legislative bodies passes legislation of the character of the Mundt-Nixon Bill. Anyone who has studied this Bill carefully must hold grave doubts not only as to its wisdom but its practicability. Are there no lawyers or jurists in our midst who have the courage to stand by the principle that, Justice Holmes stated in his dissent in *United States vs. Schwimmer*, 279 U. S. 644,645 (1929) when he said, "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought-not free thought for those who agree with us but freedom for the thought that we hate"? It is reported that the Chairman of the Civil Rights Committee of the American Bar Association supports the Mundt-Nixon Bill and thinks it is constitutional. If this report is true, then we have another example of the negative role the lawyers of today are playing in our present struggle to keep civil liberties alive in our country.

Many specific instances could be related where our profession, in the recent period, has failed to play the role which belongs to it traditionally, not only on the question of political freedom but on all other questions of civil rights. For instance, The Akron Council on Human Relations made a feeble attempt to carry out some of the recommendations made by the President's Committee, by introducing a Civic Unity Ordinance in the City Council. The purpose of the ordinance was to establish a committee with a with a full-time executive

secretary to work toward a better understanding between the nationalities, races, and religious groups in the community. The ordinance was voted down because, so the councilmen said, the people of Akron were not ready for it. It is my opinion that it was voted down because the cry of Communism was raised against it, thereby silencing those voices which in ordinary times would have spoken out in support of the ordinance.

Violation of Civil Liberties

We had another example during March of this year, when the well-known poet, Langston Hughes was unable to make a scheduled speech in Akron because of his alleged political views. The Akron Beacon Journal carried an editorial entitled "Akron's Shame" in which it said in, part, "Do the narrow-minded and timid Akronites who refused Mr. Hughes a platform realize what they have done? They have undermined their own right to free speech... Freedom of speech is meaningless if it is given only to those with whom the majority agree...

We must be alert to resist Communism, but we must be on guard too, against short-sighted patriots who would renounce our traditional liberties as an anti-Communist measure.

The editorial was well done, but the weakness of the Beacon Journal's position lies in the fact that the editorial was written after the harm was done after Hughes had left town because he was unable to find a place to speak. Langston Hughes had been brought to town by the Akron Council on Race Relations for a meeting in the YWCA Auditorium. After the Beacon journal printed front-page stories of accusations made by a local attorney that Langston Hughes was a Communist, and after the YWCA canceled the use of its auditorium, and after several other meeting places were withdrawn, then the Beacon Journal became disturbed.

No local leader of the bar or bench spoke out against either of these violations of the civil liberties that our nation was founded upon. I raise this question sharply because I am sure that we are one of the groups the President's Committee was thinking of when it expressed the conviction that there were people in this nation who have the courage, imagination, and perseverance to keep faith with the American heritage and its promise.

Duty of Women Lawyers

Because the legal profession has been slow in meeting this great responsibility, it seems to me that it now becomes even more urgent that the women lawyers step up and set the pace.

Let us sound the alarm before the speaker leaves town without an opportunity to speak. Let us exert our leadership before the Mundt-Nixon Bills are passed.

The women of this nation demonstrated their courage when they fought for the right to vote in the face of the most vicious and violent opposition. Professional women have demonstrated an extra amount of fortitude by the very fact that they have not stopped at the right to vote, but have persisted in the struggle for equality by entering the professions that were sacred to the men, for too long a period. We can live up to our tradition by meeting the issues of the day. Civil liberties is the first line of battle today. Civil liberties is the order of the day. It must be met today.

NAWL's 2020 Selma Moidel Smith Law Student Writing Contest Winner

EQUALITY FOR WHOM?

The Future of the Equal Rights Amendment

WRITTEN BY
HANNAH L. TAYLOR
NORTHEASTERN UNIVERSITY
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INTRODUCTION

Aimee Stephens was a dedicated employee. Through her work at R.G. & G.R. Harris Funeral Homes, she spent years compassionately helping people through what is often the greatest and most difficult loss one endures – that of a loved one. During all this time, however, Stephens had to hide a part of herself. Stephens was transgender,[1] and for many years, she presented at work as a man, unsure of what would happen if she were to live her life openly as the woman she was.[3] Stephens had reason to worry. Shortly after she came out to her boss as a transgender woman and requested to wear the women's uniform at work, she was fired.[4]

Stephens filed a sex discrimination claim with the Equal Employment Opportunity Commission (EEOC), and her case found its way to the United States Supreme Court.[5] Under the law at the time, it was unclear whether Title VII's prohibition against discrimination on the basis of sex includes discrimination on the basis of gender identity.[6]

Shortly after she came out to her boss as a transgender woman and requested to wear the women's uniform at work, she was fired.

The Supreme Court recently issued its opinion in this case, holding that Title VII's prohibition against discrimination on the basis of sex does include discrimination on the basis of both gender identity and sexual orientation.[2] Statutes, however, may be repealed at the whim of Congress. Unfortunately, the federal Constitution does not provide Stephens with protection from discrimination on the basis of her gender or gender identity, nor does it protect individuals against discrimination on the basis of sexual orientation.[7]

Although an amendment guaranteeing equal rights on the basis of sex has been proposed repeatedly in Congress,[8] a federal Equal Rights Amendment (ERA) has yet to be ratified.[9] As a result, as we celebrate this year the centennial of women achieving the right to vote with the ratification of the Nineteenth Amendment, women's full equality remains unprotected by the United States Constitution.[3] This paper will examine how a federal Equal Rights Amendment would fill the gaps in the current legal landscape to afford individuals greater protection than they are currently afforded and, further, how an ERA drafted through an intersectional lens would be significantly more impactful than the language typically proposed.

The 1972 proposed ERA is the version that has come closest to ratification, passing both houses of Congress and achieving ratification in thirty-five of the thirty-eight required states before the ratification deadline ultimately expired, and it continues to enjoy significant prominence in feminist discourse due to a variety of factors.[4] It is closely tied to women's movement of the 1970s, which was a historic movement at a pivotal time for women in America.[5] The 1970s saw the rise of leaders like Shirley Chisholm, who became, in 1968, the first African American woman in Congress and, in 1972, the first Black person and woman to seek the presidential nomination from one of the two major political parties.[6] Activists Gloria Steinem and Dorothy Pitman Hughes co-founded Ms., a national magazine devoted to issues related to women's rights.[7] 1977 saw 20,000 women converge in Houston, Texas for the National Women's Conference.[8] In 1978, President Jimmy Carter created the National Advisory Committee for Women.[9]

Against this backdrop, women were lobbying hard for a constitutional amendment that would guarantee their equality under the law. Although the 1972 proposed ERA ultimately failed to achieve ratification prior to the congressionally imposed deadline, it has been repeatedly proposed in Congress, either verbatim or with slight modifications, in the decades since.[10]

If the ERA proposed in 1972 were ultimately ratified, unfortunately, it would not help Stephens. On its face, this version would only protect against discrimination by state actors, not private actors such as Stephens' former employer. Further, it would only protect against discrimination "on account of sex."[10] This is essentially the same protection that is afforded in the employment context by Title VII of the Civil Rights Act, which makes discrimination in employment "because of [an] individual's … sex" unlawful.[11] By using the same language as Title VII (i.e., the word "sex"), the 1972 proposed ERA would be as vulnerable as Title VII to the argument that the definition of "sex" is strictly limited to biological sex, and does not include gender identity or sexual orientation.[12]

By using the same language as Title VII (i.e., the word "sex"), the 1972 proposed ERA would be as vulnerable as Title VII to the argument that the definition of "sex" is strictly limited to biological sex, and does not include gender identity or sexual orientation.

Proponents of a federal ERA have presented two options for the path forward: the "three-state strategy" and the "fresh start" approach.[13] The "three-state strategy" is an approach to achieve ratification of the ERA proposed in 1972 and involves removing the ratification deadline to allow for the amendment's addition to the Constitution despite taking far longer than the congressionally imposed seven-year period to achieve ratification in the requisite thirty-eight states.[14] The "fresh start" approach, on the other hand, involves proposing a new ERA in Congress and starting over in the Article V Amendment process.[15] Recent discussions have focused on passing the 1972 version of the ERA under either the three-state strategy or the fresh start approach.[16] However, nothing precludes a member of Congress from introducing an ERA using new language. Indeed, since an ERA was first introduced in Congress in 1923,[17] several different versions have been proposed [18] Additionally, although there is still no federal ERA, several states have added ERAs to their state constitutions—the language in these various state ERAs varies widely.[19]

Regardless of whether the three-state strategy remains viable, this paper proposes that a fresh-start approach is best because it would allow for new language to be introduced that is inclusive of those with intersectional identities and would allow for the removal of any state action trigger to ensure that those covered by the amendment receive its protection in all areas of life. In part II, I will survey in greater detail how the language of proposed ERAs has evolved over time and some of the historical influences on this evolution. In part III, I will analyze specific problems with the language of the 1972 proposed ERA that may ultimately prevent it from having the broad positive impact for which proponents hope. In part IV, I examine current litigation regarding sex discrimination in employment, analyzing the potential effect that differing language may have on existing law. Part V presents and analyzes language that

would be most inclusive and beneficial if ratified. Finally, part VI highlights additional challenges and concerns that present opportunities for further research.

Arguments by both proponents and opponents of the 1972 ERA often reflect the tension between the anti-classification approach and the anti-subordination approach to constitutional equality.[20] The anti-classification approach is often referred to in discussions surrounding racial inequality as the "colorblind" approach. It was perhaps most succinctly summed up by Chief Justice Roberts, writing for the plurality in *Parents Involved in Community Schools v. Seattle School District No. 1*, when he stated that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[21] This approach has largely been discredited as perpetuating inequality.[11] In contrast, the anti-subordination approach reflects the idea that the law should not perpetuate subordination, whether intentionally or inadvertently, and some distinctions on the basis of protected grounds may be necessary to achieve equality in light of historical and ongoing institutional oppression on those same bases.[22] While the language of the 1972 ERA embodies a strictly anti-classification model of equality,[23] an ERA incorporating anti-subordination principles would be far more impactful because it would allow for laws and practices targeted at remedying and removing the historic and ongoing disadvantages that women, and particularly women of color, face. While the anti-classification approach essentially requires ignoring any differences along the lines of historically marginalized identities, the anti-subordination approach allows for recognition that, while differences themselves are to be celebrated, our long record as an oppressive country has led to continuing disadvantages for those with historically marginalized identities that the law must play a part in remedying.[12] The Mansfield Rule, for example, which requires that at least thirty percent of candidates for leadership positions in participating law firms be diverse, embodies the anti-subordination approach.[13]

It allows for classification along the lines of gender, race, LGBTQ+ identity, and disability, in order to ensure that these voices that have traditionally been shut out of leadership positions have a fighting chance in a system that would otherwise perpetuate its own non-diversity.[14] In short, the Mansfield rule and other laws and initiatives embodying the anti-subordination approach recognize this fundamental truth: there can be no equality without equity.

II. EVOLUTION OF THE LANGUAGE: 1880 – 1972

While more recent proposed ERAs have attempted to grant broad protections to women and reflect a more intersectional understanding of identity, none has gone so far as to expressly prohibit discrimination on the basis of gender identity.[24] The first introduction of a potential constitutional amendment relating to gender occurred in 1880 and pertained exclusively to women's suffrage.[25] Subsequent attempts to amend the Constitution to include women-focused exclusively on suffrage until the passage of the Nineteenth Amendment 100 years ago.[26] The language that was ultimately ratified as the Nineteenth Amendment indicated an understanding of gender that was limited to biological sex.[27]

The Nineteenth Amendment granted women the right to vote, but in 2020, the centennial of the Nineteenth Amendment's passage, the Constitution still fails to guarantee women full equality under the law.[28] Following ratification of the Nineteenth Amendment, focus shifted to ratification of a constitutional amendment that would guarantee legal equality to women.[29] Although the ERA was initially drafted by Alice Paul, founder of the National Women's Party, and appeared to be composed of the original language,[30]

the language of the Nineteenth Amendment was eventually incorporated into many proposed versions of the ERA and remains the language that has been most proposed since 1943.[31] Notably, the version of the ERA that has come closest to ratification consists of this language from the Nineteenth Amendment– language that reflects an outdated understanding that equates gender with biological sex.[32] Additionally, as noted above, the language that passed both houses of Congress in 1972 reflects solely anti-classification principles.[33]

Another shortcoming of early women's rights movements, including much of the women's suffrage movement and the early movement for the ERA, is that they solely centered white women and white supremacist ideas. These movements' failure to listen to and elevate the voices of women of color served to perpetuate racist ideologies. For example, Elizabeth Cady Stanton and Susan B. Anthony, leaders in the women's suffrage movement, opposed passing the Fifteenth Amendment because they believed that white women were superior to all black people and, therefore, white women should get the vote before black men.[34] Alice Paul's work in the suffrage movement was marred by similar issues regarding inclusivity of women of color. Thus, when she organized a women's suffrage march, she attempted to exclude women of color, fearing that it would jeopardize support for women's suffrage – or rather, support for white women's suffrage.[35]

Following the Civil Rights Movement of the 1960s, language incorporating ideas of equal protection was introduced, as well as more inclusive language that addressed forms of discrimination other than that on the basis of sex.[36] However, in the years immediately following the Supreme Court's 1971 decision upholding the use of bussing to desegregate schools,[37] Congressmembers also used language of the Nineteenth Amendment to propose amendments with the goal of perpetuating racial inequality by preventing desegregation under the guise of promoting an anti-classification approach to racial and gender equality.[38] Other proposals, both pre-dating and following the expiration of the ratification deadline for the 1972 ERA, incorporated the concerns of those expressly opposed to the ERA. For example, while the 1972 version embodies a strict anti-classification approach, a constitutional amendment proposed in 1925, shortly after the first introduction of an ERA, was designed to ensure protective legislation would remain valid.[39] Some ERA opponents capitalized on prejudices against feminist ideologies to argue that ratification of the ERA would lead to erosion of the American family.[40] In apparent direct response to this concern, a version of the ERA was proposed that explicitly referenced women's "responsibilities as homemakers [and] mothers" and provided that the ERA would not prevent them from "performing their responsibilities" as such.[41] Another iteration went even further, explicitly providing that the language of the ERA would not affect protective legislation for women or the exemption of women from compulsory military or combat service, nor would it affect the responsibilities of men or make sexual offenses such as rape crimes under federal law.[42] Other proposals addressed federalism concerns (and related anti-Communist hysteria),[43] opposition to same-sex marriage,[44] and opposition to abortion.[45] Conversely, more recent proposals have responded to concerns about potential restrictions on abortion access.[46] Further, several proposed amendments focused on specific areas of inequality, such as political and labor rights, or on explicitly combatting affirmative discrimination in addition to ending denial or abridgment of rights.[47]

While the 1972 ERA's proposed language has received the most popular attention, the above discussion indicates that a wide variety of language has been proposed.

Only one proposal, however, has departed from the use of the term "sex" in favor of the potentially more inclusive term "gender,"[48] and none has abandoned terminology indicating a binary understanding of gender.[49]

III. PROBLEMS WITH THE 1972 PROPOSED ERA

As discussed above, the anti-classification approach to equality promotes the removal of distinctions in the law on the basis of protected classes. However, while this approach may achieve what appears to be equality on paper, it often fails to achieve true equality in society.[50] More intersectional feminists understand that the traditional anti-classification approach to gender equality, as embodied in the 1972 proposed ERA, is a byproduct of white feminism that would do little to ensure equality for diverse women.[51] While the most militant wing of the women's rights movement was promoting an anti-classification approach as a way to achieve gender equality, segregationists have seized on the anti-classification language of the 1972 proposed ERA as a way to appear, on paper, to be promoting equality while actually promoting a legal landscape that would allow segregation to continue unimpeded.[52] Because the anti-classification approach has perpetuated inequality when applied to race,[53] it is likely that the anti-classification approach would also perpetuate inequality when applied to gender. Thus, any ERA should be rooted in anti-subordination, not anti-classification, principles.

Additionally, while the women's suffrage movement and the later movement in support of the ERA were monumental achievements that should not be discounted—greatest of all being the passage of the Nineteenth Amendment—it is unlikely that an amendment drafted by those who failed to see the struggles of women of color as equally important as their own can bring about true equity.

It is unlikely that an amendment drafted by those who failed to see the struggles of women of color as equally important as their own can bring about true equity.

Unfortunately, this failure is not solely one of the past. The overt white supremacy of yesterday's suffragists has evolved into the "white feminism" of today, which continues to center the experiences of cisgender, heterosexual, white women to the exclusion of all others.[54] It is past time to part with language purporting to promote equal rights for all that was designed by those who either actively worked or passively agreed to uphold white supremacy in their quest for gender equality. Moreover, the ERA originated during a time when mainstream understanding of sex and gender was limited to a binary concept that we now understand to be outdated and exclusive of many individuals.[55]

Whatever language is drafted, however, must garner widespread support. Article V of the U.S. Constitution presents a high bar to any constitutional amendment, requiring approval by two-thirds of both houses of Congress and ratification by the Legislatures of three-fourths of the States.[56] A proposed addition to the 1972 version of the ERA addressing concerns about the continued viability of protective legislation effectively delayed and eroded support, contributing to the amendment's ultimate failure.[57] Further, although a version of the ERA has been introduced in every session of Congress since the expiration of the deadline for ratification of the 1972 ERA, none has garnered the support required by Article V.[58] Therefore, the ability to appeal to a significant portion of the American populace will be a critical factor in an ERA's ultimate passage.

However, since the country's founding, twenty-seven different proposed amendments have gained enough support both in Congress and in the States to achieve ratification.[59] It is entirely possible that, should the divisions be resolved within the women's rights movement regarding the best approach to an ERA, an ERA could become the twenty-eighth amendment to achieve such a feat. An ERA that acknowledges the humanity and intersecting identities of the most marginalized in our communities could be a powerful tool to build a more equitable society, and not only for those whose experiences have traditionally been centered in the feminist movement. Our capacity to think inclusively would be the only limit of such an amendment's impact.

IV. THE NEED PERSISTS

Much has been written about why we still need an Equal Rights Amendment today, with the main arguments being that passage of an ERA would: (1) signal to current and future generations that gender equality is a core ideal of our society;[60] (2) ensure that women's rights would be protected in the event that legislation promoting such rights is repealed;[61] and (3) fill the gaps regarding gender equality in the current legal landscape.[62] Many also argue that inclusion of an ERA in the federal Constitution would lead to gender being a suspect class subject to strict scrutiny, much like race receives under the Fifth and Fourteenth Amendments.[63] Half the States' constitutions now include an amendment addressing gender equality, with several more pending, indicating strong sentiment in the States for the need for such an amendment.[64] This paper will primarily examine the third argument for a federal Equal Rights Amendment: that it would fill the gaps in the current legal landscape to afford individuals greater protection than they are currently afforded. While any number of statutory schemes could be examined, this paper will specifically analyze Title VII of the Civil Rights Act of 1964 and how passage of a federal ERA may affect employment discrimination cases that have traditionally been brought under Title VII.

A. CURRENT LITIGATION

Title VII of the Civil Rights Act of 1964 is a landmark piece of civil rights legislation, protecting against discrimination in the workplace.[65] It makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[66] However, Title VII's reach is limited by its own terms to employers with at least fifteen employees, [67]meaning employees at companies with fourteen or fewer employees remain unprotected by Title VII.

The Supreme Court recently heard oral arguments in three cases involving claims of discrimination on the basis of sex in violation of Title VII.[68] In *Bostock v. Clayton County*, Gerald Bostock, a gay man, was fired for from his job as a child welfare services coordinator for Clayton County, Georgia, after he joined a gay men's recreational softball league.[69] In *Altitude Express, Inc. v. Zarda,* Donald Zarda, who is gay, was fired from his job as a sky-diving instructor after disclosing his sexual orientation to a client.[70] In the third case, R.G. & G.R. Harris Funeral Homes,[71] Aimee Stephens was fired from her job as a Funeral Director and Embalmer after she informed her employer that she was a transgender woman and intended to live and present consistent with her gender identity.[72]

At oral argument for *Bostock*, the Supreme Court appeared to struggle with the idea of including discrimination on the basis of sexual

orientation within the scope of discrimination on the basis of sex under Title VII.[73] At oral argument for R.G. & G.R. Harris Funeral Homes, the Court seemed to struggle both with basic concepts of gender identity[74] and with the idea that discrimination on the basis of gender identity constitutes discrimination on the basis of sex under Title VII.[75] The Supreme Court could rule that discrimination on the basis of sexual orientation or gender identity falls within discrimination on the basis of sex under Title VII, and such a ruling would provide LGBTQ+ individuals with workplace protection at the federal level that has largely been denied to them thus far. However, even if the Supreme Court rules that discrimination on the basis of sexual orientation and gender identity are prohibited by Title VII, that interpretation would be vulnerable to Congress repealing or amending Title VII to explicitly exclude such bases from Title VII's scope. If that were to happen, the LGBTQ+ community would be left without any federal statutory protection against employment discrimination.

Even if the ERA proposed in 1972 were ratified, it likely would not make much difference for *Zarda, Bostock,* or *Stephens.* On its face, this version would only protect against discrimination by state actors, not private actors.[76] On this basis alone, the 1972 proposed ERA would only potentially apply in *Bostock*, where *Bostock* was employed by the county government, but not in *Zarda* or *R.G. & G.R. Harris Funeral Homes*, where *Zarda* and *Stephens* were each employed by private entities. Additionally, because the 1972 proposed ERA would only prohibit discrimination "on account of sex" and Title VII likewise only prohibits discrimination on the basis of "sex,"[77] ratifying the 1972 ERA would do little to expand protection beyond that currently afforded by statute. I do not presume to predict how the Supreme Court will rule in these cases. Regardless of the outcomes, however, *Bostock, Zarda*, and *Stephens* would all have better protection against discrimination if the federal Constitution contained a truly inclusive Equal Rights Amendment, both because they would be definitively included in its coverage and because a constitutional amendment cannot be repealed nearly as easily as a statute.[78]

V. MOVING FORWARD: AN INCLUSIVE ERA FOR AN INTERSECTIONAL SOCIETY

While the ERA was originally drafted with the purpose of ensuring equality between men and women in the United States, it is time to introduce a new, more inclusive version. It would seem reductive and incomplete to limit a newly proposed ERA to a concept of equality "on the basis of sex," given modern society's expanding understanding of sex, gender, and gender identity, as well as the knowledge that the Reconstruction Amendments have yet to achieve equality on the basis of race in the United States.[79] Any proposed ERA should reflect an understanding that there are many communities still affected by various forms of oppression, and many individuals within these communities have intersectional identities that include more than one such trait.

Further, to provide the greatest benefit, the ERA should not contain a "state action trigger," so it would apply both to state and private actors. For example, the Fourteenth Amendment's state action trigger has meant that only denial of due process or equal protection by the government, but not by private citizens, is prohibited.[80] If the ERA were to include such a state action trigger, it's reach would be similarly limited.[81] It would do nothing to address discriminatory treatment committed by private employers against employees, retail workers against consumers, private citizens against other private citizens. In other words, it would provide no protection for the invidious discrimination experienced in many common everyday interactions.

Although, as discussed above, all federal ERA versions proposed so far reflect a binary understanding of gender,[82] some state ERAs have expanded coverage in other ways. For example, while Pennsylvania's ERA retains theterm "sex," it lacks the state action trigger present in the 1972 proposed federal ERA, meaning it reaches both state and private actors.[83] Other states, including, Connecticut, Florida, Massachusetts, and Pennsylvania, among others, have similarly drafted their ERAs to ensure applicability to both state and private actors.[84] The various state ERAs reflect a wide range of inclusivity, from those closely tracking the language of the 1972 proposed federal ERA[85] to those that include multiple enumerated protected classes.[86] None, however, explicitly protects against discrimination on the basis of sexual orientation or gender identity.

The ERA Coalition, a national organization working to add an ERA to the federal constitution, recently worked with the African American Policy Forum and the Center for Intersectionality and Social Policy Studies at Columbia Law School, to propose a new, expanded version of the ERA known as the Amendment for Constitutional Equality, or "ACE."[87] The ERA Coalition's expanded version of the ERA specifically notes that "all women, and men of color, were historically excluded as equals from the Constitution of the United States," and "prior constitutional amendments have allowed extreme inequalities of race and/or sex and/or like grounds of subordination to continue without effective legal remedy."[88] Given this foundational understanding, ACE would achieve the following: (1) affirmatively afford equal rights to women using language enforceable against both state and private actors; (2) expressly define sex to include "pregnancy, gender, sexual orientation, or gender identity;" (3) expressly define race to include "ethnicity, national origin, or color;" (4) provide a basis for expanding the amendment's protection to include other groups who have been similarly subjected to systemic oppression (with the specific examples of "disability or faith" provided); (5) allow for an anti-subordination approach to remedying inequality; and (6) instruct Congress and the several States to "take all steps requisite and effective to abolish institutions that infringe the right to vote."[89]

In many and varied ways, ACE is an improvement on the 1972 proposed federal ERA. It would bring pregnancy, gender, sexual orientation, and gender identity within the scope of Title VII's definition of sex, and, in the event that it did not, would provide an avenue of relief for many individuals suffering discrimination on such bases. However, the subsection of ACE that that would grant substantive rights, Subsection I, only applies to "women,"[90] and Subsection II, which defines both sex and race inclusively, includes a state action trigger, which would limit its impact.[91] The framing of these two subsections could potentially allow courts trying to take a narrow view of such an amendment to use Subsection II's state action trigger to deny affirmative equal rights to those classes enumerated in Subsection II that a court may interpret as excluded from Subsection I, such as sexual orientation, gender identity, race, disability, and faith.[92]

Moreover, ACE may not provide relief in all of the pending Supreme Court cases discussed above. Specifically, ACE may not provide protection to Zarda, a gay man fired by a private company, because Subsection II of ACE includes a state action trigger and because Subsection I of ACE, by its express language, solely applies to women.[93] ACE likely would, however, provide a cause of action, and a potential avenue for relief, to Bostock and Stephens. Because Bostock was employed by a state actor – Clayton County in Georgia– he

would likely come within the scope of Subsection II of ACE, with expressly protects against discrimination on the basis of sexual orientation when a state actor is the discriminator.[94] While there is no state action at issue in *R.G. & G.R. Harris Funeral Homes*, Subsection I of ACE would protect Stephens because it affords equal rights to "[w]omen in all their diversity" and appears to apply to both state and private actors. [95]

VI. CONCLUSION AND OPPORTUNITIES FOR FURTHER RESEARCH

ACE has many of the qualities of the best parts of the Constitution –

It enshrines the value of equality for all, provides a specific remedy to groups historically and currently facing oppression and subordination, and is broad enough to allow for growth to include additional groups as our society's social conscience continues to grow.

However, ACE has one critical shortcoming: its state action trigger in Subsection II prevents it from protecting against discrimination committed by private actors. As such, Subsection II should be revised to read: "Equality of rights shall not be denied or abridged in the United States or any place subject to its jurisdiction on account of sex (including pregnancy, gender, sexual orientation, or gender identity), and/or race (including ethnicity, national origin, or color), and/or like grounds of subordination (such as disability or faith)."[96]

As revised, this version of an ERA would achieve maximum inclusivity and would provide a balance between anti-classification and anti-subordination principles that would allow for action designed to remove disadvantages that individuals continue to suffer due to historical and ongoing systemic oppression, thus promoting true equity.

Proposing a new ERA, however, is not without its challenges. The next step would be to research the viability of this proposed language in terms of political and public support. Recent efforts in New York State indicate that it may receive such support. New York modeled its pending ERA on the ERA Coalition's expanded draft known as ACE, and it recently passed the State Senate by a vote of 62 - 0.[97] The ultimate success or failure of the proposed New York ERA may indicate how the general public would perceive a more inclusive ERA at the federal level. However, regardless of the outcome in New York, an inclusive and equitable society of which we can be proud is a society worth working towards. As there have been before, there will be setbacks. Nevertheless, we must persist.[98]

APPENDIX

Proposed Expanded ERA Drafted by the ERA Coalition, the African American Policy Forum, and the Center for Intersectionality & Social Policy Studies at Columbia Law School, with Recommended Edits

Whereas all women, and men of color, were historically excluded as equals from the Constitution of the United States, subordinating these groups structurally and systemically; and

Whereas prior constitutional amendments have allowed extreme inequalities of race and/or sex and/or like grounds of subordination to continue without effective legal remedy, and have even been used to entrench such inequalities; and

Whereas this country aspires to be a democracy of, by, and for all of its people, and to treat all people of the world in accordance with human rights principles;

Therefore be it enacted that—

I. Women in all their diversity shall have equal rights in the United States and every place subject to its jurisdiction.

II. Equality of rights shall not be denied or abridged ~~by~~ [in] the United States or ~~by any State~~ [in any place subject to its jurisdiction] on account of sex (including pregnancy, gender, sexual orientation, or gender identity) and/or race (including ethnicity, national origin, or color), and/or like grounds of subordination (such as disability or faith). Neither the United States nor any State shall give force by law to disadvantages suffered by those whose equality rights are denied or abridged.

III. To fully realize the rights guaranteed under this Article, Congress and the several States shall take legislative and other measures to prevent or redress any disadvantage suffered by individuals or groups because of past and/or present discrimination, and shall take all steps requisite and effective to abolish institutions that infringe the right to vote and to have that vote count equally.

IV. Nothing in Subsection II shall invalidate a law, program, or activity that is protected or required under Subsections I or III."[99]

[1] Ms. Stephens passed away in May 2020. Masha Gressen, Remembering Aimee Stephens, Who Lost and Found Her Purpose, New Yorker (May 20, 2020), https://www.newyorker.com/news/postscript/remembering-aimee-stephens-who-lost-and-found-her-purpose.

[2] *Bostock v. Clayton County*, No. 17-1618, slip op. at 33 (U.S. June 15, 2020).

[3] While some have argued that women are sufficiently protected by the Fourteenth Amendment, such arguments fail on three bases: (1) the Fourteenth Amendment only protects against state, not private, action; (2) women were not originally understood to be covered by the Fourteenth Amendment and their inclusion by judicial interpretation still leaves classifications on the basis of sex subject to a lower level of scrutiny than classifications on the basis of race; and (3) the Fourteenth Amendment has yet to achieve racial equality, which was the Amendment's original purpose, let alone gender equality. See infra notes ## (32 and 83-84 right now) and accompanying text.

[4] Tracey Jean Boisseau & Tracy A. Thomas, After Suffrage Comes Equal Rights? ERA as the Next Logical Step, in 100 Years of the Nineteenth Amendment 243 (Holly J, McCammon & Lee Ann Banaszak, eds. 2018).

[5] See generally, Elinor Burkett, Women's Rights Movement, Britannica (last updated Mar. 5, 2020), https://www.britannica.com/event/womens-movement.

[6] Becky Little, 'Unbought and Unbossed': Why Shirley Chisholm Ran for President, History (Dec. 4, 2018), https://www.history.com/news/shirley-chisholm-presidential-campaign-george-wallace; Debra Michals, Shirley Chisholm, Nat'l Women's Hist. Museum, https://www.womenshistory.org/education-resources/biographies/shirley-chisholm (last visited June 26, 2020).

[7]About Ms., Ms., https://msmagazine.com/about/ (last visited June 26, 2020); Karen Karbo, How Gloria Steinem Became the 'World's Most Famous Feminist', Nat'l Geographic (Marc. 25, 2019), https://www.nationalgeographic.com/culture/2019/03/how-gloria-steinem-became-worlds-most-famous-feminist/.

[8]Lorraine Boissoneault, The 1977 Conference on Women's Rights that Split America in Two, Smithsonian Mag. (Feb. 15, 2017), https://www.smithsonianmag.com/history/1977-conference-womens-rights-split-america-two-180962174/.

[9]Exec. Order No. 12,050, 43 Fed. Reg. 14431 (Apr. 4, 1978).

[10]Boisseau & Thomas, supra note ##, at 245-46.

[11] Ian Haney López, White by Law 147-48 (1996).

[12] See generally Bradley A. Areheart, The Anticlassification Turun in Employment Discrimination Law, 63 Ala L. Rev. 955 (2012); Jack M. Balkin & Reva B. Siegel, The American Civil Rights Tradition: Anticlassification or Antisubordination?, 58 U. Miami L. Rev. 9 (2003).

[13] Cathy Hinger, Why the Mansfield Rule Matters, JDSupra (Mar. 19, 2020), https://www.jdsupra.com/legalnews/why-the-mansfield-rule-matters-84244/.

[14] Id.

[15] While this paper was written while these cases were pending, the United States Supreme Court has recently issued its opinion, holding that the term "sex" in Title VII of the Civil Rights Act encompasses both sexual orientation and gender identity. Bostock v. Clayton County, No. 17-1618, slip op. at 33 (U.S. June 15, 2020).

[1] Katelyn Burns, The Supreme Court is Finally Taking on Trans Rights. Here's the Woman Who Started It All., Vox (Oct. 7, 2019), https://www.vox.com/latest-news/2019/10/7/20903503/trans-supreme-court-decision-employment-discrimination-aimee-stephens; Emanuella Grinberg, She Came Out as Transgender and Got Fired. Now Her Case Might Become a Test for LGBTQ Rights Before the US Supreme Court., CNN (Sept. 3, 2018), https://www.cnn.com/2018/08/29/politics/harris-funeral-homes-lawsuit/index.html.

[2] Meagan Flynn, A Transgender Woman Wrote a letter to her Boss. It Led to her Firing – and a Trip to the Supreme Court., Wash. Post (Apr. 30, 2019), https://www.washingtonpost.com/nation/2019/04/30/transgender-woman-wrote-letter-her-boss-it-led-her-firing-trip-supreme-court/.

[3] Id.

[4] Id.

[5] Brief for the Federal Respondent in Opposition at 4, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (U.S. cert granted Apr. 22, 2019).

[6] Id.; *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, 139 S. Ct. 1599 (2019) (granting cert. to decide, in part, "[w]hether Title VII prohibits discrimination against transgender people based on (1) their status as transgender"); *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560 (6th Cir. 2018) (holding that "discrimination on the basis of transgender and transitioning status violates Title VII"); *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes*, 100 F. Supp. 3d. 594, 598 (E.D. Mich. 2015) (holding "transgender or transsexual status is currently not a protected class under Title VII").

[7] See Danielle Kurtzleben, House Votes to Revive Equal Rights Amendment, Removing Ratification Deadline, NPR (Feb. 13, 2020) (discussing current efforts to ratify the Equal Rights Amendment to promote gender equality under the law).

[8] E.g., S.J Res. 21, 68th Cong. (1923); S.J. Res. 11, 69th Cong. (1925); S.J. Res. 64, 70th Cong. (1928); H.R.J. Res. 55, 71st Cong. (1929); H.R.J. Res. 197, 72d Cong. (1932); S.J. Res. 1, 73d Cong. (1933); H.R.J. Res 1, 74th Cong. (1935); H.R.J. Res. 1, 75th Cong. (1937); H.R.J. Res. 2, 76th Cong. (1939); H.R.J. Res. 2, 77th Cong. (1941); S.J. Res. 25, 78th Cong. (1943); H.R.J. Res. 1, 79th Cong. (1945); H.R.J. Res. 49, 80th Cong. (1947); H.R.J. Res. 5, 81st Cong. (1949); H.R.J. Res. 41, 82d Cong. (1951); H.R.J. Res. 64, 83d Cong. (1953); H.R.J. Res. 1, 84th Cong. (1955); H.R.J. Res. 35, 85th Cong. (1957); H.R.J. Res. 28, 86th Cong. (1959); H.R.J. Res. 4, 87th Cong. (1961); H.R.J. Res. 17, 88th Cong. (1963); H.R.J. Res. 208, 92nd Cong. (1971); H.R.J Res. 1066, 95th Cong. (1978); H.R.J. Res. 282, 96th Cong. (1979); H.R.J. Res. 192, 97th Cong. (1982); H.R.J. Res. 1, 98th Cong. (1983); H.R.J. Res. 2, 99th Cong. (1985); S.J. Res. 1, 100th Cong. (1987); H.R.J. Res. 1, 101st Cong. (1989); H.R.J. Res. 1, 102d Cong. (1991); H.R.J. Res. 1, 103d Cong. (1993); S.J. Res. 25, 104th Cong. (1995); S.J. Res. 24, 105th Cong. (1997); H.R.J. Res. 41, 106th Cong. (1999); S.J. Res. 10, 107th Cong. (2001); H.R.J. Res. 31, 108th Cong. (2003); H.R.J. Res. 31, 109th Cong. (2005); H.R.J. Res. 40, 110th Cong. (2007); H.R.J. Res. 61, 111th Cong. (2009); H.R.J. Res. 69, 112th Cong. (2011);
S.J. Res. 10, 113th Cong. (2013); S.J. Res. 16, 114th Cong. (2015); S.J. Res. 6, 115th Cong. (2017); S.J. Res. 15, 116th Cong. (2019).

[9] Thomas H. Neale, Cong. Research Serv., R42979, The Proposed Equal Rights Amendment: Contemporary Ratification Issues 1 (2018). The ERA introduced in the 92nd Congress has come the closest, passing both houses of Congress. Id. at 12. Although it was recently ratified in the required thirty-eight states, this occurred several decades after the ratification deadline. Moreover, several states' have rescinded their ratification of the ERA. *U.S. Const. art. V; Timothy Williams*, Virginia Approves the E.R.A., Becoming the 38th State to Back It, N.Y. Times (Jan. 15, 2020), https://www.nytimes.com/2020/01/15/us/era-virginia-vote.html. A seven-year deadline was set by Congress for ratification and, by the deadline's final expiration following an initial extension from Congress, only 35 states had ratified the ERA. Neale, supra note 9, at 1.

Additionally, although the constitutionality of such action is unclear, five states that originally ratified the ERA passed resolutions to rescind their ratifications. Id.

[10] H.R.J. Res. 208, 92d Cong. § 1 (1972).

[11] 42 U.S.C. § 2000e-2(a) (2012).

[12] See infra notes 75-77 and accompanying text. This argument has, thankfully, been greatly weakened by the recent Supreme Court holding in Bostock v. Clayton County, No. 17-1618, slip op. at 33 (U.S. June 15, 2020). However, given the fundamental differences inherent between statutes and the Constitution, its vulnerability is not completely eliminated.

[13] Neale, supra note 9, at 2-4. "Three state strategy" is now something of a misnomer, as Virginia recently became the thirty-eighth state to ratify the 1972 ERA. Williams, supra note 9.

[14] Kurtzleben, supra note 7 (discussing that removing or changing the ratification deadline is seen as a critical step in adding the ERA to the Constitution). See also supra note 11 and accompanying text.

[15] Neale, supra note 9, at 2-4. Under Article V, an amendment is first proposed either by Congress with a two-thirds majority vote in both the House of Representatives and the Senate or by constitutional convention convened by application of two-thirds of the States. U.S. Const. art. V. After this first stage, the amendment must then be ratified by three-fourths of the States. Id.

[16] See generally Robinson Woodward-Burns, The Equal Rights Amendment is One State from Ratification. Now What?, Wash. Post (Jun. 20, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/20/the-equal-rights-amendment-is-one-state-from-ratification-now-what/; Neale, supra note 9; Susan C. Del Pesco, Quieting the Sentiments, 37 Del. Law. 8, 10–11 (2019); Bridget L. Murphy, The Equal Rights Amendment Revisited, 94 Notre Dame L. Rev. 937 (2018); Martha F. Davis, The Equal Rights Amendment: Then and Now, 17 Colum. J. Gender & L. 419 (2008).

[17] See S.J. Res. 21, 68th Cong. (1923) ("Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction.").

[18] E.g., S.J. Res 72, 77th Cong. § 1 (1941) ("No person within the United States, or any place subject to the jurisdiction thereof, shall be disqualified from the exercise of any public function, or from being appointed to or holding any civil or judicial office,
or be precluded or debarred from entering or carrying on any occupation, profession, vocation, or employment, or be exempt from liability to serve as a juror, on account of sex or marriage."); H.R.J. Res. 339, 83rd Cong. § 1 (1954) ("Whenever in this Constitution the term 'person, persons, people', or any personal pronoun is used, the same shall be taken to include both sexes.");
S.J. Res. 159, 92d Cong. (1971) ("Neither the United States nor any State shall, on account of sex, deny to any person within its jurisdiction the equal protection of the laws."); H.R.J. Res. 208, 92nd Cong. § 1 (1972) ("Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."); H.R.J. Res. 31, 112th Cong. §§ 1-2 (2011) ("Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex … Reproductive rights for women under the law shall not be denied or abridged by the United States or any State.").

[19] E.g., Alaska Const. art. 1, § 3 ("No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin.); Del. Const. art. 1, § 21 ("Equality of rights under the law shall not be denied or abridged on account of sex."); Fla. Const. art. 1, § 2 ("All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property. No person shall be deprived of any right because of race, religion, national origin, or physical disability.");
R.I. Const. art. 1, § 2 ("No otherwise qualified person shall, solely by reason of race, gender or handicap be subject to discrimination by the state, its agents or any person or entity doing business with the state. Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof.").

[20] Susan D. Becker, The Origins of the Equal Rights Amendment: American Feminism Between the Wars 15 (1981) (noting that the proponents of the ERA envisioned a legal landscape that made no distinctions on the basis of sex); Janet K. Boles, The Politics of the Equal Rights Amendment 4 (1979). However, although opposition to the ERA was often framed as a fear that the ERA would invalidate "protective" legislation for women, it should also be noted that much of the opposition consisted of "far-right" organizations working to stoke prejudices that feminist ideology leads to the destruction of the home and family. Id. at 9.

[21] 551 U.S. 701, 748 (2007).

[22] See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. at 861-63 (Breyer, J., dissenting) ("de facto resegregation is on the rise.…[The school board] may need all of the means presently at their disposal to combat those problems.…That is why the Equal Protection Clause [of the Fourteenth Amendment] outlaws invidious discrimination, but does not similarly forbid all use of race-conscious criteria.").

[23] The main proponent of the 1972 ERA was the National Women's Party, with its founder, Alice Paul, authoring the proposed amendment. Alice Paul, and the National Women's Party, firmly believed in an anti-classification theory of gender equality, believing that the ERA would end "all legal distinctions between men and women." Boles, supra note 20, at 41.

[24] See, e.g., H.R.J. Res. 35, 116th Cong. (2019) ("Women shall 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."); H.R.J. Res. 31, 110th Cong. § 2 (2007) ("Reproductive rights for women under the law shall not be denied or abridged by the United States or any State."); H.R.J. Res. 85, 98th Cong. (1983) ("All persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry, sex, age, or physical handicap.").

[25] H.R.J. Res. 175, 46th Cong. (1880). Note that the use of the term "gender" in this note refers, inclusively, to sex, gender, gender identity, and sexual orientation.

[26] See, e.g., S.J. Res. 19, 48th Cong. (1883); H.R.J. Res 60, 51st Cong. (1890); S.J. Res. 102, 55th Cong. (1898); H.R.J. Res. 72, 58th Cong. (1903); H.R.J. Res. 151, 61st Cong. (1908); H.R.J. Res. 1, 63d Cong. (1913); H.R.J. Res. 47, 66th Cong. (1919).

[27] U.S. Const. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

[28] The Fourteenth Amendment was not originally intended or understood to apply to sex-based discrimination. Nina Morais, Sex Discrimination and the Fourteenth Amendment: Lost History, 97 Yale L.J. 1153, 1153 (1988); see also *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872) (in which the court held that the Privileges and Immunities Clause of the Fourteenth Amendment did not guarantee a woman's right to practice law).

[29] Becker, supra note 20, at 15; Neale, supra note 9, at 1.

[30] Equal Rights Amendment, Nat'l Org. for Women, https://now.org/resource/equal-rights-ammendment/ (last visited Aug. 25, 2019); S.J. Res. 21, 68th Cong. (1923) ("Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction.").

Alice Paul dedicated her life to achieving equal rights for women in the United States as the founder of the National Women's Party. She fought first for women's suffrage and, after the ratification of the Nineteenth Amendment, for passage of an Equal Rights Amendment to the U.S. Constitution. Who Was Alice Paul. Alice Paul Institute,
https://www.alicepaul.org/who-was-alice-paul/ (last visited Nov. 30, 2019).

[31] Compare U.S. Const. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.") (emphasis added), with, e.g., S.J. Res. 25, 78th Cong. (1943) ("Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.") (emphasis added).

[32] See H.R.J. Res. 208, 92d Cong. (1971).

[33] See Becker, supra note 20, at 18–19 (discussing that the National Women's Party, a leader in the movement to ratify an ERA, was focused solely on anti-classification and was both "uncompromising and outspoken" about its opposition to "protective legislation"); see also Julie C. Suk, Transgenerational and Transnational: Giving New Meaning to the ERA, 43 Harbinger 163, 164-65 (2019) ("Alice Paul, the drafter and most vocal proponent of the ERA, insisted that the amendment would preclude woman-protective labor legislation.... "[T]he question of whether constitutional sex equality is compatible with governmental measures to alleviate women's subordination ... remains contested.").

[34] Lillian Cunningham, Constitutional: Gender, The Washington Post (Aug. 28, 2017), https://www.washingtonpost.com/news/on-leadership/wp/2017/08/28/episode-5-of-the-constitutional-podcast-gender/; Tammy L. Brown, Celebrate Women's Suffrage, but Don't Whitewash the Movement's Racism, ACLU (Aug. 24, 2018)
https://www.aclu.org/blog/womens-rights/celebrate-womens-suffrage-dont-whitewash-movements-racism.

[35] Ama Ansah, Votes for Women Means Votes for Black Women, Nat'l Women's Hist. Museum (Aug. 16, 2018), https://www.womenshistory.org/articles/votes-women-means-votes-black-women.

[36] S.J. Res. 159, 92d Cong. (1971) ("Neither the United States nor any State shall, on account of sex, deny to any person within its jurisdiction the equal protection of the laws."); H.R.J. Res. 668, 95th Cong. (1977) ("All persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry, sex, age, or physical handicap.").

[37] *Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1(1971).*

[38] See, e.g., H.R.J. Res. 276, 93d Cong. § 1 (1973) ("The right of students to attend the public school nearest their place of residency shall not be denied nor abridged for reasons of race, color, national origin, religion, or sex."). This language closely tracks that of the most well-known version of the proposed ERA ("Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."). H.R.J. Res. 208, 92nd Cong. § 1 (1972).

[39] S.J. Res. 14, 69th Cong. (1925) ("The Congress and the several States shall have power within their respective spheres to provide for the establishment and enforcement of minimum wages for women and minors.").

[40] Boles, supra note 20, at 4.

[41] See S.J. Res. 138, 92d Cong. (1971) ("Equality of rights and responsibilities under the law with respect to opportunities and conditions of education and employment shall not be abridged by the United States or by any State on account of sex. Nor shall any State deny, on account of sex, the equal protection of its law to any person within its jurisdiction. This article shall not impair the validity of any law of the United States or any State which is essential to enable women to exercise their rights or to perform their responsibilities as homemakers or mothers.").

[42] S.J. Res. 150, 92d Cong. (1971) (as amended) ("Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. The provisions of this article shall not impair the validity, however, or any laws of the United States or any State which exempt women from compulsory military service, or from service in combat units of the Armed Forces; or extend protections or exemptions to women; or impose upon fathers responsibility for the support of children; or secure privacy to men or women, or boys or girls; or make punishable as crimes rape, seduction, or other sexual offenses.").

[43] Compare Boles, supra note 20, at 4 (discussing that opposition to the ERA often referenced a perceived threat to "American democracy"), with H.R.J. Res. 1066, 95th Cong. § 2 (1978) ("This amendment shall not be so construed to delegate to the United States any powers otherwise reserved to the States, or to the people.").

[44] Compare Boles, supra note 20, at 5 (discussing the argument made by opponents of the ERA that it would render same-sex marriage constitutional), with H.R.J. Res. 230, 98th Cong. § 2 (1983) ("Section 1 shall not apply ... to any law of any State concerning marriage between members of the same sex."). It should be noted that this particular argument is now moot, as the Supreme Court held same-sex marriage to be constitutionally protected in Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[45] Compare Boles, supra note 20, at 107 (discussing that Phyllis Schafly, a leader of the opposition to the ERA, often connected the ERA to abortion), with H.R.J. Res. 438, 98th Cong. § 3 (1983) ("Section 1 shall not be construed to grant or secure any right relating to abortion or the funding thereof.").

[46] See H.R.J. Res. 32, 107th Cong. § 2 (2001) ("Reproductive rights for women under the law shall not be denied or abridged by the United States or by any State."); see also H.R.J. Res. 31, 110th Cong. § 2 (2007); H.R.J. Res. 31, 111th Cong. § 2 (2009); H.R.J. Res. 31, 112th Cong. § 2 (2011) (utilizing the same language regarding reproductive rights as first introduced in 2001).

[47] See S.J. Res. 72, 77th Cong. (1941) ("No person within the United States, or any place subject to the jurisdiction thereof, shall be disqualified from the exercise of any public function, or from being appointed to or holding any civil or judicial office, or be precluded or debarred from entering or carrying on any occupation, profession, vocation, or employment, or be exempt from liability to serve as a juror, on account of sex or marriage."); see also H.R.J. Res. 42, 79th Cong. (1945) ("Women shall have equal rights with men without discrimination on account of sex throughout the United States and every place subject to its jurisdiction.").

[48] See H.R.J. Res. 32, 107th Cong. § 1 (2001) ("Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of gender.").

[49] Compare H.R.J. Res. 32, 107th Cong. § 1 (2001) ("Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of gender."), with H.R.J. Res. 32, 107th Cong. § 2 (2001) ("Reproductive rights for women under the law shall not be denied or abridged by the United States or any State."). Section 2 refers only to "reproductive rights for women," ignoring the possibility that those who face reproductive rights issues that have traditionally been associated with women, such as pregnancy, do not all identify as women. See also, e.g., S.J. Res. 111, 83rd Cong. (1953) ("Whenever in this Constitution the term 'person, persons, people,' or any personal pronoun is used the same shall be taken to include both sexes.") (emphasis added).

[50] See supra notes 21-22 and accompanying text.

[51] See Jenée Desmond-Harris, Doubts About Inclusive Feminism Have Little to do with the Women's March. They're Rooted in History., Vox (Jan. 25, 2017), https://www.vox.com/identities/2017/1/25/14355302/womens-march-feminism-intersectionality-women-of-color-white-feminists (discussing the fight to make the feminist movement more intersectional and noting that "'[w]e're all the same' has never served women of color").

[52] Supra notes 38- 39 and accompanying text.

[53] See, e.g., Adia Harvey Wingfield, Color-Blindness Is Counterproductive, Atlantic (Sept. 13, 2015), https://www.theatlantic.com/politics/archive/2015/09/color-blindness-counterproductive/405037/.

[54] Karen Grigsby Bates, Race and Feminism: Women's March Recalls the Touchy History, NPR (Jan. 21, 2017), https://www.npr.org/sections/codeswitch/2017/01/21/510859909/race-and-feminism-womens-march-recalls-the-touchy-history (discussing that "for decades, white women didn't have to consider any interests beyond their own because 'historically, the category "woman" has, implicitly, meant white women" and noting that "[t]he fact that the feminist movement was so white for so long … is the reason so many women of color steered clear of it"); Jarune Uwujaren & Jamie Utt, Why Our Feminism Must Be Intersectional (and 3 Ways to Practice It), Everyday Feminism (Jan. 11, 2015), https://everydayfeminism.com/2015/01/why-our-feminism-must-be-intersectional/ ("White feminism is a set of beliefs that allows for the exclusion of issues that specifically affect women of color. It is 'one-size-fits-all' feminism, where middle-class White women are the mold that others must fit."). See also Kimberle 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 (1989) (discussing the lack of intersectionality in antidiscrimination doctrine such that "in race discrimination cases, discrimination tends to be viewed in terms of sex- or class-privileged Blacks; in sex discrimination cases, the focus is on race- and class-privileged women. This focus on the most privileged group members marginalizes those who are multiply-burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination.").

[55] See generally Understanding Gender, Gender Spectrum, https://www.genderspectrum.org/quick-links/understanding-gender/(last visited Apr. 2, 2020).

[56] U.S. Const. art. V.

[57] Neale, supra note 9, at 9 (quoting Mary Frances Berry, Why ERA Failed 60 (1986)).

[58] See, e.g., H.R.J. Res. 529, 97th Cong. (1982); H.R.J. Res. 1, 98th Cong. (1983); H.R.J. Res. 2, 99th Cong. (1985); S.J. Res. 1, 100th Cong. (1987); H.R.J. Res. 1, 101st Cong. (1989); H.R.J. Res. 1, 102d Cong. (1991); H.R.J. Res. 1, 103d Cong. (1993); S.J. Res. 25, 104th Cong. (1995); S.J. Res. 24, 105th Cong. (1997); H.R.J. Res. 41, 106th Cong. (1999); S.J. Res. 10, 107th Cong. (2001); H.R.J. Res. 31, 108th Cong. (2003); H.R.J. Res. 31, 109th Cong. (2005); H.R.J. Res. 31, 110th Cong. (2007); H.R.J. Res. 31, 111th Cong. (2009); H.R.J. Res. 31, 112th Cong. (2011); S.J. Res. 10, 113th Cong. (2013); S.J. Res. 16, 114th Cong. (2015); S.J. Res. 6, 115th Cong. (2017); H.R.J. Res. 35, 116th Cong. (2019).

[59] See U.S. Const. amends. I–XXVII. When it became clear that prohibition was a failed experiment, the United States even managed to pass an amendment repealing its earlier amendment imposing prohibition. See U.S. Const. amend. XXI (repealing U.S. Const. amend. XVIII).

[60] "If I could choose an amendment to add to this constitution, it would be the Equal Rights Amendment …. It means that women are people equal in stature before the law. And that's a fundamental constitutional principle. I think we have achieved that through legislation. But legislation can be repealed. It can be altered …. 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 that is a basic principle of our society." Murphy, supra note 16, at 937 (quoting United States Supreme Court Justice Ruth Bader Ginsburg).

[61] See Martha Craig Daughtrey, Women and the Constitution: Where We Are at the End of the Century, 75 N.Y.U. L. Rev. 1, 4 (2000) ("In its original form and even in its current stage of development, the United States Constitution speaks only in the male gender.").

[62] See Jessica Neuwirth, Time for the Equal Rights Amendment, 43 Harbinger 155, 156-57 (2019) ("The legal framework for addressing sex inequality is a patchwork quilt of legislation that is full of holes.").

[63] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."); see also U.S. v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

[64] See Alaska Const. art. 1, § 3; Ariz. Const. art. 7, § 2; Cal. Const. art. 1, §§ 8, 31(a); Colo Const. art. 2, § 29; Conn. Const. art 1, § 20; Del. Const. art. 1, § 21; Fla. Const. art. 1, § 2; Haw. Const. art. 1, § 3; Ill. Const. art. 1, § 18; Iowa Const. art. 1, § 1; La. Const. art. 1, § 3; Md. Const. Declaration of Rights art. 46; Mass. Const. part 1, art. 1; Mont. Const. art. 2, § 4; Neb. Const. art. 1, § 30; N.H. Const. part 1, art. 2; N.J. Const. art. 10, par. 4; N.M. Const. art. 2, § 18; Or. Const. art. 1, § 46; Pa. Const. art. 1, § 28; R.I. Const. art. 1, § 2; Tex. Const. art. 1, § 3a; Utah Const. art. IV, § 1; Va. Const. art. 1, § 11; Wash. Const. art. XXXI, § 1; Wyo. Const. art. I, § 3; Wyo. Const. art. VI, § 1; H.R. 342, 129th Leg., 1st Reg. Sess. (Me. 2019); H.R. 13, 91st Leg., 91st Sess. (Minn. 2019); S. 200, 91st Leg., 91st Sess. (Minn. 2019); Assemb. 271, 2019 Leg., 2019-2020 Reg. Sess. (N.Y. 2019); S. 517B, 2019 Leg., 2019-2020 Reg. Sess. (N.Y. 2019); Assemb. 272B, 2019 Leg., 2019-2020 Reg. Sess. (N.Y. 2019).

[65] See 42 U.S.C. § 2000e et seq.

[66] 42 U.S.C. § 2000e-2(a)(1) (2012).

[67] 42 U.S.C. § 2000e(b) (2012).

[68] The Supreme Court consolidated two cases for the purposes of oral argument, *Bostock v. Clayton County* and *Altitude Express, Inc. v. Zarda*, which both involve the question whether Title VII's protection against discrimination on the basis of sex includes protection against discrimination on the basis of sexual orientation. *Bostock v. Clayton County*, No. 17-1618 (U.S. cert. granted Apr. 22, 2019); *Altitude Express, Inc. v. Zarda*, No. 17-1623 (U.S. cert. granted Apr. 22, 2019). The third case argued before the Supreme Court recently is *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, which involves the question whether Title VII's protection against discrimination on the basis of sex includes protection against discrimination on the basis of gender identity. *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (U.S. cert. granted Apr. 22, 2019).

[69] Second Amended Complaint at 3-6, Bostock v. Clayton County, No. 1:16-CV-1460, 2016 WL 9753356 (N.D. Ga. 2016); *Bostock v. Clayton County*, Oyez, https://www.oyez.org/cases/2019/17-1618 (last visited Dec. 1, 2019).

[70] Second Amended Complaint at 5-7, *Zarda v. Altitude Express, Inc.*, No. 10-cv-04334-JFB, 2014 WL 12884507 (E.D.N.Y. 2014); *Altitude Express v. Zarda*, Oyez, https://www.oyez.org/cases/2019/17-1623 (last visited Dec. 1, 2019).
[71] Supra notes 1-7 and accompanying text.
[72] First Amended Complaint and Jury Demand at 3-4, *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-13710, 100 F. Supp. 3d 594 (E.D. Mich. 2015); *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, Oyez, https://www.oyez.org/cases/2019/18-107 (last visited Dec. 1, 2019).
[73] See Tr. of Oral Arg. at 10-31, *Bostock v. Clayton County*, No. 17-1618 (U.S. cert. granted Apr. 22, 2019).
[74] See Tr. of Oral Arg. at 5, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (U.S. cert. granted Apr. 22, 2019) (where Chief Justice Roberts referred to a transgender woman as "a transgender man transitioning to woman" and then referred to the same hypothetical woman using the pronoun "he," which he then attempted to correct by saying "he or she").
[75] See Tr. of Oral Arg. at 5-27, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (U.S. cert. granted Apr. 22, 2019).
[76] "Equality of rights under the law shall not be denied or abridge by the United States or by any State on account of sex." H.R.J. Res. 208, 92d Cong. § 1 (1972) (emphasis added).
[77] H.R.J. Res. 208, 92d Cong. § 1 (1972); 42 U.S.C. § 2000e-2(a) (2012).
[78] As indicated by the United States' experience with prohibition, repealing an amendment requires going through the entire Article V amendment process to ratify a new constitutional amendment repealing an earlier one. See U.S. Const. amend. XXI (repealing U.S. Const. amend. XVIII).
[79] See generally, e.g., Melvin J. Kelley IV, Retuning Bell: Searching for Freedom's Ring as Whiteness Resurges in Value, 34 Harvard J. Racial & Ethnic Just. 131 (2018).
[80] See Civil Rights Cases, 109 U.S. 3, 11 (1883) (holding that the Fourteenth Amendment does not protect against "[individual invasion of individual rights," but that only "State action of a particular character … is prohibited."]; *United States v. Morrison*, 529 U.S. 598, 621 (2000) (holding that "the Fourteenth Amendment, by its very terms, prohibits only state action. . . . '[It] erects no shield against merely private conduct, however discriminatory or wrongful.'" (quoting *Shelly v. Kraemer*, 334 U.S. 1, 13 (1948)).
[81] See Suk, supra note 33, at 165 (discussing the 1972 proposed ERA and how it would presumably "be enforced by lawsuits challenging sex-discriminatory governmental action," noting that such lawsuits would fail to address the most pressing issues of gender-based discrimination today).
[82] Supra notes 48-49 and accompanying text.
[83] "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." Pa. Const. art. 1, § 28.
[84] See Conn. Const. art. 1, § 20; Fla. Const. art. 1, § 2; Mass. Const. part 1, art. 1; Pa. Const. art. 1, § 28.
[85] See, e.g., Colo. Const. art. 2, § 29 ("Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex.").
[86] See, e.g., Conn. Const. art. 1, § 20 ("No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability.").
[87] New ERA Prefatory Note, ERA Coalition, African American Pol'y F., and Colum. Law Sch. Ctr. for Intersectionality & Soc. Pol'y Stud. (on file with author); About the Coalition, ERA Coalition, http://www.eracoalition.org/about (last visited Dec. 1, 2019).
[88] New ERA Prefatory Note, supra note 87.
[89] Id.
[90] "Women in all their diversity shall have equal rights in the United States and every place subject to its jurisdiction." Id.
[91] "Equality of rights shall not be denied or abridged by the United States or by any State on account of sex (including pregnancy, gender, sexual orientation, or gender identity, and/or race (including ethnicity, national origin, or color), and/or like grounds of subordination (such as disability or faith)." Id.
[92] Id.
[93] "Women in all their diversity shall have equal rights in the United States and every place subject to its jurisdiction." Id.
[94] Id.
[95] Id.
[96] The full revised text is found, infra, in the Appendix.
[97] Karen Dewitt & Marian Hetherly, State Senate Approves Adding ERA Protections to NY Constitution, WBFO (Jun. 18, 2019), https://news.wbfo.org/post/state-senate-approves-adding-era-protections-ny-constitution; Liz Krueger, Senate Passes Inclusive Equal Rights Amendment, The New York State Senate (Jun. 17, 2019), https://www.nysenate.gov/newsroom/press-releases/liz-krueger/senate-passes-inclusive-equal-rights-amendment.
[98] "Nevertheless, she persisted" became a phrase embraced by the feminist movement after Senate Majority Leader Mitch McConnell used it against Senator Elizabeth Warren in 2017. Katie Reilly, Why 'Nevertheless, She Persisted' Is the Theme for this Year's Women's History Month, Time (Mar. 1, 2018), https://time.com/5175901/elizabeth-warren-nevertheless-she-persisted-meaning/.
[99] New ERA Prefatory Note, supra note 87; About the Coalition, supra note 87.

NAWL'S STATEMENT AND CALL TO ACTION IN RESPONSE TO THE MURDER OF GEORGE FLOYD, JUNE 1ST 2020

Pictures: Bottom Left: Crowd of protestors holding signs, 2020; Top Right: Women at a protest, 2020; Bottom Right: Crowd of protestors holding signs, 2020. [Life Matters from Pexels]

We write to you with heavy hearts as our nation has once again been shocked by the senseless killing of another Black person at the hands of the police. The murder of **George Floyd** is a reminder of the grim inequities that run rampant in our society. We are not witnessing a tear in the fabric of our democracy, but further evidence that our democracy was never fully fabricated – it has and continues to elude and exclude those who have historically been marginalized based on race, ethnicity, gender, or sex. These inequities are reflected in victims like **George Floyd, Breonna Taylor, Ahmaud Arbery**, and countless other Black women and men, as well as the disproportionate health and unemployment impacts of COVID-19 on the Black community. This country is at an inflection point from which we can and must collectively move forward in recognition that an injustice against one community is an affront to all of our communities. We must support one another to fight institutional racism and bigotry.

Over 150 years have passed since our civil war and the end of slavery, yet this country has yet to fulfill the hard-won promise of civil liberties and equality under the law. As a nation we must all come together and demand that those charged with enforcing our Constitution and laws be the standard bearers of that promise. Only when every American feels safe and that they have the same rights to live in dignity and equality will that promise be realized.

Heeding the words of Rev. Dr. Martin Luther King, Jr. that it is **"not merely for the vitriolic words and the violent actions of the bad people, but for the appalling silence and indifference of the good people who sit around,"** NAWL renews our commitment to advocate for justice and equality for all. NAWL stands unified with other organizations supporting the principle of equal justice for all and the uniform application of the rule of law regardless of color, gender, race, religious or political affiliation. We call upon our leaders to ensure that states and localities fulfill the 14th Amendment's guarantees of due process and equal protection for all. We call upon our members and the legal profession to join us and employ the knowledge, skills, and values we have as lawyers to implement strategies that will eradicate systemic racial injustice.

Each one of us can make a difference. NAWL urges our members to commit to:

1. Know and exercise your rights and encourage others to do the same. Research and understand key legislation on issues that affect you and your community. Write or contact your local and national elected officials to ask questions, advocate your beliefs and simply hold them accountable (find your representative here). And most importantly, VOTE!

2. Engage with the NAWL community to create concrete projects and action steps to further social justice and protect equal rights. NAWL's diverse membership is dedicated to equality, mutual support, and collective success – we are here to support one another.

3. Educate yourself by learning about the history and culture of people unlike you and expanding your circle to include people from diverse backgrounds. Acknowledge that implicit biases are part of the human condition but disparately affect Black and other marginalized groups. Actively work toward not allowing them to define how you view and treat people who are unlike you. Please consider 75 Things White People Can Do for Racial Justice and Anti-Racism Reading/Resource List.

Support civil rights and social justice causes. Some examples include:

- **NAACP Legal Defense Fund (LDF)**, the nation's first legal organization fighting racism, founded in 1940 by Thurgood Marshall, our country's first Supreme Court Justice of color, and the chief architect behind the effort to desegregate the south through the landmark case, Brown v. Board of Ed.Through litigation, advocacy, and public education, LDF seeks structural changes to expand democracy, eliminate disparities, and achieve racial justice in a society that fulfills the promise of equality for all Americans. LDF also defends the gains and protections won over the past 75 years of civil rights struggle and works to improve the quality and diversity of judicial and executive appointments.

- **American Civil Liberties Union (ACLU)**, founded in 1920, is our nation's guardian of liberty. The ACLU works in the courts, legislatures, and communities to defend and preserve the individual rights and liberties guaranteed to all people in this country by the Constitution and laws of the United States.

- **Lawyers Committee for Civil Rights Under Law,** a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity – work that continues to be vital today. The Lawyers' Committee is committed to securing equal justice for all through the rule of law, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities.

Manal Cheema:

An Ethos of Service

"I saw the effect and power that laws had on my community and I wanted to become an advocate for others."
- Manal Cheema

Interviewed & Written By

Courtney Worcester
Partner
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WLJ Editorial Board Member

Each year, NAWL presents a member of each graduating class of an ABA-approved law school with an outstanding law student award. This year we are pleased to present an in-depth interview with one of the recipients -- Manal Cheema. Manal, a graduate of the University of Virginia School of Law, will be clerking this year with the Honorable Kevin A. Ohlson, for the Court of Appeals for the Armed Forces. She then will be entering active duty with the Judge Advocate General's Corps through the U.S. Navy.

Path to Law School

Manal's decision to pursue a legal degree made her the first in her family to do so. "I come from a family of doctors, not lawyers." In fact, growing up, she did not know anyone who was a lawyer. Indeed, up until high school, she found it hard to speak up in class; making a legal career an unlikely path. Then, one of her high school teachers took an interest in her and became her mentor, giving her the self-confidence she needed to express herself publicly. After taking AP U.S. History and AP Government classes, Manal knew that law school might be for her.

That decision solidified during her studies at Tufts University. There she majored in political science, where her love of her classes helped her to graduate summa cum laude. While at Tufts several of her internships, including with Senator Elizabeth Warren and with the Norfolk County District Attorney's office, influenced her decision to go to law school. "I saw the effect and power that laws had on my community and I wanted to become an advocate for others." Having made the decision to go to law school, she knew she wanted a school that would allow her to pursue a career in the public sector.

No one was more surprised than Manal when she ended up at UVA. "I don't think I was even aware that UVA had a law school." Yet after talking to the UVA Law admissions office, she realized that the school had a strong commitment to the public sector, as evidenced by the school's Public Service Center. "UVA Law was so good to me and I'm grateful for my time there."

Involvement in Virginia Law Women

Manal credits her involvement with the Virginia Law Women as providing her numerous growth opportunities, including helping her to develop her own management style. Manal was not a 1L representative in the organization, but she loved what the organization did and promised to do for women in law. In the spring, she was approached to run for one of the sixteen board slots. The election is competitive, with up to thirty candidates running and over 200 casting votes.

Historically, there have not been many minority women on the board. The night before the election ballot went out, Manal called to withdraw her name, feeling like she was not the right candidate for the job or that she could win the position over her several extremely qualified and admirable peers. Her request was refused.

"I was told I was taking my name out of consideration for the wrong reasons and that I needed to run."

That turned out for the best as not only did Manal win that election, she went on to become the president of the organization. As president, Manal learned that leading meant adapting to the style and needs of the board. In particular, she "learned to recognize and support the ambitions of fellow board members," which in turn, made board members more invested in the process.

Her Decision to Enlist

While at UVA, Manal interned at the Department of State and the Department of Justice. She could have fulfilled her desire to find a public service job in the civilian legal sector. Instead, she determined that she "wanted to make the Navy the foundation of her career," and commissioned into the Navy and joined the Judge Advocate General's Corps. While recognizing that military service comes with many burdens and that she will be balancing responsibilities as both an attorney and an officer, Manal is excited about the challenge. And her parents' reaction?

"They were apprehensive when I first told them I wanted to do this. But after talking to them, they came to understand that the Navy fell in line with the ethics that they raised me with." Now, it is a point of pride for her family:

"My parents love to tell people that their daughter is serving our country."

Graduating Law School in a Pandemic

Manal, like many others, saw her third-year of law school at UVA disrupted by COVID-19. She and her classmates never had the opportunity to return to campus after leaving for Spring Break. Even though her graduation was virtual, it was still memorable and even included a performance by Yo-Yo Ma. And as if studying for the bar in your childhood bedroom or while working isn't hard enough, taking the bar this year is a separate challenge, as many states prioritized enrollment to those attending in-state law schools, postponed their bars to the fall, moved their bars online, or limited reciprocity with other states. Manal had it easier than most, as the Navy does not require a particular state's bar.

Advice to Incoming Women Law Students

Manal's success and enjoyment of law school were helped in no small part by the strong personal relationships that she was able to develop with students and professors, many of which served as her mentors. She recognizes that in the current environment it may be hard for 1Ls to develop those relationships via Zoom. Her advice: "Seek out as many potential mentorship relationships as you can, even knowing that not all are going to come to fruition. The ones that will grow into friendships will be so important to getting you through law school. Don't detach and don't give up."

2020 NAWL OUTSTANDING LAW STUDENT AWARDEES

Each year, NAWL asks the faculty of all ABA-accredited law schools to identify a third-year law student for the "NAWL Outstanding Law Student" Award. Here are the 2020 NAWL Outstanding Law Students!

Caroline Bateh
Stetson University College of Law

Lauren Bateman
Rutgers Law School

Emily Bienek
University of Maine School of Law

Jessica Burton
Atlanta's John Marshall Law School

Allison Bustin
University of Pittsburgh School of Law

Manal Cheema
University of Virginia School of Law

Bianca Falcon
Loyola Law School

Toni Hartzel
University of Wyoming, College of Law

Erin Heaney
Penn State Law

Janina Heller
The George Washington University Law School

Chelsea Henderson
Mercer University School of Law

Elizabeth Holden
Vanderbilt Law School

Natalia Homchick
Washington & Lee University School of Law

Jessica Ice
Case Western Reserve University School of Law

Haley Marie Lohr
Elon University School of Law

Shoshana Mahon
Drexel University Thomas R Kline School of Law

Anette Mendoza
University of Massachusetts School of Law

Samin Mossavi
Emory University School of Law

Amanda Nelson
University of New Mexico School of Law

Grace O'Meara
University of Minnesota Law School

Shivani Patel
University of Georgia School of Law

Kassandra Polanco
Touro College Jacob D. Fuchsberg Law Center

Francesca Rollo
West Virginia University College of Law

Jasmine Sandhu
The Pennsylvania State University - Dickinson Law

Tiffany Schaad
Ohio Northern University Claude W. Pettit College of Law

Rebecca Schultz
The University of Richmond School of Law

Danielle Schweizer
University of Maryland Francis King Carey School of Law

Madeline Sheerer
Duquesne University School of Law

Elyssa Willadsen
Vermont Law School

Facing COVID-19 With Emotional Intelligence: A "Through Her Eyes" Perspective

WRITTEN BY

JENNIFER THIBODAUX

SENIOR LEGAL EDITOR,
THOMSON REUTERS
PRACTICAL LAW AND
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WOMEN LAWYERS JOURNAL
EDITORIAL BOARD MEMBER

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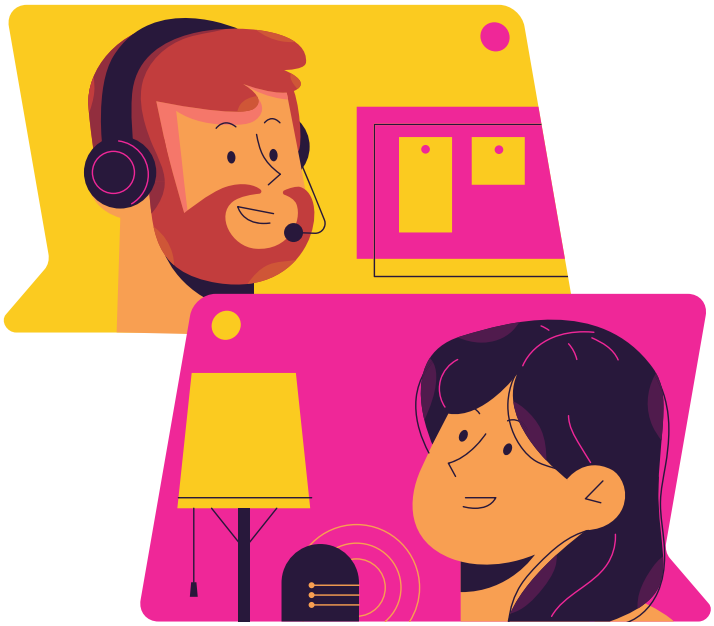
WOMEN LAWYERS JOURNAL
EDITORIAL BOARD MEMBER

One of the countless side effects of COVID-19 is the remote workplace that eliminates the line between our personal and professional lives. Lawyers are still navigating this "virtual reality" and will be for the foreseeable future. In June 2020, we interviewed three NAWL members with diverse perspectives to present a "through her eyes" account of how women lawyers are responding to the personal and professional challenges the pandemic presents.

After our interviews, we realized there is a powerful, common thread running through each woman's story: ***emotional intelligence.***[1] We have woven their stories together to present key takeaways based on how these women rely on soft skills – like empathy, honesty, and transparency – to adapt and rise to various challenges during this unprecedented time.

Use a Personal Touch to Maintain and Strengthen Human Connections

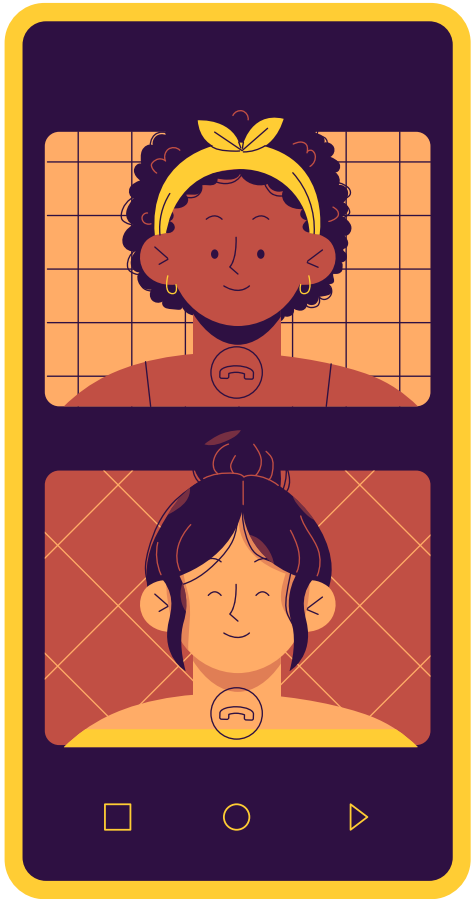
Nikaela Jacko Redd, *Vice President, Wealth Management-Legal and Compliance, Morgan Stanley*, has been in private practice or in-house for over ten years. A West Coast transplant who lives in the Washington D.C. metropolitan area, she also is a mom to a school-aged son. Many of us can relate to Nikaela, who told us that the biggest change to her workday has been the lack of human interaction with her colleagues. In fact, frequent in-person interactions are the part of pre-COVID-19 life that she misses the most. Although some of the other lawyers on Nikaela's team are based in different physical offices, she looked forward to catching up with other colleagues in the hallway or over a cup of coffee or lunch. Nikaela now strives to connect with them on a human level. She purposefully dedicates at least a few minutes at the start of virtual meetings and teleconferences to ask her colleagues about their day and to check in with them personally, for example, by asking about their children or a recent event in their personal lives. She also sets up virtual coffee breaks with friends and colleagues. **Nikaela believes that without this human element, remote professional encounters run the risk of becoming "transactional." Instead, she strongly believes that with just a few minutes a day, we all can strengthen key personal connections.**



Jayme Jonat, a partner at Holwell Shuster & Goldberg LLP, a New York-based litigation boutique, has been in private practice for ten years and is a mom to a toddler. Jayme likewise explained that "**being a good communicator is essential when working remotely in any business, including the legal profession."** As women lawyers, Jayme explained that we are **"exceptional communicators"** who "**build consensus across large teams"** and are **"well-poised to use those skills, even though it is particularly challenging in the current environment."**

Sheila Murphy, CEO and president of Focus Forward LLC, chief leadership & talent officer of WOMN LLC, and an expert and consultant at Bates Group, likewise observed that women are good at **"focusing on the personal touch,"** and the **"personal connection is leveling the playing field."**

Exercise Compassion and Empathy in Your Personal and Professional Lives



That personal touch is part and parcel of traits like empathy and compassion that Sheila, who retired in 2018 as Senior Vice President and Associate General Counsel at MetLife, told us are so valuable in today's environment. For example, she observed that women lawyers often are adept at **"noticing the nuances of body language on Zoom,"** including whether any colleagues are unusually quiet and if it **"makes sense to reach out to a coworker one-on-one"** after a group call.

Sheila also highlighted the professional and personal importance of reaching out to virtual speakers and panelists as one normally would at a conference or after a legal presentation. In today's remote environment, audience members typically are muted and often cannot be seen on video, making it particularly difficult for presenters to gauge the efficacy of their messages. As a result, Sheila explained that following up by email is well-received and "those connections are key."

Nikaela practices empathy and compassion in a different way, but still relies on those soft skills to navigate this virtual environment. When she explained how she struggles with the lack of human interaction at work, she hastened to add that she feels guilty because first responders and our healthcare heroes go to work every day and put themselves at risk. She vocalized her deep respect and admiration for their sacrifice, explaining how they inspire her to focus on the positive: she is happy and lucky to have a job when there are so many others who cannot work but desperately need to do so. Despite her own feelings, which she acknowledges and values, she is still compassionate for others.

Prioritize (and Triage) Problems

For many professionals, particularly those like Nikaela and Jayme who have young children, one of the bigger challenges of the current environment is figuring how to integrate and prioritize competing work and family responsibilities, which often feels impossible.

For Jayme, this state of affairs was just the tip of the iceberg when she tested positive for COVID-19 and became sick in late March. She was simultaneously taking care of her husband, who was also sick with the virus, watching her 18-month-old son, and trying to work remotely. Although it was a difficult situation, to say the least, Jayme was mindful that it also was temporary.

In her words: **"I responded by prioritizing my and my family's health first and foremost, and I'm lucky to be part of a firm that was incredibly understanding and supportive of my need to do so."**

"Any successful lawyer (male or female) needs to take a break and ask for help sometimes, and my firm's support was critical to getting through that predicament." - Jayme Jonat

Nikaela similarly prioritizes her family during this time. Despite her demanding work schedule and the responsibilities of home, she regularly wakes up in the very early morning hours to get a jump start on her workday and then continues working late in the evening. Her husband typically travels overseas for long periods of time and is now working remotely at odd hours of the day and night. Nikaela prioritizes her family – even if it means being short on sleep at times – so they can spend as much time together as possible and so that she can take breaks throughout the day to spend time with her son or check in on him.

Sheila, whose two children now are adults, has been able to spend more time growing her new business ventures virtually. As the impact of the pandemic grew and stay-at-home orders took effect, she quickly realized that she would need to prioritize and pivot to network effectively from home. By reaching out to her closest personal and professional connections, Sheila found that key opportunities have presented themselves organically, as "people naturally want to help each other and grow."

Sheila's prioritization on shifting her business approach was successful. Three months later, she has more relationships and potential clients than ever and has remained open to remote opportunities to amplify her brand. All too often, under ordinary circumstances, it can feel like there simply are not enough hours in the day for business development dinners and after-work cocktail hours. In today's environment, Sheila prioritized her business by focusing on the ability to grow professional relationships with a quick email or Zoom call from the comfort of her own home. Indeed, Sheila thinks this is actually a unique opportunity to forge new bonds and strengthen professional relationships. "Right now, we all have this in common," said Sheila.

Our Call to Action

Without a doubt, COVID-19 has presented each of us with a unique set of personal and professional challenges. If there is a silver lining to this pandemic and its unprecedented impact, perhaps it is the daily reminder of our humanity and the commonalities that we all share. It is something to remember the next time a colleague is quiet or distracted on a Zoom call, or when we are scrambling to balance personal responsibilities with professional deadlines, virtual networking events, and other commitments. **As women lawyers, we are in a unique position to lead by example and with emotional intelligence, humility, and compassion in our interactions – both virtual and personal. So, take a deep breath and remember that we are all in this together.**

Leading by Example

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Sidley's Committee on Retention and Promotion of Women Co-Chairs:
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DIVERSITY & INCLUSION (D&I) TOOLKIT FOR TURBULENT TIMES

This is a stressful time for law firms. The COVID-19 pandemic has negatively affected firm revenues, many firms have their lawyers working remotely, and furloughs and layoffs of lawyers seems to have begun in earnest. It is essential that during these uncertain and turbulent times law firms do not make decisions that disproportionately and inappropriately affect women and people of color (POC), which has been the case in past economic downturns. This is even more critical given the heightened attention to antiracism and racial justice.

Research shows that when firms utilize objective criteria and processes that have been stripped as much as possibility of subjective, often unconscious bias, they make better, fairer personnel decisions. This toolkit is designed to assist law firms in implementing processes and procedures that will assure their personnel decisions during these difficult times are all free of unjustified and discriminatory consequences.

CLIENT FOCUS

Before making career affecting decisions, discuss the implications with your clients. Many corporate clients are adopting minimum diversity requirements, such as the Intel Rule[1] and the Novartis Preferred Firm Program.[2] If your firm doesn't perform well under these standards, implement a "get healthy" plan.

A SEAT AT THE TABLE

Your firm's Chief Diversity Officer (and if you don't have one, you should hire a diversity consultant) should be at the table when major hiring, dismissal, furlough, compensation, and promotion decisions are being made. This person should be expressly charged with evaluating these decisions from a D&I perspective and given the authority to conduct careful analysis before any action is taken.

DATA, DATA, DATA

Be sure you have accurate and complete data on compensation, hours (including non-billable hours), promotion history, and origination credit (especially splits) by gender, race, and ethnicity. Periodically review this data to be sure there is no apparent pattern of bias.

EMPLOYEE WORTH

When determining which employees to furlough or let go, in addition to the usual data, take into consideration:

- **FIRM "HOUSEKEEPING."** Track the number of hours attorneys spend in firm marketing, mentoring, management/operations, administrative projects, and committees/affinity groups. Balance these hours against billable hours and client credits.
- **LEADERSHIP**. When assessing leadership performance and potential, ensure that you use criteria that are rooted in the actual performance of the teams that are being led, not traditional male leadership stereotypes.
- **CURRENT EVENTS**. Evaluate how POC may have been negatively impacted by current events. Check in with individuals to support them in ways that are meaningful.

TONE FROM THE TOP & BUY-IN AT THE MIDDLE

All successful diversity initiatives have one thing in common -- ownership by the organization's most senior leaders. Such initiatives must be actively supported and promoted by the head of the firm, practice group leaders, and the partnership as a whole.

FEEDBACK

Meaningful and timely feedback is harder to give without the possibility of "down the hall" chats. Feedback needs to be done promptly, effectively, and consistently. Evaluate partners' performance on their track record of delivering regular feedback. And, be sure everyone knows the complexities of providing feedback across differences.[4]

WORK ALLOCATION

Review current work allocations to ensure that the absence of in-person interactions during the pandemic is not disproportionally affecting women and POC.

DISPROPORTIONATE IMPACT

Seek input from your firm's diversity team as to what sort of impact proposed personnel decisions will have on traditionally underrepresented populations and working parents.[3]

CREATE MORE OPTIONS

Are there viable options available to avoid furloughs and layoffs? Are new work structures and practice approaches possible? This may be the perfect time to consider radical changes in law firm operations and structure -- perhaps more permanent work from home arrangements and part-time work, new technological connections and interactions, increased flexible-hours, or different lawyer categorizations. Seize the moment to better leverage technology to help build a more diverse and inclusive workforce -- a workforce that is characterized by social/racial/gender justice.

ACKNOWLEDGMENTS

The National Association of Women Lawyers would like to thank the individuals who volunteered their time and expertise to create this toolkit. Their participation was instrumental in shaping this as a practical, realistic, and highly relevant presentation of best practices -- practices that should guide our personnel decision at all times, but now more than ever.

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ABOUT NAWL

The mission of the National Association of Women Lawyers is to provide leadership, a collective voice, and essential resources to advance women in the legal profession and advocate for the equality of women under the law. Since 1899, NAWL has been empowering women in the legal profession, cultivating a diverse membership dedicated to equality, mutual support, and collective success.

END NOTES

1 "Beginning Jan. 1, 2021, Intel will not retain or use outside law firms in the U.S. that are average or below average on diversity. Firms are eligible to do legal work for Intel only if, as of that date and thereafter, they meet two diversity criteria: at least 21% of the firm's U.S. equity partners are women and at least 10% of the firm's U.S. equity partners are underrepresented minorities (which, for this purpose, we define as equity partners whose race is other than full white/Caucasian, and partners who have self-identified as LBGTQ+, disabled or as veteran)." http://newsroom.intel.com/editorials/intel-rule-action-improve-diversity-legal-profession/

2 "Novartis preferred firms will make specific diverse staffing commitments for each engagement (and in any event commit that not less than 30% of billable associate time and 20% of partner time will be provided by females, racially/ethnically diverse professionals, or members of the LGBTQ+ community, with an expectation that such commitments will move to parity over the next several years). If a firm does not meet its agreed-upon diverse staffing commitment for a particular matter, Novartis will withhold 15% of the total amount billed over the life of that specific matter." https://www.novartis.com/news/novartis-preferred-firm-program-legal-services-launched

3 According to Gallup, "married or partnered heterosexual couples in the U.S. continue to divide household chores along largely traditional lines, with the woman in the relationship shouldering primary responsibility for doing the laundry (58%), cleaning the house (51%) and preparing meals (51%)." "Women Still Handle Main Household Tasks in the U.S." Gallup.com (5 Jun. 2020) https://news.gallup.com/poll/283979/women-handle-main-household-tasks.aspx.

4 See e.g. Runyon, Natalie and Jenrette-Thomas, Ann. "9 Steps on Giving Constructive Feedback Across Differences." Thomson Reuters Legal Insights Europe (2020) http://www.legalexecutiveinstitute.com/wp-content/uploads/2020/02/9-Steps-on-Giving-Constructive-Feedback-Across-Differences.pdf

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NAWL Welcomes New Members

Membership in the National Association of Women Lawyers has many advantages, among them, opportunities for continuing legal education, a subscription to the Women Lawyers Journal, leadership development and professional networking with other members. Please welcome these new members as of December 2020 who joined to take advantage of these and the many other member benefits.

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Adina Abrahami
Emory University School of Law
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Agnes Kolbeck
Dorchester, MA

Aimee Noel Guthat
Jackson Lewis P.C.
Southfield, MI

Akiyah Francis
Hunton Andrews Kurth LLP
Washington, DC

Alanna Brook
Fisher & Phillips LLP
Phoenix, AZ

Alanna Newman
Duane Morris LLP
New York, NY

Alexandra Forte
Winston & Strawn LLP
New York, NY

Alexandra Hemmings
Winston & Strawn LLP
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Alexandra LaCombe
Jackson Lewis P.C.
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Alexandra M Robbins
Saint Louis University School of Law
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Alia Hawkins
Valparaiso, IN

Allison Mahoney
A Better Childhood
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Allison Plattsmier
AQP Consulting
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Round Lake, IL

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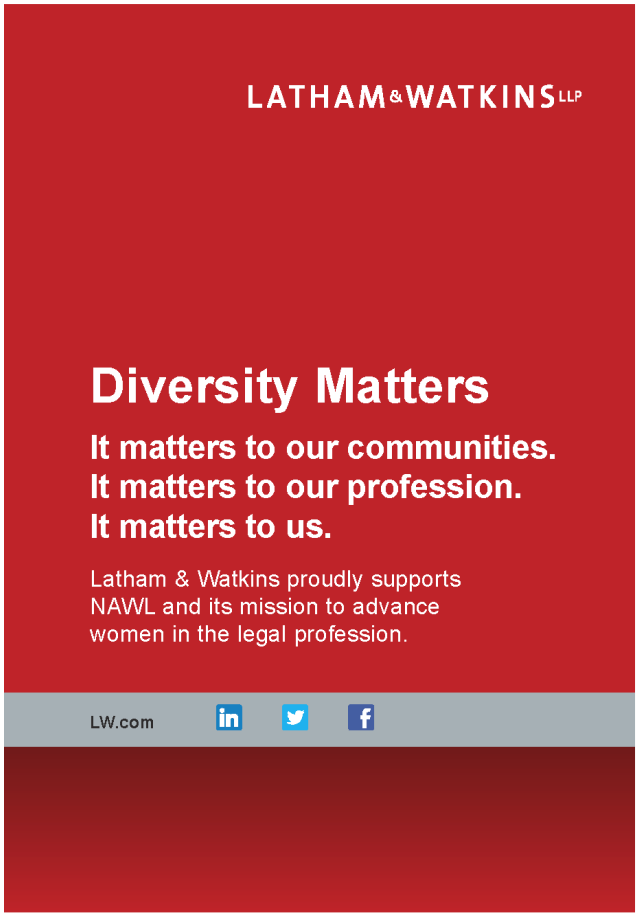
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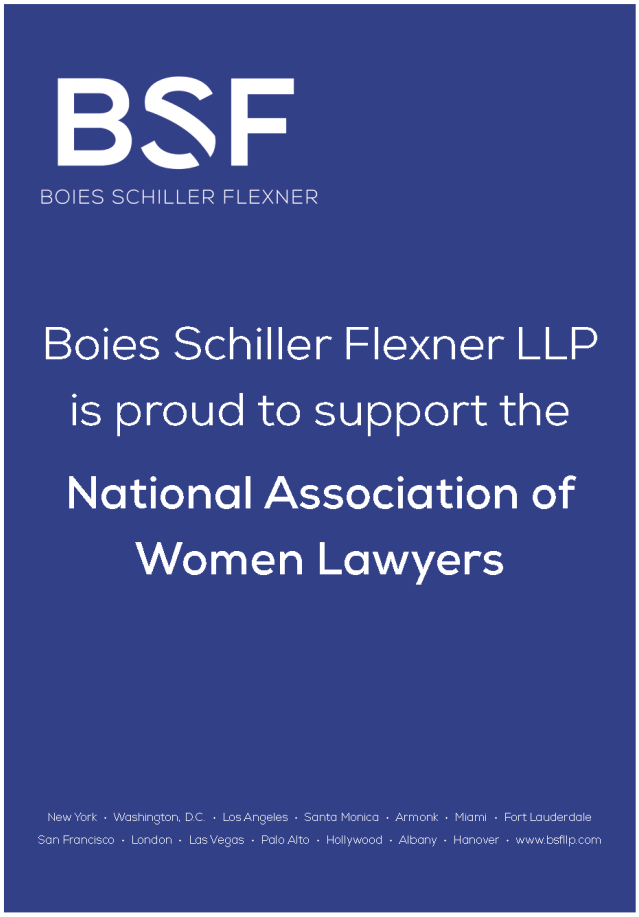
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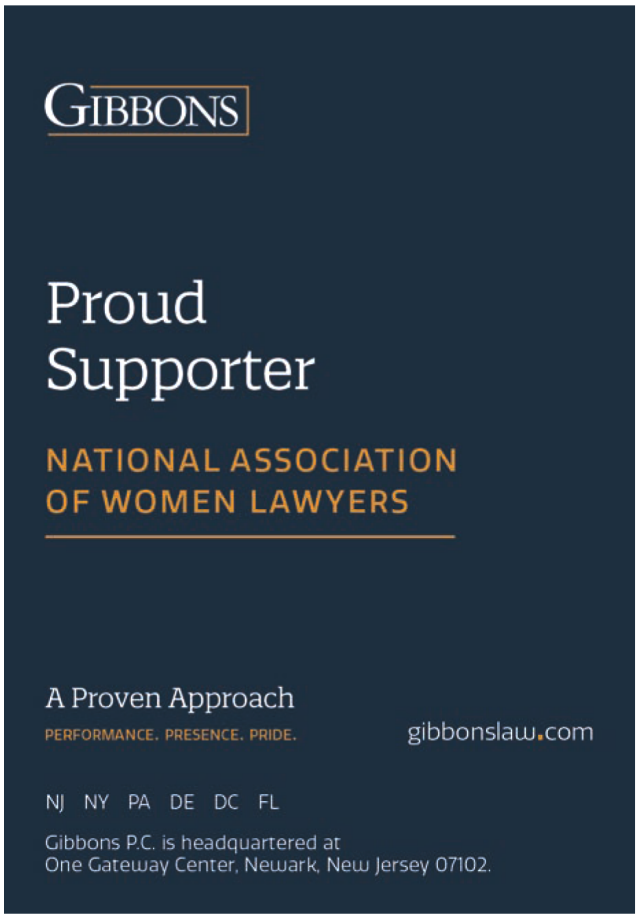
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