

**REMARKS FROM THE 2022 SYMPOSIUM
*THE EQUAL RIGHTS AMENDMENT:
A NEW GUARANTEE OF SEX EQUALITY IN THE
U.S. CONSTITUTION***

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In so many respects, the culmination of Ruth Bader Ginsburg’s career took place in 1996, three years after she joined the Supreme Court and twenty-four years before her death. In *U.S. v. Virginia*, Justice Ginsburg convinced a majority of the Supreme Court to embrace the strongest formulation of a constitutional norm condemning sex inequality in the Court’s history.¹ The new rule articulated in the *U.S. v. Virginia* case declared that “[s]ex classifications . . . may not be used, as they once were, . . . to create or perpetuate the legal, social, and economic inferiority of women.”²

Ginsburg’s aim in *U.S. v. Virginia* was to require courts to synthetically interpret a constitutional right to sex equality in a way that wove together the Fourteenth Amendment’s Equal Protection Clause with the Nineteenth Amendment’s recognition of women’s more robust citizenship rights. *U.S. v. Virginia* instructed courts to ask whether a law or policy reflects and/or entrenches gender-based stereotypes or roles, and in so doing they should undertake an historically situated and substantively critical examination of the gender-based pedigree and social meanings of laws and policies that were alleged to discriminate on the basis of sex.

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¹ *U.S. v. Virginia*, 518 U.S. 515 (1996).

² *Id.* at 533–34.

In many ways, one could regard *U.S. v. Virginia* as doing in 1996 for sex-based equality what *Loving v. Virginia* did in 1967 for race-based equality.³ In *Loving* the Court invalidated Virginia's miscegenation law on the grounds that such measures were "designed to maintain White Supremacy."⁴ The Court arrived at this conclusion based on evidence that the purposes underlying the law were to "preserve the racial integrity of Virginia's citizens," and to prevent "the corruption of blood," and "a mongrel breed of citizens."⁵ Justice Ginsburg recognized a similar kind of wrong underlying sex equality in *U.S. v. Virginia*, targeting the Equal Protection Clause at measures that were designed to maintain male, or patriarchal, supremacy.

In the late 1990s, many regarded *U.S. v. Virginia* as effectively accomplishing the goals of the Equal Rights Amendment. While the ERA struggled to satisfy the requirements of Article V, Justice Ginsburg got the job done with a majority of the Supreme Court.

Exhilarating. Wasn't it? But it didn't work. Despite the ardent and brilliant efforts of constitutional scholars, advocates, and feminist jurists like Ginsburg, *U.S. v. Virginia* never delivered on its intended promise. In the end, the courts defaulted back to a sterile form of constitutional sex equality reasoning, refusing to engage in the situated, historical, and substantive analysis envisioned by Ginsburg in her *U.S. v. Virginia* opinion.

Instead, what we have witnessed in the aftermath of the *Virginia* case is an entrenchment of constitutional protections against sex discrimination that more comfortably and regularly protect the rights of men. Of course, this parallels the Court's application of constitutional protections against race discrimination, that come to the aid of white people with greater ease than to peoples of color.

Perhaps the best recent example of how the Equal Protection clause has become one of the greatest threats to the promise of equality in this country is the recent decision from the Sixth Circuit in *Vitolo v. Guzman*.⁶ The case involved a challenge to a key provision of the \$1.9 trillion COVID stimulus package signed into law by President Biden in March

³ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁴ *Id.* at 11.

⁵ *Id.* at 7.

⁶ *Vitolo v. Guzman*, 999 F.3d 353, 364 (6th Cir. 2021).

2021. The program targeted economic sectors particularly impacted by the pandemic, such as restaurant owners, providing “a one-off monetary lifeline aimed at ameliorating short-term economic devastation.”⁷ Congress built into the aid application process a twenty-one-day fast track for restaurant owners hardest hit by the pandemic: women and “socially and economically disadvantaged” people, a.k.a. people of color.⁸ Other restaurant owners could apply for aid during this period as well, but applications from women and people of color would be processed first. Nevertheless, Antonio Vitolo, the white male owner of Jake’s Bar and Grill in Harriman, Tennessee, challenged the fast-track application procedure, claiming that it discriminated against him on the basis of his sex and race.⁹

Notwithstanding overwhelming evidence showing that women- and people of color-owned businesses were hardest hit by the effects of COVID,¹⁰ Judge Amul Thapar (a Trump appointee) ruled for Vitolo, finding that the government “fail[ed] to show that prioritizing women-owned restaurants serves an important government interest.”¹¹ With regard to the prioritization of applicants of color, Judge Thapar wrote, “When the government promulgates race-based policies, it must operate with a scalpel. And its cuts must be informed by data that suggest intentional discrimination. The broad statistical disparities cited by the government are not nearly enough.”¹²

Judge Thapar’s decision illuminated so clearly why the existing constitutional prohibitions against discrimination have been ineffective in addressing widespread sex and race-based inequality, and how difficult it is to address and remedy clearly documented disadvantage suffered by women and people of color, as was the aim of the COVID stimulus package.

⁷ *Id.* at 370.

⁸ American Rescue Plan Act of 2021, §5003(c)(3)(A).

⁹ *Vitolo v. Guzman*, 540 F. Supp. 3d, 765, 772 (E.D. Tenn. 2021).

¹⁰ See Sarah Maiellano, *How COVID-19 Is Hurting Women-Owned Restaurants: Philadelphia’s “Sisterhood of Chefs” Worry About the Future of Dining and Their Place in the Restaurant Industry*, JAMES BEARD FOUNDATION BLOG (Oct. 2, 2020), <https://www.jamesbeard.org/blog/how-covid-19-is-hurting-women-owned-restaurants> [<https://perma.cc/C2A8-ZCL8>].

¹¹ *Vitolo*, 999 F.3d at 364.

¹² *Id.* at 361.

Why is this case particularly relevant to debates about the ERA? It illustrates how important it is to amend the U.S. Constitution not only to include explicit protections against sex-based discrimination, but also to modernize the way that courts approach the concept of equality more generally. Some gender equality advocates have proclaimed that the ERA's greatest promise would be to elevate sex-discrimination claims to the same level of protection now granted to race discrimination claims, subjecting them to "strict scrutiny" by courts. But the *Vitolo* case makes it abundantly clear that no one who *really* cares about equality and *knows* what they are talking about would advance this position, since the kind of legal scrutiny afforded to race discrimination cases has been entirely ineffective in addressing systemic racism in the United States. Instead, strict scrutiny has been successfully used as a tool more suited to protecting the rights of white men, like Antonio Vitolo, than dismantling structural discrimination against people of color.

The same is true for the sex discrimination protections to be found in the Constitution: when Congress acted affirmatively to address the disproportionate gendered-effects on the economy of COVID—1.3 million women-owned businesses were forced to shutter their doors during the peak of the epidemic¹³—these measures were seen by courts as amounting to discrimination against men rather than reasonable attempts to address structural inequity in the economy. This view of equality requires the government to act in ways that are "sexually neutral" even when clear data shows that sex neutrality will perpetuate rather than protect against gender-based injustice.

Amending the Constitution now to add a new equality provision as the Twenty-Eighth Amendment would not only add explicit sex equality language to the Bill of Rights, but it could—indeed, it should—be understood to enunciate a new approach to equality more generally. Notwithstanding the ambitious promise of a substantive approach to sex equality embraced by *U.S. v. Virginia*, the Supreme Court has remained steadfast in freezing the Equal Protection Clause in a nineteenth-century conception of equality and citizenship.

The Twenty-Eighth Amendment would create a new source of constitutional equality rights that need not be tethered to the framing of the idea of equality found in the Fourteenth Amendment. This would not be a radical or unprecedented idea. We have recently witnessed the Supreme Court discover a new source of equality rights in the First Amendment's Free Exercise of Religion Clause—one that bears little resemblance to the

¹³ Robert W. Fairlie, *The Impact of Covid-19 on Small Business Owners: Evidence of Early-Stage Losses from the April 2020 Current Population Survey*, NAT'L BUREAU OF ECON. RSCH. (June 2020), <http://www.nber.org/papers/w27309> [<https://perma.cc/P2RX-8NRL>].

Fourteenth Amendment's Equal Protection Clause and is much more protective of religion-based discrimination than is the Fourteenth Amendment.

The ERA could, and should, perform the same function—finally providing a constitutional mandate to dismantle laws, policies and practices that reflect, perpetuate, and normalize structural inequality. Courts would be tasked with undertaking an historically situated and substantively critical examination of the gender-based pedigree and social meanings of laws and policies challenged under the Twenty-Eighth Amendment.

But even more felicitously, the notion of equality embraced by the ERA could serve as a warrant to courts to modernize Equal Protection doctrine more generally—as such, the beneficiaries of the Twenty-Eighth Amendment would not only be those who suffer sex discrimination, but race, sexual orientation, gender identity, and other forms of discrimination. This would reflect an intersectional, synergistic reading of the entire bill of rights as one document, something even the framers, our “founding fathers,” intended in 1791. It would deliver on an understanding of the Constitution as a guarantee of full and equal citizenship. The document interpreted as a whole secured more than the mere sum of its individual parts.

So too, adding the ERA to the Constitution could be understood as a mandate to federal, state, and local governments to undertake affirmative measures to dismantle sex-based inequality. This could include instructions to the courts that the constitution should not be used to disable these kinds of remedial actions by government, as in the *Vitolo* case and in the Supreme Court's gutting of much of Congress's effort to address domestic violence in the Violence Against Women Act.

Some conservative scholars hold the view that amendments to the Constitution can only take the form of incrementally perfecting the overall meaning of the Constitution (thereby, I suppose ruling out the Reconstruction-era amendments), but even on this parsimonious view of the substantive reach of legitimate amendments, it would be permissible to regard the ERA as a measure designed to perfect the constitutional notion of equality and citizenship. Or, under a more capacious view of the breadth permitted to amendments, we could argue that the ratification of the ERA manifests a third founding, following the first in 1791, and the second with the Reconstruction-era amendments.

In this sense, finally ratifying the ERA would not only be good for women, but it would be good for the very idea of citizenship. Who could possibly find fault with that?