

# U.S. RATIFICATION OF CEDAW: AN OPPORTUNITY TO RADICALLY REFRAME THE RIGHT TO EQUALITY ACCORDED WOMEN UNDER THE U.S. CONSTITUTION

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Sexual and reproductive rights . . . emerge from the recognition that equality in general, gender equality in particular, and the emancipation of women and girls are essential to society. Protecting sexual and reproductive rights is a direct path to promoting the dignity of all human beings and a step forward in humanity's advancement towards social justice.<sup>1</sup>

## I.

### INTRODUCTION

As a practicing women's rights lawyer for over thirty years, the *NYU Review of Law and Social Change* symposium *From Page to Practice: Looking at Sexual and Reproductive Rights Through a New Lens* provided me with a unique opportunity to examine the evolution of reproductive rights in the United States under the dual lens of U.S. constitutional jurisprudence and international equality guarantees.

I begin with the proposition that women's sexual and reproductive rights are foundational to gender equality. Women's reproductive capacity is at the core of structural inequality. Given that discrimination against women is deeply embedded in American law, in order for legal equality guarantees for women to be effective, these guarantees must include affirmative remedial measures. Although equal protection guarantees do not require positive structural remedies under the U.S. Constitution, this is not the case with international human rights laws. Most notably, the major human rights treaty for women, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), has an inclusive definition of equality that requires strict scrutiny of all laws negatively impacting women, and imposes obligations on states parties to undertake affirmative measures to eliminate systemic inequality.<sup>2</sup> The strong equality guarantees of CEDAW stand in stark contrast to the truncated definitions of equality employed by the Supreme Court.<sup>3</sup> Ratification of CEDAW, if taken seriously, would have a radical impact on American women's right to equality.

Although American women enjoy strong legal protections against sex discrimination, these protections are largely created by federal statutory

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1. Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, C-355/06 (Colom.), *translated in* WOMEN'S LINK WORLDWIDE, C-355/2006: EXCERPTS OF THE CONSTITUTIONAL COURT'S RULING THAT LIBERALIZED ABORTION IN COLOMBIA 33 (2007).

2. Convention on the Elimination of All Forms of Discrimination Against Women art. 1-2, *opened for signature* Dec. 18, 1979, 27 U.S.T. 1909, 1249 U.N.T.S. 13 [hereinafter "CEDAW"].

3. *See infra* Part III.

law rather than the U.S. Constitution.<sup>4</sup>

Women seeking to invalidate sex discriminatory laws as unconstitutional are categorized into one of three groups, each accorded a different level of judicial scrutiny. This schematic view of women's claims reflects the Supreme Court's own stereotyping of women. Under this tripartite scheme, the claims of women seeking to challenge abortion restrictions are placed in the "least favored" category, and constitutional challenges to abortion laws are accorded a singular form of begrudging and punitive judicial scrutiny.<sup>5</sup>

The Obama Administration's commitment to CEDAW ratification<sup>6</sup> provides women's rights proponents the opportunity to challenge the Supreme Court's tripartite scheme of constitutional equality protections in light of CEDAW's equality guarantees. Given the current political realities in the United States, the prospects for CEDAW ratification appear grim. However, what is important is that ratification efforts, regardless of whether they ultimately succeed, reflect CEDAW's true definition of equality. For the United States to show global leadership on women's rights, CEDAW ratification proponents must forthrightly acknowledge that implementation of CEDAW in the United States would radically change the basic equality rights of American women, including the right to an abortion. CEDAW implementation in the United States would also require the United States to change its longstanding dismissive stance towards human rights treaties<sup>7</sup> and take treaty rights seriously as the Constitution so provides.<sup>8</sup>

This Article is divided into three sections. Part II discusses the role of women's rights advocates in the evolution of the tripartite scheme for evaluating sex discriminatory laws by the Supreme Court. Part III sets out the current Supreme Court standards for judicial review that apply to each of the three categories. Part IV examines the disparity between U.S. constitutional equality protections and CEDAW, evaluates how the United States undermines human rights treaties guarantees, and outlines

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4. See, e.g., Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 101, 107 Stat. 7 (codified as amended at 29 U.S.C. §§ 2601–2654 (1994)) (requiring employers with fifty or more employees within a seventy-five-mile radius of his or her worksite and public agencies to provide employees job-protected unpaid leave to care for a new child).

5. See *infra* Part III(C).

6. Ambassador Eileen Chamberlain Donahoe & Harold Hongju Koh, Legal Advisor U.S. Dep't of State, Response of the United States of America to Recommendations of the United Nations Human Rights Council (Nov. 9, 2010), <http://www.state.gov/s/l/releases/remarks/150677.htm>.

7. For an in-depth discussion of typical U.S. practice towards human rights treaties, see generally Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 CHI. J. INT'L L. 347 (2000). See also *infra* Part IV(B).

8. U.S. CONST. art. VI, cl. 2 ("[A]ll treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.").

why it is critical that the CEDAW ratification process confronts head on the splintered rights of women under the U.S. Constitution.

## II.

### WOMEN'S RIGHTS ADVOCATES SHAPED THE DEVELOPMENT OF THE SUPREME COURT'S SCHEME OF WOMEN'S RIGHTS

The Supreme Court has developed a strange jurisprudence around women's rights. Laws that discriminate against women are divided into three categories, each accorded a different level of judicial scrutiny. Laws that facially discriminate on the basis of sex receive the strongest scrutiny, evaluated under the Equal Protection Clause of the Fourteenth Amendment and accorded what is described as either an "exceedingly persuasive" standard or "intermediate scrutiny."<sup>9</sup> Using this robust standard, the Supreme Court has struck down such laws as those excluding men from a state-funded nursing school<sup>10</sup> and excluding women from a state-funded military school.<sup>11</sup> This high level of judicial scrutiny, however, applies only to a limited group of laws which discriminate between a woman and a "similarly situated" man (or vice-versa) *on the face of the law*.<sup>12</sup> Those laws that discriminate against women based on the physical differences between women and men—namely, pregnancy-related laws—are relegated to lower levels of scrutiny.<sup>13</sup> Finally, the Supreme Court

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9. See *United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (noting that "the Court . . . has carefully inspected official action that closes a door or denies opportunity to women," and examining whether the government's proffered justification for the sex-based classification is "exceedingly persuasive"); *A Conversation with Justice Ruth Bader Ginsburg*, 53 U. KAN. L. REV. 957, 958 (2005) (discussing the evolution of the "exceedingly persuasive justification" in Supreme Court jurisprudence). See generally Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Status of Men and Women Under the Law*, 26 HOFSTRA L. REV. 263, 267 (1997) (describing the law's evolving treatment of gender discrimination claims).

10. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 733 (1982).

11. *Virginia*, 518 U.S. at 556–58.

12. See, e.g., *Michael M. v. Superior Court*, 450 U.S. 464, 471 (1981) (plurality opinion) (holding that a statutory rape statute that only criminalized men's participation in the act did not violate the Equal Protection Clause, as "young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse"); *Geduldig v. Aiello*, 417 U.S. 484, 496–97 n.20 (1974) (holding that a California social insurance program which did not allow women to receive payments for disability due to normal pregnancy did not constitute a sex-based classification in violation of the Equal Protection Clause).

13. *Geduldig*, 417 U.S. at 496–97 (rejecting the claim that laws that distinguish between men and pregnant women are sex discriminatory and refusing to give such laws heightened scrutiny). See Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 269–71 (1992) [hereinafter Siegel, *Reasoning from the Body*] (noting that that Supreme Court has continued to interpret "the Equal Protection Clause in ways that suggest that regulation concerning pregnancy presents little possibility of sex discrimination" and thus is not subject to intermediate scrutiny).

carefully distinguishes between women challenging abortion restrictions and those “mothers or mothers-to-be” challenging laws such as discriminatory maternity benefits.<sup>14</sup> Laws regulating abortion are not analyzed under equal protection, but rather under due process.<sup>15</sup> Restrictions on abortion are only struck down as constitutional when then they are found to impose an “undue burden” on women’s ability to access abortions. Women seeking to challenge abortion restrictions are further put in a separate sub-class whose claims are entitled to only the lowest level of scrutiny.

As discussed below, this tripartite scheme is not a historical accident, but the direct result of the advocacy strategies of women’s rights and abortion rights advocates, as well as a product of the Court’s own biases against women.

#### *A. The Historic Exclusion of Women from the Constitution and the Rise of the Equal Rights Amendment Movement*

Although systemic discrimination against women remains embedded in legal structures globally, it is particularly difficult to dismantle the patriarchal premises of the legal structure in the United States.<sup>16</sup> The U.S. Constitution is the world’s oldest living constitution and, while the democratic framework of the Constitution was progressive for 1787, women, slaves, and even male non-property owners were denied the right to vote.<sup>17</sup> In fact, it took until the ratification of the Nineteenth Amendment in 1920 for women to achieve suffrage,<sup>18</sup> and until 1971 for the Supreme Court to extend the constitutional guarantees of equal protection to women.<sup>19</sup> By contrast, many modern constitutions contain

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14. *Compare* Gonzales v. Carhart, 550 U.S. 124, 146–47, 150 (2007) (applying an “undue burden” standard to uphold a law prohibiting certain abortion methods) *with* Nevada Dep’t of Human Res. v. Hibbs, 538 U.S. 721 (2003) (indicating that the regulation of pregnant women can constitute sex discrimination).

15. See *infra* notes 92–95 and accompanying text.

16. Cf. Janet Benshoof, *The Truth About Women’s Rights*, 6 WM. & MARY J. WOMEN & L. 423 (2000) [hereinafter Benshoof, *The Truth About Women’s Rights*] (describing the struggle for women’s rights and efforts to roll back *Roe v. Wade*).

17. It took constitutional amendments to guarantee the right to vote to these groups. Cf. U.S. CONST. amend. XIV, § 2 (prohibiting the states from generally denying the right to vote to male citizens who are over twenty-one years-old); U.S. CONST. amend. XV, § 1 (prohibiting states from denying the right to vote on account of “race, color, or previous condition of servitude”); U.S. CONST. amend. XIX (prohibiting states from denying the right to vote on account of sex).

18. U.S. CONST. amend. XIX.

19. *Reed v. Reed*, 404 U.S. 71, 76–77 (1971) (holding, for the first time, that a statute that treated women differently than men violates the Equal Protection Clause in a case involving an Idaho statute that designated males as preferred estate administrators over females).

explicit guarantees of women's right to equality,<sup>20</sup> and some even explicitly reference CEDAW as the source of this right.<sup>21</sup>

Beginning in 1923, after the suffragette movement secured women's right to vote, women activists initiated the first push for an Equal Rights Amendment (ERA) to the U.S. Constitution.<sup>22</sup> This movement went nowhere fast. In fact, it was not until nearly fifty years later, in 1972, that a version of the ERA passed Congress and went to the states for ratification.<sup>23</sup> Although the federal ERA failed to obtain the necessary thirty-eight state ratifications,<sup>24</sup> the legal advocacy around ERA ratification set the stage for the development of the "tripartite" constitutional scheme applied to sex discriminatory laws.<sup>25</sup>

The goal of the ERA was a narrow one: to give women broad, affirmative rights to actual equality. ERA proponents sought to add "sex" to the existing "suspect" classifications of race, national origin, and alienage that receive strict equal protection scrutiny under the Fourteenth Amendment.<sup>26</sup> However, the drafters of the ERA cautiously crafted a narrow definition of "sex discriminatory laws" that only mandated strict scrutiny for those laws that, on their face, treated women differently than similarly situated men.<sup>27</sup> Under this definition, laws that treated women

20. See S. AFR. CONST. § 9 (barring states and individuals from discriminating directly or indirectly on the basis of gender, sex, and pregnancy); CONST. POLÍTICA DE LA REPÚBL. DE COLOMB. art. 13 ("All individuals are born free and equal before the law, are entitled to equal protection and treatment by the authorities and enjoy the same rights, freedoms and opportunities without any discrimination on the basis of gender . . .").

21. See CONST. RWANDA pmbl. ("Reaffirming our adherence to the principles of human rights enshrined in the . . . Convention on the Elimination of All Forms of Discrimination Against Women of 1 May 1980."); CONST. CENT. AFR. REPUB. ("Réaffirme son adhésion à toutes les Conventions Internationales dûment ratifiées, notamment celle relative à l'interdiction de toute forme de discrimination à l'égard des femmes ainsi que celle relative à la protection des droits de l'enfant.").

22. JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 8 (1986).

23. *Id.* at 11–12.

24. *Id.* at 13.

25. Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1324 (2006) [hereinafter Siegel, *Constitutional Culture*] (noting that the legislative record of the ERA "played a crucial role in enabling and shaping the modern law of sex discrimination"). ERA proponents remained on message even after Supreme Court decisions upholding discriminatory abortion funding signaled that abortion rights would not be evaluated using heightened scrutiny. See *Harris v. McRae*, 448 U.S. 297, 317–18 (1980); *Maher v. Roe*, 432 U.S. 464, 470–71 (1977).

26. H.R.J. Res. 208, 92d Cong. (1971); S.J. Res. 8, 92d Cong. (1971) ("Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.").

27. See Barbara Brown, Thomas I. Emerson, Gail Falk & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L. J. 871, 893–95 (1971) (stating that the ERA Amendment "does not preclude legislation (or other official action) which regulates, takes into account, or otherwise deals with a physical characteristic unique to one sex . . . [s]o long as the law deals only with a

differently based on their physical differences from men—namely, pregnancy-related laws—were not considered “sex discriminatory,” and thus were not laws which could be invalidated under the equal protection guarantees of the Fourteenth Amendment. The doctrinal basis for the ERA was embodied in a *Yale Law Review* article in 1971 coauthored by Barbara Brown, Thomas Emerson, Gail Falk, and Ann E. Freedman, entitled *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*.<sup>28</sup> Both Emerson and Freedman testified unreservedly before Congress that “the ERA has nothing to do with the power of the states to stop or regulate abortions, or the right of women to demand abortions.”<sup>29</sup>

Women’s rights advocates in the late 1960s reluctantly embraced this truncated definition of sex discrimination, for reasons of political pragmatism.<sup>30</sup> ERA advocates were driven by the (not unreasonable) fear that including abortion as an ERA issue would derail ratification.<sup>31</sup> Today, CEDAW proponents similarly propose to remove abortion from the larger discussion of women’s right to equality.<sup>32</sup>

The fear of linking abortion with the ERA was heightened by the fact that, while the ERA was in the process of state ratification, cases challenging states’ criminal abortion laws were gaining momentum. Although the women’s rights lawyers challenging abortion laws were often the same lawyers advocating for the ERA, they took a different legal tack in the abortion cases, arguing that a woman’s right to make the decision

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characteristic found in all (or some) women but *no* men, or in all (or some) men but *no* women”); Siegel, *Constitutional Culture*, *supra* note 25, at 1397–98 (“ERA proponents could argue that ERA did not constrain laws that regulated unique physical characteristics—a claim they maintained, with some equivocation.”).

28. See Brown, Emerson, Falk & Freedman, *supra* note 27, at 893–95.

29. *Impact of the Equal Rights Amendment Part 1: Hearings on S.J. Res. 10 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 98th Cong. 1–2, 94 (1983) [hereinafter *Hearings*] (statement of Rep. Henry Hyde) (quoting Thomas Emerson). Emerson and Freeman articulated this same point in 1971, writing:

So long as the law deals only with a [physical] characteristic found in all (or some) women but no men . . . it does not ignore individual characteristics found in both sexes in favor of an average based on one sex. Hence such legislation does not, without more, violate the basic principles of the [ERA].

*Id.* at 893.

30. See Siegel, *Constitutional Culture*, *supra* note 25, at 1384 (noting that the “physical characteristics exception” to the ERA “was a pragmatic compromise”).

31. See *id.* at 1382 (explaining that the “ERA’s subsidiary principle was responsive to opponent concerns”).

32. See, e.g., Statement of Professor Harold Hongju Koh Regarding United States Ratification of the Convention on the Elimination of Discrimination Against Women, U.S. Senate Foreign Relations Committee 6 (June 13, 2002), [http://www.law.yale.edu/documents/pdf/News\\_&\\_Events/KohTestimony.pdf](http://www.law.yale.edu/documents/pdf/News_&_Events/KohTestimony.pdf) (“[O]n its face, the CEDAW treaty itself is neutral on abortion, allowing policies in this area to be set by signatory states and seeking to ensure equal access for men and women to health care services and family planning information.”).

between childbirth and abortion must be accorded the highest degree of scrutiny under the evolving due process-based constitutional privacy doctrine rather than under the Equal Protection Clause.<sup>33</sup>

*B. Equality and Privacy Law in Equilibrium: The Pregnant Pause  
Between 1971 and 1974*

At the same time the political campaign to get the ERA ratified by the states was in full swing, women's rights activists pursued a litigation strategy to get the Supreme Court to recognize sex as a "suspect" classification that would receive strict scrutiny under the Equal Protection Clause. These early legal challenges were based on the same limited definition of "sex discrimination" that was used to support the ERA.<sup>34</sup> As noted in the preceding section, advocates simultaneously challenged abortion-restrictive laws as violating women's privacy rights, as protected by the Due Process Clause.

The decision by ERA advocates to limit constitutional equality arguments to facially discriminatory laws—and to rely solely on the privacy doctrine to challenge abortion laws—was made for political, not legal reasons.<sup>35</sup> Legal academics and ERA advocates believed, at least in private, that laws that limited women's ability to control their reproductive capacity were at the heart of a legal structure that treated women as "second class" citizens.<sup>36</sup>

Initially, this two-track strategy met with success. In 1971, in the historic case *Reed v. Reed*, the Supreme Court struck down a state law that gave preference to men over women for appointments as administrators of decedent's estates, ruling for the first time that women are entitled to protection against facially discriminatory laws under the Equal Protection Clause.<sup>37</sup> The Court in *Reed*, however, left open the question of what level of scrutiny laws that classified on the basis of sex

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33. In her oral testimony supporting the ERA, Ann Freedman argued that the ERA would not be used to establish an equality-based right to abortion because of the power of the Court's commitment to a privacy analysis. Freedman's opinion was that the "Court has such a powerful commitment to the privacy analysis . . . that they don't even need to consider the [ERA] one way or the other." *Hearings*, *supra* note 29, 510–18 (questioning of Ann Freedman, Assoc. Prof. of Law, Rutgers Univ. Law Sch.).

34. See Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 979–81 (1984) (describing the arguments made in *Frontiero v. Richardson*, 411 U.S. 677 (1973), and comparing them to the arguments made by ERA proponents).

35. See Siegel, *Constitutional Culture*, *supra* note 25, at 1384 ("Advocates offered unique physical characteristics as a subsidiary principle that would restrict the proposed jurisdiction of the antidiscrimination principle in the hopes that the modification might enhance the proposal's chance of public acceptance.").

36. *Id.*

37. *Reed v. Reed*, 404 U.S. 71, 76–77 (1971).



should receive under the Equal Protection Clause.<sup>38</sup> In a subsequent case, the Supreme Court made clear that gender classifications should receive a very high “intermediate” level of review, but not the strict scrutiny required of laws that discriminated against suspect classes, such as race or alienage.<sup>39</sup>

Any unease about this compromised two-track approach to women’s rights was briefly laid to rest by the historic 1973 decision in *Roe v. Wade*.<sup>40</sup> In a 7-2 opinion, the Supreme Court, applying strict scrutiny, struck down Texas’s criminal abortion law and declared that a woman’s right to make choices related to pregnancy, at least until mid-pregnancy, was part of her fundamental right to privacy.<sup>41</sup> *Roe* thus invalidated criminal abortion laws existing in a majority of states.<sup>42</sup>

Given the seminal equality decision in *Reed* in 1971 and the historic application of constitutional privacy rights to abortion laws in *Roe* in 1973, it seemed to women’s rights activists, myself included, that this two-track approach to women’s rights—equality and privacy—however doctrinally discordant, might actually work. But as the political backlash against women gained momentum, this tenuous legal framework for women’s rights fell apart.

The inherent instability of the compromise around women’s rights in ERA advocacy must serve as a critical historical lesson. The U.S. CEDAW ratification process must confront, not obfuscate, the need for one inclusive equality standard for American women.<sup>43</sup>

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38. *Id.* at 75–78. See also MANSBRIDGE, *supra* note 22, at 49–50 (“While the justices [in *Reed*] appeared to be using the traditional ‘rational basis’ test to reach [their] conclusion, most observers agreed that [the Court] was applying the test more stringently than it would have done if the law had used some basis other than sex (like age) to choose estate administrators.”). In *Frontiero v. Richardson*, the Supreme Court, 8-1, struck down a military regulation that mandated different benefits policies for men and women. 411 U.S. 677, 688, 691 (1973). However, only four justices (Brennan, Douglas, White and Marshall) would have made sex a suspect class and not one standard of review prevailed. *Id.* at 682.

39. See *Craig v. Boren*, 429 U.S. 190, 218 (1976) (Rehnquist, J., dissenting) (describing the standard applied by the court as “an elevated or ‘intermediate’ level of scrutiny”).

40. 410 U.S. 113 (1973).

41. *Id.* at 163. For an authoritative and fascinating description of the Justices’ debates around *Roe*, see generally LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* (2005); LINDA GREENHOUSE & REVA SIEGEL, *BEFORE ROE V. WADE: VOICES THAT SHAPED THE DEBATE BEFORE THE SUPREME COURT’S RULING* (2010).

42. *Roe*, 410 U.S. at 118, 166.

43. See *infra* Part IV.

*C. The Importance of Struck v. Secretary of Defense*<sup>44</sup>

While the ERA failed to recognize restrictions on women's reproductive freedom as violations of women's equality, proponents acknowledged that such restrictive laws applying only to women *were* sex discriminatory and that rationales based on the biological differences between men and women were at the heart of systems of sex discrimination. As pointed out in a noteworthy article by Neil and Reva Siegel, the doctrinal disconnect between privacy and equality doctrines was articulated early on in a 1972 Supreme Court brief authored by (now) Justice Ruth Bader Ginsburg.<sup>45</sup> In the Petition for Certiorari in *Struck v. Secretary of Defense*, Justice Ginsburg argued that an Air Force policy that automatically dismissed women who became pregnant and chose to have the child was unconstitutional sex discrimination.<sup>46</sup> The *Struck* brief argued that such laws were key to perpetuating women's inequality, and that the "presumably well-meaning exaltation of women's unique role in bearing children has, in effect, denied women equal opportunity to develop their individual talents and capacities and has impelled them to accept a dependent, subordinate status in society."<sup>47</sup> This case caused considerable consternation in Air Force circles. The Air Force ended the policy in question while the decision for *certiorari* was pending, rendering the case moot.<sup>48</sup>

The Supreme Court therefore never had the opportunity to adjudicate Justice Ginsburg's arguments in *Struck*. As pointed out in the Siegels' article, history would have played out differently had those arguments prevailed.<sup>49</sup>

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44. I would like to give great credit to Neil and Reva Siegel in their article for the *Duke Law Journal* for pointing out to the legal community the importance of Justice Ginsburg's brief in *Struck v. Sec'y of Def.*, 409 U.S. 1071 (1972) to the development of the argument that pregnancy discrimination does in fact constitute sex discrimination. See Neil S. Siegel & Reva B. Siegel, *Struck By Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 791-94 (2010).

45. *Id.* at 787.

46. Brief for the Petitioner at 7, *Struck v. Sec'y of Def.*, 409 U.S. 1071 (1972) (No. 72-178).

47. *Id.* at 38.

48. *Struck*, 409 U.S. at 1071 (holding the "[j]udgment vacated and case remanded to consider issue of mootness in light of the position presently asserted by the Government"). See also Siegel & Siegel, *supra* note 44, at 777-78 (discussing the history of the case).

49. See Siegel & Siegel, *supra* note 44, at 792-94 (noting several cases that would have come out differently if the Court had adopted Ginsburg's arguments).

## III.

THE TRIPARTITE SCHEME USED BY THE SUPREME COURT TO  
ADJUDICATE WOMEN'S RIGHTS TO EQUALITY

Following *Roe*, the intense political pressure that grew out of the backlash to the women's rights movement shaped the development of the constitutional doctrines governing women's rights. This pressure was brought to new heights by religious, right-wing forces that successfully made abortion opposition, and overturning *Roe*, the pronounced priority of the Republican Party.<sup>50</sup> As a consequence, Republican presidents made a concerted effort to appoint "pro-life" judges to the Supreme Court.<sup>51</sup> The deliberate appointment of judges who were at least perceived to be "anti-*Roe*," such as Justice O'Connor in 1981,<sup>52</sup> solidified the existing doctrinal disconnect between how sex discriminatory laws were adjudicated under privacy and equality protections. Together, these factors led to the creation of the tripartite scheme now used by the Supreme Court.

*A. The Constitutional Standard for a Woman Challenging a Facially Discriminatory Law*

As noted above, in the years since *Reed v. Reed*<sup>53</sup> in 1971 and *Craig v. Boren*<sup>54</sup> in 1976, the Supreme Court rejected the application of strict scrutiny to facially sex discriminatory laws, instead applying what can be considered a high-level form of intermediate scrutiny. Under this standard, the Court requires that the state prove that a sex-based classification is supported by an "exceedingly persuasive justification."<sup>55</sup> Intermediate scrutiny also requires that such sex discriminatory laws serve an "important" governmental interest and that the law is "substantially related" to this goal.<sup>56</sup> By contrast, strict scrutiny would require that the law actually promote a "compelling interest" and that it do so by using the least restrictive and most narrowly tailored means possible.<sup>57</sup>

Intermediate scrutiny, however, applies only to laws where women are disadvantaged compared to "similarly situated" men (or vice versa).<sup>58</sup> This

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50. TANYA MELICH, *THE REPUBLICAN WAR AGAINST WOMEN: AN INSIDER'S REPORT FROM BEHIND THE LINES* 184–85 (1996).

51. Benshoof, *The Truth About Women's Rights*, *supra* note 16, at 440.

52. MELICH, *supra* note 50, at 155–156.

53. 404 U.S. 71 (1971).

54. 429 U.S. 190, 204 (1976) (striking down a law prohibiting *males* aged eighteen to twenty from buying alcohol as sex discriminatory under the Equal Protection Clause).

55. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 524 (1996).

56. *Id.*

57. *Id.*

58. *See Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974) (stating that a California insurance program's failure to provide disability benefits to pregnant women did not constitute invidious sex-based discrimination because "the program divides potential

standard of scrutiny does not apply to laws based on biological differences between men and women, such as laws that fail to provide disability benefits for pregnant women or abortion restrictions; because men cannot get pregnant, no similarly situated man exists, and the Court has found that such laws are not sex discriminatory.<sup>59</sup> Further, the Court does not accord intermediate scrutiny to laws that are neutral on their face but have a discriminatory impact on women.<sup>60</sup> For example, the Supreme Court held that laws giving preference to veterans are not sex discriminatory because they do not discriminate between similarly situated men and women, but solely between veterans and non-veterans.<sup>61</sup>

*B. The Constitutional Standard for a Woman Challenging a Law that Discriminates Based on Her Pregnant Status: From Geduldig to Today*

Pivotal to the development of the Court's tripartite scheme of review was the 1974 case *Geduldig v. Aiello*.<sup>62</sup> In a sharply divided 5-4 decision, the Court upheld a California state insurance program that excluded from coverage certain pregnancy-related benefits.<sup>63</sup> The majority declared that such pregnancy-based classifications were "a far cry" from "discrimination based upon gender."<sup>64</sup>

Why? The strange and disturbing reasoning of the majority was that the program did not discriminate between men and women, but rather

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recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.”).

59. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269–70 (1993) (noting that opposition to abortion does not constitute sex-based discrimination and refusing to enjoin an association and individuals who organize and coordinate anti-abortion demonstrations from conducting such demonstrations in front of abortion clinics).

60. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979). In *Feeney*, a female, nonveteran state employee challenged the Massachusetts Veterans Preference Statute, which mandated that veterans who qualified for a civil service position by granted preference for government jobs over even more highly qualified nonveterans. *Id.* at 264. After she was passed over for several civil service jobs in favor of male veterans who received lower scores on civil service examinations, Feeney challenged the law on equal protection grounds. A Massachusetts district court invalidated the law and enjoined its operation because it found that, although the law was neutral on its face regarding gender, its impact on women was sufficiently severe to require that the state use a more narrowly tailored approach to meet its objective of supporting veterans. *Id.* at 260. The Supreme Court subsequently overturned the district court, holding that the law indicated a preference for veterans (of either sex) over non-veterans, not men over women. *Id.* at 280. The Court held that while the Massachusetts law may be “unwise policy,” it did not “reflect[] a purpose to discriminate on the basis of sex.” *Id.*

61. *Id.* at 280.

62. 417 U.S. 484 (1974).

63. *Id.* at 486.

64. *Id.* at 497 n.20.

between “pregnant women and nonpregnant persons;”<sup>65</sup> while “the first group is exclusively female, the second includes members of both sexes.”<sup>66</sup> Since such pregnancy-based classifications were only required to be rationally related to California’s alleged fiscal objectives, the scheme was upheld.<sup>67</sup> Justice Brennan’s vigorous dissent pointed out the fallacy of this argument and concluded that “such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination.”<sup>68</sup>

Two years after *Geduldig*, in *General Electric Company v. Gilbert* the Supreme Court upheld a similarly discriminatory law that excluded pregnancy-related illnesses from certain disability benefits.<sup>69</sup> Although the challengers argued that the law violated Title VII of the 1964 Civil Rights Act instead of the Constitution’s Equal Protection Clause,<sup>70</sup> the Supreme Court rejected the challenge, relying heavily on the *Geduldig* rationale.<sup>71</sup>

The *Geduldig* and *Gilbert* cases, which gave a green light to discrimination against pregnant women, mobilized women’s rights activists to push for Congress to amend Title VII and thus overturn those decisions.<sup>72</sup> To avoid becoming bogged down in abortion politics, however, proponents of the Pregnancy Discrimination Act (PDA) of 1978 agreed,

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65. *Id.* The women’s rights community, which had coalesced behind the case, was shocked and dismayed that the argument that pregnancy-related discrimination was not covered by the ERA was used to support the state’s argument that the statute did not discriminate based on sex. See Ruth Bader Ginsberg & Susan Deller Ross, *Pregnancy and Discrimination*. N.Y. TIMES, Jan. 25, 1977, at 33 (responding to the *Geduldig* opinion); *Don’t Fight the Phony Wars*, GLOBAL JUSTICE CTR., <http://www.globaljusticecenter.net/publications/Phony-Wars.pdf> (arguing that, although never ratified, the ERA’s exclusion of laws based on physical difference was “used to frame the Supreme Court decision [in *Geduldig*] finding discrimination against pregnant women was not sex discrimination”).

66. *Id.*

67. *Id.* at 484.

68. *Id.* at 501 (Brennan, J., dissenting) (“In my view, by singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex, such as prostatectomies, circumcision, hemophilia, and gout. In effect, one set of rules is applied to females and another to males.”).

69. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145–46 (1976) (finding that a private company’s disability benefit plan which did not cover pregnant women did not violate Title VII of the 1964 Civil Rights Act). *But cf.* *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (striking down a state law that excluded pregnant women from teaching jobs by requiring them to take maternity leave for the last five months of pregnancy as a violation of due process rather than equal protection).

70. *Gilbert*, 429 U.S. at 127.

71. *Id.* at 136.

72. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000(e) (1978) (amending the definition of sex discrimination under Title VII to include discrimination “because of or on the basis of pregnancy, childbirth, or related medical conditions”).

albeit reluctantly, to include an explicit abortion exclusion in the PDA.<sup>73</sup> Once again, political forces forced terrible compromises in women's equality efforts.

Interestingly, in a 2003 decision regarding the Family and Medical Leave Act (FMLA), the Supreme Court suggested that some laws that discriminate against pregnant women could be successfully challenged as sex discriminatory.<sup>74</sup> Noting that the FMLA was targeted to remedy "state gender discrimination" against pregnant women, the Court explained that such discrimination "triggers a heightened level of scrutiny."<sup>75</sup> The Court carefully described the would-be beneficiaries of this heightened scrutiny as "mothers or mother-to-be,"<sup>76</sup> making clear that pregnant women seeking an abortion would not be entitled to such rights.

Further, although the Supreme Court has implied that some pregnancy-based laws may constitute sex-based discrimination in violation of the Equal Protection Clause, it is unclear what form of intermediate scrutiny the Court would apply if confronted with such a case.

*C. The Constitutional Standard for a Woman Seeking an Abortion:  
From Roe to Gonzales*

As discussed above, in the historic *Roe v. Wade* case, the Supreme Court held that the fundamental right of privacy applied to a woman's decision whether or not to bear a child and applied strict scrutiny to strike down a Texas criminal abortion statute.<sup>77</sup> The decision applied strict scrutiny to require that the state protect the integrity of a woman's choice whether or not to have an abortion.<sup>78</sup> *Roe* also required that the state prove that any restrictions on a woman's right to choose an abortion actually promote a "compelling state interest."<sup>79</sup> Further, *Roe* held that no compelling interest existed prior to fetal viability, thus rendering laws

73. *Id.* at § 2000(e)(k) ("This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion.").

74. *See Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (finding that the FMLA was justified under Section 5 of the Fourteenth Amendment because it was targeted at "state gender discrimination [against pregnant women], which triggers a heightened level of scrutiny"); Siegel & Siegel, *supra* note 44, at 794–95 ("*Hibbs* clearly indicates that regulation of pregnant women can amount to constitutionally actionable sex discrimination.").

75. *Hibbs*, 538 U.S. at 736.

76. *See id.* (restating, with approval, Congress' determination that the FMLA was necessary to prevent "discrimination against women when they are mothers or mothers-to-be.").

77. *See* discussion *supra* Part II(B).

78. *See Roe v. Wade*, 410 U.S. 113, 162–64 (1973).

79. *Id.* at 155.

restricting abortion presumptively unconstitutional.<sup>80</sup>

The constitutional protections that attach to rights deemed “fundamental”—which the Court held applied to the right to privacy in *Roe* in 1973—have now been removed from abortion challenges.<sup>81</sup> The demise of *Roe* demonstrates the effectiveness of religious and conservative political forces in using opposition to abortion to reshape the U.S. political and legal landscape.<sup>82</sup> It also demonstrates American women’s lack of political power. And it is potent proof that the Supreme Court’s institutional legitimacy can be demolished by the politics of Supreme Court appointments.

The political forces coalescing around an anti-abortion message had an impact on the Supreme Court. In 1977, in what are called the “funding cases” (*Maher v. Roe*,<sup>83</sup> *Harris v. McRae*,<sup>84</sup> and *Rust v. Sullivan*<sup>85</sup>), the Court reversed one of the central constitutional protections outlined in *Roe*: state neutrality on a woman’s choice between abortion and child-bearing.<sup>86</sup> State neutrality mandates are an integral part of protecting fundamental rights; for example, the state cannot influence a person’s choice of religion or whom to vote for.<sup>87</sup> In *Maher*, however, the Supreme Court ignored this principle and upheld a state Medicaid funding scheme that funded childbirth but not abortions for poor pregnant women.<sup>88</sup> The

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80. *Id.* at 164.

81. Benshoof, *The Truth about Women’s Rights*, supra note 16, at 435. See also Janet Benshoof, *Gonzales*, CEDAW, and the U.S. Exportation of Gender Inequality, Panel Discussion Sponsored by Stanford Law School Chapter of Law Students for Choice (October 10, 2007).

82. The most forceful example of the political success of the anti-abortion movement is the fact that, beginning with the Reagan administration in 1983, the Solicitor General of the United States has moved to appear in every abortion case heard by the Supreme Court arguing to overturn *Roe*. For example, in 1992 Solicitor General Kenneth W. Starr argued that, “[i]n our view, a state’s interest in protecting fetal life throughout pregnancy, as a general matter, outweighs a woman’s liberty interest in an abortion. The State’s interest in pre-natal life is a wholly legitimate and entirely adequate basis for restricting the right to abortion derived in *Roe*.” Brief for United States as Amicus Curiae Supporting Respondents at 16, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (No. 91-744, 91-902).

83. 432 U.S. 464 (1977) (challenging a Connecticut state Medicaid program that paid for expenses incident to childbirth but not abortion).

84. 448 U.S. 297 (1980) (challenging the Hyde Amendment funding restrictions under Title XIX of the Social Security Act).

85. 500 U.S. 173 (1991) (challenging regulations by the Department of Health and Human Services that restricted federally-funded projects from counseling women about abortion).

86. See also Janet Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 HARV. L. REV. 1916, 1920 (1988) (discussing the neutrality principle).

87. Janet Benshoof, *Roe v. Wade: Revisiting the Fundamentals*, CONSCIENCE, Winter 1998, at 16–17.

88. *Maher*, 432 U.S. at 480 (holding that the State of Connecticut does not have to

Court held that the rationale of “protecting the potential life of the fetus” was a legitimate goal which allowed states to abandon the neutrality required by *Roe*.<sup>89</sup> The Court explicitly stated that strict scrutiny did not apply to any abortion challenges, restrictive funding schemes, or criminal laws.<sup>90</sup> The Court dismissed arguments that such laws were sex discriminatory because they singled out only (poor) women.<sup>91</sup>

In 2007, the Supreme Court, dominated by Republican anti-choice appointees,<sup>92</sup> put the last nail in the coffin of *Roe* in the 5-4 decision of *Gonzales v. Carhart*.<sup>93</sup> In *Gonzales*, the Court strangled the undue burden standard by holding that states must only show that abortion-restrictive laws are “rational,”<sup>94</sup> and that “marginal safety” concerns about women should not block the crucial goal of promoting respect for unborn life.<sup>95</sup>

Today, in 2011, a woman’s right to choose between an abortion or childbearing is no longer protected as a fundamental constitutional right. In fact, the Court now applies the lowest level of scrutiny to laws restricting abortions. Further, the majority in *Gonzales* went out of its way to give legal and moral legitimacy to states’ efforts to “protect women from themselves” and to promote “moral” lessons that strike at the core of

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provide funding for abortions through Medicaid). See also *Harris*, 448 U.S. at 356 (holding that the Hyde Amendment, which bans Medicaid funding for abortions, is constitutional).

89. *Maier*, 432 U.S. at 478, 478 n. 11.

90. *Id.* at 470–71. Subsequent to *Maier*, in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), the Court employed the “undue burden” test to determine if a abortion restriction was unconstitutional. The court held that where “a state regulation has the purpose or effect of placing a substantial obstacle in the path of a women seeking an abortion of a nonviable fetus,” such a violation would be invalid. *Id.* at 876–77.

91. *Harris*, 448 U.S. at 322 (“For the reasons stated above, we have already concluded that the Hyde Amendment violates no constitutionally protected substantive rights. We conclude as well that it is *not predicated on a constitutionally suspect classification.*”) (emphasis added); *Maier*, 432 U.S. at 470–71 (“This case involves no discrimination against a suspect class. An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases.”).

92. The *Gonzales* majority consisted of Justices Kennedy, Roberts, Scalia, Thomas and Alito, each of whom was appointed by a Republican president. 550 U.S. 124 (2007). See also Supreme Court of the United States, *Members of the Supreme Court of the United States*, SUPREME COURT OF THE UNITED STATES <http://www.supremecourt.gov/about/members.aspx> (last visited Apr. 25, 2011); *Political Parties of the Presidents*, PRESIDENTS USA, <http://www.presidentsusa.net/partyofpresidents.html> (last visited Apr. 25, 2011).

93. 550 U.S. 124. In *Gonzales*, the Supreme Court upheld the Partial Birth Abortion Ban Act of 2003 in a 5-4 decision, *id.* at 170–171, even though the Court had struck down a similar law because it had no health exception in a prior case, *Stenberg v. Carhart*, 530 U.S. 914 (2000).

94. See *Gonzales*, 550 U.S. at 158 (“Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.”).

95. See *id.* at 166 (“Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends.”).



women's dignity.<sup>96</sup>

#### *D. Voices of Courage: Opponents of the Tripartite Scheme*

Despite the Supreme Court's pronouncements to the contrary, the fact that women's reproductive capacity is at the core of sex discriminatory laws has never been absent from public debate, private belief, or legal advocacy.<sup>97</sup> In fact, the equality-based logic of Justice Brennan's dissent in *Harris* has had great traction in state courts. Brennan's dissent has provided the arguments adopted by several state high courts to invalidate discriminatory Medicaid schemes and other abortion restrictions on state constitutional grounds.<sup>98</sup>

As the Supreme Court shifted away from its strong 7-2 majority in *Roe*, those justices supporting abortion rights became increasingly vocal about the fact that restrictive abortion laws were, in fact, inherently sex discriminatory.<sup>99</sup> Justice Blackmun, speaking for a bare majority in his 1986 opinion in *Thornburgh v. American College of Obstetrics & Gynecology*, described a woman's abortion choice, for the first time, in equality terms:

Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy than . . . [a] woman's decision whether to end her pregnancy. A women's right to make that choice freely is fundamental . . . a central part

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96. For example, Nebraska recently passed a bill prohibiting abortions after twenty weeks based on the notion of fetal pain, and Oklahoma now requires that women who seek abortions look at an ultrasound picture of the fetus, and requires doctors to describe the fetus to their patients, before women can consent to an abortion. See John Leland, *Abortion Foes Advance Cause at State Level*, N.Y. TIMES, June 3, 2010, at A18.

97. E.g. Neil A. Lewis, *The Supreme Court; Ginsburg Affirms Right of Woman to Have an Abortion*, N.Y. TIMES, July 22, 1993, at A1 (noting that, in her Supreme Court confirmation hearings in 1993, then-Judge Ruth Bader Ginsburg defended her belief that abortion laws could be challenged under equal protection). See also Benshoof, *The Truth About Women's Rights*, *supra* note 16, at 423 (noting that reproductive rights are central to women's equality).

98. See Comm. to Defend Reprod. Rights v. Myers, 625 P.2d 779 (Cal. 1981) (invalidating California state funding restrictions on Medi-Cal as unconstitutional); Doe v. Maher, 515 A.2d 134 (Conn. Super. Ct. 1986) (invalidating a Connecticut policy restricting state funding for therapeutic abortions as unconstitutional under the state constitution's due process clause); Planned Parenthood Ass'n v. Dep't of Human Res., 663 P.2d 1247 (Or. Ct. App. 1983) (holding that funding restrictions on certain abortions violated the Privileges and Immunities Clause of the Oregon Constitution), *aff'd*, 687 P.2d 785 (Or. 1984) (affirming on statutory grounds); Right to Choose v. Burns, 450 A.2d 925 (N.J. 1982) (invalidating New Jersey Medicare restrictions on therapeutic abortions where there was no health exception as unconstitutional); Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387 (Mass. 1981) (holding that Medicaid restrictions on abortions discriminatorily burdened the exercise of a fundamental right by coercing poor women to choose childbirth over abortion). See also *In re T.W.*, 551 So. 2d 1186 (Fla. 1989) (noting that the express privacy right in the Florida constitution protected abortion as a fundamental right).

99. See *Gonzales v. Carhart*, 550 U.S. 124 (2007) (Ginsburg, J., dissenting); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (Blackmun, J., dissenting).

of the sphere of liberty that our law guarantees equally to all.<sup>100</sup>

As the Supreme Court systematically chipped away at the privacy-based protections of *Roe*, legal advocates defending *Roe* increasingly raised the alternative argument that abortion restrictions are sex discriminatory.<sup>101</sup> However, it was too late in the game for this doctrinal switch.<sup>102</sup> In fact, the divorce of equality from privacy law was so complete that by 1995 even raising the claim that abortion laws were sex discriminatory and putting forth equality as an alternative to the *Roe* privacy foundation rendered at least one lawyer subject to sanctions for making a “frivolous” claim (though the sanction was later reversed).<sup>103</sup>

Justice Ginsburg remains, not surprisingly, the Court’s clear and consistent voice for an inclusive standard of gender equality. In her opinions in both *Stenberg* and *Gonzales*, Justice Ginsburg discussed how abortion restrictions reflect illegal stereotypes about women,<sup>104</sup> an analysis that is required when laws are evaluated under the Equal Protection Clause.<sup>105</sup> In *Gonzales*, Justice Ginsburg dissented based on her understanding that abortion restrictions are sex discriminatory.<sup>106</sup> She stated, “Legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”<sup>107</sup> In contrast, the Supreme Court calibrates the degree of scrutiny it will apply to sex discriminatory laws based on the life choice at issue, not on the degree of injury inflicted by the law on a women’s ability to fully access her rights and enjoy equal political

100. *Thornburgh v. Am. Coll. of Obstetrics & Gynecology*, 476 U.S. 747, 772 (1986).

101. *E.g.*, Siegel, *Reasoning from the Body*, *supra* note 13, at 263 (“A growing number of commentators have begun to address abortion regulation as an issue of sexual equality, articulating concerns scarcely recognized in prevailing accounts of abortion as a right of privacy.”).

102. *See Bray v. Alexandria Clinic*, 506 U.S. 263, 269–70 (1993) (rejecting the notion that opposition to abortion constitutes discrimination against women).

103. *Jane L. v. Bangerter*, 61 F.3d 1505, 1513–17 (10th Cir. 1995). In *Jane L.*, the district court awarded defendants attorney’s fees against plaintiffs to castigate plaintiffs’ attorney, Janet Benshoof, for raising “frivolous” equality theories. *Id.* at 1513. The Tenth Circuit reversed, observing that equality arguments have not been formally rejected by the Supreme Court and that Justice Ginsburg and other “recognized legal authorities” have expressed approval of the equality approach extrajudicially. *Id.* at 1516.

104. *See Stenberg v. Carhart*, 530 U.S. 914, 951–52 (2000) (Ginsburg J., concurring); *Gonzales*, 550 U.S. at 169–91 (Ginsburg, J., dissenting).

105. *See Craig v. Boren*, 429 U.S. 190, 198–99 (1976) (explaining that the Court has applied equal protection to “invalidat[e] statutes employing gender as an inaccurate proxy for other, more germane basis of classification. Hence, ‘archaic and overbroad’ generalizations concerning the financial position of servicewomen and working women could not justify use of a gender line in determining eligibility for certain government entitlements.”)

106. *Gonzales*, 550 U.S. at 172 (Ginsburg, J., dissenting).

107. *Id.*

citizenship.<sup>108</sup>

#### IV.

#### THE U.S. RATIFICATION OF CEDAW: AN OPPORTUNITY FOR CHANGE

CEDAW, the major “bill of rights” for women, is a treaty that was first adopted by the United Nations General Assembly in 1979.<sup>109</sup> CEDAW requires state parties to take affirmative steps to eliminate all laws that discriminate against women.<sup>110</sup> By 2011, it had been ratified by 186 countries.<sup>111</sup> Although President Carter signed CEDAW in 1980,<sup>112</sup> some thirty years later the Senate has still failed to ratify this treaty.

The CEDAW ratification process to date has been marked by the same anti-abortion political concerns that surfaced around the ERA. Although the Senate has not yet taken a full vote on CEDAW, the Obama Administration has pledged to support ratification and efforts are moving forward.<sup>113</sup> Thus, now is a critical time to make CEDAW “real.” For CEDAW to send a global message, proponents must address how, under CEDAW, American women would be entitled to one inclusive equality standard and admit that implementation of CEDAW in the United States would radically change women’s rights.

#### *A. A Study in Opposites: U.S. Sex Discrimination Jurisprudence and CEDAW*

The right to equality for women under CEDAW stand in stark contrast to women’s rights under U.S. constitutional law. As noted earlier, due to insufficient constitutional protections for sex based discrimination American women’s rights are largely protected by federal statutes rather than the federal Constitution. Even these statutes leave large gaps, as many explicitly exclude abortion.<sup>114</sup>

In contrast to U.S. constitutional law, CEDAW imposes one single

108. *Id.*

109. CEDAW, *supra* note 2.

110. *Id.* at art. 1.

111. *Status of Treaties: Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en) (last visited Apr. 25, 2011)

112. LUISA BLANCHFIELD, CONGRESSIONAL RESEARCH SERV., THE CONVENTIONS ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: CONGRESSIONAL ISSUES 4 (2008).

113. Donahoe & Koh, *supra* note 6.

114. *See, e.g.*, Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended in scattered sections of 29 U.S.C. (2006)); Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e-e-17 (2006); the Pregnancy Discrimination Act, *supra* note 72; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, tit. IV (Violence Against Women Act) (codified in scattered sections of 42 U.S.C. (2006)).

equality standard requiring that all laws disparately impacting women be evaluated under the most rigorous scrutiny.<sup>115</sup> CEDAW also defines discrimination broadly as,

any distinction, exclusion or restriction made on the basis of sex which has the *effect or purpose* of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>116</sup>

CEDAW's intent is to guarantee that women enjoy both *de jure* and *de facto* equality.<sup>117</sup> Furthermore, laws based on physical differences between men and women, including pregnancy-related laws, are specifically singled out as requiring review.<sup>118</sup> The U.N. Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has made clear that "[i]t is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account."<sup>119</sup>

Importantly, CEDAW protects women's reproductive rights as part of protecting women's equality. As of 2005, the CEDAW Committee and the Human Rights Committee, which oversees the International Covenant on Civil and Political Rights (ICCPR), issued at least 122 concluding observations requiring states to review and reform criminal abortion laws.<sup>120</sup> Substantive protection for women's reproductive rights can be

115. U.N. Comm. on the Elimination of Discrimination Against Women [hereinafter CEDAW Comm.], *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)* ¶ 7, U.N. Doc. A/54/38/Rev.1 (1999) [hereinafter CEDAW Comm., *General Recommendation No. 24*].

116. CEDAW, *supra* note 2, art. 1 (emphasis added).

117. See *Applying the Principles of the CEDAW Convention*, INT'L WOMEN'S RIGHTS ACTION WATCH ASIA PACIFIC, <http://www.iwraw-ap.org/protocol/practical.htm> (last visited Apr. 25, 2011) ("Discrimination can stem from both law (de jure) or from practice (de facto). The CEDAW Convention recognizes and addresses both forms of discrimination, whether contained in laws, policies, procedures or practice.").

118. See CEDAW, *supra* note 2, pmb. (noting "that the role of women in procreation should not be a basis for discrimination").

119. CEDAW Comm., *CEDAW General Recommendation No. 25: Article 4, Paragraph 1, of the Convention (Temporary Special Measures)* ¶ 8, U.N. Doc. TK (2004) [hereinafter CEDAW Comm., *General Recommendation No. 25*].

120. HUMAN RTS. WATCH, INTERNATIONAL HUMAN RIGHTS LAW AND ABORTION IN LATIN AMERICA 4 (2005), <http://www.hrw.org/background/wrd/wrd0106/>. The United States ratified the ICCPR in 1992, but has yet to implement it domestically. See generally William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still A Party?*, 21 BROOK. J. INT'L L. 277 (1995), for a discussion of the United States and the ICCPR.

found in several CEDAW articles.<sup>121</sup> The most stunning application of CEDAW to a state's abortion law is the decision by the Constitutional Court of Columbia in 2006, which cited to CEDAW's legal mandates in invalidating Colombia's criminal abortion law.<sup>122</sup>

In contrast with the U.S. Constitution, which mandates only negative equality rights,<sup>123</sup> CEDAW, like other human rights treaties, requires that states parties take affirmative measures to guarantee equality. CEDAW specifically requires that states take measures to address systemic discrimination, to establish legal protection of women's rights, and to repeal discriminatory laws.<sup>124</sup> The CEDAW Committee has made the broad scope of states' duties under CEDAW clear.<sup>125</sup>

CEDAW further requires that laws impacting women, including abortion laws, be scrutinized as to whether they perpetuate outmoded stereotypes about women's roles.<sup>126</sup> By contrast, under privacy law scrutiny, the Supreme Court does not require any review of whether laws reflect illegal stereotyping of women. In fact, the omission of this scrutiny

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121. The CEDAW Committee has found that CEDAW requires that states parties refrain from "obstructing action taken by women in pursuit of their health goals," and prohibits any "laws that criminalize medical procedures only needed by women," like abortion. CEDAW Comm., *General Recommendation No. 24*, *supra* note 115, at ¶ 14. *See also* CEDAW Comm., *Concluding Observations on Belize*, ¶ 56, U.N. Doc. A/54/38/Rev.1 (1999) ("[T]he Committee notes that the level of maternal mortality due to clandestine abortions may indicate that the Government does not fully implement its obligations to respect the right to life of its women citizens."). In May 2006, the Constitutional Court of Colombia invalidated a criminal abortion law on the grounds that it was invalid under both CEDAW and ICCPR. For more information on the link between human rights and the right to abortion, see generally CTR. FOR REPROD. RIGHTS, BRINGING RIGHTS TO BEAR: ABORTION AND HUMAN RIGHTS (2008), [http://reproductiverights.org/sites/crr.civicactions.net/files/documents/BRB\\_abortion\\_hr\\_revised\\_3.09\\_WEB.PDF](http://reproductiverights.org/sites/crr.civicactions.net/files/documents/BRB_abortion_hr_revised_3.09_WEB.PDF).

122. Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, C-355/06 (Colom.), *supra* note 1, at 30.

123. Both the equal protection and privacy arguments for women's rights rely on the notion that the Constitution grants women freedom *from* prohibited government action, whether that action is sex-based discrimination or intrusion into their privacy.

124. CEDAW, *supra* note 2, art. 2 (requiring all states parties to "pursue by all appropriate means and without delay a policy of eliminating discrimination against women" and listing the actions required to do so).

125. CEDAW Comm., *General Recommendation No. 25*, *supra* note 119, at ¶ 7. First, states must "ensure that there is no direct or indirect discrimination against women in their laws" and practices in both the public and private spheres. Second, states must act to improve the *de facto* position of women through policies and programs. Finally, states need to proactively address gender-based stereotypes that impact women in all areas. *Id.*

126. *See* CEDAW, *supra* note 2, art. 5(a) (requiring states parties "to modify the social and cultural patterns of the conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."). *See also* CEDAW Comm., *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Malaysia*, ¶ 16, U.N. Doc. C/MYS/CO/2 (May 31, 2006) (calling upon Malaysia to "implement comprehensive measures to bring about change in the widely accepted stereotypical roles of men and women").

has allowed various anti-abortion justices to indulge in deprecatory stereotypes about women who seek abortions, and to use these false stereotypes as the basis for upholding restrictive state abortion laws.<sup>127</sup>

Full implementation of CEDAW in the United States would mean replacing the current tripartite scheme of women's rights with a single international strict scrutiny standard. This would require both disparate impact and gender stereotyping analyses. Most controversially, CEDAW would require a wholesale shift in abortion jurisprudence by requiring that abortion laws be reviewed under an equality, rather than a privacy, analysis.

*B. A Study in Contrasts: The U.S. Stance Towards Human Rights Treaties and International Law*

While CEDAW could revolutionize women's reproductive rights, the U.S. stance toward federal treaty law impedes CEDAW's potential impact. The U.S. Constitution provides for international treaties to become the "law of the land," making treaties the legal equivalent to a federal statute.<sup>128</sup> Yet, in practice, our treatment of human rights treaties has been the opposite. As Kenneth Roth, Executive Director of Human Rights Watch, has elaborated,

[O]n the few occasions when the US government has ratified a human rights treaty, it has done so in a way designed to preclude the treaty from having any domestic effect. Washington pretends to join the international human rights system, but it refuses to permit this system to improve the rights of US citizens.<sup>129</sup>

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127. See *Gonzales v. Carhart*, 550 U.S. 124, 159–60 (2007) ("Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. . . . While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."). See generally REBECCA COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES (2010) (describing the harmful effect of gender stereotyping on women's equality).

128. U.S. CONST. art. 6, § 2. The Supremacy Clause reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.* See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(3) (1987) ("A rule of international law or a provision of an international agreement of the United States will not be given effect as law in the United States if It is inconsistent with the United States Constitution.").

129. Roth, *supra* note 7, at 347. See also Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L. L. 341, 344 ("By adhering to human rights conventions subject to these reservations, the United States, it is charged, is pretending to assume international obligations but in fact is undertaking nothing

Further, the President and the Senate routinely add reservations, understandings, and declarations (RUDs) during the treaty ratification process that significantly alter the effect of a treaty on domestic law.<sup>130</sup> This violates states' duty under international law to fulfill their obligations under treaties in "good faith"<sup>131</sup> and to not formulate reservations that are "incompatible with the object and purpose of the treaty."<sup>132</sup>

The U.S. government also routinely considers treaties to be "non-self-executing," which means that there must first be federal implementing legislation in order for a treaty to be judicially enforceable.<sup>133</sup> Although this "non-self-execution" doctrine is often treated as black letter law, it is not. As explained by Louis Henkin, "Surely, there is no evidence of any intent, by the Framers (or by John Marshall), to allow the President or the Senate, by their *ipse dixit*, to prevent a treaty that by its character *could* be the law of the land from becoming law of the land."<sup>134</sup> Numerous scholars on international and treaty law, including current Legal Advisor of the Department of State, Harold Koh, agree with Henkin's assessment that this doctrine has a flimsy constitutional foundation.<sup>135</sup> In order for the United States to take CEDAW seriously there would need to be a major turnaround from the usual practice of the United States relating to human rights treaties.

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. . . To many, the attitude reflected in such reservations is offensive: the conventions are only for other states, not for the United States.").

130. Roth, *supra* note 7, at 347 ("Once the government signs a treaty, the pact is sent to Justice Department lawyers who comb through it looking for any requirement that in their view might be more protective of US citizens' rights than pre-existing US law. In each case, a reservation, declaration, or understanding is drafted to negate the additional rights protection. These qualifications are then submitted to the Senate as part of the ratification package.").

131. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331. See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. 5 (1987) ("A treaty is generally binding on states parties from the time it comes into force for them, whether or not it is self-executing. If a treaty is not self-executing for a state party, that state is obliged to implement it promptly, and failure to do so would render it in default on its treaty obligations.").

132. Vienna Convention on the Law of Treaties, *supra* note 131, at art. 19(c).

133. See Roth, *supra* note 7, at 348–49 ("To ensure that some new hidden right is not lurking in parts of the treaty for which no reservation, declaration or understanding was entered, the US government, first declares that the treaty is 'not self-executing,' meaning that it has no force of law without so-called implementing legislation.")

134. Henkin, *supra* note 129, at 347.

135. See Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1828–29 n.24 (1998) ("Many scholars *question persuasively* whether the United States declaration [that a particular treaty was not self-executing] has either domestic or international legal effect.") (emphasis added).

*C. An Opportunity to Be Serious About Human Rights Treaties: The United States and CEDAW*

The Obama Administration's commitment to CEDAW ratification<sup>136</sup> provides the public space for women's rights advocates to openly confront and challenge the Supreme Court's bizarre tripartite sex discrimination framework. In the past, however, advocates for U.S. CEDAW ratification have turned a blind eye to CEDAW's true purpose and, instead, have argued that CEDAW would have little effect on domestic law.<sup>137</sup> In fact, advocacy around U.S. CEDAW ratification barely mentions why American women need CEDAW, much less how, if taken seriously, it would radically revamp the rights of American women. Rather, U.S. ratification is promoted as a symbolic gesture of support for women's rights globally.<sup>138</sup>

The history of U.S. attempts to ratify CEDAW is illustrative. President Carter signed a "clean" CEDAW and then sent it to the Senate for "advice and consent" shortly after he lost his reelection bid in 1980.<sup>139</sup> Neither the Reagan nor the H.W. Bush administrations supported CEDAW, however, and it languished in the Senate.<sup>140</sup>

136. Donahoe & Koh, *supra* note 6.

137. See AMNESTY INT'L, A FACT SHEET ON CEDAW: TREATY FOR THE RIGHTS OF WOMEN 1-2 (2005) (arguing, among other things, that CEDAW would not authorize any lawsuits not already allowed under U.S. law and that CEDAW is "abortion-neutral"), [http://www.amnestyusa.org/women/pdf/CEDAW\\_fact\\_sheet.pdf](http://www.amnestyusa.org/women/pdf/CEDAW_fact_sheet.pdf); Harold Hongju Koh, *Why America Should Ratify the Women's Rights Treaty (CEDAW)*, 34 CASE. W. RES. J. INT'L L. 263, 272 (2002) [hereinafter Koh, *Why America Should Ratify the Women's Rights Treaty*] (downplaying the obligations of CEDAW and writing that though opponents claim that the treaty would "supersede[e] or override[e] our national, state, or local laws," "very few occasions will arise in which this is even arguably an issue").

Although this was Harold Koh's position in 2002, there is now reason to believe that these assertions may be an example of the tenor and political compromises that were necessary at the time due to the political climate. Recent statements by the Obama Administration and by Koh himself, in his position as Legal Advisor of the Department of State, indicate a more serious commitment to the international legal obligations of the United States. See, e.g., Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Address at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), *available at* <http://www.state.gov/s/l/releases/remarks/139119.htm>.

138. See, e.g., Joseph R. Biden & Barbara Boxer, Op-Ed., *Senate Needs to Ratify the Treaty for the Rights of Women*, S.F. CHRONICLE, June 13, 2002, *available at* [http://articles.sfgate.com/2002-06-13/opinion/17549985\\_1\\_treaty-opponents-important-treaty-human-rights](http://articles.sfgate.com/2002-06-13/opinion/17549985_1_treaty-opponents-important-treaty-human-rights) ("Ratification of the treaty would not impose a single new requirement in our laws—because our Constitution and gender discrimination laws already comply with the treaty requirements. But U.S. participation could advance the lives of millions of women elsewhere.").

139. LOUISA BLANCHFIELD, THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: CONGRESSIONAL ISSUES 4 (2006) [hereinafter Cong. Issues CEDAW].

140. *Id.* at 4.



In 1994, President Clinton reactivated the ratification process but only after reconfiguring CEDAW.<sup>141</sup> Clinton's CEDAW was pre-packaged with nine RUDs severely limiting the effect of the law.<sup>142</sup> This 1994 Clinton version of CEDAW declared that the treaty was not self-executing and was accompanied with the explicit disclaimer that "no new laws would be created as a result of Convention ratification."<sup>143</sup>

Although CEDAW was not brought up for a vote by the Senate in 1994,<sup>144</sup> it was revived once again in 2002.<sup>145</sup> Under the George W. Bush administration, the Senate Subcommittee on Foreign Relations took up the compromised 1994 version of CEDAW and then formally added both the "Helms Abortion Understanding," discussed in more detail below, and several other RUDs.<sup>146</sup> Despite the fact that the 2002 version of CEDAW ("CEDAW lite"), if passed with all of the RUDs, would violate the object and purpose of the treaty, it was supported by Senator Boxer and (then) Senator Biden,<sup>147</sup> as well as over 190 U.S. human rights, women's rights, and religious organizations.<sup>148</sup> This "CEDAW lite" was voted out of the Subcommittee by a twelve to seven vote, but was not put to a full Senate vote.<sup>149</sup>

The debates around abortion and CEDAW that continue into 2011 are a surrealistic replay of the ERA and abortion debacle. The RUDs placed on CEDAW eviscerate the inclusive definition of equality, remove affirmative obligations to enact equality legislation, and deny that abortion

141. *Id.* at 4–5.

142. The 1994 CEDAW considered by the Senate had four reservations, three understandings and two declarations (cumulatively, "RUDs") added by the Clinton Administration. *Id.* at 4. The reservations negated CEDAW provisions that regulated private conduct, regulated women in the military, mandated the use of comparable worth, and mandated paid maternity leave. *Id.* at 4. The understandings clarified how the United States would implement CEDAW beyond the federal level, limited any restrictions on freedom of expression to be controlled by the Constitution, and "understood" that the United States would determine what health care was to be appropriate for family planning and where it would be free. *Id.* at 4–5. The declarations removed the United States from the dispute resolution provisions of the Convention and declared the treaty to be non-self-executing. *Id.* at 5.

143. *Id.* at 5. *See also supra* note 138.

144. BLANCHFIELD, *supra* note 110, at 6.

145. Cong. Issues CEDAW, *supra* note 139, at 6.

146. *Id.* The Helms Abortion Understanding was first proposed by Senator Helms during the 1994 Senate ratification debate. *See id.* The Helms Abortion Understanding stated that "nothing in this Convention shall be construed to reflect or create any right to abortion and in no case should abortion be promoted as a method of family planning." *Id.*

147. Boxer & Biden, *supra* note 143.

148. *See Support Treaty for the Rights of Women (CEDAW)*, AMNESTY INT'L USA, <http://www.amnestyusa.org/women/cedaw/background.html> (last visited Apr. 25, 2011) ("A coalition of over 190 U.S. religious, civic, and community organizations remain committed to supporting ratification.").

149. BLANCHFIELD, *supra* note 110, at 6–7.

rights are part of women's equality.<sup>150</sup>

Additionally, CEDAW proponents have themselves advanced the specious and misleading argument that CEDAW is "abortion neutral."<sup>151</sup> While CEDAW does not explicitly refer to abortion, it also does not explicitly refer to "bride burning," "female genital mutilation," or "sexual slavery." Yet the absence of these terms does not make CEDAW "neutral" as to their legality.<sup>152</sup> The purpose of CEDAW is to eliminate any "distinction, exclusion or restriction" that has the "effect or purpose" of discriminating against women.<sup>153</sup> CEDAW treats all restrictions on women, whether *de jure* or *de facto*, the same; all such laws must be invalidated if they cannot withstand strict scrutiny.<sup>154</sup> The statement by CEDAW advocates that "CEDAW leaves abortion to each state party" is just plain wrong. The CEDAW Committee has repeatedly made clear that it considers criminal abortion laws incompatible with CEDAW.<sup>155</sup> The Committee has admonished states parties to refrain from "obstructing action taken by women in pursuit of their health goals," including any "laws that criminalize medical procedures only needed by women" such as abortion.<sup>156</sup>

Faced with a hostile political climate, CEDAW proponents, albeit reluctantly, also agreed to the abortion "understanding" proposed by the late Senator Jesse Helms, which states that "[n]othing in this Convention shall be construed to reflect or create any right to abortion and in no case should abortion be promoted as a method of family planning."<sup>157</sup> The phrase "abortion as a method of family planning," sounds benign but has

150. See discussion *supra*, at Part III(B).

151. AMNESTY INT'L, *supra* note 137, at 2 ("CEDAW does not address the matter of abortion and, according to the U.S. State Department, is 'abortion-neutral.' Many countries in which abortion is illegal—such as Ireland, Burkina Faso, and Rwanda—have ratified the Convention."). See also Koh, *Why America Should Ratify the Women's Rights Treaty*, *supra* note 137, at 272 ("There is absolutely no provision in CEDAW that mandates abortion or contraceptives on demand . . . . [T]he CEDAW treaty itself is neutral on abortion, allowing policies in this area to be set by signatory states and seeking to ensure equal access for men and women to health care services and family planning information."); *Testimony of Representative Carolyn B. Maloney U.S. House of Representatives 14th District of New York to the U.S. Senate Committee on Foreign Relations*, REP. CAROLYN B. MALONEY [http://www.maloney.house.gov/index.php?Itemid=110&id=590&option=com\\_content&task=view](http://www.maloney.house.gov/index.php?Itemid=110&id=590&option=com_content&task=view) (testifying that the State Department has "certified" CEDAW as "abortion-neutral").

152. CEDAW Comm., *CEDAW General Recommendation No. 14: Female Circumcision*, U.N. Doc. A/44/38 (1990).

153. CEDAW, *supra* note 2, at art. 1.

154. CEDAW Comm., *General Recommendation No. 25*, *supra* note 119, at ¶¶ 3–14.

155. See CTR. FOR REPROD. RIGHTS, *supra* note 121, at 4.

156. CEDAW Comm., *General Recommendation No. 24*, *supra* note 115, at ¶ 14.

157. Cong. Issues CEDAW, *supra* note 139, at 6.

been interpreted to prohibit abortions for any purpose at all.<sup>158</sup>

The position the United States takes on CEDAW has the potential to undermine efforts globally to implement CEDAW's inclusive definition of equality. Further, "CEDAW lite" is at odds with developing global jurisprudence on abortion rights.<sup>159</sup> There is no reason for the 2002 RUDs to accompany efforts to ratify CEDAW in 2011. Human rights groups are increasingly voicing the dangers and global ramifications of attaching an anti-abortion RUD on CEDAW.<sup>160</sup> Senator Boxer has stated that the renewed ratification efforts in 2010 will start off with a "clean" CEDAW.<sup>161</sup>

The United States must ratify CEDAW, declare it self-executing, and implement its obligations in domestic law. Only by doing this—what it is obligated to do under international law—can the United States send a strong global message that it takes human rights seriously.<sup>162</sup>

## V.

### CONCLUSION

The idea of the United States ratifying CEDAW and then passing legislation to ensure that all sex discriminatory laws are evaluated under the highest level of judicial scrutiny is a radical one. So radical, in fact, that even this author understands that such a scenario is a visionary ideal, one politically impossible at this time. However, the enormous gap between CEDAW's vision and the current constitutional reality in the United States underscores why it is so important to take CEDAW ratification seriously by being honest about the extent it would change U.S. law. The

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158. *See* Ctr. for Reprod. Law & Policy v. Bush, 304 F.3d 183, 188 (2d Cir. 2002) (construing USAID assistance agreements that prohibited the promotion of "abortion as a method of family planning" to mean that "in order to receive U.S. government funds, a foreign NGO may not engage in *any* activities that promote abortion"). The case made clear that under the law, any abortion for any reason is always "a method of family planning."

159. *See, e.g.,* Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, C-355/06 (Colom.), *supra* note 1.

160. *See* GLOBAL JUSTICE CTR., FALSE CHOICES: SACRIFICING EQUALITY TO GET CEDAW (2007), <http://globaljusticecenter.net/publications/CEDAW%20-%20ratification.pdf>; *Don't Be Deceived: Only a "Clean" CEDAW Should be Ratified*, NAT'L ORG. FOR WOMEN (Aug. 31, 2009), <http://www.nowfoundation.org/issues/global/083109cedaw.html>.

161. NAT'L ORG. FOR WOMEN, *supra* note 160.

162. *See* United States v. Belmont, 301 U.S. 324, 331 (1937) ("Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning . . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear."). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(2) (1987) ("A provision of a treaty of the United States that becomes effective as law of the United States supersedes as domestic law any inconsistent preexisting provision of a law or treaty of the United States.").

current constitutional standards governing gender equality are so in tension with the single equality mandate of CEDAW that obscuring these differences in order to ratify CEDAW as a symbolic gesture would be both an insult to women and to the rule of law. Whether or not the United States ratifies CEDAW, it must acknowledge that: (1) reproductive rights are central to gender equality, (2) the inclusive definition of equality under CEDAW supports such an assertion, (3) an enormous gap exists between CEDAW and U.S. constitutional law, and (4) if CEDAW were implemented, it would change how sex discrimination is viewed and treated in the United States.