Wrenching the Feet off our Necks: The Continued Necessity of the ERA

By: Tina Taboada

In her oral argument before the Supreme Court in Fronteiro v. Richardson, 411 U.S. 677 (1973), Ruth Bader Ginsburg paraphrased suffragette and abolitionist Sarah Grimke when she said: "I ask no favor for my sex, all I ask of our bretheren, is that they take their feet off our necks." When Grimke first used those words in her Letters on the Equality of the Sexes, it was to show there was no basis in the Bible that women were not equal to men in the eyes of God. Ginsburg used those words to show how there was no basis in the Constitution that women were not equal to men in the eyes of the law. She succeeded, but only in part.

In Frontiero, a woman was contesting a military policy granting men the ability to claim their spouses as dependants, thereby granting them increased housing allowances amongst other benefits. However, women could not claim their spouses as dependents unless they were dependent on them for more than half of the support. Concurring in judgement, Justice Powell expressed that part of what kept him from joining the other justices was that they were unnecessarily deciding a constitutional question; more importantly was that the Equal Rights Amendment, if adopted would resolve the issue of the classification of sex as a suspect class. Id, at 692. But as it happened, it never was and was expected to never be until recently. In the past three years, we have seen the ratification by states like Nevada, Illinois and most recently Virginia after the 1982 deadline. This begs two questions, first whether as a purely procedural matter, these ratifications are valid. The second matter addressed here is whether the Equal Rights Amendment is even still necessary given statutory and judicial precedent addressing the subject. Despite the successes of laws like Title IX and the Equal Pay Act, the fact remains that the Equal Rights Amendment is necessary to assure and protect women's rights, and without it women are effectively second class citizens.

The Standard of Review

The lode star for equal protection analysis is United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). There the court stated that "there may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." Id. The Court named possible classes to be subject to heightened scrutiny like race, religion, and national origin. Noticibly absent is sex. Even though women had been granted the right to vote less than twenty years earlier, sex was not named as a suspect class. But this is not surprising; sex was not a specifically enumerated prohibition in the Constitution, and one is hard pressed to argue that the Founders had women in mind when writing the Constitution from an originalist perspective. Almost fourty years later, the court in Frontiero used the discrete and insular minority analysis to justify heightened scrutiny on the basis of sex. If however, equal protection was specifically enumerated within the constitution like race and religion that would give firm basis for textualist judges, like Justice Powell, for the standard of review to be strict scrutiny. This would be stronger than the current standard of intermediate scrutiny; government interests would have to be compelling and the means narrowly tailored.

There is no Substitute for Equal Protection

History has shown us that the right to vote alone is a necessary but not sufficient requirement to guarantee rights to a class. The purpose of the equal protection clause under the 14th amendment was to prevent the states from targeting in a discriminatory way certain groups of individuals for disparate treatment or burdens. After the 13th amendment, states engaged in campaigns of discrimination and suppression through the Black Codes. To prevent frustration of Reconstruction efforts by later Presidents, legislatures or even the judiciary, Congress enshrined equal protection into the 14th amendment. Similarly, reliance on statutes and judicial precedent for women's equality is insufficient. The protection they provide women is illusory as they can be changed at any time by the whim of elected officials or judges.

a. The Right to Vote for Representatives is No Substitute

The right to vote in a representative democracy is not a substitute for Equal Protection. After the ruling in Rucho v. Common Cause, 139 S.Ct. 2484 (2109), where the court found gerrymandering based on political affiliation to be a political question, we can expect this type of practice to increase on the state level. Gerrymandering has the effect of diluting the power of voters by compressing them into large single districts or by spreading them out so they do not make up a majority in any district. This will have a disparate impact on women due to the gender gap in political affiliation. In 2018, 59% of women stated they voted for democratic candidates compared to 47% of men. Alec Tyson, The 2018 Midterm Vote: Divisions by race, gender, education, https://www.pewresearch.org/fact-tank/2018/11/08. Overtime this gap has gotten larger; having gone from 48% of registered voters who identify as Democrats or lean Democratic in 1994, to 56% in 2017. Pew Research Center, Wide Gender Gap, Growing Educational Divide in Voters' Party Identification,https://www.people-press.org/2018/03/20/wide-gender-gap-growing-educational-divide-in-voters-party-identification. We can expect that women's power through the vote will yield elected officials who, less and less, represent their interests. For these reasons, the right to vote for representatives who can put forth legislation on behalf of women is no substitute for Equal Protection.

b. Current Statutory Protection is No Substitute

Statutory protections like Title IX and the Equal Pay have carried a heavy load in protecting women from discrimination in educational institutions and in employment. However, they have not been able to completely account for the persistant and pervasive discrimination still faced by women. For example, despite women making up 50.08% of the population, in the 116th congress, women make up 24% of the House and 25% Senate. Drew Desilver, A Record Number of Women will be Serving in the new Congress, December 8th 2018, https://www.pewresearch.org/fact-tank/2018/12/18/record-number-women-in-congress/. Additionally, the Equal Pay Act specifically has an exception for employees in a "bona fide executive, administrative or professional capacity." 29 U.S.C.A. § 213. We can see the results this has

wrought in the legal field. While women now are entering law school at the same rate as men, women only represent 47% of associates and 20% of all equity partners. National Association of Women Lawyers, 2019 Survey Report on the Promotion and Retention of Women in Law Firms. Therefore, while statutory protections like Title IX and the Equal Pay have made a significant difference for women in the United States, they are no substitute for Equal Protection.

c. Reliance on Judicial Precedent is no Substitute

Judicial precedent cannot substitute for an explicit grant of equal protection. The doctrine of stare decisis refers to how a court must follow an earlier judicial decision if they come up again in later cases. Stare decisis, Black's Law Dictionary (11th ed. 2019). However, the current Court's propensity for overruling precedent should give women pause. *See* Knick v. Township of Scott, Pennsylvania, 139 S.Ct. 2162 (2019), (overruling thirty year old precedent of takings clause); Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485 (2019), (overruling forty year old precedent on sovereign immunity). Even now, the Court granted certiorari in April of 2019 to June Med. Services L.L.C v. Gee, 139 S. Ct. 663, 203 L. Ed. 2d 143 (2019) challenging an admitting privileges law in Louisiana that is identical to the one struck down in Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016). The Court seems poised either to overrule Whole Woman's Health or Roe v. Wade with this grant. Therefore, women cannot be content to rely on judicial precedent; it is no substitute for an explicit grant of equal protection.

Conclusion

Now, as much as ever, the need for the Equal Rights Amendment is paramount. This is because history has shown us there is no substitute for equal protection under the law. Further, the current statutory framework has been insufficient to remedy the underlying systemic issues. And finally, reliance on judicial precendent is misplaced given the current Court's non-deference to stare decisis. Certainly, without equal protection, a minority is relegated to second class citizenship.