

THE BENEFITS OF EQUITY IN THE CONSTITUTIONAL QUEST FOR EQUALITY

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Recent high-profile scandals have prompted a national conversation about male privilege, gender-based disparities, and sexual violence in the United States. Relatedly, within an 18-month period, two states ratified the Equal Rights Amendment, proposed by Congress in 1972, thereby reviving the chances of securing a constitutional guarantee of gender equality.¹ Unlike the broader national conversation, however, the renewed debate over the ERA has been fairly limited, mainly focused on two types of questions. On one hand, there are questions about the ratification process, in particular, the merits of picking up where the initial campaign left off—the “three-state strategy”—versus beginning anew with the “fresh start” approach.² On the other, advocates and opponents have sparred over whether, given the progress over the last 50 years, the U.S. Constitution needs an ERA.³ To be sure, these are valid concerns that demand resolution. The process issue, likely a political question, merits consideration because it implicates not just the ERA, but future battles in amendment politics and even democratic legitimacy. The substantive concern, whether there is a present need for an ERA, is fundamentally a question about our values, and addressing it properly requires deep reflection about the type of nation we have been, are, and aspire to be.

Yet, these are not the only issues raised by the prospect of an ERA. Instead, the greatest ERA-related “controversy” may be the narrowness of the debate and the important questions left out of it. For example, is the ERA sufficient to meet today’s gender discrimination challenges? And if not, what else could help? Drawing on the development of American law and history, I conclude that the answer to the first

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¹ See Bill Chappell, *One More to Go: Illinois Ratifies Equal Rights Amendment*, N.Y. TIMES (May 31, 2018), <https://www.npr.org/sections/thetwo-way/2018/05/31/615832255/one-more-to-go-illinois-ratifies-equal-rights-amendment> [<https://perma.cc/R7GK-BDUU>] (discussing Illinois’ ratification of the ERA in 2018, which followed Nevada’s ratification of the ERA in 2017).

² Compare Vikram David Amar, *What Legal Effect, If Any, Can Recent State Ratifications (Including Illinois’s Earlier this Summer) of the Equal Rights Amendment Have*, JUSTIA: VERDICT (Sept. 21, 2018), <https://verdict.justia.com/2018/09/21/what-legal-effect-if-any-can-recent-state-ratifications-including-illinois-earlier-this-summer-of-the-equal-rights-amendment-have> [<https://perma.cc/6Q2N-2FS3>] (explaining lawmakers would have to restart the process to pass an ERA, because extending the lapsed ratification deadline “would be problematic.”), with Allison L. Held, Sheryl L. Herndon & Danielle M. Stager, *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. WOMEN & L. 113, 135 (1997) (If Congress reviews and votes to repeal the ratification deadline, which “is not part of the amendment,” state legislatures can restart the ratification process where it left off.).

³ Compare, e.g., JESSICA NEUWIRTH, EQUAL MEANS EQUAL: WHY THE TIME FOR AN EQUAL RIGHTS AMENDMENT IS NOW (2015) (making the case for the ERA through a range of gender discrimination cases), with Susan Estrich, *Politics and the Limits of Law: A Musing for Dean Sullivan*, 90 CAL. L. REV. 813, 813 (2002) (“Phyllis Schlafly was right, ironically enough. We didn’t need an Equal Rights Amendment. We got one, virtually identical to the one we proposed, through the decisions of the U.S. Supreme Court.”).

question is “no,” and to the second, “equity.” Due to the differences between legal equality and equity, parties might invoke an Equal Rights Amendment in certain cases but remain aggrieved, whereas equity might result in a more just remedy.

Defining equality and equity—the two concepts at the core of my thesis—is a difficult task, but a common understanding of them is essential to the argument. Equality refers to “[t]he quality, state, or condition of being equal” or “likeness in power or political status.”⁴ Our conception of legal equality is often crammed into a bipartite paradigm, with one component considering access or opportunity (more or less procedural equality), and the other concerned with results or outcome (more or less substantive equality). Equity, in contrast, entails a “recourse to principles of justice to correct or supplement the law as applied to particular circumstances,” enabling judges to “prevent[] hardship that would otherwise ensue from the literal interpretation of a legal instrument [in] . . . extreme case[s] or from the literal exclusion of a case that seems to fall within what the drafters of the instrument probably intended.”⁵ If equality’s function is bivariate, equity’s is multivariate. Notably, “[e]quity can perform three functions—it can be used to adapt the law to the facts of individual cases (equity *infra legem*); it can be used to fill gaps in the law (equity *praeter legem*); and it can be used as a reason for refusing to apply unjust laws (equity *contra legem*).”⁶ Translated literally, equity can be applied under, besides, or against the law, regardless of whether the dispute relates to process or substance. This key feature distinguishes equity from the more polarized equality. Yet the effects of using both in an analysis are cumulative; when applied together, they can address a broader spectrum of anti-discrimination cases, and with greater nuance. This relative continuity permits a more robust, intersectional analysis than what is possible under the legal equality paradigm alone.

Two things are important to note up front for this discussion. First, the Fourteenth Amendment’s equal protection doctrine is the principal model for the U.S. anti-discrimination or legal equality framework. Many scholars believe that an equal rights analysis would mirror the current equal protection analysis,⁷ but the precise doctrinal implications of an ERA (i.e. whether ratifying it would lead to gender discrimination claims being subject to “strict scrutiny” rather than the current

⁴ *Equality*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁵ *Equity*, BLACK’S LAW DICTIONARY (10th ed. 2014). See also Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 FORDHAM L. REV. 23, 24 (1951) (“Equity is that portion of the law which was developed . . . to remedy defects in the common law” and “more important, . . . enunciated for the purpose of meliorating any harsh or otherwise undesirable effects resulting from the strict application of any particular rule of law.”).

⁶ Michael Akehurst, *Equity and General Principles of Law*, 25 INT’L & COMP. L.Q. 801, 801 (1976).

⁷ See, e.g., Barbara A. 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, 892 (1971) (Because “[t]he process by which [the courts and Congress] make that judgment [of whether differential treatment is justified] involves the same discretionary weighing of preferences as has resulted in the present inequality[,] . . . [t]here is no reason to believe that such a decision-making apparatus will end up in a substantially different position from what we have now.”); Wilfred R. Caron, *The Equal Rights Amendment: A Legal Assessment*, 30 CATHOLIC LAWYER 301, 305–07 (1985) (discussing a model for legal analysis under the ERA in light of “equal protection precedents”).

“heightened review” standard) is subject to debate.⁸ I argue that courts have authority to invoke principles of equity, and should do so to augment the legal equality analysis in anti-discrimination law.

Second, this is neither an argument against using the legal equality framework nor against the Equal Rights Amendment. Equality under the law is a laudable goal for society, and our equal protection doctrine has advanced the rights of women and minorities, vastly improving American society. The U.S. would likewise be better-served with an equal rights doctrine rooted in an explicit, permanent constitutional provision outlawing gender-based discrimination. Still, our legal equality framework has critical shortcomings that have sometimes resulted in courts reaching the wrong outcome in discrimination cases. Adding an equity-based analysis to the existing legal equality framework could empower courts to provide appropriate relief. I conclude with an example to briefly demonstrate that equity can enhance courts’ analysis and potentially would have altered the outcome in the 2007 gender discrimination case *Ledbetter v. Goodyear Tire & Rubber Co.*⁹

Beyond its potential to address a wider array of discrimination cases, equity has at least three other traits that make it well-suited for use in U.S. courts. For one, it is a familiar concept in American society, and the U.S. legal system contemplates its use. Also, liberty, which is arguably the most entrenched principle underlying our legal system, works more seamlessly with equity than equality. And finally, equity can be employed within the broader framework of U.S. law to enhance the pursuit of equality.

First, Americans are well acquainted with the notion of equity, and judges presiding over cases are already authorized to invoke it. Not only is it a fixture in our Constitution, which extends “judicial power . . . to all cases, *in law and equity*,”¹⁰

⁸ Compare, e.g., Martha F. Davis, *The Equal Rights Amendment: Then and Now*, 17 COLUM. J. GENDER & L. 419, 422 (2008) (“By adding a specific reference to sex equality to the Constitution, the amendment would result in strict scrutiny for governmental policies that discriminate based on sex and lead to a greater consideration of the particular impact of decisions on women even in the private sector.”), with Lisa Baldez, Lee Epstein & Andrew D. Martin, *Does the U.S. Constitution Need an Equal Rights Amendment?*, 35 J. LEGAL STUD. 243, 250 (2006) (“One set [of commentators], for example, asserts that the amendment’s presence would not necessarily ensure adoption of strict scrutiny and that its absence does not automatically negate it.”). Whether the Equal Rights Amendment would raise the standard of review or maintain the current level of scrutiny, a firm constitutional hook to establish clarity on this point is a legitimate reason to support its ratification.

⁹ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *superseded by statute*, Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111–2, 123 Stat. 5 (2009).

¹⁰ U.S. CONST. art. III, § 2 (emphasis added). See also U.S. CONST. amend. XI (stripping federal courts of jurisdiction over “suit[s] in law or equity . . . against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”). Cf. U.S. CONST. art. II, § 2, cl. 1 (“The President . . . shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.”). The pardon power may be thought of as an executive tool for providing equitable relief in extraordinary cases that lead to unjust outcomes. See, e.g., Harold J. Krent, *Conditioning the President’s Conditional Pardon Power*, 89 CAL. L. REV. 1665, 1674 n.48 (2001) (comparing Alexander Hamilton’s argument for presidential pardon power to Aristotle’s argument for “equity to temper the inevitable imprecision of rules.”); James D. Barnett, *The Grounds of Pardon*, 17

but its justification has remained constant: equity empowers courts “to give relief in extraordinary cases, which are exceptions to [the] general rules.”¹¹ Two centuries later, equity remains a mainstay in American legal and political culture. Because equity falls squarely within the courts’ competencies, invoking it can nudge society forward without introducing wholly novel concepts that might upend the administration of justice.¹²

Equality, however, demands some measure of social upheaval,¹³ “evolution,”¹⁴—or even a revolution¹⁵—in the legal system to account for the scope of “prejudice against discrete and insular minorities,” particularly in a society as diverse as ours.¹⁶ Whereas “legal equality comes only when the ground has been prepared by social and political movements,”¹⁷ no groundswell of energy by marginalized groups (and their allies) or other major societal shift is required for equity to prevail. In this sense, *equity is less foreign to the American justice system than equality.*

Second, there is inherent tension between liberty and equality. The problem, put simply, is that one person’s exercise of unfettered freedom can encroach on another’s legitimate expectation of equal treatment, and vice versa. For example, underlying the Supreme Court’s ruling that the Fourteenth Amendment prohibits racially-restrictive housing covenants is the principle that society’s collective interest in racial equality may trump an individual’s liberty to contract.¹⁸ In the crudest sense, the relationship between the two can be conceived of as a zero-sum game, where transactions result in winners and losers.¹⁹ This framing, liberty *versus*

AM. INST. CRIM. L. & CRIMINOLOGY 490, 508 (1927) (“The pardoning power . . . answers about the same purposes in the administration of criminal matters that equity does in the administration of civil matters. Equity supplies that wherein the [civil] law by reason of its universality is deficient; and pardons supply that wherein the criminal law by reason of its universality is deficient.”).

¹¹ THE FEDERALIST NO. 83 (Alexander Hamilton).

¹² *Contra* Alda Facio & Martha I. Morgan, *Equity or Equality for Women? Understanding CEDAW’s Equality Principles*, 60 ALA. L. REV. 1133, 1156 (2009) (arguing for “equality,” not “equity,” in the global fight against gender discrimination because the latter is “not guaranteed in any legal document” in the international human rights framework). Notably, the United States is a signatory to CEDAW, but the Senate has not ratified it, and U.S. courts “have been reluctant to accord even persuasive interpretive weight to international or comparative law sources.” *Id.* at 1167.

¹³ See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 968–76 (2002). The author explains that “[f]rom the moment” female abolitionists learned “that early drafts of the Fourteenth Amendment’s second section referred to ‘male’ suffrage, the woman’s rights movement began a campaign for the enfranchisement of women . . . that did not abate until ratification of the Nineteenth Amendment over a half century later.” *Id.* at 968–69.

¹⁴ See, e.g., Colin Daileida, *A Short History of Obama’s Evolving Stance on Gay Marriage*, MASHABLE (Apr. 16, 2014), <https://mashable.com/2014/04/16/history-obama-gay-marriage/#Bj1NxEmHmuqZ> [<https://perma.cc/B3XW-8N35>].

¹⁵ See AKHIL REED AMAR, *AMERICA’S CONSTITUTION 354–59* (2005) (discussing the path to abolition from Civil War to the Thirteenth Amendment).

¹⁶ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

¹⁷ Michael C. Dorf, *The Paths to Legal Equality: A Reply to Dean Sullivan*, 90 CAL. L. REV. 791, 794 (2002).

¹⁸ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

¹⁹ See, e.g., Timothy Zick, *The Dynamic Relationship Between Freedom of Speech and Equality*, 12 DUKE J. CONST. L. & PUB. POL. 13 (2016). Comparing the liberty-equality dynamic in the Civil Rights era and the modern gay rights movement, Zick explains that “[t]he right to dissent entails the right to

equality, undergirds a long-running philosophical debate, and the search for an equilibrium continues to shape our political and legal system.

It is an open question whether the American system has achieved—or can ever achieve—the correct balance between liberty and equality. The Declaration of Independence elided over the tension by simply proclaiming the “self-evident” truth “that all men are created equal,” specifically with respect to their endowment of liberty.²⁰ But the statement fell short in theory by proclaiming fundamental rights without explaining which prevails when the two are at odds (or even prioritizing the liberty rights of equal citizens). The shortcomings of the pronouncement were even more glaring in practice. The statement’s flagrant omission of women, half of the nation’s population, is emblematic of the country’s approach to legal equality over the course of American history, exposing its comfort with the political and economic interests of a few grossly outweighing *even the vast majority’s* basic right to be treated with human dignity. To this end, liberty has been given primacy over equality in U.S. law.

Liberty and equity, however, are not necessarily at loggerheads because, under an equity frame, the focus is not the parties’ competing interests. To be sure, equity accounts for inherent self-interest and acknowledges that individuals want to both be free to act as they see fit and respected as peers within the social order. But in doing justice, equity need not consider that tension. Instead, it can focus on the entirety of a transaction to resolve what is actually due given the mere fact that parties have decided to establish a relationship. This is because equality’s underlying assumptions are different than equity’s. Whereas the argument for equality presupposes the existence of a non-trivial amount of parity among the parties, equity need only assume the bare minimum: that parties freely enter into a relationship in which each has some stake or share, agreeing—either explicitly or implicitly—to fair and just treatment throughout if only because they commonly have some interest in establishing that relationship. Appealing to equity, then, can be understood as advancing the cause of liberty because even the most egocentric among us can appreciate the idea that discrete, self-interested relationships are best sustained through fairness. Equity can encourage the very transactions that produce beneficial relationships because parties will enter into them knowing that when unique disputes arise, their own interest in seeing that justice is vindicated will be honored. Thus conceived, liberty and equity can co-exist more seamlessly and, to some degree, are mutually reinforcing.

Finally, there is the matter of how legal equality has been manifested in American law. Our experience with the Fourteenth Amendment makes clear that courts have not always been receptive to the cause of equality. Indeed, when equality has been at stake, the Supreme Court has often led from behind—trailing the work of its co-equal branches and society generally. So even if the country ratifies the Equal Rights Amendment, it is not clear that courts would enforce it robustly.

Consider, for example, the *Slaughter-House Cases*, which the Supreme Court used as an opportunity to dull the Fourteenth Amendment’s edges a mere four

reject the dignity of others, to deny their entitlement to equality, and to exclude them from some of the benefits of civil society.” *Id.* at 63.

²⁰ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

years after it was ratified.²¹ The Court read the amendment to make a “distinction between citizenship of the United States and citizenship of a State,”²² holding that only the privileges and immunities of “the former [] are placed . . . under protection of the Federal Constitution, and that the latter . . . are not intended to have any additional protection”²³ In this case, which was entirely unrelated to the type of legal equality contemplated by the Fourteenth Amendment’s drafters, the Court excised any number of civil rights from the Constitution’s purview. Women felt the impact of the ruling just two years later when the Court reiterated that “[t]he amendment . . . simply furnished an additional guaranty for” those privileges and immunities already granted by the states, and rejected the underlying discrimination claim to deny them equal rights to suffrage.²⁴

Within a decade, the Court curtailed the amendment’s scope even further in the *Civil Rights Cases* by establishing the “state action” doctrine, which stymied enforcement of legal equality against non-government actors.²⁵ According to the Court, it would be “absurd to affirm that, because the rights of life, liberty and property . . . are by the amendment . . . protected against invasion on the part of the State without due process of law,” and because “the denial by a State to any persons, of equal protection of the laws, is prohibited,” Congress has legislative power to protect and vindicate the same.²⁶ Of course, after facing decades of mounting social pressure, the Court ultimately began to give “full[er] effect . . . to the intent with which” the Fourteenth Amendment was adopted.²⁷ But even that was short-lived. Less than 25 years after the Supreme Court had “dusted off” the Equal Protection Clause to hold that *de jure* segregation in education was unconstitutional,²⁸ the same provision was weaponized against its intended beneficiaries—despite the existence of pervasive *de facto* segregation in schools—to sustain legal claims of “reverse discrimination.”²⁹

These cases demonstrate that the legal equality framework is no silver bullet, and can even be manipulated to produce unintended consequences. One cannot underestimate the ingenuity of a court that is hostile to legal change, or the intensity of the forces motivating it to circumvent the law’s true intentions. Even as the Court’s reluctance to apply anti-discrimination principles cautions against an over-reliance on the judiciary to protect rights, equity provides courts with a greater ability to “establish justice.”³⁰ Equity is a tool to supplement—not supplant—the current anti-discrimination analysis in the constitutional quest for equality.

²¹ The Slaughter-House Cases, 83 U.S. 36 (1873).

²² *Id.* at 73.

²³ *Id.* at 74.

²⁴ *Minor v. Happersett*, 88 U.S. 162, 171 (1875).

²⁵ *Civil Rights Cases*, 109 U.S. 3, 11 (1883).

²⁶ *Id.* at 13.

²⁷ *Id.* at 26 (Harlan, J., dissenting).

²⁸ Compare *Berea College v. Kentucky*, 211 U.S. 45 (1908) (upholding states’ power to prohibit integrated schools), with *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding that segregation in schools inherently results in a denial of equal protection).

²⁹ See, e.g., *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

³⁰ U.S. CONST. pmbl.

This leads to the strongest argument against the use of equity principles in this context: the concept is too subjective and would afford judges too much discretion. Whereas there is already a strict legal equality doctrine to resolve discrimination claims, equity's framework is mushy and amorphous. A creative judge could parse the facts of any case to make it a candidate for equitable resolution, arguing that equity, like "hard-core pornography," is difficult "to define . . . [b]ut I know it when I see it."³¹

This is not a novel position. In fact, the Anti-Federalists criticized the Constitution's grant of equity power to the federal judiciary. "It is a very dangerous thing to vest" in a judge both legal and equitable jurisdiction, "Federal Farmer" argued, "for if the law restrain [sic] him, he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate."³² The very reasoning advanced by our Constitution's ablest opponents advises against the use of equity; it would license unelected "politicians in robes" to administer justice in accordance with personal beliefs or political whims.

But this reasoning has some incoherence. It not only presumes that equity is not subject to *any* rules, but also that law adheres to especially strict ones. Neither premise is completely fair. While it is true that "[e]quity eschews *mechanical* rules [and] depends on flexibility," the tool is by no means boundless.³³ Equity, just as law, consists of principles and rules that dictate when and how it should be applied.³⁴ Certainly it requires some measure of faith to believe that judges would look to equity only when the law offers insufficient guidance. But if the objection is due to skepticism about judges' expertise, i.e. that they lack the legal skill and judgment to know when to resort to equity, that is a concern about legal training, not equity. If, however, the objection stems from doubt about judges' intention or willingness to apply the law, that doubt is no greater than what is warranted now; judges take an oath of office, and we already rely on them to apply the law faithfully.³⁵ Our confidence in the judiciary should presume that judges understand when the administration of justice calls on them to "mould [a] decree to the necessities of the particular case,"³⁶ and that they will show restraint and apply the rules that each case demands.

³¹ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

³² Letter from Federal Farmer, no. 3 (Oct. 10, 1787), in 1 THE COMPLETE ANTI-FEDERALIST 244 (Herbert J. Storing, ed., 1981).

³³ *Holmberg v. Armbricht*, 327 U.S. 392, 396 (1946) (emphasis added).

³⁴ See, e.g., Michael T. Morely, *The Federal Equity Power*, 59 B.C. L. REV. 217, 231–32 (2018) ("For more than a century after the Founding, federal courts treated equity as an independent body of law they were required to apply . . . [that] distinguished among four types of issues relating to equity to which different constitutional provisions, statutory restrictions, and other doctrines applied: jurisdictional, procedural, remedial, and substantive.")

³⁵ 28 U.S.C. § 453 (requiring federal judges to swear that they "will faithfully and impartially discharge and perform all the duties incumbent upon [them] . . . under the Constitution and laws of the United States.")

³⁶ *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)) (holding that the Federal Water Pollution Control Act did not preclude courts from using equity to ensure compliance with the law).

Nor is it necessarily the case that legal rules are more constant or rigid than equitable ones, a point that our anti-discrimination cases make clear. Not only has doctrine changed dramatically over time (as noted above), but judges are taught that the meaning of legal equality can be discerned through balancing tests or appeals to the legislators' then-state of mind. At best, the doctrinal shifts and development of legal tests prove that courts grapple with difficult cases and seek to reconcile tricky facts and imprecise rules. But tough cases will always arise irrespective of the law or analytical devices used to apply it. By using equity, judges would probably show more—but certainly no less—fidelity to the law than those who look for it to be revealed through modes like “originalism,” “living constitutionalism,” and other theories of interpretation.³⁷

To illustrate equity's potential, consider *Ledbetter v. Goodyear Tire & Rubber Co.*³⁸ A female, 20-year veteran of the company filed a discrimination suit under Title VII of the Civil Rights Act, alleging that her employer took adverse action against her over a long period of time because of her gender.³⁹ The effects of the alleged conduct were stark: before taking early retirement, Ledbetter learned that she had been making significantly less than her male counterparts—approximately 87% of what the lowest paid male in the same position earned when the claim was filed.⁴⁰

Ledbetter initiated the administrative grievance process, then filed her claim in court. At the trial stage, the jury found the evidence to be in her favor, and granted her backpay, damages, and attorneys' costs and fees.⁴¹ The appeals court reversed. It held that the evidence did not prove that Goodyear acted with discriminatory intent during the 180-day statutory filing period before Ledbetter filed a claim, ruling that the case was untimely.⁴² In affirming the decision, the Supreme Court held that salary determinations—not the separate paychecks based on them—are discrete, litigable employment actions.⁴³ So, despite the cumulative impact of such action, wage discrimination claims will lapse if not contested when employers set salaries.

In this case, the primary obstacle to redress for the unequal treatment alleged was procedural—the statute of limitations. While the majority found it to be unsurmountable, it is not clear that a strictly legal test demanded this outcome. Not

³⁷ See Saul Cornell, *New Originalism: A Constitutional Scam*, DISSENT MAGAZINE, May 3, 2011, https://www.dissentmagazine.org/online_articles/new-originalism-a-constitutional-scam [<https://perma.cc/2JRP-KAQX>]; Ilya Somin, *Originalism, Living Constitutionalism, and Outrageous Outcomes*, WASH. POST (Feb. 4, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/04/originalism-living-constitutionalism-and-outrageous-outcomes/> [<https://perma.cc/FYH4-MXPM>].

³⁸ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

³⁹ *Id.* at 621–22.

⁴⁰ See *id.* at 643 (Ginsburg, J., dissenting).

⁴¹ *Id.* at 644.

⁴² *Id.* at 622–23 (majority opinion).

⁴³ *Id.* at 628 (“A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination.”).

only did the Supreme Court split 5-4 on the question, but the majority acknowledged that the case resolved “disagreement among the Courts of Appeals as to the proper application of the limitations period.”⁴⁴ As the dissent noted, reasonable minds could differ on the issue based on whether they viewed “the pay-setting decision, and that decision alone, as the unlawful practice,” or “both the pay-setting decision and the actual payment of a discriminatory wage as unlawful practices.”⁴⁵ At a minimum, this suggests that the dispute was not a simple one that could be settled through rote application of a legal test.

Assume, then, that the legal equality framework is inapt or insufficient to discern which view “is more faithful to precedent.”⁴⁶ Courts could apply an equity analysis—equity *praeter legem* given the law’s vagueness—in addressing the legitimate concern about timeliness. The Court would likely draw on two relevant doctrines: equitable tolling and laches. If “the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired,” the claim need not be automatically time-barred but, instead, the statutory period should be “suspended or tolled until the plaintiff discovers the injury.”⁴⁷ If, still, the court finds an “[u]nreasonable delay in pursuing a right or claim . . . in a way that prejudices the party against whom relief is sought,” then laches would prevail, and the claim will have lapsed.⁴⁸

Instead of being mired in stalemate, using equity could move courts past the textual ambiguity to proceed with a fact-based inquiry. The test would probe whether Ledbetter met her “burden of establishing . . . (1) that [she] has been pursuing [her] rights diligently, and (2) that some extraordinary circumstance stood in [the] way” of her vindicating them.⁴⁹ For this part of the inquiry, it would be appropriate for the Court to consider facts relevant to “the realities of the workplace,” such as the company “kept salaries confidential [and] employees had only limited access to information regarding their colleagues’ earnings.”⁵⁰ The Court could also elicit facts to assess whether Ledbetter’s “inaction” resulted in “legitimate reliance” by Goodyear or otherwise prejudiced the company, factors which “may bar long-dormant claims.”⁵¹ The Court could determine whether Goodyear could establish a diminished ability to obtain witnesses due to death or faded memory, for example, and whether it had become too difficult or impossible to collect other evidence over time. Unlike judicial philosophies not rooted in the Constitution, this supplemental equity analysis offers a concrete basis for dealing with the law’s imprecision. While

⁴⁴ *Id.* at 623.

⁴⁵ *Id.* at 646 (Ginsburg, J., dissenting).

⁴⁶ *Id.*

⁴⁷ *Equitable Tolling*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“Equitable tolling does not require misconduct such as concealment by the defendant.”).

⁴⁸ *Laches*, BLACK’S LAW DICTIONARY (10th ed. 2014). Notably, the dissent in *Ledbetter* made a passing reference to equity that highlighted its potential benefit for the case: “Employers disadvantaged by such delay may raise various defenses. Doctrines such as ‘waiver, estoppel, and equitable tolling’ ‘allow us to honor Title VII’s remedial purpose without negating the particular purpose of the filing requirement, to give prompt notice to the employer.’ *Ledbetter*, 550 U.S. at 657 (Ginsburg, J., dissenting) (internal citations omitted).

⁴⁹ *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

⁵⁰ *Ledbetter*, 550 U.S. at 646, 650 (Ginsburg, J., dissenting).

⁵¹ *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 217 (2005).

an Equal Rights Amendment would not necessarily have altered the majority's reasoning or outcome, applying equity might have led to a more just outcome.⁵²

It is worth reiterating that my argument for invoking equity is not an argument against the Equal Rights Amendment. Quite the contrary. The principle underlying the ERA is wholly consistent with our constitutional values, and a default rule against the pernicious use of gender would provide a basis for further legal progress. As they were with the Fourteenth Amendment, lawmakers would be justified in adopting the ERA, even if it is uncertain that the amendment would fully achieve its advocates' desired ends. My argument for an appeal to equity is just that, and it stems from a belief in equity's potential. Equity can play an important role to ensure more just treatment because it can work within a system that Americans, despite our differences, have come to know and accept.

⁵² Because the Court affirmed the case's dismissal on procedural grounds, it did not have to answer the substantive question or address relief. Importantly, the jury found that there was sex discrimination occurring before the 180-day period and determined the measure of damages due to her. My proposal would have enhanced the *Ledbetter* Court's analysis, as exemplified by a separate appeal to equity by the dissent, which would be fully supported by an Equitable Rights Amendment. *See Ledbetter*, 550 U.S. at 650–51 (“When a male employee is selected over a female for a higher level position, someone still gets the promotion and is paid a higher salary; the employer is not enriched. But when a woman is paid less than a similarly situated man, the employer reduces its costs each time the pay differential is implemented.”) (Ginsburg, J., dissenting).