

INTERNATIONAL HUMAN RIGHTS LAW AND THE
 EQUAL RIGHTS AMENDMENT LITIGATION:
 PROMISE AND PITFALLS UNDER
ROPER V. SIMMONS

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The United States has long been criticized in the international human rights community for its insufficient protections for sex- and gender-based equality. One area of criticism is the United States’ failure to ratify the Equal Rights Amendment (ERA), a Constitutional amendment that would enshrine equality on the basis of sex. Though domestic support for the ERA resurged in 2020, as Virginia became the thirty-eighth and final state required to ratify the amendment, litigation ensued to determine whether the deadline for ratification has passed. This litigation attracted the attention of international human rights organizations, who asserted in an amicus brief that international law, including international treaties and customary international law, compels the United States to certify the ERA.

*This note discusses the need for an ERA in the United States and considers how the Supreme Court opinion in *Roper v. Simmons* might provide*

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guidance for drafting an international human rights law amicus brief to submit to U.S. courts. Based on this guidance, the note evaluates the amicus brief submitted by international human rights organizations in the ERA litigation. The ERA human rights brief succeeds in providing a comprehensive overview of relevant international laws and practice, but ultimately, this note argues that the brief fails to frame its argument in a way that will be persuasive to U.S. courts under the Roper framework. A more compelling brief would refrain from directly accusing the United States of violating international law, highlight the parallel between international consensus and the practice of U.S. states with respect to constitutionalizing gender equality, and demonstrate a better understanding of American law, including American law regarding international obligations and American procedural law.

I. INTRODUCTION

The United States has long been criticized in the international human rights community for its insufficient protections for sex- and gender-based equality.² As such, the United States' failure to pass the Equal Rights Amendment (ERA), a Constitutional amendment that would enshrine equality on the basis of sex, has similarly drawn international scrutiny.³ However, domestic support for the ERA has resurged this year, as Vir-

2. See, e.g., *Women in US Lagging Behind in Human Rights, UN Experts Report After 'Myth-Shattering' Visit*, U.N. NEWS (Dec. 11, 2015), <https://news.un.org/en/story/2015/12/517932-women-us-lagging-behind-human-rights-un-experts-report-after-myth-shattering> (citing a U.N. Working Group as saying that "[t]he US, which is a leading State in formulating international human rights standards, is allowing its women to lag behind"). Though sex and gender are distinct concepts, for simplicity, this note will use the term "sex-based equality" or "sex-based discrimination" to include both sex-based and gender-based issues for all genders. This note also recognizes that, in light of *Bostock v. Clayton County*, 140 S. Ct. 1731 (U.S. 2020), protections against discrimination on the basis of sex extend to sexual orientation, at least under Title VII of the Civil Rights Act of 1964.

3. See, e.g., Teo Grossman, *The Equal Rights Amendment Still Hasn't Passed: Jessica Neuwirth on Why That's a Big Deal*, BIONEERS <https://bioneers.org/the-equal-rights-amendment-still-hasnt-passed-jessica-neuwirth-on-why-thats-a-big-deal-zmbz1903/> (last visited Mar. 4, 2020) (noting that unlike the United States, "many countries have equality provisions in their Constitution[s]" and that "[w]omen in other countries are often very surprised to find out that we don't have these protections."); Marie Wilken, *U.S. Lacks Concrete Domestic and International Modes of Legal Protection for U.S. Women*, GLOBAL JUSTICE CENTER, (July 27, 2017), <https://globaljusticecenter.net/blog/792-u-s-lacks-concrete-domestic-and-international-modes-of-legal-protection-for-u-s-women> (criticizing the United States for failing to ratify both the ERA and the U.N. Convention on the Elimination of All Forms of Discrimination Against Women).

ginia became the thirty-eighth and final state required to ratify the amendment. The future of the ERA now rests in American courts, where ongoing litigation will decide whether the deadline for ratifying the ERA has passed. This litigation has attracted the attention of international human rights organizations, who asserted in an amicus brief that the United States is compelled to certify the ERA as a matter of international law.⁴

The goal of this note is to identify a framework for using international human rights law in support of the ERA based on existing American jurisprudence, and to measure the persuasive value of the amicus brief against that framework. This note will proceed in five main parts. In Part I, it will provide an overview of the ERA and the status of the litigation in the U.S. District Court for the District of Columbia as of December 2020. Part II will discuss the need for an ERA in the United States. Part III will introduce the case of *Roper v. Simmons*, a Supreme Court case that considered international human rights arguments in striking down the juvenile death penalty as unconstitutional. By comparing the *Roper* opinion with an international human rights law amicus brief filed in that case, this note will extrapolate best practices for international human rights law amicus briefs in U.S. courts.⁵ Based on these

4. See generally Brief for Equality Now et al. as *Amici Curiae* Supporting Plaintiffs at 14, *Virginia v. Ferriero*, No. 20-cv-00242, 2020 U.S. Dist. LEXIS 103545, (D.D.C. June 29, 2020) [hereinafter Equality Now Brief] (arguing that in order to comply with binding treaty commitments, “the United States must adopt a constitutional sex equality provision like the ERA”).

5. It is worth noting two caveats to adopting *Roper* as a framework in this note. First, the use of international and foreign law to inform American judicial decision-making has been controversial. For instance, though Justice Kennedy considered international sources in *Roper*, Justice Scalia’s dissent rejects this partial reliance. See *Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) (“[T]he basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.”). Second, the interpretation of the Eighth Amendment has specifically invoked international law, a point upon which the *Roper* majority relies. See *id.* at 575 (“[T]he Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments.’”). To the first caveat, this note does not aim to discuss the legitimacy of invoking international law in American courts. Rather, this note conducts its analysis based on the practical reality that international sources have been cited by both the Supreme Court and amicus briefs. To the second caveat, this note does not argue that doctrinally, use of international sources should

best practices, this note will then evaluate in Part IV the amicus brief submitted by Equality Now and other international human rights organizations (“Equality Now Brief”) in the ongoing ERA litigation. Ultimately, this note argues that, though the Equality Now Brief provides a comprehensive overview of relevant international laws and practices, it fails to frame its argument in a way that will be persuasive to U.S. courts. A more successful brief would refrain from directly accusing the United States of violating international law, highlight the parallels between international consensus and the practice of American states, and demonstrate a better understanding of American law. Accordingly, Part V provides suggestions for improvement.

II. OVERVIEW OF THE ERA AND ONGOING LITIGATION

The ERA was first introduced to Congress in 1923 by suffragette Alice Paul and was revised in 1943 to read as it does today:

extend from Eighth Amendment interpretation cases to questions of amending the Constitution, nor does it argue that the latter must necessarily follow the framework of the former. Rather, it recognizes that Eighth Amendment interpretation is one area in which the invocation of international sources has been successful, and thus uses *Roper* as a template for developing an international amicus argument in another area: adding the ERA to the Constitution. Regardless, use of international and foreign law in American courts extends beyond Eighth Amendment interpretation, and has been cited in what Steven Calabresi and Stephanie Zimdahl call “social issue cases.” See Steven Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and The Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 868 (2005) (discussing the use of international sources in *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (assisted suicide); *Lawrence v. Texas*, 539 U.S. 558 (2003) (same-sex intercourse in the privacy of the home)). Moreover, international and foreign law has also been argued to be a useful “form of persuasive authority” in a case that “presents many difficult questions and there is no clear answer, either because of the originality of the issue presented or because of the conflicting directions in which the sources point.” David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 557–58 (2001) (citation omitted). The question of adding the ERA to the constitution involves social issues and also represents an original issue, and thus, it is useful to consider how international law may be wielded in its favor.

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.⁶

In 1972, the amendment passed both houses of Congress and was sent to the states for ratification, pursuant to the requirements of Article V of the U.S. Constitution.⁷ Because the required three-fourths of states had not ratified the ERA by its original 1979 deadline, Congress extended the deadline for three more years. By 1982, however, the ERA fell three states short of the required thirty-eight for ratification.⁸ In 2017, after forty-five years of inaction, Nevada ratified the ERA.⁹ Illinois and Virginia followed suit in 2018 and 2020, respectively, with Virginia becoming the thirty-eighth state required to add the ERA to the Constitution.¹⁰

Days after Virginia ratified the ERA, the Attorneys General of Nevada, Illinois, and Virginia brought suit in the U.S. District Court for the District of Columbia against Archivist of

6. Alice Paul Institute, Frequently Asked Questions, ERA, <https://www.equalrightsamendment.org/faq> (last visited Mar. 4, 2020).

7. U.S. Const. art. V; Id.

8. U.S. Const. art. V.

9. Eliminate the ERA Deadline, Equality Now, <https://www.equalitynow.org/era?locale=en> (last visited Dec. 16, 2020). Since the lapse of the deadline, organizations such as the National Organization for Women organized around a “three-state strategy,” advocating for three more states to pass the ERA so as to reach the three-quarters of states required for ratification. David Montero, Thirty-Five Years Past a Deadline Set by Congress, Nevada Ratifies the Equal Rights Amendment, L.A. Times (Mar. 20, 2017), <https://www.latimes.com/nation/la-na-nevada-era-2017-story.html>. The resurgence of interest in the ERA has been credited to the growing “political activism of women and their allies across the country” at a level “the nation hasn’t seen since the feminism movement of the ‘60s and ‘70s.” Amber Phillips, Nevada Is About To Be the First State in More Than Three Decades To Ratify the Equal Rights Amendment, WASH. POST (Mar. 4, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/03/04/nevada-is-about-to-be-the-first-state-in-more-than-three-decades-to-ratify-the-equal-rights-amendment/>.

10. *Eliminate the ERA Deadline*, *supra* note 9.

the United States, David Ferriero,¹¹ who refused to certify the amendment, claiming that the deadline for ratification had lapsed.¹² In the lawsuit, the Attorneys General argued that the congressional deadline is not binding and that Ferriero has a constitutional duty under Article V to publish and certify the

11. Complaint, *Virginia v. Ferriero*, No. 20-cv-00242, 2020 U.S. Dist. LEXIS 103545 (D.D.C. Jan. 30, 2020). The complaint states that under Article V of the Constitution, a proposed amendment automatically becomes part of the Constitution as soon as it is ratified by three-fourths of the states. *Id.* ¶ 57. Further, it purports that under federal statute, “[w]henver official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.” *Id.* ¶ 58 (citing 1 U.S.C. § 106b). Further, the complaint notes that this statute “does not grant the Archivist any discretion in deciding whether to publish and certify a newly adopted amendment. Instead, the duties imposed upon the Archivist are mandatory and purely ministerial.” *Id.* ¶ 59.

12. See Sarah Rankin, *Attorneys General Seek Summary Judgment in ERA Lawsuit*, NBC4 WASHINGTON (Aug. 19, 2020), <https://www.nbcwashington.com/news/local/attorneys-general-seek-summary-judgment-in-era-lawsuit/2395447/> (“The U.S. Department of Justice issued an opinion . . . saying it was too late for states to sign off because of the deadline.”). In addition, in January 2020, Equal Means Equal, a nonprofit organization, the Yellow Roses, a high school organization, and a woman named Katherine Weibrecht who suffered from gender-based violence, filed a lawsuit in United States District Court for the District of Massachusetts against Ferriero in an attempt to compel him to ratify the ERA. Complaint, *Equal Means Equal v. Ferriero*, 478 F. Supp. 3d 105 (D. Mass. Jan. 7, 2020) (No. 20-cv-10015). The court dismissed the suit on the Defendant’s motion on the basis of lack of standing. *Equal Means Equal v. Ferriero*, 478 F. Supp. 3d 105, 125. Upon its dismissal, the Plaintiffs appealed the case to the United States Court of Appeals for the First Circuit. Notice of Appeal, *Equal Means Equal v. Ferriero*, No. 20-01802 (1st Cir. Aug. 21, 2020), wherein a stay was granted in September 2020 as the Plaintiffs’ petition for certiorari to the United States Supreme Court was pending. Order Granting Plaintiff-Appellants’ Motion to Stay Appeal, *Equal Means Equal v. Ferriero*, No. 20-01802 (1st Cir. Sept. 25, 2020). The Supreme Court denied certiorari in October 2020. 141 S. Ct. 611 (2020). As such, the lawsuit is ongoing in the First Circuit. Order Lifting Stay of Appellate Proceedings, *Equal Means Equal v. Ferriero*, No. 20-01802 (1st Cir. Nov. 3, 2020). However, this paper focuses on the litigation brought by states because it is the locus of the international human rights law amicus brief.

amendment.¹³ In May 2020, the Department of Justice (on behalf of Ferriero) filed a motion to dismiss for failure to state a claim. The following month, the plaintiffs filed a memorandum in opposition to that motion, and a plethora of American states, domestic and international non-profit organizations, and corporations filed amicus briefs in support of the plaintiffs. One of those amicus briefs, filed by non-profit organization Equality Now on behalf of a large group of human rights organizations, discussed the international legal obligation of the United States to certify the ERA. As of December 2020, the District Court is still considering a Motion for Summary Judgment filed by intervening parties, the states of Alabama, Louisiana, Nebraska, South Dakota, and Tennessee, who claim to have withdrawn their ratification of the ERA.

III. NEED FOR THE ERA IN THE UNITED STATES

In light of persistent sex inequality in the United States,¹⁴ human rights advocates should support the addition of the ERA to the Constitution. Despite some criticism that the ERA is merely an “expression of elites’ obsession with using politics to enact their virtue,”¹⁵ there are still concrete and practical reasons to enact the amendment. Specifically, three main issues ground the amendment’s necessity: first, the patchwork

13. Complaint ¶¶ 64, 77, *Virginia v. Ferriero*, 466 F. Supp. 3d 253 (D.D.C. 2020) (No. 20-cv-00242).

14. See, e.g., Paula England, Andrew Levine & Emma Mishel, *Progress Toward Gender Equality in the United States Has Slowed or Stalled*, 117 PROC. NAT’L ACAD. SCI. U.S. AM. 6990, 6990 (2020) (“Our updated and broadened analysis strongly reinforces a conclusion a number of scholars have reached recently: that progress toward gender equality has slowed in recent decades, and on some indicators has stalled completely.”); Kelly L. Hazel & Kerry S. Kleyman, *Gender and Sex Inequalities: Implications and Resistance*, 48 J. PREVENTION & INTERVENTION CMTY. 281, 282 (2020) (“In the US, 14% of women and 27% of female led households (compared to 11% of men, 13% of male households) reported incomes that were below poverty. . . . [I]n regards to pay, women in general still earn only 82% (median full-time, weekly earnings) compared to White men. The gender wage gap is further complicated when race/ethnicity is considered The Institute for Women’s Policy Research has estimated the wage gap in the U.S. in general is likely not to close until 2059; and in some states not until the 22nd Century.”) (citations omitted).

15. Joan C. Williams, *The Misguided Push for an Equal Rights Amendment*, N.Y. TIMES (Jan. 16, 2020), <https://www.nytimes.com/2020/01/16/opinion/sunday/equal-rights-amendment.html>.

protection against sex discrimination afforded by federal laws and state constitutions; second, the insufficiency of Fourteenth Amendment jurisprudence to address gender discrimination; and third, the failure of the U.S. government to demonstrate a commitment to gender equality at the domestic level and on the international stage.

Current federal and state constitutional law insufficiently and inefficiently protect against sex discrimination. In protesting the addition of the ERA, opponents point to existing federal and state legal protections for women. Admittedly, the Equal Pay Act of 1963,¹⁶ Title VII of the 1964 Civil Rights Act on workplace discrimination,¹⁷ Title IX of the 1964 Civil Rights Act on educational equality,¹⁸ and the Pregnancy Discrimination Act of 1978¹⁹ all represented great strides in the protection of women's rights. In addition, as of June 2020, Title VII officially protects individuals based on their sexual orientation as well.²⁰ However, this scheme is insufficient. As the American Bar Association Governmental Affairs Office director, Thomas Susman, wrote to Congress in 2018, these laws only provide "patchwork protection and have been subject to different levels of enforcement and judicial interpretation."²¹ They apply only to pregnancy discrimination, employment discrimination, and discrimination in federally-funded education programs, "leaving women and minority genders vulnerable to discrimination in other areas."²² Because the protections are

16. Equal Pay Act of 1963, 29 U.S.C. § 206(d).

17. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17.

18. Civil Rights Act of 1964, 42 U.S.C. § 2000h-2.

19. Pregnancy Discrimination Act, 42 U.S.C. §§2000e, 2000e-2 (1978).

20. The Supreme Court held recently in *Bostock*, 140 S. Ct. 1731, that Title VII of the Civil Rights Act of 1964 protects people on the basis of their sexual orientation as well as gender identity. This development represents a significant advancement for the rights of sexual minorities, but the holding may not be strong enough to protect against sexual orientation-based discrimination under Title VII in contexts other than outright firing. *See id.* at 1753 ("Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.").

21. Cynthia L. Cooper, *Advocates Reignite the Fight for an Equal Rights Amendment*, ABA: PERSPECTIVES (Nov. 1, 2018), <https://www.americanbar.org/groups/diversity/women/publications/perspectives/2018/october-november/advocates-reignite-fight-an-equal-rights-amendment/>.

22. Hanna H. White, *The Equal Rights Amendment in the Twenty-First Century: Ratification Issues and Intersectional Effects*, 47 DTPP, 34-35 (Winter 2019).

not constitutionalized, they could also be repealed by Congress at any time. A federal ERA would protect against congressional or judicial erosion of equality for people of all genders and sexual orientations,²³ since neither statutes nor common law could contravene the ERA. In addition, though several states have a version of the ERA in their state constitutions, the standards of protection offered by these provisions vary greatly across states.²⁴ Some state ERA-like provisions create only as much protection as that already granted by the Fourteenth Amendment,²⁵ which, as will be discussed below in more detail,²⁶ presents its own set of problems by leading to insufficient protection against sex-based discrimination in courts. An elevated national standard would harmonize these different levels of protection for women, allowing for nationwide litigation. Under a federal standard, activists would only need to demonstrate once that some practice or pattern constitutes discrimination in violation of the ERA, rather than argue in every single state to achieve protection.²⁷

Second, an ERA is necessary because the existing constitutional standard prohibiting discrimination is insufficiently protective. Though the Fourteenth Amendment has been inter-

23. This protection would arguably cover sexual orientation in light of *Bostock*, 140 S. Ct. 1731 (2020). See Robin Bleiweis, *The Equal Rights Amendment: What You Need to Know* CTR. FOR AM. PROGRESS (Jan. 29, 2020, 4:05 PM), <https://www.americanprogress.org/issues/women/reports/2020/01/29/479917/equal-rights-amendment-need-know/> (“The ERA would protect individuals against discrimination on the basis of sex, gender identity, and sexual orientation, the same way that federal statutes such as Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 do.”).

24. The states with these provisions are Alaska, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, and Wyoming. Alice Paul Institute, *supra* note 6.

25. White, *supra* note 22, at 35.

26. See *infra* p. 7.

27. See Steph Black, *The Ms. Q&A: Jennifer Weiss-Wolf on What the U.S. Can Learn from Scotland's Period Products Law*, Ms. MAG (Dec. 7, 2020), <https://msmagazine.com/2020/12/07/ms-qa-jennifer-weiss-wolf-scotland-free-period-products-menstrual-equity/> (discussing the value of a federal ERA for activism for menstrual equity in the United States, since it would avoid a “piecemeal approach” in favor of a “national standard,” and activists “would not have to do this fight over and over and over from state to state”).

preted to protect against sex-based discrimination, case law has rendered it a weak protection. Supreme Court jurisprudence holds that sex- and gender-based discriminatory laws are only subject to an “intermediate scrutiny” level of review, as opposed to the “strict scrutiny”²⁸ afforded to discrimination based on race, national origin, or classifications that affect fundamental rights.²⁹ Accordingly, the protections for sex-based discrimination are less rigorous than for other categories. In addition, the intermediate scrutiny standard has been inconsistently applied by the Supreme Court and lower courts, and is thus “not functional because it does not provide a clear and consistent rule.”³⁰

Some scholars debate whether the text of the ERA would compel the court to use heightened scrutiny for sex-based claims.³¹ However, the experience of states with an ERA-like

28. Surviving intermediate scrutiny requires that “a quasi-suspect classification, such as sex . . . serve government interests and . . . substantially relate[] to those objectives.” Sarah M. Stephens, *At the End of Our Article III Rope: Why We Still Need the Equal Rights Amendment*, 80 BROOK. L. REV. 397, 409 (2015) (citing Ryan Lozar & Tahmineh Maloney, *Equal Protection*, 3 GEO. J. GENDER & L. 141, 147–48 (2002) but noting that “the Court has upheld sex-based classifications without explicitly analyzing whether the relationship between the objective and the classification qualified as substantial. In such instances, the Court has relied at least in part on legislative judgment to find that a sufficient nexus existed between the objective and the sex-based classification”). In comparison, for a law that distinguishes between individuals on the basis of a “suspect classification” to survive strict scrutiny, “the government actor bears the burden of demonstrating that the classification serves a compelling government interest and is narrowly tailored to accomplish that government interest.” *Id.* at 408 (citations omitted).

29. Cooper, *supra* note 21. See, e.g., *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J. dissenting) (“Strict scrutiny, we have said, is reserved for state ‘classifications based on race or national origin and classifications affecting fundamental rights.’”) (citing *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).

30. Stephens, *supra* note 28, at 411–12 (2015) (commenting that the intermediate scrutiny standard exists “somewhere between rational basis and strict scrutiny” therefore making the Court’s application of the standard “unpredictable”).

31. See, e.g., Martha F. Davis, *The Equal Rights Amendment: Then and Now*, 17 COLUM. J. GENDER & L. 419, 435 (2008) (stating that the ERA would result in strict scrutiny for governmental policies that discriminate on the basis of sex, pointing to the plurality’s dicta in *Frontiero v. Richardson*, 411 U.S. 677 (1973), that the sex-based law at issue should be struck down under the Fourteenth Amendment, applying strict scrutiny). But see Lisa Baldez, Lee Epstein & Andrew D. Martin, *Does the U.S. Constitution Need an Equal Rights*

provision in their constitutions may indicate that courts would adopt the heightened standard.³² Another issue with limiting constitutional protection for gender and sexual minorities to the Fourteenth Amendment is that an originalist interpretation of the amendment—which the current conservative-leaning Supreme Court is increasingly likely to apply—could roll back those protections. In fact, the late Justice Scalia, an originalist, stated that the Fourteenth Amendment did not protect against sex discrimination because that was not the intent of the amendment.³³ Though some legal scholars caution against the ERA because of the risk that the current Supreme Court could interpret it restrictively,³⁴ this concern applies to all existing rights, including those grounded in Fourteenth Amendment jurisprudence and the status of *Roe v. Wade*, and thus is not a valid reason to reject the amendment. An ERA, at the very least, would provide a textual basis for heightened protection of sex-based rights that is not yet present in the Constitution. Such a protection may be important in the context of the current composition of the Supreme Court, since the conservative majority might be more originalist in their approach to constitutional interpretation.

Finally, there is a normative reason for the United States to pass the ERA: to demonstrate a commitment on the na-

Amendment?, 35 U. CHI. J. LEGAL STUD. 243, 250 (2006) (writing that some scholars believe that the ERA would not necessarily compel the heightened scrutiny standard, nor would the absence of an ERA negate the possibility of one) (citations omitted).

32. See Davis, *supra* note 31, at 422 n.20 (noting the presence of this phenomenon in states with ERA-like provisions, “where courts import their constitutions’ equality concepts into common law”) (citing Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1237 (2005)).

33. See Bleiweis, *supra* note 23 (commenting that Justice Scalia and other conservative thinkers have declined to recognize sex as being protected by the Fourteenth Amendment because such a protection was not envisioned by the Constitutional framers); Paul Courson, *Scalia Comments Show Need for New Rights Amendment, Backers Say*, CNN POLITICS (Jan. 6, 2011), <http://edition.cnn.com/2011/POLITICS/01/06/era.scalia/> (noting that in September 2010, Justice Scalia remarked during an interview with a California law professor that “[c]ertainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn’t”).

34. See Williams, *supra* note 15 (cautioning that even if the ERA were adopted, the current Supreme Court likely would not interpret the amendment in accordance with “a bold view of the E.R.A.’s vague promises”).

tional and international levels to sex-based equality. As stated by gender scholars, it is no secret that “the U.S. record on women’s rights is undistinguished.”³⁵ Women continue to be underrepresented in positions of power in the private and public sectors.³⁶ As of 2018, women of all races earned eighty-two cents for every one dollar earned by men of all races. The gap is even larger for women of color.³⁷ The COVID-19 pandemic has further exacerbated levels of gender inequality in the United States, with unemployment rates higher among women than men,³⁸ and an increase in gender-based violence due to quarantine measures.³⁹ The United States also lags interna-

35. Davis, *supra* note 31, at 454 (“The United States has not ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). We have never had a female president, women are underrepresented in the federal Congress, and women lag in a number of other areas: according to the latest U.S. Census, for example, female-headed households are disproportionately poor. To top it off, our Constitution offers no specific sex equality protection. ¶ The international community is aware of this, and some are intent on using it to criticize the United States on the international stage.”) (citations omitted).

36. See Judith Warner & Diana Boesch, *The Women’s Leadership Gap*, CTR. FOR AM. PROGRESS (Nov. 20, 2018), <https://www.americanprogress.org/issues/women/reports/2018/11/20/461273/womens-leadership-gap-2/> (providing a list of statistics demonstrating the underrepresentation of women in leadership positions in various professions).

37. Robin Bleiweis, *Quick Facts About the Gender Wage Gap*, CTR. FOR AM. PROGRESS (Mar. 24, 2020), <https://www.americanprogress.org/issues/women/reports/2020/03/24/482141/quick-facts-gender-wage-gap/> (reporting that for every \$1 earned by white men, Black women made \$0.62, Hispanic or Latina women made \$0.54, Asian women made \$0.90, and American Indian or Alaskan Native women made \$0.57).

38. See *Gender Economic Inequality*, INEQUALITY.ORG, <https://inequality.org/facts/gender-inequality/> (last visited Mar. 4, 2021) (“In March 2020, U.S. men and women had the same unemployment rate — 4.4 percent, according to Bureau and Labor Statistics data. But in April, as the pandemic nearly shut down the economy, these rates sharply diverged, with the female unemployment spiking to 16.2 percent, compared to 13.5 percent for men. As the economy slowly improves, these gender gaps have narrowed. In December 2020, men and women were even again, with 6.7 percent unemployment rates. But this leveling does not make up for women’s larger income loss over the course of the year. It also masks particular employment challenges faced by women with children and women of color.”).

39. See Megan L. Evans, Margo Lindauer & Marueen E. Farrell, *A Pandemic Within a Pandemic—Intimate Partner Violence During Covid-19*, 383 NEW ENG. J. MED. 2302, 2302–03 (2020) (noting that stay-at-home orders were expected to increase intimate partner violence, and that the pandemic “has

tionally: it is among the thirteen percent of 193 U.N. member states that do not provide an explicit guarantee for sex-based equality in their constitutions,⁴⁰ and it is one of the few countries in the world that has not ratified the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).⁴¹ Some scholars write that the poor record of the United States on an international scale “provides comfort to those nations that continue to oppress women” and that until the United States ratifies CEDAW or implements greater constitutional protections, “many governments will take their commitments less seriously.”⁴² Thus, even if the ERA does not have the substantial practical legal effects its advocates might hope, its passage has normative value on both domestic and international levels because it demonstrates a commitment to rectifying sex-based inequality.

IV. LESSONS FROM *ROPER V. SIMMONS*

Given the potential importance of the ERA for the protection of the rights of women and sexual minorities, does inter-

put a spotlight on numerous ongoing public health crises, including violence within the home”).

40. See *Policy Data Tables*, WORLD POL’Y ANALYSIS CTR., <https://www.worldpolicycenter.org/data-tables/policy/undefined> (last visited Dec. 16, 2020) (providing data tables that disaggregate information by factors including country and whether their constitutions have provisions that guarantee sex equality). The United States is one of twenty-five countries whose constitutions either guarantee equality or non-discrimination without reference to sex and/or gender, or have no equality provision at all, compared to 168 countries whose constitutions either guarantee equality or non-discrimination across sex and/or gender, or “aspire[] to equality or non-discrimination based on sex or gender.”

41. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, S. Treaty Doc. No. 96-53, 1249 U.N.T.S. 1 [hereinafter CEDAW]. See also U.N. NEWS, *supra* note 2 (noting that the United States is one of seven countries that have not ratified CEDAW, and that U.N. experts have commented that “ratification of CEDAW is crucial, on both the domestic and the global levels, in order to confirm the U.S. commitment to substantive equality for women in all spheres of life”).

42. Davis, *supra* note 31, at 455–56 (noting also that the absence of full constitutional protections for women in the United States “allows other nations to score an easy point against the United States in the human rights propaganda wars”) (citing Elizabeth M. Schneider, *Transnational Law as a Domestic Resource: Thoughts on the Case of Women’s Rights*, 38 NEW ENG. L. REV. 689, 717 (2004)).

national human rights law provide any basis for its enactment, either as persuasive or binding authority? A few notable Supreme Court cases on domestic issues that implicate international human rights concepts have cited to relevant international law in order to draw a distinction between U.S. practice and human rights-based global norms. One such case is *Roper v. Simmons*,⁴³ which abolished the death penalty for juvenile offenders in the United States. In the majority opinion, Justice Kennedy made several substantive references to international law that were originally raised by *amici*. These references supported the Court's conclusion that the death penalty was disproportionate punishment for juveniles because foreign law and international authorities were deemed "instructive for . . . interpret[ing] the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"⁴⁴ One such amicus brief was prepared by "[t]he European Union and Members of the International Community" ("The E.U. Brief") in support of Respondent,⁴⁵ Christopher Simmons, who had been put on death row as a juvenile. Given the pedagogic value of *Roper* in both domestic criminal law and international law, the case provides an instructive framework for understanding how an international human rights law argument can support human rights in U.S. courts. This part analyzes how the *Roper* opinion relies on international law against the backdrop of the E.U. Brief. By comparing the arguments in the brief with the ultimate *Roper* opinion, some best practices emerge that may serve as guidance for using international human rights law to support the passage of the ERA.

The *Roper* decision hinged on whether the death penalty for juveniles constituted "cruel and unusual punishment" proscribed by the Eighth Amendment under "the evolving standards of decency that mark the progress of a maturing society."⁴⁶ Therefore, the main elements of the *Roper* opinion in-

43. *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

44. *Id.* at 555 (citing *Trop v. Dulles*, 356 U.S. 86, 102–03 (1958)).

45. Brief of *Amici Curiae* the European Union and Members of the International Community in Support of Respondent, *Roper*, 543 U.S. 551 (2005) (No. 03-633) 2004 U.S. S. Ct. Briefs LEXIS 424 [hereinafter E.U. Brief].

46. *Roper*, 543 U.S. at 561 (citing *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion)). *Roper* also relied on cases such as *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (holding unconstitutional the execution of any offender who was under the age of sixteen at the time of the crime),

clude the history of the death penalty in the United States, the “national consensus” against the death penalty for juvenile offenders among American states,⁴⁷ and finally, the international consensus against the death penalty for juvenile offenders.⁴⁸ Justice Kennedy made clear that the “opinion of the

Stanford v. Kentucky, 492 U.S. 361 (1989) (holding that the Constitution did not proscribe the death penalty for juvenile offenders between the ages of fifteen and eighteen), Penry v. Lynaugh, 492 U.S. 302 (1989) (holding that the death penalty for mentally ill people was not unconstitutional), and Atkins v. Virginia, 536 U.S. 304 (2002) (overturning Penry and holding that the Eighth and Fourteenth Amendments prohibited the death penalty for mentally ill people) to demonstrate that the Court considers evolving norms and shifts in national consensus to interpret the constitutional right to be free from cruel and unusual punishment. Roper, 543 U.S. at 561–64 (“Just as the Atkins Court reconsidered the issue decided in Penry, we now reconsider the issue decided in Stanford. The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. These data give us essential instruction. We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.”).

47. Roper, 543 U.S. at 564. In several cases, Supreme Court justices have considered the practices of American states when interpreting the phrase “cruel and unusual punishment.” See, e.g., Coker v. Georgia, 433 U.S. 584, 595–96 (1977) (noting that state legislatures were not unanimous in punishing rape with the death penalty, but that Georgia was the “sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman” and that “only two other jurisdictions provide capital punishment when the victim is a child”); Enmund v. Florida, 458 U.S. 782, 788–89 (1982) (stating that it would follow Coker’s manner of interpreting “cruel and unusual punishment,” which entailed “look[ing] to the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made”); Thompson v. Oklahoma, 487 U.S. 815, 824–230 (1988) (surveying how the states draw distinctions between childhood and adulthood for the purpose of determining whether to hold the death penalty unconstitutional for juveniles aged sixteen and under).

48. While several Supreme Court cases interpreting the Eighth Amendment find international confirmation in their result, they do not engage in international analysis as deeply as Roper, whose discussion on international sources spans about three pages. See Roper, 543 U.S. at 575–79; see also, e.g., Trop, 356 U.S. at 100–03 (1958) (mentioning in a short paragraph that only two countries impose denationalization as a penalty for desertion); Coker, 433 U.S. at 587, n.10 (mentioning in a footnote that Trop referenced international opinion, and thus, “it is . . . not irrelevant here that out of sixty major nations in the world surveyed in 1965, only three retained the death penalty for rape where death did not ensue”); Enmund, 458 U.S. at 796, n.22 (1982) (mentioning in a footnote that Coker referenced international

world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”⁴⁹ This indicates that the Court’s ruling does not depend on any international legal obligations that the United States might hold, even if global practice is normatively convincing for understanding American conceptions of certain individual rights. Though it may have had grounds to do so,⁵⁰ the E.U. Brief importantly does not assert a violation of international law, which may have been less convincing to an American court. Instead, the argument is framed around the broad idea that U.S. national practice departs from international norms.

In the *Roper* opinion, Justice Kennedy echoed several elements from the several international law briefs submitted in the litigation, particularly those in the E.U. Brief. Specifically, he mentioned the practices of other nations, highlighting that the United States was an outlier in using the juvenile death penalty;⁵¹ the plethora of international laws, including international treaties (even those not ratified by the United States), regional treaties, and customary international law (CIL), that forbid the death penalty for juvenile offenses;⁵² and an emerging consensus among American states that aligns with the international consensus on the juvenile death penalty.⁵³ Cru-

opinion, and thus it is “worth noting that the doctrine of felony murder” had been abolished, severely restricted, or was unknown in many other countries); Thompson, 487 U.S. at 830, n.31 (noting in one paragraph that several countries prohibit juvenile executions and recognizing in a footnote that Trop, Coker, and Enmund considered “the views of the international community in determining whether a punishment is cruel and unusual”).

49. *Roper*, 543 U.S. at 578.

50. See E.U. Brief, *supra* note 45, at 25 (noting that both the United Nations Sub-Commission on the Promotion and Protection of Human Rights and the United Nations Human Rights Committee have stated that “the execution of juvenile offenders violates customary international law.”).

51. *Id.* at 8–11 (“[T]he United States, at present, stands virtually alone among all the nations of the world in actively carrying out death sentences for offenses committed by children.”).

52. *Id.* at 12 (noting that such treaties include the U.N. Convention on the Rights of the Child, the ICCPR, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Arab Charter on Human Rights, and more).

53. *Id.* at 8 (“[T]he direction of U.S. practice has consistently moved away from the application of the death penalty to juveniles . . . [a]mong the thirty-eight U.S. States authorizing the death penalty, eighteen have ex-

cially, the latter point ties international practice to practice already existing in the United States. The Court regarded this connection as particularly salient, finding international practice relevant because it confirmed what the Court had already decided: that the death penalty for juvenile offenders was cruel and unusual punishment.⁵⁴ Finally, though not explicitly mirrored in the text of Kennedy's opinion, the E.U. Brief bolstered its credibility by discussing international authorities' views on international norms, as well as how U.S. jurisprudence has historically accounted for the views of the international community⁵⁵ and respected international authorities.⁵⁶ These arguments have strong persuasive value because they demonstrate an understanding of the U.S. legal system—in this case, how it interacts with international legal sources.

It follows from a comparison of the E.U. Brief and the *Roper* opinion that there may be certain best practices for drafting international human rights law briefs that aim to further a given human right issue in U.S. courts. First, an amicus brief should provide a comprehensive review of international law and norms pertaining to that right. Though perhaps contrary to the views of many human rights practitioners, in this review of international jurisprudence advocates should avoid arguing that the United States has explicitly violated international law. Rather, the brief should merely highlight how U.S. practice differs from provisions of international law.⁵⁷ Second,

pressly set a minimum age of eighteen at the time of the crime as the eligibility threshold for the death penalty.”).

54. *Roper*, 543 U.S. at 575 (“Our determination that the death penalty is disproportionate punishment for offenders under eighteen finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”).

55. See E.U. Brief, *supra* note 45, at 7–8 (noting that the Supreme Court considered the views of the world community in their opinions in *Atkins v. Virginia*, 536 U.S. 304 (overturning the death penalty for mentally disabled people), and *Lawrence v. Texas*, 123 S. Ct. 2472 (holding unconstitutional laws that prohibited same-sex intercourse in the privacy of the home)).

56. *Id.* at 14 (stating that that a number of federal courts have recognized the authority of the U.N. Human Rights Committee to interpret the ICCPR).

57. It is not evident from the brief itself why they may have taken this strategy. As mentioned in this note, *supra* p. 13, there may have been a sufficient legal basis to assert a violation of international law. For the purposes of this analysis, in light of the fact that the *Roper* opinion so extensively incorporated international law issues that the amicus brief raised, refraining from making a direct accusation will be deemed a best practice.

the brief should demonstrate that there is an international consensus around upholding that right, found in the practice of other countries. Third, it should argue that the international consensus on a human rights norm aligns with a national consensus among American states. Finally, it should bolster its credibility by demonstrating an understanding of U.S. law through citations to American case law and recognition of American civil procedure standards.

V. THE EQUALITY NOW BRIEF UNDER *ROPER V. SIMMONS*

In June 2020, several human rights organizations, led by Equality Now, filed an amicus brief grounded in international law on behalf of the plaintiffs in the ERA lawsuit (Equality Now Brief).⁵⁸ In many ways, it is similar to the E.U. Brief in *Roper*: it discusses international law and norms pertaining to sex-based equality, specifically constitutional provisions for sex-based equality, and demonstrates an international consensus under which the United States is an outlier. However, it fails to meet some of the benchmarks set by the E.U. Brief and subsequent *Roper* opinion as outlined above. With respect to the first best practice extracted from *Roper*, namely, that an amicus brief should provide a comprehensive review of international law and norms, the Equality Now Brief may go too far. Rather than solely summarizing the relevant international law, it conducts a novel and potentially flawed legal analysis to conclude that international law compels the addition of the ERA to the U.S. Constitution. The brief directly accuses the United States of violating international law, something that the E.U. Brief had a basis to assert, but did not. As for the second and third best *Roper* practices, though the brief establishes an international consensus, it does not sufficiently highlight how that consensus finds a parallel in American states' practices. Finally, the brief does not demonstrate an understanding of U.S. law: unlike the E.U. Brief, the Equality Now Brief does not effectively highlight American jurisprudence that recognizes the authority of international law and bodies. Moreover, the Equality Now Brief misunderstands the concept of "standing" in U.S. courts. These issues will be addressed in turn.

58. Equality Now Brief, *supra* note 4.

A. *International Law and Norms*

The first best practice established in *Roper* is that an amicus brief should provide a non-accusatory, comprehensive review of relevant international law and norms. The Equality Now Brief does provide a review of international law and norms related to sex-based equality. As for international treaties, it discusses, *inter alia*, the obligations of states under the International Covenant for Civil and Political Rights (ICCPR) and CEDAW. It also examines obligations of the United States under CIL. The main issue with the brief's international legal analysis is that it overstates the obligations of the United States under these sources of law. The brief asserts that international law affirmatively compels the addition of a constitutional amendment, and states that the United States, by failing to pass the ERA, has violated that obligation.⁵⁹ While the ICCPR, CEDAW, and arguably CIL require states to protect gender equality, none explicitly require the addition of a constitutional provision to ensure that equality, and the Equality Now Brief does not make a compelling argument that they do. Moreover, the *Roper* opinion suggests that Equality Now need not make such a strong argument, since no violation of international law was mentioned in the E.U. Brief or by Justice Kennedy.

As for the ICCPR, no provisions require that sex-based equality be constitutionalized. The ICCPR, which the United States ratified in 1992, is an early U.N. human rights treaty that protects civil and political rights, including sex-based rights.⁶⁰ In particular, Article 3 requires that States parties “undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”⁶¹ Article 26 similarly sets out:

59. Equality Now Brief, *supra* note 4, at 3 (“[T]he United States’ failure to adopt the ERA violates its binding international legal obligations . . .”).

60. Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 *Nw. U. J. INT’L HUM. RTS.* 1, ¶¶ 3, 12 (2005).

61. International Covenant on Civil and Political Rights art. 3, Dec. 19, 1966, S. Treaty. Doc. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]. The Human Rights Committee has interpreted this provision, in combination with Article 2, to require that States parties “take all necessary steps to enable every person to enjoy those rights . . . [which] include the removal of obstacles to the equal enjoyment of such rights . . . and the adjustment of domes-

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁶²

The phrase “undertake to ensure” in Article 3 is vague enough to theoretically compel the addition of the ERA. As discussed above, the current patchwork protection of federal legislation, alongside state constitutions, is insufficient to address the serious problem of sex inequality in the United States, so the United States arguably has failed to “undertake to ensure” sex-based equality. In support of this argument, the Equality Now Brief mentions that in 2006, the Human Rights Committee (HRC) criticized the United States in its periodic review for failing to adopt sufficient laws against sex-based discrimination.⁶³ The HRC instructed the United States to “take all steps necessary . . . to ensure the equality of women before the law and equal protection of the law, as well as effective protection against discrimination on the ground of sex.”⁶⁴ The Equality Now Brief contends that the instruction to “take all steps nec-

tic legislation so as to give effect to the undertakings set forth in the Covenant.” U.N. Human Rights Committee, ICCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), ¶ 3, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) [hereinafter ICCPR General Comment No. 28]. In addition, these two articles “mandate States parties to take all steps necessary, including the prohibition of discrimination on the ground of sex, to put an end to discriminatory actions.” *Id.* at ¶ 4. There is no explicit requirement that these steps involve creating constitutional protections.

62. ICCPR art. 26, *supra* note 61. The Human Rights Committee has interpreted this provision to require that States parties “review their legislation and practices and take the lead in implementing all measures necessary to eliminate discrimination against women in all fields.” ICCPR General Comment No. 28, *supra* note 61, at ¶ 31. Like the Committee’s interpretation of Articles 2 and 3, *see supra* note 61, here, there is no explicit requirement that these measures involve creating constitutional protections.

63. Equality Now Brief, *supra* note 4, at 16; Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Human Rights Committee on its Eighty-Seventh Session, ¶ 28, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (2006) [hereinafter Rep. of the Human Rights Comm.].

64. Rep. of the Human Rights Comm., *supra* note 63, at ¶ 28.

essary” is a binding requirement to adopt the ERA. However, most scholars view HRC remarks that result from periodic reviews as non-binding, contrary to the brief’s assertion.⁶⁵

In addition, the Equality Now Brief invokes Article 2 of the ICCPR to assert that the United States is obliged to ratify the ERA because it requires that “each State Party . . . undertakes . . . the necessary steps” to secure the rights enumerated in the covenant,⁶⁶ which include protecting sex-based equality. However, Article 2 also dictates that each state takes these steps “in accordance with its constitutional processes.” The legal battle in the ERA litigation pertains, at least on its face, to the appropriate constitutional process for passing the ERA. The Equality Now Brief does not anticipatorily respond to this caveat.

Second, the brief argues that CEDAW, which the United States signed in 1980 but never ratified, also provides relevant obligations for the United States. Despite its failure to ratify the treaty, as a signatory to CEDAW the United States has an obligation to not defeat its object and purpose,⁶⁷ a point that

65. See, e.g., Valentina Carraro, *Promoting Compliance with Human Rights: The Performance of the United Nations’ Universal Periodic Review and Treaty Bodies*, 63 INT’L STUD. Q. 1079, 1081 n.3 (2019) (“The legal status of Concluding Observations has been debated. Despite the fact that the treaty obligations monitored by treaty bodies are legally binding, it is widely acknowledged that the recommendations issued in the state reporting procedure impose no formal legal obligations on states.”) (citations omitted).

66. ICCPR, art. 2.

67. The obligation of a State to not defeat the object and purpose of a treaty which it has signed but not ratified is found in Article 18 of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, S. Treaty Doc. No. 92-12, 1155 U.N.T.S. 331. Though the United States is not technically a party to this treaty, the United States Department of State has recognized it as an authoritative guide for treaty law and procedure. The term “object and purpose” has been described as possessing an “indeterminate character,” and thus its precise meaning may arguably “depend[] on the treaty concerned and the circumstance in which the notion is invoked.” Jan Klabbers, *Some Problems Regarding the Object and Purpose of Treaties*, 8 FINNISH Y.B. INT’L L. 138, 140, 141 (1997). In the context of interim obligations present between signing and ratifying, there are three main views of what it means to defeat the “object and purpose” of a treaty. First, it may mean to violate the “essential goals” of a treaty; second, it may mean to make “subsequent performance of the treaty . . . impossible or ‘meaningless’”; and third, it may mean to take actions that are “unwarranted or condemnable,” demonstrating bad faith. David S. Jonas et

the Equality Now Brief highlights.⁶⁸ The object and purpose of the treaty, as stated by the CEDAW Committee in 2005, is to “eliminate all forms of discrimination against women with a view to achieving women’s de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms.”⁶⁹ In the absence of authoritative guidance from a treaty body, it remains up to subjective interpretation whether failing to affirmatively pass the ERA runs contrary to the goal of eliminating discrimination. However, the United States’ inaction likely does not defeat the object and purpose of CEDAW. Frances Raday, former member of the U.N. Office of the High Commissioner on Human Rights Working Group on Discrimination against Women and Girls, has stated that though enshrining sex-based equality in the constitution is the “optimal” means to guarantee that right, CEDAW does not expressly require such a right to be incorporated in the constitution.⁷⁰ By logical extension, the object and purpose of the treaty is not to establish a constitutional guarantee of sex- and gender-based equality.

The Equality Now Brief neither recognizes the CEDAW Committee’s stated object and purpose nor the views of relevant international authorities. Instead, the brief asserts that the object and purpose of CEDAW is to eliminate discrimination “without delay,” a phrase found in Article 2 of the treaty. The brief then argues that the actions of Ferriero constitute “delay” in violation of this object and purpose.⁷¹ Moreover, the

al., *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT’L L. 565, 596, 598, 602 (2010).

68. Equality Now Brief, *supra* note 4, at 18.

69. Report of the Committee on the Elimination of Discrimination Against Women on its Thirtieth Session, Annex I, ¶ 4, at 78, U.N. Doc. A/59/38 (2004).

70. Frances Raday, *Women’s Access to Justice*, 4–5 (2013), <https://www.ohchr.org/Documents/HRBodies/CEDAW/AccessToJustice/Ms.FrancesRaday.pdf> (“CEDAW Article 2(a) places great importance on the role of law in contributing to the elimination of discrimination against women. CEDAW did not expressly require that the guarantee of equality for women be incorporated in a constitution and adds that the obligation can be satisfied by embodying the principle in other appropriate legislation.”).

71. See Equality Now Brief, *supra* note 4, at 3–4 (“[T]he United States has signed the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”), which has a core purpose of ending all forms of discrimination against women *without delay*. Under international law, the United States may not defeat the object or purpose of a treaty it has signed;

amici rely on language in Article 2 CEDAW relating to constitutions:

Indeed, by failing to adopt the ERA, the United States violates a core provision of CEDAW: the Article 2 directive to pursue the elimination of discrimination by all means necessary including ‘undertak[ing]. . . [t]o embody the principle of the equality of men and women *in their national constitutions* or other appropriate legislation if not yet incorporated therein.’⁷²

Because current U.S. legislation does not afford sufficient protections, the Equality Now Brief reasons that under Article 2 of CEDAW, the United States *must* ratify the ERA as a matter of international law.⁷³ Though the premise of this argument is sound, i.e., that existing laws are insufficient, the conclusion does not follow. The Equality Now Brief does not succeed in demonstrating why the passage of the ERA is the only method by which the United States could satisfy its international legal obligations. As Article 2 of CEDAW notes, states may also adopt “other appropriate legislation.”⁷⁴

A third main body of international law that the Equality Now Brief discusses is CIL. The brief argues that, given the “overwhelming consensus of an international commitment to sex equality” (a consensus that will be discussed further in the next section of this paper), protecting sex equality has attained the status of binding customary law.⁷⁵ According to the International Law Commission, CIL is established when there is sufficient practice among states and when the states regard the practice as law (*opinio juris*).⁷⁶ The Equality Now Brief

yet, the government argues that the Archivist properly ignored Virginia’s lawful ratification of the ERA. This is inconsistent with a goal of ending discrimination against women *without delay*. . . . Immediate certification of the ERA is a necessary step to remedy the failures of the United States to comply with its obligations and duties under international law.”) (citations omitted).

72. *Id.* at 21 (alterations in original).

73. See Equality Now Brief, *supra* note 4, at 4 (“Immediate certification of the ERA is a necessary step to remedy the failures of the United States to comply with its obligations and duties under international law.”).

74. CEDAW, art. 2.

75. Equality Now Brief, *supra* note 4, at 24.

76. See Report of the International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, at 122, U.N. Doc. A/73/10 (2018) (“To determine the existence and content

makes a strong case for asserting that protecting sex equality has achieved CIL status. As the brief recognizes, many international law scholars agree that the principle of gender equality has become a rule of CIL.⁷⁷ The Equality Now Brief also notes that U.S. courts and executive statements have previously found CIL to bind the United States, as international law mandates, such as in the landmark case *Paquete Habana*⁷⁸ and in presidential statements about maritime law.⁷⁹ However, the Equality Now Brief again overstates its conclusion about the United States' obligations under CIL to ratify the ERA. Nowhere does the brief state that enshrining sex equality *in a constitution* is a CIL obligation, and yet, it argues without substantiation that the United States is "violating [CIL] in failing to certify the ERA as part of the Constitution."⁸⁰ To argue that the United States has violated CIL, one might attempt to demonstrate that CIL obligates the constitutionalization of gender equality. If CIL only requires that gender equality be protected in a general sense, this obligation might be satisfied through ordinary legislation. In fact, Raday has stated that there might be sufficient state practice, combined with *opinio juris*, to find that constitutional protection to protect sex

of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves.”).

77. Equality Now Brief, *supra* note 4, at 24 n.85 (first citing Catharine A. MacKinnon, *Creating International Law: Gender as Leading Edge*, 36 HARV. J. L. & GENDER 105, 118–19 n. 43 (2013) (noting a “building” “international consensus” that sex discrimination and gender crimes violate customary international law); and then citing Beate Rudolf & Andrea Eriksson, *Women’s Rights Under International Human Rights Treaties: Issues of Rape, Domestic Slavery, Abortion, and Domestic Violence*, 5 INT’L J. CONST. L. 507, 524 (2007) (noting that states are bound to the principle of gender equality through customary international law)).

78. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . .”).

79. Equality Now Brief, *supra* note 4, at 24 n.86 (“U.S. Presidents and executive branch officials have repeatedly proclaimed that certain rules, such as particular provisions of the United Nations Convention of the Law and the Sea, the Additional Protocol II to the 1949 Geneva Conventions, and the Vienna Convention on the Law of Treaties, reflect customary international law and bind the United States.”).

80. *Id.* at 4.

equality is CIL.⁸¹ Moreover, the extent of the international consensus on the constitutional protection of sex equality, discussed in more depth in the next section of this note, also weighs in favor of the existence of CIL since it is a reflection of state practice.

In sum, in its discussion of the ICCPR, CEDAW, and CIL, the Equality Now Brief makes the conclusory argument that because States are bound to uphold gender equality, they must have *constitutional* protections in place. Certainly, passing a constitutional amendment would be an important step forward for sex-based rights in the United States, but the Equality Now Brief has failed to demonstrate that the United States has a legal obligation to do so. Based on the *Roper* opinion, it may not even be necessary to establish an international legal obligation, since Justice Kennedy relied only on the “persuasive” value of foreign and international law. Attempting to do so without a compelling argument detracts from the credibility of the brief overall. Moreover, rather than discuss the ways in which U.S. practice runs counter to international law, the Equality Now Brief explicitly states that the United States is violating international law. The brief’s conclusory remarks about obligations under international law and its argument that the United States has breached that body of law is inconsistent with *Roper*’s best practices.

B. *International Consensus*

The second takeaway from *Roper* is that an international law brief derives its strength from arguing for the existence of an international consensus. This is where the Equality Now Brief succeeds. Not only does the brief demonstrate an international consensus regarding the importance of gender equality, but it also discusses how most states codify protections of that equality in their constitutions. Just as *Roper* explained that the U.S. practice of executing juvenile offenders was an international anomaly, here, the Equality Now Brief highlights that

81. See Raday, *supra* note 70, at 2 (“The wide spread inclusion of guarantees of gender equality or equality for women in post 1980 constitutions might perhaps be regarded as sufficient evidence of state practice to serve as a basis, together with appropriate *opinio juris*, of a customary international law requirement that women’s right to equality be entrenched in explicit constitutional provisions.”).

“the United States’ failure to include an express guarantee of equality on the basis of sex in its Constitution stands in contrast to the rest of the world.”⁸² Relying on data from the World Policy Analysis Center, the Equality Now Brief notes that eighty-five percent of the 193 U.N. member states “explicitly guarantee equality or non-discrimination based on sex and/or gender in their constitutions.”⁸³ In addition, the brief notes that ninety-four percent of constitutions adopted since 1970 have this kind of constitutional guarantee, including all of those adopted since 2000.⁸⁴ Though the Equality Now Brief does not state this, it is worth noting that the United Kingdom is among the states that have incorporated principles of gender equality into their constitutions. In the *Roper* opinion, Kennedy paid particular attention to the legal practice of the United Kingdom because of the “historic ties” between the American and English legal systems.”⁸⁵

The Equality Now Brief also points to other evidence of international consensus that, though not directly compelling a constitutional amendment, demonstrates how the United States falls behind other countries in terms of protecting gender equality. For example, the Equality Now Brief explains that the United States is as an international outlier in its failure to ratify CEDAW. CEDAW has been adopted by 189 states, and the United States is one of only eight U.N. member and observer states not to ratify the Convention (the other non-ratifying states are Iran, Niue, Palau, Somalia, Sudan, the Holy See,

82. Equality Now Brief, *supra* note 4, at 5.

83. *Id.* Data from the World Policy Analysis Center also reveals that the United States is one of only seventeen U.N.-member countries in the world to have a constitutional provision for equality that makes no mention of gender or sex. The other countries in this category are Belarus, Costa Rica, El Salvador, Indonesia, Ireland, Jordan, Latvia, Lebanon, Monaco, Norway, Seychelles, Singapore, Tonga, the U.A.E, Uruguay, and Yemen. There are also eight countries that have no constitutional protection of equality at all: Australia, the Bahamas, Barbados, Brunei, Denmark, Kiribati, Nauru, and Saudi Arabia. *Policy Data Tables*, *supra* note 40 (providing data tables that disaggregate information by factors including country and whether their constitutions have provisions that guarantee sex equality).

84. Equality Now Brief, *supra* note 4, at 5 (citing JODY HEYMANN ET AL., *ADVANCING EQUALITY* 50–51 (2020)).

85. *Roper*, 543 U.S. at 577 (noting that the Eighth Amendment to the United States Constitution was modeled on a similar provision in the English Declaration of Rights of 1689, which prohibited cruel and unusual punishments).

and Tonga).⁸⁶ Broad ratification of CEDAW demonstrates that the international consensus on gender equality supports higher standards than those that have been legally recognized by the United States so far because CEDAW is a comprehensive treaty encompassing a large number of protections based on sex and gender. Focusing on CEDAW is analogous to the E.U. Brief's emphasis on the U.N. Convention on the Rights of the Child (CRC). Justice Kennedy showed respect for the CRC in *Roper*,⁸⁷ recognizing that the treaty reflects consensus of the international community because most countries have ratified it. Like the E.U. Brief, the Equality Now Brief also points to regional treaties⁸⁸ and decisions of international legal bodies (including the European Court of Human Rights, the Inter-American Commission on Human Rights, and the Court of Justice of the Economic Community of West African States)⁸⁹ to support its argument about an international consensus, in this case, on the importance of ensuring sex equality.

86. *Status of Ratification Interactive Dashboard: Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. HUM. RTS. OFFICE OF THE HIGH COMM'R, <https://indicators.ohchr.org/> (last updated Feb. 9, 2021).

87. See *Roper*, 543 U.S. at 576–77 (“As respondent and a number of *amici* emphasize, Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under eighteen. No ratifying country has entered a reservation to the provision prohibiting the execution of juvenile offenders. Parallel prohibitions are contained in other significant international covenants. Respondent and his *amici* have submitted, and petitioner does not contest, that only seven countries other than the United States have executed juvenile offenders since 1990 . . . In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.”) (citations omitted).

88. Equality Now Brief, *supra* note 4, at 22–23 (citing, for example, the European Convention on Human Rights, the African Charter on Human and Peoples’ Rights, and the American Convention on Human Rights).

89. See *id.* at 23–24 (citing, for example, *Abdulaziz v. United Kingdom*, A94 Eur. Ct. H.R. at 83 (1985); *María Isabel Véliz Franco*, Case 12,578, Inter-Am. Comm’n H.R., Report No. 170/11, ¶ 83 (2011); *Lenahan v. United States*, Case 12.626, Inter-Am. Comm’n H. R., Report No. 80/11 ¶ 162 (2011); *Women Against Violence and Exploitation in Society (WAVES) v. Republic of Sierra Leone*, No. ECW/CCJ/JUD/37/19, Court of Justice of the Economic Community of West African States (2020)).

C. *Alignment of International Consensus with National U.S. Consensus*

The third best practice under *Roper* is to align the international consensus with a national consensus in the United States. Accordingly, the Equality Now Brief would be stronger if the *amici* directly compared the international consensus on constitutional sex-based protections to one among American states, which it did not. On the one hand, the Equality Now Brief does address the fact that several American states protect against sex discrimination in their own constitutions.⁹⁰ However, it uses this fact only in the context of discussing why these state constitutions are insufficiently protective of gender equality.⁹¹ While this argument speaks to the political and social need for the ERA, the brief could have had more persuasive legal value if it focused on the alignment of U.S. state practice and international law practice.

As it turns out, twenty-five states have an Equal Rights Amendment in their state constitutions.⁹² While not as strong of a statistic as that used in the *Roper* opinion regarding state death penalty practices,⁹³ it is not insignificant that half of U.S. states have heightened protections for gender equality. Moreover, the fact that thirty-eight of the fifty states have ratified the ERA demonstrates that a significant number of states align with the international consensus that constitutional protection is necessary to ensure gender equality in the United States.

90. *See id.* at 6 (“[A] patchwork of state-based action does not alter the reality that the United States is a global outlier. . . . An American woman or girl should enjoy the same rights and protections whether she lives in Virginia or Illinois (which have passed state-level constitutional sex equality amendments) or Alabama, Louisiana, South Dakota, or Tennessee (which lack state-level constitutional sex equality guarantees and which have intervened in this lawsuit to block equal rights).”).

91. *See id.* and *supra* text accompanying note 90.

92. These twenty-five states are Alaska, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, and Wyoming. Alice Paul Institute, *supra* note 6.

93. *See Roper*, 543 at 565 (“[I]n this case, 30 States prohibit the juvenile death penalty, comprising [i] 12 that have rejected the death penalty altogether, and [ii] 18 that maintain it but, by express provision or by judicial interpretation, exclude juveniles from its reach.”).

D. *Understanding of U.S. Law*

The final best practice from *Roper* is for *amici* to demonstrate an understanding of American law. Here, the brief should have better addressed both U.S. law regarding international obligations and U.S. procedure regarding standing. While the Equality Now Brief examines how U.S. courts have discussed CIL, it does not cite as much case law as the E.U. Brief. For example, while the Equality Now Brief attempts to invoke the authority of the HRC to create obligations for the United States, it does not discuss whether U.S. courts actually follow HRC guidance. In comparison, the E.U. Brief noted that several federal cases have recognized the authority of the HRC in interpreting obligations under the ICCPR.⁹⁴

In addition, the Equality Now Brief misunderstands the concept of “standing” in U.S. courts. The doctrine of standing, a fundamental aspect of American civil procedure, requires that a plaintiff suffer a “concrete and particularized injury” in order to bring a claim.⁹⁵ As such, the legal question at issue in the motion to dismiss the present case was whether the states of Virginia, Illinois, and Nevada have legal standing to bring the claim. The Equality Now Brief muddles the standing issue with the merits of the case by contending that the “government’s arguments regarding standing fail to recognize the international consensus that express constitutional provisions are necessary to address the significant harm to all caused by sex discrimination.”⁹⁶ Despite the importance of an international consensus to the merits of the case, the Equality Now Brief does not demonstrate the relevance of such a consensus to the “particularized injury” requirement. Though the brief’s

94. See E.U. Brief, *supra* note 45, at 14 (“A number of federal courts also have explicitly recognized the HRC’s authority in matters of the ICCPR’s interpretation.”) (first citing *United States v. Duarte-Acero*, 208 F.3d 1282, 1287 (11th Cir. 2000) (the HRC’s guidance may be the “most important” component in interpreting ICCPR claims); then citing *United States v. Benitez*, 28 F. Supp. 2d 1361, 1364 (S.D. Fla. 1998) (same); then citing *United States v. Bakeas*, 987 F. Supp. 44, 46, n.4 (D. Mass. 1997) (HRC has “ultimate authority to decide whether parties’ clarifications or reservations have any effect”); and then citing *María v. McElroy*, 68 F. Supp. 2d 206, 232 (E.D.N.Y. 1999) (HRC interpretations as “authoritative”).

95. Moore’s AnswerGuide: Federal Civil Motion Practice, § 3.13 (Matthew Bender & Co., ed. 2021).

96. Equality Now Brief, *supra* note 4, at 4.

statement is true that “female citizens of the plaintiff states . . . suffer concrete injury from ongoing discrimination,”⁹⁷ this injury is not necessarily part of the standing inquiry, because the states, rather than their citizens, are plaintiffs to the case.⁹⁸

VI. SUGGESTIONS FOR IMPROVEMENT

As noted in the prior section, there are several aspects of the Equality Now Brief that fall short of the best practices set out in the *Roper* opinion. While the Equality Now Brief finds its strength in establishing an international consensus, it does not adequately measure up to the three other *Roper* best practices. Namely, though the brief provides a comprehensive overview of relevant law, it overstates its conclusion that these sources of law specifically compel the United States to *constitutionalize* gender equality by passing the ERA. In addition, the *amici* frame the brief in a way that accuses the United States of violating international law, which goes farther than the E.U. Brief did, and the accusation is rooted in a novel, arguably flawed legal analysis. Regardless of the merits of this argument, the brief might have better persuasive value in a U.S. court if it did not take such a strong position. As to the remaining two best practices, the brief would be strengthened by establishing the alignment of U.S. states’ practices and the international consensus, and by demonstrating a better understanding of U.S. law, particularly standing doctrine.

To the credit of the *amici*, it is more difficult to use an international human rights law argument in this case than it was in *Roper*. The task of the Court in *Roper* was to interpret an existing provision in the U.S. Constitution, answering whether “the evolving standards of decency”⁹⁹ compelled a new reading of the Eighth Amendment’s prohibition on cruel and unusual punishment. Indeed, when scholars discuss how international law should be used in U.S. courts, some state that it is

97. *Id.* at 2.

98. This situation also does not meet the narrow exception to standing discussed in *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (U.S. 2017), where the Supreme Court recognized that standing could be conferred on an individual plaintiff when they have a close relationship with the real possessor of standing and that possessor is unable to protect their own interests. In that case, the possessor of standing had passed away.

99. *Roper*, 543 U.S. at 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1985) (plurality opinion)).

authoritative or guiding for interpreting domestic law.¹⁰⁰ In the ERA litigation, however, the question is not one of constitutional interpretation about the breadth of a right. Rather, the question is whether the United States should be compelled to make an addition to the Constitution, which presents a novel question. Moreover, Equality Now filed its amicus brief during a stage of litigation that mostly addresses procedural issues. As such, in addition to following the *Roper* best practices, a successful international human rights law brief should attempt to address the procedural questions at hand.

For example, international human rights *amici* could consider how a creative human-rights-based argument might support the idea that the U.S. states have standing to bring a claim. One of the main points that Ferriero made in the motion to dismiss was that the plaintiffs' alleged harm was overly vague. The motion asserted that while the plaintiffs argued Ferriero's failure to certify the ERA created "widespread confusion," they did not "indicat[e] how that general state of uncertainty and confusion actually harms the plaintiffs in any concrete way."¹⁰¹ However, the existence of different standards across state laws for adjudicating claims related to sex discrimination may result in harm to particular states. American states that have an ERA-like provision in their constitutions have an interest in protecting their residents with that provision, and this interest might be undermined by federal

100. See, e.g., Judith E. Guertin, *Customary International Law and Women's Rights: The Equal Rights Amendment as a Fait Accompli*, 1987 DEF. C.L. REV. 121, 132 (1987) (emphasis added) (commenting that treaties ratified by the United States and customary international law, the latter of which includes the principles espoused in the Universal Declaration of Human Rights and the Declaration on the Elimination of All Forms of Discrimination Against Women, "may be used by any United States court as authoritative interpretations of federal common law"); Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 823 n.87 (1990) (stating that several scholars argue that, at the very least, "applicable international norms should provide *guidance* in interpreting domestic legal provisions") (first citing J. F. Hartman, "Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 U. CIN. L. REV. 655, 659-87 (1983); then citing Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 782-83 (1988); and then citing Guertin, *supra*, at 125, 148-49).

101. Memorandum in Support of Defendant's Motion to Dismiss Plaintiffs' Complaint at 9, *Virginia v. Ferriero*, 466 F. Supp. 3d 253 (D.D.C. May 5, 2020) (No. 20-cv-00242).

courts sitting in diversity that choose the law of a state that does not afford the same protections. This problem is heightened compared to general claims of incompatible state laws, since sex-based equality should be regarded as a fundamental right.

In fact, this issue may be analogous to the situation addressed by the Supreme Court in its landmark decision, *Obergefell v. Hodges*.¹⁰² In *Obergefell*, the Court held that the Constitution required all states to recognize same-sex marriages, which were previously only recognized through some states' laws. Though conflict of state law issues are common in federal courts sitting in diversity, the *Obergefell* Court acknowledged that the recognition of same-sex marriages in some states but not others was a "one of 'the most perplexing and distressing complication[s]' in the law of domestic relations," noting the practical difficulties of having a marriage recognized in some states but not others.¹⁰³ Arguably, the recognition of heightened protections for sex-based equality in some states but not others is a similarly "distressing complication." As the Equality Now Brief states:

[a]n American woman or girl should enjoy the same rights and protections whether she lives in Virginia or Illinois (which have passed state-level constitutional sex equality amendments) or Alabama, Louisiana, South Dakota, or Tennessee (which lack state-level constitutional sex equality guarantees and which have intervened in this lawsuit to block equal rights).¹⁰⁴

The brief also highlights its concern that actors will behave strategically to engage in discriminatory practices where they will be tolerated, providing examples to demonstrate that "[t]hese harms are not theoretical."¹⁰⁵

102. *Obergefell v. Hodges*, 576 U.S. 644 (2015). This note only briefly discusses *Obergefell*; an in-depth analysis of how the case might be wielded in the ERA litigation is beyond the scope of this note.

103. *Id.* at 680 (quoting *Williams v. North Carolina*, 317 U. S. 287, 299 (1942)).

104. Equality Now Brief, *supra* note 4, at 6.

105. *Id.* at 6–7 ("For example, the failure of certain states to pass laws against female genital mutilation ("FGM") results in perpetrators of this harmful practice transporting girls from states with protections to states that lack them.") (citing *United States v. Nagarwala*, 350 F. Supp. 3d 613, 615–16

Moreover, the *Obergefell* decision relied on more than just resolving conflicting state laws, which is a common difficulty: it recognized the importance of same-sex marriage based on “equal dignity in the eyes of the law” as a basis for resolving the conflict issue.¹⁰⁶ The same argument can be wielded in favor of passing the ERA, since it would guarantee the equal dignity of all genders and sexual orientations. Though states were not parties to *Obergefell*, and the decision was rooted in the Fourteenth Amendment, the principles of contradictory state laws and equal dignity may still be relevant here should future scholarship wish to explore a potential amicus argument. Regardless, a discussion of U.S. jurisprudence to address a question of standing is likely to have more persuasive value in a U.S. court than pointing to an international consensus about generalized harms to society, as the Equality Now Brief does.

VII. CONCLUSION

This paper has highlighted the need for the addition of the ERA to the U.S. Constitution as well as how an international human rights amicus brief might argue to advance the passage of the amendment. Though the time has passed for updating the Equality Now Brief in this particular lawsuit, the lessons distilled from *Roper* can serve as guidance on how an international human rights argument may be employed to advance human rights in U.S. courts. In particular, international human rights *amici* in their briefs should discuss how U.S. practice compares to international law and norms, establish an international consensus, align American states’ practices with the international consensus, and demonstrate an understanding of U.S. law.

Moreover, though adding the ERA to the U.S. Constitution would be a significant step for the country’s advancement towards greater sex-based equality, litigating for its certification cannot be the sole strategy for doing so. Even if the ERA does pass, this does not mean that all future litigation under the amendment will result in justice for parties seeking protection under the amendment. In addition, it is possible that the

(E.D. Mich. 2018) (noting that victims subjected to FGM at a Michigan clinic had been brought from Minnesota and Illinois)).

106. *Obergefell*, 576 U.S. at 681.

passage of the ERA will lead to “political backlash,”¹⁰⁷ with opponents mobilizing to restrict the application of the amendment or engage in other activities to counter the amendment’s effects. As indicated by the Women’s Legal Education & Action Fund (LEAF), “law, and in particular litigation, is only one tool in the struggle against gender injustice.”¹⁰⁸ Accordingly, regardless of the outcome of the ERA litigation, gender rights advocates should prepare to continue the fight for equality in all areas of life, whether it be through policy reform, education, alliance-building, or other actions.

107. Williams, *supra* note 15 (cautioning that fighting to pass the E.R.A would galvanize conservative groups, specifically “evangelicals and working-class whites in the Rust Belt states,” to re-elect President Trump in the 2020 election). Indeed, in less than two decades after the passage of the Reconstruction Amendments, many states began to respond to newfound gains in racial equality by severely restricting the rights of Black people. See Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 309 (1998) (discussing the dramatic increase in lynching, disenfranchisement, and segregation of Black people in the 1880s, particularly in southern states).

108. KAITLIN OWENS, THIS CASE IS ABOUT FEMINISM: ASSESSING THE EFFECTIVENESS OF FEMINIST STRATEGIC LITIGATION 16 (2020) (recognizing that the law is merely one segment of a complex society, and thus must be accompanied by social forms of activism).