COVERTURE AND LASTING EFFECTS OF GENDER INEQUALITY: AN ANALYSIS THROUGH EQUAL PROTECTION JURISPRUDENCE

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ABSTRACT

Coverture is the legal personhood of a married woman. This doctrine has negatively affected women's legal and social roles and altered the scope of the Equal Protection clause, both explicitly and implicitly. This Note explores the relationship between coverture and present-day equal protection jurisprudence moving forward and argues that the Supreme Court's decisions have continued to preserve coverture in today's legal framework. Historical beliefs about coverture are discussed, as well as their implications on the legal framework today. The claim of this Note is that the Supreme Court has continued to bolster coverture with its legal opinions, and to truly rid America of coverture, the Court must change its equal protection jurisprudence.

This Note is divided into four parts. Parts I and II outline the history of coverture and related jurisprudence. Part III summarizes the current equal protection jurisprudence pertaining to gender. Part IV explains what the Court could have done differently to avoid the present-day equal protection doctrine that does not fully protect gender.

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INTRODUCTION

In 1137, Eleanor of Aquitaine became the duchess of one of the wealthiest and most powerful duchies in the French Kingdom, Aquitaine.[1] She ruled her land well, serving as Queen Regent to France and England at different times throughout her tenure.[2] Eleanor was undoubtedly an astonishing woman. She was, for instance, one of the few women to join a crusade and play an active role in the day-to-day operations of ruling a duchy.[3] Despite this, history largely remembers her today as a woman who had an affair with her uncle, even though there is no evidence to support that claim.[4]

In 1558, Elizabeth I ascended to the English throne.[5] Many people at the time did not believe she had the ability or fortitude to rule because she was a woman.[6] It made no difference that she was highly educated and demonstrated an innate talent for domestic and foreign policy; her gender still limited her.[7] She was pressured to marry but refused, as any man who became her husband would be her "master" and, likewise, the ruler of England.[8] She is known today as the "Virgin Queen," exemplifying that her relation to men was considered more important than her political accomplishments of unifying a nation in religious turmoil or defeating the great Spanish Armada.[9]

In 1762, Catherine the Great was coronated.[10] She ushered Russia into a renaissance of culture and sciences inspired by the ideas of the Enlightenment.[11] She modernized Russia and thrust it into the role of a global power.[12] She was not born into this role but took the power from her inept husband.[13] She cast herself into a role reserved for a man and bore the

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1. Régine Pernoud, *Eleanor of Aquitaine*, BRITANNICA (Jan. 4, 2024), https://www.britannica.com/biography/Eleanor-of-Aquitaine.
2. *Id.*
3. *Id.*
4. *See* RALPH V. TURNER, ELEANOR OF AQUITAINE: QUEEN OF FRANCE, QUEEN OF ENGLAND 24-25 (2009).
5. Stephen J. Greenblatt & John S. Morrill, *Elizabeth I*, BRITANNICA (Sep. 3, 2022), https://www.britannica.com/biography/Elizabeth-I.
6. *Id.*
7. *See id.*
8. *See* WILLIAM CAMDEN, THE HISTORY OF THE MOST RENOWNED AND VICTORIOUS PRINCESS ELIZABETH LATE QUEEN OF ENGLAND 28-30 (Wallace T. MacCaffrey ed. 1970) (1616).
9. *See* Greenblatt & Morrill, *supra* note 5; CAMDEN, *supra* note 8.
10. Zoe Oldenbourg-Idalie, *Catherine the Great*, BRITANNICA (Aug. 12, 2022), https://www.britannica.com/biography/Catherine-the-Great.
11. *Id.*
12. *Id.*
13. *See id.*

consequences of a tarnished reputation that has followed her ever since.[14]

This is a familiar story: a woman is doubted, constrained, and punished by society due to her gender. This issue has been prevalent in America since its founding, as indicated in a 1776 letter by Abigail Adams to her husband, John Adams:

> Remember the ladies and be more generous and favorable to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all men would be tyrants if they could. If particular care and attention are not paid to the Ladies, we are determined to foment a Rebellion and will not hold ourselves bound by any laws in which we have no voice or Representation.[15]

The suppression of women is relevant to any woman who dares to cross the antiquated line into a role that men traditionally hold. And the law molds this suppression.

This Note focuses on the relationship between the doctrine of coverture and equal protection jurisprudence. Part I introduces coverture jurisprudence and explains how coverture either expressly or implicitly influences judicial decisions. Part II considers cases explicitly or implicitly rooted in coverture. Part III focuses on four prominent cases that have changed and revised equal protection jurisprudence regarding gender. Part IV discusses the effects of coverture on equal protection jurisprudence, specifically focusing on how the doctrine of coverture has limited the scope of equal protection jurisprudence as applied to gender. The volatile nature of equal protection jurisprudence has resulted in an unclear, feeble framework that can quickly be undone. This Note examines how coverture has been and continues to be deeply rooted in the American legal system.

I. COVERTURE

The term coverture "stems from the fact that a married woman lived almost entirely under her husband's legal cover."[16] Broadly, coverture limited a married woman's legal position by subordinating her personhood

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14. When Catherine the Great ascended the throne, there were many people in Russia who were opposed to a woman ruler. Thus, many rumors were born which have tainted the reputation of Catherine the Great to this day. *See How Did Catherine the Great Really Die*?, HISTORY, https://www.history.co.uk/articles/how-did-catherine-the-great-really-die (last visited Feb. 9, 2024).

15. Abigail Adams*, Letter from Abigail Adams to John Adams, 31 March - 5 April 1776*, MASS. HIST. SOC': ADAMS FAM. PAPERS, https://www.masshist.org/digitaladams//archive/doc?id=L17760331aa (last visited Mar. 4, 2024) (spelling corrected).

16. Alshaikhmubarak et al., *Single Motherhood and the Abolition of Coverture in the United States*, 16 J. OF EMPIRICAL L. STUD. 94, 94 (2019).

and property to her husband.[17] In other words, the legal identity between husband and wife was entirely under the husband's domain, and the wife's husband had full legal control over her.[18]

Coverture was tremendously oppressive to women, as a married woman (i.e., *feme covert*) did not have the power to hold property in her own right or make decisions without her husband's permission.[19] Specifically, a *feme covert* could not "make contracts, buy or sell property, sue or be sued, own her market earnings, or draft wills."[20] Although fairly doctrinally consistent throughout the nation, coverture had varying impacts on women depending on their location.[21] Thus, not all women dealt with the same repercussions throughout the late medieval ages to the 1870s.[22] However, most women had to depend on men to survive because coverture subordinated women to men both legally and socially.[23]

The unequal treatment of women predates the formation of America by way of the common law doctrine of "coverture,"[24] which can be traced back to England during the Middle Ages.[25] During the Middle Ages, coverture "adhered to the biblical principle" that a husband and wife were "one flesh" represented legally by the husband as the head of the household.[26] As described by Judith Bennett, "[m]edieval people thought of conjugality as a hierarchy headed by a husband who not only controlled his wife's financial assets and public behavior but also freely enforced his will through physical violence."[27] Women were forced to be subject to the will of their husbands,

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17. Tim Stretton & Krista J. Kesselring, *Introduction: Coverture and Continuity* in MARRIED WOMEN AND THE LAW: COVERTURE IN ENGLAND AND THE COMMON LAW WORLD 3, 6 (Tim Stretton & Krista J. Kesselring eds., 2013).

18. *Id.* at 7.

19. Joshua Patlik, *Book Note: Married Women and the Law: Coverture in England and the Common Law World, by Timothy Stretton & Krista J Kesselring (eds*), 52 OSGOODE HALL L. J. 361, 361 (2015).

20. Alshaikhmubarak, *supra* note 16, at 94. It is also important to note that upon the death of her husband, a wife could not be the legal guardian of their children, and in instances of divorce the husband was granted full custody rights. *Id.* at 94-95.

21. Patlik, *supra* note 19.

22. *Id.*

23. *See generally* STRETTON & KESSELRING, *supra* note 17, at 1.

24. Coverture is a legal doctrine that stems from English Common law and continued through American colonial heritage. "Coverage held that no female person had a legal identity." A women's identity was associated with her father's identity before marriage and her husband's identity after marriage. Since women did not have a legal identity, they were unable to contract, sue or be sued, or own a business. Catherine Allgor, *Coverture: The Word You Probably Don't Know But Should*, WOMEN'S HISTORY (September 4, 2022), https://www.womenshistory.org/articles/coverture-word-you-probably-dont-know-should; *See* Amy Louise Erickson, *Coverture and Capitalism*, 59 HIST. WORKSHOP J. 1, 3-8 (2005) (discussing the history of coverture).

25. Allgor, *supra* note 24.

26. Sara Butler, *Runaway Wives: Husband Desertion in Medieval England*, 40 J. OF SOC. HISTORY 337, 337 (2006).

27. JUDITH M. BENNETT, WOMEN IN THE MEDIEVAL ENGLISH COUNTRYSIDE: GENDER AND

and when women chose to reject the power of their husbands, they were often beaten into submission.[28] But coverture changed throughout the centuries, and as it evolved, it became what we recognize as the legal principle today.[29]

Historically, coverture was validated as a legal principle by Sir William Blackstone's *Commentaries on the Laws of England*, an influential treatise that outlines English "common law" into a system of legal principles.[30] Blackstone defined coverture as:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection and cover, she performs everything; and is therefore called in our law-French a feme-covert; is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities that either of them acquires by the marriage.[31]

Blackstone's treatise outlined the consolidation of the husband and wife into one legal entity, where the husband controls the power of the legal entity.[32] Because Blackstone's treatise was written so that the layperson would know the law, his inclusion of coverture in his treatise further legitimized coverture as an accepted legal principle within the English common law.[33] His definition of coverture proved to be influential throughout history.[34]

Although, in principle, coverture only applied to married women, it affected all women.[35] It affected women not only in terms of their rights but also in "terms of the vitiating effects of the laws on popular consciousness and relations of the sexes more generally so that the indirect

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HOUSEHOLD IN BRIGSTOCK BEFORE THE PLAGUE, OXFORD, 103 (1987).

28. *See id.*

29. *See generally* STRETTON & KESSELRING, *supra* note 17.

30. *See generally* WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, BOOK THE FIRST: CHAPTER THE FIFTEENTH: OF HUSBAND AND WIFE. 4 VOLS (Oxford: Printed at the Clarendon Press, 1765–1769).

31. *See* STRETTON & KESSELRING, *supra* note 17, at 7.

32. BLACKSTONE, *supra* note 30.

33. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, JACK MILLER CENTER, (Pub. 1765-1769), https://jackmillercenter.org/cd-resources/blackstones-commentaries/.

34. *See* STRETTON & KESSELRING, *supra* note 17.

35. *See id* (quoting Caroline Frances Cornwallis, "the law with respect to the property of married women has influenced the position of all females").

action is reflected in feeling and opinion and operates on all, married and unmarried."[36] For example, women were not able to hold office or participate in the political process because people believed women would be incapable of being unbiased due to the "effect of marriage in compromising a woman's ability to act autonomously."[37] For the same reasons, because of this perceived bias regarding a woman's intentions, women were excluded from self-held citizenship, entitlements, and obligations, and these areas fell "under the authority of their husbands."[38]

Deeply rooted in English common law, American law adopted the idea of coverture at its founding. Whilst the Founding Fathers debated idealistic principles, women were disenfranchised and legally shackled to the wills of their husbands.[39] America's Founding Fathers revolted against the British government to free white males with property but did not use their power to free their wives from the patriarchal bondage of coverture.[40] One founding father, John Adams, was so troubled by the issue of coverture that he corresponded with other lawmakers regarding the "virtual representation" of women by men.[41] Nothing came from his concern, and women's status as *feme covert* did not change with the American Revolution.[42]

If explicitly followed, "the legal restrictions of coverture would have made ordinary life all but impossible."[43] A woman could not do anything without her husband's permission, even something as simple as purchasing household goods.[44] In reality, this extreme would not have been feasible. Instead, coverture served as a legal principle "to provide clarity and direction in times of crisis or after a death."[45] This practical implementation of coverture resulted in historians not recognizing the significant restrictions that coverture placed, and continues to place, on women.[46]

Common law coverture changed very little from the twelfth century

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36. STRETTON & KESSELRING, *supra* note 17, at 6 (internal citations omitted)
37. *See id.*
38. *See id.*
39. *See* Allgor, *supra* note 24.
40. *See generally* STRETTON & KESSELRING, *supra* note 17, at 6.
41. The famous "Remember the Ladies" letter that Abigail Adams wrote was alluding to the doctrine of coverture, contrary to popular belief. *See* Catherine Allgor, *Coverture: The Word You Probably Don't Know But Should*, WOMEN'S HISTORY (Sept. 4, 2022), https://www.womenshistory.org/articles/coverture-word-you-probably-dont-know-should. *See also* Abigail Adams*, Letter from Abigail Adams to John Adams*, MASS. HIST. SOCY.*,* Mar. 31 Apr. 5, 1776, https://www.masshist.org/digitaladams/archive/doc?id=L17760331aa.
42. *How Much Revolutionary Change? The Status of Women*, OPENED CUNY (Oct. 13, 2022), https://opened.cuny.edu/courseware/lesson/342/student/?task=2.
43. STRETTON & KESSELRING, *supra* note 17, at 8.
44. *Id.*
45. *Id.*
46. *See id.* at 9.

through the late nineteenth century in Europe.[47] The traditional notion that when a woman married, she lost her ability to "own or control property, enter into contracts, make a will, or bring or defend a lawsuit without her husband" was maintained throughout this extensive period.[48] Any real property a woman had fell under her husband's control as soon as they were married, although there were limitations on what her husband could do with the land.[49] However, these safeguards provided minimal protection.[50] For example, when a husband and wife disagreed on the management of the wife's real property, it was almost impossible to enforce the wife's will.[51]

By contrast, any personal or chattel property that a woman owned was completely under her husband's control.[52] A woman truly did not own anything in her own right. Rather, it was her husband's property to control, and she was permitted to use the property as determined by her husband.[53] This lack of control over property was later used to deny a woman the custody of her children.[54]

Coverture not only had legal implications but also altered society.[55] During Colonial America, male and female students were segregated due to their incompatible educational needs.[56] Puritan beliefs constrained the formal education of young girls because Puritans viewed women as "wives and mothers who had little time or need for formal instruction."[57] Puritans thought that formal education would "ruin women," as they were not equipped with the necessary minds to handle academic learning.[58] During this time, the differences in education between males and females resulted in the literacy rate for women being significantly less than that of men, with many women not knowing how to sign their names.[59]

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47. *Id.* at 7.
48. *Id.* at 8.
49. Although a husband had "control" of his wife's properties, he "still did not own them and he could not sell them without her consent, to be given freely before a judge in her husband's absence, but during his lifetime he could do with them what he wished, planting them or leaving them fallow, renting them out, and taking to himself any profits they produced." STRETTON & KESSELRING, *supra* note 17, at 8.
50. *See id.*
51. *Id.*
52. Examples of personal or chattel property included and money, livestock, or personal possessions. STRETTON & KESSELRING, *supra* note 17, at 8.
53. *Id.*
54. *Id.*
55. *See* Barbara Matthews, *Women, Education and History*, 15 DEMOCRACY IN EDUCATION 47, 48 (Feb. 1976); *See generally* TIM STRETTON, MARRIED WOMEN AND THE LAW: COVERTURE IN ENGLAND AND THE COMMON LAW WORLD, MCGILL-QUEEN'S UNIVERSITY PRESS (2013).
56. *See* Matthews, *supra* note 55, at 48.
57. *Id.*
58. *Id.*
59. *See id.*

In the latter half of the eighteenth century, many girls began to attend "dame schools," where domestic and practical skills were taught rather than the philosophical education that their male peers enjoyed.[60] This continued discrepancy in educational experiences between male and female students further perpetuated the legal principle of coverture because girls were taught at a young age that their role was of a homemaker and no more.[61]

In addition to education, this power imbalance between the sexes is most clear in the husband's "sexual monopoly" and "power of correction" over his wife.[62] A husband could punish his wife physically, within "limits," and society "expected and encouraged" a husband to "coerce [his wife] into domestic habits."[63] Moreover, a wife did not have bodily autonomy.[64] Wives were not legally allowed to refuse their husband's sexual advances, and wives were never able to divorce their husbands without "sufficient cause."[65] Thus, the relationship between a husband and wife was more of a relationship between person and property than between equal partners.

Explicit coverture was partially dismantled through legislation throughout the late nineteenth and early twentieth century; however, implicitly, it remained.[66] Reform was largely located at the state level, as states passed debt statutes allowing women to maintain a separate estate that was insulated from their husbands' debts.[67] Eventually, the majority of states passed the "married women's property acts" and "married women's earning acts."[68] This legislation, which allowed women to claim legal rights over their property and earnings,[69] is best summarized by an 1871 commentator:

> The law of the status of women is the last vestige of slavery. Upon their subjection it has been thought rests the basis of society; disturb that, and society crumbles into ruins. By the married women's property acts, the first blow has been struck . . . . The huge idol will sooner or later be broken into pieces.[70]

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60. *Id.*
61. *See id.*
62. STRETTON & KESSELRING, *supra* note 17, at 10.
63. *Id.*
64. *See id.*
65. *Id.*
66. Alshaikhmubarak, *supra* note 16, at 96.
67. *See id.* at 96.
68. *Id.* The author defines the "married women's property acts" as the statutes which "granted a married women the right to own and control real and personal property." And the "married women's earnings acts" as statutes which "granted married women the right to own their earnings from work outside the home." *Id.*
69. *Id.* at 95.
70. *Id.* at 98 (quoting AM. L. REV. (no author)).

Over the course of seventy years, many states slowly passed versions of this legislation, marking the beginning of the end of historical coverture.[71]

The same social movement that pioneered women's suffrage also pushed for the end of coverture.[72] Many women saw the right to vote as part of the path to equal rights, however, critics of women's suffrage believed that women were too fragile to understand politics and that allowing women the ability to vote would change the traditional husband and wife dynamic that often came with marriage.[73] But with the passage of the Nineteenth Amendment on August 26, 1920, women not only gained the right to vote but now also had the right to participate fully in political life.[74] This "rebutt[ed] the heart of the rationale for coverture: that women's role in society lay solely in the domestic sphere of home and marriage."[75] Thus, women gaining the right to vote was another nail in the antiquated coverture's coffin.

Although coverture was being legally dismantled, coverture-adjacent legislation and beliefs continued to dominate the lives of women in the United States. For example, economic freedom for women was greatly limited until the 1970s.[76] Before the passing of the Equal Credit Opportunity Act, women were not guaranteed to be free from discrimination based on their gender when applying for credit.[77] Thus, women were "systematically excluded from equal access to credit by lending institutions."[78] This practice of exclusion led to many women not having the financial ability to be independent of their husbands. Therefore, many women stayed in dangerous

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71. Alshaikhmubarak, *supra* note 16, at 97. It is important to note the change in society that de-coverture has sparked. A 2017 study noted that the economic freedom that resulted from the passage of the "married women's property acts" and the "married women's earning acts" has resulted in a drastic change in women's fertility. On average, women between the ages of 20-40 had a "lower likelihood of having children under the age of five, after the passage of both the property and earnings acts" suggesting that women stood to "lose more" from marriage and were "more likely to wait until marriage to have a child." Thus, concluding that allowing women the right to control their finances to some degree may vastly change the status quo on gender roles in society that coverture has perpetrated. *Id.* at 113.

72. Nan D. Hunter, *Reconstructing Liberty, Equality, and Marriage: The Missing Nineteenth Amendment Argument*, 19 GEO. L. J. 73 (2020).

73. *On Her Own Wings: Women and the Struggle for Suffrage, Hierarch and Coverture,* (last visited Jan. 19, 2023), https://sos.oregon.gov/archives/exhibits/suffrage/Pages/context/hierarchy.aspx.

74. *See id.*

75. Hunter, *supra* note 72, at 73.

76. *See* Ron Sanders, *The History of Women and Money in the United States in Honor of Women's History Month*, ONE ADVISORY PARTNERS (May 7, 2022), https://www.oneadvisorypartners.com/blog/the-history-of-women-and-money-in-the-united-states-in-honor-of-womens-history-month.

77. 15 U.S.C. §§ 1691-91e (originally enacted as Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521, 1521-25 (1974)).

78. Michigan Law Review, *The Impact of Michigan's Common-Law Disabilities of Coverture on Married Women's Access to Credit*, 74 MICH. L. REV. 76, 76 (1975).

marriages because they did not have the financial freedom to leave.[79]

As discussed above, coverture has been ingrained in women's experiences for decades. Although explicit coverture purportedly ended at the close of the twentieth century, its cultural and legal implications continue to reverberate today.[80] Many insidious doctrines based on the doctrine of coverture have permeated our legal system for centuries and have yet to be formally overruled.

II. JURISPRUDENCE OF COVERTURE

Over the centuries, the Supreme Court embedded coverture within American law. Using coverture to influence its legal rulings, the Supreme Court consistently relied on coverture to define the legal status of women.[81] Although not always explicitly stated, the Court's reliance on coverture impacted many judicial decisions,[82] ultimately affecting the legal personhood of women in this nation.[83] Put plainly, the Supreme Court based its decision on coverture to reinforce the belief that women were legally inferior by not granting them the same rights of citizenship granted to men.

First, in *Bradwell v. State of Illinois*, the Supreme Court held that the Privileges or Immunities Clause of the Fourteenth Amendment does not guarantee women the right to hold the same occupations as men.[84] Although the majority opinion focused on the reasoning in the recent *Slaughterhouse Cases*[85] to deny Bradwell the ability to practice law, the Court also emphasized the common law doctrine of coverture in the opinion, with Justice Bradley's concurrence going so far as to say:

> [T]he civil law . . . has always recognized a wide difference in the respective spheres and destinies of man and woman . . . . [T]he harmony, not to say identity, of interests and views which belong, or should belong, to the family constitution is repugnant to the idea of a woman adopting a distinct and independent career from that of her

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79. *See generally* Dana Harrington Conner, *Financial Freedom: Women, Money, and Domestic Abuse*, 20 WM. & MARY J. WOMEN & L. 339 (2014). "Financial impediments, in particular, play a major role in restricting the freedoms enjoyed by women who are abused by their intimate partners." *Id*. at 340.

80. *See generally* LINDA K. KERBER, NO CONSTITUTIONAL RIGHTS TO BE LADIES (1998).

81. *See, e.g.*, Bradwell v. Illinois, 83 U.S. 130 (1873); Muller v. Oregon, 208 U.S. 414 (1908); Hoyt v. Florida, 368 U.S. 57 (1961).

82. *See, e.g.*, *Bradwell*, 83 U.S. 130; *Muller*, 208 U.S. 414; Hoyt v. Florida, 368 U.S. 57 (1961).

83. *See generally* Diane Schulder, *Women and the Law*, THE ATLANTIC (Mar. 1970).

84. 83 U.S. 130 (1873).

85. 83 U.S. 36 (1872).

husband.[86]

In *Minor v. Happersett*,[87] the Court found that although there is "no doubt that women may be citizens," this citizenship does not inherently grant women the right to vote.[88] The Court volleyed the decision to the legislature because "the Constitution of the United States does not confer the right of suffrage upon anyone."[89] Consequently, women were not allowed to vote until August 18, 1920.[90]

The Supreme Court implicitly relied on coverture in *Muller v. Oregon*.[91] In *Muller,* the Supreme Court held that states were allowed to limit a woman's working hours because women were inherently different from men.[92] By allowing states to mandate fewer working hours for women than men, the Supreme Court ultimately found that state legislatures could pass discriminatory laws to protect women's unique qualities and societal roles.[93] Although there is no clear discussion surrounding the impact of coverture in this judicial opinion, the influence of coverture is clear.[94] The Court relied on the traditional and physical traits of women to justify its opinion, noting:

> The two sexes differ in structure of body, in functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enabled one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.[95]

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86. *Bradwell*, 83 U.S. at 20-21.
87. 88 U.S. 162 (1874).
88. *Id.* at 165.
89. *Id.* at 178.
90. *19th Amendment to the U.S. Constitution: Women's Rights to Vote (1920),* NAT'L ARCHIVES (Feb. 8, 2022), https://www.archives.gov/milestone-documents/19th-amendment. The text of the Nineteenth Amendment read, "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have the power to enforce this article by appropriate legislation." US CONST. amend. XIX. Essentially, the Amendment allowed for women's suffrage and granted Congress the power to enforce this amendment by legislation. *See id.*
91. 208 U.S. 412 (1908).
92. *See id.*
93. *See id.*
94. *See id.* at 422.
95. *See id.* at 422-23. "The language of the Court in *Muller* has been used to uphold a wide range of laws which differentiate on the basis of sex." Susan V. Walters, *Constitutional Law - Frontiero v. Richardson, Uniform Services Fringe Benefit Statute which Presumes Spouses of Male Members to be Dependent, but Requires Spouses of Female Members to Be Dependent in Fact, is Violative of Due Process*, 5 LOY. U. CHI. L. J. 295, 299 (1974).

The Court perpetrated these differences to justify discriminatory legislation.[96] Here, like coverture, the Court points to the inherent differences between men and women to justify discrimination.[97]

Once again, in the 1960s, the Court in *Hoyt v. Florida*[98] relied on coverture when the Court allowed Florida to provide that "women would not be called for jury selection unless they registered their desire to be eligible to serve on juries with the clerk of the circuit court."[99] Traditionally, the justification for excluding women from jury duty was "because most women were confined to the domestic sphere of the household . . . [thus] women lacked the worldly experience necessary to make informed decisions as jurors" and because "the indelicacies of jury service would interfere with a woman's ability to maintain the purity required by their domestic roles in the home."[100] In *Hoyt,* the Court used the prior rationale to exclude women from jury duty:

> Despite the enlightened emancipation of women from the restrictions and protections of bygone years and their entry into many parties of community life formerly reserved for men, women are still considered the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in the pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she determines that such service is consistent with her own special responsibilities.[101]

This reasoning resulted in the exemption of women from jury duty due to their "unique" role in society.[102] In other words, women were excluded from civic duty just because they were women.

The Court also hinged its decision explicitly on coverture in *United States v. Yazell*.[103] At the time of this decision, Texas law promulgated that a married woman could not bind her separate property unless she had obtained a court decree removing her "disability" to contract.[104] This

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96. *See id.*

97. *See id.*

98. Hoyt v. Florida, 368 U.S. 57 (1961). The court found jury service sex-based classifications not "arbitrary" because women are mothers and homemakers, and thus making jury service optional for women does not violate the constitution. *Id.* at 69.

99. *See id.*

100. Lucy Fowler, *Gender and Jury Deliberations: The Contributions of Social Science*, 12 WM. & MARY J. WOMEN & L. 1, 2-3 (2005).

101. *Id.* at 5.

102. *See id.* at 6. Eventually, *Hoyt* was reversed by the Supreme Court in *Taylor v. Louisiana*, 419 U.S. 522 (1975). The Court found that it is essential to select a jury that is a true representation of the community, and thus women must not be excluded because they are a part of the community. *Id.*

103. United States v. Yazell, 382 U.S. 341 (1966).

104. *Id.* at 357.

"disability" was a woman's legal inability to contract without her husband.[105] Ultimately, the Court found that, under the facts of this case, the Texas law based on coverture was allowed.[106] In contrast, Justice Black's dissent argued that coverture "rests on the old common-law fiction that the husband and wife are one" and further elaborated that coverture is an outdated legal jurisprudence, stating that "[t]his rule has worked out, in reality, to mean that though the husband and wife are one, the one is the husband."[107] Moreover, he highlighted the dated nature of coverture by discussing how it rested on a "discredited" notion that "a married woman, being a female, is without the capacity to make her own contacts and do her own business" and pointed to the "vast number of women in the United States engaging in the professions of law, medicine, teaching, and so forth, as well as those engaged in plain old business ventures"[108] as evidence.

III. EQUAL PROTECTION CLAUSE

As demonstrated above, the Court creatively entwined coverture within American jurisprudence. This doctrinal trend continued to rear its ugly head in the Supreme Court's rulings on early gender-based Equal Protection Clause cases.[109] Although the Equal Protection Clause cases discussed *infra* do not explicitly address coverture in the text of the opinions, coverture still implicitly impacts Equal Protection jurisprudence, much like how coverture's continues to affect societal, legal, and political issues today.

The Equal Protection Clause of the Fourteenth Amendment states, "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the law,"[110] and was intended to afford equal protection of the law to suspect classifications.[111] The Equal Protection Clause was initially used to prohibit discriminatory state action

105. *See id.*
106. *See id.*
107. *Id.* at 361 (Black, J., dissenting).
108. *Id.*
109. *See e.g.,* Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); Craig v. Boren, 429 U.S. 190 (1976); United States v. Virginia, 518 U.S. 515 (1996).
110. U.S. CONST. amend. XIV, § 2.
111. A "suspect classification" refers to a "class of individuals that have been historically subject to discrimination." *Suspect Classifications,* CORNELL LAW SCHOOL (Feb. 15, 2023), https://www.law.cornell.edu/wex/suspect_classification. Race, religion, national origin, and alienage are generally agreed upon suspect classifications. *Id.* Alternatively, "gender" or "sex" is considered a "quasi-classification" which means that courts must apply intermediate scrutiny when analyzing if a statute is discriminatory. Brett Parker, *What Level of Legal Scrutiny Should Sexual Orientation-Based Classifications Receive?*, STANFORD POLITICS (Jan. 19, 2015), https://stanfordpolitics.org/2015/01/19/level-legal-scrutiny-sexual-orientation-classifications/.

against African Americans under the "separate but equal doctrine"[112] since the ruling *of Brown v. Board of Education*;[113] however, more recently, the Equal Protection Clause has been extended to prevent discrimination based on gender among other suspect classes as well.[114]

Three standards of review, also known as the "tiers of scrutiny," are used in Equal Protection analysis. These are rational basis, intermediate scrutiny, and strict scrutiny.[115] Certain classes of individuals are awarded different tiers of scrutiny, and thus, a different test applies to the discriminatory state action to determine if it is constitutionally permissible under the Fourteenth Amendment.[116]

Under strict scrutiny, "the statute must: (1) advance compelling or overriding government ends; (2) be directly and substantially related to advancing those ends; and (3) be the least restrictive effective means to advance the ends."[117] The government bears the burden of proof to justify its discriminatory action.[118] This is the strongest tier of scrutiny, as the government must prove a compelling interest in this legislation, that the statute is directly related to advancing the state's compelling interest, and that the statute is the "least restrictive means" to achieving the end.[119] Strict scrutiny is the most difficult tier for the government to prevail on and thus, results in many discriminatory state actions being ruled unconstitutional.[120]

Intermediate scrutiny is the level between rational basis and strict scrutiny, and it is the tier applied to gender discrimination cases.[121] In questions of discriminatory legislation, under intermediate scrutiny, the government must prove the legislation under review "(1) advances

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112. *See* Plessy v. Ferguson, 163 U.S. 537 (1896); Korematsu v. United States, 323 U.S. 214 (1944).

113. *See* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954) (ruling that separate but equal educational facilities are inherently unequal and violate the Fourteenth Amendment).

114. *See generally*, Michael Klarman, *An Interpretative History of Modern Equal Protection*, 90 MICH. L. REV. 213, 254-257 (1991), https://repository.law.umich.edu/mlr/vol90/iss2/2.

115. *See* R. Randall Kelso, *Justifying the Supreme Court's Standards of Review*, 52 ST. MARY'S L.J. 973, 977–80 (2021), https://commons.stmarytx.edu/cgi/viewcontent.cgi?article=1121&context=thestmaryslawjournal.

116. *See* Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny,* NAT'L AFFAIRS (2019), at https://www.nationalaffairs.com/publications/detail/ against-the-tiers-of-constitutional-scrutiny.

117. R. Randall Kelso, *The Structure of Intermediate Review*, 25 LEWIS & CLARK L. REV. 691, 699-700 (2021).

118. *Id.* at 701.

119. *See id.*

120. *See* Loving v. Virginia, 388 U.S. 1 (1967) (the Court struck down a statute that prohibited interracial marriage); Brown v. Board of Education, 347 U.S. 483 (1954) (the Court ended segregation in public schools); City of Boerne v. Flores, 521 U.S. 507 (1997) (the Court held that certain zoning laws may be unduly burdensome for some religious groups).

121. *See* Alicea & Ohlendorf, *supra* note 116.

important, significant, or substantial government ends, not mere legitimate ends; (2) is substantially related to advancing those ends, not merely rationally related; and (3) is not substantially more burdensome than necessary to advance those ends, rather than not merely an irrational burden."[122] Compared to rational basis review, intermediate scrutiny, like strict scrutiny, puts the burden of proof on the government. This makes it harder for the state to justify its discriminatory actions. Intermediate review is a higher standard of review than rational basis, but it requires less than a "compelling interest" as required for strict scrutiny."[123]

Although the Equal Protection Clause has developed over the years to protect women from some discriminatory state action, the Supreme Court has refrained from applying strict scrutiny to gender discrimination cases, thus not "fully exercising total protection of women."[124] Rather, the Court has considered gender to be a "quasi-suspect" class,[125] which, in turn, results in the application of mere "heightened scrutiny" or "intermediate scrutiny."[126]

The tiers of scrutiny have consistently continued to limit women to their traditional roles. Supreme Court holdings have systemically "show[n] a biased judicial attitude toward women which hindered the attainment of equal rights of the law."[127]

A. Reed v. Reed

Reed v. Reed[128] marked the first time in history that the Court applied the Equal Protection Clause of the Fourteenth Amendment to strike down a law that discriminated against women.[129] Before *Reed*, there were only two tests for analyzing an equal protection claim: "rational basis" and "strict scrutiny."[130] In *Reed*, the Court invalidated an Idaho law, which stated that males should be preferred to females when both parties were equally qualified to serve as an administrator of an estate.[131] But what is most

122. Kelso, *The Structure of Intermediate Review, supra* note 117, at 700.

123. *Id.*

124. *See The Origins of the Intermediate Scrutiny Test for Sex Classifications and the Proposed Equal Rights Amendment*, EXPLORING CONST'L CONFLICTS (Oct. 13, 2022), http://law2.umkc.edu/faculty/projects/ftrials/conlaw/era.htm.

125. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

126. *See* Craig v. Boren, 429 U.S. 190 (1976).

127. Walters, *supra* note 95, at 298.

128. 404 U.S. 71 (1971). The Court held that the Equal Protection Clause of the Fourteenth Amendment denies states the power to discriminate on the basis of sex.

129. *See id.*

130. *Reed v. Reed at 40: A Landmark Decision*, NAT'L WOMEN'S LAW CENTER, https://equity.siu.edu/_common/documents/resources/reed-vs-reed40.pdf.

131. *Reed*, 404 U.S. at 71.

impressive about *Reed* is that it was the first time that the Supreme Court held that sex is a protected class and that statutory classifications that distinguish based on sex are "subject to scrutiny under the Equal Protection Clause."[132]

Although the Court in *Reed* applied the Equal Protection Clause to gender discrimination, the Court still failed to address sex head-on.[133] The Court instead sidestepped the issue of gender completely by choosing not to contradict the "weaker-sex philosophy" found in previous decisions and refusing to state that sex is a basis for classification.[134] The avoidance of addressing sex was to the detriment of women.

The Court's "brief and unanimous"[135] decision and its avoidance of addressing sex inadvertently led to weak judicial reasoning and limited the utility of the *Reed* decision.[136] *Reed* was handed down without much discussion and is argued to be more "remarkable for what it did not do as for what it did do."[137] The Court's unwillingness to truly address sex led to confusion among the lower courts over which standard of review should be applied in questions of gender discrimination.[138] This confusion resulted in the application of different standards of review in gender discrimination cases.[139]

B. Frontiero v. Richardson

The Supreme Court addressed the issue again in *Frontiero v. Richardson* to clarify its previous decision in *Reed*.[140] *Frontiero v. Ricardson*[141] distinguished gender discrimination from other protected classes by applying a heightened scrutiny framework to gender discrimination analysis and affirming *Reed*.[142] Unsurprisingly, the Supreme Court could not conclude what standard of review should be applied.[143] Instead, *Frontiero* resulted in multiple pluralities, all addressing and supporting a different

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132. *Id.* at 75.
133. *See* Walters, *supra* note 95, at 301.
134. *Id.*
135. *Supreme Court Decisions & Women's Rights" Breaking New Ground – Reed v. Reed*, 404 U.S. 71 (1971), SUP. CT. HIST. SOC'Y (Jan. 19, 2023), https://supremecourthistory.org/classroom-resources-teachers-students/decisions-womens-rights-reed-v-reed/.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *See* Frontiero v. Richardson, 411 U.S. 677 (1973).
141. *Id.* at 682. The Court's plurality opinion held that "heightened scrutiny" applies to disparate treatment based on gender.
142. *See id.*
143. *See* Walters, *supra* note 95, at 304-06.

standard of review.[144]

Justice Brennan announced the judgment of the Court and addressed the prior stereotypes that women have faced in American jurisprudence and the effects that sexist decisions, like *Bradwell*, had on women, societally, politically, and legally.[145] Although never specifically referring to coverture, Justice Brennan hinted at its effects in his decision by comparing womanhood in America to slavery, stating:

> As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century, the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their children.[146]

As such, *Frontiero* became one of the first Supreme Court decisions to address the unequal treatment of women in American jurisprudence.

Justice Brennan's opinion not only recognized the effect that prior legal decisions had on the stature of women but also moved to recognize women as "inherently suspect," like race classifications.[147] Justice Brennan came to this conclusion by once again relating sex to race, arguing that because sex is an "immutable characteristic determined solely by the accident of birth," the "imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility."[148] He further argued that gender should be a suspect class because sex has no bearing on one's "ability to perform or contribute to society."[149]

Justice Brennan's opinion cemented the inclusion of women as a definitive suspect class and led many lawyers to aspire to apply strict scrutiny to state gender-discriminatory action. However, since the decision was only a plurality, it was a weaker decision to alter or overturn, as demonstrated in *Craig v. Boren*.[150]

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144. *See Frontiero,* 411 U.S. at 690-92.
145. *Id.* at 684-85.
146. *Id.* at 685.
147. *Id.* at 688.
148. *Id.* at 686 (internal quotations omitted).
149. *Id.*
150. Craig v. Boren, 429 U.S. 190 (1976). The Court ruled that statutory or administrative sex

C. Craig v. Boren

In *Craig v. Boren,* the Court pivoted from Justice Brennan's plurality opinion in *Frontiero*.[151] *Craig* limited the level of scrutiny regarding the Equal Protection Clause in gender discrimination cases to intermediate scrutiny, which was the first instance where intermediate scrutiny was applied.[152] *Craig* was different from *Reed* and *Frontiero* because a man was challenging a statute for gender discrimination.[153] Two men brought this case, arguing gender discrimination because an Oklahoma statute allowed the sale of "nonintoxicating" beer to women between the ages of 18 and 21 but not to men of the same age.[154] This statute inherently discriminated based on sex.[155]

The Oklahoma statute[156] perpetuated traditional gender stereotypes that Justice Brennan had so strongly rejected in *Frontiero*.[157] Oklahoma argued that the purpose of enacting the statute was for reasons of "public policy."[158] The state contended that the gender distinction of the law was justifiable "because males aged eighteen to twenty-one were more likely to drive drunk than females of the same age."[159] Essentially, the state was justifying its discriminatory statute on the basis that women were more virtuous than men and, therefore, more likely to handle their liquor.[160] The plaintiff briefly attacked this stereotype as "archaic" and "victorian" as it was "stereotyped sex roles."[161] Feminists and their supporters recognized that "gaining advantages by idealizing women would ultimately hurt the honest search for reform" because "men and governments are content to confer benefits upon women only so long as the women act in accordance with expectations of them."[162] The plaintiff combatted this idealized traditional role of women by dismantling "dubiously-generated advantages" that were conferred on

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classifications were subject to immediate scrutiny under the Fourteenth Amendment's Equal Protection Clause.

151. *Id.*

152. *Id.*

153. *Id.* at 192.

154. *Id.*

155. *Id.* at 210.

156. OKLA. STAT., tit. 37, §§ 241, 245 (1976). "The interaction of two sections of an Oklahoma statute, OKLA. STAT., tit. 37, §§ 241 and 245 (1958 and Supp. 1976), prohibits the sale of 'non-intoxicating' 3.2% beer to males under the age of 21 and to females under the age of 18." Craig v. Boren*,* 429 U.S. 190, 191-92 (1976).

157. *See* Arthur Y. Whang, *A Case at the Crossroads: Craig v. Boren, An Historical Analysis 8-10* (1998) (Seminar paper, Georgetown University) (DigitalGeorgetown).

158. *Id.* at 5.

159. *Id.*

160. *See id.* at 6-7.

161. Brief of Appellants at 5, Craig v. Boren, 429 U.S. 190 (1976) (No. 75-628).

162. Whang, *supra* note 157, at 9.

women.[163]

Nevertheless, the Court stopped short of awarding women full protection. Instead of adopting strict scrutiny to apply to questions of gender discrimination, as pushed by the plurality in *Frontiero*, the Court instead chose to apply an "intermediate scrutiny" standard of review.[164] Some heralded this as a victory for women's rights, but other activists were hoping for the Court to adopt the strict scrutiny standard of review as it would provide more protection for women from gender discrimination.[165]

D. United States v. Virginia

Gender classifications were revisited in *United States v. Virginia.*[166] *Virginia* continued to build upon *Craig* by providing a more tangible framework for courts to apply when confronted with questions of gender discrimination under the Equal Protection clause of the Fourteenth Amendment.[167]

In *United States v. Virginia*, a female student filed a complaint against the Virginia Military Institute's ("VMI") single-sex admission policy.[168] Like *Craig*, VMI's admission policy was rooted in traditional gender stereotypes.[169] Despite women being integrated into the armed forces, the VMI chose to continue to limit admission to men because it thought women were too fragile to undergo the required training that the VMI offered.[170]

Without hesitation, the Court applied intermediate scrutiny.[171] But then the Court did something profound: it applied a heightened level of intermediate scrutiny, called "skeptical scrutiny," and in doing so, the Court recognized our nation's "long and unfortunate history of sex discrimination."[172] The Court called attention to historical gender discrimination by stating:

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163. *Id.* at 9-10.

164. Ann Shalleck, *Revisiting Equality: Feminist Thought About Intermediate Scrutiny*, 6 J. OF GENDER & L. 31, 33 (1997).

165. *Id.*

166. United States v. Virginia, 518 U.S. 515 (1996). The Court ruled that all governmental gender classifications must be substantially related to an important governmental purpose that must be proven by the government if it offers an exceedingly persuasive justification for the classification.

167. *See id.*

168. *Id.* at 519.

169. Mike Allen, *Defiant VMI to Admit Women, But Will Not Ease Rules for Them*, N.Y. TIMES (Sept. 22, 1996).

170. *See id.*

171. *See* United States v. Virginia, 518 U.S. at 532.

172. *Id.* at 531.

> Through a century plus three decades and more of that history, women did not count among voters composing 'We the People'; not until 1920 did women gain a constitutional right to the franchise. And for a half-century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any "basis in reason" could be conceived for the discrimination.[173]

The "skeptical scrutiny" adopted was more in line with strict scrutiny rather than the traditional intermediate scrutiny and forced gender-based state discrimination to have a "compelling" reason.[174] But this new "skeptical scrutiny" was short-lived as the Supreme Court returned to the intermediate scrutiny found in *Craig* not long after.[175]

IV. DISCUSSION

The Equal Protection Clause, as applied to gender, has proven to be both freeing and limiting to women. Although well-meaning in theory, the reasoning and analysis that was applied to equal protection decisions have allowed the Supreme Court to continue to prevent women from reaching beyond the diluted citizenship that plagues women.[176] The Court's aversion to providing women equal protection of the law is apparent throughout the history of equal protection cases.[177] Moreover, the application of intermediate scrutiny in gender-based equal protection cases is one of the principal ways the legal doctrine of coverture has been covertly protected over time.

Coverture began as a marriage law and evolved to allow the social subjection of women to men.[178] The Supreme Court's views seesaw between adamantly ending gender discrimination and authorizing gender-based classification, sometimes within the same decade.[179] Each instance of the Court undoing its steps toward gender equality is another nod to coverture, showing that women have never been and will never be equal. The Supreme Court has hindered women legally, politically, and societally.

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173. *Id.*

174. Kevin N. Rolando, *A Decade Later: United States v. Virginia and the Rise and Fall of "Skeptical Scrutiny*," 12 ROGER WILLIAMS L. REV. 182, 184 (2006).

175. *Id.* at 185.

176. *See e.g.*, Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); Craig v. Boren, 429 U.S. 190 (1976); United States v. Virginia, 518 U.S. 515 (1996).

177. *See supra* Part II.

178. *See supra* INTRODUCTION.

179. *See e.g., Reed*, 404 U.S. at 71; *Frontiero*, 411 U.S. at 677; *Craig*, 429 U.S. at 190; *Virginia*, 518 U.S. at 515.

If the Court had instead taken a stricter approach, such as applying strict scrutiny to equations of statutory gender discrimination, the influence of coverture would have been fully extinguished.

If strict scrutiny had been applied to questions of gender discrimination at the initial application of the Equal Protection Clause to gender, much of the turmoil the Court grappled with throughout *Reed's* progeny would have ended.[180] The Court's unwillingness to discuss even the gendered foundation of *Reed* resulted in an unclear framework that allowed the archaic narrative of coverture to thrive.[181] Strict scrutiny applied to *Reed* would have prevented much turmoil in the cases to come and supplied courts with the necessary framework to dismantle the discriminatory practices of gender classifications successfully.[182]

When the Supreme Court began taking the necessary steps to correct the confusing and antiquated doctrine of *Reed* in *Frontiero*, the Court could only muster a plurality, thus not adding much clarity regarding the steps toward addressing gender discrimination.[183] Although the Court issued a strong opinion, admitting to how it perpetrated a system of gender inequality, the opinion was weakened because it was only a plurality.[184] This plurality ultimately left the Court unable to make any true stands against gender discrimination, as it was easily undone.[185]

If *Frontiero* remained, instead of being overturned in *Craig*, the application of strict scrutiny would have resulted in less gender discrimination by the state throughout the years. Because intermediate scrutiny is a lower standard of review and only requires the law to promote "important government ends" rather than a "compelling government interest," this results in discriminatory gender classifications by the government, rooted in coverture, to continue to prevail.[186]

Even if strict scrutiny would come to be the ultimate standard of review for questions of gender discrimination, it is important to note that the application of strict scrutiny could result in continued gender discrimination by the Court. As stated:

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180. *See supra* Part II.
181. *See* Reed v. Reed, 404 U.S. 71 (1971).
182. *See id.*
183. Frontiero v. Richardson, 411 U.S. 677 (1973).
184. *Id.*
185. *Id.*
186. *See supra* Part II.

> Deeply rooted assumptions about gender, as well as legal standards, operate to produce results. Because stereotypical thinking about men and women would also affect decision-making under a strict scrutiny regime, advocates need to be constantly aware of the interaction between legal doctrine and the understanding of gender.[187]

Thus, more than strict scrutiny would be needed to fully change the doctrinal framework. Instead, the Supreme Court must become aware of its biases and actively work against them to completely undo the historical influence of coverture, as equal protection doctrine is not the only place that coverture can prosper.[188]

Recently, the Court relied on the principles of coverture in *Dobbs v. Jackson* and legislated from the bench to say that the Equal Protection Clause and its jurisprudence could not hold up in Court to challenge abortion laws.[189] The Court stated that because neither *Roe v. Wade* nor *Casey v. Planned Parenthood* relied on the Equal Protection Clause, the Equal Protection Clause argument is "squarely foreclosed by precedents, which establish that a State's regulation of abortion is not a sex-based classification and is not subject to heightened scrutiny that applies to such classifications."[190] The Court argued that abortion laws are not sex-based discrimination, although women are the only suspect class that will be affected by anti-abortion laws. It could be argued that coverture influenced the decision of *Dobbs*, as family and traditional gender roles are enforced by forcing women to carry a child to term. Since *Dobbs*, women have once again been relegated to the role of wife and mother.

CONCLUSION

Coverture is one of the legal reasons that women have been limited to the role of homemaker and mother and have struggled to succeed in careers that are traditionally limited to males. Although no longer without legal identity, women are culturally subjected to the longstanding ramifications of coverture and are socially expected to continue in the role of a mother and a wife.[191] Present-day systemic coverture could have been avoided if the Court had taken a stand.

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187. Shalleck, s*upra* note 164, at 33.

188. *See* Allison Anna Tait, *The Return of Coverture*, MICH. L. REV. (Jan. 2016), https://michiganlawreview.org/the-return-of-coverture/; Obergefell v. Hodges, 576 U.S. 644 (2015) (ruling that marriage is a fundamental right, ultimately allowing for same sex marriage).

189. *See* Dobbs v. Jackson Women's Health, 142 S. Ct. 2228, 2245-46 (2022).

190. *See id* (internal quotations omitted).

191. *See generally*, KERBER, *supra* note 80.

Fleetingly, there was a movement to pass the Equal Rights Amendment (ERA) to bypass the Court's continued protection of coverture.[192] The Equal Rights Amendment was designed to "guarantee equal legal rights for all American citizens regardless of sex." [193] The proposed amendment reads, "[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."[194] The ERA intended to provide explicit protection against gender discrimination, which the Constitution or the Bill of Rights has not been interpreted to protect fully.[195] Some of the members of the Court in *Frontiero* refused to implement the plurality as the majority because of the potential passage of the ERA.[196] However, the ERA was never adopted.[197] The Court punted a landmark decision for an event that never occurred nor will probably ever occur.

If the Court had chosen to affirm the holding of *Frontiero* instead of undoing it in *Craig*, the Equal Protection Clause would have been the strongest prohibition against gender discrimination. However, the Court chose differently, and once again, women are stuck cleaning up the mess made by men. It is now time to guarantee women's life, liberty, and pursuit of happiness.

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192. *Equal Rights Amendment*, ERA (viewed Jan. 26, 2023), https://www.equalrightsamendment.org.

193. *Id.*

194. *Id.*

195. *See id.*; *see also supra* Part III.

196. NCC Staff, *Frontiero v. Richardson: A Landmark Case for Gender Equality*, NAT'L CONST. CTR.: BLOG POST (May 14, 2017), https://constitutioncenter.org/blog/frontiero-v.-richardson-a-landmark-case-for-gender-equality.

197. *Id.*