

An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home

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ABSTRACT: The last few years have seen a renewed push to constitutionalize sex equality in the United States. A generation after the federal Equal Rights Amendment (ERA) failed to be ratified by the requisite number of states, the ERA is on the platform of the 2017 Women's March on Washington. Oregon added a sex equality guarantee to its state constitution in 2014, joining 22 state constitutions and most constitutions around the world. Feminist coalitions, Hollywood celebrities, and members of Congress are vocally endorsing an ERA revival. Why is an ERA desired now, when judges have interpreted the Fourteenth Amendment to prohibit sex discrimination? Today's ERA proponents want the Constitution to do something about women's continued economic disadvantages, the unfair treatment of pregnant women and mothers in the workplace, women's underrepresentation in leadership positions, and the inadequate responses to violence against women. Yet, the legal functions they attribute to the proposed constitutional guarantee—such as strict scrutiny for sex distinctions—are unlikely to respond to these post-industrial problems of gender inequality. Nonetheless, this Article proposes a new vision of the ERA's legal function, drawing on the experience of global constitutionalism. Focusing on countries that adopted constitutional amendments on sex equality after the ERA's failure, this Article shows how the constitutional right to sex equality can promote gender balance in positions of political and economic power, combat practices that disadvantage mothers in the workplace, and shift family care policies to increase fathers' participation in childcare. In Europe, constitutional

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sex equality amendments since the 1990s go beyond outlawing sex discrimination; these new amendments engender and legitimize legislative efforts to disrupt the traditional gendered division of roles in the family and public spheres. Constitutional courts in Germany and France have construed these amendments as articulating actual equality between women and men as a principle by which the constitutional order's legitimacy is measured, rather than as an individually enforced right. In the United States, there are some synergies between European constitutional innovations in gender equality and public policies that are emerging piecemeal at the state and local level. States are leading the way in legislating pregnant worker fairness, paid parental leave, and childcare. A motherhood movement and a wide range of actors from across the political spectrum are driving these new laws. These developments can shape an updated vision of constitutional sex equality for the United States. Taking inspiration from global constitutionalism, and recognizing the potential of state constitutionalism, this Article identifies the emerging new infrastructure of social reproduction—rather than antidiscrimination—as the normative core for the twenty-first-century ERA.

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INTRODUCTION

The Equal Rights Amendment (ERA) to the U.S. Constitution was proposed almost a century ago. The ERA would have guaranteed sex equality. A generation after the ERA met its demise in 1982, a new movement led by members of Congress, feminist coalitions, and Hollywood celebrities is now reviving the push for the ERA. Since 1982, the Supreme Court has applied heightened scrutiny to sex distinctions, invalidated laws based on gender stereotypes, and recognized the right to same-sex marriage. Meanwhile, in November 2014, Oregon became the twenty-third state in the United States to add a sex equality provision to its state constitution.¹ And, in the intervening century since the ERA entered into American constitutional consciousness, sex equality provisions have been added to many other constitutions throughout the world, notably in European social democratic states. These developments should enrich and change our thinking about whether the ERA is desirable today. They should broaden our imagination about what constitutional sex equality can accomplish.

This Article reconceptualizes the ERA for the twenty-first century as the legal infrastructure of gender equality. The ERA that was adopted by Congress in 1972 primarily prohibited discrimination on grounds of sex by government.

1. See OR. CONST. art. I, § 46.

But a new constitutional amendment on sex equality ought to go beyond nondiscrimination. For women to gain fully equal status in post-industrial democracies, basic institutions need to be redesigned to alter the status quo where women and men play different and unequal roles in producing the next generation of citizens. Social reproduction—the mechanisms by which a society reproduces itself to enable its survival beyond the present generation of citizens—is a concern for constitutional law. A constitution constitutes a polity that lives on beyond the lifetimes of the constitution-makers. Constitutions contain implicit or explicit plans for how the citizens who make up that polity will be made and raised. For hundreds of years, the survival of modern societies depended on gender-differentiated, unequal roles in economic, political, and family life. A constitutional commitment to gender equality thus must include a commitment to new institutions that enable the polity to continue in the absence of gender-unequal roles. An Equal Rights Amendment for the twenty-first century is best conceptualized as a right to egalitarian institutions rather than a right against discrimination. Proposing an Equal Rights Amendment today can reorient the way we think about constitutional rights more broadly, and the function of constitutional rights in our legal and economic system.

Instead of using the constitutional right to sex equality as a shield against sexist government action, this Article proposes that a constitutional guarantee of sex equality be approached as a foundation for federal and state governmental initiatives to build gender-equal infrastructures. We need not start from scratch; we can take inspiration and ideas from other constitutional orders around the world that have begun to move in this direction through the process of constitutional change. New legislation and government programs that reduce women's disadvantage have a constitutional valence, due in part to new sex equality amendments added to constitutions in recent memory. Not all constitutional sex equality clauses around the world have bite, but it is worthwhile to closely engage those that do. Sex equality amendments enacted in the late twentieth and early twenty-first centuries in Europe provide examples of constitutional amendments undertaken with consciousness of post-industrial manifestations of gender inequality. They should help us think about the goals of constitutional sex equality in the United States today.

In the United States, the failure to ratify the ERA led legal feminists to pursue change in the 1980s and 1990s through the Equal Protection Clause and anti-discrimination statutes. Their successes produced a sex equality jurisprudence under the Equal Protection Clause and Title VII of the Civil Rights Act that many legal scholars regard as a “de facto ERA.” Thus, it is widely believed that a formal constitutional amendment in the form of an ERA, if adopted today, would not make a significant difference to the law of sex equality, and that it would be merely symbolic. This Article challenges this understanding. A twenty-first-century ERA can significantly disrupt the remaining

manifestations of gender inequality, such as pay inequity; women's economic disadvantages related to pregnancy, maternity, and caregiving; women's underrepresentation in positions of economic and political power; and violence against women. But in order to do so, the legal imagination of the ERA would have to stretch beyond strict scrutiny, disparate impact, and other familiar antidiscrimination tools to which ERA proponents continue to cling. European countries have intervened more robustly on pay inequity, parental leave, early childhood education, and women's equal representation in leadership, and this Article explores the relationships between these interventions and the countries' constitutional amendments.

Part I describes the current ERA revival effort, detailing arguments in legal and political discourse about why an ERA is needed now. Part I points out the mismatch between the early twenty-first-century problems that concern today's ERA movement, and the legal solutions that the proponents believe the ERA offers. Identifying this mismatch is important in overcoming some of the resistance to the ERA and in revealing the legal potential of the gender equality right.

In that vein, Part II turns to global constitutionalism. ERA proponents often note that the vast majority of the world's constitutions explicitly guarantee sex equality. Part II raises the questions of whether, why, and how sex equality in foreign constitutions should matter to the U.S. trajectory. In international rankings of gender equality, the United States does better than most countries with sex equality in their constitutions, but we still lag behind many European countries. Most European countries have guaranteed sex equality in their constitutions since World War II, and several others amended their constitutions in the past twenty-five years, responding to the more recent manifestations of gender inequality that most concern today's ERA movement. Part II identifies three types of constitutional provisions in global constitutionalism that concern women's status: nondiscrimination guarantees that name sex as a prohibited ground; additional sex equality provisions that refer to some form of substantive equality (such as "actual" equality or a duty to promote women's equal access to positions of power); and motherhood clauses, which declare the state's duty to protect mothers.

Part III zeroes in on two countries that amended their constitutions to clarify the meaning of sex equality after the United States' ERA failed in 1982: Germany and France. In Germany and France, amendments in 1994 and 1999 transformed constitutional sex equality—from formal to substantive, and from an individual constitutional right to a structural principle that legitimizes the constitutional political order. These amendments were primarily concerned with affirming the legitimacy of state efforts to promote women's advancement in politics and employment, but they have also been broadly construed to speak to the role of the state in transforming men and women's social functions in the

family. Constitutional change occurred through litigation, amendment, and legislation invoking the sex equality provision.

Part IV draws out some common threads between global gender constitutionalism and state constitutional law in the United States. Almost half of the United States' state constitutions have provisions that explicitly commit to sex equality or non-discrimination on grounds of sex. Some state courts have interpreted these provisions as requiring strict scrutiny, disparate impact liability, and equal treatment by non-state actors. In addition, states have begun to adopt legislation on paid parental leave, pregnancy accommodation, equal pay, and other policy issues at the core of the ERA movement's agenda. While these legislative initiatives have not been framed in legal or political discourse as enforcements of the ERA, Part IV proposes a constitutional framing. State courts have not interpreted state ERAs to go much beyond federal equal protection sex jurisprudence, but their legislatures are adopting paid parental leave regimes, rights to early childhood education, equal pay laws that reach beyond pay discrimination, and laws that protect flexible work arrangements. Whatever their purpose, these laws are forming the twenty-first-century infrastructure of social reproduction: they enable children to be raised without depending on the incumbent unequal infrastructure of female child-rearers and male breadwinners. The developing infrastructure responds to the shared concerns of twenty-first-century women's constitutionalism in post-industrial societies around the world.

Part V considers what is gained and lost by giving constitutional status to the new gender-equal form of social reproduction required to achieve post-industrial sex equality. A constitutional amendment can give coherence to these piecemeal legislative initiatives, and nudge lawmakers, lawyers, and judges to build the other necessary pieces of this infrastructure.

I. THE ERA REVIVAL

A. A Popular Constitutional Movement

ERA bills have been reintroduced in Congress every year for the last few years with the sponsorship of Congresswoman Carolyn Maloney.² New discussions of the Equal Rights Amendment have come up, not only in Congress³

2. See, e.g., S.J. Res. 16, 114th Cong. (2015); H.R.J. Res. 52, 114th Cong. (2015).

3. See 162 CONG. REC. H1111-14 (daily ed. Mar. 2, 2016), <https://www.gpo.gov/fdsys/pkg/CREC-2016-03-02/html/CREC-2016-03-02-pt1-PgH1111.htm>.

and political rallies,⁴ but in conversations with Supreme Court Justices,⁵ a new documentary⁶ and book by advocates,⁷ and even in Oscar acceptance speeches.⁸ The Guiding Vision and Definition of Principles for the January 2017 Women's March on Washington includes "an all-inclusive Equal Rights Amendment to the U.S. Constitution."⁹ In a recent interview at the National Press Club, Justice Ginsburg was asked what amendment she would add to the Constitution. She replied:

If I could choose an amendment to add to this Constitution, it would be the Equal Rights Amendment. . . . It means that women are people equal in stature before the law. That's a fundamental constitutional principle. I think we have achieved that through legislation, but legislation could be repealed, it can be altered. I mentioned Title VII of the Civil Rights Act, and the first one was the Equal Pay Act. But that principle belongs in our Constitution and is in every constitution written since the Second World War. So I would like my granddaughters, when they pick up the Constitution, to see that that notion, that women and men are persons of equal stature, I'd like them to see that that is a basic principle of our society.¹⁰

In 2014, many women's organizations, including the National Organization for Women (NOW), the National Women's Political Caucus, and Feminist Majority, formed the ERA Coalition, devoted to passage and ratification of the ERA.¹¹

4. There were ERA rallies in front of the Supreme Court in July 2014 and on the West Lawn of the Capitol in September 2014. See *Feminist Leaders and Activists Rally for the Equal Rights Amendment*, FEMINIST NEWSWIRE (Jul. 24, 2014), <https://feminist.org/blog/index.php/2014/07/24/feminist-leaders-and-activists-rally-for-the-equal-rights-amendment/>; Nicole Gaudiano, *Fight to ratify Equal Rights Amendment draws new interest*, USA TODAY (Sept. 12, 2014), <http://www.usatoday.com/story/news/politics/2014/09/12/equal-rights-amendment-rally/15508713/>.

5. See *Justices Scalia and Ginsburg on the First Amendment and Freedom*, C-SPAN (Apr. 17, 2014), <https://www.c-span.org/video/?318884-1/conversation-justices-scalia-ginsburg-2014> [hereinafter *Justices Scalia and Ginsburg*].

6. EQUAL MEANS EQUAL: THE DEFINITIVE DOCUMENTARY FILM ABOUT THE STATUS OF WOMEN IN AMERICA (Kamala Lopez 2016), <http://equalmeansequal.com/>.

7. JESSICA NEUWIRTH, *EQUAL MEANS EQUAL: WHY THE TIME FOR AN EQUAL RIGHTS AMENDMENT IS NOW* (2015).

8. When Patricia Arquette won an Academy Award for Best Supporting Actress in 2015, she ended her acceptance speech with the following: "To every woman who gave birth to every taxpayer and citizen of this nation, we have fought for everybody else's equal rights. It's our time to have wage equality once and for all and equal rights for women in the United States." See Lauren Moraski, *Patricia Arquette gives rousing Oscars speech*, CBS NEWS (Feb. 22, 2015), <http://www.cbsnews.com/news/patricia-arquette-gives-rousing-oscars-speech/>.

9. J. Bob Alotta et al., *Guiding Vision and Definition of Principles*, WOMEN'S MARCH ON WASH. (2017), <https://www.womensmarch.com/principles>.

10. See *Justices Scalia and Ginsburg*, *supra* note 5.

11. See Jessica Ravitz, *The New Women Warriors: Reviving the Fight for Equal Rights*, CNN (Apr. 16, 2015), <http://www.cnn.com/2015/04/02/us/new-womens-equal-rights-movement/index.html>; see also *Our Members*, ERA COALITION, <http://www.eracoalition.org/ourmembers.php> (last visited Aug. 13, 2016).

The current ERA movement is primarily concerned with the difficulties that women continue to face in the United States, despite the fact that the Equal Protection Clause of the Constitution has been interpreted to prohibit sex discrimination, and many statutes also prohibit sex discrimination. These problems include pay inequity, violence against women, employers' failures to accommodate pregnancy, and the general lack of public support for child-rearing, which negatively affects working mothers. The movement is also concerned with women's underrepresentation in positions of political and economic power. ERA proponents argue that putting sex equality into the text of our Constitution, in the form of the ERA, would have a positive impact on all these fronts.

In providing an overview of ERA proponents' understanding of these problems, I rely on a few main sources: press releases by the members of Congress who have supported the ERA, the ERA Coalition President Jessica Neuwirth's book *Equal Means Equal*,¹² Kamala Lopez's documentary film by the same name,¹³ and documents available on the ERA Coalition's website.¹⁴ Meryl Streep sent Neuwirth's book to every member of Congress in 2015. Kamala Lopez's documentary presents itself as the rallying cry of the new ERA movement, and was produced by Patricia Arquette, whose Oscar speech and media appearances have called for the ERA.¹⁵ *Equal Means Equal* has been shown at Women's Equality Day events across the country, including at a gathering of UN Women.

1. Pay Inequity

The persistence of women's unequal pay, suggesting the inadequacy of existing antidiscrimination and equal pay laws, is a central issue for the ERA campaign. Congresswoman Carolyn Maloney has invoked the Supreme Court's 2011 decision in *Wal-Mart v. Dukes*¹⁶ as an example of a problem that the ERA would address: "The Wal-Mart case decided by the Supreme Court . . . is a classic example of how far attitudes must still come. The facts of the case support the view that over a million women were systematically denied equal pay by the world's largest employer."¹⁷ The question in *Wal-Mart* was whether all the women who had been denied promotions at Wal-Mart could proceed in one class action lawsuit, despite the varying facts surrounding their claims. The Supreme

12. NEUWIRTH, *supra* note 7.

13. EQUAL MEANS EQUAL, *supra* note 6.

14. See, e.g., *Why We Need an Equal Rights Amendment*, ERA COALITION & FUND FOR WOMEN'S EQUALITY, <http://www.eracoalition.org/files/whyweneedtheERA.pdf> (last visited Nov. 19, 2016).

15. *Supra* note 8.

16. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

17. See Press Release, Rep. Maloney, Sen. Menendez reintroduce Equal Rights Amendment, (Jun. 22, 2011) <https://maloney.house.gov/media-center/press-releases/rep-maloney-sen-menendez-reintroduce-equal-rights-amendment>.

Court answered in the negative. The Court's decision to de-certify the class was taken by ERA proponents as a symptom of U.S. law's inadequate commitment to eradicating pay and promotion practices that disadvantage women. In the movement's documentary film, *Equal Means Equal*, the Wal-Mart case, along with the Supreme Court's decision in *Ledbetter v. Goodyear*,¹⁸ are invoked as evidence of the need for the ERA.

2. *Unfair Treatment of Pregnant Workers and Mothers*

ERA proponents also highlight employers' unfair treatment of pregnant workers, which is often permitted by law. The documentary *Equal Means Equal* recounts the stories of pregnant women who asked to carry water bottles on the job, to be relieved of their duty to lift heavy objects, or for other accommodations from their employers. Many of these women were fired or involuntarily put on unpaid leave. The failure to accommodate pregnant workers is not necessarily illegal. As the recent Supreme Court case *Young v. UPS* affirmed, pregnant workers are entitled to accommodations only to the extent that the employer accommodates other workers similarly situated in their incapacity to work.¹⁹ Employers are not required to give any special accommodations to pregnant workers that they do not give to other disabled workers, and employers may deny pregnant workers accommodations that they provide to a subset of disabled workers for special reasons.

ERA proponents want the law to require the accommodation of pregnant workers, and they believe the ERA could play a role in doing so. As Neuwirth says, "The ERA could create a right to sex equality that in the context of pregnancy recognizes that women and men have equal rights to work and have children at the same time."²⁰ Neuwirth suggests that the Equal Rights Amendment "could change the legal landscape. . . . What this might mean in the context of pregnancy is recognition . . . that women and men have biological differences and that the workplace cannot be structured solely around the biology of men, ignoring the biology of women."²¹ Properly construed, the ERA would make it:

impossible to consider the accommodation of pregnancy in the workplace as any kind of "preferential treatment" or discrimination

18. See *Ledbetter v. Goodyear Tire Co., Inc.*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. Although *Ledbetter* was reversed by a statute that makes each discriminatory paycheck a separate adverse employment action, the fact that the Supreme Court ruled against *Ledbetter* under Title VII is invoked as evidence of the need for a more robust expression of commitment to sex equality.

19. *Young v. United Parcel Servs., Inc.*, 135 S. Ct. 1338, 1350 (2015) ("We doubt that Congress intended to grant pregnant workers an unconditional most-favored-nation status.").

20. NEUWIRTH, *supra* note 7, at 34.

21. *Id.* at 49.

against men. Rather, the failure to accommodate pregnancy would be rightly recognized as a form of discrimination against women that disadvantages them in the workplace and violates their right to sex equality.²²

3. Violence Against Women

Another major theme of the ERA movement is the persistence of violence against women—and the law's inadequate response to it. The film *Equal Means Equal* spends a significant amount of time documenting violence against women. One type of legal injustice is the harsh criminal punishment of battered women who kill their batterers in alleged self-defense. When a battered woman's self-defense argument does not succeed, even in the face of ample evidence of the man's past repeated violence against the woman, the woman may be sentenced to decades of imprisonment. The film suggests that law enforcement inadequately prevents, prosecutes, and punishes violence against women. By contrast, law enforcement excessively prosecutes and punishes women who attempt to prevent or end the violence that they have suffered.

Similarly, government does too little to prevent or punish the sex trafficking of young girls, which persists throughout the world, including in the United States. The documentary tells the stories of teenage girls who have been kidnapped and forced into prostitution. Some of them have been prosecuted for prostitution, while their pimps have managed to continue their activities on the streets, escaping prosecution and punishment.

The book *Equal Means Equal* also devotes some attention to violence against women, including the Supreme Court's decisions related to the issue. In 2000, the Supreme Court struck down the private civil remedy provision of the Violence Against Women Act (VAWA).²³ The Court held that Congress lacked constitutional authority under the Commerce Clause or under Section Five of the Fourteenth Amendment to authorize individuals to sue alleged perpetrators of gender-motivated violence in federal court.²⁴ In that particular case, the Court's holding meant that a female college student who had been raped by a fellow student on a college campus could not pursue a remedy.

The Supreme Court's decision in *Castle Rock v. Gonzales* is also a significant target of ERA proponents. In *Castle Rock*, a woman unsuccessfully sued her town for its police force's failure to enforce a restraining order against her husband.²⁵ Because the restraining order was not enforced, the violent husband succeeded in abducting and murdering their three children. Under these circumstances, the Supreme Court found no violation of the woman's

22. *Id.*

23. *United States v. Morrison*, 529 U.S. 598 (2000).

24. *Id.* at 617-18, 625-27.

25. *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

constitutional Due Process rights. The ERA Coalition suggests that “[a]n ERA could require that states meet Constitutional sex equality standards in the enforcement of their laws against gender violence and expand the federal power to legislate against these crimes.”²⁶

4. *Women’s Underrepresentation in Leadership*

A video that was a precursor to the *Equal Means Equal* documentary illustrates “[t]he Situation Today Without the ERA,” noting that “[w]omen are 52% of the population but only 17% of Congress,” that “[w]omen are 46.5% of the workforce but only 12% of its corporate officers,” and that “[w]omen are 55% of Hollywood’s audience but only 9% of its directors.”²⁷ Women’s underrepresentation in positions of decision-making power is another inequality that concerns ERA proponents.

An August 2015 report of Congress’s Joint Economic Committee, issued on the ninety-fifth anniversary of the Nineteenth Amendment, lists the “[e]conomic challenges facing women today.” First on the list is the fact that “[a]lthough women hold over half of all professional-level jobs, they are underrepresented in leadership positions, holding about 5 percent of CEO positions and only 17 percent of board seats at Fortune 500 companies.”²⁸ In addition to pay inequities, the list also includes the lack of paid leave for new mothers and the earnings gap between mothers and women without children. In 2007, Representative Carolyn Maloney directly linked the underrepresentation of women in government and business to her support for the Equal Rights Amendment.²⁹

5. *Post-Industrial Gender Inequalities*

The issues on the twenty-first-century ERA agenda are post-industrial manifestations of gender inequality. All of these problems—pay inequity, failure to accommodate pregnancy and motherhood in the economic sphere, violence against women, underrepresentation of women in leadership—arise in the context of the transformation of gender roles that evolved throughout the twentieth century. When the U.S. Constitution was adopted, and even at the moment when the Nineteenth Amendment empowered women to vote, women

26. *Why We Need an Equal Rights Amendment*, *supra* note 14.

27. *How Does Not Having the Equal Rights Amendment Affect Me?*, ERA EDUC. PROJECT, <http://eraeducationproject.com/how-does-not-having-the-equal-rights-amendment-affect-me>.

28. Carolyn B. Maloney, *Women and the Economy: Celebrating Women’s Equality Day*, U.S. CONG., JOINT ECON. COMMITTEE (Aug. 26, 2015), http://maloney.house.gov/sites/maloney.house.gov/files/wysiwyg_uploaded/Women%2527s%20Equality%20Day%20Fact%20Sheet%20Final%20-%2008%2026%202015.pdf.

29. Press Release, Senators Kennedy & Boxer, Reps. Maloney & Nadler Begin New Push for Women’s Equality Amendment (Mar. 28, 2007), <https://maloney.house.gov/media-center/press-releases/senators-kennedy-boxer-reps-maloney-nadler-begin-new-push-women%E2%80%99s-equality-amendment>.

and men occupied traditional roles and functions in creating, raising, and sustaining the next generation of American citizens. The industrial economy allocated market work to men, and the unpaid caregiving work of raising the next generation of workers was left to women. In economist Heather Boushey's view, the "American Wife" was America's silent partner, helping to grow the American economy by supporting her breadwinning husband and raising children.³⁰ Or, as Anne-Marie Slaughter puts it, "women at home" was America's "infrastructure of care" in past generations.³¹

But throughout the twentieth century, these roles eroded with deindustrialization and the emergence of post-industrial economies with large technology and service sectors. These economies depend on the market work of women. By the late twentieth century, the traditional assumption that one parent (the mother) was available full-time to raise children, fully supported by a (male) breadwinner, no longer held. By 1970, around the time that Congress adopted the ERA, 30% of women were in the workforce;³² today, 59% are.³³ Among mothers with children under the age of eighteen, 70% participate in the labor market.³⁴ Most families with children need two incomes to afford housing, healthcare, education, and other basic needs.³⁵ As of 2006, two-paycheck couples were more numerous than male-breadwinner households were in 1970.³⁶ In addition, nearly 40% of families with children have a sole female breadwinner.³⁷ Fewer than one-third of children in 2012 lived in a family with a stay-at-home caregiver.³⁸ As Arlie Hochschild has noted, "[w]omen's move into the economy is the basic social revolution of our time."³⁹ What this means is that the male-breadwinner, female-caregiver family is no longer a viable or feasible structure for raising the next generation of U.S. citizens. The twenty-first-century gender inequalities that form the core concerns of the current ERA movement are symptoms of this incomplete economic transition. Throughout the twentieth century, the male-breadwinner, female-caregiver family slowly declined as a structure for raising the next generation, as an increasing number of mothers

30. See HEATHER BOUSHEY, *FINDING TIME: THE ECONOMICS OF WORK-LIFE CONFLICT* 5-7 (2016).

31. See ANNE-MARIE SLAUGHTER, *UNFINISHED BUSINESS: WOMEN MEN WORK FAMILY* 232 (2015).

32. *Women in the Labor Force, 1970-2009*, BUREAU LAB. STAT., http://www.bls.gov/opub/ted/2011/ted_20110105.htm.

33. *Data and Statistics: Women in the Labor Force*, U.S. DEP'T LAB., http://www.dol.gov/wb/stats/stats_data.htm.

34. *Id.*

35. See ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS & FATHERS ARE GOING BROKE* 8 (2003).

36. See KATHLEEN GERSON, *THE UNFINISHED REVOLUTION: HOW A NEW GENERATION IS RESHAPING FAMILY, WORK, AND GENDER IN AMERICA* 4 (2010). Gerson's book provides a qualitative study of the experiences of families with single, two-paycheck, and same-sex parents.

37. See BOUSHEY, *supra* note 30, at 7.

38. *Id.*, fig. I.1.

39. See ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME* 250 (2d ed. 2003) (1989).

became breadwinners. While the twenty-first-century parent is typically both caregiver and breadwinner, our institutions have not adapted to this new reality. Pay inequity, unfair treatment of pregnant workers, violence against women, and women's underrepresentation in leadership illustrate the gap between our institutions and the reality we now inhabit. A constitutional response is appropriate.

Take, for instance, the problems of pay inequity and unfair treatment of pregnant workers and working mothers; these issues arise because of the change in the roles of men and women in social reproduction. Paying men more than women may have made sense in an economic system that assumed that men were breadwinners and women were dependent caregivers. Men had to make a "family wage."⁴⁰ Not accommodating pregnancy nor paying for parental leave also made sense in an industrial economy in which women did not work and raise children at the same time. But now the post-industrial economy depends on women's participation in the labor market, including during women's childbearing and childrearing years. Twenty-first-century economies depend on women's work, and thus leave a gap in the functions covered in the past by the American Wife. A system-wide solution is needed.

The violence against women highlighted by ERA activists can also be understood as a problem with post-industrial specificity. Violence against women is in part a reaction to the threats to masculinity occasioned by the late-twentieth-century dynamics of post-industrial economies. Deindustrialization and the decline of manufacturing are linked to the decline of the man's dominion within the household as the exclusive breadwinner. Deindustrialization brought about higher levels of male unemployment, and the accompanying downward mobility, stress, and demoralization are associated with higher incidence of violence against women.⁴¹ The rise of sex trafficking is also explained by the profitability of an underground sector that has grown in this late-twentieth-century economic context.⁴²

B. The Mismatch Between ERA Politics and Law

For those convinced of the need for law to intervene more robustly on these post-industrial gender inequality problems, it is not obvious that a constitutional amendment would be effective or appropriate, even if it were politically feasible. Many U.S. constitutional law scholars believe that the Supreme Court's approach to sex discrimination under the Equal Protection Clause has produced a "de facto

40. See BOUSHEY, *supra* note 30, at 12.

41. See Deborah M. Weissman, *Domestic Violence and the Postindustrial Household*, in VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS 111, 117 (Evan Stark & Eve S. Buzawa eds., 2009).

42. See MEREDITH DANK ET AL., THE URBAN INST., ESTIMATING THE SIZE AND STRUCTURE OF THE UNDERGROUND COMMERCIAL SEX ECONOMY IN EIGHT MAJOR CITIES (2014).

ERA.”⁴³ As feminist law professor Mary Anne Case observes, “the current constitutional law of sex discrimination is almost exactly what E.R.A. supporters in the 1970s hoped for from the E.R.A.”⁴⁴ At the same time, Professor Reva Siegel has suggested that the “de facto ERA” achieved through Equal Protection jurisprudence reflects compromises made by feminist ERA proponents in efforts to gain public support in the face of a growing opposition movement.⁴⁵ It is thus important to map out and evaluate current ERA proponents’ understandings of why a constitutional amendment is needed now, and how it would work as a legal intervention.

Today’s ERA proponents envision the ERA as doing three things that current Equal Protection sex equality doctrine does not do. First, they propose that the ERA would require strict scrutiny for sex classifications in the law, such that sex distinctions would be treated just like race distinctions facing an Equal Protection challenge.⁴⁶ Second, ERA proponents believe that the ERA would invalidate government practices that have a disparate impact on women.⁴⁷ Third, they believe that the congressional power to enforce the ERA would sweep more broadly than its analogue in Section Five of the Fourteenth Amendment,⁴⁸ and would thus empower Congress to legislate more robustly on matters like violence against women.

The difficulty is that there is nothing in the text of the ERA that obviously requires strict scrutiny, disparate impact, or expanded congressional authority any more so than does Equal Protection. The proposed ERA, which could become law if ratified by three more states,⁴⁹ reads in relevant part as follows:

43. See CASS SUNSTEIN, *THE SECOND BILL OF RIGHTS* (2004); Michael Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951 (2002); David Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

44. See Mary Anne Case, *The Supreme Court Has Delivered on Many of the ERA’s Promises*, N. Y. TIMES ROOM FOR DEBATE (Sept. 8, 2016), <http://www.nytimes.com/roomfordebate/2016/09/08/was-the-eras-defeat-really-a-loss-for-feminism/the-supreme-court-has-delivered-on-many-of-the-eras-promises>.

45. See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1403 (2006).

46. Congresswoman Maloney’s explanation of the ERA on her website reads: “This critical amendment would guarantee the equal rights of men and women by: make[sic] sex a suspect category subject to strict judicial scrutiny, clarifying the legal status of sex discrimination for the courts. This would prohibit sexual discrimination in the same way we have prohibited discrimination on the basis of race, religion, and national origin.” See Carolyn B. Maloney, *Equal Rights Amendment*, <https://maloney.house.gov/issues/womens-issues/equal-rights-ammendment>.

47. See NEUWIRTH, *supra* note 7, at 19-31.

48. See Maloney, *supra* note 46; see also NEUWIRTH, *supra* note 7, at 68.

49. By the 1982 deadline for ratification of the ERA by the states, only 35 states had ratified the constitutional amendment. Ratification by 38 states is required to amend the Constitution. ERA proponents believe that ratification by three additional states, accompanied by congressional action extending the 1982 deadline, is all that is needed to add the ERA to the Constitution. The theory is that, since it was valid for Congress to extend the ERA deadline in 1978, it would be valid for Congress to extend it again now. See THOMAS H. NEALE, CONG. RESEARCH SERV., *THE PROPOSED EQUAL RIGHTS AMENDMENT: CONTEMPORARY RATIFICATION ISSUES* 13 (2014); Allison L. Held, Sheryl L. Herndon & Danielle M. Stager, *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. WOMEN & L. 113 (1997); see also Representative Robert E. Andrews,

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.⁵⁰

The U.S. Supreme Court applies intermediate, not strict scrutiny to sex classifications under the Equal Protection Clause, and refuses to recognize disparate impact liability under Equal Protection. Courts embracing the justifications for these approaches could easily apply the same rationale to enforcing the Equal Rights Amendment. Furthermore, the U.S. Supreme Court has taken a limited view of Congress's power to enforce the Equal Protection Clause. In *Morrison v. United States*, the Court held that Congress did not have the power to enact the Violence Against Women Act's civil rights remedy provision, which permitted victims of gender-motivated violence to sue their alleged perpetrators in federal court for civil damages.⁵¹ The Court held that Congress had to be proportionate and congruent in exercising its enforcement power, and thus could not strike too broadly at private conduct that would not itself violate the Equal Protection Clause. Courts could easily take the exact same approach to the ERA, particularly since Section 1 of the ERA only prohibits abridgment of equal rights by the federal and state governments, and not by private actors.

For these reasons, the proposed ERA will not require a different approach to strict scrutiny, disparate impact, or congressional enforcement authority than that already present in the de facto ERA as established through Equal Protection sex equality jurisprudence. Of course, the mere fact that the ERA would create a new and separate textual source for sex equality reasoning would at least permit a different approach to strict scrutiny, disparate impact, or congressional enforcement authority if courts were looking to justify one. But this possibility alone cannot be enough to motivate a formal constitutional amendment. After all, those who are zealously committed to strict scrutiny, disparate impact, and expanded enforcement authority against sex discrimination can continue to litigate cases that urge the Supreme Court to overrule its precedents rejecting strict scrutiny for sex classifications or disparate impact liability under Equal

Applauding the Recent Actions Taken by the Illinois State Legislature Regarding the Equal Rights Amendment, 149 CONG. REC. 14,039-40 (2003). In some unratified states, such as Illinois and Virginia, state legislatures have debated ratification bills in the past few years. See *Illinois Senate Passes Resolution to Ratify the Equal Rights Amendment*, FEMINIST NEWSWIRE (May 23, 2014), <https://feminist.org/blog/index.php/2014/05/23/illinois-senate-passes-resolution-to-ratify-era>; Travis Fain, *Equal Rights Amendment Passes, Then Doesn't, in Virginia Senate*, DAILY PRESS (Feb. 3, 2015), <http://www.dailypress.com/news/politics/dp-nws-ga-era-shenanigans-20150203-story.html>.

50. See S.J. Res. 16, 114th Cong. (2015). This text is identical to the 1972 text that was adopted by the requisite two-thirds majorities of Congress and then ratified by thirty-five states.

51. 529 U.S. 598 (2000).

Protection. It is imaginable that, one day, a Supreme Court with a different composition might take a slightly broader view of congressional enforcement power under the Fourteenth Amendment. In fact, the Court has arguably expanded the Commerce Clause in cases decided after *Morrison*,⁵² so an expansion of Fourteenth Amendment Section Five power is plausible.

Of the three legal reforms that the ERA is imagined to require, one of them—strict scrutiny for sex classifications—may introduce barriers to the ERA movement's political agenda. In recent years, strict scrutiny for racial classifications has enabled courts to dismantle or limit race-based affirmative action and other efforts by public institutions to achieve racial integration or diversity.⁵³ Laws and policies that take race into account—even to achieve diversity—are suspect and subject to rigorous justification, leading to the demise of many worthwhile experiments in achieving racial balance and integration in public schools. ERA proponents point out the underrepresentation of women in leadership positions,⁵⁴ but strict scrutiny would actually make it harder than it is today under intermediate scrutiny to adopt policies that consciously promote gender balance or women in leadership. For instance, the recent laws enacted in European countries that require gender parity on corporate boards of directors⁵⁵ would be suspect under strict scrutiny and highly unlikely to survive. Strict scrutiny would not only invalidate gender quotas, but would also make it easier to challenge and end other gender-conscious programs designed to reduce women's unique disadvantages and injuries.

Consider, for instance, the decision by a California court to apply strict scrutiny to gender classifications under its state equal protection clause.⁵⁶ Note that it did not need a sex-based ERA to apply strict scrutiny to sex; it just used state equal protection. More importantly, applying strict scrutiny to sex meant invalidating the policy of providing state funding to battered women's shelters that only admitted women victims of domestic violence and their children. In the litigation, male plaintiffs, including one who claimed to be beaten by his wife and was denied access to a battered women's shelter, brought suit. It is not obvious that a commitment to gender equality should bar women-only domestic

52. See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that Congress could regulate the local intrastate cultivation and use of marijuana under the Commerce Clause).

53. See, e.g., *Fisher v. University of Texas at Austin (Fisher I)*, 133 S. Ct. 2411 (2013); *Fisher v. University of Texas at Austin (Fisher II)*, 136 S. Ct. 2198 (2016). *Fisher II* reinforced strict scrutiny as the standard to apply to use of racial classifications in university admissions. Four Justices joined the opinion holding the University of Texas's race-conscious affirmative action policy lawful, whereas three dissenting Justices would have reversed the Fifth Circuit's decision upholding the policy. In the absence of five Justices voting to reverse the lower court's decision, the race-conscious policy survived strict scrutiny in this case. See also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). For a critique of the American use of heightened scrutiny for race- or sex-based quotas, see generally Julie C. Suk, *Quotas and Consequences: A Transnational Re-evaluation*, in *PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW* 228 (Deborah Hellman & Sophia Moreau eds., 2013).

54. See *supra* text accompanying notes 27-29.

55. See *infra* text accompanying notes 147-148.

56. *Woods v. Horton*, 167 Cal. App. 4th 658 (Cal. Ct. App. 2008).

violence shelters. One can see how male victims of domestic violence should have access to safe spaces, but one can also see how, given the unique psychological issues faced by battered women, men's presence might undermine their sense of safety. Strict scrutiny would hamper public policy experimentation to address these complex problems in a nuanced fashion, as it has in the context of policy responses to racial injustice and inequality. The strict scrutiny desired by 1970s ERA activists was formulated before strict scrutiny became an anti-affirmative action tool, and it may be less desirable today.

The new text of the ERA, introduced in 2013, appears to be a closer fit to the ERA movement's political agenda. This is in part due to the significant substantive textual differences between the new text and the Equal Protection Clause. But more importantly, the new ERA text, because it is new, can have meanings and interpretations that are liberated from the meanings associated with the legislative history of the 1972 congressional adoption and ratification by thirty-five states. Whatever goals were desired in 1972 by the ERA's framers, or compromised in the ratification process through 1982 to the present, would not determine the meaning of a new ERA. The new text reads:

Section 1. Women shall have equal rights in the United States and every place subject to its jurisdiction. 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. Congress and the several States shall have the power to enforce, by appropriate legislation, the provisions of this article.⁵⁷

Professor Catharine MacKinnon has pointed out the legal benefits of the new text.⁵⁸ The new ERA bill is more expansive than the 1972 text in that the first sentence declares that women have equal rights with no mention of abridgment by a state actor. The second sentence prohibits abridgment by a state actor. But because the first sentence generally declares the right, it is like the Thirteenth Amendment's declaration, "Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction."⁵⁹ The Supreme Court has not imposed a state action requirement in interpreting the scope of Thirteenth Amendment rights, particularly in its jurisprudence interpreting the scope of Congress's authority to regulate private conduct to enforce the ban on slavery.⁶⁰ A sentence declaring rights separately from the

57. H.R.J. Res. 52, 114th Cong. (2015).

58. See Catharine A. MacKinnon, *Toward a Renewed Equal Rights Amendment: Now More than Ever*, 37 HARV. J.L. & GENDER 569, 578-79 (2014).

59. U.S. CONST. amend. XIII.

60. See George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1367 (2008) ("Unlike its close cousin, the Fourteenth Amendment, the Thirteenth Amendment restrains not only government actors, but also private individuals. Private forms of 'involuntary servitude' violate the self-executing provisions of the Amendment, and private attempts to

sentence prohibiting abridgment by state action opens up the possibility of enforcing the right against private actors, and expanding the scope of legislative enforcement power to reach more broadly across private conduct than does legislative enforcement power under Section Five of the Fourteenth Amendment.⁶¹

The new version also introduces concurrent state power to enforce the federal ERA within a federal constitutional amendment. There is no other similar grant of enforcement power in the Constitution currently in force.⁶² Nonetheless, this clause could carry significance if a conflict were to arise between state legislative efforts to promote gender equality (for example, gender quotas in state political party committees⁶³ or special accommodations for pregnant workers) and a federal judicial construction of the Equal Protection Clause scrutinizing such sex classifications. A federal constitutional amendment authorizing the state to enforce sex equality would cast the state statute as an enforcement of federal constitutional law against a federal constitutional challenge emanating from a different provision. I shall return to the question of state enforcement of post-industrial gender equality in Part IV.

The new ERA text provides a better legal apparatus for the policy goal of reducing post-industrial gender inequality. By firmly declaring women's equal rights separately from the sentence prohibiting their abridgment on account of sex by the state, the new text shares features in common with several constitutions around the world, in which clauses prohibiting sex discrimination are independent from clauses guaranteeing women's equality. In some constitutional democracies, these clauses are enforced in constitutional litigation, or otherwise viewed as normative legal sources that nudge legislative action. The new ERA text lends itself to a dialogue with sex equality amendments in other constitutions, particularly those that emerged in response to post-industrial gender inequalities and supported policy agendas similar to those at the center of today's American ERA movement.

perpetuate the 'badges and incidents of slavery' can be prohibited by Congress in legislation to enforce the Amendment.").

61. See discussion of *United States v. Morrison*, *supra* text accompanying notes 23 to 24 and 51 to 52.

62. The Eighteenth Amendment, which prohibited the manufacture, sale, or transportation of intoxicating liquors within the United States, included Section 2, which provided that "Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." U.S. CONST. amend. XVIII (repealed by U.S. CONST. amend. XXI (1933)). After its repeal, no other constitutional right or declaration involves this dual delegation.

63. See *infra* Section IV.B.4.

II. SEX EQUALITY IN GLOBAL CONSTITUTIONALISM

A. Sex Equality Provisions and Global Gender Gap Rankings

Since ERA proponents frequently argue that the United States is virtually alone in the world in its failure to constitutionalize sex equality, some attention to foreign constitutions' sex equality provisions and the status of women in those societies is informative. The World Economic Forum (WEF)'s annual Global Gender Gap rankings measure the gender gap in 144 countries by various indicators relevant to post-industrial gender inequality: women's economic participation rates, men's and women's wages for comparable work, representation of women in political institutions, and women's health and education levels.⁶⁴ Year after year, Norway consistently ranks in the top three for closing the gender gap, but Norway's constitution makes no mention of sex or gender equality. So we can't conclude that constitutionalizing sex equality by text is *necessary* to reduce gender gaps. At the other end of the spectrum, Chad ranks 140th, very close to the bottom of the WEF's Global Gender Gap Rankings. However, the constitution of Chad declares: "Chadians of both sexes have the same rights and same duties. They are equal before the law."⁶⁵ So it is also wrong to conclude that constitutionalizing sex equality by text is *sufficient* to achieve gender-equal outcomes. Constitutional sex equality provisions are neither necessary nor sufficient to reducing gender gaps.

So, what is the point of global constitutional inquiry? Recent efforts to assess the comparative performance of constitutional clauses in a scientific manner⁶⁶ raise questions about whether generalizable normative insights can be drawn from the effects of constitutions across such different national, cultural, economic, and political contexts. My purpose here is somewhat different. I collect and categorize snapshots of the textual clauses in constitutions that explicitly speak to gender equality or inequality, and then provide a deeply textured portrait of the evolving meaning of constitutional sex equality in legal and political discourse. I focus on the examples that could best illuminate the issues that most concern American ERA proponents today. How have the recent constitutional changes abroad been linked in legal reasoning to these problems? If any transformative moves have been made outside of the United States, can such measures be usefully translated for the American constitutional trajectory? I focus on the constitutional regimes that have taken their gender equality clauses seriously, and thoughtfully worked through their evolution in debates at the moment of adoption, through jurisprudence interpreting the clauses, and revision

64. *The Global Gender Gap Index 2016*, WORLD ECONOMIC FORUM 11 tbl.3, <http://reports.weforum.org/global-gender-gap-report-2016/>.

65. CHAD CONST. art. 13. All foreign constitutions hereinafter quoted and cited in English are available from the Constituent Project at <https://www.constituteproject.org/>.

66. See, e.g., *ASSESSING CONSTITUTIONAL PERFORMANCE* (Tom Ginsburg & Aziz Huq eds., 2016).

through later constitutional amendments. The approach here is translation, not transplantation; engagement, not immersion. There are obvious differences in historical and cultural context between the United States and other constitutional orders, including, very importantly, foreign constitutions' conscious commitment to positive rights, including social and economic rights. Nonetheless, engaging law that we cannot possibly transplant can be useful in helping us to deepen and refine our understanding of what is desirable, which, in turn, can shift the way we inhabit and engage what is possible within our own constitutional boundaries. Furthermore, our ERA was first proposed almost a century ago, and then came closest to adoption almost a half-century ago, at a moment when the post-industrial shift in traditional gender roles was in an earlier stage. More recent constitutional activity in similar post-industrial democracies can serve as a sounding board for constitutional modernization in the United States.

The United States ranks forty-fifth out of 144 countries in 2016. As noted in Part I, the American ERA activists tend to be primarily concerned with gender gaps that can be described as post-industrial, which makes high-income countries most relevant for comparison. In the WEF's ranking of fifty high-income countries, the United States ranks twenty-sixth. I examined the sex equality-related provisions of the high-income countries that ranked higher than the United States in the WEF 2016 gender equality index: Iceland, Finland, Norway, Sweden, Ireland, Slovenia, New Zealand, Switzerland, Germany, the Netherlands, France, Latvia, Denmark, United Kingdom, Estonia, Belgium, Lithuania, Barbados, Spain, Portugal, Luxembourg, Canada, Bahamas, Poland, and Trinidad and Tobago.⁶⁷ In examining the constitutions of these countries, many of which are members of the European Union, I identified three types of constitutional provisions that address sex or gender equality or inequality.

The first is a guarantee of equality without discrimination on various grounds. These guarantees are roughly equivalent to the U.S. Constitution's Equal Protection Clause, but I noted those equality or nondiscrimination guarantees that explicitly name sex or gender as a prohibited ground of distinction or discrimination. The second type of provision guarantees equality using language other than antidiscrimination. These are essentially substantive equality clauses, but substantive equality is defined differently across different constitutions. Some use the term "equal access by men and women," others "factual equality" or "equal treatment" or "equal rights." Some, but not all, of these provisions were amendments that were added in the last three decades to authorize positive measures to reduce gender inequality, such as gender quotas for decisionmaking positions. The third type of provision is a special protection for mothers. From the U.S. perspective, these provisions might not register as equality provisions, since American legal feminists historically fought to

67. *The Global Gender Gap Index 2016*, *supra* note 64, at 25 tbl.6.

eradicate such protections.⁶⁸ At the same time, current ERA activists have suggested that the ERA would enable pregnant worker accommodations. Thus, the constitutional provisions in other countries most relevant to this problem must be examined. Indeed, in many countries, the protection of mothers—through paid maternity leave, pregnancy accommodations, protections from termination of employment during pregnancy, and childcare rights—plays a significant role in enabling women's access to employment. It is worth noting, from a gender equality perspective, those countries which have constitutionalized the special protection of mothers.

Table 1. WEF 25 High-Income Countries with Narrowest Gender Gaps: Textual Provisions in Constitutions

Country	Sex Equality or Nondiscrimination	Substantive Equality for Women	Maternity or Pregnancy
Iceland	Art. 65	No	No
Finland	Ch. 2, § 6	Ch. 2, § 6	No
Norway	No	No	No
Sweden	Ch. 2, Part 4, art. 13	Ch. 1, art. 2	No
Ireland	No	Art. 45.2.i	Art. 41.1.2
Slovenia	Art. 14	No	No
New Zealand	Art. 21.1(a)	No	No
Switzerland	Art. 8.1 & 8.2	Art. 8.3 & 8.4	Art. 41.2
Germany	Art. 3.2 & 3.3	Art. 3.2	Art. 6.4
Netherlands	Art. 1	No	No
France	Preamble, § 3 (1946)	Art. 1	Preamble § 11 (1946)
Latvia	No	No	No
Denmark	No	No	No
United Kingdom	N/A	N/A	N/A
Estonia	Art. 12	No	No
Belgium	Art. 10	Art. 11bis	No
Lithuania	Art. 29	No	Art. 39
Barbados	Ch. III, art. I	No	No
Spain	§ 14	No	§39.1
Portugal	Art. 13.2	Art. 9h	Art. 59(2)c

68. See Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Perspective*, 21 CARDOZO L. REV. 253, 268 (1999) (warning against protections for women that “perpetuate myths or stereotypes inhibiting women’s achievement of their full human potential.”).

Luxembourg	Art. 11.2	Art. 11.2	No
Canada	Art. 15.1; Art. 28	Art. 15.2	No
Bahamas	Art. 15	No	No
Poland	Art. 33	Art. 33	Art. 68.3, Art. 71.2
Trinidad and Tobago	Art. 1.1.4	No	No

B. Antidiscrimination

A paradigmatic example of a general equal protection clause that prohibits sex discrimination along with many other prohibited grounds, can be found in the Section 6 of the Finnish constitution: "Everyone is equal before the law. No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person."⁶⁹ Another model is the stand-alone guarantee of equal rights for men and women (and not for other groups or categories), which is assumed to prohibit discrimination on grounds of sex. In France, for example, the 1946 Preamble's guarantee to women of "equal rights to those of men in all spheres"⁷⁰ has been understood to prohibit discrimination based on sex.⁷¹

C. Substantive Equality

The line between these non-discrimination provisions, on the one hand, and substantive equality provisions, on the other, is not always clear. Many constitutions simply guarantee equality, or equal rights, or equal treatment to men and women, which can be interpreted as merely a prohibition of sex discrimination or as a guarantee of substantive equality. This ambiguity is significant from the U.S. perspective because the new 2013 House version of the ERA states that "women shall have equal rights in the United States . . .," followed by the promise that "[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."⁷² In Iceland, which ranks first in the Global Gender Gap Rankings this year, Article 65 of the constitution provides: "Everyone shall be equal before the law and enjoy human rights irrespective of sex, religion, opinion, national origin, race,

69. SUOMEN PERUSTUSLAKI [CONSTITUTION], § 6 (Fin.).

70. 1958 CONST. 1946 Preamble § 3 (Fr.).

71. See Conseil constitutionnel [CC] [Constitutional Council] decision No. 81-133DC, Dec. 30, 1981 (Fr.).

72. See H.R. J. Res. 52, 114th Cong. (2015) and discussion at text accompanying note 57, *supra*.

colour, property, birth or other status. Men and women shall enjoy equal rights in all respects.”⁷³ Similarly, the Belgian constitution guarantees “equality between women and men.”⁷⁴ Article 1 of the French constitution notably does not prohibit sex distinctions; it guarantees “the equality of all citizens before the law, without distinction of origin, race, or religion.”⁷⁵ The French Preamble of 1946 states, “The law guarantees women equal rights to those of men in all spheres,”⁷⁶ and it has been read not only to prohibit sex discrimination, but also to justify legislative efforts to combat women’s exclusion.⁷⁷ Similarly, the German constitution says, “Men and women shall have equal rights.”⁷⁸ The constitution of Luxembourg says, “Women and men are equal in rights and duties,”⁷⁹ and the Netherlands’ constitution frames the right in terms of equal treatment: “All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted.”⁸⁰ Some constitutional courts have read these equality guarantees as merely embodying a formal equality ban on sex discrimination, whereas others have read them as expressing an aspiration to substantive equality.

Nonetheless, some of these constitutions provide further clarification of the meaning of these equality guarantees by additionally addressing substantive equality. Germany provides a notable example, with an amendment that was debated and adopted in the process of German reunification in 1994. Before 1994, Articles 3(2) and 3(3) stated, “Men and women shall have equal rights,” and “No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland, and origin, faith, or religious or political opinions.”⁸¹ Then, in 1994, a sentence was inserted in Article 3(2) that reads, “The state shall promote the actual implementation of equal rights for men and women and take steps to eliminate disadvantages that now exist.”⁸²

Similarly, consider Finland’s provision, dating to 1995:

Everyone is equal before the law.

73. STJÓRNARSKRÁ LÝÐVELDISINS ÍSLANDS [CONSTITUTION] art. 65 (Ice.).

74. 1994 CONST. art. 10 (Belg.).

75. 1958 CONST. art. 1 (Fr.).

76. 1958 CONST. 1946 Preamble (Fr.). The Preamble to the 1946 Constitution was preserved and became part of the 1958 Constitution.

77. See MICHEL DE VILLIERS & THIERRY S. RENOUX, CODE CONSTITUTIONNEL 352 (2014) (providing an annotated constitution with commentary).

78. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [Basic Law], art. 3(2), May 23, 1949 (Ger.).

79. 1868 CONST. art. 11 (amended 2006) (Luxembourg).

80. GW. [CONSTITUTION] art. 6 (Neth.).

81. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [Basic Law], art. 3, May 23, 1949 (Ger.).

82. GRUNDGESETZ [GG] [BASIC LAW], art. 3, https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0024 (Ger.).

No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person.

...

Equality of the sexes is promoted in societal activity and working life, especially in the determination of pay and other terms of employment, as provided in more detail by an Act.⁸³

Another interesting example is found in the Portuguese constitution. Article 9 lists “[f]undamental tasks of the state,” which include “promot[ing] equality between men and women.”⁸⁴

Many of these amendments directing the state to implement “real equality,” “factual equality,” or “equal access” between men and women were adopted in the 1990s and early 2000s.⁸⁵ Some amendments were explicit attempts to resolve constitutional conflicts about the compatibility of legislation mandating gender balance in political institutions with pre-existing constitutional guarantees of equality. International and supranational norms played a significant role in bringing about these changes. Finland’s sex equality promotion clauses appeared during constitutional reforms to facilitate Finland’s accession to the European Union. In addition, the Beijing Declaration and Platform for Action emerging from the United Nations World Conference on Women in 1995 included the strategic objective of governments taking measures to ensure women’s equal access and full participation in power structures and decisionmaking.⁸⁶ In addition, the European Commission had encouraged member states since the 1980s to adopt policies to ensure women’s equal representation in decisionmaking positions,⁸⁷ but those adopted by some member states were challenged or struck down based on national constitutional guarantees of equality.

In France, a 1999 amendment added language to Article 3 addressing suffrage, stating: “The law shall promote equal access by men and women to the electoral mandate and to elected positions.”⁸⁸ In 2008, the constitution was amended again, deleting the Article 3 provision and adding language to Article

83. SUOMEN PERUSTUSLAKI [CONSTITUTION], § 6 (Fin.).

84. 1976 CONST. art. 9 (Port.).

85. I provide more details regarding the conflicts in France that gave rise to such amendments in 1999 and 2008 in Part III, *infra*.

86. U.N. Fourth World Conference on Women, Beijing Declaration and Platform for Action, strategic objective G.1, ¶ 190.

87. See First Programme of Action by the Commission of 14 December 1981, for 1982-85, Communication to the Council, bull. Suppl. 2/86, 9, No. 19, p. 5.

88. Loi constitutionnelle no. 99-569 du 8 juillet 1999 relative à l’égalité entre les femmes et les hommes (1) [Constitutional Law of July 8, 1999 on Equality Between Women and Men (1), Journal officiel de la République Française [J.O.] [Official Gazette of France], July 9, 1999, p. 10175.

1 to expand the scope of the state's duty to reduce gender gaps. Article 1 now reads:

France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organised on a decentralised basis.

Statutes shall promote equal access by women and men to elected offices and posts as well as to positions of professional and social responsibility.⁸⁹

Similar provisions explicitly authorizing measures to promote equal access by men or women or to alleviate the disadvantage of women are found in the constitutions of Belgium,⁹⁰ Greece,⁹¹ Hungary,⁹² Italy,⁹³ Malta,⁹⁴ Portugal,⁹⁵ Romania,⁹⁶ Slovenia,⁹⁷ Sweden,⁹⁸ Canada,⁹⁹ and South Africa.¹⁰⁰ Most of these constitutional clauses authorizing (and possibly requiring) positive action are amendments that were adopted since the 1990s.

D. Maternity Protection

Finally, a good number of constitutions have provisions guaranteeing the special protection of mothers. Some of the articles that impose the duty to protect mothers also include children, the elderly, and/or the disabled. I regard these provisions as "special" protections for mothers, even if these other categories of persons are included, when the protection is reserved specifically for "mothers" rather than gender-neutral "parents" or "mothers and fathers." In Germany, this protection appears in Article 6, which establishes the constitutional status of the family in general. It is worth quoting in full:

Article 6 [Marriage and the family; children born outside of marriage]

89. 1958 CONST. art. 1 (Fr.) (amended 2008).

90. 1994 CONST. art. 11 bis (Belg.) (amended 2002).

91. 2000 SYNTAGMA [SYN.] [CONSTITUTION] 116 (Greece) (as amended 2001).

92. 2011 MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, art. XV. The sentence on promoting the achievement of equality of opportunity does not mention gender or women, but it immediately follows the section that guarantees women and men equal rights. *Id.*

93. Costituzione [Cost.] [CONSTITUTION] art. 51 (It.) (amended 2003).

94. 1964 CONST. arts. 14, 45.11 (Malta) (amended 2003).

95. 1976 CONST. art. 109 (Port.) (amended 1997).

96. 1991 CONST. art. 16.3 (Rom.) (amended 2003).

97. 1991 CONST. art. 43 (Slovn.) (amended 2004).

98. REGERINGSFORMEN [RF] [CONSTITUTION] 1:2 (Swed.).

99. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, art. 15.2 (U.K.).

100. 1996 S. AFR. CONST. art. 9.2, 174 (S. Afr.).

- (1) Marriage and the family shall enjoy the special protection of the state.
- (2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.
- (3) Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect.
- (4) Every mother shall be entitled to the protection and care of the community.
- (5) Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage.

The right of mothers to the special protection of the state is embedded in an amendment that also imposes a duty on the part of the state to give special protection to marriage, family, and children. In Germany, the protection of motherhood and the protection for children born outside of marriage originated in the Weimar Constitution of 1919, and were written again into the 1949 West German Basic Law in their present form.¹⁰¹ In the French constitution, Paragraph 11 of the 1946 Preamble articulates the special protection of mothers in the context of pronouncing the Nation's duty towards its most vulnerable members. Paragraph 11 reads:

[The nation] shall guarantee to all, notably to children, mothers and elderly workers, protection of their health, material security, rest and leisure. All people who, by virtue of their age, physical or mental condition, or economic situation, are incapable of working, shall have to the right to receive suitable means of existence from society.¹⁰²

The guarantee of special protection for mothers, often articulated in the context of protections for children, marriage, the family, the elderly, or the disabled, are very common in the constitutions of the formerly communist Eastern European countries. Bulgaria,¹⁰³ Croatia,¹⁰⁴ the Czech Republic,¹⁰⁵ Hungary,¹⁰⁶

101. See ROBERT G. MOELLER, *PROTECTING MOTHERHOOD: WOMEN AND THE FAMILY IN THE POLITICS OF POSTWAR WEST GERMANY* 38-75 (1993).

102. 1958 CONST. preamble ¶ 11 (Fr.).

103. CONST. art. 47(2) (Bulg.).

104. CONST. art. 65 (Croat.).

105. Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], Charter of Fundamental Rights and Basic Freedoms, ch. 4, art. 29(1), 32(2).

106. MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNYE, art. XIX.

Lithuania,¹⁰⁷ Poland,¹⁰⁸ and Slovakia¹⁰⁹ all have such provisions. But explicit constitutional protection of mothers or pregnant women can be found in the constitutions of Italy,¹¹⁰ Ireland,¹¹¹ and Greece¹¹² as well.

Many European constitutions have provisions that guarantee formal equality and non-discrimination, and further provisions that separately address some form of substantive equality between men and women. The maternity protection clause is also very common. As Part III will illustrate, these clauses evolved to encompass a vision of women's constitutional equality that responds to the concerns of the ERA revival. Belgium, Finland, Italy, Portugal, Greece, Germany, and France have added sex equality amendments to their constitutions since the 1990s. These amendments legitimize and encourage government initiatives to promote women's participation in political and economic life. In some jurisdictions, these amendments have also catalyzed reforms intended to reduce women's disadvantages and burdens stemming from motherhood and caregiving.

III. FROM ANTIDISCRIMINATION TO ACTUAL EQUALITY: TWO JURISDICTIONS WITH RECENT AMENDMENTS

I now present a more focused, textured portrait of the evolution of constitutional sex equality and the trajectory of sex equality amendments in two jurisdictions, Germany and France. The focus on Germany and France might be criticized as comparativism of the cherry-picking variety. But cherry-picking is sometimes appropriate, depending on one's purpose. When one's purpose is not to identify a global consensus on sex equality, but rather to study thoughtful approaches to a set of legal problems, focusing on well-theorized examples ("cherries") is what one must do.¹¹³ Warnings against comparing apples to oranges justify similar caution when comparing cherries to apples or oranges. Looking to Germany and France does not entail the proposition that what has worked in these places will work in the United States. The purpose of looking beyond our borders is to engage real-world examples of post-industrial gender constitutionalism as an imagination-broadening exercise. Germany and France

107. CONST. art. 39 (Lith.). This provision entitles working mothers to "paid leave before and after childbirth as well as favourable working conditions and other concessions."

108. CONST. art. 71 (Pol.) ("A mother, before and after birth, shall have the right to special assistance from public authorities, to the extent specified by statute.").

109. CONST. art. 41(2) (Slovk.) ("Pregnant women shall be entitled to special treatment, terms of employment, and working conditions.").

110. Costituzione [Const.] art. 37 (It.) ("Working conditions must allow women to fulfil their essential role in the family and ensure the appropriate protection for the mother and child.").

111. Constitution of Ireland 1937 art. 41(2)(2) ("The State shall, therefore, endeavor to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties at home.").

112. 1975 SYNTAGMA [SYN.] [CONSTITUTION] 21(1) (Greece).

113. See discussion *supra* text accompanying notes 64 to 67.

are good examples because they both shared some (but not all) things in common with the United States regarding the legal status of women in constitutional law in the 1970s and 1980s. In addition, they are both examples of jurisdictions which have developed a constitutional discourse around some of the gender inequalities focused on by today's American ERA activists, such as pay inequity, the persistence of traditional gender roles in the family, and the underrepresentation of women in positions of power. Germany and France have both moved away from the 1970s and 1980s concerns with scrutinizing sex classifications in the law towards a vision of sex equality as a principle that government must make real. In Germany, the maternity protection clause is construed together with the non-discrimination and substantive equality clauses. In France, sex equality is becoming a legitimizing constitutional principle rather than a judicially enforceable fundamental right. While both of these jurisprudential moves may at first glance seem to weaken women's rights to equality, I shall highlight their advantages. The shift from strict scrutiny towards a critical appreciation of motherhood's effects on women's economic and political participation, and the shift from rights to principles, have laid a constitutional foundation for public policies that enable men to do more caregiving, accommodate pregnancy, and increase women's representation in decisionmaking positions.

A. Germany

1. The 1950s: Antidiscrimination and Traditional Gender Roles

Article 3(2) of the German constitution has stated that "men and women shall have equal rights" since 1949.¹¹⁴ There is an additional section in Article 3(3), also adopted in 1949, which prohibits discrimination on the basis of sex as well as other characteristics: "No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland, and origin, faith, or religious or political opinions." Germany's 1949 constitution had founding mothers as well as founding fathers. They worried that the non-discrimination guarantee in Article 3(3) would be inadequate.¹¹⁵ Article 3(2) emerged as a result of a campaign by feminists. Elisabeth Selbert, a member of the Social Democratic Party and one of the four women who served on the Parliamentary Council for the drafting and adoption of the new Basic Law, played a pivotal role in the adoption of Article 3(2).¹¹⁶ Selbert believed that Article 3(2) was intended

114. For the period from 1949 to German reunification in 1994, my references to the German constitution or Federal Constitutional Court are intended to refer to the West German constitution and court.

115. See Ninon Colneric, *Making Equality Law More Effective: Lessons from the German Experience*, 3 CARDOZO WOMEN'S L.J. 229, 230 (1996).

116. See Justice Renate Jaeger, *The Federal Constitutional Court: Fifty Years of the Struggle for Gender Equality*, 2 GERMAN L.J. 35 (2001) available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=35>; Susanne Baer, *The Basic Law at 60*

to guarantee equality by recognizing differences,¹¹⁷ notwithstanding the language of Article 3(3) which appeared to prohibit all differences in treatment based on sex. Nonetheless, the Federal Constitutional Court long treated Article 3(2) (“equal rights”) and Article 3(3) (“nondiscrimination”) as having the same legal effect and meaning.¹¹⁸

From the early 1950s, the Federal Constitutional Court read both Articles 3(2) and 3(3) as merely prohibiting *unjustified* differential treatment of women and men. In its jurisprudence, it permitted some forms of sex-based differential treatment, invoking biological and functional differences that made men and women differently situated. In 1953, for instance, the Federal Constitutional Court pointed to maternity as a biological difference that justified women’s special treatment, which was bolstered by Article 6(1) of the Constitution, the clause protecting marriage and the family.¹¹⁹ Using this logic, in 1956, the Federal Constitutional Court upheld a labor code provision limiting the working hours of women.¹²⁰ Invoking the same principle, the Constitutional Court in 1957 held that penal provisions against male homosexuality did not violate the equality and non-discrimination guarantees in Article 3(2) and 3(3), in an opinion that catalogued a wide array of expert and scientific opinions on the different social threats posed by male and female homosexuality.¹²¹ The cases of the 1950s construed the Article 3(2) equality of rights guarantee as doing no more than prohibiting discrimination, and the Article 3(3) antidiscrimination guarantee as permitting different treatment pursuant to review similar to American rational basis review. Nonetheless, even under this regime, the Federal Constitutional Court declared in 1959 that men and women were equal in marriage, and struck down Civil Code provisions that accorded more weight to fathers than to mothers in the exercise of parental authority over minor children in the event of disagreements between the parents.¹²²

2. Heightened Scrutiny for Sex Distinctions from the 1970s to the 1990s

Continuing in this vein, in the 1960s and 1970s, the German Federal Constitutional Court more frequently rejected statutes that treated men and women differently. The sex equality jurisprudence of Article 3 evolved similarly to that of the U.S. Supreme Court’s Equal Protection sex cases. For instance, in

– *Equality and Difference: A Proposal for the Guest List to the Birthday Party*, 11 GERMAN L.J. 67, 70 (2010).

117. Baer, *supra* note 116, at 70.

118. See Colneric, *supra* note 115, at 231.

119. BVERFG 3, 225 (1953), ¶ 42.

120. BVerfG 1 BvR 53/54, May 25, 1956). For a discussion of regulation of women’s work during this period, see Dagmar Schiek, *Lifting the Ban on Women’s Night Work in Europe: A Straight Road to Equality in Employment?* 3 CARDOZO WOMEN’S L.J. 309 (1996).

121. BVERFG 6, 389 (1957).

122. BVERFG 10, 59 (1959).

1974, the Constitutional Court, invoking Article 3(2), invalidated a statutory provision that had granted German citizenship to the illegitimate child of a German father and foreign mother, but withheld citizenship from the illegitimate child of a German mother and foreign father, except when the child would be otherwise stateless.¹²³ In 1977, the court departed from the notion that “functional” differences between men and women, including women’s traditional caregiving role, could justify sex-based differences in treatment.¹²⁴ During this period, the court applied heightened scrutiny to statutory sex distinctions, and rejected justifications for differential treatment that perpetuated the traditional sex roles that had led to women’s inequality.¹²⁵ This line of cases culminated in the 1991 decision on married names, in which the Federal Constitutional Court struck down a Civil Code provision that treated the husband’s birth name as the default name to be taken as a married couple’s family name in the event that the spouses failed to make a specific declaration of their chosen married name.¹²⁶ The court held that this provision was incompatible with the “equality of rights” guarantee in Article 3(2).

The Court also began to work out the relationship between the gender equality and non-discrimination guarantees in Article 3 and the special protection of mothers in Article 6(4). In 1979, the Federal Constitutional Court invoked Article 6(4) to invalidate a provision of the Maternity Protection Law for insufficiently protecting a pregnant employee from dismissal.¹²⁷ The statute generally prohibited the dismissal of pregnant employees and made such dismissals void only if the employer knew of the pregnancy or was informed of it within two weeks of the pregnant worker’s dismissal. A terminated female employee had informed her employer immediately after she found out that she was pregnant (but more than two weeks after the dismissal), in an effort to invalidate her dismissal. In this case, the Court seems to view pregnancy as a disadvantage that the employer must accommodate pursuant to the maternity protection clause. The maternity protection clause obligates the state to protect pregnant workers by accommodating them, beyond merely prohibiting discrimination against the pregnant woman.

In the late 1980s, the Federal Constitutional Court suggested that the “equal rights” guaranteed in Article 3(2) went beyond prohibiting discrimination as articulated in Article 3(3). In 1987, a male complainant challenged a social security statute that granted women the right to old-age pensions from the age of 60, whereas men had to wait until the age of 65 to access their pensions. The constitutional complaint was rejected, and the differential treatment was upheld,

123. BVERFGE 37, 217 (1974).

124. See ANNE PETERS, WOMEN, QUOTAS, AND CONSTITUTIONS 159 (1999) (citing BVERFGE 43, 213, 225-26 (1977)).

125. See Jaeger, *supra* note 116.

126. BVERFGE 84, 9 (1991).

127. BVERFGE 52, 357 (1979).

on the grounds that “social considerations,” namely the “double burden” sustained by working women as a result of their traditional caregiving role, justified the differential treatment. There was no discrimination on grounds of sex under Article 3(2) or 3(3) in the event of a measure aiming to compensate disadvantages associated with the double burden.¹²⁸ In 1991, in the context of German reunification, a law abolishing various civil service positions in the former East Germany was held unconstitutional on the grounds that it failed to sufficiently protect pregnant employees from dismissal and was therefore contrary to Article 6(4).¹²⁹ In a jurisprudential context where the duty to protect mothers and pregnant workers is enforced and recognized, it goes without saying that at least some special legal protections for pregnant women and mothers can be adopted without running afoul of equality guarantees.

At the same time, the Court continued to scrutinize sex classifications, and it decided a landmark case in 1992 applying heightened scrutiny to a sex classification, parallel to the U.S. Supreme Court’s landmark decision in *United States v. Virginia*. There, the German Constitutional Court struck down a statute prohibiting women’s nighttime employment. The law had been defended as a protection of women, who were assumed to be more susceptible to harm by night work due to women’s daytime responsibilities for child-rearing. In striking down the ban, the Court explained that it was not merely the sex classification that rendered the law unconstitutional under Article 3(3),¹³⁰ but that the operation of the law undermined women’s factual equality, which must be protected under Article 3(2):

Insofar as investigations show that women are more seriously harmed by night work, this conclusion is generally traced to the fact that they are also burdened with housework and child rearing. . . . Women who carry out these duties in addition to night work outside the home . . . obviously suffer the adverse consequences of nocturnal employment to an enhanced degree. . . . But the present ban on night work for all female labourers cannot be supported on this ground, for the additional burden of housework and child rearing is not a sufficiently gender specific characteristic.¹³¹

In addition to recognizing the changing roles of men and women in relation to housework and child rearing, the Court was also concerned with the effects of the ban on night work on women’s economic opportunities. The Court framed

128. BVERFGE 74, 163 (1987). The decision focuses on Article 3(2), and highlights not only women’s double burden, but also other disadvantages faced by women in employment.

129. BVerfG, 1BvR 1341/90 (1991), http://www.bverfg.de/e/rs19910424_1bvr134190.html.

130. “Not every inequality based on sex offends Article 3(3).” See BVERFGE 85, 191 (1992). (Trans. Donald Kommers, German Law Archive), <http://www.iuscomp.org/wordpress/?p=79>.

131. *Id.*

women's access to employment as a primary concern of Article 3(2)'s guarantee of equal rights:

The infringement of the discrimination ban of Article 3(3) is not justified by the equal opportunity command of Article 3(2). The prohibition of night work . . . does not promote the goals of this provision. It is true that it protects a number of women . . . from nocturnal employment that is hazardous to their health. But this protection is coupled with significant disadvantages: Women are thereby prejudiced in their search for jobs. They may not accept work that must be done even in part at night. In some sectors this has led to a clear reduction in the training and employment of women. In addition, women labourers are not free to dispose as they choose of their own working time. One result of all this may be that women will continue to be more burdened than men by child rearing and housework in addition to work outside the home, and that the traditional division of labour between the sexes may be further entrenched. To this extent the prohibition of night work impedes the elimination of the social disadvantages suffered by women.¹³²

Thus, what emerges from the night work case is an approach that permits the differential treatment of men and women under Article 3(3) when that differential treatment furthers the goals of equal rights as articulated in Article 3(2). The Court noted that the sentence "Men and women shall have equal rights" "is designed not only to do away with legal norms that base advantages or disadvantages o[n]sex but also to bring about equal opportunity for men and women in the future. It is aimed at the equalization of living conditions."¹³³ It was "a constitutional mandate to foster equal standing of men and women . . . that extends to social reality."¹³⁴

3. The "Actual Implementation of Equal Rights": Amendment, Affirmative Action, and Disparate Impact

The night work case was part of a growing legal and political discourse concerning the legitimacy of affirmative action for women, including gender quotas in the civil service. The issue became salient in the context of German reunification, in part because women in East Germany had been employed in higher proportions than women in West Germany. In any case, as reflected in the language of the night work case, many advocates of women's rights believed that Article 3(2) went beyond Article 3(3) by imposing an affirmative duty on the state to promote women's equal standing as a matter of social reality. If this

132. *Id.*

133. *Id.*

134. *Id.* For a discussion of how this case read actual implementation of equal rights into Article 3(2), even before the 1994 amendment, see PETERS, *supra* note 124, at 161.

meant that the state had a duty to promote women's advancement to achieve their factual equality, some believed that this created a justiciable right to affirmative action for women. At the very least, Article 3(2) appears to permit measures to achieve factual equality. However, others continued to assert that Article 3(2) did not go beyond Article 3(3), such that Article 3(3)'s prohibition of discrimination was a mere restatement of what "equal rights" in Article 3(2) required. Strictly construed, a prohibition of different treatment on the basis of sex would not permit measures to promote equality if they distributed privileges or burdens on the basis of sex.

The opportunity to clarify this debate emerged in the context of negotiating German reunification in the early 1990s. Article 5 of the 1990 Treaty on Reunification addressed future amendments to the Constitution. It recommended that the legislative bodies of the United Germany consider constitutional amendments on various subjects, including "considerations on introducing state objectives into the Basic Law."¹³⁵ Article 31 of the Unification Treaty, on "Family and Women," declared, "It shall be the task of the all-German legislator to develop further the legislation on equal rights for men and women."¹³⁶ It continued: "In view of different legal and institutional starting positions with regard to the employment of mothers and fathers, it shall be the task of the all-German legislator to shape the legal situation in such a way as to allow reconciliation of family and occupational life."¹³⁷ The Joint Commission on Constitutional Reform proposed an amendment that would nudge the legislator to adopt public policies towards these goals. That amendment became the second sentence of Article 3(2): "The State shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist."¹³⁸

In the late 1990s, the Federal Constitutional Court for the reunified Germany also recognized the disparate impact theory. The Court recognized disparate impact as a theory of discrimination under Article 3(3) of the Basic Law. It cited the European Court of Justice's indirect discrimination jurisprudence. Under review was a pension scheme for Hamburg civil service employees that excluded part-time workers who worked less than half of normal working hours. The German Constitutional Court noted that Article 3(3) prohibited discrimination on grounds of sex, and determined that sex discrimination can be present "when

135. Einigungsvertrag [Unification Treaty], Aug. 31, 1990, BGBl II, 885, 889 at art. 5 (Ger.).

136. *Id.* at art. 31(1).

137. *Id.* at art. 31(2).

138. GRUNDGESETZ [GG], art. 3(2). Nonetheless, conflicts about the permissibility of gender quotas continued through references and litigation before the European Court of Justice. The European Court initially invalidated a civil service gender quota adopted in the German Land of Bremen, but later upheld preferences for the underrepresented sex as long as the candidate was equally qualified and the rejected male candidate had an opportunity to show that special circumstances tilted the balance in his favor. *See Kalanke v. Freie Hansestadt Bremen*, 1995 E.C.R. I-03051; *Marschall v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-06363; *Badeck v. Hessen*, 2000 E.C.R. I-01875.

a gender neutral regime mainly affects women and this is due to natural or social differences between the sexes.”¹³⁹ The Court then found that the statistical evidence did not show that the percentage of women in the group of under-half-time employees was greater than that in the more-than-half-time employees. Nonetheless, the Court then resorted to the general equality guarantee in article 3(1), which guarantees equality to all persons without reference to sex or other protected characteristics. Hamburg’s pension scheme treated unequally two classes of persons without sufficient justification, and therefore violated Article 3(1).

In 2006, the Federal Constitutional Court brought together the maternity protection guarantee of Article 6(4) with the duty to reduce existing disadvantages of Article 3(2), diminishing the formal guarantee of equality before the law in Article 3(1). The 2006 decision held that mothers’ constitutional entitlement to protection of the state was violated when their time on mandatory maternity leave was not taken into account in calculating the qualifying period for their statutory unemployment insurance.¹⁴⁰ In Germany, the maternity leave statute requires pregnant women to take maternity leave for six weeks before and eight weeks after childbirth, during which they receive maternity pay with contributions from both the employer and the state.¹⁴¹ However, this time was not treated as time worked for purposes of calculating unemployment insurance eligibility. The Constitutional Court noted that this framework violated the equality guarantee of Article 3(2) and 3(3). Because mandatory maternity leave only affects women, “Article 3(2) of the Basic Law imposes on the legislature an obligation to pass provisions that put women during the prohibition of employment in the same position as if there were no prohibition of employment.”¹⁴²

4. The Constitutional Rights Norm of Equal Rights: A Focus on Equal Parenting

The second sentence of Article 3(2) regarding the “actual implementation” of equal rights articulates what Robert Alexy calls a “constitutional rights

139. BVerfG, 1 BvL 12/91, Nov. 27, 1997, <http://sorminiserv.unibe.ch:8080/tools/ainfo.exe?Command=ShowPrintVersion&Name=bv097035>.

140. BVERFG, 1BvL 10/01, March 28, 2006, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2006/03/lS20060328_1bvI001001.html.

141. Whereas mandatory maternity leave is fairly common in European countries, including France, requiring pregnant women to take leave has been held to violate due process in the United States. For a discussion of this contrast, see Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 26-27, 51-52 (2010); and Julie C. Suk, *From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe*, 60 AM. J. COMP. L. 75, 78 (2012).

142. BVERFG, 1BvL 10/01, *supra* note 140, at margin number 49.

norm.”¹⁴³ The equality of rights between men and women is a goal that the government is directed by the Constitution to realize, and a principle that can limit the exercise of other enforceable rights.¹⁴⁴ Individuals do not enforce an entitlement to actual implementation of equality through the constitutional complaints procedure, but the Constitutional Court can rely on the clause to limit the scope of other constitutional rights that constitutional complainants can invoke. Additional examples of government goals that function this way in German constitutional enforcement include European integration, environmental protection, and the principle of the social state. The constitutional principle of “actual implementation of equal rights” thus clearly articulates a compelling state interest, in American parlance, which can then be weighed when individuals assert other enforceable constitutional entitlements, such as their right to equal treatment under Article 3(1) and their right not to be favored or disfavored on account of sex under Article 3(2).

Thus, the primary enforcer of the constitutional right to “actual implementation of equal rights” is the legislature. In 1999, a Cabinet Resolution invoked the state aim established in Article 3(2) to declare equality between men and women to be a universal guiding principle for its actions.¹⁴⁵ In 2001, the legislature adopted the Federal Equality Law on the Equality of Men and Women in Federal Administration and Courts.¹⁴⁶ In departments where women are underrepresented, women with equal qualifications must be given preferential consideration for training, jobs, and promotions, taking individual circumstances into account. The statute also established rights to part-time work and tele-work to promote the compatibility of work and family life. It requires gender equality plans within administrative units, including a stipulation that when a unit is downsizing, its proportion of women must be maintained. More recently, the German Parliament also adopted a law imposing gender quotas on corporate boards of directors in March 2015.¹⁴⁷ Germany joins Norway, France, the

143. ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 362 (Julian Rivers trans., 2002).

144. See PETERS, *supra* note 124, at 162 (citing BVERFGE 85, 191, 209 (1992)).

145. See Kabinettsbeschluss der Bundesregierung vom 23 Juni 1999 (Cabinet Resolution of the Federal Government of June 23, 1999) (Ger.). For a discussion of how this Cabinet Resolution invoked the new gender equality amendment of 1994 as a constitutional principle that should guide legislative action to promote gender equality, see Bundesministerium für Familien, Senioren, Frauen, und Jugend, Strategie “Gender Mainstreaming,” [Federal Ministry for Families, Seniors, Women, and Youth, “Gender Mainstreaming” Strategy], Feb. 19, 2016, <https://www.bmfsfj.de/bmfsfj/themen/gleichstellung/gleichstellung-und-teilhabe/strategie-gender-mainstreaming/strategie—gender-mainstreaming-/80436?view=DEFAULT>.

146. Gesetz zur Gleichstellung von Frauen und Männern in der Bundesverwaltung und in den Gerichten des Bundes (Bundesgleichstellungsgesetz – BGleG), Nov. 30, 2001, BGBl I at 3234, http://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F%5B%40attr_id%3D%27bgbl101s3234.pdf%27%5D#_bgbl_%2F%2F%5B%40attr_id%3D%27bgbl101s3234.pdf%27%5D_1478738905246.

147. Gesetz für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst, Apr. 24, 2015, http://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F%5B%40attr_id%3D%27bgbl115s0642.pdf%27%5D#_bgbl_%2F%2F%5B%40attr_id%3D%27bgbl115s0642.pdf%27%5D_1478738671124.

Netherlands, Italy, Belgium, and Spain in adopting some form of gender balance rule for corporate boards.¹⁴⁸

As gender quotas aimed to increase women's participation in the economic sphere, other new statutes aimed to increase men's participation in the family caregiving sphere. The 1994 amendment has been the basis for recent Constitutional Court decisions upholding these statutes against constitutional challenges. The Federal Parental Benefit and Parental Leave Law¹⁴⁹ adopted various measures consciously intended to encourage fathers to take parental leave so that men and women would share in caregiving more equally. The law entitles new parents to twelve months of paid parental leave, which can be taken by one parent or shared by the two. If the two parents share the leave, an additional two months of paid leave become available.¹⁵⁰ In Germany, a parental benefit is available upon birth of a child, regardless of whether the parent worked before the birth of a child. Before the 2006 reform, the benefit was calculated on a sliding scale basis, with higher benefits for lower-income families. Under the 2006 reform, the amount of the monthly allowance is calculated based on the salary the parent taking the parental leave earned before the birth of the child.¹⁵¹ A parent who did not work before the leave receives the minimum amount, but a parent who is taking time off work gets a higher benefit according to salary.¹⁵² The purpose is to incentivize the higher-wage parent—typically the father—to take parental leave.

Another statutory intervention to encourage women's labor market participation was the creation of a legally enforceable entitlement, as of 2013, to a public daycare placement for any child over the age of twelve months.¹⁵³ The political discourse surrounding public daycare also invoked Germany's low birth rates. The political agenda explicitly aimed at reconciling work-family conflict in order to respond to the fertility crisis of "Shrinking Germany." As part of this campaign, Chancellor Angela Merkel also promoted the lengthening of the school day to enable more women to work full-time. Overall, legislative activity to enforce the 1994 sex equality amendment has included affirmative action to increase women's presence in the public and economic spheres, and measures to increase men's presence in the family and private spheres.

The Federal Constitutional Court has explicitly linked policies that encourage care of children by fathers and by public institutions to the

148. For accounts of corporate board gender quota laws, see AARON DHIR, *CHALLENGING BOARDROOM HOMOGENEITY* (2015); Julie C. Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards*, 10 INT'L J. CONST. L. 449 (2012).

149. Gesetz zum Elterngeld und zur Elternzeit (Bundeselterngeld- und Elternzeitgesetz – BEEG), Dec. 5, 2006, BGBl I, at 2748.

150. *Id.* § 4.

151. BEEG, *supra* note 149, § 2, ¶ 7.

152. *Id.* § 2, ¶ 5.

153. Sozialgesetzbuch [SGB VIII] [Social Code VIII], § 24 (Ger.), https://www.gesetze-im-internet.de/sgb_8/.

constitutional duty to promote actual sex equality. In a pair of cases in 2011, individual women complainants brought constitutional challenges against some features of the 2006 parental leave reform, claiming that the law violated their constitutional rights to equal treatment and family autonomy. In the first case, a woman claimed that calculating the parental benefit based on the previous salary of the parent taking leave amounted to an unjustified unequal treatment before the law in violation of both Articles 3(1) and 3(2).¹⁵⁴ The legal theory sounds in disparate impact: Since a neutrally formulated rule (benefit based on salary of leave-taking parent) effectively lowers the benefit for women, in light of women's greater likelihood of drawing a lower salary or no salary, the benefit scheme is discriminatory. The Constitutional Court rejected her claim, viewing the policy as incentivizing men to do more caregiving in order to reduce women's disadvantages in the economic sphere and thus found no violation of 3(1) or 3(2).

In the next case challenging the 2006 Parental Benefit and Parental Leave statute,¹⁵⁵ another mother challenged the policy of extending the length of leave only if both parents take leave. She wanted to take the full fourteen months, and argued that the 2006 law violated the constitutional protection of marriage and the family because it conditioned the availability of the additional two months on the father taking some leave. She argued that the baby, who was born pre-term, needed special care that only she as the mother could provide. A lower court had held that the state violated the married couple's constitutional right to decide for themselves how to allocate care within the family in its efforts to incentivize paternity leave. The Federal Constitutional Court rejected her claim, noting that the state had a duty under Article 3(2) to implement actual equality for men and women. The legislature could thus combat traditional gender roles in the family. Because men were subject to social pressure based on traditional gender roles against taking paternity leave, the policy was upheld as a vindication of the legislature's duty.¹⁵⁶

Finally, the Federal Constitutional Court struck down a provision of the 2013 amendment to the Parental Benefit and Parental Leave Law, which provided a childcare allowance of € 150 per month for any parent who took care of their child at home from the ages of 15 to 36 months. That year, another change in law created a legally enforceable entitlement of children to a placement in a public daycare or preschool from the age of 12 months. The Federal Constitutional Court held that, in light of the legally enforceable right to public daycare, the federal government was not constitutionally competent to provide a childcare allowance. The state of Hamburg, in challenging the federal childcare allowance, noted that 94% of parents claiming the care allowance in lieu of public daycare

154. BVerfG, 1 BvR 2712/09, June 6, 2011, http://www.bverfg.de/e/rk20110606_1bvr271209.html.

155. Gesetz § 24 Abs. 2 Satz 1 SGB VIII (Ger.).

156. BVerfG, 1 BvL 15/11, Aug. 19, 2011, http://www.bverfg.de/e/lk20110819_1bv1001511.html.

were women, and argued that the childcare allowance was contrary to Article 3(2) because it incentivized women to stay home to raise children.¹⁵⁷ The Court rejected the childcare allowance based on the constitutional provisions delineating federal power, but it is noteworthy that the litigants characterized the outcome that prevailed as an implementation of the state's constitutional duty to promote gender-equal parenting.

In recent cases on parental benefits, leave, and childcare, the litigants unsuccessfully raised constitutional rights claims to parental autonomy. Under Article 6(1) of the German Basic Law, marriage and the family are entitled to the special protection of the state.¹⁵⁸ The litigants claimed that this entitled parents to decide for their family whether the father should take any parental leave, and whether the mother should stay home instead of working and sending their baby to daycare. Such family privacy claims resonate with the American jurisprudence of Due Process.¹⁵⁹ Nonetheless, the family privacy claims were unsuccessful because they had to be balanced against the constitutional rights norm of "actual implementation of equality for women and men" in Article 3(2). Since families are given financial incentives to choose options that involve female labor market participation and male caregiving, but without being coerced to do so, the Constitutional Court saw the Article 6(1) entitlement as minimally compromised and outweighed by the legislature's duty in Article 3(2).¹⁶⁰

B. France

The French constitution, like the German, contains all three features that function to reduce gender inequalities: nondiscrimination, authorization of special measures to promote sex equality, and protection of mothers. The 1946 Preamble guarantees equality in broad terms to men and women,¹⁶¹ and this has been understood to embody an anti-sex-discrimination norm.¹⁶² France, like Germany, amended its constitution in the 1990s to authorize measures like gender quotas to address women's underrepresentation. The French constitution also contains a postwar clause that articulates a duty on the part of the state to

157. BVerfG, 1 BvF 2/13, July 21, 2015, http://www.bverfg.de/e/fs20150721_1bvf000213.html.

158. Grundgesetz [GG] [BASIC LAW], art. 6(1) (Ger.).

159. *E.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). With regard to maternity leave, the U.S. Supreme Court held mandatory maternity leave to violate Due Process, because "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Bd. of Educ. of Cleveland v. LaFleur*, 414 U.S. 632, 639 (1974).

160. See BVerfG, 1 BvR 2712/09, June 6, 2011, http://www.bverfg.de/e/rk20110606_1bvr271209.html; BVerfG, 1 BvR 2712/09, June 6, 2011, http://www.bverfg.de/e/rk20110606_1bvr271209.html.

161. 1958 CONST. 1946 Preamble (Fr.).

162. See, *e.g.*, Conseil constitutionnel [CC] [Constitutional Council] decision No. 81-133DC, Dec. 30, 1981 (Fr.).

protect mothers.¹⁶³ Unlike the German Constitutional Court, the French Constitutional Council has decided very few cases interpreting these constitutional provisions with regard to sex equality, because individual and post-hoc constitutional review were not available until the constitutional amendment of 2008. That amendment coincided with an additional gender equality amendment, which rewrote Article 1 to include the paragraph that authorizes gender quotas: “The law shall promote equal access by men and women to the elected offices and posts as well as to positions of professional and social responsibility.”¹⁶⁴

1. Formal Constitutional Equality in 1982

In France, the constitutional amendments of 1999 and 2008 removed doubt about the compatibility of gender-conscious interventions with other constitutional guarantees of equality and non-discrimination. It is worth rehearsing the history of these two amendments to understand why they were thought to be necessary. The French constitution, in addition to the specific mentions of equality between men and women in the 1946 Preamble and recent amendments, contains other guarantees of equality. Article 6 of the Declaration of the Rights of Man, a provision which is frequently invoked before the Constitutional Council, provides:

The Law is the expression of the general will. All citizens have the right to take part, personally or through their representatives, in its making. It must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes, shall be equally eligible to all high offices, public positions and employments, according to their ability, and without other distinction than that of their virtues and talents.¹⁶⁵

Because Article 6 states that the law must be the same for all, whether it protects or punishes, and makes all citizens equally eligible for public positions, the Constitutional Council invoked it, along with other provisions on the indivisibility of sovereignty, to strike down a gender quota law in 1982.¹⁶⁶ The repudiated law had prohibited political parties from running more than seventy-five percent of candidates of one gender in municipal elections.¹⁶⁷

163. 1958 CONST. 1946 Preamble ¶ 11.

164. 1958 CONST. art. 1 (amended 2008).

165. 1789 DECLARATION OF THE RIGHTS OF MAN art. 6.

166. Conseil Constitutionnel [CC] [Constitutional Council] decision No. 82-146 DC, Nov. 18, 1982.

167. *Id.*

2. *Feminist Mobilization: From Antidiscrimination to Parity Democracy*

Following the 1982 decision by the Constitutional Council, feminists mobilized and created a strong public discourse challenging the underrepresentation of women in Parliament.¹⁶⁸ Whereas the proponents of the 1982 gender quota framed the law as a remedy for discrimination against female politicians, the new discourse that developed in the late 1980s and throughout the 1990s shifted the emphasis from discrimination to democracy. Article 1 of the Declaration of the Rights of Man provides: "Men are born free and equal in rights. Social distinctions may be based only on considerations of the common good."¹⁶⁹ The sex distinctions necessarily employed by a legislated gender quota began to be framed as a social distinction that was premised on the common good of a democratic republic that represents all of humanity. The new discourse of parity envisioned humankind as consisting of two complementary halves—male and female. A democracy lacking in parity between men and women would fail to correspond to this natural and universal fact, and would thereby lack legitimacy. The absence of democratic legitimacy is an obvious problem for state institutions of governance, particularly the legislature, whose legitimacy clearly depends on its ability to represent its constituents.

The 1999 amendment to the French constitution was an attempt to transform the meaning of constitutional equality arrived at by the Constitutional Council in 1982. Thus, it focused on the issue of gender representation in elected office. The 1999 amendment authorized statutes to promote equal access by men and women to the electoral mandate and elected offices.¹⁷⁰ The following year, legislation was introduced to require gender parity in parties' selection of candidates. The law prohibited a difference greater than one in the number of female and male candidates.¹⁷¹ This gender quota was also challenged by the political opposition in 2000 on the grounds that a hard quota exceeded the legislature's authority to promote equal access to elected offices. This time, the Constitutional Council upheld the new quota, acknowledging that the 1999 Amendment permitted the legislature to adopt strong measures, even those that departed from universalism,

168. A major book articulating the goals of this movement was FRANÇOISE GASPARD, CLAUDE SERVAN-SCHREIBER & ANNE LEGALL, *AU POUVOIR, CITOYENNES! LIBERTÉ, EGALITÉ, PARITÉ* (1989); see also SYLVIANE AGACINSKI, *PARITY OF THE SEXES* (Lisa Walsh trans., 1999); JOAN SCOTT, *PARITÉ!* (2002); Eric Millard, *Constituting Women: The French Ways, in THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* 122 (Beverly Baines & Ruth Rubio-Marin eds., 2005).

169. 1789 DECLARATION OF THE RIGHTS OF MAN art. 1.

170. Loi constitutionnelle 99-569 du 8 juillet 1999 relative à l'égalité entre les femmes et les hommes [Constitutional Law 99-569 of July 8, 1999 on Equality Between Women and Men], *JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE* [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 9, 1999, p. 10175.

171. Loi 2000-493 du 6 juin 2000 tendant à favoriser l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives [Law 2000-493 of June 6, 2000 Aiming to Promote Equal Access by Women and Men to Electoral Mandates and Elected Positions], *JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE* [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 7, 2000, p. 8560, tit. I, arts. 1-8.

to render effective the constitutionally prescribed norm of equal access by women and men to the electoral mandate and elected office.¹⁷²

Nonetheless, when the legislature adopted a law that imposed gender quotas on corporate boards of directors in 2006,¹⁷³ the Constitutional Council invalidated it, reading the 1999 amendment as addressing equal access by men and women only to the electoral domain, and not to other decisionmaking powers.¹⁷⁴ It was in reaction to the 2006 Constitutional Council decision that the more comprehensive amendment of 2008 was proposed,¹⁷⁵ authorizing the legislature to promote equal access by women and men to positions of professional and social responsibility, in addition to elected offices. Perhaps of greater importance, albeit largely symbolic, is the placement of this constitutional provision in Article 1 of the constitution, which declares the most fundamental values by which the republic is constituted. Indeed, paragraph 1 of Article 1 states: "France shall be an indivisible, secular, democratic and social republic. It shall ensure equality before the law, without distinction of origin, race, or religion. It shall respect all beliefs. It shall be organized on a decentralized basis."¹⁷⁶ The second paragraph then states: "Statutes shall promote equal access by women and men to elective offices and posts as well as to professional and social positions."¹⁷⁷

3. Legislating "Real Equality"

This 2008 amendment set off a flurry of legislative activity over the last few years to promote gender equality. Almost immediately, a law requiring gender quotas on corporate boards of directors was reintroduced,¹⁷⁸ very similar to the one that was struck down in 2006.¹⁷⁹ The new statute, adopted in 2011, provided that, by 2017, the proportion of board members of each sex could not be less than

172. Conseil Constitutionnel [CC] [Constitutional Council] decision No. 2000-429, May 30, 2000, ¶ 7.

173. Projet de loi relatif à l'égalité salariale entre les femmes et les hommes, adopté, dans les conditions prévues à l'article 45, alinéa 3, de la Constitution par l'Assemblée nationale le 23 février 2006, http://www.assemblee-nationale.fr/12/dossiers/egalite_salariale_femmes_hommes.asp.

174. Conseil Constitutionnel [CC] [Constitutional Council] decision No. 2006-533DC, Mar. 16, 2006.

175. Loi constitutionnelle 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République (1), [Constitutional Law 2008-724 of July 23, 2008 on the Modernization of the Institutions of the Fifth Republic], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 24, 2008, p. 11890, art. 1.

176. 1958 CONST. art. I, ¶ 1 (amended 2008).

177. *Id.*

178. Loi 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle (1), [Law 2011-103 of January 27, 2011 on the balanced representation of women and men on administrative and supervisory boards and on professional equality], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 28, 2011, p. 1680.

179. See Projet de loi relatif à l'égalité salariale entre les femmes et les hommes, *supra* note 173.

40%.¹⁸⁰ Several statutes and regulations that imposed gender quotas in many other decisionmaking bodies followed. For example, a 2012 law provided that various civil service governing bodies could not be less than 40% of each sex.¹⁸¹ A 2013 statute reforming higher education provided that certain committees within higher education institutions had to achieve parity between women and men in composition.¹⁸² Also in 2013, the existing parity rules in regional and municipal elections were strengthened, requiring political parties' candidate lists to strictly alternate male-female in a wider range of elections.¹⁸³

In 2014, the French legislature adopted a comprehensive gender equality statute,¹⁸⁴ asserting a mandate emanating from the 2008 constitutional amendment.¹⁸⁵ The statute, on "Real Equality Between Women and Men," included an expansion of abortion rights, measures to reduce the gender pay gap, reform of parental leave to incentivize equal caregiving by fathers and mothers, aid to victims of violence against women, and gender balance rules in new institutional settings where they had not previously applied. A Senate report introducing the legislation begins by pointing to the constitutional promise of sex equality in Article 3 of the 1946 Preamble.¹⁸⁶ This provision, in addition to the 2008 amendment and several EU directives, are cited as sources of a legislative mandate to adopt a comprehensive approach to gender equality in all the many different domains of social, political, and economic life in which sex inequality is produced.¹⁸⁷ The most significant reforms in this statute, on "professional equality between women and men," address the disadvantaging effects of women's disproportionate share of work within families and households on women's careers.¹⁸⁸ Thus, there are many new provisions, largely inspired by

180. See Loi 2011-103 du 27 janvier 2011, *supra* note 178, at art. 1.

181. Loi 2012-347 du 12 mars 2012 relative à l'accès à l'emploi titulaire et à l'amélioration des conditions d'emploi des agents contractuels dans la fonction publique, à la lutte contre les discriminations et portant diverses dispositions relatives à la fonction publique [Law 2012-347 of March 12, 2012 on Tenured Employment and the Improvement of Employment Conditions of Contractual Agents in the Civil Service, on the Fight Against Discrimination and Imposing Various Measures Relating to the Civil Service], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 13, 2012, p. 5598, at art. 52-56.

182. Loi 2013-660 du 22 juillet 2013 relative à l'enseignement supérieur et à la recherche (1), [Law 2013-660 of July 22, 2013 on Higher Education and Research (1)], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jul. 23, 2013, p. 12235, at art. 50.

183. Loi 2013-403 du 17 mai 2013 relative à l'élection des conseillers départementaux, des conseillers municipaux et des conseillers communautaires, et modifiant le calendrier électoral, [Law 2013-403 of May 17, 2013 on the Election of Regional Councilmembers, Municipal Councilmembers, and Community Councilmembers, and Modifying the Electoral Calendar], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], J.O., Mar. 18, 2013, p. 8242, at art. 3.

184. Loi 2014-873 du 4 août 2014 pour l'égalité réelle entre les femmes et les hommes (1) [Law 2014-873 of August 4, 2014 for Real Equality Between Women and Men (1)], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 5, 2014, p. 12949.

185. Etude d'impact, Projet de loi pour l'égalité entre les femmes et les hommes, NOR: DFE1313602L/Bleue-1 (July 1, 2013), at I.1.1 (justifying the bill that was eventually adopted in 2014 as an implementation of the 2008 constitutional amendment).

186. See *id.* at 5, 15.

187. *Id.* at 15.

188. Loi 2014-873, *supra* note 184, tit. I.

policies that have been successful in Scandinavian countries and now in Germany, which lengthen paternity leaves and incentivize fathers to take them. Many provisions of the statute, grouped in Title V, impose gender parity rules in new domains, such professional sports organizations, and strengthen mechanisms of enforcing existing political party quotas.¹⁸⁹

The statute includes an abortion reform, which is presented as a measure to promote equality between women and men in professional life. Article 24, in Title I of the statute, amends the abortion law within the Code of Public Health. The Public Health Code had, since 1973, permitted abortion on demand within the first trimester, as long as the pregnant woman certified that the pregnancy put her in “a situation of distress.”¹⁹⁰ The reform at Article 24 abolishes the distress-certification requirement in first trimester abortions, and authorizes abortions in the first trimester for any woman “who does not want to continue a pregnancy.”¹⁹¹

Title II, on “the fight against insecurity,” contains, *inter alia*, special pension benefits for single working parents and financial support for nannies employed by low-income families.¹⁹² Title III aids victims of violence as well as victims of “attacks on dignity and image in communications based on sex.”¹⁹³ Title IV, “on equality between women and men in their relations with the administration,” entitles each person to be addressed by administrative authorities by his or her “family name,” which, under French civil law, is a person’s last name at birth.¹⁹⁴

4. *Not a Fundamental Right: Parity as Principle*

In April 2015, the French Constitutional Council issued an important ruling construing “equal access by men and women” in the 2008 amendment to Article 1. The Constitutional Council declared that “equal access by women and men to professional and social positions” articulated a constitutional goal to be realized by the legislature, and did not create individually justiciable rights. The Constitutional Council articulated this view in the course of ruling on a constitutional complaint brought by opponents of a statutory gender quota that had been added to the Education Code in 2013, requiring gender balance on

189. *Id.*, tit. V.

190. C. SANTÉ PUBLIQUE, art. L 2212-1 (2013).

191. With regard to abortion funding, it should be noted that a 2012 statute authorized 100% reimbursement by the state for all legally permitted abortions. The same statute entitles young people age 15 to 18 to free contraception. *See* Loi 2012-1404 du 17 décembre 2012 de financement de la sécurité sociale pour 2013 [Law 2012-1404 of December 17, 2012 on Social Security Funding for 2013], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 18, 2012, p. 19821, at art. 50, 52.

192. *See* Loi 2014-873, *supra* note 184, tit. II.

193. *Id.*, tit. III.

194. *See id.*, tit. IV art. 59. This provision prohibits communications from public institutions from addressing any person by a married name (“nom d’usage”) unless the concerned person herself uses the married name in written communications.

certain university committees. Individual suits challenging the constitutionality of quotas, brought by persons claiming to be injured by quotas, are a new phenomenon. Due to constitutional reforms of 2008 that occurred simultaneously with the aforementioned gender parity amendment, any individual litigant or criminal defendant may now claim that the application of a statute in his or her case is unconstitutional by utilizing a process called “question prioritaire de constitutionnalité” (QPC).¹⁹⁵

The first QPC action challenging the constitutionality of a gender quota was brought against a minor provision of the Education Code, adopted in 2013, which requires certain university governance committees to be gender-balanced. An organization of university presidents challenged the provision, invoking the equality guaranteed by Article 6 of the Declaration of the Rights of Man, as well as other constitutional principles. The Constitutional Council upheld the gender quota,¹⁹⁶ holding that it was permitted pursuant to Article 1’s command that “[s]tatutes shall promote equal access by women and men to . . . positions of professional . . . responsibility.”¹⁹⁷

The 2013 statute on higher education had only imposed gender parity rules on some, but not all, university governance committees. The statute had generally restructured university governance to consist of several different committees. One of the committees was of a “limited” or ad hoc nature, to be constituted to deliberate on the careers of non-professor researchers (essentially postdoctoral lecturers). For committees formed for this purpose, the statute required “double parity”—an equal number of professors and lecturers, and an equal number of men and women.

The Constitutional Council, in upholding the parity rule, noted that Article 6 of the Declaration of the Rights of Man established a principle of equality that was not opposed to legislation that treated different situations differently, nor to derogations of equality for the common good, provided that the resulting differences of treatment would have a direct correspondence to the purpose of the law that established them. The Constitutional Council was, indeed, repeating language that is found in almost all of its decisions about Article 6. Then, the Constitutional Council identified the purpose of the law as “promoting the equal access of women and men to positions of professional responsibility” with which the parity rule had a direct relationship.

But the more interesting part of the Constitutional Council’s decision consisted of remarks obliquely directed at the intervenors in the QPC proceedings. Although interventions are rare in QPC proceedings to date, the Constitutional Council had authorized an intervention in this action by fifteen

195. See 1958 CONST. art. 61-1 (amended 2008).

196. Conseil Constitutionnel [CC] [Constitutional Council] decision No. 2015-465QPC, Apr. 24, 2015 (Fr.).

197. See *id.* ¶ 13.

academic researchers, some professors and other lecturers, who were members of REGINE, a research group on law and gender.¹⁹⁸ REGINE's brief to the Constitutional Council argued that the 2008 amendment putting equal access by women and men to leadership positions in Article 1 of the constitution had established gender parity as a "foundational rule." What this meant was that (1) Article 1 had to be read as a blanket authorization to Parliament to adopt measures favoring equal access by women and men,¹⁹⁹ essentially validating gender quotas in all domains of social and professional life, and (2) the legislature had an obligation to promote equal access by women and men in university governance committees.

On the second point, the intervenors argued that, if anything, the statute was unconstitutional because it did not go far enough in promoting gender parity. The statute only imposed gender parity on committees limited to deliberating on the careers of lecturers, and not on committees deliberating on the careers of professors. The intervenors recited the Constitutional Council's longstanding equality jurisprudence, which permits different treatment of different situations, as long as the difference of treatment is justified by the law's purpose. Here, the difference of treatment between professors and lecturers could not be justified by the purpose of the law, given that their situations were identical and that the purpose of the law was to promote equal access by women and men to professional positions.

Without much explanation, the Constitutional Council rejected the intervenors' argument. The Constitutional Council simply noted that the law can justifiably treat two committees differently when they are differently situated. Since one committee dealt with lecturers' careers, and the other dealt with professors' careers, there was no equality problem in having different rules for each committee. In effect, the Constitutional Court was rejecting the intervenors' attempt to invoke the 2008 "equal access" amendment to render a statute unconstitutional for its failure to impose more gender parity rules than it had. The Constitutional Council took the opportunity to declare Article 1 to be a constitutional principle, rather than an individual constitutional right that could be enforced pursuant to the QPC procedure, saying: "this provision did not create a right or liberty that the constitution guarantees; such that its misapprehension therefore cannot be invoked to support a preliminary question of constitutionality."²⁰⁰ Thus, the recent constitutionalization of gender equality is a foundational republican principle or goal, and not an individual right.

198. REGINE is an acronym for Recherches et Etudes sur le Genre et les Inégalités dans les Normes en Europe. Consisting largely of feminist law professors, the group is based at the Université de Paris Ouest Nanterre. See REGINE, <http://regine.u-paris10.fr>.

199. REGINE Brief at 4-5, Conseil Constitutionnel decision No. 2015-465 QPC, Apr. 24, 2015 (on file with author).

200. Conseil Constitutionnel decision No. 2015-465QPC, *supra* note 196, at ¶ 14.

This statement is mysterious and unnecessary to the Constitutional Council's decision to uphold the quota. After all, the QPC claimants themselves were not invoking Article 1 as the source of the rights they alleged to be violated; they were relying on Article 6 of the Declaration of the Rights of Man. The intervenors invoked Article 1's parity provision, but they were intervenors, not claimants. More importantly, the intervenors, too, premised their constitutional rights claim primarily on Article 6, not on Article 1. They claimed that, contrary to Article 6 of the Declaration, the statute had treated similarly situated persons (professors and researchers) differently by not imposing parity on committees dealing with professors, without justification. Their legal argument never encompassed the claim that the parity amendment in Article 1 entitled them to parity in all possible situations.

Thus, the Constitutional Council's statement—that parity is not a fundamental right—is superfluous, perhaps a warning to future claimants not to challenge statutes for failing to impose gender balance rules if Article 1 is their only constitutional source. By rejecting the intervenors' Article 6 argument, the Constitutional Council is implicitly holding that Article 6 should not be invoked as a vehicle for invalidating the legislature's interpretation of Article 1. One implication is that future QPC attempts to rely on Article 6, not only by feminists demanding more gender quotas but also by opponents of gender quotas demanding a narrower reading of Article 1, will not be admissible. What this suggests is that the French constitutionalization of gender parity is primarily an enumeration of legislative power and priorities. A powerful transformation has occurred, in reconceptualizing gender parity as a condition to be attained so that the constitutional order of a democratic republic can flourish, rather than an individual right. This idea can inform the way American feminists imagine the political and legal function of Equal Rights Amendments in state and federal constitutions.

IV. BRINGING GLOBAL CONSTITUTIONALISM HOME

A. Completing the Revolution in Social Reproduction

In the three decades since the ERA's demise in the United States, constitutional orders outside of the United States have updated and refined the meaning of constitutional sex equality in ways that respond directly to the ultimate goals of today's ERA proponents. American ERA revivalists believe that the ERA will strengthen the tools of antidiscrimination doctrine to disrupt the persistence of the gendered division of labor within the family, pay inequity, women's underrepresentation in leadership positions, and the failure to accommodate pregnancy in the workplace. Yet, the prescribed legal apparatus for the ERA is ill-matched to the remaining manifestations of women's

disadvantage. Strict scrutiny would make the law more gender-neutral and remove stereotypes from the law, but the absence of official stereotypes does not end gendered norms and cultural practices. Even in legal regimes that make paid parental leave available on gender-neutral terms to both mothers and fathers, uptake by mothers is significantly higher than uptake by fathers.²⁰¹ This is why Sweden introduced incentives to encourage fathers to take leave, which Germany copied. Even when fathers take some leave, they take less than mothers.

To address these problems, carefully designed and well-funded public policies are needed: paid parental leave designed to be attractive to men, paycheck fairness rules that explicitly prohibit the setting of wages based on gender-unequal factors like previous salary, affordable high-quality childcare and afterschool programs, and norms of diversity and gender balance in major institutions of power, to name a few. An updated constitutional sex equality amendment could help engender or protect these institutional supports for gender-equal families and economies. As presently conceptualized on the federal level and practiced on the state level, the legal framework of the ERA primarily refines and strengthens the tools of antidiscrimination law, such as doctrines of strict scrutiny and disparate impact.²⁰² The *de facto* ERA and state jurisprudence have imposed heightened scrutiny on sex classifications, and federal statutes and some state ERAs have applied disparate impact theory. An ERA thus conceived would be primarily symbolic, and function legally as a fine-tuner, not a transformer. It is hard to gather up the steam to amend the Constitution for such subtle gains. On the other hand, it is hard to imagine getting the consensus required under Article V to amend the Constitution for more drastic changes.

But as the European experience illustrates, a constitutional sex equality amendment can be more than a fine-tuner, and less than a revolution. Consider the concerns of the ERA revival together with the work of legal feminists over the last two decades, the rising social movement of mothers' organizations, and the proliferation of state laws addressing work-family conflict in the past decade. They focus on the same problems addressed by European gender constitutionalism since the 1990s. By lining up these piecemeal and multifaceted developments in the United States with the projects of constitutional sex equality amendments in Germany and France, we can begin to imagine a new role for the ERA.

European gender constitutionalism from the 1990s to the present is best understood as the completion of a quiet revolution that has been occurring in the

201. In Finland, for example, fathers take less than 9% of the total of all parental leave, even though the leaves are available to both genders. In addition, Finland offers a "daddy month," a paternity allowance available to fathers for 25 days to take leave concurrently while the mother is on parental leave. As of 2012, only 32% of fathers took the extra "daddy month." See EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS, PROMOTING UPTAKE OF PARENTAL AND PATERNITY LEAVE AMONG FATHERS IN THE EUROPEAN UNION 2-3 (2015).

202. See *supra* text accompanying notes 16 to 24.

economies of wealthy democracies since the late twentieth century.²⁰³ These economies now depend on women's participation in the labor market, which destabilizes women's role as full-time caregivers within the family and leaves a gap in the society's presumed arrangements for raising the next generation of citizens. Enlightenment constitutions assumed that women would be excluded from suffrage and from full economic citizenship so that they could devote themselves to the important task of reproducing (both biologically and socially) the next generation of constitutional subjects.²⁰⁴ But today, average American middle-class families cannot afford housing, education, healthcare, and other basic costs unless both parents work.²⁰⁵ Such societies require new arrangements by which the next generation gets raised and households get maintained. These arrangements constitute what I refer to as the infrastructure of social reproduction, and every society constituted by a constitution needs to have one in order to ensure its continued existence.

Past economies that did not depend on women's participation in the labor market depended on women at home raising children. That was the infrastructure of social reproduction silently embedded in eighteenth- and nineteenth-century constitutions. Alexis de Tocqueville, observing the early American republic, noted, "Almost all men in democracies are engaged in public or professional life; and on the other hand the limited income obliges a wife to confine herself to the house in order to watch in person, and very closely, over the details of the domestic economy."²⁰⁶ Women's constitutional exclusion from suffrage and civil rights is therefore logically connected to the economy's reliance on women's devotion to the tasks of social reproduction—the raising of the next generation of full constitutional citizens. Known as the "separate spheres" tradition, this infrastructure of social reproduction was not explicitly described in constitutions before the late twentieth century, but its place in the legal order was affirmed in judicial decisions interpreting those constitutions. In the United States, Justice Bradley's now-infamous concurrence in *Bradwell v. State* justified women's exclusion from "adopting a distinct and independent career from that of [their] husband[s]" as consistent with Equal Protection and Due Process, because "the domestic sphere" and "the family institution" belonged to

203. Sociologist Gosta Esping-Anderson has shown that the revolution in women's roles is incomplete in the sense that women have increased their participation in market work without a proportionate decrease in their share of family caregiving and household work. See GOSTA ESPING-ANDERSON, *THE INCOMPLETE REVOLUTION: ADAPTING TO WOMEN'S NEW ROLES* 19-54 (2009).

204. See Ruth Rubio Marín, *The [Dis]establishment of Gender: Care and Gender Roles in the Family as a Constitutional Matter*, 13 INT'L J. CONST. L. 787 (2015).

205. Elizabeth Warren and Amelia Warren Tyagi noted in 2003 that the average American middle-class family can no longer buy a home unless both parents work. Although the average two-income family earns more now than did the single-breadwinner family with a stay-at-home mom a generation ago, the costs of housing, education, healthcare, and other basic costs of raising children require both paychecks. WARREN & WARREN TYAGI, *supra* note 35, at 8.

206. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 207 (Henry Reeve trans., 1994).

the “domain and functions of womanhood.”²⁰⁷ In Germany, even after the Constitution guaranteed equal rights to women, the Constitutional Court upheld a law limiting women’s working hours because of women’s functional difference from men as primary caretakers.²⁰⁸

The German Constitutional Court’s sex equality jurisprudence then moved on to dismantling sex classifications that reinforced women’s traditional roles in the family. The *de facto* ERA in the United States, driven by the 1970s legal feminist agenda of ridding the law of sex stereotypes about women’s roles as dependents and caregivers in the family, operated similarly. But more recently, the German interpretation of constitutional sex equality is moving beyond dismantling the old infrastructure towards articulating and supporting a new one. The legislature invoked the 1994 sex equality amendment when it legislated gender quotas in the civil service, and the Constitutional Court invoked it to uphold paternity leave incentives against allegations of unconstitutional equal rights violations. In France, social movements successfully achieved constitutional amendments that made gender parity a fundamental principle of the republic, which led to the legislative adoption of a comprehensive “real equality” agenda, strengthening abortion rights, implementing gender quotas for a wide range of decisionmaking positions, and creating incentives for fathers to take paternity leave. The French Constitutional Council has also relied on gender equality as a fundamental republican principle and as a shield against individual constitutional rights claims challenging the sex classifications in gender quotas. These new amendments have made sex equality into a constitutional goal rather than an enforceable individual right against discrimination. This enables the legislature to build the new infrastructure of social reproduction, which courts can defend against attacks by individuals attempting to vindicate formal equality rights.

B. The American Infrastructure of Social Reproduction in the States

Twenty-first-century post-industrial societies need updated institutional arrangements for raising the next generation of citizens. To operate efficiently and to enable society to flourish, our institutions must fit the lives of the people they serve. Today, citizens of all genders participate equally in democratic governance and market work. If a society consisting of such citizens is also committed to reproducing and raising future generations, new institutional arrangements are needed. The new infrastructure of social reproduction has at least four essential components that are being pursued piecemeal in the United States, largely in the states and municipalities. They include the accommodation of pregnancy in the workplace, paid parental leave, education designed for the

207. *Bradwell v. State*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring).

208. BVERFGE 3, 225 (1953), ¶ 42; see discussion *supra* Section III.A.1.

children of two breadwinners, and employment designed for coequal parents. These components need to be put together and buttressed. Like roads, pipes, and public transportation, the education and care of children can be conceptualized as an infrastructure on which the economy and social life of a constitutional order depends.

1. Pregnancy Accommodation

Women's unequal economic status stems in part from their unwanted separation from work during pregnancy. In European countries, strong protections for pregnant workers include prohibitions on dismissal, even for cause, accommodation of job tasks, and mandatory maternity leave shortly before and after childbirth.²⁰⁹ In the United States, the federal Pregnancy Discrimination Act simply prohibits discrimination against pregnant workers; it does not require employers to accommodate pregnancy unless the employer accommodates other similarly disabling conditions.²¹⁰

To overcome the limits of federal pregnancy discrimination law, states and localities are imposing more robust duties on employers. Due to the inadequacies of the federal antidiscrimination approach to the employment disadvantages of pregnancy, fifteen states have adopted laws requiring the reasonable accommodation of pregnancy: Alaska,²¹¹ California,²¹² Connecticut,²¹³ Delaware,²¹⁴ Hawaii,²¹⁵ Illinois,²¹⁶ Louisiana,²¹⁷ Maryland,²¹⁸ Minnesota,²¹⁹ Nebraska,²²⁰ New Jersey,²²¹ New York,²²² North Dakota,²²³ Rhode Island,²²⁴ Texas,²²⁵ and West Virginia.²²⁶ In addition, local governments, including the

209. These requirements are stipulated by a European directive on the safety and health of pregnant workers. *See* Council Directive 92/85, art. 5, 8, 10, 1992 O.J. (L 348) 1, 2 (EC).

210. Despite the decision in favor of the plaintiff to allow her past the summary judgment stage, the Supreme Court's decision in *Young v. United Parcel Service* affirms this understanding of the Pregnancy Discrimination Act. *Young v. United Parcel Servs., Inc.*, 135 S. Ct. 1338, 1350 (2015).

211. ALASKA STAT. § 39.20.520 (2013).

212. CAL. CODE REGS. tit. 2, § 11049 (2016).

213. CONN. GEN. STAT. §§ 46a-60(a)(7), 46a-51 (2011).

214. DEL. CODE ANN. tit. 19, §§ 710, 711, 716 (2016).

215. HAW. CODE R. §§ 12-46-107 (2016).

216. 775 ILL. COMP. STAT 5/2-101, 102 (2014).

217. LA. STAT. ANN. §§ 23:342, 23-341 (1997).

218. MD. CODE, STATE GOV'T, §§ 20-609, 20-601 (2013).

219. MINN. STAT. §§ 181.940, 181.9414, 181.9436 (2014).

220. NEB. REV. STAT. §§ 48-1107.01(2), 48-1107.02 (2015).

221. N.J. STAT § 10:5-12(s) (2013).

222. N.Y. EXEC. LAW §§ 292(21)(e)-(f), 296(2)(e) (McKinney 2016).

223. N.D. CENT. CODE § 14-02.4-03(2) (2015).

224. R.I. GEN. LAWS § 28-5-7.4(a) (2015).

225. The Texas statute applies to county and municipal employers. TEX. LOC. GOV'T CODE ANN. § 180.004 (2016).

226. W. VA. CODE §§ 5-11b-1, et seq. (2014).

District of Columbia,²²⁷ Philadelphia,²²⁸ New York City,²²⁹ and Providence,²³⁰ have also enacted reasonable accommodation laws for pregnant workers. Most of these statutes were passed in the last five years. Of the states that have pregnant worker fairness statutes, every single one has either ratified the federal ERA or adopted a state ERA. Notably, eight of these states (including Pennsylvania, where Philadelphia has adopted a pregnant worker statute) have ratified the federal ERA and adopted a state constitutional ERA.²³¹

2. Paid Parental Leave

Paid parental leave for both mothers and fathers is an essential component of the infrastructure of care that is necessary to support women and men's equal participation in economic and political life. The federal Family and Medical Leave Act (FMLA) guarantees unpaid leave for employees of large employers. Only twelve percent of private sector workers have access to paid family leave through their employer.²³²

States have taken the lead in legislating paid parental leave. California led the way in 2002.²³³ New Jersey followed in 2008²³⁴ and Rhode Island in 2013.²³⁵ All three states that have legislated and implemented paid parental leave are states which have ratified the federal ERA and adopted state ERAs. Washington (which ratified the federal ERA and has a state ERA) also adopted a paid parental leave statute in 2007,²³⁶ but the program has yet to be implemented. New York State passed legislation in April 2016 adopting twelve-week paid family leave benefits, which will go into effect in 2018.²³⁷ Local governments are also adopting paid leave policies: The mayor of New York City recently signed an executive order requiring nonunion employers to provide six weeks of paid parental leave at 100 percent pay.²³⁸ In April 2016, San Francisco also enacted six weeks of fully paid parental leave, which will eventually cover all employees

227. D.C. CODE § 32-1231 (2016).

228. PHILA., PA., CODE § 9-1128 (2014).

229. N.Y.C. ADMIN. CODE § 8-107(22)(a) (2015).

230. PROVIDENCE, R.I., CODE ORDINANCES § 16-(b)(1)(c), 16-57(c)(1)(f)-(g) (2015).

231. See *infra* tbl.2.

232. See U.S. DEP'T LAB., DOL FACTSHEET: PAID FAMILY AND MEDICAL LEAVE (June 2015), <http://www.dol.gov/wb/PaidLeave/PaidLeave.htm>.

233. CAL. UNEMP. INS. CODE §§ 3300-06 (West 2016).

234. N.J. STAT. ANN. §§ 43:21-37 et. seq.

235. R.I. GEN. LAWS § 28-41-34 et. seq.

236. R.I. GEN. LAWS ANN. §§ 49-86.005-86.903 (West 2016).

237. Assemb. 9006-C, Leg. 201st Sess. (N.Y. 2016).

238. See Michael M. Grynbaum, *New York to Offer 6 Weeks Paid Parental Leave to Nonunion Workers*, N.Y. TIMES (Dec. 22, 2015), <http://www.nytimes.com/2015/12/23/nyregion/new-york-to-offer-6-weeks-paid-parental-leave-to-nonunion-workers.html>.

working for more than 180 days for an employer with more than twenty employees.²³⁹

3. *Childcare and Education for Children of Breadwinners*

The third important component of the infrastructure of social reproduction, which must be coordinated with paid parental leave, is an education system designed for children of two parents of any gender who are both full participants in economic and political citizenship. Would that education system look anything like the one we inherited from the era of separate spheres? For example, would formal education, provided by the public school system, begin at the age of five or six? To some degree, an education system designed for the children of two breadwinners depends on other aspects of the infrastructure, such as paid parental leave.

In the United States, Congress passed the Comprehensive Child Development Act in 1971,²⁴⁰ which would have created nationally funded, locally administered, comprehensive childcare centers providing quality education, nutrition, and medical services, open to all on a sliding-scale fee basis. Four months before Congress passed the ERA, President Nixon vetoed the childcare bill,²⁴¹ arguing that it would diminish the role of families in raising children, and channeling the same sentiments that enabled the Stop-ERA movement to succeed. Almost half a century later, President Obama called for universal pre-kindergarten in his 2013 State of the Union Address.²⁴² Meanwhile, states have been creating the right to pre-kindergarten education, with strong bipartisan support.²⁴³ Forty-five states provide some funding for preschool.²⁴⁴ Florida, for example, amended its constitution in 2002 to entitle every four-year-old to be offered a voluntary pre-K program.²⁴⁵ Georgia and Oklahoma also aim to offer universal pre-K for all four-year-olds.²⁴⁶ In other states, publicly funded preschool does not serve all eligible children and typically limits enrollment to

239. See Thomas Fuller, *San Francisco Approves Fully Paid Parental Leave*, N.Y. TIMES (Apr. 5, 2016), <http://www.nytimes.com/2016/04/06/us/san-francisco-approves-fully-paid-parental-leave.html>.

240. Comprehensive Child Development Act of 1971, S. 1512, 92nd Cong. (1971).

241. Veto Message from Richard Nixon, 387 – *Veto of the Economic Opportunity Amendments of 1971* (Dec. 9, 1971) <http://www.presidency.ucsb.edu/ws/?pid=3251>.

242. See *Early Learning*, WHITEHOUSE.GOV, <https://www.whitehouse.gov/issues/education/early-childhood>.

243. EDUCATION COMMISSION OF THE STATES, 50-STATE REVIEW 1 (Jan. 2016), http://www.ecs.org/ec-content/uploads/01252016_Prek-K_Funding_report_revised_02022016.pdf (noting that 32 states increased state funding for pre-K programs in 2015-16, of which 22 states had Republican governors and 10 states had Democratic governors).

244. *Id.*

245. FLA. CONST. art. IX, § 1.

246. See Mike Bostock, Shan Carter & Kevin Quealy, *State-Financed Preschool Access in the U.S.*, N.Y. TIMES (Feb. 13, 2013), <http://www.nytimes.com/2013/02/14/education/early-education-far-short-of-goal-in-obama-speech.html>. Florida and Oklahoma have the highest percentages of four-year-olds enrolled in state preschool programs, at 76% and 73% respectively.

low-income children.²⁴⁷ Note that none of three leading states on universal pre-K have ratified the federal ERA, and two of them lack a state ERA. This illustrates the extent to which support for childcare and early education is unmoored from the women's equality agenda. Once equal rights for women are understood to engender a modern infrastructure of social reproduction, the dynamics of national consensus might shift.

4. Structuring Work for Coequal Parents and Caregivers

There is also an after-school childcare gap for school-age children when both parents work full-time. A school day that ends at 3:00 p.m. made sense in the old infrastructure, which assumed that the non-working mother would be available to care for children between the end of the school day and the end of the standard workday. A workday that ends a few hours after school ends is also part of the old infrastructure of social reproduction, which assumed that one parent need not work a standard workday. The relationship between the length of the school day and the length of the workday needs to be rethought to equalize men's and women's shares of market work and caregiving.

This brings us to the fourth component of the infrastructure of social reproduction: a system of employment designed for workers who are also co-parenting equally. If employment policy assumed that the typical worker is raising children without depending on a partner to provide as much unpaid caregiving support as needed, how would jobs, including schedules and wages, be structured?²⁴⁸ One's answer to this question depends in part on how the other components of the infrastructure, such as education, would be designed. If the school day is lengthened, the current norm of 9:00-5:00 jobs need not change. However, if the school day remains roughly the same, different employment arrangements such as flex-time, comp time, and job sharing would be necessary for two breadwinners to also fulfill their family responsibilities.

Workplace flexibility laws are emerging at the state and local level in the United States. In 2013, Vermont adopted a law that entitles employees to request a flexible working arrangement, and requires the employer to discuss and consider such requests at least twice a year. Although the law does not require the employer to grant requests when reasonable, it requires the employer to

247. See Sara Mead, *The Building Blocks of Success: Clearing up common misconceptions about state pre-K programs can lead to better outcomes for our kids*, U.S. NEWS & WORLD REPORT (Jun. 15, 2015), <http://www.usnews.com/opinion/knowledge-bank/2015/06/26/setting-the-record-straight-on-state-pre-k-programs>.

248. Joan Williams argues that the ideal worker norm, including the nine-to-five workday, is designed around masculine norms. See JOAN WILLIAMS, UNBENDING GENDER: WHY WORK AND FAMILY CONFLICT AND WHAT TO DO ABOUT IT 64-100 (2000). Vicki Schultz and Allison Hoffman argue that a reduced workweek would alleviate work-family conflict without exacerbating the gendered division of labor in the workplace and in family caregiving. See Vicki Schultz & Allison Hoffman, *The Need for a Reduced Workweek in the United States*, in PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY (Judith Fudge & Rosemary Owen eds., 2006).

discuss the request in good faith, and provides the employer with factors the employer may consider.²⁴⁹ San Francisco adopted a law with very similar terms and requirements. It protects employees from retaliation for requesting flexible work arrangements.²⁵⁰

The achievement of gender balance in management and decision-making positions could also play a role in structuring the workplace for coequal parents and caregivers. Institutions that achieve gender balance must confront the fact that a critical mass of their participants will be primary or coequal caregivers. When there are a few token women, it is possible for the institution to continue to operate on the assumption that every participant is available full-time, without caregiving responsibilities, and the women most likely to succeed in such institutions are typically not mothers. But once women are in the public sphere in sufficiently large proportions, as German leaders recently recognized, a fertility crisis may ensue if working full-time is incompatible with raising a family. Thus, the social order must devise an alternative infrastructure of social reproduction, and there are many models and approaches from which to choose. Gender-balanced leadership catalyzes the process by which the alternative employment regime emerges.²⁵¹

Laws requiring gender balance in any institutional setting are also more likely to emerge and be upheld at the state level. Indeed, some fourteen states in the United States have statutes that require gender balance on the state, county, or city committees of major political parties: Florida, Kansas, Louisiana, Massachusetts, Michigan, Missouri, Montana, New Jersey, Oregon, South Carolina, Tennessee, Texas, Washington, West Virginia, Wisconsin, and Wyoming.²⁵² All but two of these states (Missouri and South Carolina) have either ratified the federal ERA or adopted a state ERA or both.²⁵³ While these statutes only apply to political party committees, they suggest the legal possibility in the states of legislating gender balance.

These statutes were first adopted in the period before and after the adoption and ratification of the woman's suffrage amendment to the U.S. Constitution.²⁵⁴

249. VT. STAT. ANN. tit. 21 § 309 (2013).

250. S.F., CAL., SAN FRANCISCO FAMILY FRIENDLY WORKPLACE ORDINANCE, Ord. 209-13, File No. 130785 (App. 10/9/2013, Eff. 11/8/2013, Oper. 1/1/2014).

251. I have developed this theory in more detail in Julie C. Suk, *Work-Family Conflict and the Pipeline to Power*, 2012 MICH. ST. L. REV. 1797, 1805.

252. FLA. STAT. ANN. § 103.091 (West 2016); KAN. STAT. ANN. § 25-3801 (2016); LA. STAT. ANN.- Rev. Stat. 18:443.1 (2016); MASS. GEN. LAWS ch. 52, § 1 (2016); MICH. COMP. LAWS ANN. § 168.597 (West 2016); MO. ANN. STAT. § 115.607 (West 2016); MONT. CODE ANN. § 13-28-201 (2016); N.J. STAT. ANN. § 19:5-3 (2016); OR. REV. STAT. § 248.015 (2016); S.C. CODE ANN. § 7-9-90 (2016); TENN. CODE ANN. § 2-13-103 (2016); TEX. ELEC. CODE ANN. § 171.002 (2015); WASH. REV. CODE § 29A.80.020 (2016); W. VA. CODE § 3-1-9 (2016); WIS. STAT. ANN. § 8.17 (West 2015); WYO. STAT. ANN. § 22-4-101 (2016).

253. See *infra* Table 3.

254. See KRISTI ANDERSEN, AFTER SUFFRAGE: WOMEN IN PARTISAN AND ELECTORAL POLITICS BEFORE THE NEW DEAL 77-109 (1996); JO FREEMAN, A ROOM AT A TIME: HOW WOMEN ENTERED PARTY POLITICS 110 (2000); Marguerite J. Fisher, *Women in the Political Parties*, in 251 ANNALS OF THE

While some state courts struck down these equal representation provisions on various federal constitutional grounds,²⁵⁵ including Equal Protection and even the Nineteenth Amendment itself,²⁵⁶ some state courts have upheld them on either the same grounds or state constitutional grounds.²⁵⁷

One state case, *Marchioro v. Chaney*, illustrates how a state ERA can form the normative foundation of state legislation to achieve gender equality.²⁵⁸ The Washington Supreme Court upheld its statutory gender quota on state political party committees, providing a long and detailed discussion of the quota's relationship to the state's ERA. Both male and female members of the Democratic Party challenged this statute on various federal and state constitutional grounds.²⁵⁹ They argued, *inter alia*, that the 50-50 sex division led to exclusions based on sex and thus violated Washington State's Equal Rights Amendment. The Washington Supreme Court rejected their claims, and suggested instead that the constitutional amendment encouraged the government to promote "actual" equality for women. The court held that Washington's pre-ERA approach of applying heightened scrutiny to sex classifications had been "swept away" by the ERA.²⁶⁰ The ERA did not make the government "powerless to take measures designed to assure women actual as well as theoretical equality of rights."²⁶¹ The court then concluded, "This is precisely the purpose of this legislation."²⁶² Thus, in addition to finding that the statute did not violate the ERA, it also suggested that the statute vindicated the ERA's underlying purpose:

What has been done to assure women actual as well as theoretical equality of these rights? The legislature has found that in the conduct of the offices of state committees there shall be an absolute equality of rights between the sexes. An equal number of both sexes must be elected to the committee and as chairman and vice chairman of the state committee. Neither sex may predominate. Neither may discriminate or be discriminated against. There is an equality of numbers and an equality of rights to be in office and to control the affairs of the state committee. The ironic result of plaintiffs' theory would be to abolish a

AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 87 (May 1947); Emily Newell Blair, *Women in the Political Parties*, in 143 ANNALS OF AMERICAN POLITICAL AND SOCIAL SCIENCE 217, 223 (May 1929).

255. *E.g.*, *Hartman v. Mintz*, 303 N.J. Super. 326 (1997).

256. *E.g.*, *In re Cavellier*, 159 Misc. 212 (N.Y. 1936).

257. *E.g.*, *State ex rel. Christian D. Tompras v. Board of Election Commissioners of St. Louis County*, 136 S.W.3d 65, 67 (Mo. Banc. 2004); *Gallant v. LaFrance*, 101 R.I. 299 (1966); *Marchioro v. Chaney*, 90 Wash. 2d 298 (1978).

258. *Marchioro*, 90 Wash. 2d at 309 ("We have found no case or any literature which suggests mandated equality by statute would violate the equal rights amendment.").

259. *See id.*

260. *Id.* at 305.

261. *Id.* at 306.

262. *Id.*

statute which mandates equality by invoking a provision of the constitution passed to guarantee equality.²⁶³

As this paragraph makes clear, two decades before the French feminists of the 1990s fully developed their vision of equality as gender parity, the Washington Supreme Court envisioned “absolute equality” and “equality of numbers,” particularly in leadership positions for a major political party, as central to the vision of equality of rights guaranteed by the ERA. It went on to distinguish a rule requiring an equal number of men and women from “special exemptions or exceptions because of sex, e.g. ‘protective’ labor legislation applicable to women only.”²⁶⁴ Such rules were problematic because they were “exclusionary statutes which apply to one sex only,”²⁶⁵ unlike the gender quota at issue here.

The Washington Supreme Court also noted that, while sixteen states at the time had state ERAs, only the state of Washington used the phrase “equality of rights and responsibility.”²⁶⁶ The Court continued, “we must presume the legislature and the people did not intend the phrase to be mere surplusage but that it was to have meaning.”²⁶⁷ The gender quota ensured that men and women exercised equal responsibility on state political party committees. By focusing on responsibility rather than rights, the legitimacy of the statute is tied up with its creating an opportunity for equal representation in a democratic process, which must coexist with litigants’ equal rights to compete for a position. The Washington Supreme Court’s construction of the ERA resonates, as we shall see, with German and French constitutional interpretations of sex equality clauses as legitimizing principles rather than enforceable rights.

C. The Significance of Constitutional Commitment

State laws imposing gender representation rules for political party committees are an example of state legislative activity undertaken to enforce and realize the potential of the federal Nineteenth Amendment. They proliferated around the time that the first ERA was introduced in 1923, on the heels of the Nineteenth Amendment. Today, American states are adopting policies appropriate to post-industrial economies, which depend on people of all genders to perform market work and raise children at the same time. These emerging policies are not framed in terms of constitutional equality for women. But they should be.

263. *Id.*

264. *Id.* at 307.

265. *Id.*

266. *Id.* at 307 (citing WASH. CONST. art. XXXI, § 1 (1972)).

267. *Id.* at 307-08.

Many of the states that are leading the way do have ERAs in their state constitutions. While thirty-five states ratified the federal ERA, twenty-three states now have ERAs in their state constitutions.

Table 2. Federal ERA Ratifications and State Constitutional ERA, State by State.

State	Ratified ERA?	State ERA
Alabama	No	No
Alaska	Yes	Art I, § 3 (1972)
Arizona	No	No
Arkansas	No	No
California	Yes	Art. I, § 8 (1879)
Colorado	Yes	Art. II, § 29 (1973)
Connecticut	Yes	Art. I, § 20 (1974)
Delaware	Yes	No
Florida	No	Art. I, § 2 (1998)
Georgia	No	No
Hawaii	Yes	Art. I, § 3 (1978)
Idaho	Yes	No
Illinois	No	Art. I, § 18 (1971)
Indiana	Yes	No
Iowa	Yes	Art. I, § 1 (1998)
Kansas	Yes	No
Kentucky	Yes	No
Louisiana	No	Art. I §§ 3, 12 (1974)
Maine	Yes	No
Maryland	Yes	Decl. Rts. Art. 46
Massachusetts	Yes	Pt. 1, Art. 1 (1976)
Michigan	Yes	No
Minnesota	Yes	No
Mississippi	No	No
Missouri	No	No
Montana	Yes	Art. 2, § 4 (1972)
Nebraska	Yes	No
Nevada	No	No
New Hampshire	Yes	Pt. 1, Art. 2 (1974) Art. 1, ¶ 1, Art. X, ¶ 4 (1947)
New Jersey	Yes	

New Mexico	Yes	Art. 2, § 18 (1973)
New York	Yes	No
North Carolina	No	No
North Dakota	Yes	No
Ohio	Yes	No
Oklahoma	No	No
Oregon	Yes	Art. 1, § 46 (2014)
Pennsylvania	Yes	Art. 1, § 28 (1971)
Rhode Island	Yes	Art. I, § 2 (1986)
South Carolina	No	No
South Dakota	Yes	No
Tennessee	Yes	No
Texas	Yes	Art. 1, § 3 (1972)
Utah	No	No
Vermont	Yes	No
Virginia	No	Art. I, § 11 (1971)
Washington	Yes	Art. XXXI, § 1 (1972)
West Virginia	Yes	No
Wisconsin	Yes	No
Wyoming	Yes	Art. I, §§ 2, 3 (1890)

Injecting a story of constitutionalism into states' efforts to reduce post-industrial gender inequality can reframe these policies as a deliberately designed framework rather than the convergence of contingent political interests at a particular moment. Constitutionalizing a commitment to eradicating women's sex-based disadvantages can connect the dots in the newly emerging social reproduction paradigm. As a practical matter, it is clear that some degree of institutional coordination is required among the different elements of the infrastructure. The length of paid parental leave depends on the age at which public childcare becomes available, and the extent and desirability of flexible work arrangements also depend on the length of the school day. Understanding these components as comprising a constitutional infrastructure for social reproduction might prevent courts from striking down individual components based on the constitutional rights claims of individual complainants.

The potential for such challenges is illustrated by the German parental leave cases. The 1994 amendment on the actual implementation of equality between women and men enabled the Constitutional Court to defend the measures intended to incentivize fathers to take parental leave against individual litigants' constitutional disparate impact and family autonomy claims. Even if we do not adopt such strong interventions in the United States as a matter of policy, the

Equal Protection claims of men and women adversely affected by the policy should not be a barrier to doing so. We can easily see how application of strict scrutiny or disparate impact antidiscrimination constructions of ERAs would strengthen challenges to paternity leave incentives or gender balance initiatives. If the law nudges fathers to do more caregiving through different legal consequences for mothers and fathers taking leave, it would be unfortunate if ERAs made such incentives harder rather than easier. Moving ERAs away from antidiscrimination and towards the infrastructure of social reproduction would avoid this situation.

If we rethink an ERA as a directive to create an infrastructure of social reproduction that is compatible with all genders participating equally in both the private and public spheres, state constitutional law is a good place to start. State constitutional law is more amenable to the infrastructure of social reproduction for several reasons. First, as a practical matter, the states are already leading in adopting pregnancy accommodations, paid parental leave, universal preschool, workplace flexibility, and gender quotas. Second, the infrastructure of social reproduction involves positive rights, such as paid parental leave and early childhood education. Our state constitutions have a tradition of positive rights, such as the right to education, which is missing from the federal Constitution.²⁶⁸ Education, the right to which is enshrined in every state constitution, is an extremely important channel of social reproduction already. In addition, states have always been open to comparativism in interpreting their constitutions. When they look to other states, it is with the understanding that they are separate sovereigns looking for similarities and guidance. In this mindset, it would not be a huge shift or compromise in sovereignty for state courts to learn from constitutions outside the United States.

In both Germany and France, it is clear that the recent amendments conceptualize “actual implementation” of equality between men and women as a normative principle or goal rather than an enforceable right held by individuals. As such, the equality amendments are enablers rather than constrainers of state action.²⁶⁹ By authorizing and legitimizing state action to pursue “actual implementation of equal rights” or “equal access,” the function of these amendments is to clarify the relationship of gender equality policies to other constitutional values. The German parental leave cases illustrate how the

268. See EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* (2013); Robert F. Williams, *Rights, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY* 7 (G. Alan Tarr & Robert F. Williams eds., 2006); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1121 (1999). Zackin writes, “Americans have a long tradition of enshrining positive rights in constitutions, but . . . we must look at state constitutional politics to find them.” ZACKIN, *supra*, at 11.

269. “[C]onstitutional rights norms do not simply contain defensive rights of the individual against the state, but at the same time they embody an objective order of values, which applies to all areas of law as a basic constitutional decision, and which provides guidelines and impulses for the legislature, administration, and the judiciary.” Alexy, *supra* note 143, at 352 (citing BVerfGE 39, 1 (41)).

amendment provides a concrete constitutional command that must be balanced against the individual claim of equal treatment and family autonomy. The legislature, rather than courts, has primary responsibility for enforcing the constitution.²⁷⁰

Translated into U.S. Equal Protection analysis, the German constitutional text and construction of “actual implementation of equal rights” forms what American courts could embrace as the compelling state interest, which would overcome the individual rights violation presumed to occur through the use of sex classifications or generalizations about the likely behavior of men and women. The jurisprudence of many European courts, including the German Constitutional Court and the European Court of Human Rights, has developed a proportionality analysis in balancing constitutional principles against constitutional rights.²⁷¹ On this understanding of the ERA, the amendment’s primary contribution to existing law would be to limit the scope of individual rights claims, especially those premised on equal protection, rather than to enlarge them. To mobilize the institutional coordination required to build a gender-equal infrastructure of social reproduction, it will be necessary to limit individual rights claims against sex-based affirmative action and state attempts to reshape the roles of men and women in the family. As the European examples illustrate, public policy schemes that actually incentivize gender role reversals at home and at work sometimes require parental leave policies designed with fathers’ likely behavior in mind and workplace policies designed with mothers’ likely behavior in mind. This may best be done in gender-neutral terms, but in some cases, gender-conscious policy might be more effective. The Constitution should not prohibit the latter possibility, and a twenty-first-century ERA would provide a doctrinal framework by which the rights claim to gender neutrality could be balanced against the goal of restructuring social reproduction for a world of gender equality. This conception would expand legislative authority under the ERA to respond to ERA proponents’ critique of existing Fourteenth Amendment Section Five jurisprudence.

The Oregon and Washington ERAs explicitly authorize the state legislatures to enforce the guarantee of equal rights. State legislatures contemplating legislation on pregnant worker fairness, paid parental leave, childcare, workplace flexibility, or gender balance should present such initiatives as enforcements of constitutional equality. Recall that the new ERA text authorizes Congress and

270. Legislative enforcement of the constitution also occurs in the United States, although it is less formally recognized. See MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 111-39 (2008); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L.J.* 1943, 1980-2020 (2003); Lawrence Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *HARV. L. REV.* 1212 (1978).

271. See Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 *U. TORONTO L.J.* 383 (2007); Vicki Jackson, *Constitutional Law in an Age of Proportionality*, 124 *YALE L.J.* 3095 (2015).

the states to enforce the federal ERA. If all of the state efforts to build a new infrastructure of social reproduction are explicitly understood to enforce state or federal constitutional equal rights, the ERA can play an important role in overcoming individual antidiscrimination challenges to equality policy.

D. Towards a New Constitutional Consensus

Even before the ERA was officially pronounced dead, Betty Friedan wrote in *The Second Stage* that the family should be the new feminist frontier.²⁷² She called for a renewed focus on remaking the private and public arrangements that worked against full lives with children for both men and women.²⁷³ Ruth Bader Ginsburg's 1970s advocacy, which shaped Equal Protection sex discrimination jurisprudence, was largely driven by her view that women's entry into the public sphere would have to be supported by men's increased role in the home.²⁷⁴ Proponents of a reintroduced ERA in the mid-1980s also embraced policies beyond non-discrimination that would help women achieve real equality, including childcare.²⁷⁵ Legal feminists began to innovate within antidiscrimination law to remedy disadvantages experienced by mothers in the workplace.²⁷⁶ Since the 1990s, courts have increasingly recognized employers' adverse actions against mothers as sex discrimination,²⁷⁷ and, in 2007, the EEOC issued guidelines detailing the circumstances under which discrimination against caregivers constituted sex discrimination.²⁷⁸ When men or women were adversely treated at work because of their caregiving responsibilities, the EEOC guidelines established that such actions were premised on gender stereotypes. Title VII plaintiffs who allege "family responsibilities discrimination" tend to be more successful than other employment discrimination plaintiffs.²⁷⁹

272. BETTY FRIEDAN, *THE SECOND STAGE* 70-111 (1981).

273. *See id.* at 3-30.

274. As Cary Franklin has detailed, Justice Ginsburg's vision of equalizing roles both at work and at home was largely inspired by Swedish feminism of the period. *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 98-105 (2010).

275. *See* Serena Mayeri, *A New E.R.A. or a New Era? Amendment Advocacy and the Reconstitution of Feminism*, 103 NW. U. L. REV. 1223, 1233 (2009).

276. *See* WILLIAMS, *supra* note 248.

277. *See, e.g.,* Chadwick v. Wellpoint, 561 F.3d 38, 46-47 (1st Cir. 2009); Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 122 (2d Cir. 2004); Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 55 (1st Cir. 2000); Sheehan v. Donlen Corp., 173 F.3d 1039, 1044-45 (7th Cir. 1999).

278. U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES 1 (2007); *see also* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EMPLOYER BEST PRACTICES FOR WORKERS WITH CAREGIVING RESPONSIBILITIES (2009).

279. MARY C. STILL, *LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES*, CENTER FOR WORKLIFE LAW 2 (2006), <http://www.worklifelaw.org/pubs/FRDreport.pdf>.

The politics that defeated the ERA in the 1970s and early 1980s²⁸⁰ have shifted considerably in the last thirty years. In that era, Phyllis Schlafly convinced many women, mainly homemakers, that their roles as mothers and caregivers would be demeaned as a result of a constitutional agenda that encouraged women to participate more actively in the economic sphere.²⁸¹ Today, the economic reality has shifted, such that most women, including mothers, cannot afford to refrain from participation in the economic sphere in advanced democracies. Most mothers with school-age children are in the workforce. Families depend on the incomes of both parents to meet their basic needs.²⁸² There are more two-paycheck households in the twenty-first century than there were male-breadwinner households in 1970.²⁸³ The rise of single-parent families also makes it more common that a full-time worker is not supported by a full-time homemaker.

Today, mothers' groups are advocating for public policies that would protect motherhood, but they do so from the premise that most mothers must work.²⁸⁴ Many of these groups focus on policies that would make it easier to combine family caregiving and market work. These organizations include Moms Rising, Mothers of Preschoolers (MOPS), Mothers & More, Mocha Moms, and Mom-momentum.²⁸⁵ These groups advocate for maternity and paternity leave, flexible work arrangements, education and childcare, fair wages, universal healthcare, toxin-free environments, paid sick days, gun control, healthy school foods, and immigration fairness.²⁸⁶ These mothers might have been attracted to Phyllis Schlafly's STOP ERA campaign in the 1970s, as Schlafly claimed that the right to raise one's children was "the most precious and important right of all."²⁸⁷ In organizing homemakers against the ERA, Schlafly aroused fears that the legal guarantee of women's equality would lead to a denigration of women's role in family caregiving, as well as its eventual abandonment. Today, women's

280. See MARY FRANCES BERRY, *WHY ERA FAILED: POLITICS, WOMEN'S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION* (1986); JOAN HOFF-WILSON, *RIGHTS OF PASSAGE: THE PAST AND FUTURE OF THE ERA* (1986); JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* (1986); GILBERT Y. STEINER, *CONSTITUTIONAL INEQUALITY: THE POLITICAL FORTUNES OF THE EQUAL RIGHTS AMENDMENT* (1985).

281. See Phyllis Schlafly, *What's Wrong with 'Equal Rights' for Women?*, PHYLLIS SCHLAFLY REPORT 5, no. 7 (Feb. 1972).

282. See WARREN & TYAGI, *supra* note 35, at 8.

283. See KATHLEEN GERSON, *THE UNFINISHED REVOLUTION: HOW A NEW GENERATION IS RESHAPING FAMILY, WORK, AND GENDER IN AMERICA* 4 (2010). Gerson's book provides a qualitative study of the experiences of families with single, two-paycheck, and same-sex parents.

284. See generally THE 21ST CENTURY MOTHERHOOD MOVEMENT: MOTHERS SPEAK OUT ON WHY WE NEED TO CHANGE THE WORLD AND HOW TO DO IT (Andrea O. Reilly ed., 2011).

285. For a study of how motherhood organizations are forming a social movement in favor of better work-family reconciliation, see JOCELYN ELISE CROWLEY, *MOTHERS UNITE! ORGANIZING FOR WORKPLACE FLEXIBILITY AND THE TRANSFORMATION OF FAMILY LIFE* (2013). See also THE 21ST CENTURY MOTHERHOOD MOVEMENT, *supra* note 284.

286. JOAN BLADES & KRISTIN ROWE-FINKBEINER, *THE MOTHERHOOD MANIFESTO: WHAT AMERICA'S MOMS WANT – AND WHAT TO DO ABOUT IT* loc. 76 (2006) (ebook).

287. Schlafly, *supra* note 281.

participation in the workplace is not merely a choice made for the luxurious goals of women's self-fulfillment, but a necessity for twenty-first-century families raising children. As the Motherhood Manifesto puts it, "We have a twenty-first-century economy stuck with an outdated industrial-era family support structure."²⁸⁸ Anne-Marie Slaughter sparked a national conversation after her 2012 article, *Why Women Still Can't Have It All*,²⁸⁹ confessed that the pull of motherhood led her to quit a high-powered job at the State Department.

New bipartisan political coalitions are forming around each component of the infrastructure of social reproduction. There is bipartisan support for pregnant workers' accommodations. In *UPS v. Young*, a coalition of conservative pro-life groups filed an amicus brief in favor of Peggy Young, arguing that the failure to accommodate pregnant women in the workplace encouraged pregnant women to seek abortions.²⁹⁰ Republican legislators are also now cosponsors of the Pregnant Worker Fairness Act in Congress. Forty-five states—more states than required for a constitutional amendment—now offer some form of public preschool. The states with the highest levels of support and participation (Florida, Georgia, and Oklahoma) did not ratify the ERA in the 1970s and 1980s. But a new framing of constitutional sex equality as the infrastructure for social reproduction that supports mothers and children can alter the political coalitions in the states.

CONCLUSION

If we begin to view global sex equality constitutionalism as establishing a sustainable twenty-first-century framework for social reproduction, and state work-family life policies as having constitutional significance, a new paradigm of constitutional sex equality can emerge. The new paradigm would not focus on enabling individuals to transcend the constraints of gender as a category. Nor would it be about advancing women. The new paradigm would simply recognize the need to bring our political, economic and social institutions up-to-date with how twenty-first-century people of all genders live, work, and raise the next generation.

As currently construed, the de facto ERA of equal protection sex equality jurisprudence liberates women and men from confining stereotypes. American constitutional sex equality is now primarily concerned with appreciating the freely chosen traits of individuals. Because gender categories interfere with this goal, our existing law of gender equality is hostile to gender quotas, even while feminists acknowledge the value of greater gender balance in powerful institutions. Similarly, it is becoming increasingly central to our law of gender

288. BLADES & ROWE-FINKBEINER, *supra* note 286, at 76.

289. Anne-Marie Slaughter, *Why Women Still Can't Have It All*, ATLANTIC (July/Aug. 2012), <http://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020/>.

290. Brief for 23 Pro-Life Organizations and the Judicial Education Project as Amici Curiae supporting Petitioner, *Young v. United Parcel Service*, 135 S. Ct. 1338 (2015) (No. 12-1226).

equality that no individual person be treated unequally because of his or her chosen gender identity. Thus, lately, our gender equality talk focuses on bathrooms and the importance of not excluding transgender individuals from the bathroom that serves persons sharing their chosen gender identities.

This individual freedom-based account of gender equality is not wrong; it is morally compelling and should remain the focus of Equal Protection and antidiscrimination law. But this understanding is different from (though usually compatible with) the purpose and paradigm of gender equality that should form the basis of a new constitutional amendment. To add something that we don't already have, and that all Americans need, a new ERA should take social reproduction, rather than the problem of individual freedom from discrimination, as its core concern. The primary purpose of guaranteeing real sex equality is to ensure that the next generation of citizens can be raised without depending on an obsolete social arrangement that no longer works: the male breadwinner-female caregiver family. A twenty-first-century ERA could serve as the foundation for collective efforts to complete the revolution in the way Americans work, reproduce, and raise the next generation in the post-industrial age. These efforts need not take the form of gender quotas or generous maternity protections, as they have in Europe. But whatever the focus is for the new social reproduction infrastructure that is largely emerging in the states, courts could rely on a federal or state ERA to uphold the infrastructure if challenged by individuals complaining of discrimination or due process liberty violations. Imagining a new ERA operating in this way can transform our assumptions of what our Constitution can and should do.