An Equal Rights Amendment for the Twenty-First Century?
Bridging Global and State Constitutionalism

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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, 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? This Article answers this question by proposing a new vision of the ERA, drawing on the experience of state constitutions and European constitutions that adopted sex equality amendments after the ERA’s failure. In the United States, judicial development of sex equality doctrine under the Equal Protection Clause has achieved many of the goals of the 1972 ERA that failed in 1982. Sex distinctions in the law receive heightened scrutiny, and many have been invalidated. However, current ERA proponents point to women’s continued economic disadvantages, the persistence of traditional gender roles and stereotypes, and women’s underrepresentation in leadership positions in the public sphere. Twenty-first-century gender constitutionalism outside of the United States has focused on achieving gender balance in positions of political and economic power, and changing family care policies to increase fathers’ participation and decrease the disadvantaging effects of maternity on women. Constitutional sex equality amendments since the 1990s do much more than prohibit sex discrimination; they are engendering a new infrastructure of social reproduction to replace the traditional gendered division of labor 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

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enforced right. In the United States, states and localities are building components of the new infrastructure of social reproduction, through legislation on pregnant worker fairness, paid parental leave, and childcare, supported by a motherhood movement and other actors from across the political spectrum. These state developments can shape an updated vision of constitutional sex equality. Taking inspiration from global constitutionalism, and recognizing the potential of state constitutionalism, this Article reframes the emerging infrastructure of social reproduction as the normative core for the twenty-first-century ERA.

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An Equal Rights Amendment for the Twenty-First Century?
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Introduction

The Equal Rights Amendment (ERA) to the U.S. Constitution was proposed almost a century ago. Today, a new movement led by members of Congress, feminist coalitions, and Hollywood celebrities is reviving the push for the ERA, a generation after the ERA met its demise in 1982. Since then, 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. 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 change our thinking about whether the ERA is desirable today. They should broaden our imagination about what constitutional sex equality can possibly accomplish.

This Article reconceptualizes the ERA for the twenty-first century as the legal infrastructure of gender equality that goes beyond outlawing discrimination. For women to gain fully equal status in advanced democracies, the basic institutions of society must be designed to enable the next generation of citizens to be raised without depending on mothers’ disproportionate share of unpaid child-rearing work. The problem of social reproduction should be a basic concern of constitutional law, even though it is addressed only implicitly in existing constitutional law. This new vision of the ERA as an infrastructure of gender equality and social reproduction draws upon the experiences of state and global constitutional developments around women’s equality since ERA’s demise in 1982.

Current ERA proponents view a constitutional amendment as a solution to the failure of existing law to reduce women’s remaining disadvantages, especially in the economic sphere. They believe that ERA would require greater judicial scrutiny for sex classifications, and for practices which disparately impact women. This Article evaluates these arguments in light of the trajectories of state ERAs and recently adopted constitutional sex equality amendments in European countries. In the United States, almost half of the state constitutions now contain sex equality provisions that can be compared to the sex equality amendments in European constitutions. While distinguished American jurists and legal scholars have underscored the achievements and potential of state constitutional law, state law remains marginal and largely neglected in the growing field of global and

1 See OR. CONST. art. I, § 46.
comparative constitutional law.\textsuperscript{3} Connecting American state constitutions to constitutional developments around the world can open up new avenues of constitutional transformation in the United States, especially for the status of women.

While state courts have largely echoed federal Equal Protection sex equality jurisprudence to construe their state ERAs, social movements in other countries have transformed the goals, purposes, and meaning of constitutional sex equality through recent amendments. By focusing on the constitutionalizations of gender equality that occurred in other advanced democracies during the period that Americans considered the ERA and enforced it in some states, a broader concrete picture of what an ERA could do for twenty-first century gender relations emerges.

In the United States, the failure to ratify the ERA led legal feminists to pursue change through the Equal Protection Clause and anti-discrimination statutes. Their successes produced a sex equality jurisprudence under Equal Protection and Title VII that functions as the “de-facto ERA.” Thus, it is widely believed that a formal constitutional amendment in the form of the 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 strict scrutiny, disparate impact, and other familiar antidiscrimination tools will not do the trick. 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 relationship between these interventions and recent constitutional amendments.

Part I describes the current ERA revival, detailing the arguments in the legal and political discourse about why it is needed now. ERA revivalists believe that strict scrutiny for sex distinctions, disparate impact as a constitutional sex discrimination standard, and legislative authority to reach private conduct will enable ERA to do something about a familiar litany of problems that haven’t gone away: stereotypical gender roles in the family, pay inequity, violence against women, non-accommodation of pregnancy in the workplace, and women’s underrepresentation in government and business. ERA proponents also claim that the United States is a global outlier in neglecting to constitutionalize women’s equality.

\textsuperscript{3}Some scholars of comparative constitutional law have called for greater attention to the synergies between state constitutions and global constitutionalism. See, e.g., Vicki Jackson, Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse, 65 Mont. L. Rev. 15, 19 (2004); Mila Versteeg & Emily Zackin, American Constitutional Exceptionalism Revisited, 81 Univ. Chicago L. Rev. 1641 (2014). Nonetheless, state law is rarely the object of sustained analysis or comparison in comparative public law scholarship, both by American academics and by comparativists outside the United States.
Part II considers the trajectory of ERAs in state constitutions. Is there any reason to believe that “equal rights” in the ERA will achieve any legal meaning different from the sex equality jurisprudence of the Equal Protection Clause? State courts’ interpretations of state ERAs suggest that the answer is no. For the most part, state courts have interpreted their ERAs similarly to the U.S. Supreme Court’s construction of equal protection in cases alleging sex discrimination. However, a few exceptional state court decisions with regard to disparate impact, pregnancy discrimination, gender quotas for political party committees, and abortion funding are noted.

Part III, taking the ERA proponents’ globalist discourse seriously, turns to sex equality provisions in foreign constitutions. I focus on the constitutions of advanced democracies that outperform the United States in global measures of gender equality, many of which are European countries. Part III identifies three types of provisions in foreign constitutions that address sex equality or inequality: nondiscrimination guarantees that name sex as a prohibited ground, additional provisions that refer to some form of substantive sex equality, including “factual” equality or equal access to positions of power, and provisions declaring the state’s special obligations towards mothers. Several European countries have adopted new sex equality clauses since the 1990s, after the failure of ERA in the United States. These new provisions envision sex equality as requiring more than a prohibition of sex discrimination.

Part IV provides a more textured account of the evolution of constitutional sex equality law in two countries that have adopted sex equality amendments to their constitutions in the last twenty years: Germany and France. In both of these jurisdictions, courts and social movements transformed constitutional sex equality, from formal to substantive, and from an individual constitutional right to a structural principle legitimizing the polity maintained by the constitution. These changes have occurred through constitutional litigation as well as constitutional amendment. The constitutional vision of these amendments has been consolidated through landmark legislation in the last few years in both countries adopting gender quotas for political and economic decisionmaking positions and strengthening paternity leave.

Part V draws out some common threads between state women’s equality agendas and the recent European developments. In other countries, constitutional sex equality amendments have authorized women’s equal representation in political and economic institutions and catalyzed new legislation to reduce gender gaps. The legislation in pursuit of the constitutional goal of sex equality is creating an infrastructure for women’s equal share of political and economic power, and men’s equal contribution to family caregiving. Part V shows how components of this are being pursued piecemeal in state and local legislative agendas in the United States, with widespread and bipartisan support. This infrastructure should be understood as giving life to these states’ constitutional commitments to sex equality. Understanding the Equal Rights Amendment in this way, rather than as primarily a source of individual antidiscrimination rights, can modernize the American understanding of constitutional rights and constitutionalism itself.
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. Talk of adopting the Equal Rights Amendment has come up, not only in Congress and political rallies, but in conversations with Supreme Court Justices, a new documentary and book by advocates, and even in Oscar acceptance speeches. 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. [applause] . . . 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.

In 2014, many women’s organizations, including NOW, National Women’s Political Caucus, and Feminist Majority, formed the ERA Coalition, devoted to passage and ratification of the ERA. The President of the ERA Coalition, Jessica Neuwirth,

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5 Recently, there have been ERA rallies in front of the Supreme Court in July 2014 and on the west lawn of the Capitol in September 2014. See 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/.
8 JESSICA NEUWIRTH, EQUAL MEANS EQUAL: WHY THE TIME FOR AN EQUAL RIGHTS AMENDMENT IS NOW (2015).
9 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/.
10 See Justice Scalia and Ginsburg, supra note ____. 
published Equal Means Equal: Why the Time for the Equal Rights Amendment is Now early in 2015. The book contains an introduction by Gloria Steinem, and Meryl Streep sent it to every member of Congress in June 2015. Jane Fonda, Rosie O’Donnell and other well-known comedians recently performed in a fundraiser for the ERA, and many well-known Hollywood actors have publicly supported the ERA. Bernie Sanders’ campaign platform on “Women’s Issues” included a commitment to passing the “long overdue” ERA. With vocal public support from a sitting Supreme Court Justice, many Hollywood stars, a presidential contender, and several members of Congress, a popular constitutional movement to revive the ERA is afoot.

B. Two Paths

1. The Three-State Strategy

There are two strategies that are currently being pursued. The first is known as the “three-state strategy,” and simply requires three states to ratify the 1972 ERA for it to become part of the Constitution. 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. The “three-state strategy” would involve ratification by three additional states, accompanied by Congressional action extending the 1982 deadline. 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. In some unratified states, such as Illinois and Virginia, state legislatures have debated ratification bills in the last few years. ERA

12 See Our Members, ERA Coalition, supra note __.
13 See id.
19 Article V requires ratification by three-quarters of the states. See U.S. CONST. art. V.
proponents began to embrace the “three-state strategy” after 1992, when the
Twenty-Seventh Amendment prohibiting Congressional pay raises while Congress is
in session, was ratified. That amendment had been introduced by James Madison
in 1789 with no deadline.

Every year since 1982, the ERA has been reintroduced, alongside bills
removing the deadline for ratification by three-fourths of the states. Sections 1 and 2
of the 1972 bill reads:

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.

While it seems within reach that three of the unratified states will soon ratify, the
three-state strategy would preserve an ERA that both houses of Congress and most
states ratified over forty years ago. This raises questions about the meaning, scope,
interpretation, and legitimacy of the amendment were it to become law today.

2. The Fresh Start Text

An alternative route to ERA passage is a new adoption by Congress with new
ratifications by at least 38 states. Since 2013, a House version of the ERA, co-
sponsored by Congresswoman Carolyn Maloney, contains a different text in both
Sections 1 and 2:

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.

As this is a new bill, different from the text of the 1972 ERA, it would require a new
adoption by each House of Congress followed by new ratifications by at least 38
states. The most recent House version, introduced by Representative Maloney, now
enjoys the co-sponsorship of Representative Cynthia Lummis, a Republican from
Wyoming. There is a bipartisan coalition of 170 cosponsors.

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Virginia Senate, DAILY PRESS (Feb. 3, 2015), http://www.dailypress.com/news/politics/dp-nws-ga-
era-shenanigans-20150203-story.html.
22 U.S. CON. amend. XXVII.
25 U.S. CON. amend. XIII.
The 2013 House version, which was reintroduced in May 2015, is more expansive than the 1972 text because 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 13th Amendment’s declaration, “Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.” 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. Furthermore, this text is closer to the text introduced in Congress in 1923, which read: “Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction.” A sentence declaring rights separately from the 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 5 of the Fourteenth Amendment.

Finally, the new version’s inclusion of concurrent state power to enforce the federal ERA within a federal constitutional amendment is interesting. There is no other similar grant of enforcement power in the Constitution. Nonetheless, one can imagine this clause doing some work if and when a conflict were to arise between state legislative efforts to promote gender equality (for example, gender quotas in state political party committees) 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 make it more plausible to uphold the state statute as an enforcement of federal constitutional law against a federal constitutional challenge emanating from a different provision.

C. State Constitutionalism

The ERA revival is also taking place in state constitutional lawmaking. A movement in Oregon led to the passage of Oregon Ballot Measure 89 in the November 2014 election. The referendum added an Equal Rights Amendment to the Oregon constitution. The amendment received 64.26% of the vote. Now, Article 1 Section 46 of the Oregon constitution closely tracks the language of the proposed federal ERA of 1972, stating:

26 U.S. CONST. amend. XIII.
27 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 perpetuate the “badges and incidents of slavery” can be prohibited by Congress in legislation to enforce the Amendment.”).
28 Lucretia Mott Amendment, 1923 Declaration of Sentiments, Seneca Falls.
29 See discussion of United States v. Morrison, infra, text accompanying notes ___ to ___.
30 See infra, Section V.B.4.
(1) Equality of rights under the law shall not be denied or abridged by the State of Oregon or by any political subdivision in this state on account of sex.

(2) The Legislative Assembly shall have the power to enforce, by appropriate legislation, the provisions of this section.

(3) Nothing in this section shall diminish a right otherwise available to persons under section 20 of this Article or any other provision of this Constitution. 31

Prior to the ERA’s adoption, the Oregon constitution, adopted in 1859, contained a general equality guarantee, which remains:

Section 20. Equality of privileges and immunities of citizens. No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens. 32

The ballot in the November 2014 referendum provided the following explanation:

Under Article I, section 20, of the Oregon Constitution, laws granting privileges or immunities must apply equally to all persons. The Oregon Supreme Court has held that provision prohibits laws treating people differently based on sex unless justified by specific biological differences. No current provision in the constitution expressly states that prohibition. Measure amends Article I by creating new section 46, which provides that equality of rights under the law shall not be denied or abridged by the state or any political subdivision on account of sex. Measure authorizes legislature to enforce that provision by appropriate legislation. Measure provides that nothing in section 46 “shall diminish a right otherwise available to persons under section 20 of this Article or any other provision of this Constitution.”

The addition of paragraph 3 makes clear that the new ERA is not intended to alter the existing guarantee of equal privileges and immunities. Thus, if equal privileges in immunities in Article 1 Section 20 prohibits gender quotas, for instance, the ERA would not then authorize what the equal privileges and immunity clause prohibits. Prior to Oregon’s 2014 referendum, the last state to adopt a state ERA was Florida in 1998.

Oregon’s 2014 ERA is similar in language to the federal ERA and of the many state ERAs that were adopted in the 1970s as the federal ERA was on the horizon. Alaska, Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana, New Hampshire, New Mexico, Pennsylvania, Texas, Virginia, and Washington all adopted state constitutional sex equality clauses which mimic proposed federal ERA’s guarantee of “equality of rights” and/or explicitly prohibit “discrimination” on the basis of “sex.” California, Utah, and Wyoming mentioned sex

31 OR. CONST. art. I, § 46.
32 OR. CONST. art. I, § 20.
equality in some form as early as the late nineteenth century. Oregon’s ERA, like Washington’s ERA, explicitly authorizes the state legislature to enforce equal rights, like Washington’s ERA.\(^{33}\)

D. Opposition and the De-Facto ERA

It is important to note that the opposition to ERA has changed since 1982. Many commentators attribute the failure of the ERA in the early 1980s to the efforts of Phyllis Schlafly, who formed an effective counter-movement, mobilizing mothers and homemakers in a culture war against the ERA. Drawing on fears of ERA’s unintended consequences, she argued that ERA would lead to same-sex marriage, women in combat, and unisex bathrooms.\(^{34}\) She rallied opposition to the ERA by mothers and homemakers by convincing them that ERA would make them worse off.

As of 2015, same sex marriage is now constitutionally protected, women are now in combat and transgender people are changing the law’s protection of single-sex bathrooms. The culture wars that successfully defeated the ERA in 1982 have shifted significantly, in part because of the role played by existing equality and anti-discrimination law in nudging and reaffirming the evolution of gender norms.

Now, the Supreme Court’s decision in Obergefell v. Hodges has recognized the constitutional right of persons in same-sex relationships not to be excluded from marriage, grounded not only on the fundamental Due Process right to marry, but also on Equal Protection.\(^{35}\) In interpreting the Equal Protection Clause to prohibit a state from denying marriage licenses to same-sex couples, the Supreme Court moved equal protection law beyond one of the most powerful political objections to the Equal Rights Amendment. The lack of an ERA will not stop same-sex marriage.

Schlafly also invoked fears of women being drafted, as men had been during the Vietnam War. The fear invoked by the drafting of women had largely to do with the fear of women in combat. However, during the wars in Iraq and Afghanistan over the last 15 years, women’s roles in the military brought them closer to combat, and by 2009, women were patrolling streets with machine guns and serving as gunners on tanks. In January 2013, Secretary of Defense Leon Panetta announced new rules which eliminated the exclusion of women from ground combat, and in December 2015, Secretary of Defense Ashton B. Carter announced that all combat jobs would be open to women.\(^{36}\) In light of the twenty-first century realities of women in the military, and a body of law that has caught up with those realities, the question of whether women will have access to combat no longer depends on the ERA.

\(^{33}\) Wash. Const. art. XXXI, § 1.

\(^{34}\) See Jane J. Mansbridge, Why We Lost the ERA 90-117 (1986); Phyllis Schlafly, The Power of the Positive Woman 68-138 (1977); Gilbert Y. Steiner, Constitutional Inequality: The Political Fortunes of the Equal Rights Amendment 57 (1985).


Although the evolution of bathrooms is meeting more resistance, there have been significant shifts in this area as well. In November 2015, the Department of Education’s Office for Civil Rights determined that a school district had violated Title IX in refusing to allow a transgender student who was born male but identified as female to use the girls’ locker room and changing facilities. OCR’s resolution of this complaint indicates that existing law, without the help of an ERA, is leading toward a future in which strictly unisex bathrooms will be called into question.

If the main opposition to ERA has become moot because of the operation of Equal Protection and statutory antidiscrimination law, does that mean that ERA is no longer necessary? In Oregon, the ACLU opposed the ERA on the grounds that “the Oregon Constitution already has the strongest possible protection against sex discrimination and the Oregon Supreme Court has enforced that protection.” Conservative opponents of the ERA have also argued that the ERA is unlikely to add any rights that women don’t already have.

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 ERA” which would render a constitutional amendment unnecessary. The Supreme Court began to strike down sex classifications in the law in the 1970s, culminating in the intermediate scrutiny framework articulated by Justice Ginsburg in United States v. Virginia. Current sex discrimination analysis under Equal Protection scrutinizes sex classifications and stereotypes in the way ERA advocates of the 1970s had hoped. The women’s movement of the 1960s and 1970s

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38 See ACLU Oregon, Oregon Equal Rights Amendment Unnecessary, ACLU OREGON (July 3, 2014), http://www.aclu-or.org/2014BM_ERA.


41 Or, in Bruce Ackerman’s frame, we can regard the statutory sex discrimination law and the constitutional jurisprudence culminating in United States v. Virginia as achieving an informal amendment outside of Article V. See BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 15-30 (1998). Ackerman argues, specifically with regard to ERA, that despite a strong national majority in favor of the ERA, the frustrations of the federalism-protective formal amendment process might have fed a turn to courts as an alternative form for constitutional change. See id. at 413-14.


43 Consider the account of sex classifications in the 1971 Yale Law Journal article that is now widely treated as the informal legislative history of the ERA. See Barbara A. Brown, Thomas I. Emerson, Gail
succeeded in bringing about the passage of several statutes that prohibit discrimination, including disparate impact discrimination. Thus, even feminist law professors have voiced only lukewarm and measured support for the ERA, largely viewing it as symbolic and unlikely to have much effect. At the same time, not everyone believes in the legitimacy of the de-facto ERA. The late Justice Scalia has publicly stated that the Constitution does not prohibit sex discrimination.

E. The ERA’s Legal Apparatus: Stronger Antidiscrimination Rights

In light of these concerns, why ERA, and why now? ERA revivalists argue that the ERA is necessary now because of the persistent inadequacies of existing constitutional and statutory gender equality law. In “Why We Need an Equal Rights Amendment,” the ERA Coalition argues that “[t]he ERA will give women new avenues of legal recourse when they face sex discrimination.” Current ERA supporters believe that the ERA will reduce pay inequity, address violence against women, alleviate women’s employment disadvantages resulting from failures to accommodate pregnancy and caregiving. ERA supporters also point to women’s underrepresentation in leadership positions, suggesting that constitutional sex equality could do something about it.

These concerns are not entirely new. As Serena Mayeri has documented in her historical account of the attempt to revive ERA immediately following its failure in 1982, advocates of “ERA II” in the mid-1980s focused on “equality in fact” as compared to “equality in theory,” and wanted constitutional gender equality to encompass affirmative action, remedies for disparate impact discrimination, and broader freedom from discrimination based on pregnancy.


See, e.g., Elizabeth F. DeFeis, The Legal Impact of the Equal Rights Amendment, in Rights of Passage: The Past and Future of the ERA (Joan Hoff-Wilson ed., 1986); National Constitution Center, Do We Need an Equal Rights Amendment to Ensure Gender Equality in the US? Remarks by Professors Cary Franklin and Serena Mayeri (Mar. 4, 2015), https://www.youtube.com/watch?v=ulN0n0Flk0E.


But, as a practical legal matter, how would the ERA change women’s disproportionate share of family caregiving, the failure to accommodate pregnancy, the lack of remedies for violence against women, and women’s underrepresentation in leadership positions? To the extent that ERA advocates have described ERA as a legal framework, the amendment seems to embrace the familiar tools of constitutional and statutory anti-discrimination law and assume that strengthening these tools will lead to gender-equal outcomes. There is a significant gap between the popular constitutionalist vision and the legal constitutionalist vision of the ERA.

1. **Strict Scrutiny and Gender Roles in the Family**

For example, Congresswoman Maloney and the ERA organizations have issued statements arguing that the ERA should lead to strict scrutiny for sex classifications. Sex distinctions in the law would be suspect, like race distinctions, and would require a compelling state interest to justify.49 These arguments, made in 2015, echo the arguments of ERA proponents of the 1970s, who wanted the ERA to abolish the many sex distinctions in the law that effectively excluded women from the workplace and reinforced their role as mothers,50 many of which have been struck down in the intervening period on Equal Protection grounds.51

So why do ERA advocates want strict scrutiny now? They point to the Supreme Court’s 2000 decision in *Nguyen v. INS*52 which upheld a statutory provision that imposed more burdensome requirements on unwed fathers than on unwed mothers who were U.S. citizens for establishing the U.S. citizenship of their illegitimate children. Applying intermediate scrutiny to this sex-based differential treatment, the Supreme Court accepted the government’s position that mothers were necessarily present at a child’s birth, whereas fathers need not be, and therefore the rule ensured that citizenship was granted only to children who had a meaningful parent-child relationship with the U.S. citizen parent. ERA advocates, embracing Justice O’Connor’s dissenting opinion in that case, worry that the lack of strict scrutiny perpetuates gender stereotypes about the caregiving roles of mothers and fathers.53 The law in question would discourage unwed fathers from taking on a caregiving role, which in turn would saddle unwed mothers with caregiving duties. ERA advocates’ commitment to strict scrutiny is largely driven by the desire for law not to penalize fathers who defy the stereotype. Although the absence of strict scrutiny seems to leave courts to condone

50 See Brown et al., supra note __, at 888-909.
53 See *Nguyen v. INS*, 533 U.S. at 87 (O’Connor, J., dissenting); NEUWIRTH, supra note __, at 76.
traditional gender roles, which makes it hard for willing fathers to step out of traditional gender roles, stopping the law from perpetuating stereotypes is many steps away from actually incentivizing fathers to do more caregiving.

2. Disparate Impact and Pay Inequity

One concrete inequality that the ERA is envisioned to mitigate is pay inequity. Take, for example, a case in which a woman’s starting salary is significantly lower than her male peer’s, and remains lower several years into the job. An employer might justify the discrepancy in starting salaries on the grounds that they were arrived at based on the new employees’ prior salaries at other jobs, and not based on sex. A recent federal district court case brought by a female employee against a school district declined to find an Equal Pay violation under such circumstances, due to the acceptable business objective of using earnings history to determine salary.\textsuperscript{54} The ERA Coalition argues that “an ERA would hold such decisions to more rigorous sex equality standard, giving women a fighting chance to oppose basing present unequal decisions on past unequal decisions.”\textsuperscript{55}

Similarly, Representative Maloney has invoked the Supreme Court’s 2011 decision in Wal-Mart as an example of a problem that the ERA would address. “The Wal-Mart case decided by the Supreme Court this week 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.”\textsuperscript{56} The suggestion that the ERA might make a difference to future Wal-Mart cases is an ambitious one. The Wal-Mart plaintiffs could not proceed in their discrimination suit against Wal-Mart’s practices due to the Supreme Court’s view that they had not suffered a common injury, which it held to be required to proceed as a class action.\textsuperscript{57}

Would ERA help? If ERA is read to prohibit any neutrally formulated wage regime that produces inequity, then perhaps the claimants could more easily be said to suffer the same injury. Note that, under the new text, it is possible that the ERA will reach private conduct. It is also possible, but not necessary, that courts will construe disparate impact liability as a constitutional standard under ERA, even as they have refused to do so under Equal Protection. Currently, the text of the Equal Pay statute is read to be inconsistent with disparate impact theories.\textsuperscript{58} But surely, the ERA can be read to be compatible with disparate impact liability against private actors.

3. Legislative Authority and Violence Against Women

\textsuperscript{55} See ERA Coalition, Why We Need an Equal Rights Amendment, supra note __, at 2.
ERA advocates also argue that existing law has failed to remedy violence against women. In 2000, the Supreme Court struck down the private civil remedy provision of the Violence Against Women Act (VAWA) in 2000. The Court held that Congress lacked constitutional authority to authorize individuals to sue alleged perpetrators of gender-motivated violence in federal court. According to the Court, Section V of the Fourteenth Amendment was limited in scope to legislation that would remedy violations of Section 1 of the Fourteenth Amendment. Because Section 1, as long interpreted by the Supreme Court, can only be violated by state action, and not by private individual acts of violence, the Court concluded that enabling a rape victim to sue her attacker could not be understood as a remedy for a Section 1 violation. Even though there was ample evidence of the inadequate responses by police, prosecutors, and judges to violence against women, the Court declined to find the civil rights remedy to be a congruent and proportionate enforcement of equal protection or due process.

Implicit in Morrison is the assumption that the state’s failure to prosecute or punish violence against women raises is not a constitutional violation. In the 2004 case of Gonzales v. Castle Rock, a woman sued her town for its police’s failure to enforce a restraining order against her husband. Even though the police’s failure to enforce the restraining order led to her violent husband’s abduction and murder of their three children, the Supreme Court found no Due Process violation. The ERA Coalition suggests that “An 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.” The suggestion here is that, when prosecutors and police inadequately investigate and prosecute women’s allegations of violence, or fail to enforce orders of protection against perpetrators of violence against women, it can be said that “equality of rights under the law” are being “denied or abridged” by a state “on account of sex.”

4. Pregnancy and Caregiving

ERA proponents also believe that the ERA would lead to support for pregnant women at work and ease the burdens of work-family conflict for men and women alike. “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

60 Id. at 619-27
61 Id. (citing United States v. Harris, 106 U.S. 629 (1883) and Civil Rights Cases, 109 U.S.3 (1883)).
64 Id.
same time.”

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.” 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 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.” Unlike the arguments for strict scrutiny for sex classifications, disparate impact for wage inequity, and broader Congressional enforcement power for violence against women, ERA proponents have not offered a legal theory as to how a guarantee of women’s equality would lead to pregnancy or caregiving supports.

The ERA Education Project, another group advocating for immediate passage of the ERA, has a video on its website answering the question, “How does not having an Equal Rights Amendment affect me?” One slide describes the “The Situation Today Without the ERA,” pointing out that “Women do 90% of the unpaid labor of raising children and caring for the elderly and sick [sic]” all the work done in the country.” ERA Education Project claims that ERA would “enforce equality in wages, health insurance, pension, and social security,” but it is not obvious whether women’s disproportionate share of caregiving would be compensated or disrupted by the ERA.

5. Women’s Underrepresentation in Leadership

The same ERA Education project video also points out on its list of “The Situation Today Without the ERA” that “Women are 52% of the population but only 17% of Congress” and “Women are 46.5% of the workforce but only 12 percent of its corporate officers,” and “Women are 55% of Hollywood’s audience but only 9% of its directors.” Proponents seem to believe that the ERA would do something about women’s underrepresentation in positions of decisionmaking power.

An August 26, 2015 report of the Joint Economic Committee of the U.S. Congress on “Women and the Economy,” issued on the 95th anniversary of the 19th Amendment, lists the “[e]conomic challenges facing women today.” First on the list is the fact that “Although women hold over half of all professional-level jobs, they are underrepresented in leadership positions, holding about 5 percent of CEO

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66 See id. at 50.
67 Id.
69 Id.
positions and only 17 percent of board seats at Fortune 500 companies.” In addition to pay inequities, the list also includes the lack of paid leave to new mothers and the gap between mothers and women without children. In 2007, Representative Caroline Maloney directly linked the underrepresentation of women in government and business to her support for the Equal Rights Amendment. Again, there is no explicit account of how an ERA will lead to more women in leadership positions, unless one believes that women’s underrepresentation is explained by discriminatory policies that the ERA would invalidate. The connection between the leadership gap and ERA raises the question, however, of what the ERA’s stance would be with regard to measures, such as gender quotas, to increase women’s representation in government and business leadership.

6. Would ERA Help?

On all of these issues – strict scrutiny for sex classifications, disparate impact theory to address wage inequity, expansion of legislative power to enforce equality in areas like violence against women, pregnancy and caregiving supports, and women’s equal representation in leadership positions – there is a serious question as to whether either of the two proposed ERA texts, if added to our Constitution, would necessarily lead to change. First, on strict scrutiny, there is nothing in the text of either version of the ERA that would require strict scrutiny as compared to intermediate scrutiny. Furthermore, the embrace of strict scrutiny is not necessarily desirable, in light of the need for interventions on pay inequity, women’s underrepresentation in leadership positions, and pregnancy accommodations, which may require a non-gender-neutral acknowledgment of the gendered inequities stemming from pregnancy and parenting. In the race context, strict scrutiny now facilitates courts’ invalidation of affirmative action programs for underrepresented racial minority groups.

Second, with regard to pay inequity and disparate impact, there is no reason why a court that refuses to embrace disparate impact in equal protection sex cases would embrace it in construing ERA. It could be argued that the new text’s declaration that, “Women shall have equal rights,” makes any pay inequity constitutionally problematic, regardless of state action and regardless of whether it is caused by intentional discrimination. Much depends on whether having an “equal right” is defined by outcomes as compared to opportunities. The new text is perhaps a more plausible source of disparate impact liability on pay claims than the Equal Pay Act and the Equal Protection Clause. Unlike the Equal Pay Act, which explicitly justifies differences in pay that are not based on sex, ERA lacks the language that would put it at odds with disparate impact. Perhaps on both strict

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scrutiny and disparate impact, the mere existence of a separate constitutional clause for sex equality creates the possibility for courts wishing to do so to develop a fresh start jurisprudence that is not constrained by equal protection precedents. This seems at best a weak account as to how ERA would intervene on pay inequity.

With regard to violence against women, there are two problems that the ERA is imagined to solve. First, when the state fails to prosecute, punish, or otherwise remedy violence against women, that failure would be construed as an “abridgment” of “equality of rights under the law” “on account of sex.” Under Morrison, the state’s failure to prosecute domestic violence does not clearly register as an equal protection or due process violation, but perhaps the nexus between domestic violence and the ERA right to be free from sex-based abridgment of rights is perhaps clearer. Furthermore, the ERA advocates’ interest in Morrison suggests a more ambitious vision of legislative enforcement power under ERA Section 2. The ERA includes, in section 2, a delegation of power to Congress to enforce the equal rights guarantee. If failure to prosecute domestic violence can be construed as a violation of Section 1 of ERA, then it would follow that legislation authorizing private civil remedies, or other state initiatives to prevent or remedy violence against women, would be constitutionally sound.

It is also proposed that ERA would recognize men and women’s equal rights to work and have children at the same time and would require pregnancy accommodations. Again, an ERA is more likely to accomplish this directly if the new text is adopted, since it includes the sentence generally declaring women’s equal rights, with no state action requirement. More plausibly, however, an ERA in either formulation could lead indirectly to statutes and regulations on work-family reconciliation and pregnancy accommodation by consolidating a different, more expansive understanding of the federal legislative power to enforce women’s equal rights than that currently in the Supreme Court’s Equal Protection Section Five jurisprudence.

On all of these issues, it is also very possible for courts to interpret ERA as closely as possible to Equal Protection sex equality jurisprudence, especially if the three-state strategy is what leads to its passage. The three-state strategy preserves the 1972 text and the 1972 concerns with sex classifications and disparate impact. To make a difference to the remaining issues of gender inequality, such as the disadvantaging effects of pregnancy and caregiving, violence against women, and women’s underrepresentation in decisionmaking positions, a new text and a new opportunity to create legislative history may be needed.72

F. The Politics of Global Constitutionalism

In addition to the legal and doctrinal arguments thus far detailed, a powerful part of the rhetoric surrounding the ERA revival is a challenge to American

72 As Martha Davis points out, “[L]ike all constitutional provisions, much of the ERA’s ultimate meaning will depend on the legislative debate leading up to the provision’s enactment and on the particular construction it is then given by the executive and the courts.” See Martha Davis, The Equal Rights Amendment: Then and Now, 17 COLUM. J. L. & GENDER 419, 423 (2008).
constitutional exceptionalism. Like Justice Ginsburg, many twenty-first century ERA supporters decry our Constitution’s failure to mention sex equality as evidence of its falling behind the constitutions of the rest of the world. Catharine MacKinnon reports that 184 out of 200 written constitutions in the world have gender equality in some form. Only eight have the U.S. model, and 139 explicitly use the words sex, gender, or women and men.73 “At least in language,” she writes, “most other countries have legal guarantees of sex equality that are far superior to ours.”74

Congresswoman Carolyn Maloney has stated, “With the growing attention to the importance of worldwide equal rights for women, it is OUTRAGEOUS that unlike the constitutions of over 50 nations, the United States Constitution still does not guarantee equal rights on account of sex.”75 Congressman Jerry Nadler has stated, “In the year 2011, it truly an embarrassment for our nation that we still do not have gender equality enshrined in our Constitution . . . This profound omission undermines our standing as a nation committed to freedom and equality for all. It is a matter of simple justice and our leadership in the world that we move quickly to rectify this defect.”76 More recently, in a March 2015 speech commemorating the twentieth anniversary of the Beijing Declaration and Platform for Action, Maloney criticized the United States, declaring it a “disgrace” that we are “one of only 32 countries that doesn’t guarantee gender equality in its Constitution,” and the “only industrialized country that hasn’t” ratified CEDAW.77 Other proponents have emphasized the importance of the United States’ leadership on gender equality issues: “The United States will be a global model when it passes the Equal Rights Amendment.”78

The ERA Task Force, in its July 2015 statement, notes, “Ratification of the ERA would also improve the United States’ global credibility in the area of sex discrimination. Many other countries have in their governing documents, however imperfectly implemented, an affirmation of legal equality of the sexes. Ironically, some of those constitutions – in Japan and Afghanistan, were written under the direction of the United States government.”79 In a similar vein, the ERA Coalition states, “The United States has played an active role in promoting sex equality around the world. Most countries now have explicit sex equality provisions in their constitutions, leaving the United States behind in this respect. The United States, presenting itself as an example, should at least keep up with global progress in constitutional advancement for women.”80

74 Id.
75 The Equal Rights Amendment, 111th Congress, Prepared by the Office of Congresswoman Carolyn B. Maloney, July 13, 2009, at 8.
80 See ERA Coalition, Why We Need an Equal Rights Amendment, supra note __.
In his most recent film, Where to Invade Next, which takes the viewer on a tour of Europe in search of ideas to import to the United States, Michael Moore highlights the importance of constitutionalizing sex equality and putting women in decisionmaking positions. Congresswoman Jackie Speier hosted a screening of the film at the Capitol. Moore has expressed hope that American viewers, in witnessing European countries that have constitutionalized sex equality and made it a priority in public policy, will come to support the Equal Rights Amendment. In short, the popular constitutional movement for the ERA has embraced comparative constitutional law. The rhetoric of global constitutionalism is more promising than ERA’s legal apparatus of strict scrutiny, disparate impact, and other antidiscrimination enhancements as a route to improving ERA supporters’ goals of equalizing women’s wages and reconciling work and family.

II. Evaluating the Legal Arguments: The Experience of State ERAs

One way of evaluating whether and how ERA might lead to changes in the legal standards applied by courts is to consider the experience of state ERAs. While thirty-five states ratified the federal ERA, 23 states now have ERAs in their state constitutions. Curiously, some states with state constitutional ERAs have declined to ratify the federal ERA, and several states which ratified the federal ERA lack a state ERA.

Table 1. Federal ERA Ratifications and State Constitutional ERA, State by State.

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There is a debate within the law review literature about whether state ERAs have made a difference to advancing gender equality. The experience of state ERAs is relevant to any projections about whether a federal ERA is likely to produce a jurisprudence more robust than Equal Protection sex equality jurisprudence for the purposes of promoting gender equality. As it is argued that an ERA is unnecessary because of the adequacy of the “de facto ERA” in Equal Protection sex jurisprudence, it is worth considering whether and to what extent state courts have advanced any of the issues of greatest concern to ERA proponents in enforcing state ERAs.

A. State Adoption of Federal Equal Protection Jurisprudence

For the most part, state courts have been unimaginative in their interpretations of state ERAs, taking approaches very similar to the federal courts’ intermediate scrutiny framework for sex distinctions under the Equal Protection Clause. More generally, it appears that in the jurisprudence of constitutional equality, state courts have not developed doctrine independent of the federal Equal Protection Clause when interpreting their own constitutions’ equality clauses, even though most state constitutions have worded their equality clauses differently from the federal Equal Protection Clause. Similarly, state courts have been preoccupied with federal equal protection constructs when interpreting state ERAs in the face of sex discrimination claims. There is an unexamined reliance on the U.S. Supreme Court’s treatment of sex discrimination in Equal Protection cases.

Take, for example, the question of whether sex distinctions would be subject to strict scrutiny under the ERA. Several states have simply applied intermediate scrutiny to sex classifications. Some have used the language and label of strict scrutiny to describe their review of statutes that formally distinguish between men and women. Using the language of strict scrutiny, several state courts have declared sex classifications to be generally impermissible, except when the classification is required by physical differences. In Colorado, for instance, a rape statute that only

84 Id. at 23.
punished male offenders withstood strict scrutiny, and in Washington, a “lewd conduct” ordinance that punished women, but not men, for exposing their breasts in public also survived strict scrutiny. Because the sex classification at issue reflects a physical difference between men and women, the court does not belabor the question of whether the state has a compelling interest that is furthered by recognizing that physical difference, and there is no consideration of sex-neutral alternatives to recognizing the physical difference. In practice, the strict scrutiny label is stuck on an approach that is very similar to the U.S. Supreme Court’s intermediate scrutiny framework in *United States v. Virginia.*

Current ERA advocates have linked the ERA to interventions that would reduce pay inequity. This could occur if ERA came with a more lax state action doctrine than Equal Protection, and if courts recognized neutral practices that disadvantaged women as violations of the ERA. However, for the most part, state courts have not used the disparate impact theory to interpret state ERAs. As Linda Wharton points out, there are few reported decisions involving disparate impact claims under state ERAs. Some state Supreme Courts have explicitly rejected disparate impact in construing their ERAs. The Supreme Court of Texas, for example, has cited the U.S. Supreme Court’s rejection of disparate impact claims under the Equal Protection Clause to enforce a discriminatory intent requirement in construing the Texas ERA. Furthermore, as Robert Williams has documented, some states have adopted an approach to state constitutional equality guarantees, including ERAs, which consciously mirrors federal Equal Protection. Any state ERA that is interpreted in this manner would implicitly exclude the disparate impact theory, which may explain the dearth of cases. Nonetheless, some state courts have embraced disparate impact theory in interpreting their ERAs. This avenue is underutilized, but it may signal an opening for further development.

Current ERA advocates have also linked the ERA to interventions that are needed to ease the burdens of pregnant workers. With attention to the recent Supreme Court case of *UPS v. Young*, the failure to accommodate the needs of pregnant workers is portrayed as a form of sex discrimination that undermines women’s equal rights. One issue that has come up is the status of maternity leave in calculating unemployment insurance benefits. In Massachusetts, the Supreme Judicial Court upheld a decision to exclude maternity leave from the period of time worked for the purpose of calculating the amount of time a female employee had

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87 Wharton, *supra* note __, at 1257.
88 See *Bell v. Low Income Women of Texas*, 95 S.W.2d 253, 260 (Tex. 2002) (rejecting a disparate impact theory as to why Texas’s exclusion of abortion from Medicaid funding violated the state ERA).
89 See Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 *Tex. L. Rev.* 1195, 1213 (1986). Here Williams points out that a 1973 decision of the Virginia Supreme Court held that exempting women with caregiving responsibilities from juries did not violate the state ERA, because the new state constitutional provision was “no broader than the equal protection clause of the Fourteenth Amendment,” and thus, at the time, only gave rise to rational basis review. *See Archer v. Mayes*, 194 S.E. 2d 707 (1973).
90 *See infra*, text accompanying notes __ and __.
worked to determine her benefit. The Supreme Judicial Court that this approach did not violate the state ERA.91

B. State Departures from Federal Equal Protection

However, a few notable divergences illustrate the potential of state law and state courts to innovate in developing the meaning of sex equality under their own Equal Rights Amendments.92 State courts have played an important role in the evolution towards the Supreme Court’s recognition of the right to same-sex marriage.93 In Washington and Pennsylvania, for instance, state courts in the 1970s explicitly declared that their ERAs were to go beyond federal equal protection jurisprudence. While the U.S. Supreme Court had recently applied a rational basis test to sex-based distinctions, the Washington Supreme Court cited from the Pennsylvania Supreme Court's construction of the Pennsylvania ERA to conclude that the Washington ERA required heightened scrutiny of sex classifications.94

In 1975, the Pennsylvania Supreme Court recognized the disparate impact theory in construing its Equal Rights Amendment to scrutinize a neutral state rule regarding the ownership of household goods in divorce which appeared to disadvantage women.95 Without explicitly using the language of disparate impact, the Court viewed ERA as rejecting any approach that imposed unjustifiable greater burdens on one sex, even if formulated in a gender-neutral way. Then, in 1999, the Pennsylvania Supreme Court rejected a defendant’s argument that “a facially neutral rule that does not classify individuals on the basis of gender cannot violate the ERA.” It concluded that, “while a practice may purport to treat men and women equally, if it has the effect of perpetuating discriminatory practices, thus placing an unfair burden on women, it may violate the ERA.”96

Some state courts have departed from the U.S. Supreme Court’s Equal Protection jurisprudence by making pregnancy discrimination a violation of the state ERA. In Colorado, the Supreme Court held that an employee violated the Equal Rights Amendment in providing an insurance policy that did not cover the medical expenses of a normal pregnancy.97 California’s lower courts have construed the state’s constitutional sex equality provision98 to authorize remedies for pregnancy discrimination. In so doing, the court has noted that the U.S. Supreme Court, in

92 For a more thorough account of these cases, see JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES, Vol. 1, Ch. 3 (2000).
98 CAL. CONST. art. I, § 8 (1879).
*Geduldig v. Aiello*, does not recognize pregnancy discrimination as an Equal Protection violation, but nonetheless determined that the California provision should be read differently.\(^{99}\) If it contravenes the public policy of constitutional sex equality to discriminate against an employee on the basis of pregnancy, and pregnancy discrimination includes failure to accommodate pregnant workers, one can see how the state ERA can provide a normative hook for legal strategies to ease the burdens of pregnancy.

Several state courts have also consciously departed from federal law to strike down healthcare funding schemes that exclude abortion.\(^{100}\) In applying heightened scrutiny to policies that involve no explicit sex classification, the approach has some similarities to a disparate impact test. In *New Mexico Right to Choose/NARAL v. Johnson*, the New Mexico Supreme Court struck down a state law that limited state funding for abortions for indigent women based on the state's Equal Rights Amendment. Under federal law, the Hyde Amendment made funding unavailable for medically necessary abortions. In 1994, a New Mexico regulation had made state funding available for medically necessary abortions, but a subsequent revision, at issue in this case, restricted state funding of abortions to those certified by a physician as necessary to save the life of the mother or to end an ectopic pregnancy. The Court began by acknowledging that the New Mexico Equal Rights Amendment afforded Medicaid-eligible women "greater protection against gender discrimination than they receive under federal law." Even though the regulation did not use a formal sex classification, the Court applied heightened judicial scrutiny because the law treated the medical necessity of patients differently "based on a physical characteristic unique to one sex, namely the ability to become pregnant and bear children."\(^{101}\) Under heightened scrutiny, no compelling justification was found for this unequal treatment. The New Mexico Supreme Court viewed the New Mexico ERA was “the culmination of a series of state constitutional amendments that reflect an evolving concept of gender equality in this state.”\(^{102}\) In reviewing this history, the court pointed out that pregnancy was not merely a physical condition unique to one sex, but a physical condition that has historically operated to the disadvantage of women.\(^{103}\) Similarly, the Connecticut Supreme Court has concluded that abortion funding restrictions violate the state ERA.\(^{104}\) In Alaska, where the state constitution prohibits sex discrimination in the employment context only, the Alaska Supreme Court held that Medicaid restrictions on medically necessary abortions violate the state constitution’s equal protection clause.\(^{105}\)

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\(^{100}\) In *Harris v. McRae*, the U.S. Supreme Court held that a state participating in a Medicaid program is not required by the U.S. Constitution to fund medically necessary abortions. 448 U.S. 297, 326 (1980).

\(^{101}\) *New Mexico Right to Choose/NARAL v. Johnson*, 126 N.M. 788, 975 P.2d 841, 850 (1998).

\(^{102}\) *Id.*

\(^{103}\) *Id.* at 854.


In 1978, in *Marchioro v. Chaney*, the Washington State Supreme Court upheld its statutory gender quota on state political party committees, with 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.\textsuperscript{106} 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 the pre-ERA approach, in Washington, of applying heightened scrutiny to sex classifications, had been “swept away” by the ERA. The ERA did not make the government “powerless to take measures designed to assure women actual as well as theoretical equality of rights.” The court then concluded, “This is precisely the purpose of this legislation.”\textsuperscript{107} 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 statute which mandates equality by invoking a provision of the constitution passed to guarantee equality.\textsuperscript{108}

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.”\textsuperscript{109} Such rules were problematic because they were “exclusionary statutes which apply to one sex only,”\textsuperscript{110} unlike the gender quota at issue here.

The Washington Supreme Court also noted that, while 16 states at the time had state ERAs, only the state of Washington used the phrase “equality of rights and responsibility.” 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.”\textsuperscript{111} The gender quota ensured that men and women exercised equal responsibility on state political party committees. By focusing on responsibility

\textsuperscript{106} See *Marchioro v. Chaney*, 90 Wash. 2d 298 (1978).
\textsuperscript{107} Id. at 306.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 307.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 307-08.
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.

The experience of state ERAs is mixed. On the one hand, state courts have relied significantly on the analysis developed by the United States Supreme Court in Equal Protection sex discrimination cases. They are not taking advantage of all the significant opportunities to fix the gender inequalities that federal law has failed to address. But one recent empirical study of constitutional sex discrimination litigation in all 50 states finds a statistically significant higher likelihood of a decision favoring an equality claim in states that have ERAs.112 At the level of doctrine, the openness of some state courts to disparate impact and their willingness to invoke ERA to fund medically necessary abortions illustrate the potential for state ERAs to develop a more robust constitutional response to issues of pay inequity and pregnancy.

III. 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 its failure to constitutionalize sex equality, some attention to foreign constitutions’ sex equality provisions and the status of women in those societies is needed. Norway consistently ranks first or second for closing the gender gap in the World Economic Forum’s annual Global Gender Gap rankings, but Norway’s constitution makes no mention of sex or gender equality. So it is hard to argue that constitutionalizing sex equality by text is necessary to achieve the outcomes that many international organizations count as indicators of gender equality – women’s economic participation rates, equal wages between men and women for comparable work, representation of women in political institutions, and women’s health and education levels. At the other end of the spectrum, Chad ranks #142, very close to the bottom of the WEF’s Global Gender Gap Rankings. The constitution of Chad contains an Equal Rights Amendment that looks remarkably similar to that of Washington State: “Chadians of both sexes have the same rights and same duties. They shall be equal before the law.”113 So it is also hard to argue that constitutionalizing sex equality by text is sufficient to achieve outcomes that count as indicators of gender equality. Constitutional sex equality provisions are neither necessary nor sufficient to reducing gender gaps. So, contrary to the

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113 Constitution art. 13 (Chad). All foreign constitutions hereinafter quoted and cited in English, are available from the Constitute Project at https://www.constituteproject.org/.
rhetoric of ERA proponents, the mere fact that the vast majority of constitutions throughout the world contain a sex equality provision is not a seriously compelling argument in favor of constitutionalization in the United States.

My purpose here is not to stipulate a necessary or causal relationship between gender equality amendments and outcomes that we could describe as optimal for gender equality. Rather, a close look at the actual content of constitutional provisions relating to sex equality in economically advanced democracies might open up the American imagination about what a twenty-first-century constitutional amendment can possibly accomplish, in light of the changed landscape of gender equality since the ERA was last seriously debated. Sex equality is a staple of global constitutionalism, and an informed picture of what constitutional equality can do, and how, is helpful. Does entrenching women’s equality in the constitution help address the problems that preoccupy the ERA movement? How have constitutional sex equality provisions been enforced, utilized, or invoked to intervene on gender roles in caregiving, pay inequity, violence against women, pregnancy-related disadvantages, or women’s underrepresentation in government and business leadership? If any transformative legal moves have been made outside of the United States, how might such accomplishments be usefully translated for the American constitutional trajectory? The approach here is translation, not transplant. The recent history of constitutionalizing gender equality in Europe reveals possibilities for Americans to consider. While we can’t cut and paste foreign law, knowing about our peers should open some new avenues, and disrupt path dependencies. With the ERA, which was first proposed almost a century ago, and came close to adoption a generation ago, the more recent constitutional activity in similar advanced democracies can be a sounding board for constitutional modernization.

Turning to the WEF gender equality rankings of high-income countries, the United States ranks 19th this year. I examined the sex equality-related provisions of all the high income countries that ranked higher than the United States in the WEF 2015 gender equality index: Iceland, Norway, Finland, Sweden, Ireland, Switzerland, Slovenia, New Zealand, Germany, Netherlands, Denmark, France, United Kingdom, Belgium, Latvia, Estonia, Barbados, and Spain. 114 All but one of the countries that rank higher than the United States in this group are European countries. Thus, I focused on the constitutions of European countries. 13 of these 18 countries were European Union member states, which is unsurprising in light of the robust body of EU sex equality law that binds its members. 115 I examined the constitutions of all 28 member-states of the European Union and identified, from these two overlapping groups, 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. Equal Protection

Clause, but they 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 differently defined 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 eradicate such protections.\textsuperscript{116} At the same time, current ERA activists have suggested that pregnant worker accommodations would be enabled by the ERA. 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, play a significant role in enabling women’s access to employment. So it is worth noting, from a gender equality perspective, those countries which have constitutionalized the special protection of mothers.

Table 2. Constitutions of EU Member States

<table>
<thead>
<tr>
<th>Country</th>
<th>Equality</th>
<th>Substantive</th>
<th>Maternity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>Art. 3.1 &amp; Art. 3.3</td>
<td>Art. 3.2</td>
<td>Art. 6.4</td>
</tr>
<tr>
<td>France</td>
<td>Pr. 1946</td>
<td>Art. 1</td>
<td>Pr. 1946</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>N/A</td>
<td>Art. 51</td>
<td>Art. 37</td>
</tr>
<tr>
<td>Italy</td>
<td>Art. 3</td>
<td></td>
<td>§ 14</td>
</tr>
<tr>
<td>Spain</td>
<td>§ 14</td>
<td>No</td>
<td>§ 39.1</td>
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<tr>
<td>Poland</td>
<td>Art 33</td>
<td>Art. 33</td>
<td>Art. 68.3, Art. 71.2</td>
</tr>
<tr>
<td>Romania</td>
<td>Art. 4.2</td>
<td>Art. 16.3</td>
<td>Art. 41.2</td>
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<td>Netherlands</td>
<td>Art 1</td>
<td>No</td>
<td>No</td>
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<td>Belgium</td>
<td>Art. 10</td>
<td>Art. 11bis</td>
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<tr>
<td>Greece</td>
<td>Art. 4.2</td>
<td>Art. 116.2</td>
<td>Art. 21.1</td>
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<tr>
<td>Portugal</td>
<td>Art 13.2</td>
<td>art. 9h</td>
<td>Art. 59(2)c</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Art. 3.1</td>
<td>No</td>
<td>Art. 29.1, Art. 32.2</td>
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<tr>
<td>Hungary</td>
<td>Art.XV(2) &amp; (3)</td>
<td>Art. XV(4)</td>
<td>Art XV(5)</td>
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<td>Sweden</td>
<td>Ch. 2 Part 4 art. 13</td>
<td>Ch. 1 Art. 2</td>
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<td>Art. 7</td>
<td>Art. 7.2</td>
<td>Art. 12.1.1</td>
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<td>Bulgaria</td>
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<td>Denmark</td>
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<td>No</td>
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<td>Finland</td>
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<td>Ch. 2, Section 6</td>
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<td>Slovakia</td>
<td>Art. 12.2</td>
<td>No</td>
<td>Art. 41.2</td>
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</table>

\textsuperscript{116} 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.”)
<table>
<thead>
<tr>
<th>Country</th>
<th>Equality</th>
<th>Substantive</th>
<th>Maternity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Iceland</td>
<td>Art. 65</td>
<td>No</td>
<td>No</td>
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<td>Norway</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Switzerland</td>
<td>Art. 8.1 &amp; 8.2</td>
<td>Art. 8.3 &amp; 8.4</td>
<td>Art. 41.2</td>
</tr>
<tr>
<td>Barbados</td>
<td>Ch. III, art. 1</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>New Zealand</td>
<td>Art. 21.1(a)</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

Table 3

Gender Equality Provisions in constitutions of non-EU wealthy countries ranking higher than the United States in the Global Gender Gap Index 2015.

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 Finnish constitution, Section 6: “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.”117 Finland has consistently ranked either second or third in the WEF’s global gender gap index for the past decade, and this year third only to Norway and Iceland.118 Some constitutions, like the Austrian, frame the nondiscrimination guarantee as an exclusion of “[p]rivileges based upon birth, sex, estate, class, or religion.”119 And in other constitutions, like the French, the prohibition of discrimination is expressed in the Preamble.

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

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117 Suomen perustuslaki [CONSTITUTION], § 6 (Fin).
118 Global Gender Gap Index 2015, supra note __, at 173.
119 BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION], art. 7 ¶ 1 (Austria).
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, but can also be interpreted 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 “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.” 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, colour, property, birth or other status. Men and women shall enjoy equal rights in all respects.”120 Similarly, the Belgian constitution guarantees “equality between women and men.”121 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.” But the Preamble to the French constitution declares, “The law guarantees women equal rights to those of men in all spheres.”122 Similarly, the German constitution says, “Men and women shall have equal rights.” The constitution of Luxembourg says, “Women and men are equal in rights and duties,” and the Dutch 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.”123 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 as aspiration to substantive equality.

Nonetheless, some of these constitutions provide further clarification on the meaning of these equality guarantees by way of additional substantive equality talk. 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 befavoured or disfavoured because of sex, parentage, race, language, homeland, and origin, faith, or religious or political opinions.” 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.”124

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

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120 Stjórnarskrá lýðveldisins Íslands [CONSTITUTION] art. 65 (Ice.).
121 1994 CONST. art. 10 (Belg.).
122 1958 CONSTITUTION preamble (Fr.).
123 GW. [CONSTITUTION] art. 6 (Neth.).
124 GRUNDEGESETZ [GG] [BASIC LAW], art. 3 (Ger.) translation at https://www.bundestag.de/blob/284870/.../basic_law-data.pdf.
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.125

An interesting example is also found in the Austrian constitution, which contains a separate paragraph that follows the non-discrimination guarantee: “The federation, Länder, and municipalities subscribe to the de-facto equality of men and women. Measures to promote factual equality of women and men, particularly by eliminating actually existing inequalities, are admissible.” In addition to this clause, the Austrian constitution contains many additional provisions that clarify the duty of government to reduce gender inequality. Article 13, which covers taxation, states “Federation, Länder, and municipalities have to aim at the equal status of women and men in budgeting.” In Portugal, Article 9, which lists “Fundamental tasks of the state,” includes “To promote equality between men and women.”126

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.127 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 in the context of a constitutional reforms to facilitate Finland’s accession to the European Union. In addition, the Beijing Declaration and Platform for Action emerging from the United Nation’s 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.128 In addition, the European Commission had encouraged member states since the 1980s to adopt policies to ensure women’s equal representation in decisionmaking positions,129 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 the Article 3 addressing suffrage, stating “The law shall promote equal access by men and women to the electoral mandate and to elected positions.” In 2008, the constitution was amended again, deleting the article 3 provision and adding language to Article 1 to expand the scope of the state’s duty to reduce gender gaps. Article 1 now reads:

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125 Suomen perustuslaki [Constitution], § 6 (Fin.).
126 CONST, art. 9 (Port.).
127 I provide more details into the conflicts in France giving rise to the amendments in 1999 and 2008 in Part IV, infra.
128 U.N. World Conference on Women, Beijing Declaration and Platform for Action, Strategic Objective G.1; para. 190.
129 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.
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 elective offices and posts as well as to professional and social positions.\textsuperscript{130}

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, \textsuperscript{131} Greece, \textsuperscript{132} Hungary, \textsuperscript{133} Italy, \textsuperscript{134} Malta, \textsuperscript{135} Portugal, \textsuperscript{136} Romania, \textsuperscript{137} Slovenia, \textsuperscript{138} and Sweden, \textsuperscript{139} Canada, \textsuperscript{140} and South Africa. \textsuperscript{141} 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 include children, the elderly, and/or the disabled as well. I regard these provisions as “special” protections for mothers, even when 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]

(1) Marriage and the family shall enjoy the special protection of the state.

\textsuperscript{130} 1958 Const. art. 1 (Fr.).
\textsuperscript{131} 2002 Const. art. 11bis (Belg.).
\textsuperscript{132} 2000 Syntagm [Syn.] [Constitution] 116 (Greece).
\textsuperscript{133} Magyarország Alaptörvény [The Fundamental Law of Hungary], 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.
\textsuperscript{134} Art. 51 Costituzione [Cost.] [Constitution] (It.).
\textsuperscript{135} Const. art. 14; 45.11 (Malta).
\textsuperscript{136} 1997 Const. art. 109 (Port.).
\textsuperscript{137} Const. art. 16.3 (Rom.).
\textsuperscript{138} Const. art. 43 (Slovn.).
\textsuperscript{139} Regeringsformen [RF] [Constitution] 1:2 (Swed.).
\textsuperscript{140} Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, art. 15.2.
\textsuperscript{141} S. Afr. Const. 1996, art. 9.2, 46, 174 (South Africa) (latter two articles impose gender quotas explicitly).
(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. 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:

It [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.¹⁴²

The guarantee of special protection for mothers, often articulated in the context of protections for children, marriage, the family, and the elderly, or disabled are very common in the constitutions of the formerly communist Eastern European countries. Bulgaria,¹⁴³ Croatia,¹⁴⁴ the Czech Republic,¹⁴⁵ Hungary,¹⁴⁶ Lithuania,¹⁴⁷

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¹⁴² 1958 Const. preamble para. 11 (Fr.).
¹⁴³ Const. art. 47 (2) (Bulg.).
¹⁴⁴ Const. art. 65 (Croat.).
¹⁴⁶ Magyarország Alaptörvény [The Fundamental Law of Hungary], art. XIX.
¹⁴⁷ 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.”
Poland,\textsuperscript{148} Slovakia\textsuperscript{149} all have such provisions. But explicit constitutional protections of mothers or pregnant women can be found in the constitutions of Italy,\textsuperscript{150} Ireland,\textsuperscript{151} and Greece\textsuperscript{152} 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. Have 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, and Greece, Germany and France 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.

IV. From Antidiscrimination to Actual Equality: Two Jurisdictions With Recent Amendments

I now focus on 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 described as comparativism of the cherry-picking variety. In some important respects, Germany and France each 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

\textsuperscript{148} 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.”).

\textsuperscript{149} Const. art. 41(2) (Slovak) (“Pregnant women shall be entitled to special treatment, terms of employment, and working conditions.”).

\textsuperscript{150} Art. 37 Costituzione [Cost.] [Constitution] (It.) (“Working conditions must allow women to fulfil their essential role in the family and ensure the appropriate protection for the mother and child.”).

\textsuperscript{151} Constitution of Ireland 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.”)

\textsuperscript{152} 1975 Syntagma [Syn.] [Constitution] 21(1) (Greece).
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. There is an additional section at 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 disadvantaged 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.153 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).154 Selbert believed that Article 3(2) was intended to guarantee equality by recognizing differences,155 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.156

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 special treatment, which was additionally bolstered by Article 6(4) of the Constitution, the maternity protection clause.157 Using this logic, in 1956, the Federal Constitutional Court upheld a labor code provision limiting the working hours of women.158 Invoking the same

155 Baer, supra note __, at 76.
156 See Colneric, supra note __, at 231.
157 BVerfGE 3, 225 (1953), para. 42.
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.\textsuperscript{159} The cases of the 1950s construed the 3(2) equality of rights guarantee as doing no more than prohibiting discrimination, and the 3(3) antidiscrimination guarantee as permitting different treatment pursuant to review similar to American rational basis. 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.\textsuperscript{160}

2. Heightened Scrutiny for Sex Distinctions in the 1970s to 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 1974, the Constitutional Court invalidated a statutory provision, invoking Article 3(2), which 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.\textsuperscript{161} 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.\textsuperscript{162} 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.\textsuperscript{163} 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.\textsuperscript{164} 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 German Constitutional Court invoked Article 6(4) to invalidate a provision of the Maternity Protection Law for insufficiently

\textsuperscript{159} BVerfGE 6, 389 (1957).
\textsuperscript{160} BVerfGE 10, 59 (1959).
\textsuperscript{161} BVerfGE 37, 217 (1974).
\textsuperscript{162} See Anne Peters, Women, Quotas, and Constitutions 159 (1999) (citing BVerfGE 43, 213, 225-26 (1977)).
\textsuperscript{163} See Jäger, supra note ___ at ___.
\textsuperscript{164} BVerfGE 84, 9 (1991).
protecting a pregnant employee from dismissal.\textsuperscript{165} The statute generally prohibited the dismissal of pregnant employees and made such dismissals void if the employer knew of the pregnancy or was informed of it within two weeks of the pregnant worker's dismissal. But the Court held that the statute, in allowing for valid dismissals of pregnant employees if the employer did not know of the pregnancy, was insufficiently protective of mothers and therefore unconstitutional. The constitutional duty to protect mothers extended to protecting pregnant workers even when they are not aware that they are pregnant. 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 appears to obligate the state to protect pregnant workers by accommodating them, beyond merely prohibiting discrimination against the pregnant.

In the late 1980s, the West German Federal Constitutional Court suggested that the "equal rights" guaranteed in that clause 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, 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(3) in the event of a measure aiming to compensate disadvantages associated with the double burden.\textsuperscript{166} 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). 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 \textit{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),\textsuperscript{167} but that the operation of

\textsuperscript{165} B\textsc{VerfGe} 52, 357 (1979).
\textsuperscript{166} B\textsc{VerfGe} 74, 163 (1987).
\textsuperscript{167} "Not every inequality based on sex offends Article 3(3)." \textit{See} B\textsc{VerfGe} 95, 191 (1992). (Trans. Donald Kommers, German Law Archive) available at \url{http://www.iuscomp.org/wordpress/?p=79} (last visited Aug. 13, 2016).
the law undermined women’s factual equality, which had to 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.168

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 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.169

Thus, what emerges from the Nocturnal Employment Decision 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” “not only seeks to abolish legal norms that link advantages or disadvantages to gender, but seeks to implement equal rights for the future. It is directed at the equalization of living conditions.” It was “a constitutional mandate to foster equal standing of men and women . . . that extends to social reality.”170

168 Id.
169 Id.
170 Id. See Peters, supra note __, at 161.
3. The “Actual Implementation of Equal Rights”: Amendment, Affirmative Action, and Disparate Impact

The German Constitutional Court’s Nocturnal Employment 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 Nocturnal Employment 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 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. But others continued to assert, however, 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.” 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.” It went further: “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.” 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 promotes the actual implementation of equal rights for men and women and takes steps to eliminate disadvantages that now exist.”

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171 Einigungsvertrag [Unification Treaty], Aug. 31, 1990, BGBl. II at art. 5 (Ger.).
172 Id. at art. 31.
173 Id.
174 GRUNDGESETZ [GG], art. 3(2) (Germany 1994). 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 Case C-450/93, Kalanke v. Freie Hanstadt Bremen,
In the late 1990s, the German Constitutional Court also recognized the disparate impact theory. The German Constitutional 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 a gender neutral regime mainly affects women and this is due to natural or social differences between the sexes.” On the one hand, 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 great-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 in Article 6(4) with the duty to reduce existing disadvantages in Article 3(2), diminishing the formal anti-discrimination provision of 3(2). 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. In Germany, the maternity leave statute requires pregnant women to take maternity leave for 6 weeks before and 8 weeks after childbirth, during which they receive maternity pay with contributions from both the employer and from the state. But the 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."  

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 norm.” 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

1995 IRLR 660; Case C-409/95, Marschall v. Land Nordrhein-Westfalen; Case C-158/97, Badeck v. Hesse, 2000 ECR I-01875.
175 BVerfGE 97, 35 (1997).
177 Id. at 50.
other enforceable rights.\textsuperscript{179} Individuals do not enforce an entitlement to actual implementation of equality through the constitutional complaints procedure, but the Constitutional Court can invoke the clause to limit the scope of other rights attempted to be enforced. Other examples of government goals that function similarly 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 unfavored 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 principles for its actions.\textsuperscript{180} In 2001, the legislature adopted the Federal Equality Law on the Equality of Men and Women in Federal Administration and Courts.\textsuperscript{181} In departments where women are underrepresented, women with equal qualifications must be given preferential consideration for training, jobs, and promotions, taking the individual case 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, and if the unit is downsizing, the 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.\textsuperscript{182} Germany joins Norway, France, the Netherlands, Italy, Belgium, and Spain in adopting some form of gender balance rule for corporate boards.\textsuperscript{183}

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 Law\textsuperscript{184} 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 12 months of paid parental leave, which can be taken by one parent or

\textsuperscript{179} See Peters, supra note __, at 162, citing BVerfGE 85, 191, 209 (1992).
\textsuperscript{180} Cabinet Resolution 23 June 1999.
\textsuperscript{181} Bundesgleichstellungsgesetz (2001). Gesetz zur Gleichstellung von Frauen und Männern in der Bundesverwaltung und in den Gerichten des Bundes, 
\textsuperscript{182} Gesetz für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen in der 
Privatwirtschaft und im öffentlichen Dienst (March 5, 2015).
\textsuperscript{183} For an account 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 I*CON 449 (2012).
\textsuperscript{184} Gesetz zum Elterngeld und zur Elternzeit (2006).
shared by the two. If the two parents share the leave, an additional 2 months of paid leave become available.\footnote{Id. at Abschnitt 4.} 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 was calculated based on the salary the parent taking the parental leave earned before the birth of the child. 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. 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 12 months.\footnote{Sozialgesetzbuch [SGB] VII, § 24 (Germany).} 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 sphere, and measures to increase men’s presence in the family and private sphere.

Nonetheless, the Federal Constitutional Court has explicitly linked policies that encourage care of children by fathers and by public institutions to the constitutional duty to promote actual sex equality. In a pair of cases in 2011, individual women complainants brought constitutional challenges to some features of the 2006 parental leave reform, claiming that they violated their rights to equal treatment. 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).\footnote{BvR 2712/09 (Germany 2011).} 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, another mother challenged the policy of expanding the length of leave only if both parents take leave.\footnote{Gesetz § 24 Abs. 2 Satz 1 SGB VIII (Germany).} She wanted to take the full fourteen months, and argued that it violated her right to equal treatment to condition the availability of the two months on the father taking some leave. She argued that the baby, who was
born pre-term, needed the special care that only she as the mother could provide. The Federal Constitutional Court rejected her claim, noting that the state had a duty under Article 3(2) to actually implement equality for men and women. The legislature thus had to 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.

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 takes care of their child at home from the ages of 15-36 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 noted that 94% of parents claiming the care allowance in lieu of public daycare were women, and concluded that the childcare allowance was contrary to Article 3(2) because it incentivized women to stay home to raise children.\(^\text{189}\)

In all of these recent cases on parental benefits, leave, and childcare, the litigants raised, in addition to claims of equal treatment, additional 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.\(^\text{190}\) 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 autonomy claims resonate with the American jurisprudence of Due Process.\(^\text{191}\) 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, without being coerced to do so, the Constitutional Court saw the Article 6(1) entitlement as minimally compromised and outweighed by the legislator’s duty in Article 3(2).

B. France

The French constitution, like the German, contains all three features that do work 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,\(^\text{192}\) and this has been understood to embody an anti-sex-discrimination norm.\(^\text{193}\) France, like Germany,
amended its constitution in the 1990s to authorize measures to address women’s underrepresentation, such as gender quotas. The French constitution also contains a postwar clause that articulates a duty on the part of the state to protect mothers.\textsuperscript{194} Unlike the German Constitutional Court, the French Constitutional Court 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 electoral mandate and to positions of social and professional responsibility.”\textsuperscript{195}

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 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.\textsuperscript{196}

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.\textsuperscript{197} The repudiated law had prohibited political parties from running more than 75 percent of candidates of one gender in municipal elections.\textsuperscript{198}

2. Feminist Mobilization: From Antidiscrimination to Parity Democracy

\textsuperscript{194} Preamble 1946 art. 11.
\textsuperscript{195} 2008 CONST. art. 1 (Fr.).
\textsuperscript{196} Constitution Decl. Rights of Man art. 6 (Fr.).
\textsuperscript{197} Conseil Constitutionnel, 82-146 DC, Nov. 18, 1982.
\textsuperscript{198} Id.
Following the 1982 decision by the Constitutional Council, feminists mobilized and created a strong public discourse challenging the underrepresentation of women in Parliament.\footnote{A major book articulating the goals of this movement was Françoise Gaspard, Claude Servan-Schreiber, & Anne LeGall, Au pouvoir, citoyennes! Liberté, Égalité, Parté (1989). See also Joan Scott, Parité! (2002); Sylviane Agacinski, Parity of the Sexes (Lisa Walsh trans., 1999); Eric Millard, Constituting Women: The French Ways, in The Gender of Constitutional Jurisprudence 122 (Beverly Baines & Ruth Rubio-Marin eds., 2005).} But 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 its emphasis from discrimination to democracy. Article 1 of the Declaration of Rights of Man provides, “Men are born free and equal in rights. Social distinctions may be based only on considerations of the common good.”\footnote{Const. Decl. Rts. of Man, art. 1 (Fr.).} 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 Court 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.\footnote{Loi constitutionnelle n° 99-569 du 8 juillet 1999 relative à l’égalité entre les femmes et les hommes; J.O. du 9 juillet 1999} The following year, legislation prohibiting political parties from running more than 60 percent of candidates of one gender was introduced.\footnote{Loi no. 2000-493 du 6 juin 2000 tendant à favoriser l’égal accès des femmes et des hommes aux mandats électoraux et fonctions électives, J.O. du 7 juin 2000.} 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. But the Constitutional Court upheld the new quota, acknowledging that the 1999 Amendment permitted the legislature to adopt strong measures, even those that departed from universalism to compel equal equality.\footnote{Conseil Constitutionnel, Décision no 2000-429 du 30 mai 2000.}

Nonetheless, when the legislature adopted a law that imposed gender quotas on corporate boards of directors in 2006,\footnote{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.} 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. It was in reaction to the 2006 Constitutional Council decision that the more comprehensive amendment of 2008 was proposed, 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.” 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.”

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, very similar to the one that was struck down in 2006. It provided that, by 2017, the boards of publicly traded companies could not exceed 60% of each gender. The corporate board gender quota law was adopted in January 2011, and it was followed by several statutes and regulations that imposed gender quotas in many other decisionmaking bodies. For example, a 2012 law provided that civil service governing bodies could not exceed 60% of each gender. A 2013 statute, reforming education, provided that the list of candidates for decisionmaking positions within higher education institutions had to be gender-balanced. The education statute also imposed the 60% cap on members of one gender on various university committees. 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.

In 2014, the French legislature adopted a comprehensive gender equality statute, asserting its mandate emanating from the 2008 constitutional

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207 Loi no. 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).
208 Id.
209 Loi n° 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, art. 52.
210 Loi n° 2013-660 du 22 juillet 2013 relative à l’enseignement supérieur et à la recherche (1).
212 Loi n° 2014-873 du 4 août 2014 pour l’égalité réelle entre les femmes et les hommes (1).
amendment. 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. 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. The most significant reforms in this statute, Title I, on “professional equality between men and women,” address the disadvantage of women’s disproportionate share of work within families and households on women’s careers. Thus, there are many new provisions, largely inspired by 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 as professional sports organizations, and strengthen mechanisms of enforcing existing political party quotas.

The statute includes an abortion reform, which is presented as a measure to promote equality between men and women in professional life. Article 14, in Title I of the statute, amends the abortion law within the Code of Public Health. The Public Health Code has, since 1973, permitted abortion on demand within the first trimester, as long as the pregnant woman certifies that the pregnancy puts her in “a situation of distress.” The reform at Article 14 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.”

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. Title III aids victims of violence as well as victims of “attacks on dignity and image in communications based on sex.” 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.

4. Not A Fundamental Right: Parity as Principle

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214 See id. at 5, 15.
215 Id. at 15.
216 LOI n° 2014-873 du 4 août 2014 pour l’égalité réelle entre les femmes et les hommes (1), Title V.
217 It should be noted that, with regard to abortion funding, a 2012 statute authorized 100% reimbursement by the state for all legally permitted abortions. The same statute entitles young people age 15-18 to free contraception. See LOI n° 2012-1404 du 17 décembre 2012 de financement de la sécurité sociale pour 2013, art. 50, 52.
218 It 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 herself in written communications.
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 men and women to political and professional 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 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).

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 Rights of Man, as well as other constitutional principles. The Constitutional Council upheld the gender quota, holding that it was permitted pursuant to Article 1’s language, “Statutes shall promote equal access by women and men to . . . positions of professional . . . responsibility.”

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, so as 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 1789 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 it. 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.

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219 See 2008 CONST. art. 61-1 (Fr.).
But the more interesting part of the Constitutional Council’s decision concerned its remarks directed at the intervenors in the QPC proceedings. Although rare in QPC proceedings to date, the Constitutional Council had authorized an intervention in this one by fifteen academic researchers, some professors and other lecturers, who were members of a REGINE, a research group on law and gender. REGINE’s brief to the Constitutional Council argued that the 2008 amendment putting equal access by women and men to important 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,221 essentially validating gender quotas in all domains of social and professional life, and (2) the legislator 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 limited committees 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 notes that the law can justifiable treat two committees differently when they are differently situated. Since one committee deals with lecturers’ careers, and the other deals with professors’ careers, there is equality problem in having different rules for each committee. In effect, the Constitutional Council 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: “... 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.” Thus, the recent constitutionalization of gender equality is a foundational republican principle or goal, and not an individual right.

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 Rights. The intervenors invoked Article 1’s parity provision, but they were intervenors, not claimants. More importantly, the

221 REGINE brief, at 4-5 (on file with author).
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 legislator’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. The reconceptualization of gender parity as a condition to be attained to maintain the constitutional order of a democratic republic, rather than an individual right, is a powerful transformation that can inform the American debate about the future of federal and state Equal Rights Amendments.

V. Remaking the ERA Through State and Global Constitutionalism

A. Completing the Revolution in Social Reproduction

In the three decades since 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 ERA will strengthen the tools of antidiscrimination doctrine to disrupt 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 ERA is ill-matched for 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.\(^{222}\) This is why Sweden introduced incentives to encourage fathers to take

\(^{222}\) In Finland, for example, fathers take 9 percent of the total of all parental leave days, 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 3-4 (2015).
leave, which Germany copied, and even when fathers take some leave, they take less than mothers.

What’s needed to address these problems are carefully designed and well-funded public policies: 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, norms of diversity and gender balance in major institutions of power, to name a few. Would a constitutional sex equality amendment help engender or protect these institutional supports for gender equality? 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.223 Because both 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 amendment 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 economies of wealthy democracies of the late twentieth century.224 These economies now depend on women’s participation in the labor market. This necessarily destabilizes women’s role as full-time caregivers within the family, leaving a gap in the society’s presumed arrangements for raising the next generation of citizens. Enlightenment constitutions assumed that women would be excluded from the 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.225 But today, average American middle-class families cannot afford housing, education, healthcare, and other basic costs unless two parents work.226 Such societies require new arrangements by which the

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223 See supra, text accompanying notes [] to [].
226 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
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 18th and 19th 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.”227 Women’s constitutional exclusion from the 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 the constitution. 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 her husband” as consistent with Equal Protection and Due Process, because “the domestic sphere” and “the family institution” belonged to the “domain and functions of womanhood.”228 In Germany, for example, 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.229

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 role as dependent and caregiver 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 protection 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

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227 ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 207 (1994).
228 Bradwell v. State, 83 U.S. 130, 141 (1873) (Bradley, J., concurring).
229 BVerfGE 3, 225 (1953), para. 42. See discussion, supra, Part IV.A.1.
positions, and creating incentives for fathers to take paternity leave. The French Constitutional Court has also relied on gender equality as a fundamental republican principle 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 principle 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

The twenty-first century infrastructure of social reproduction includes the institutional arrangements by which the new generation of citizens will be raised in a society where men and women are participating equally in democratic governance and market work. It 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 children of two breadwinners, and employment designed for coequal parents.

1. Pregnancy Accommodation

Women’s unequal economic status stems in part from their unwanted separation from work during pregnancy. Even though employment discrimination statutes prohibit discrimination on the basis of pregnancy, they do not require the reasonable accommodation of pregnant workers unless the employer accommodates workers who are similarly situated in their ability or inability to work. 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. 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.

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, 15 states have adopted laws requiring the reasonable accommodation of pregnancy: Alaska, California, Connecticut, Delaware, Hawaii, 

\[^{230}\text{These requirements are stipulated by a European directive on the safety and health of pregnant workers. See Council Directive 92/85, art. 5, 8, 10; 1992 O.J. (L 348) 1, 2 (EC).}\]

\[^{231}\text{Despite the decision in favor of the plaintiff to allow her past the summary judgment stage, the Supreme Court’s decision in Young v. UPS affirms this understanding of the Pregnancy Discrimination Act. See Young v. UPS, 135 S.Ct. 1338, 1350 (2015).}\]

\[^{232}\text{ALASKA STAT. § 39.20.520 (2013).}\]
Illinois, Louisiana, Maryland, Minnesota, Nebraska, New Jersey, New York, North Dakota, Rhode Island, Texas, and West Virginia. In addition, local governments, including the District of Columbia, Philadelphia, New York City, and Providence 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, 8 of these states (including Pennsylvania, in which Philadelphia has adopted a pregnant worker statute), have ratified the federal ERA and adopted a state constitutional ERA.

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 12 percent of private sector workers have access to paid family leave through their employer. States have taken the lead in legislating paid parental leave. California led the way in 2002. New Jersey followed in 2008 and Rhode Island in 2013. All of the 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

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233 CAL. CODE REGS. tit. 2 § 11049 (2013).
234 CONN. GEN. STAT. §§ 46a-60(a)(7), 46a-51 (2011).
235 DEL. CODE. tit. 19, §§ 710, 711, 716 (2014).
237 775 ILL. COMP. STAT 5/2-101, 102 (2014).
243 N.D. CENT. CODE § 14-02.4-03(2) (2015).
245 The Texas statute applies to county and municipal employers. TEX. LOC. GOV’T CODE §180.004 (2001).
251 See Table 1, supra.
253 Disability Insurance Program, CAL. UNEMPL. INS. CODE, §§ 3300-3306 (Cal.)
255 Temporary Caregiver Insurance Act, R.I. GEN. LAWS § 28-41-34 et seq.
leave statute in 2007, but the program has yet to be implemented. New York State passed legislation in April 2016 adopting a 12-week paid family leave benefits law which will go into effect in 2018. Local governments are also adopting paid leave policies: The mayor of New York City recently signed an executive order requiring nonunion employers to provide 6 weeks of paid parental leave at 100 percent pay. In April 2016, San Francisco also enacted 6 weeks of fully paid parental leave, which will eventually cover all employees working for more than 180 days for an employer with more than 20 employees.

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 5 or 6? 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, which would have created nationally funded, locally administered, comprehensive child care centers providing quality education, nutrition, and medical services, open to all on a sliding-scale fee basis. Four months before Congress passed the ERA, Nixon vetoed the childcare bill, 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, Obama called for Universal Pre-Kindergarten in his 2013 State of the Union Address. Meanwhile, states have been creating the right to pre-kindergarten education, with strong bipartisan support. Forty-five states provide some funding for preschool. Florida, for example, amended its constitution in 2002 to

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256 Family and Medical Leave Insurance Act of 2007 (Wash.)
264 Id.
entitle every 4-year-old to be offered a voluntary pre-K program.\textsuperscript{265} Georgia and Oklahoma also offer universal pre-K for all four-year-olds.\textsuperscript{266} In other states, publicly funded preschool does not serve all eligible children and typically limits enrollment to low-income children.\textsuperscript{267} 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 right is understood as an infrastructure of social reproduction, the dynamics of national consensus might shift considerably.

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 pm makes sense in the old infrastructure of care, 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 care, which assumes 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 share 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?\textsuperscript{268} One’s answer to this question depends in part on how the other components of the infrastructure would be designed, such as education. If the school day is lengthened, the current norm of 9-5 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 the right to

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\item \textsuperscript{265} \textit{FLA. CONST.} art. IX, § 1 (2002).
\item \textsuperscript{266} See Mike Bostock, Shan Carter & Kevin Quealy, \textit{State-Financed Preschool Access In the U.S.}, N.Y. TIMES, Feb. 13, 2013. Florida and Oklahoma have the highest percentage of 4 year olds enrolled in state preschool programs, at 76% and 73% respectively.
\item \textsuperscript{267} See Sara Mead, \textit{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.
\item \textsuperscript{268} Joan Williams argues that the ideal worker norm, including the 9 to 5 workday, is designed around masculine norms. \textit{See 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. \textit{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).
\end{itemize}
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 discuss the request in good faith, and provides the employer with factors the employer may consider. San Francisco adopted a law with very similar terms and requirements. It protects employees from retaliation for requesting flexible work arrangements. The achievement of gender balance in management and decisionmaking 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 have 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, when 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.

Laws requiring gender balance in any institutional setting are also more likely to emerge and be upheld at the state level. Indeed, some 14 states in the United States have statutes that require gender balance on the state 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. All but two of these states (Missouri and South Carolina) have either ratified the federal ERA or adopted a state ERA or both. 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 of the woman’s suffrage amendment to the U.S. Constitution. Their proponents viewed political party gender balance rules a realization of the 19th Amendment’s goals. While some state courts struck down these amendments on

\[269\] Act No. 31 relating to equal pay (Vt. July 1, 2013).
\[271\] See supra, text accompanying notes [] to [].
\[273\] See Table 1, supra.
various federal constitutional grounds, including Equal Protection and even the Nineteenth Amendment itself, some state courts have upheld them on either the same or state constitutional grounds. Marchioro v. Chaney illustrates how a state ERA can form the normative foundation of a statutory gender quota.

C. Calling it Constitutional

State policies are beginning to build the new infrastructure of social reproduction in the United States, but they are not necessarily framed in terms of constitutional equality for women. But constitutionalization can make it an infrastructure rather than a set of policies promoting contingent political interests at a particular moment. Constitutionalizing a commitment to eradicating women’s sex-based disadvantages can help coordinate the components of the social reproduction infrastructure. As a practical matter, it is clear that some degree of institutional coordination is required between the elements of the infrastructure of social reproduction; 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 depends 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 against these policies. Even if we don’t adopt such strong interventions in the United States as a matter of policy, the Equal Protection claims of men and women who are somehow 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 anti-discrimination constructions of ERA would strengthen the challengers of paternity leave incentives or gender quotas, rather than the adopters. If the law nudges fathers to do more caregiving through different legal requirements for mothers and fathers seeking leave, it would be unfortunate if ERA made such initiatives harder rather than easier. Moving ERA away from antidiscrimination and towards the infrastructure of social reproduction would avoid this situation.

If we rethink the ERA as a directive to create an infrastructure of social reproduction that is compatible with all genders participating equally in both the

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276 E.g., In re Cavelier, 159 Misc. 212 (N.Y. 1936).
278 See discussion at supra, Part II, text accompanying notes [] to [].
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, and 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. 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. 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 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, have primary responsibility for enforcing the constitution.

Translated to 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, have developed a proportionality analysis in


280 As Robert Alexy puts it, “constitutional 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 __, at 352.

balancing constitutional principles against constitutional rights. 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 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 21st-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 5 jurisprudence.

As noted earlier, the Oregon ERA, along with Washington’s ERA, explicitly authorize the state legislature 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 the states to enforce the federal ERA. If all of the state attempts to build a new infrastructure of social reproduction are explicitly understood to enforce state or federal 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. 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. 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. Proponents of ERA II in the 1980s also embraced public policies such as paid parental leave and

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284 See id. at 3-30.
285 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 (2010).
childcare. Legal feminists began to innovate within antidiscrimination law to remedy disadvantages experienced by mothers in the workplace. Since the 1990s, courts have increasingly recognized employers’ adverse actions against mothers as sex discrimination, and, in 2007, the EEOC issued guidelines detailing the circumstances under which discrimination against caregivers constituted sex discrimination. 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.

The divisions that killed the ERA in the 1980s have a completely different valence today, due to changes in the economy. In the 1980s, 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. This rhetoric has less relevance today, because the full-time homemaker is becoming extinct in advanced democracies. In 1970, 30 percent of women were in the workforce; today, 57 percent are. Among mothers with children under the age of 18, 70 percent participate in the labor market. Most families with children need two incomes to afford housing, healthcare, education, and other basic costs. As of 2006, two-paycheck couples are more numerous than male-breadwinner households had been in 1970. 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 the public policies that would protect motherhood, but they do so from the premise that most mothers must work. Many of these groups focus on policies that would make it easier to

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286 See Mayeri, supra note __, at 1233.
293 Id.
296 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).
combine family caregiving and market work. These organizations include Moms Rising, Mothers of Preschoolers (MOPS), Mothers & More, Mocha Moms, and Momentum. These groups advocate for maternity and paternity leave, flexible work arrangements, education and childcare, fair wages, universal healthcare, toxics-free environments, paid sick days, gun control, healthy school foods, and immigration fairness. 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." 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 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 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." Anne-Marie Slaughter sparked a national conversation after her 2012 article “Why Women Can’t Have it All" confessed that the pull of motherhood led her to quit a high-powered job at the State Department. Now, in Unfinished Business, she argues that public policy should enable everyone to work and care equally. Only then will we approach gender equality.

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. 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 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

297 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: Mothers Speak Out on Why We Need to Change the World and How To Do It (Andrea O’Reilly ed., 2011).
300 Motherhood Manifesto, supra note __, at __.
301 Anne-Marie Slaughter, Why Women Still Can’t Have It All, The Atlantic, July/August 2012.
Recent state legislative interventions with regard to paid parental leave and pregnant worker fairness, and the tradition of state gender quotas for political party leadership, should all be understood as enforcing constitutional sex equality. In Europe, constitutional equality is institutionalizing a twenty-first century infrastructure of social reproduction to replace the separate spheres tradition that declined in the late twentieth century. These legal orders’ special protections of mothers, held over from the separate spheres era, have been reinterpreted to entail a constitutional duty to eradicate the disadvantages and burdens of motherhood, to enable women’s equal participation in politics and the economic sphere. There is great potential in states for developing innovative jurisprudence around their ERAs in connection to the recent legislative agendas. States that are adopting laws that ease the burdens of pregnancy and caregiving should see themselves as participating in global constitutionalism. By becoming more aware of other constitutional orders’ varied struggles and solutions to shared obstacles to gender equality, gender equality advocates in the American legal space can develop a more nuanced and ambitious vision for state ERAs. Eventually, this transformation should influence federal constitutional change.