

TRANSGENERATIONAL AND TRANSNATIONAL: GIVING NEW MEANING TO THE ERA

Julie C. Suk[∞]

This convening on the Equal Rights Amendment to the U.S. Constitution is titled “The Equal Rights Amendment: A Century in the Making.” It highlights the transgenerational nature of the Equal Rights Amendment (ERA), which was introduced in 1923, adopted by Congress almost fifty years later in 1972, only to expire in 1982 three states shy of the requisite 38 ratifications. Then, over four decades later, two additional states ratified, with a 38th state ratification feasible in 2019. If ratified in the coming year, how should we construe the meaning of a constitutional amendment introduced almost a century ago and adopted half a century before full ratification? Proponents of the ERA in 1923 wanted to remove major legal impediments to women’s full citizenship, and the ERA movement in 1972 focused on other remaining forms of sex discrimination. Today, the feminist discourse around ERA ratification revolves around twenty-first century issues, such as #MeToo, unequal pay between women and men, and the failure to accommodate pregnancy in the workplace.¹ If the ERA is ratified in 2019, activists and scholars must create a robust public discourse to update its meaning for the twenty-first century to move beyond the legislative histories at the moments of introduction and legislative adoption. Though it was introduced in 1923 and adopted in 1972, an ERA ratified in 2019 should speak to present and future generations.

A transnational lens can provide a useful contemporary perspective on this transgenerational constitutional amendment, as many countries have recently added gender equality amendments to their constitutions.² Most constitutions around the world contain clauses that explicitly guarantee sex equality or prohibit sex discrimination. Provisions guaranteeing equal rights for men and women were put in place by women who participated as “founding mothers” in constituent assemblies in European nations that adopted these constitutions after World War I and World War II.³ In the past twenty years, these European countries added additional gender equality amendments to their constitutions, clarifying the meaning of constitutional sex equality for a new generation. Much can be learned from this

[∞] Professor of Sociology and Dean for Master’s Programs, The Graduate Center, CUNY.

¹ See, e.g., Maya Salam, *What is the Equal Rights Amendment and Why Are We Talking About It Now?*, N. Y. TIMES (Feb. 22, 2019), <https://www.nytimes.com/2019/02/22/us/equal-rights-amendment-what-is-it.html> [<https://perma.cc/UXV4-244B>]; Gayle Lemmon, *Now’s the Time to Ratify the Equal Rights Amendment*, CNN (Nov. 24, 2018), <https://www.cnn.com/2018/11/24/opinions/time-to-ratify-the-equal-rights-amendment-lemmon/index.html> [<https://perma.cc/7DP2-SE7Z>].

² For an extended discussion of constitutional sex equality clauses in European constitutions, and relevant insights for the ERA revival, see generally Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 YALE J. L. & FEMINISM 381 (2017).

³ For a more detailed account of women constitution-makers after World War I and World War II in Germany, France, and Italy, see Julie C. Suk, *Feminist Constitutionalism and the Entrenchment of Motherhood*, in *Special Issue: Law and the Imagining of Difference*, 75 STUD. IN L., P., & SOC’Y 107 (2018).

evolution. The United States is an outlier in not guaranteeing equal rights to women.⁴ Our constitution is one of the oldest constitutions in the world, and perhaps the most difficult to amend.⁵ Gender equality amendments adopted within the last twenty years in Europe were intended to address some of the same gender inequalities that are motivating the renewed ERA effort.

The origins of the American struggle for the ERA ran parallel to European developments. Led by suffragist Alice Paul, the ERA was introduced in 1923, on the heels of the suffrage amendment.⁶ Across the Atlantic, German women had just participated in constitution-making at Weimar in 1918–19, freshly equipped with the right to vote and elected by an electorate that included women for the first time.⁷ These women advocated in favor of a constitutional provision guaranteeing basic equality of rights and duties between men and women in the German constitution of 1919,⁸ a provision that survives, with minor modifications and additions, in the German Basic Law that is in force today.⁹

But unlike equal rights provisions in other countries, the American ERA has a history of dividing women rather than uniting them. First, the ERA divided the feminists who fought for women's suffrage: Notable social feminists like Florence Kelley did not support an ERA that would endanger laws that protected women in the workplace.¹⁰ But Alice Paul, the drafter and most vocal proponent of the ERA, insisted that the amendment would preclude woman-protective labor legislation.¹¹ In Germany, by contrast, equal rights were construed by the women constitution-

⁴ See Catharine A. Mackinnon, *Toward a Renewed Equal Rights Amendment: Now More Than Ever*, 37 HARV. J. L. & GENDER 569, 579 (2014) (“On my count and analysis, gender equality exists in some form in 184 out of 200 written constitutions in the world.”).

⁵ See Rosalind Dixon, *Partial Constitutional Amendments*, 13 U. PA. J. CONST. L. 643, 645–46 (2011) (“[B]y global standards, Article V imposes some of the most onerous hurdles in the world for the ratification of amendments.”). Article V of the U.S. Constitution authorizes constitutional amendments either by adoption by two thirds of both houses of Congress followed by ratification by three-quarters of the states, or by a constitutional convention called by two-thirds of the state. See U.S. CONST. art. V. Only the first method has been utilized thus far to amend the Constitution. By contrast, other constitutions have amendment provisions that simply require majoritarian referenda or legislative supermajorities. See, e.g., 1958 CONST. art. 89 (Fr.), GRUNDGESETZ [GG] [BASIC LAW] art. 79 (Ger.), translation at http://www.gesetze-im-internet.de/englisch_gg/index.html [<https://perma.cc/58CZ-TWYD>].

⁶ See Suffragists Oral History Project, *Conversations with Alice Paul: Woman Suffrage and the Equal Rights Amendment*, Interview by Amelia R. Fry with Alice Paul (1976), <http://content.cdlib.org/view?docId=kt6f59n89c> [<https://perma.cc/HN6J-83KZ>].

⁷ See generally RICHARD EVANS, *THE FEMINIST MOVEMENT IN GERMANY 1894-1933* (1976); UTE FREVERT, *WOMEN IN GERMAN HISTORY: FROM BOURGEOIS EMANCIPATION TO SEXUAL LIBERATION* (1989); PAUL BOOKBINDER, *WEIMAR GERMANY: THE REPUBLIC OF THE REASONABLE* (1996).

⁸ See Weimar Constitution of August 11, 1919, art. 109, available at www.documentarchiv.de/wr/wrv/html [<https://perma.cc/NH86-FRNU>].

⁹ See GRUNDGESETZ [GG] [BASIC LAW] art. 3.2 (Ger.).

¹⁰ See NANCY WOLOCH, *A CLASS BY HERSELF* 130 (2015); JOSEPHINE GOLDMARK, *IMPATIENT CRUSADER: FLORENCE KELLEY'S LIFE STORY 184-85* (1953).

¹¹ See Tracey Jean Boisseau & Tracy A. Thomas, *After Suffrage Comes Equal Rights? ERA as the Next Logical Step*, in *100 YEARS OF NINETEENTH AMENDMENT: AN APPRAISAL OF WOMEN'S POLITICAL ACTIVISM* 227, 232 (Holly J. McCammon & Lee Ann Banaszak eds., 2018).

makers from all sides of the political spectrum as compatible with the constitutional protection of motherhood, another clause for which they fought.¹²

Nonetheless, the question of whether constitutional sex equality is compatible with governmental measures to alleviate women's subordination continued to be, and remains, contested. Women tend to be disadvantaged economically and underrepresented in positions of power. That is why, in Germany, as well as in France, Italy, and Belgium, additional gender equality amendments were added to these postwar constitutions at the end of the twentieth century and beginning of the twenty-first century.¹³ Building on the sex equality guarantees that emerged after World War II, constitutional amendments of the 1990s, often in the form of rules requiring gender balance, were made in response to some constitutional court decisions of the 1980s striking down affirmative action for women. The new constitutional amendments adopted language authorizing, if not obligating, governments to promote equality for men and women. In Germany, the 1994 amendment explicitly said that the law shall promote actual implementation of equal rights between women and men, and eradicate disadvantages that now exist.¹⁴ Similarly, a series of constitutional amendments in France in 1999 and 2008 were designed to make clear the legislature's legitimate authority to promote "equal access by women and men to the electoral mandate, elected offices, and positions of professional and social responsibility."¹⁵

In the American legal culture, leading thinkers note that judicially enforced remedies make constitutional rights effective.¹⁶ It is assumed that the ERA, if ratified, would be enforced by lawsuits challenging sex-discriminatory governmental action, and that such lawsuits would combat remaining manifestations of gender inequality. But consider the problems that today's ERA advocates emphasize: violence against women by powerful men like Harvey Weinstein and Brett Kavanaugh, unequal pay by many private employers, failure to accommodate pregnancy in the workplace, and lack of good childcare options, which leads mothers to take on disproportionate care burdens to their economic detriment.¹⁷ Lawsuits alleging that a state entity is abridging equal rights would not directly address these issues. The lion's share of work that needs to be done to address these twenty-first century manifestations of women's subordination is at the level of legislation, regulation, and public policy. What is needed is a policy infrastructure that empowers women against the mechanisms that produce gendered disadvantage, more so than lawsuits challenging sex-discriminatory governmental action. Congress and the States should legislate institutional changes mandating effective equal pay, pregnant worker fairness, the sharing of childcare burdens with men, and

¹² For a more detailed account of the debates in the Weimar National Assembly, see Julie Suk, *Gender Equality and the Protection of Motherhood in Global Constitutionalism*, 12 J. L. & ETHICS OF HUM. RTS. 151, 163-70 (2018).

¹³ See, e.g., GRUNDGESETZ [GG] [BASIC LAW] art. 3.2 (Ger.); 1958 CONST. art. 1 (Fr.); Art. 51, 117 COSTITUZIONE [COST.] (It.); 1994 CONST. art. 11bis (Belg.).

¹⁴ GRUNDGESETZ [GG] [BASIC LAW] art. 3.2 (Ger.).

¹⁵ 1958 CONST. art. 1 (Fr.).

¹⁶ See, e.g., Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

¹⁷ See, e.g., Salam, *supra* note 1.

women's representation on corporate boards and public office. Rethinking and redesigning schools and workplaces could also prevent the abuses of power inherent in sexual harassment and violence against women. What, if anything, is the ERA's relationship to these policies?

In Germany and France, the constitutional amendments of the late twentieth century catalyzed and legitimized aggressive legislative action to combat women's disadvantages and lack of access to positions of power. Legislators invoked the constitutional sex equality amendments to lend political legitimacy to gender equality agendas, resulting in laws combating the underrepresentation of women in civil service positions, elected offices, and corporate boards, and laws incentivizing fathers to take parental leave.¹⁸ When litigants challenged these policies, invoking various constitutional rights (for example, equal rights of men, or family privacy/substantive due process), the German Constitutional Court, in several key rulings, used the 1994 gender equality amendment, particularly its language on the legislative power to eradicate existing disadvantages, to uphold such policies. For instance, legislation intending to promote equal parenting through providing incentives for paternity leave-takers has been legitimized by the Constitutional Court.¹⁹

In France, the Constitutional Court rejected challenges to gender quotas framed in terms of formal equality by male litigants, on the grounds that the 2008 amendment clearly authorized the legislature to promote equal access by women and men to positions of power, which naturally meant measures to overcome women's underrepresentation.²⁰ Since the 2008 amendment, which stated "the law shall promote equal access by women and men to elective offices and posts and positions of social and professional responsibility," the legislature has invoked the amendment to justify a wide-ranging law on "real equality between women and men."²¹ That statute, adopted in 2014, liberalized abortion, imposed gender balance rules on a wider array of institutions, and created incentives for those who take paternity leave, to name a few provisions. Both the French and German examples illustrate how a constitutional amendment on sex equality can function as a catalyst for rigorous legislative gender equality agendas, as well as a shield to legitimize such agendas when challenged in litigation enforcing other rights.

My purpose is not to prescribe the current law and politics of the United States, but to help imagine paths to a brighter future for gender equality. Imagine how a twenty-first-century ERA could function if its transgenerational meaning were informed by transnational practice. Gender-equal rights in the Constitution can do more significant work in the twenty-first century as a shield rather than as a sword. The ERA's primary role in the U.S. constitutional landscape could be to clarify and legitimize initiatives to eliminate gender subordination. This function can be an important twenty-first-century counterweight to the tendency to enforce

¹⁸ For further discussion of these laws, *see generally* Suk, *supra* note 2.

¹⁹ *See* BVerfG, 1 BvR 2712/09, June 6, 2011.

²⁰ Conseil constitutionnel [CC] [Constitutional Court] decision No. 2015-465QPC, Apr. 24, 2015 (Fr.).

²¹ Loi 2014-873 du 4 août 2014 pour l'égalité réelle entre les femmes et les hommes, [Law 2014-873 of August 4, 2014 for real equality between women and men], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Aug. 5, 2014, p. 12949.

formal sex equality through existing constitutional and statutory antidiscrimination law, sometimes to women's detriment. Recently, in California, the legislature adopted a new law requiring publicly traded companies with headquarters in the state to have at least one woman on their board of directors.²² (Contrast this with the laws in France and Germany requiring at least 30 or 40 percent women). Before the ink was dry, legislators worried that the law would be challenged on federal or state Equal Protection grounds because it employs a gender classification, which might not survive intermediate scrutiny.²³ If the Constitution contained an Equal Rights Amendment in addition to the Equal Protection Clause, a thoughtful judge could hold that legislative action to eradicate gendered disadvantages is legitimate and constitutional under the ERA. Such reasoning could be deployed to defend against any suggestion that measures to reduce women's disadvantage violate Equal Protection. A twenty-first century ERA could be interpreted similarly to the recent amendments in other countries that have clarified the legitimacy of measures to eliminate the gender-based disadvantages that continue to persist.

On this understanding of the ERA, the amendment belongs more to legislators, or the people themselves, than to lawyers and judges. The ERA's capacity to bring us closer to a gender-equal world stems not from the declaration of equal rights in Section 1 of the Amendment, but from the legislative power to enforce equal rights in Section 2. The ERA may not require gender quotas, affirmative action, or paternity incentives, but a transgenerational and transnational understanding of the ERA could legitimize a broad range of public policies to promote a gender-equal society, both politically and judicially.

²² CAL. CORP. CODE § 301.3 (West 2019).

²³ *Hearing on S.B. 826 Before the Assembly Committee on Judiciary*, 2018 Leg., LEG SESSION 6–7. (Cal. 2018) (analysis prepared by Thomas Clark and Sandra Nakagawa).