

THE EQUAL RIGHTS AMENDMENT IN GLOBAL CONTEXT: GENDER EQUALITY IN CONSTITUTIONS WORLDWIDE AND THE POTENTIAL OF MORE COMPREHENSIVE APPROACHES

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INTRODUCTION

The United States' failure to explicitly guarantee equal rights on the basis of sex in its Constitution is rare by global standards. Among the 193 United Nations member states, 85% specifically guarantee equal rights or prohibit discrimination on the basis of sex and/or gender.¹ Among newer constitutions, these protections are universal: every constitution adopted since 2000 has guaranteed women's equal rights. And even in countries with older constitutions, policymakers have taken action to address gender equality. The Constitution of Luxembourg, for example, which was adopted in 1868—the same year as the Fourteenth Amendment—was amended in 2006 to not only establish that “[w]omen and men are equal in rights and duties” but also to make clear that “[t]he State must actively promote the elimination of any existing obstacles to equality between women and men.”²

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¹ JODY HEYMAN, ALETA SPRAGUE & AMY RAUB, *ADVANCING EQUALITY: HOW CONSTITUTIONAL RIGHTS CAN MAKE A DIFFERENCE WORLDWIDE* 49 (2020); *Constitutions Database*, WORLD POL'Y ANALYSIS CTR. (2022), <https://www.worldpolicycenter.org/topics/constitutions/policies> [<https://perma.cc/6F3Q-RZG2>]. For details on WORLD's methods for building the globally comparative data on constitutional rights presented throughout this article, see *Constitutional Rights Database – Methods*, WORLD POL'Y ANALYSIS CTR. (2022), <https://www.worldpolicycenter.org/topics/constitutions/methods> [<https://perma.cc/HQ3P-6WZA>].

² CONSTITUTION OF LUXEMBOURG (1868, rev. 2009), art. 11(2).

Against this backdrop, enacting the Equal Rights Amendment (ERA) is both long overdue and critical to bringing the United States in line with global norms. Moreover, case law from various countries illustrates that constitutional guarantees of sex or gender equality have made a difference in a wide range of areas that matter to women's fundamental rights, including areas that require far greater attention if we are to accelerate progress on gender equality in the United States. At the same time, a constitution designed to fully embody equality would go farther—and newer constitutions from around the world illustrate two additional elements that would remain absent from the U.S. approach even if we were to adopt the ERA: 1) guarantees of core social and economic rights that matter to substantive gender equality, including health, education, and social protection, and 2) comprehensive protections of equal rights on all grounds, rather than sex alone.

In this essay, we briefly survey case law from around the world to illustrate why adopting the ERA is a critical first step toward full constitutional gender equality in the United States. We then share findings from a unique global dataset about the prevalence of constitutional protections for core social and economic rights and comprehensive anti-discrimination protections globally, and explore how, paired with guarantees of gender equality, these protections can provide a strong foundation for realizing equal rights for all women in practice.

I. Passing the ERA Matters—Now As Much As Ever

Well into the twenty-first century, half of the U.S. population lacks equal rights. Though the Fourteenth Amendment guarantees “equal protection of the laws,” it took over a hundred years for the Supreme Court to find that this protection extended to women³—and even then, an all-male bench determined that sex discrimination only merited “intermediate scrutiny,” a lower standard than that afforded to discrimination based on race, religion, or national origin.⁴ Moreover, as textualism enjoys a resurgence in the judiciary, even established precedents—including those central to gender equality—are facing new threats because certain rights are not clearly enumerated in the language of the Constitution.⁵ As recently as 2010, a Supreme Court Justice confidently asserted that the

³ Reed v. Reed, 404 U.S. 71 (1971).

⁴ Craig v. Boren, 29 U.S. 190, 218 (1976) (Rehnquist, J. dissenting).

⁵ Jessica Glenza, *How Dismantling Roe v. Wade Could Imperil Other ‘Core, Basic Human Rights’*, GUARDIAN (Dec. 11 2021, 2:00 AM), <https://www.theguardian.com/us-news/2021/dec/11/supreme-court-roe-v-wade-gay-rights-contraceptives-fertility-treatments> [<https://perma.cc/2EQR-N72Q>].

Constitution does not prohibit discrimination based on sex.⁶ To assume that gender equality will remain settled law leaves much up to chance when the text is silent.⁷

Other countries' experiences demonstrate both the practical and normative value of these protections—underscoring why moving forward with the ERA, which would add the following language to the constitutional text, matters: “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.”⁸

In particular, gender equality guarantees in other countries have played an important role in shaping how laws address paid work and caregiving, a critical area for continued norm change—both in the United States and globally—if we are to realize gender equality in practice. For example, in Colombia, the Constitutional Court cited the gender equality provision in ruling that women could not be fired from their jobs without cause during pregnancy or in the three months after giving birth.⁹ Similarly, in Spain, the Constitutional Court ruled in favor of a woman who had received a negative performance review with no reasonable basis following her maternity leave, citing the constitution's protections against discrimination based on sex.¹⁰ In Germany, the Constitutional Court cited its “constitutional duty . . . to enforce gender equality in social reality and overcome traditional gender roles in the future” in an important decision upholding the structure of the country's parental leave law, which incentivizes men to take leave by providing two “bonus” months

⁶ Emi Kolawole, *Scalia: Constitution Does Not Protect Women Against Discrimination*, WASH. POST (Jan. 4 2011, 9:08 AM), <http://voices.washingtonpost.com/44/2011/01/scalia-constitution-does-not-p.html> [<https://perma.cc/9X3L-7GH8>].

⁷ See, e.g., Jonathan F. Mitchell, *Textualism and the Fourteenth Amendment*, 69 STAN. L. REV. 1237, 1237 (2017) (arguing that “[t]he language of the Fourteenth Amendment does not secure equal status for women as a self-executing matter, but it empowers Congress to secure that status—and Congress may similarly act to secure equal status for racial minorities, religious minorities, people with disabilities, and other marginalized components of the citizenry”).

⁸ H.R.J. Res. 115th Cong. § 1 (2017).

⁹ Martha I. Morgan, *Taking Machismo to Court: The Gender Jurisprudence of the Colombian Constitutional Court*, 30 UNIV. MIAMI INTER-AM. L. REV. 253, 286 (1990).

¹⁰ S.T.C., July 4, 2005 (B.O.E. No. 182) (Spain).

if leave is shared between parents.¹¹ In Germany and elsewhere, this type of policy structure has had documented impacts on gender equity in leave-taking,¹² which in turn improves women's employment outcomes and increases shared responsibility for care and household work.¹³ The basis for the court's ruling was Germany's particularly strong gender equality provision, which was amended in 1994 to require the government to eliminate existing inequalities and "promote the actual implementation of equal rights for women and men."¹⁴

Moreover, case law from around the world illustrates how similar guarantees of equal rights on the basis of sex have provided a foundation for repealing discriminatory legislation and enacting new laws that advance equality. For example, in Zimbabwe and Tanzania, courts invoked constitutional protections of gender equality to strike down laws allowing girls to be married at earlier ages than boys.¹⁵ In Nepal, the Supreme Court cited the constitutional guarantee of gender equality in two sequential cases on marital rape: the first made spousal rape a crime, and the second eliminated sentencing disparities that reduced penalties for spousal perpetrators.¹⁶ And lest we presume that these examples bear little relevance to the United States, it's worth noting that over 300,000 children, mostly

¹¹ Ruth Rubio-Marín, *The (Dis)Establishment of Gender: Care and Gender Roles in the Family as a Constitutional Matter*, 13 INT'L J. CONST. L. 787, 814 (2016) (citing Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] 1 BvL 15/11, Aug. 19, 2011, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2011/08/lk20110819_1bv1001511.html [<https://perma.cc/LPX9-3N44>]); Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 YALE J. L. & FEMINISM 381, 417–418 (2017).

¹² Thordis Reimer et al., *Germany*, in INT'L NETWORK ON LEAVE POL'YS & RSCH., 13TH INTERNATIONAL REVIEW OF LEAVE POLICIES AND RESEARCH 2017, at 173 (Sonja Blum et al., eds., 2017), https://www.leavenetwork.org/fileadmin/user_upload/k_leavenetwork/annual_reviews/2017_Leave_Review_2017_final2.pdf [<https://perma.cc/B4U8-M5AF>].

¹³ See Andrews Kotsadam & Henning Finseraas, *The State Intervenes in the Battle of the Sexes: Causal Effects of Paternity Leave*, 40 SOC. SCI. RSCH. 1611 (2011); Linda Haas & C. Philip Hwang, *The Impact of Taking Parental Leave on Fathers' Participation in Childcare and Relationships with Children: Lessons from Sweden*, 11 CMTY. WORK & FAM. 85 (2008).

¹⁴ Suk, *supra* note 11, at 403.

¹⁵ *Loveness Mudzuru v. Minister of Just., Legal & Parliamentary Affs.* [2016] ZWCC 12 (Zim.); *Rebeca Z. Gyumi v. Att'y Gen.*, Misc. Civil Cause No 5 of 2016 (HC) (unreported) (Tanz.).

¹⁶ *Meera Dhungana v. Ministry of L.*, Writ No. 55 of the Year 2058 BS (2001–2002) (Nepal); *Jit Kumari Pangani (Neupane) v. Prime Ministers*, 2065, 50(6) NKP 664 (2008) (Nepal).

girls, were married in the United States between 2000 and 2018, and nearly every state legally permits girls to be married as children in certain circumstances; Mississippi, for example, sets a lower minimum age for girls than for boys.¹⁷ Meanwhile, while all states now criminalize spousal rape, some—such as Nevada¹⁸—provide that marriage is a valid defense unless there was use or threat of force, while others, like South Carolina, explicitly establish lower sentences for spouses, as well as reduced statutes of limitations.¹⁹

In short, explicit gender discrimination within American laws is far from an historical artifact, and the ERA would provide a stronger foundation for dismantling it. Further, clearly enshrining equal rights on the basis of sex in the Constitution would provide stronger protection against backsliding, while establishing a tool for accelerating progress on gender equality in areas that have plateaued. Even as the ERA is an essential first step, however, global data and jurisprudence demonstrate that social and economic rights, as well as more comprehensive equality provisions, can further strengthen efforts to constitutionally advance equality for all women.

II. Addressing Social and Economic Rights

The United States has long spurned the idea of social and economic rights in the Constitution.²⁰ These omissions have undercut equality writ large. For example, the Court relied on its finding that the Constitution neither guarantees a right to education nor prohibits discrimination based on wealth in *San Antonio Independent School District v. Rodriguez*, the notorious 1972 case that upheld funding of schools through local property taxes despite the extensive evidence that it exacerbates racial and socioeconomic disparities in school quality.²¹ In *Mathews v. Eldridge*, the Court held that no hearing was required

¹⁷ Page Cassidy & Tychimba Turner, *The Fight Continues to End Child Marriage in the U.S.*, UNICEF (Aug. 25, 2021), <https://www.unicefusa.org/stories/fight-continues-end-child-marriage-us/38893> [<https://perma.cc/P5ZJ-XKHS>]; MISS. CODE ANN. § 93-1-5 (2013); see also Alissa Koski & Jody Heymann, *Child Marriage in the United States: How Common Is the Practice, and Which Children Are at Greatest Risk?*, 50 PERSPECTIVES ON SEXUAL & REPROD. HEALTH 59 (2018).

¹⁸ NEV. REV. STAT. § 200.373 (2011).

¹⁹ S.C. CODE ANN. § 16-3-652 (2020); § 16-3-615; § 16-3-653; § 16-3-658.

²⁰ See Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees*, 56 SYRACUSE L. REV. 1 (2005).

²¹ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1972).

before the termination of Social Security disability benefits, a decision that once again presumed no right to economic support for people with disabilities and even rejected basic procedural fairness.²² In *Dandridge v. Williams*, the Court found that capping public assistance regardless of family size did not violate the Equal Protection Clause, a decision that implicitly rejected the notion that the Constitution guaranteed a basic level of income security while also making clear that discrimination based on family status did not warrant heightened scrutiny.²³

The consequences of this neglect matter acutely to gender. The *Dandridge* ruling, for example, helped lay the foundation for “family cap” rules enacted by many states that limited access to cash benefits after welfare reform, with disproportionate impacts on Black and Latina women and their children.²⁴ More broadly, structural discrimination against women when it comes to healthcare, education, economic opportunities, and income protection underscores what’s at stake when social and economic rights are dismissed. For example:

- **Women in the United States face higher average health costs than men,²⁵ and the high costs of healthcare more generally remain a leading cause of bankruptcy.** The lack of universal, affordable healthcare also disproportionately affects women from marginalized groups. Black Americans are more likely than white Americans to live in states that declined to expand Medicaid, which helps explain why 17% of Black adults, compared to 12% of white adults, lack health insurance, the Affordable Care Act notwithstanding.²⁶ Nearly one in three Black women (29%) and Latina women (27%), compared to 22% of white women, report

²² *Mathews v. Eldridge*, 424 U.S. 319 (1976).

²³ *Dandridge v. Williams*, 397 U.S. 471 (1970).

²⁴ See Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J. L. & GENDER 151 (2006).

²⁵ David Lassman et al., *US Health Spending Trends By Age and Gender: Selected Years 2002–10*, 33 HEALTH AFF. 815 (2014).

²⁶ Berneta L. Haynes, *The Racial Health and Wealth Gap: Impact of Medical Debt on Black Families*, NAT’L CONSUMER L. CTR. (Mar. 2022), <https://www.nclc.org/images/pdf/medical-debt/RacialHealth-Rpt-2022.pdf> [<https://perma.cc/E5YJ-WBCQ>].

facing difficulty paying medical bills within the past year.²⁷ And beyond the costs of care, the scope and quality of services available can vary greatly across the country, with basic reproductive healthcare remaining under constant threat. In 2021 alone, states passed 108 new restrictions on abortion—the most since 1973.²⁸

- **While women in the United States now attain similar levels of education as men, they not only accrue more debt along the way but take longer to pay it off due to structural inequalities including occupational segregation, gender discrimination in pay, and women’s greater likelihood of taking unpaid time out of the workforce for caregiving.**²⁹ Intersectional disparities further compound these disadvantages: the average Black woman graduating from college in 2011–2012 had \$29,051 in student loans, compared to \$25,366 for Black men, \$20,210 for white women, and \$18,934 for white men.³⁰ Even worse, within three years of graduation, data from 2007–2008 graduates shows that Black women were able to pay just 12% of their loan balance, while white women paid 33% and white men paid 42%.³¹
- **Despite overwhelming evidence that women shoulder the majority of unpaid caregiving for both children and aging adults—and that this unpaid work often reduces access to paid employment—the United States does not guarantee universal preschool, childcare, or long-term care, and lags behind nearly every other country when it comes to paid leave; indeed, the United**

²⁷ Michelle Long et al., *Women’s Health Care Utilization and Costs: Findings from the 2020 KFF Women’s Health Survey*, KAISER FAM. FOUND. (Apr. 21, 2021), <https://www.kff.org/womens-health-policy/issue-brief/womens-health-care-utilization-and-costs-findings-from-the-2020-kff-womens-health-survey/> [<https://perma.cc/33J2-SZJZ>].

²⁸ Elizabeth Nash, *State Policy Trends 2021: The Worst Year for Abortion Rights in Almost Half a Century*, GUTTMACHER INST. (Dec. 16, 2021), <https://www.guttmacher.org/article/2021/12/state-policy-trends-2021-worst-year-abortion-rights-almost-half-century> [<https://perma.cc/TX2M-XEHN>].

²⁹ See KEVIN MILLER, AM. ASS’N OF UNIV. WOMEN, *DEEPER IN DEBT: WOMEN AND STUDENT LOANS* (2017), <https://files.eric.ed.gov/fulltext/ED580345.pdf> [<https://perma.cc/SH9K-TDKC>].

³⁰ *Id.* at 19.

³¹ *Id.* at 26.

States remains one of just seven countries, and the only high-income country, that fails to guarantee a single day of paid leave to new mothers.³² The consequences for infant and maternal health, maternal employment, and families' risks of poverty are extensive and well documented.³³

- **Access to sick leave is also critically important to women due to their overrepresentation in caregiving, yet the United States is one of just eleven countries with no national paid sick leave.**³⁴ Both paid and unpaid care work increase risks of exposure to infectious disease, while the need to meet unpaid care responsibilities puts women at greater risk of job or income loss when leave is unavailable. Moreover, low-wage workers, immigrants, and Black and Latina women are disproportionately excluded from the employer-provided benefits that partially fill these gaps.³⁵

Constitutional guarantees of core social and economic rights can provide a foundation for ensuring that healthcare, education, and social protection are equally and adequately available to all. Once again, case law from other countries demonstrates how these guarantees, particularly when paired with a guarantee of gender equality, have had an impact.

In Kenya, for example, after two women who had just given birth were detained at hospitals because of their inability to pay their bills, the High Court found violations of

³² *Is Paid Leave Available for Mothers of Infants?*, WORLD POLICY ANALYSIS CENTER, <https://www.worldpolicycenter.org/policies/is-paid-leave-available-for-mothers-of-infants> [<https://perma.cc/BW3P-N4PM>].

³³ See, e.g., Arijit Nandi et al., *The Impact of Parental and Medical Leave Policies on Socioeconomic and Health Outcomes in OECD Countries: A Systematic Review of the Empirical Literature*, 96 MILBANK Q. 434 (2018).

³⁴ Jody Heymann et al., *US Sick Leave in Global Context: US Eligibility Rules Widen Inequalities Despite Readily Available Solutions*, 40 HEALTH AFF. 1501, 1504 (2021)

³⁵ Julia Goodman et al., *Racial and Ethnic Inequities in Paid Family and Medical Leave, United States 2011 and 2017-18*, AM. J. PUB. HEALTH (2022, forthcoming); Drew DeSilver, *As Coronavirus Spreads, Which U.S. Workers Have Paid Sick Leave – and Which Don't?*, PEW RSCH. CTR. (Mar. 12 2020), <https://www.pewresearch.org/fact-tank/2020/03/12/as-coronavirus-spreads-which-u-s-workers-have-paid-sick-leave-and-which-don't/> [<https://perma.cc/RZ22-TQM8>].

their constitutional rights to liberty and freedom of movement, to dignity, to health, and to be free from discrimination on the basis of both “economic position” and gender.³⁶ In Colombia, the Constitutional Court invoked both equal rights and the rights to dignified and equitable conditions of work in ruling that domestic workers are entitled to the same level of unemployment benefits as other workers.³⁷ And in South Africa, the Constitutional Court ruled that a ban on pregnant students attending school violated both the constitutional right to non-discrimination on basis of gender and the right to basic education.³⁸ Moreover, in countries like Portugal, Bulgaria, and the Czech Republic, top courts have cited the constitutional right to health to invalidate attempts to shutter or impose new fees to access the public health system.³⁹

Globally, rights to health, education, and social protection are commonplace. Around the world, 57% of constitutions take some approach to guaranteeing health rights; 41% guarantee the right to medical care.⁴⁰ Some countries also explicitly protect the right to reproductive health; Nepal’s 2015 constitution, for example, provides that “[e]very woman shall have the right relating to safe motherhood and reproductive health.”⁴¹ Seventy-seven percent of countries take some approach to guaranteeing the right to education, including 7% that explicitly guarantee that higher education will be free.⁴² Altogether, 55% of

³⁶ Millicent Awuor Maimuna v. Att’y Gen. (2015), Petition No. 562 of 2012 (HC) (Kenya).

³⁷ Corte Constitucional [C.C.] [Constitutional Court], febrero 28, 1995, Sentencia C-051/95 (Colom.) <https://www.corteconstitucional.gov.co/relatoria/1995/C-051-95.htm> [<https://perma.cc/8XVT-3K24>].

³⁸ *Head of Dep’t, Dep’t of Educ., Free State Province v. Welkom High Sch.* [2013] ZACC 25 (CC) (S. Afr.).

³⁹ Christian Courtis, “The Role of Judges in the Protection of Economic, Social and Cultural Rights,” Presentation Before the South African Chief Justices Forum Annual Meeting (Aug. 8 2009), https://www.venice.coe.int/SACJF/2009_08_BTW_Kasane/speeches/Courtis_social_rights.pdf [<https://perma.cc/RF6E-6729>] (citing Tribunal Constitucional [Constitutional Tribunal], Precedent no. 39/84 of 11-04-1984, Proceedings no. 6/83, DR 104/1984 Series I of 1984-05-05 (Port.)); *see also* Jan Alexa et al., *Czech Republic: Health System Review*, 17 HEALTH SYSTEMS IN TRANSITION 1 (2015); Antoniya Dimova et al., *Bulgaria: Health System Review*, 20 HEALTH SYSTEMS IN TRANSITION 1 (2018).

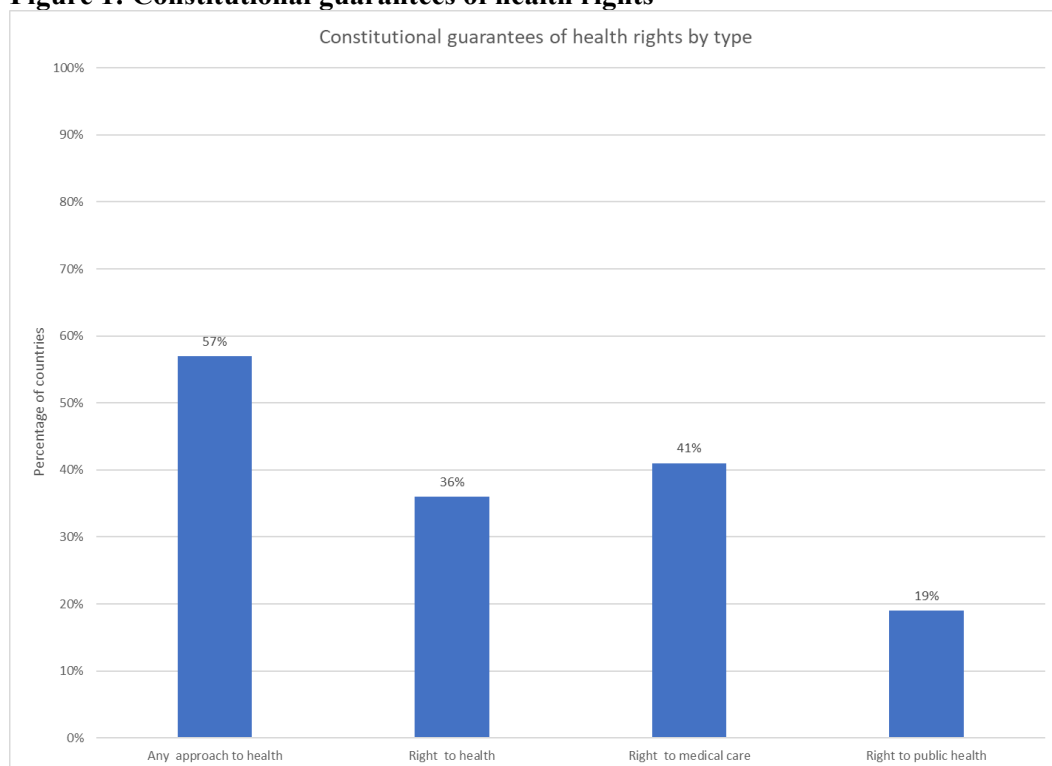
⁴⁰ *See* fig.1.

⁴¹ CONSTITUTION OF NEPAL (2015, rev. 2016), art. 38(2).

⁴² *See* fig.2.

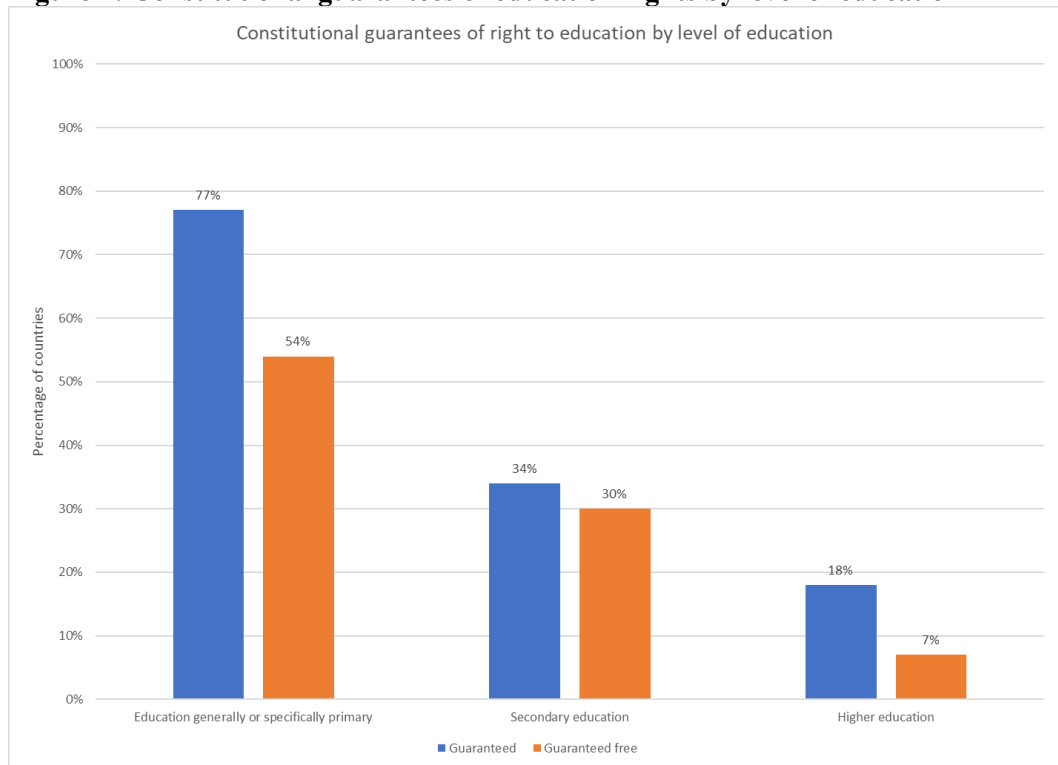
countries provide a constitutional guarantee of income protection in at least some circumstances, including 16% that specifically guarantee maternity benefits and 22% that guarantee pay during illness.⁴³

Figure 1: Constitutional guarantees of health rights



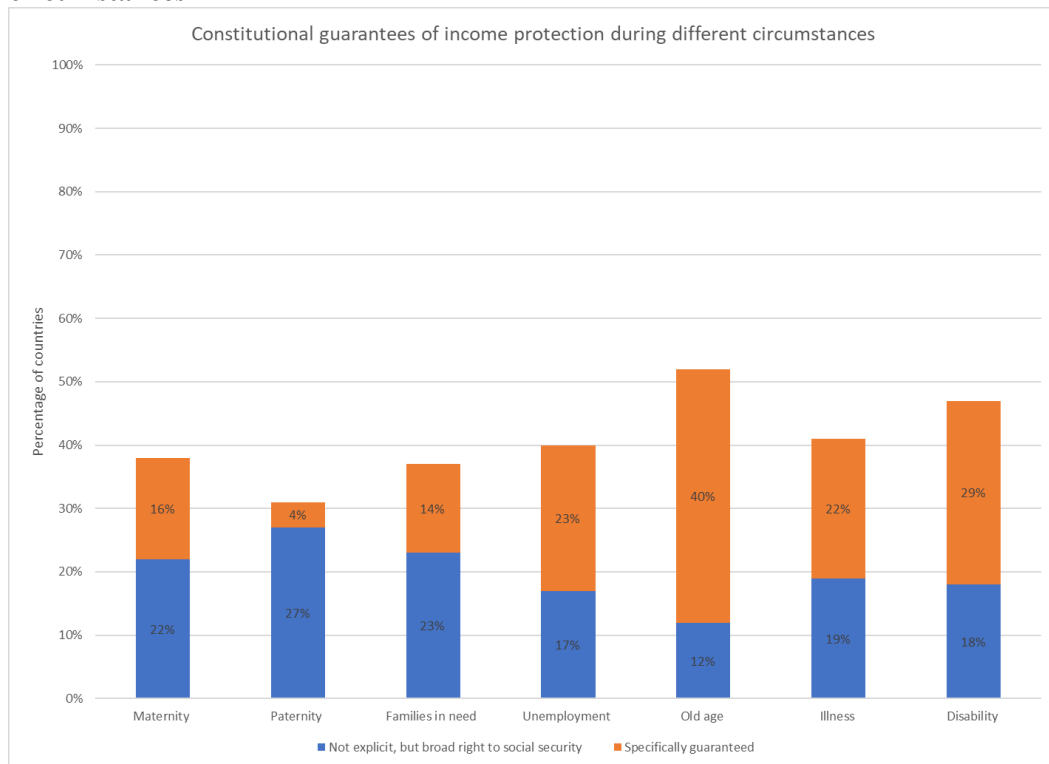
Source: WORLD Policy Analysis Center, Constitutions Database (2022).

⁴³ See fig.3.

Figure 2: Constitutional guarantees of education rights by level of education

Source: WORLD Policy Analysis Center, Constitutions Database (2022).

Figure 3: Constitutional guarantees of income security during different circumstances



Source: WORLD Policy Analysis Center, Constitutions Database (2022).

III. Addressing Equal Rights on All Grounds

While addressing equal rights on the basis of sex is a critical start, extensive evidence demonstrates that women facing multiple or intersecting forms of discrimination experience even higher barriers to the full realization of equal rights. As initially adopted, the U.S. Constitution not only failed to prohibit common forms of discrimination, but actively embedded discriminatory provisions and language that denied equal rights and full citizenship across gender, race, and ethnicity. Though a general guarantee of equality and specific guarantees of the right to vote were critical steps toward undoing these foundational harms, the United States still lacks explicit guarantees of equal rights not only on the basis of sex but across a wide range of other grounds that are integral to equality. These omissions create a substantial barrier to fully realizing equal rights for all women

and all people, while resulting in a constitution that fails to adequately express what the United States has long put forth as an animating ideal: the equal worth and dignity of each person.

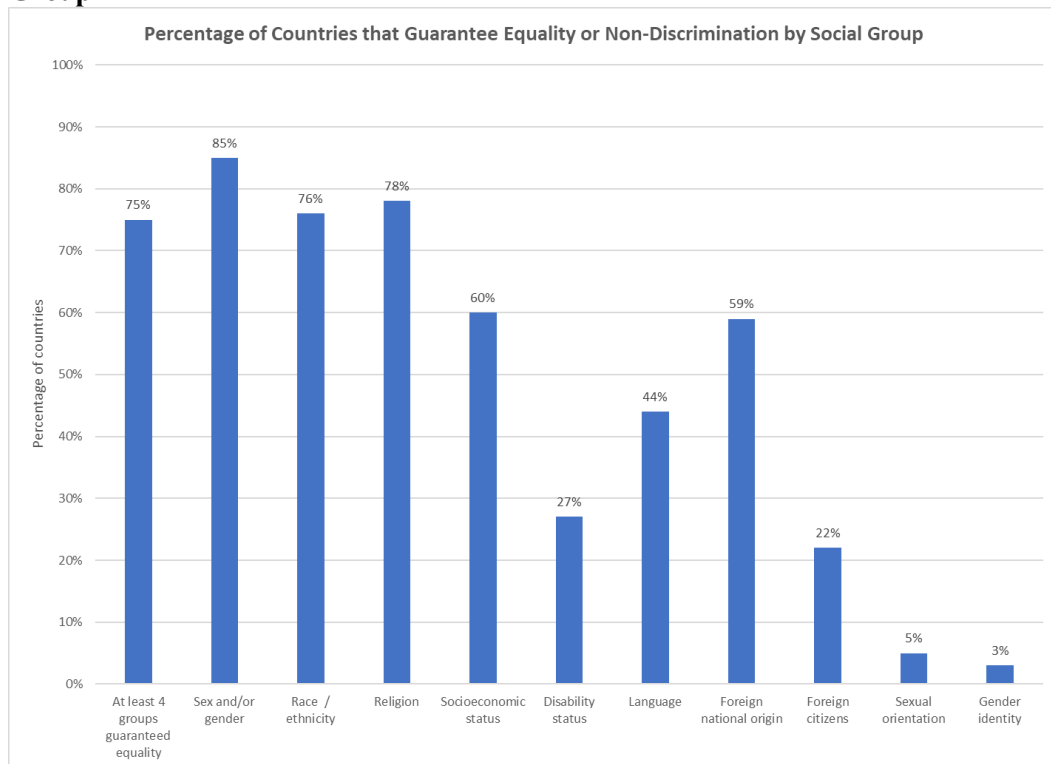
Indeed, just as the United States is a global outlier in failing to explicitly guarantee equal rights regardless of sex, so too does it lag behind global standards when it comes to the breadth of equal rights. Unlike the U.S. approach of enshrining only a general equality clause—which has resulted in inconsistent and often inadequate levels of protection for the rights of different groups—three-quarters of the world’s countries, 144, have constitutional provisions specifically guaranteeing equal rights or prohibiting discrimination across at least four of the following grounds: sex and/or gender, race and/or ethnicity, religion, socioeconomic status, disability, language, foreign national origin, foreign citizenship, sexual orientation, or gender identity.⁴⁴ As with protections based on sex, significant majorities of constitutions have equal rights provisions that specifically address race/ethnicity (76%), religion (78%), socioeconomic status (60%), and foreign national origin (59%).⁴⁵ Moreover, for nearly all common grounds of discrimination, explicit constitutional protections are becoming more common over time.⁴⁶

⁴⁴ See fig.4.

⁴⁵ See fig.4.

⁴⁶ See tbl.1

Figure 4: Constitutional Guarantees of Equality or Non-Discrimination by Social Group



Source: WORLD Policy Analysis Center, Constitutions Database (2022).

Table 1: Constitutional Guarantees of Equality or Non-Discrimination by Social Group and Year of Constitution Adoption

	All Years	Before 1970	1970 – 1979	1980 – 1989	1990 – 1999	2000 – 2009	2010 – 2022
Equality guaranteed on at least four grounds	144 (75%)	18 (44%)	18 (69%)	15 (68%)	50 (86%)	15 (88%)	28 (97%)

Sex and/or gender	165 (85%)	22 (54%)	23 (88%)	20 (91%)	54 (93%)	17 (100%)	29 (100%)
Race and/or ethnicity	147 (76%)	20 (49%)	20 (77%)	17 (77%)	50 (86%)	15 (88%)	25 (86%)
Religion	150 (78%)	23 (56%)	21 (81%)	15 (68%)	49 (84%)	14 (82%)	28 (97%)
Socioeconomic status	116 (60%)	14 (34%)	11 (42%)	7 (32%)	47 (81%)	12 (71%)	25 (86%)
Disability status	53 (27%)	4 (10%)	3 (12%)	2 (9%)	16 (28%)	8 (47%)	20 (69%)
Language	85 (44%)	8 (20%)	7 (27%)	5 (23%)	36 (62%)	8 (47%)	21 (72%)
Foreign national origin	114 (59%)	18 (44%)	19 (73%)	12 (55%)	36 (62%)	11 (65%)	18 (62%)
Foreign citizenship	42 (22%)	3 (7%)	2 (8%)	3 (14%)	23 (40%)	3 (18%)	8 (28%)
Sexual orientation	10 (5%)	3 (7%)	1 (4%)	1 (5%)	1 (2%)	2 (12%)	2 (7%)
Gender identity	5 (3%)	1 (2%)	0 (0%)	0 (0%)	0 (0%)	2 (12%)	2 (7%)

Source: WORLD Policy Analysis Center, Constitutions Database (2022).

A growing number of countries have also adopted constitutional provisions addressing statuses related to sex or gender, including pregnancy, family status, and marital status. The Constitution of Fiji, for instance, prohibits discrimination based on: “. . . actual or

supposed personal characteristics or circumstances, including race, culture, ethnic or social origin, colour, place of origin, sex, gender, sexual orientation, gender identity and expression, birth, primary language, economic or social or health status, disability, age, religion, conscience, marital status or pregnancy.”⁴⁷ Although some courts have found that protections against sex discrimination encompass pregnancy and marital status, these interpretations have not always been consistent in the absence of specific language.⁴⁸

Further, while no substitute for specifically prohibiting discrimination against women based on their family or caregiving status, a small share of constitutions (at least 5%) explicitly prohibit indirect or disparate impact discrimination on the basis of gender.⁴⁹ In contrast, the U.S. Constitution does not address indirect discrimination and the Supreme Court has long held that the Fourteenth Amendment only protects against “intentional” discrimination, including in cases challenging policies with disparate impacts on women.⁵⁰

In addition, dozens of constitutions specify that affirmative measures to advance equality in practice are not inherently incompatible with equal rights guarantees, representing an important commitment to substantive rather than formal equality.⁵¹ For women from marginalized groups, these provisions have the potential to importantly support laws and policies thoughtfully designed to remedy the consequences of both historic and ongoing discrimination and exclusion.⁵² In Ecuador, for instance, the constitution provides that:

⁴⁷ CONSTITUTION OF THE REPUBLIC OF FIJI (2013), art. 26(3)(a).

⁴⁸ See, e.g., *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Bliss v. Att’y Gen. of Can.* [1979] 1 S.C.R. 183; *Air India v. Nargesh Meerza* (1981) 1982 SCR (1) 438.

⁴⁹ HEYMANN ET AL., *supra* note 1, at 50.

⁵⁰ *Washington v. Davis*, 426 U.S. 229 (1976); Catharine A. MacKinnon & Kimberlé W. Crenshaw, *Reconstituting the Future: An Equality Amendment*, 129 YALE L.J.F. 343, 349 (2019) (citing *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979)).

⁵¹ *Constitutions Database*, *supra* note 1; HEYMANN ET AL., *supra* note 1, at 43.

⁵² See, e.g., Fidan Ana Kurtulus, *Affirmative Action and the Occupational Advancement of Minorities and Women During 1973–2003*, 51 INDUS. REL.: J. ECON. & SOC’Y 213 (2012); Randall Kennedy, *Colorblind Constitutionalism*, 82 FORDHAM L. REV. 1 (2013).

No one shall be discriminated against for reasons of ethnic belonging, place of birth, age, sex, gender identity, cultural identity, civil status, language, religion, ideology, political affiliation, legal record, socio-economic condition, migratory status, sexual orientation, health status, HIV carrier, disability, physical difference or any other distinguishing feature . . . the State shall adopt affirmative action measures that promote real equality for rights holders who are in a situation of inequality.⁵³

Finally, a small number of constitutions use more specific language to address intersectional or multiple discrimination.⁵⁴ In South Africa, for example, the constitution prohibits both direct and indirect discrimination on “one or more grounds,” including “race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”⁵⁵

Adopting more comprehensive equal rights protections, as well as language clarifying their scope, has mattered for ensuring that constitutions fully protect the rights of all women. For example, in Canada, the Supreme Court cited constitutional protections against both sex and race discrimination in a case striking down portions of a provincial law that established lower protections against eviction for tenants in public rather than private housing, reasoning that—due to broader intersections of race, gender, class, and family status discrimination—it would indirectly discriminate against women like the plaintiff, a Black single mother.⁵⁶ In South Africa, the Constitutional Court invoked the constitution’s protections against indirect discrimination on the basis of sex, gender, and race in a groundbreaking 2020 decision extending basic occupational safety protections to domestic workers, noting that “[m]ultiple axes of discrimination are relevant to the case of domestic workers . . . [who] experience racism, sexism, gender inequality and class stratification.”⁵⁷

⁵³ CONSTITUTION OF THE REPUBLIC OF ECUADOR (2008, amend. 2021), art. 11(2).

⁵⁴ *Constitutions Database*, *supra* note 1.

⁵⁵ S. AFR. CONST., 1996, art. 9(3).

⁵⁶ *Sparks v. Dartmouth/Halifax County Regional Housing Authority* (1993), 119 N.S.R. 2d 91 (Can.).

⁵⁷ *Mahlangu v. Minister of Lab.*, [2020] ZACC 24.

To be sure, even if the U.S. Constitution were to explicitly address discrimination on all grounds, further work would be needed to ensure that courts actually apply an intersectional lens when interpreting these provisions, rather than treating each claim discretely and individually.⁵⁸ However, the historic inconsistency and ongoing reluctance of the Court to extend full equal protection of the laws to all people—including people with disabilities, migrants, and LGBT+ Americans—evidences the need for stronger protections in the text as a key starting point, along with clear language addressing indirect discrimination and the permissibility of affirmative measures.

IV. The ERA as a Critical Next Step

When the ERA was first proposed in 1923, few countries guaranteed women's equal rights in their constitutions. Nearly a hundred years later, the opposite is true: our data shows that the United States is among just 15% of countries in the world that fail to explicitly guarantee gender equality or prohibit discrimination on the basis of sex in the constitution.⁵⁹ When it comes to equal rights, the United States has fallen behind.

Meanwhile, progress on many aspects of gender equality in the United States has stalled. Other high-income countries have outpaced the United States on gender equality in labor force participation.⁶⁰ In the midst of the pandemic, which underscored the devastating consequences of the United States' historic underinvestment in both public health and caregiving infrastructure, women's labor force participation dropped to levels unseen since 1988.⁶¹ The lack of any kind of national paid leave in the United States, and especially the lack of paid maternal leave, positions the United States far behind its peers.⁶²

⁵⁸ See generally Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 U. CHI. LEGAL F. 139 (1989).

⁵⁹ *Constitutions Database*, *supra* note 1.

⁶⁰ See Francine D. Blau & Lawrence M. Kahn, *Female Labor Supply: Why Is the United States Falling Behind?*, 103 AM. ECON. REV. 251 (2013).

⁶¹ *Another 275,000 Women Left the Labor Force in January*, NAT'L WOMEN'S L. CTR. (Feb. 5 2021), <https://nwlc.org/resource/january-jobs-day-2021/> [<https://perma.cc/FT22-A3MN>].

⁶² *Labor*, WORLD POL'Y ANALYSIS CTR., <https://www.worldpolicycenter.org/topics/labor/policies> [<https://perma.cc/NT27-GW2T>] (providing globally comparative data on paid parental leave, paid sick leave, and paid annual leave); see also Claire Cain Miller, *The World 'Has Found a Way to Do This': The U.S. Lags*

The gender wage gap in the United States has barely budged in a decade and currently stands at 17.7%, exceeding the OECD average by over six percentage points;⁶³ for Black and Latina women, the gap is even greater.⁶⁴ And even where women are making steady progress, the disparities remain striking: while more women are serving in Congress than ever, they still account for just over a quarter of elected representatives.⁶⁵

Adopting the ERA is a critical first step toward overcoming these plateaus and accelerating progress on gender equality in the United States in these and many other spheres. While a stronger constitution, on its own, cannot undo centuries of gender discrimination embedded in both laws and the very structure of our economy, it can lay a strong foundation for repealing discriminatory legislation, enacting new laws that can make a powerful difference for women's equal rights across spheres, and expressing gender equality as a fundamental national value—a contribution that should not be underestimated.

Nevertheless, countries around the world offer lessons about how to take an even stronger approach to advancing substantive gender equality in the Constitution. This includes guaranteeing fundamental social and economic rights that can shape whether equal opportunities are accessible in practice, such as education, health, and social protection; explicitly guaranteeing equal rights or prohibiting discrimination on grounds of race, disability, socioeconomic status, migration status, religion, sexual orientation, and gender identity; and adopting more comprehensive equality provisions that clearly apply to all people, including by articulating the scope of equality protections more thoroughly to encompass indirect discrimination and allow affirmative measures to advance equality.

on *Paid Leave*, N.Y. TIMES (Oct. 25, 2021), <https://www.nytimes.com/2021/10/25/upshot/paid-leave-democrats.html> [<https://perma.cc/G9C8-N26C>].

⁶³ *Gender Wage Gap*, OECD (2022), <https://data.oecd.org/earnwage/gender-wage-gap.htm> [<https://perma.cc/5CHX-H9XJ>].

⁶⁴ *Quantifying America's Gender Wage Gap by Race/Ethnicity*, NAT'L P'SHIP FOR WOMEN & FAMS. (Jan. 2022), <https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/quantifying-americas-gender-wage-gap.pdf> [<https://perma.cc/A3JG-4QZW>].

⁶⁵ See JENNIFER E. MANNING & IDA A. BRUDNICK, CONG. RSCH. SERV., R43244, WOMEN IN CONGRESS: STATISTICS AND BRIEF OVERVIEW (2022), <https://sgp.fas.org/crs/misc/R43244.pdf> [<https://perma.cc/2EUS-D2DJ>].

CONCLUSION

In short, adopting the Equal Rights Amendment is an essential next step, not the final step, toward the United States realizing the ideals of equality and equal opportunity that policymakers have long espoused. Enshrining gender equality in the Constitution is also critical to bringing the United States in line with global standards, and thirty-eight of the fifty states have now voted to make it the law of the land. To strengthen our democracy and the vision it stands on, Congress should not hesitate to act.