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The Sex Equality Gap: How the 20th Century Sex Equality Paradigm Continues to Leave Women of Color Behind

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THE SEX EQUALITY GAP:
HOW THE 20th CENTURY SEX EQUALITY PARADIGM CONTINUES TO LEAVE WOMEN OF COLOR BEHIND

This policy brief is the work of the Equal Rights Amendment (ERA) Project and the Racial Justice (RJ) Project at Columbia Law School's Center for Gender and Sexuality Law—where faculty, staff, students, and researchers provide policy analysis and thought leadership on cutting-edge issues at the intersection of gender, sexual, reproductive, and racial justice, and envision a 21st century Sex Equality Paradigm that centers women of color.

Website: gender-sexuality.law.columbia.edu
Email: ERAProject@law.columbia.edu
Phone: 212-854-0167
Address: Center for Gender & Sexuality Law
Columbia Law School
435 West 116th St, Mailbox E9
New York, NY 10027

INTRODUCTION

The United States has a sex equality[1] problem that disproportionately impacts women of color. Despite the passage of sweeping federal, state, and local laws that prohibit discrimination on the basis of sex in employment, education, public benefits, housing, healthcare, voting, and in significant aspects of the U.S. economy and society,[2] women—and particularly women of color—continue to experience persistent sex discrimination.[3] These laws, starting with the Equal Pay Act of 1963 and the Civil Rights Act of 1964, make up what we call the *20th Century Sex Equality Paradigm*.

At face value, such laws can be credited with having made considerable progress in dismantling stubborn forms of sex-based inequality for women. For instance, in 1960, women earned 60% of what men earned for the same or comparable work, and today that gap has been reduced to about 82%.[4] Yet, a deeper examination of this data reveals a harsher truth: white women have been the primary beneficiaries of sex equality laws, leaving women of color significantly behind.[5]

Table 1: For every $1 a non-Hispanic white man makes in the U.S., women make the following:

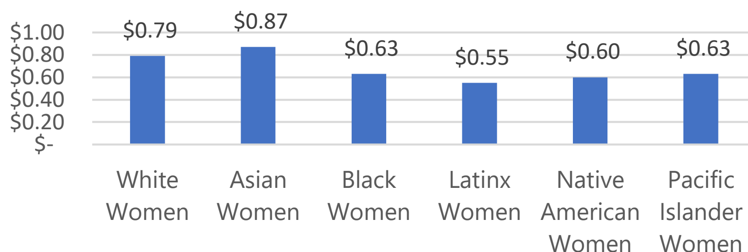
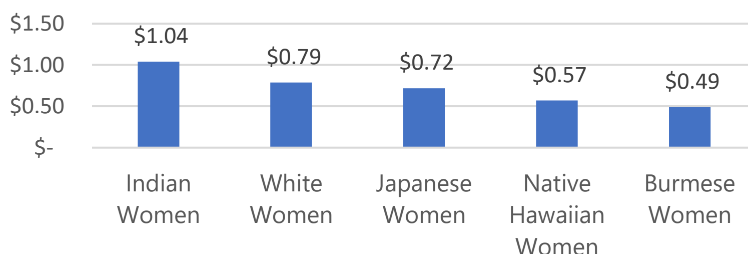


Table 2: The Wage Gap for Asian American, Native Hawaiian, and Pacific Islander Women



It is important to recognize that graphs may not always capture the nuance of gender and race disparities that exist within particular communities. For example, Table 1 shows Asian women earning more than white women, compared to white men, because the Asian and Pacific Islander category aggregates many distinct Asian and Pacific Islander communities into a single group, while losing the full picture of the gender and race wage gap analysis. According to the National Women's Law Center, "[t]he wage gap varies widely among AAPI women and many AAPI communities experience much larger wage gaps compared to white, non-Hispanic men than AAPI women overall. For example, among full-time, year-round workers, Burmese women typically make just 52 cents for every dollar paid to white, non-Hispanic men, while Japanese women are typically paid 95 cents."[6]

The policy brief examines this equality gap, demonstrating how the existing sex equality paradigm does not adequately account for the ways in which sex and race discrimination intersect with one another. In reality, an approach to combating sex discrimination that ignores or tacks on considerations of race discrimination disguises how the benefits of existing equality measures have been distributed in ways that center white women and further marginalize women of color. Thus, the implicit focus on the experiences of white women that is built into the current sex equality paradigm creates an equality gap that is itself a serious problem of gender-based injustice. The paper utilizes comparative data to measure the extent of sex-based inequality in society for women of color as compared with their white female counterparts.

The policy brief recommends that a *21st Century Sex Equality Paradigm* should reassess the relative value of sex equality laws and policies by deliberately centering the impacts on—and benefits to—women of color, and by adopting a substantive, rather than formal, approach to equality. The paper concludes that the **Equal Rights Amendment**,[7] a measure that would add specific sex equality protections to the U.S. Constitution, could—and should—be the vehicle to bring about a more equitable form of sex equality in the U.S.

While this paper seeks to name, examine, and ultimately, disrupt the Sex Equality Gap that exists between women of color and white women, it is important to note that men of color, and in particular Black men, as well as transgender, gender nonconforming, and gender non-binary people of color, experience their own particular sex equality gap. Therefore, the *21st Century Sex Equality Paradigm* must also take into account how race, sex, and gender impact all marginalized individuals and groups.

EXAMINING THE EQUALITY GAP THAT ADVERSELY IMPACTS WOMEN OF COLOR

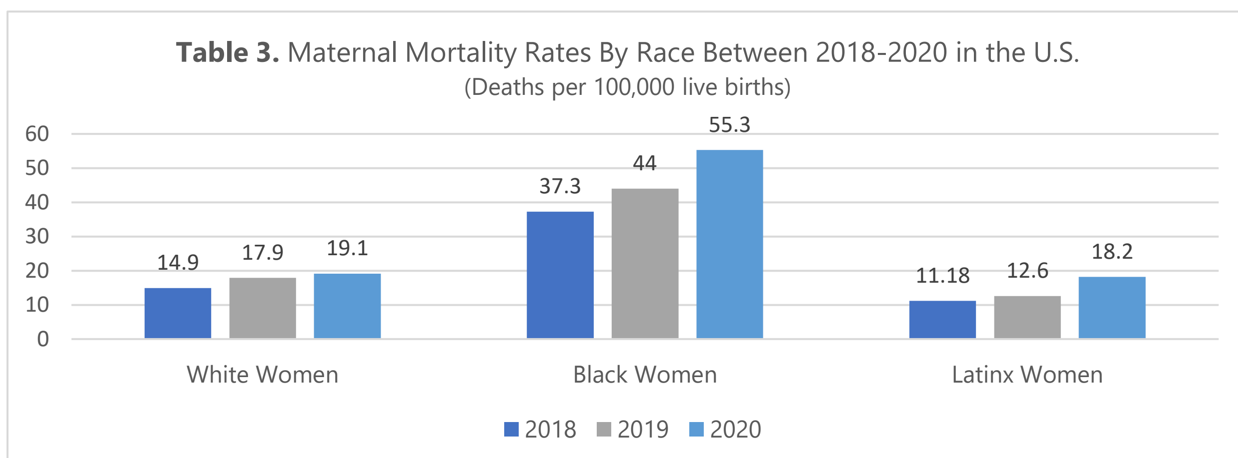
The Healthcare Equality Gap

Sex-based bias in access to healthcare in the U.S. has been well documented by researchers for decades.[8] The Affordable Care Act (ACA), signed into law in March of 2010, was designed to fill the equality gap in healthcare for millions of people, explicitly prohibiting sex-based discrimination in access to healthcare. The ACA mandates that individuals cannot be denied healthcare or health coverage based on their sex; women must be treated equally with men in the healthcare they receive and the insurance they

obtain; and sex-specific health programs or activities are permissible only if the entity can demonstrate an exceedingly persuasive justification.[9] What is more, the ACA required employers to cover contraception in employee health plans.[10]

In an effort to close the sex equality gap in healthcare, the ACA focused on specifically improving maternal health outcomes. According to the Center for American Progress, the "ACA helped to improve the quality of coverage for pregnant and birthing people by requiring individual and small group plans, as well as Medicaid expansion plans, to cover maternity and newborn care. Before the ACA, only 12 percent of plans in the individual health insurance market offered maternity benefits, and 6 out of 10 people did not have maternity benefits."[11] The ACA also required insurers to provide maternal health services, such as wellness screenings, lactation consultation and breastfeeding equipment.[12]

Yet, the ACA's crucial benefits remain out of reach for women of color, while white women continue to be the disproportionate beneficiaries of the law. After the ACA went into effect, researchers found "significant improvements in service use and access primarily among white and Hispanic men and women," while "Black women fared the worst with respect to emergency room visits and unmet need compared to other groups. Rates of emergency room visits and unmet need increased significantly for Black women in 2014 compared to 2006."[13] Shockingly, Black women are three times more likely to die from pregnancy-related causes than white women and receive subpar medical services in other areas of reproductive healthcare such as screenings, notification, and treatment for abnormal pap tests.[14] The rate of maternal mortality has increased for all women, but it has significantly increased for Black and Latinx women since 2018, notwithstanding the protections of the ACA. [15]

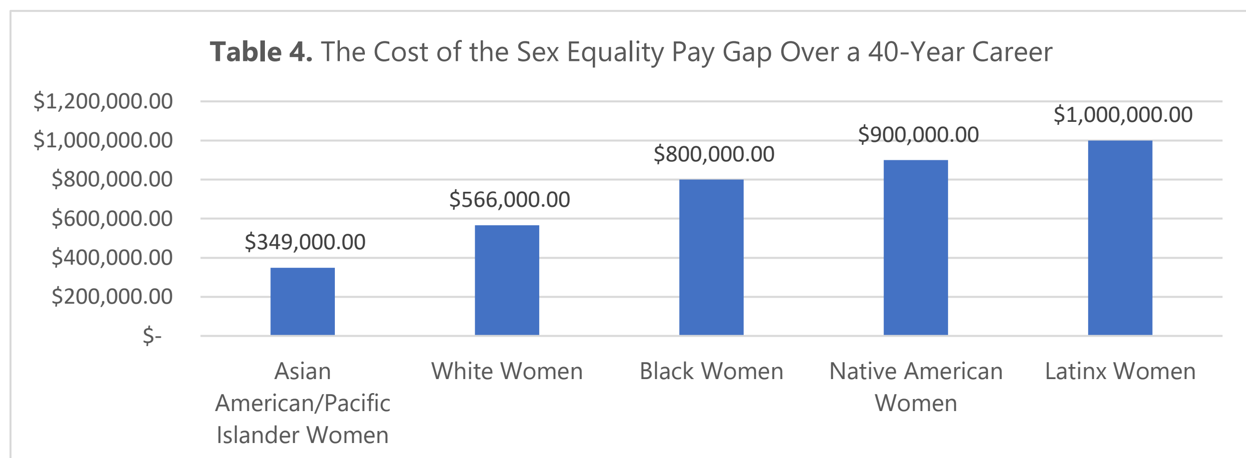


Although the ACA's insurance expansion provisions resulted in a significant increase in health insurance coverage overall for women, significantly lower coverage rates could be found among low-income, women of color, and immigrant women. [16]

The Pay Equity Gap

Over the last sixty years, federal, state, and local governments have passed significant legislation designed to address economic disparities between women and men in employment. The Equal Pay Act of 1963[17] and Title VII of the 1964 Civil Rights Act,[18] among other laws, were enacted with the intention of addressing pay inequities.

To some degree, these laws have delivered on the promise of narrowing gender-based pay disparities. For instance, between 1973 and 2020, the gender wage gap in the U.S. shrank from 38% to 16%.[19] Yet, generalizing about the gains for all women eclipses how these gains have been distributed among women when controlling for race.[20] Looking at the intersection of race and sex, it becomes abundantly clear that pay equity laws have failed women of color. For instance, due to overlapping systemic race and sex discrimination, over a 40-year career, the wage equality pay gap is much greater for Black and Latinx women than it is for white women.



The Homeownership Equality Gap

The Fair Housing Act (FHA) of 1968[21] is another piece of the *20th Century Sex Equality Paradigm*, specifically designed to prohibit discrimination in housing on the basis of race, color, national origin, religion, sex, family status, and disability. The FHA was intended to

eradicate sex discrimination by prohibiting landlords from refusing to rent or setting different terms for sale or rental property because of the buyer's sex.[22]

Nevertheless, even with this piece of landmark legislation, structural racism in housing policies and practices, compounded by structural race discrimination, still significantly and disproportionately inhibits access to equal housing opportunities for women of color in the U.S.[23] When compared with white women, women of color lag behind in homeownership, which would substantially promote wealth building.[24] Even when women of color own homes, they still experience extreme poverty and predatory lending practices which leaves them more at risk for foreclosure and debt.[25]

Discriminatory housing policies such as steering (when a real estate agent illegally steers a potential buyer to a certain neighborhood depending on their race, ethnicity, color or national origin)[26] and redlining (a discriminatory practice when a lender rejects a loan for a mortgage in specific neighborhoods based on race or ethnicity)[27] have resulted in racially and economically segregated neighborhoods throughout the U.S.[28] This persistent segregation exacerbates the equality gap between white women and women of color because where one lives often factors into one's ability to access other resources, such as education, healthcare and food. When women of color are intentionally driven into neighborhoods with fewer resources than their white female counterparts, they are less able to find economic security for themselves and their families.[29]

The Education Equality Gap

In an attempt to close the sex equality gap in education, Congress passed Title IX of the Educational Amendments in 1972.[30] This landmark legislation prohibits discrimination on the basis of sex (including pregnancy, sexual orientation, and gender identity) in any education program or activity receiving federal financial assistance.[31]

Over the past 50 years, Title IX, coupled with prohibitions on sex discrimination in employment and the educational sector, has advanced educational opportunity for women including the attainment of college and advanced degrees, representation in faculty and leadership positions, and athletic opportunities. For example, women now make up approximately 60% of college students, earning 57% of bachelor's degrees conferred in 2021.[32] Women are at near parity with men in law and medical degrees earned today, compared to the 7% of law degrees and 9% of medical degrees earned in 1972.[33] Today, women make up 50% of faculty members in higher education, double the

amount in 1970.[34] Furthermore, 32% of college presidents are women, marking a significant increase from 3% in 1975.[35] Since the passage of Title IX, women's participation in athletics increased from 7% to 43% in high school sports and from 15% to 44% in college.[36]

Despite significant progress for women overall, women of color have not benefited equally from the gains of Title IX. Equal access to quality education continues to be out of reach for a disproportionately high percentage of women of color in comparison with their white female counterparts. Research shows that college enrollment, graduation rates, and graduate degree opportunities for women of color lag significantly behind those for white women.[37] Among enrolled students, Black women, in particular, are over-represented in majors that have low median earnings, such as human resources and community organization.[38] Women of color continue to face obstacles to participation in college sports in comparison to their white counterparts.[39] In addition, Black female students in particular are more subject to harsh discipline due to "implicit biases, stereotyping, and other cultural factors."[40] In the 2011-2012 academic school year, Black girls had a suspension rate of 12% compared with a 2% suspension rate for white girls.[41]

The passage of Title IX has resulted in an increase in science, engineering, technology, and mathematics (STEM) education for women.[42] Yet, even with these gains for women overall in STEM majors and in the STEM workforce, the representation for Black and Latina women is substantially lower.[43]

The Food Security Equality Gap

In 1972, the U.S. Department of Agriculture established the Special Supplemental Nutrition Program for Women, Infants, and Children,[44] or WIC, in an effort to close the equality gap for low-income pregnant women, postpartum and breastfeeding mothers, and infants up to age five with nutritional deficiencies. While this program continues to bolster the health of many mothers and their children,[45] there is still little evidence that WIC participation actually reduces the risk of infant mortality for Black women.[46] Furthermore, since only two-thirds of women who are eligible for the program actually participate, it is difficult to determine whether it actually helps to close the food security equality gap experienced by pregnant and parenting women.[47]

While data collection on the food security needs of the U.S. population fails to adequately disaggregate the population by race and ethnicity,[48] what is known is that Black and

Hispanic households are at least twice as likely as white households to experience food insecurity.[49] Today, Black and Latina women are almost three times more likely to lack enough food compared to white men, and the racial disparities between women in access to food, disaggregated by race, are striking.[50]

Inadequate access to food correlates with a wide range of other adverse life experiences, such as investigations for possible abuse or neglect of children. Research has shown that household food insecurity is a distinct economic stressor associated with an increased likelihood of experiencing a child abuse or neglect investigation.[51] Black families disproportionately experience food insecurity and involvement with child protective services (CPS) agencies.[52] When states liberalized the income eligibility criteria for monthly food assistance programs, such as the Supplemental Nutrition Assistance Program (SNAP), investigations for child abuse or neglect dropped considerably, but more so for white than Black families.[53] The authors of this research concluded that "in the context of structural racism, increases in SNAP eligibility and enrollment and subsequent decreases in food insecurity may contribute to decreases in CPS involvement among both Black and White children but may not be sufficient to reduce the existing racial disproportionality."[54]

THE EQUAL RIGHTS AMENDMENT: CONSTRUCTING A 21st CENTURY EQUALITY FRAMEWORK

Our current sex equality paradigm has not worked as well for women of color as it has for white women in the arenas of economic security, healthcare, education, and food security. The success of sex equality laws should be measured not only by how they benefit women overall, but specifically how they benefit the most disenfranchised women, including women of color. Failing to account for the intersectional dynamics of both sex and race discrimination by using the gains experienced by the most privileged women in society as a model for all women has the effect of disguising how the benefits of existing equality measures have been distributed in ways that further marginalize women of color, thus erasing and normalizing harsh reality of the sex equality gap.

The Equal Rights Amendment (ERA), first introduced into Congress in 1923 and reintroduced in revised form in 1972, is now on the verge of final ratification.[55] It would amend the U.S. Constitution by adding new language: **"Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."** The ERA holds the potential to address the sex equality gap that permeates the *20th*

Century Sex Equality Paradigm by modernizing constitutional sex equality in ways that would benefit and center the people who have been left behind by current equality measures.

Why is this so? Article V of the Constitution sets out an onerous process for amending the Constitution, one that requires two-thirds of both houses of Congress and three-quarters of the states to ratify new amendments. In fact, the U.S. Constitution is the most difficult modern constitution to amend. Given how difficult it is to amend, it makes sense that amendments add something new rather than merely reiterating existing provisions. An amendment, by its very nature, makes a change or updates the document it is amending. In fact, every one of the 27 constitutional amendments to the U.S. Constitution created either new rights (free speech, religious liberty, trial by jury, rights to vote for women and citizens at 18 years old), repealed rights explicitly enumerated in earlier amendments (prohibition), or barred abhorrent anti-Black historical practices (slavery and poll taxes). It would not make sense for amendments to be understood to merely reaffirm rights already found in the Constitution. As such, the ERA should be understood to update and enhance our constitutional conception of equality from that which was commonly understood in the 19th century, when explicit equality protections were added to the Constitution via the 14th amendment, to a more modern notion of equality.

One of the most important early advocates for the ERA, Pauli Murray, argued that the ERA could provide the constitutional foundation for the rights of women of color if, and only if, the ERA was intersectionally interpreted, and considered the race and gender equity needs of Black women at the center of its analysis.[56] Murray argued that an ERA could, and should, empower Congress to level up existing racial and gender equality protections, as well as provide the legal justification for courts to interpret gender and racial justice protections simultaneously.

SPOTLIGHT: HOW A MODERN SEX EQUALITY PARADIGM WOULD ALSO BENEFIT BLACK MEN

Women, men, and people of all gender identities can experience sex and gender discrimination. A modern *Sex Equality Paradigm* must take seriously the significance of discrimination and stereotyping for all people on account of their sex or gender.

It is important to note that Black men in particular are overly burdened by negative race and sex discrimination and stereotyping. According to the National Institute of Health (NIH), Black men have the worst overall heath compared with all other groups in the U.S.[57] For instance, "in 2013, the top three causes of mortality among men overall were heart disease, cancer, and unintentional injuries; however, the only race by gender group for which homicide is a top-five cause of death is for black males between the ages of 15 and 44."[58] More specifically, Black men have the lowest life expectancy of any group.[59] NIH research has also found that differences in life expectancy for Black men can be directly correlated with race and educational differences.[60]

In a separate NIH study, commissioned to determine whether sexual stereotyping adversely affected the health of Black men who have sex with men, researchers found that when accounting for sexuality, the "stereotypes of gay men were more similar to *White* gay men."[61] Yet, when accounting for race, "stereotypes of Black men were more similar to Black *heterosexual* men," and Black men were stereotyped as "physically dominant, aggressive, hypermasculine, and [more likely] to possess large penises" compared with other men of color, or white men.[62] This dangerous race and sex stereotyping leads to racial profiling and the criminalization of Black men at an alarming rate.[63]

A modern *21st Century Sex Equality Paradigm* should be able to capture the ways in which Black men suffer sex-based discrimination, insofar as stereotypes about and bias against Black men burden them in ways that amount to both race and sex discrimination.

WHAT KIND OF *NEW* EQUALITY PROTECTIONS WOULD THE ERA DELIVER?

A Modern Approach to Sex Equality Should Provide Substantive, Not Only Formal, Equality Protections

The Supreme Court has interpreted the 14th Amendment's Equal Protection Clause[64] to include protections against sex discrimination.[65] Numerous federal, state, and local laws similarly prohibit sex discrimination in a wide range of contexts, as the first part of this paper described. But at best, those protections assure *formal* equality between the sexes, not *substantive* sex equality.

a) What is "formal equality"?

Formal equality is based on the notion that a person's sex should be irrelevant to their qualifications for important social goods, such as a job, housing, education, health care, elected office, etc. In this sense, an equal society should be "sex-blind" just as it is "race-blind." Under this approach, sex discrimination occurs when a person is denied a job, access to education, or housing "because of their sex." Usually this means that the person who is accused of discrimination acted intentionally; that is, they intended to deny a job, promotion, or apartment to someone because of their sex.

Figure 1

HELP WANTED—MALE

BARBER—White, for Saturday; $4.25. 1307 East Capitol st. 1*

MAN to attend stable, wash carriages, clean harness, and take care of horses; white. Apply at 707 22d, Apt. 12, after 7 p. m. 1

WASHMAN—Experienced, on shirts, collars, and family work. Apply BOX 316, Times office. 1*

WANTED—Men to learn barber trade; new method; wages after first month; steady position guaranteed. For particulars address MOLER BARBER COLLEGE, Dept. N, 207 Bowery, New York City. 1*

BUSHELMAN and coat maker. WATSON, 1809 G st. N. W. *

INSURANCE AGENTS—White and colored; one policy covers sick, accident and life; pays old age benefits; loans made on policies; old reliable company licensed to do business in the District of Columbia. Address BOX 311, Times office. 1*

MEN—Young, wanted to solicit subscriptions for Catholic magazine in Washington; producers can make big money. BOX 310, Times office. 1*

PRESSER—First-class, at once. Call 2504 14th st., J. KLEIN.

WHITE MAN—Active, to clean windows and help other work. Apply before 9 or after 5. ELLIOTT, 1400 U st. N. W.

HELP WANTED—FEMALE

GIRL—Good, for kitchen work. Call after 6 p. m., 7 H st. N. W. 1

GIRL—Good, to work in dining room, also one to do chamberwork, will pay good wages to right party, room and board; no colored need apply. Call 201 Eye st. N. W.

GIRL—Colored, for general housework; reference. 221 3rd st. N. W.

WAITRESS—Experienced; good wages. 610 9th st. N. W. No other need apply. AMERICAN LUNCH. 1

WOMAN—White, for cooking and housework in small family; leave city for summer. 3821 Woodly road. 1

It was the case for many years, if not centuries, that laws, policies, and practices explicitly differentiated between men and women, and thus, discriminated on the basis of sex in a blatant way. Often, these same practices also discriminated on the basis of race. Women of color, as a result, were barred from applying for these positions on two counts: sex *and* race.

Most, though not all, of the laws and policies that explicitly discriminated on the basis of sex have been repealed. Yet, sex-based inequality persists. This is because the current sex equality paradigm focuses on how people are classified (as male or female) and not on the substantive impact of sex-neutral policies. So, too, a formal equality approach is committed only to protecting *individuals* from intentional sex-based discrimination and is largely incapable of capturing how neutral policies can have a disparate impact on particular social groups.[66] Formal equality principles do not define as discrimination those policies or practices that may aggravate, or perpetuate, the negative experiences of historically disadvantaged groups.[67]

The limits of this 19th century model of equality are well documented.[68] It has no capacity to capture the social, economic, political, and cognitive dynamics that produce and perpetuate inequality. Neutral policies that do not explicitly allocate opportunity or resources on the basis of sex may, and often do, have the effect of distributing resources in sex-specific ways.

One of the best examples of the limits of the formal sex equality paradigm is how the Supreme Court has treated employment policies that discriminate against pregnant employees.[69] The Court found that these policies were not a form of sex discrimination because they did not treat women differently from men, and thus were not "about sex." They argued that the policies singled out pregnant employees for different, and worse, treatment, thus differentiating between pregnant and non-pregnant employees. Since the class of non-pregnant employees was made up of both men and women, the policy wasn't treating women worse than men, and therefore it wasn't a form of sex-based discrimination.[70] In response to this outrageous decision, Congress enacted the Pregnancy Discrimination Act, clarifying that pregnancy-based discrimination was a form of sex discrimination.[71]

Perhaps most insidiously, the current formal equality paradigm makes it almost impossible to implement policies that are designed to dismantle structural forms of sex discrimination. In fact, the 20th century "sex-blind" sex equality paradigm has become, in important ways, one of the greatest threats to the promise of sex equality in this country. A recent decision from the 6th Circuit Court of Appeals in *Vitolo v. Guzman*[72] is an excellent example of this. The case involved a challenge to a key provision of the $1.9 trillion COVID stimulus package signed into law by President Biden in March 2021.[73] The program targeted economic sectors particularly impacted by the pandemic, such as restaurants, providing "a one-off monetary lifeline aimed at ameliorating short-term economic devastation."[74] Congress built into the aid application process a 21-day fast track for restaurant owners hardest hit by the pandemic: women, veterans and "socially and economically disadvantaged" people, i.e. people of color.[75] Other restaurant owners could apply for aid during this period as well, but applications from women and people of color would be processed first. Nevertheless, Antonio Vitolo, the white male owner of Jake's Bar and Grill in Harriman, Tennessee, challenged the fast-track application procedure, claiming that it discriminated against him on the basis of his sex and race.[76]

Notwithstanding overwhelming evidence showing that women- and people-of-color-owned businesses were hardest hit by the effects of COVID, the judge ruled for Vitolo, finding that the government "failed to show that prioritizing women-owned restaurants

serves an important government interest."[77] With regard to the prioritization of applicants of color, Judge Thapar wrote, "When the government promulgates race-based policies, it must operate with a scalpel. And its cuts must be informed by data that suggest intentional discrimination. The broad statistical disparities cited by the government are not nearly enough."[78] The decision illuminated so clearly why the existing constitutional prohibitions against discrimination have been ineffective in addressing widespread sex- and race-based inequality, and how difficult it is to address and remedy clearly documented disadvantages suffered by women and people of color, as was the aim of the COVID stimulus package.

While the administration's stimulus package did attempt to address and remedy the systemic inequality that business owners of color, including women, faced at the height of the pandemic, the government did not have a constitutional mechanism to shore up its claims since there are still open questions concerning the ERA's status as a fully ratified amendment. Once a fully ratified ERA ushers in a new substantive equality approach, it could target those who have experienced sex-based inequality most severely: women of color. Moreover, without acknowledging and considering the systems and structures in place, such as institutional racism, that cause and uphold inequality, the ERA would fail to achieve meaningful transformation for sex equality beyond what has already been done in the 14th Amendment's formal equality context.

b) Why should the ERA reform sex equality doctrine by adding substantive equality protections?

If formal equality merely promises that each person has the freedom or opportunity to pursue their goals in the absence of specific, individualized, and intentional discrimination aimed at denying them that opportunity, a substantive approach to equality focuses on outcomes: it "seeks to eliminate the power disparities between men and women, and between white people and people of color, through the development of laws and policies that directly redress those disparities."[79] Legal scholar Laurence Tribe framed the merits of a substantive version of equality as reaching "acts that, given their history, context, source, and effect, seem most likely not only to perpetuate [inequity] but also to reflect a tradition of hostility toward a group that has been historically marginalized, or a pattern of indifference to the interests of that group."[80]

If lawmakers used a substantive equality framework to pass laws that eradicated sex inequality in the arena of family leave, they would have to consider the distinct needs that

women have compared with men, and therefore, ensure that family leave was paid,[81] and provided support services like childcare, as well as food services, since women are still more likely to manage these household responsibilities as compared with men.[82]

A substantive equality family leave paradigm would consider specific race and gender needs for women of color. It could provide resources to help curb the expenses of housing costs, especially since women of color are more likely to be the breadwinners when compared with white women,[83] as well as provide in-home care services for single mothers who may not have the support of a partner to help care for their children.

An intersectional approach to equality comports with Pauli Murray's vision of what an ERA could accomplish. In a 1971 Harvard Law Review article, Pauli Murray unequivocally declared, "[Black] women as a group have the most to gain from the adoption of the Equal Rights Amendment. Black women have been doubly victimized by the twin immoralities of racial and sexual bias."[84]

For this reason, more recent efforts to address systematic and structural forms of inequality have improved upon the anti-classification norm, embracing, instead, a substantive approach to equality. For instance, the Age Discrimination Act (ADEA), passed by Congress in 1967,[85] has been interpreted to not only prohibit age-based discrimination, but courts have created a rule that an employee alleging age discrimination need only show an age difference of ten years or more between themselves and their replacement to create a rebuttable presumption that the difference in age was substantial. Similarly, the Americans with Disability Act[86] imposes a duty of affirmative accommodation on entities covered by the law, such that employers and others will be found to have discriminated against a disabled employee if they have not implemented measures that accommodate the employee's disability and make it possible for them to perform the essential functions of the job (so long as the accommodations do not impose an undue burden on the employer). In addition, the Fair Housing Act's prohibition on discrimination in access to housing was interpreted by the Department of Housing and Urban Development in 2013 to include measures that have *discriminatory effects*.[87]

An ERA that is worth going through the hard work of fighting for and finalizing is one that seeks to eradicate sex discrimination in all of its overlapping and intersecting forms. An ERA that is used to address one-dimensional sex discrimination—separate from other issues of race, class, economic and educational status, immigrant status, and disability—will not address the needs of those most marginalized who experience multiple forms of discrimination all at once.

How the ERA Could Provide Practical Intersectional Policy Interventions

If the ERA is interpreted in ways that focus on substantive and not merely formal equality, it will be particularly beneficial for women of color who still experience a larger equality gap than white women.

The following section provides specific examples of how the ERA could close this equality gap and move the *20th Century Sex Equality Paradigm* into the 21st century. This would be accomplished not merely by promulgating mandates to refrain from sex-based discrimination, but by implementing affirmative measures that are designed to dismantle structural forms of sex-based disadvantage.

a) Promoting economic security (including wealth accumulation and pay equity)

An ERA could encourage Congress to direct the relevant federal agencies (such as the Equal Employment Opportunity Commission, the Departments of Housing and Urban Development, and Health and Human Services, and the Small Business Administration) to create more wealth generation opportunities for women of color, including, but not limited to: job creation programs, access to financial advisors, more opportunities to become home owners through first-time homebuyers' programs, the incorporation of an updated tax code, and better employment laws that mandate pay parity and opportunities for promotions. In addition, the ERA could motivate Congress to update the Family and Medical Leave Act (FMLA), and/or pass a completely new federal leave program that includes paid leave so that workers, especially those of color, are able to take time off work to care for themselves and their families.

b) Fostering food security

The ERA could foster food security for women of color by requiring Congress and the U.S. Department of Agriculture (USDA) to eradicate food deserts, which continue to exist in neighborhoods where many women of color live.[88] Furthermore, the USDA could institute deeper data collection around the outcomes for those who are eligible for the WIC program, as well as work to destigmatize the usage of this important program so that pregnant and postpartum women of color and their children have access to more nutritional foods.

c) Protecting healthcare

In order to close the healthcare equality gap, Congress, as well as state and local legislators, could look to the ERA as the impetus to set benchmarks for increases in health insurance coverage for and healthcare usage by women of color. So too, the ERA could motivate public agencies to improve data collection for maternal healthcare and maternal mortality prevention through the U.S. Department of Health and Human Services (HHS). Congress, and all other federal, state, and local agencies, could mandate the creation of task forces specifically poised to create and implement policies to fight against and ultimately end the rising rate of maternal mortality, particularly for Black birthing individuals, in the U.S. The ERA could also protect the right to abortion by ensuring that future anti-abortion laws are deemed unconstitutional and in violation of the ERA. An ERA could also protect access to all other reproductive healthcare services from contraception to in vitro fertilization, and even comprehensive and scientifically sound sexual education.

d) Ensuring more equal access to housing

Ratification of the ERA could ensure that women of color are better protected against housing discrimination. While the 1968 Fair Housing Act's prohibition of sex discrimination offers some protections for women, particularly those who experience domestic violence in the home,[89] the ERA could shore up these protections by allowing Congress to direct the U.S. Department of Housing and Urban Development (HUD) to better ensure that the specific needs of women of color are at the center of solutions-oriented conversations and policies. As aforementioned, since the Fair Housing Act's prohibition on discrimination in access to housing was interpreted by HUD in 2013 to include measures that have *discriminatory effects*,[90] the ERA could motivate HUD to more aggressively implement programs that dismantle the discriminatory effects of racism and sexism in housing, while also developing programs that affirmatively expand housing opportunities for women of color.

e) Encouraging educational opportunities

The ERA could encourage the U.S. Department of Education (DOE) to create programs that provide middle and high school girls of color with culturally competent pre-college counseling, thus motivating them to further their education and improving the enrollment of women of color in higher education. The DOE could rely on the ERA to bolster programs

that ensure that female students of color pursue higher earning majors by helping to create pipelines of success from college to their post-graduate endeavors. It must be noted that recruiting women of color into STEM and more lucrative majors will only be successful if the courses are taught in a more culturally competent way, where professors understand the unique needs of their female students of color and there is a process in place to ensure that a student's needs are met.

Additionally, in order to rectify the equality gap in access to STEM courses for girls of color in federally funded K-12 educational systems, the ERA could motivate the DOE to conduct an audit to identify which schools do not have STEM programs, and then require them to establish such programs expeditiously. An ERA could also serve as impetus for the Administration to overhaul its current practice of policing within K-12 schools, and instead establish a system of restorative justice and counseling so that girls of color will no longer be suspended at such high rates.[91]

CONCLUSION

To the extent that the *20th Century Sex Equality Paradigm* has been successful in addressing systematic sex discrimination in society, it has done so in ways that have left women of color behind. This equality gap is the result of an approach to sex equality that places white women's experiences of discrimination at the center of legal and policy measures used to combat sex inequality. Final ratification of the Equal Rights Amendment holds the promise of correcting for the failure of existing laws to take an intersectional approach to sex equality.

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Endnotes

[1] Note that this policy brief defines sex and sex equality in expansive terms to include gender as well as sex-based stereotyping and gender-based stereotyping.
[2] These laws include the 1964 Civil Rights Act, the 1965 Voting Rights Act, the 1978 Fair Housing Act, the Equal Pay Act of 1963, the 2009 Lily Ledbetter Fair Pay Act, Title XI of the Educational Amendments of 1972, the pregnancy discrimination act of 1978, the 1993 Family and Medical Leave Act, the 1994 Violence Against Women Act (and its 2022 reauthorization), among others.
[3] Please note that transgender, nonbinary and gender-nonconforming people also experience gender-based discrimination, but based on the available data, this paper focuses on self-identified women.
[4] "Equal Pay Day is March 31 – the Earliest Since it Began in 1996," United States Census Bureau, Mary Leisenring, March 31, 2020, https://www.census.gov/library/stories/2020/03/equal-pay-day-is-march-31-earliest-since-1996.html; "The Simple Truth About the Gender Pay Gap," American Association of University Women, 2022, https://www.aauw.org/resources/research/simple-truth/.
[5] It wasn't until the Civil Rights Act of 1964 that women of color, and particularly Black women, were able to legally access most places of public accommodations or apply for employment in most workplaces. Practically speaking, even after the passage of the Civil Rights Act, the Jim Crow racial order persisted in many parts of the United States and women of color were still unable to equally access most aspects of the U.S. economy and society in comparison with their white female counterparts; *See* "Women of Color and the Wage Gap," the Center for American Progress, Robin Bleiweis, Jocelyn Frye, and Rose Khattar, November 17, 2021, https://www.americanprogress.org/article/women-of-color-and-the-wage-gap/; "Equal Pay Day," Elise Gould, Economic Policy Institute, March 10, 2022, https://www.epi.org/blog/equal-pay-day-there-has-been-little-progress-in-closing-the-gender-wage-gap/.
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[7] "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] See e.g., "Gender Bias in Healthcare Is Very Real — and Sometimes Fatal," Crystal Raypole, Healthline, January 19, 2022, https://www.healthline.com/health/gender-bias-healthcare.
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https://www.hhs.gov/civil-rights/for-individuals/section-1557/fs-sex-discrimination/index.html.
[10] "Health Benefits & Coverage, Birth Control Benefits," https://www.healthcare.gov/coverage/birth-control-benefits/. The contraceptive coverage mandate has been challenged many times in court including the landmark Supreme Court decision in *Hobby Lobby v. Burwell* (2014) which required the government to provide an accommodation to religious employers.
[11] "Building on the ACA: Administrative Actions to Improve Maternal Health," Jasmine Fields Allsbrook and Osub Ahmed, Center for American Progress March 25, 2021,
https://www.americanprogress.org/article/building-aca-administrative-actions-improve-maternal-health/.
[12] *Id.*

[13] "Racial/Ethnic and Gender Disparities in Health Care Use and Access," Jennifer I. Manuel, Health Services Research 1407, 1423 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5980371/.
[14] "Working Together to Reduce Black Maternal Mortality, Center for Disease Control and Prevention," April 6, 2022, https://www.cdc.gov/healthequity/features/maternal-mortality/index.html ("multiple factors contribute to these disparities, such as variation in quality healthcare, underlying chronic conditions, structural racism, and implicit bias. Social determinants of health prevent many people from racial and ethnic minority groups from having fair opportunities for economic, physical, and emotional health."). Note that since 1935 only some maternal mortality rates have been disaggregated by race, leading to inconsistent and oftentimes incomplete maternal mortality data. "Maternal Mortality Review Committees," Guttmacher Institute, October 1, 2022, https://www.guttmacher.org/state-policy/explore/maternal-mortality-review-committees. "Some states first established maternal mortality review committees (MMRCs) to investigate deaths related to pregnancy in the early 20th century, when rates were the highest on record. These jurisdictions reviewed deaths in an effort to understand why many women died in childbirth and to respond to poor medical practices and inadequate care provided by physicians. Many committees became inactive by the late 1980s, following a decline in maternal deaths for several decades." Note that the federal government began to mandate that states report maternal mortality data as recently as 2003. Therefore, it is difficult to know exactly what the actual rates of maternal mortality have been for women of color in particular over the last 70 years.
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[17] 29 U.S.C., Chapter 8 sec. 206(d).
[18] 42 U.S.C. §§ 2000e - 2000e17 (as amended).
[19] "Economic Inequality by Gender," Esteban Ortiz-Ospina and Max Roser, 2018, https://ourworldindata.org/economic-inequality-by-gender; "Gender pay gap in U.S. held steady in 2020," Amanda Barroso and Anna Brown, Pew Research Center, May 25, 2021, https://www.pewresearch.org/fact-tank/2021/05/25/gender-pay-gap-facts/.

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[21] Fair Housing Act, 42 U.S. Code § 3604.

[22] "Housing Discrimination under the Fair Housing Act," U.S. Department of Housing and Urban Development, https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview#_What_Is_Prohibited.

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government drew maps of every metropolitan area in the country designed to indicate where it was "safe" to insure mortgages. Adopted by the Home Owners Loan Corp., the Federal Housing Administration, and the Veterans Administration, these color codes carved out the areas in which African-Americans lived in order to indicate to appraisers that these neighborhoods were too risky to insure mortgages.

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[29] "Gender and Racial Justice in Housing," National Women's Law Center, February 2021, https://nwlc.org/wp-content/uploads/2021/02/Gender-and-Racial-Justice-in-Housing.pdf. (Housing instability can also worsen the struggles of survivors of domestic violence. Only 25% of eligible households get HUD rental assistance but women who receive a housing voucher are one-third less likely to experience domestic violence; 22-57% of women and children are homeless due to domestic violence, and 38% of survivors experience homelessness at some point.).

[30] Education Amendments Act of 1972, 20 U.S.C. §§1681 - 1688 (2018). Title IX states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

[31] *Id.*

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[39] "50 Years of Title IX," Women's Sports Foundation Report, May 2022, 23, https://www.womenssportsfoundation.org/wp-content/uploads/2022/05/13_Low-Res_Title-IX-50-Report.pdf. For example, white women represent the largest population of women athletes in NCAA Divisions I, II, and III conferences combined at 68%. Black women represent 11%, followed by Hispanic women (6%), International women (5%), women identifying with Two or More Races (5%), and Asian women (2%) (National Collegiate Athletic Association [NCAA], 2021a)).

[40] "Black Girls Matter: Pushed Out, Overpoliced and Underprotected," Kimberle Williams Crenshaw, Priscilla Ocen and Jyoti Nanda, Columbia Law School Center for Intersectionality and Social Policy Studies and African American Policy Forum, 2015, https://www.law.columbia.edu/sites/default/files/2021-05/black_girls_matter_report_2.4.15.pdf ("Black males were suspended more than three times as often as their white counterparts, Black girls were suspended six times as often.").

[41] *Id.*

[42] "Title IX at 50," National Coalition for Women and Girls in Education, June 2022, https://www.ncwge.org/.

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[53] "Association of State Expansion of Supplemental Nutrition Assistance Program Eligibility With Rates of Child Protective Services–Investigated Reports," Anna E. Austin, et al., *JAMA Pediatr.* (2023), https://jamanetwork.com/journals/jamapediatrics/fullarticle/2800739?resultClick=1.
[54] *Id.*
[55] Article V of the Constitution sets out an onerous process for amending the Constitution, one that requires two-thirds of both houses of Congress and three quarters of the states to ratify new amendments. In fact, the U.S. Constitution is the most difficult modern Constitution to amend.
[56] In a 1971 Harvard Law Review article, Murray espoused that Black women as a group "have the most to gain from the adoption of the Equal Rights Amendment," because "implicit in the amendment's guarantee of equality of rights without regard to sex is the constitutional recognition of personal dignity which transcends gender," and, thus, is inclusive of race. See, "The Negro Woman's Stake in the Equal Rights Amendment," Pauli Murray, 6 *Harv. C.R.-C.L. L. Rev.* 253, 253 (1971).
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[58] *Id*.
[59] *Id*.; "Leading Causes of Death in Males, United States," Center for Disease Control and Prevention, Last updated Feb. 18, 2015, CDC, Atlanta: http://www.cdc.gov/men/lcod/2011/LCODrace_ethnicityMen2011.pdf.
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stereotypes may be both shaped by historical influences and contemporary media. According to Patricia Hill Collins, unfounded ideas of 19th and 20th century Western scientists about the evolutionary proximity of Africans to nonhuman species fueled longstanding stereotypes of Black sexuality as primitive and reproductively uncontrolled. In this context, Blacks were regarded as heterosexually promiscuous and homosexuality was assumed to be "impossible" since same-sex sexual behavior was not reproductive in nature. Such same-sex behavior was considered to be a sexual practice perpetrated by Whites."
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[67] *Id*.
[68] "National Strategy on Gender Equity and Equality," the White House, https://www.whitehouse.gov/wp-content/uploads/2021/10/National-Strategy-on-Gender-Equity-and-Equality.pdf; "How Unpredictable Schedules Widen the Gender Pay Gap," Valentin Bolotnyy and Natalia Emanuel, Harvard Business Review, July 1, 2022, https://hbr.org/2022/07/how-unpredictable-schedules-widen-the-gender-pay-gap.
[69] Geduldig v. Aiello, 417 U.S. 484 (1974). It is important to note that not all women have the capacity to become pregnant, and men, including transgender men, as well as gender non-conforming people, also have the capacity for pregnancy and therefore would also experience a specific form of sex-based discrimination.
[70] *Id*.
[71] Pub. L. 95–555.
[72] 999 F.3d 353 (6th Cir. 2021).
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[74] "Restaurant Revitalization Fund," U.S. Small Business Administration, https://www.sba.gov/funding-programs/loans/covid-19-relief-options/restaurant-revitalization-fund.
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