

# Women do need constitutional protections and guarantees

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## OPINION

In her desire to keep women subordinate to men, Cathi Herrod is purposefully downplaying the Equal Rights Amendment’s far reaching impact on women’s lives, and dangerously misrepresenting the facts.

The ERA is not expected to solve “all of society’s ills with one piece of controversial legislation.” It will provide women and men with the same constitutional protections and equality under the law. The ERA is a starting point, an essential legal foundation. Legislation can be taken away with the swipe of a pen, the change of an administration, or the whim of a politician. We need a constitutional amendment. The ERA is not controversial, it simply prohibits discrimination based on sex. A majority of Americans support it and most think it’s already been passed.



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The United States is one of the only countries in the world that does not have a constitutional equality provision guaranteeing equal rights for women. Even under the Afghan Constitution, men and women have equal legal rights and duties. It specifically outlaws discrimination based on sex. Women around the globe do not feel “insulted” that their countries’ constitution includes them. They do not feel it’s “nonsense” to be protected from discrimination on the basis of sex in foundational documents. The Declaration of Independence, signed in 1776, stated: “All men are created equal” and that governments derive their powers “from the consent of the governed.” Women were not included in either concept. And women were not recognized as citizens or as individuals with legal rights in the U.S. Constitution either. The word “woman” is not

used once in either document. This omission of legal equality for half the US population has never been amended or updated.

Women are not equal under the law. There is nothing in our Constitution that protects women from discrimination on the basis of sex. Early court decisions made clear that women were not “persons” under the 14th Amendment. The 14th Amendment only covers state action and is limited to public employees. It does not cover private action by individuals.

The Supreme Court uses a different and lower standard of review for sex discrimination claims under the 14th Amendment than it does for claims of racial or religious discrimination. No majority opinion has articulated sex as a “suspect” classification.

Systemic bias has not been considered by the Supreme Court to violate the equal protection guarantee of the 14th Amendment unless the bias can be shown to be intentional. Whether intentional or not, pay inequity is harmful and discriminates against women based on sex. Women have no legal recourse under the 14th Amendment for many forms of discrimination, including unequal pay for equal work and pregnancy discrimination. The courts have upheld the constitutionality of paying a woman less than her male colleagues, even though they are doing the same work, because the woman’s salary in a prior job was less than a man’s. Employers can continue paying women less than a man if other employers did it.

Herrod argues that women usually don’t do the exact same job, working the same hours, with the same background as men. She says **women choose different career paths** and take time out of the workforce **over higher wages**. Women “choose” these things because we are the only developed country in the world without guaranteed maternity leave or child care benefits. Women still do most of the unpaid work at home, and are forced to take jobs with fewer hours and less pay. This is not a “choice.” This is a systemic problem that perpetuates the inequity in pay. Women and men have equal rights to work and have children at the same time. The ERA would create a right to sex equality that is fundamental and substantive.

Herrod’s real concern is limiting a woman’s basic human right to decide whether and when to have children. She thinks the ERA is mostly about preserving access to abortion care. We can endlessly debate whether or not a fertilized egg has rights, but the government never has the right to compel a woman to use her body and risk her life against her will. Men do not have restrictions on making their own medical decisions that impact their bodies, health and lives. Our Constitution must protect a woman’s right to make these same decisions. Guaranteeing women equality under the law would give them the same personal sovereignty and bodily autonomy that men enjoy. If denying women equal rights under the law ensures that they can’t make their own reproductive decisions, then that is exactly why we need an ERA. Women are free citizens.

The ERA will enshrine in our Constitution the value judgment that sex discrimination is wrong. If it’s not needed, as Herrod claims, why does she care so much if we pass it?

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