

Tanya Domi: Hi. This is Tanya Domi. Welcome to the Thought Project, recorded at the Graduate Center of the City University of New York, fostering groundbreaking research and scholarship in the arts, social sciences, and sciences.

In this space, we talk with faculty and doctoral students about the big thinking and big ideas generating cutting-edge research, informing New Yorkers and the world.

Julie Suk is Dean for Master's Programs and Professor of Sociology at the Graduate Center CUNY. She is a scholar of comparative law and society with a focus on women in comparative constitutional law. She is most well known for her recent work on renewed efforts to ratify the Equal Rights Amendment for women in light of the theory and practice of gender equality provisions in constitutions around the world.

So Dean Suk, welcome to the Thought Project podcast.

Julie Suk: Thank you.

Tanya Domi: So this is an interesting time to have a conversation with you, Dean Suk, because it would seem that the revival of the Equal Rights Amendment to prohibit sex discrimination could not occur at a more fortuitous moment in American history, in view of a number of events that have taken place since 2017, the largest demonstration by any human beings, but in this case, women in the United States after the inauguration of Donald Trump, and then of course, being accompanied by the rise of the "Me Too" moment, and so what are your thoughts about this moment and what it could bear potentially for the adoption of an equal rights amendment?

Julie Suk: Well, I think that after the election of Donald Trump and particularly because some of the remarks that he made in the campaign that were misogynistic, I think women mobilized in very unprecedented and surprising ways around women's rights and women's empowerment, broadly speaking, and the ERA was one of the things that was on the agenda of the Women's March, and I think since then, because of the rise of the "Me Too" movement, there's a general sense that whatever law and politics that we currently have, it's not really working for women, and we need something more, and a constitutional amendment, one that has been in our political and legal imaginary since 1923 and has never really gone away, that constitutional amendment has a new interest and a new discourse, and so I do think that this is a moment in which women are mobilizing in favor of change.

Tanya Domi: Yes, and he just seems to be doubling down on the issues of how he sees and portrays and talks about women. I mean, just today, in the New York Times, his comments uttered yesterday on Twitter, calling a woman with the appearance of a horse face. It's just not only undignified, but this intent to insult over and over again I think will serve as a continued impetus for social change and demand for women's equity and dignity, quite frankly.

Julie Suk: Yeah, and I do think that part of the problem is the media and the discourse around women, but I what's really driving our interest in change is not just what Donald Trump

is saying about women but the underlying realities for most ordinary women in America, that is the pay gap, the lack of protections for pregnant women in the workplace, the lack of support for child rearing, which unfortunately today is a responsibility despite the legal guarantee of nondiscrimination on grounds of sex, the responsibility of child rearing tends to fall heavily on women and tends to cause their economic disadvantage and their lack of access to political power as well.

Tanya Domi: I agree, and so in, this is a great segue, you assert in your article published in the Yale Journal of Law and Feminism last year that the elevation of judicial review to strict scrutiny standard would not effectively address post-industrial problems that confront women in the 21st century. Why not?

Julie Suk: So the problem with strict scrutiny, I think, in our constitutional law of equality, strict scrutiny refers to the test by which judges, when they see a classification, typically a racial classification, they assume that that classification and the law in which that classification is used is illegitimate unless there is a compelling state justification or is compelling state interest that's driving the use of that classification, and of course, this test was created in the context of classifications being used to disadvantage racial minorities and specifically racial segregation, but today, the use of strict scrutiny in the equal protection context in race cases is used equally to scrutinize affirmative action and policies that are designed to promote the equality of disadvantaged racial minorities in various contexts.

So if you analogize that now to the sex equality context, one concern is that if you use strict scrutiny to scrutinize all gender-based or sex-based classifications in public policy or law, it can be used by judges to strike down measures that are taken at the state legislative level to actually promote women's equality, and I'll give you an example of something that's come up, and it's come up in very big ways over constitutional crises in Europe in decades earlier, the question of women's representation on corporate boards.

In California at the moment ...

Tanya Domi: That's right. There's an initiative.

Julie Suk: There's legislation, right, that would require publicly traded companies to have at least one women, right? And that's a version, although a perhaps less ambitious version of gender quotas laws that were passed in Europe in the late 1990s or actually dating back earlier if you look at some civil service laws, but there were laws that said that corporate boards had to have at least 40% women, or I think technically they're framed so that you can't exceed 60% one sex on a publicly traded company's board, and those laws actually, they date to the early 2000s, but the earlier versions had to do with representation of women on political party lists for elected office.

Tanya Domi: I actually was involved in that effort in Bosnia where we adopted it, a quota.

Julie Suk: Wonderful.

Tanya Domi: One third of the ballot would be evenly distributed, in the case of Bosnia.

Julie Suk: Great, but it's very common in Europe now that both in the political context and the corporate board context, there are laws that say that you can't exceed 60% one sex in terms of representation on boards or candidates for political office.

Tanya Domi: Okay, that's a good point. I just never thought about that.

Julie Suk: But California law now, I mean, there are threats of constitutional challenges, and the constitutional challenges would come from constitutional guarantees of equality, which have been judicially interpreted both on the federal level as well as the state level notwithstanding the fact that there are also state ERAs that explicitly speak to sex, but all of these constitutional provisions that are interpreted to or explicitly prohibit sex discrimination, if you use strict scrutiny, it does mean that you're strictly scrutinizing things like gender quotas that are designed to promote women in areas where they have been underrepresented.

Tanya Domi: I see. That's a really good point. Now let's go back to the pay equity issue and childbearing. A few states now have paid family leave, as we were discussing before we started. I just think that this is one of the biggest gaps that confront women and families in America, and it definitely affects women's earnings, and too, when they retire, they are gonna retire with much less money even though according to mortality tables, women live longer on average, so this really compounds women in their senior years. It compounds the quality of their life.

These are some of the biggest issues that I have seen. While I do not have children, I've had many colleagues that do, and you know what happens to people in and out of the workforce, and then the lost opportunities for advancement, these kinds of issues that really complicated women's economic earnings and wellbeing over the course of their life.

Talk about how the ERA, the new, re-imagined ERA that you talk about in the article, how that would be addressed.

Julie Suk: The ERA that we're now currently really talking about is the ERA that was adopted in 1973, and that's the ERA that just says that equality of rights shall not be abridged or denied on account of sex by the state or by the United States or any [inaudible 00:10:18] subject who has jurisdiction. Right?

And so that version of the ERA would just prohibit sex discrimination by the state, and what that means, it would not require any form of maternity leave, and so I don't think that the ERA would directly. Let's say that we had a 38th state that ratified the ERA. It wouldn't mean that we get paid family leave for women or men or really for anyone tomorrow.

So it wouldn't quite work like that, but the problem that I was pointing you to a moment ago, which is that any time you distinguish, treat women better in the law, that's going

to be thought to be problematic under any guarantee of sex discrimination, so there is a little bit of that problem as women try to get pregnancy protections in the workplace.

The law right now, statutory federal law just prohibits discrimination against pregnant women but doesn't require special accommodations of pregnant-

Tanya Domi: For their situation.

Julie Suk: Right.

Tanya Domi: It's unique to their sex.

Julie Suk: Right. When we say that pregnancy discrimination is prohibited, what the law means by that is that pregnant women should not be treated worse than other people similarly situated in their ability or inability to work.

Tanya Domi: I see.

Julie Suk: So these are some of the problems now. I think that because we talk about equality of rights not being denied or abridged, if the government were to enact legislation trying to promote women's equality, we might see that much more easily as a way of protecting gender equality as guaranteed by the Equal Rights Amendment, right? And so that's a legal problem that you could see being resolved by the ERA that current equal protection law doesn't address.

Tanya Domi: I see.

Julie Suk: But what I'm saying is actually, I mean, it's really just a solution to a problem that was created by Supreme Court jurisprudence over many years, strictly limiting Congress's ability to enforce sex equality or to actually promote gender equality under Section V of the 14th Amendment, and so what I think the ERA can do about a lot of these issues, it's not a magic bullet that's going to create a public policy solution, but I think that the most valuable thing it could do is create a politics and reinforce the politics-

Tanya Domi: That could-

Julie Suk: Of women's organizing that could then open up a new legal space because the Supreme Court that we have and will continue to have has written a lot of jurisprudence that actually makes it very hard for Congress or even the states to promote women's equality, and given that we have a law that makes it hard to do that, having a new amendment with a new understanding of Congress's enforcement powers can actually open up more political possibility, and I think that's the best thing that the ERA can do for us right now.

Tanya Domi: So it would in essence create a political space that would allow women to articulate and advance policies that would address how they live and work.

Julie Suk: Absolutely.

Tanya Domi: Okay. Very good. So in your article, you also point to examples of France and Germany updating their constitutions in the 1990s as examples of how Europe arguably has some of the best legal standards, which are based on the European Convention on Human Rights and the jurisprudence that is generated through the Court on Human Rights.

Julie Suk: Well, no, actually. The Court on Human Rights has its own jurisprudence, drawing on its provisions, but the constitutional traditions that I'm pointing to are not derivative of those traditions, and also the more advanced gender equality law in these issues probably emanates not from the European Court of Human Rights in Strasbourg but from some of the jurisprudence around the equal treatment directive of the Court of Justice of the European Union.

Tanya Domi: Okay.

Julie Suk: And there's a little bit, so I mean, there are interesting links between the Court of Justice of the European Union and a dynamic between that court and the German Constitutional Court and the constitutional courts of the German states, the Länder, which are like the states within the federated system.

Tanya Domi: Okay. So, but given that, that they did update it, as we talked about earlier, they really do, Germany and France and the Netherlands and the Scandinavian countries all have extremely advanced family public policy with respect to paternal and maternal leave and topping off the government, topping off employers, salary agreements when you're out of the job and you're on leave. Canada does that. Canada tops off your salary as well so that you hit approximately, at least 90% of what you were making before you were out on leave.

I mean, these are, again, these are the big, big issues. We're seeing it happening in the United States. There's like about five states now, I believe, five states that have paid family leave. How do you think passing the ERA would inform that movement, for example?

Julie Suk: So I think it actually, as a legal and policy matter, the relationships are quite complicated, but I think, in some ways, what the ERA can do is simple in that I think it's bringing political voice to all of the causes of women's disadvantage. Right?

In Europe right now, I mean, you're right that there are these very developed social welfare states, and they have some connection, at least in some of the countries, although not all, to the constitutional law of gender equality because in Europe, and this is a subject of more recent work that I've done since I wrote the article about the ERA that you read, but in Europe, I trace the constitutional history of some of those provisions guaranteeing explicitly equality between men and women, so in Germany, for example.

That actually dates to the German Constitution at Weimar in 1919 where they first introduced equality of rights between men and women, and what's very interesting in the German case is that that provision was advocated for by women who were part of the constitution-making process right after women got the vote.

So in a lot of European countries, there are actually founding mothers as well as founding fathers of the Constitution, and I use the term "founding mothers" pretty deliberately in that what was also going on in many of these constitutions at the time, and it's something I mentioned in the ERA article as well, is that many European constitutions, including the German and the French and the Italian and many others, in addition to protecting equality of the sexes also contains a provision saying that motherhood deserves the special protection of the state, and it's really that provision and not the equality provision that becomes the foundation, that becomes the constitutional legal foundation of many social welfare initiatives, including maternity leave, and of course, many of these countries had maternity leave, no paternity leave, but only maternity leave which, from the standpoint of modern sex equality law, is sex discrimination.

If you just have maternity leave and not paternity leave, that's sex discrimination, but of course, originally, women who were constitution makers in Germany in 1919 and then after World War II in both Germany and France and Italy, many other European countries, they advocated for both, and this is an interesting paradox for us that they advocated for both equality without discrimination on grounds of sex, equality between men and women, and special protection of mothers by the state.

Tanya Domi: That is interesting. Well also, the Germans really, I think, stand out. I mean, it was a German socialist who founded International Women's Day as a way to bring attention to the situation of women and girls, and this is a day that is really observed throughout Europe, mostly originally in the eastern European countries but now more broadly, so it's an interesting cultural custom that has emanated in Europe.

So I want to come back to United States for a moment. In recent years, the EEOC has interpreted the Title VII application to issues related to, for example, transgender persons, under sex discrimination, and this kind of, I think it shows, it indicates that there's an evolution of the law, interpretation of the law and the application of it. I believe that there's a case going to the Supreme Court on this. I think I saw something on a docket recently about Title VII interpretation, and I'm somewhat concerned about it, given the most recent addition to the court. What are your thoughts on the EEOC interpretations and how Title VII's been applied under the 1964 Civil Rights Act?

Julie Suk: Well, it's a very interesting history in terms of the inclusion of sex as a category of prohibited discrimination in Title VII of the Civil Rights Act, that the story that's often told is that sex was included as an effort to kill Title VII, which was primarily growing out of the Civil Rights Movements concerned with race discrimination.

Tanya Domi: Yeah, by the segregationists and Congress.

Julie Suk: Right. So, but of course, then we did get a prohibition of sex discrimination, and the jurisprudence that you get around sex discrimination ends up being influenced by race discrimination law, and so the idea of sex stereotyping, right? Applying generalizations about the sex to a woman, that that becomes prohibited, and I think once you start down that path of really focusing on the need to treat everyone the same and not apply stereotypes in the workplace or in other contexts, that then, Title VII or the prohibition of sex discrimination in the workplace really comes to be seen as an individual right not to have other people impose an identity on you and that everyone should be treated roughly the same, right?

And this is one vision of discrimination law, which I think is intentioned with another way of understanding what sex discrimination law is about, that sex discrimination law, and in fact, race discrimination law is not really about individuals' rights to be free from generalizations. That's one vision of it, and it's a vision that I think is very resonant with a very individualistic understanding of one's rights as a worker in the workplace, but another way of understanding discrimination law is that it's really about groups, that it's about groups like women who have been systematically, by the way that jobs have been designed, by the way that we not just have generalizations about individuals but a whole social structure designed around the assumption that women don't work and are in fact primarily responsibly for childbearing, that we have all these social structures and institutions that are designed around those assumptions, and so if you think that sex discrimination law or any kind of guarantee of equality is a way of undoing those oppressive social structures, then you're going to need something that's much more than ...

Tanya Domi: Being free from-

Julie Suk: Being free from generalization, and sometimes, you might actually need to use generalizations in order to undo the structures that entrench those generalizations.

Tanya Domi: Very interesting. I think that's very interesting.

I just want to say one more thing about the politics of the moment. We now see that women running principally in the Democratic Party, more than double the number of candidates for office that have won their primaries, about, it's very significant. It's dramatic, and the idea that many of these women, we hope, will be elected, and they'll take their place in the House and, I hope, in the Senate, that there's going to be more attention paid by the mere fact of their presence.

There is political science study, social science studies that show that the higher the level of representation, and once you reach one third, more of a body, representative in a body of legislators, you're going to have significant impact, and we already see women having significant impact by virtue of their political activism, let alone taking a formal role of power to legislate. This will be an interesting moment to see what happens after the elections.

Julie Suk: Yeah. I mean, I am curious to see what happens, although I don't think, I mean, I think women's representation makes a huge difference because if, as long as we live in a world in which people want to continue to reproduce, it is true that unless you actually figure out a system for allocating duties that's not gendered, that basically, one of the problems or one of the explanations for why women are so underrepresented is not just sexism but that the fact that caregiving falls primarily on women ends up making it so that as a practical matter, it's very hard for women, especially women who are mothers, to put themselves in leadership positions, and I think, so then there's this other dynamic by which, if you end up having political bodies or corporate boards or whatever it is with at least 40 or 50% women, that maybe because then so many people in that body have childcare responsibilities or need some kind of arrangement, that you're going to see the institutional practices around those organizations change, but I don't think that one thing necessarily follows from another.

I think a lot of work has to be done. I mean, it's also true that a large percentage of white women voted for Trump, and it's also true that the original fights that we had about ERA ratification in the late 1970s, it wasn't conservative or misogynistic men who defeated the ERA. It was organizing by Phyllis Schlafly, and a lot of women-

Tanya Domi: Yes. I'm intimately familiar with her. Yeah.

Julie Suk: Well, and I do think that one of the difficulties is that women in America are very diverse and very diverse in their understandings of what should happen on these issues affecting [crosstalk 00:26:23] against women, affecting women in the workplace, and protections for motherhood and child rearing.

Tanya Domi: True, but this is also principally democrats on the democratic side that have an agenda that's quite different from the republican side on these issues specifically, so it's going to be a contestation without a doubt, even when they're elected, so ... I agree, and I mean, Phyllis Schlafly is someone who brought Elaine Donnelly into the military battle. She was a part of the Schlafly [inaudible 00:27:04], and she's somebody I personally had to take on in a lot of the work that we did on women in the military and women in combat, et cetera.

So, anyway, but the last question I do have for you, we are gonna digress for a moment and talk about your role as the Dean of the Master's Programs at the Graduate Center. Can you tell us about some of your priorities as you oversee these growing number of programs and really interesting ones including cognitive neuroscience and data visualization and analysis? These are really interesting master's programs at this point in the academy.

Julie Suk: Yes, absolutely. So I'm really excited to join the Graduate Center as the new Dean for Master's Programs because, well, the Graduate Center has always been this amazing place for research, and research in areas that are closely aligned with CUNY's public mission of bringing together access to education and excellence, and I think master's programs are very importance-based with regard to access because, as well as the public impact that our research can have here at the Graduate Center, because we're

educating people who may or may not continue into careers in academia, may or may not even aspire to career in academia, and so you're going to have a much more diverse set of people with regard to their career aspirations, and I think that is also going to diversify the social backgrounds of the people coming into the Graduate Center and also will create an opportunity for us to teach as faculty, people who are going to take the research into many, many different areas of life.

And then in the emerging fields where we have new programs, the cognitive neuroscience program, there's really nothing like it, really, in the country right now where they're bringing together psychology and biology and studying really interesting topics like, "What is the brain doing when you are focusing on things or distracted by things?" And we have a data science program where we're really at the cutting edge of things like machine learning, artificial intelligence, and I think these programs are going to prepare a very diverse group of new students for many new and exciting careers and, I hope, train them in ways that make them reflective about the ethical dimensions of fast technological change, including who owns data, who has access-

Tanya Domi: Yeah, these are really, these are very big questions facing our society right now.

Julie Suk: So my priorities are to connect with these students, make sure they're learning the material and thinking in a huge, publicly minded way about the material that they're encountering and also really supporting their career aspirations and supporting their ability to make a difference and work for positive social change.

Tanya Domi: Well, thank you very much. The issues about sex discrimination, and we hope a new ERA will be adopted, not a new one. It's the one from 1973, and we should have you back to talk about that, and of course, keep us up to date on the new master's programs and how there's increased enrollment, and this is a very exciting time at the Graduate Center.

Julie Suk: Thank you.

Tanya Domi: So thanks for tuning into the Thought Project, and thanks to our guest, Dean Julie Suk of the Graduate Center, CUNY.

The Thought Project is brought to you with production, engineering, and technical assistance by Sarah Fishman. I'm Tanya Domi. Tune in next week.