For my honors thesis, I will look into the idea of using public policy to invest in women to eradicate poverty from Third World to First World nations. I will do so by comparing Kenya, a country that recently adopted a new constitution in 2010, and the United States. I will take into account the cultural differences and seeing what strategies are working and what must be done on top of the current policies in place.

Would we need to change public policy to directly favor women more so than men to help eradicate poverty in a more efficient and cost-effective way in the United States? Does Kenya’s constitution prove to be more effective than the United States’ constitution? Should other countries follow the model of the United States’ constitution? Is focus on welfare and basic education enough to ensure women will have enough income and time to support a family? How can we stop women from passing down the burden of their role as a mother to their daughters? Have the laws in the United States actually helped women to be economically empowered?
Introduction

Many national and international organizations and world leaders have said that investing in women and girls is the key to economic development, that gender equality is smart economics, that an investment in women is an investment in the community which then grows into an investment in the nation, and so on. Typically, the need to empower women is perceived as greatest in Third World countries where initiatives such as The Girl Effect focus their efforts. However, it just might be that First World countries can learn from smaller, developing countries.

Despite the wide recognition that gender equality is key to development, gender inequality persists in both Third World and First World countries worldwide:

This [gender] inequality is manifestly unfair. It is also bad economics: under-investing in women puts a brake on poverty reduction and limits economic and social development. Gender equality is a longer-term driver of competitiveness and equity that is even more important in an era of increasingly globalized economies. No country can afford to fall behind because it is failing to enable women and men to participate equally in the economy and society.¹

Investing in women can be done in many ways, such as programs in microfinance, education, or health resources. This paper will focus on investing in women by establishing gender equality as a nation’s public policy through the adoption of constitutional provisions that ensure the equality of women. It will explore the idea of using public policy, as expressed in constitutional provisions that enshrine gender equality, to invest in women in order to develop economies in both Third World countries and First World. To do this, I compare the United States, a First World country, with Kenya, a Third World country that adopted a new constitution in 2010 that explicitly provides for equality for Kenyan women.

Definition

Investment: Providing national support for women by explicitly providing them with power or authority in a nation’s constitution.

Question

If countries invest in women through public policy, particularly through adopting provisions in the countries’ constitutions that ensure gender equality, will those countries’ economies develop faster than the economies of countries that do not invest in women in this way?

To answer this question, this paper will first examine gender equality in Kenya, focusing on its historic tribal culture, the effects of the British colonization of Kenya, Kenya’s first constitution after achieving independence from Britain, and its 2010 constitution. It will then examine the evolution of gender equality in the United States, without the disruption of tribal culture by colonization, but also without express constitutional provisions establishing the equality of women. To predict the possible economic effect of constitutional provisions that enshrine gender equality, this paper will also look at recent developments in Rwanda, a Third World country with some similarities to Kenya.
It would be difficult to predict whether public policies protecting women will work in a
certain country without first considering its history. Any discussion of the history of Kenya must
take into account not only Kenya’s history since independence from Britain, but also its history
prior to British colonization. In her book, The Challenge for Africa, Wangari Maathai argued that
part of the reason for the major problems in Africa is the fact that British colonialism almost
erased the original tribal culture of the African nations. Maathai’s argument is supported by the
fact that there are not nearly as many publications on Africa’s pre-colonial history as there are
for post-colonial history:

Like other peoples who experienced not only physical colonization but also what might
be called a colonization of the mind, Africans have been obscured from themselves. It is
as if they have looked at themselves through another person’s mirror – whether that of a
colonial administrator, a missionary, a teacher, a collaborator, or a political leader – and
seen their own cracked reflections or distorted images, if they have seen themselves at
all.\(^2\)

In order to predict whether the new Kenyan Constitution will not only protect women but also
help Kenya’s economy, we focus on two of the larger tribal cultures that existed in Kenya prior
to British colonization, the Kikuyu tribe and the Luo tribe.

*Kikuyu Tribe*

The largest tribe in Kenya today is the Kikuyu, with a population of 6.6 million.\(^3\) The
Kikuyu live in the foothills of Mount Kenya. The tribe was divided into various clans based on
patrilineal lineage. Within each Kikuyu clan, the village governance was based on an age-grade
system. Although the Kikuyu had a rather democratic system of governance, men and women

were separate in its governing bodies. Select male elders would form temporary group councils on an ad hoc basis. These elder male councils made decisions on matters that affected the entire group. Women elders also formed group councils; but these councils made decisions on matters that only affected women, such as female circumcision, childbirth and women’s religious duties. However, it is noteworthy that, to implement the decision of the male elder councils, men had to negotiate with their wives.⁴

There is evidence of tension between male and female power in the traditional Kikuyu society. According to one myth, male members of the tribe defeated a tyranny of the descendants of daughters, made up of pregnant women who proved to be unfit to stop the men’s revolt. Other myths portrayed women as unfit for political positions as well, such as depicting women as unable to attend important meetings because they had to tend to their children. This mythical portrayal of women rulers as tyrannical makes it seem from an outside perspective that the pre-colonial Kikuyu may not have had a true democracy.⁵

Men and women had mixed roles in the pre-colonial Kikuyu economy. Women and girls performed much of the horticulture and food processing activities, while men were primarily responsible for tending to the livestock. Kikuyu wealth was measured by the amount of livestock, land, and people within a clan. Within the home, the husband and wife worked together as a team to recruit more followers for their clan and therefore obtain more land. In marriage, an exchange of livestock was common for a bride wealth exchange. Once the exchange of livestock happened, the marriage was considered legitimate, and the married women could then bring children into the clan, thus enhancing the clan’s ability to obtain more land. Males

---

⁵ (Clark 1980) 360.
were viewed as the leaders of the land, to demonstrate support for that specific clan, while the women’s value was in cultivating the land.\(^6\)

According to pre-colonial Kenyan tradition, the following were tasks allocated to men and women for agricultural work:

<table>
<thead>
<tr>
<th>Men</th>
<th>Women</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) Taking care of cattle in all aspects and trading livestock.</td>
<td>1) Planting staple crops such as maize, beans and millet, hoeing,</td>
</tr>
<tr>
<td>2) Clearing fields, breaking up the surface for women, cutting drains and water furrows, and building roads and bridges.</td>
<td>2) Storing and taking care of the food supply, cooking, getting water and firewood, grinding grain and pounding sugar cane for beer, taking care of hives and making honey, and milking cows.</td>
</tr>
<tr>
<td>3) Planting certain crops such as bananas and sweet potatoes,</td>
<td></td>
</tr>
<tr>
<td>scaring birds away and burning grain stalks.</td>
<td></td>
</tr>
</tbody>
</table>

Women were great contributors to the political economy of the pre-colonial Kikuyu. They were the lead participants in trade with another Kenyan tribe, the Maasai tribe. Kikuyu women traded their vegetables for livestock as well as other items, in what could be considered “long-distance trade.”\(^8\) Not only did the Kikuyu women participate in trade in order to gain more resources, they also helped maintain diplomatic ties with the Maasai. “It would take several days to go to the edge of Kikuyu territory or into Maasai (or Kamba) territory and back. Where

\(^6\) (Clark 1980)
\(^7\) (Clark 1980) 359-360.
\(^8\) (Clark 1980) 363.
hostilities were so great that trade could not be conducted and environmental conditions such that one group feared famine, peace treaties would be negotiated to allow for trade…”\(^9\) The presence of women and girls during these negotiations was considered to be a sign of peace. Usually the mothers had to go on these long journeys to conduct trade, leaving the oldest daughter to care for the rest of the children of the household. When the daughters became adults, the elder women passed on the trade duties to their daughters.\(^10\)

The livestock the Kikuyu women obtained through trade with other tribes were kept in each woman’s “dwelling” and could not be disposed of without her permission. This also applied to livestock she was given at the time of her marriage, as well as livestock received for marrying off her daughters. According to pre-colonial Kikuyu tradition, livestock received in a bride wealth exchange could only be used for a subsequent bride wealth exchange.\(^11\)

The pre-colonial Kikuyu practiced widow inheritance, that is, if a man who had no sons left a will to his wife on his deathbed, she could inherit his share of the herd as well as land. Widows of childbearing age might then find a lover or lovers, and give her children the name of her dead husband. Sources also suggest that pre-colonial Kikuyu widows who were past childbearing age would enter into a same-sex marriage with a younger woman who could have children. The younger woman was then encouraged to find a married male to impregnate her, so that they would have more children. According to the tradition, “[t]he female husband, however, was the legal father and participated on other ritual occasions…. [T]he female husband was not marrying for her deceased husband, but establishing a line for her future son(s).”\(^12\)

\(^9\) (Clark 1980) 363.
\(^10\) (Clark 1980) 363.
\(^11\) (Clark 1980) 363.
\(^12\) (Clark 1980) 364.
Finally, women in pre-colonial Kikuyu society played a key role in maintaining work groups for their land. They did so by taking responsibility for providing food and beer for the labor groups who worked on the family’s land. The male workers who worked on the land were given small shares of the land as well and food and drinks, so long as they pledged their dedication to the male elder of the clan:

Among the Kikuyu as elsewhere, it seems the rich get richer, the poor get dependent on them. *Mbān’s* with several women cultivators were more likely to have the resources to support work parties, and eventually attract ahoi (tenants). Men who could entreat the women of their families to cook and distribute food and beer had a greater chance of expanding the *mbān’s* holding and their own following.13

Pre-colonial Kikuyu women depended on each other for help in the community. Polygamy was a social norm in Kikuyu society, so they relied on their co-wives, as well as other women of their clan who were in the same age group. The Kikuyu women were also responsible for distributing food to their community, and to their own family.

In retrospect, the Kikuyu women were thought to be heads of the households and we charged with maintaining the land. The purpose of girls was to marry them off to a respective husband and then perform their duties as wives, while also having a say with their resources. Kikuyu women also have great power over resources in terms of both obtaining them and maintaining them for their family.

*Luo Tribe*

The Luo tribe is the fourth largest tribe in Kenya, located in the Nyanza, Kisumu, and Siaya Provinces. Similar to the Kikuyu, the Luo system of governance was based on seniority, beginning with village elders, then clan elders, and then chiefs. The village elders represented homesteads, which were made up of multiple families of close if not the same lineage. Decisions were made amongst the village elders based on consensus, in a process that was considered to be

13 (Clark 1980) 365.
highly democratic. The elders of different homesteads would in turn meet to make decisions about different topics such as welfare, security, disputes and settlements, and the like. Luo tradition was that these leaders were thought to have mystic powers and were usually medicine men. However, according to a Kenya National Commission on Human Rights publication, the term “medicine men” could include both men and women.14 So it is unclear how large a role women played in pre-colonial Luo tribal governance.

The pre-colonial Luo believed in justice and fairness. When it came to childbirth, Luo tradition claimed to value both boys and girls equally. However, in reality, the Luo preferred boys to girls. The Luo viewed child rearing as a community effort; babies belonged to the entire Luo community and therefore would be loved and nurtured by the community. At about age 5 or 6, pre-colonial Luo boys and girls attended what was known as a “Siwindhe.”15 In the “Siwindhe,” a grandmother who was past childbearing age and “no longer had sexual relations with her husband” would provide education to the children: “Young people learnt about the history of their people, oral narratives, proverbs, riddles and other genres. It is here too that they learnt about family life, courtship, and how to relate to members of the opposite sex.”16 After obtaining this education and learning how to behave with a boyfriend, pre-colonial Luo girls would be married off. Once pre-colonial Luo boys obtained an education, their six bottom teeth would be removed and they would move into a small hut built for an unmarried man.17

A pre-colonial Luo woman could obtain land only after she had been married for years and had proven herself to be a valuable part of her husband’s family by staying home with her mother-in-law to help with household chores. Once the young wife began bearing children, the

---

mother-in-law would pass down a piece of land to her. The mother-in-law would also give the young wife a cow, as well as household items to help her with her chores. The Luo woman would then use this land to provide for her family and to increase wealth by maintaining her livestock. If she was good at harvesting, she would gain a surplus of grains, goats, and cows. No one, including her husband, could interfere with her livestock.  

Similar to the Kikuyu, Luo women also participated in trade. However, for the Luo, the women’s trade was used to buy, sell and save various commodities. Luo women would usually save up to be able to buy a goat or a cow. This gave Luo women the freedom to develop their own wealth and not fully depend on their husbands. However, Luo women also had the responsibility to develop wealth; the only time a woman could ask for her husband’s help was during a disaster such as a famine. Although the Luo men would have their own piece of land and harvest their own crops, overall, pre-colonial Luo men entrusted the Luo women entirely with the utilization of land.

The Effect of British Colonization on Kenya’s Tribal Culture

In her book, *The Challenge for Africa*, Wangari Maathai discusses a “legacy of woes” for modern-day Africa, particularly its notoriously corrupt leadership, and argues that the British colonists’ determination to erase African tribal culture is at least partly responsible. Maathai points to the Berlin Conference from 1884 to 1885, in which Great Britain, Germany, France, Italy, Portugal, Belgium, and other countries divided up the African continent. These countries wanted African colonies not only for more land to extend their geopolitical influence; they were also looking for more sources of raw materials to support their expanding industrial economies. Maathai asserted that the colonial powers were not interested in bettering the African areas they

---

colonized: “They were there either to ensure the flow of raw materials to the mother countries or to provide representation and organizational capacity for the white settlers who were encouraged to colonize the new territories, in the name of developing them, and to ‘civilize’ and Christianize the native peoples.”\textsuperscript{20} The colonial powers gave natives who cooperated with the mother country’s administration leadership positions such as chiefs, scouts, and church elders. However, tribe members who cooperated with the colonial powers were usually members who were in trouble with the local tribal community and would not have been given a leadership position in the traditional African societies. Maathai argued that this practice laid the foundation for the current oppressive administrations that are endemic in modern Africa.

Maathai described traditional culture as the foundation for people to live in harmony and independence, and to protect their self-interests.\textsuperscript{21} In contrast, people without culture are insecure and tend to become obsessed with obtaining material items, and communities lose self-awareness and direction. This phenomenon, Maathai says, is seen in many areas of Africa today: “To be sure, culture is a double-edge sword that can be used as a weapon to strike a blow for empowerment or to threaten those who would assert their own self-expression or self-identity.”\textsuperscript{22} Maathai pointed to the fact that, in many modern African communities, women are the victims of discrimination and exploitation through the dominant cultures that demand for women to behave in a certain way:

They [women] are denied power, access to wealth and services, and even control of their bodies through practices such as female genital mutilation, early or child marriage, and rules of disinheritance. Some cultures demand that men be warriors and learn to kill, or to treat women a certain way, or to repress emotions, such as affection, pain, and compassion. Those who break away from the norm are punished or ostracized. These are some of the negative aspects of culture. We cannot shy away from these realities.\textsuperscript{23}
Is colonization to blame for the negative aspects of African culture today? During the process of colonization, African tribes were told their culture was wrong and immoral. Kenyan history during British colonization is rife with examples of colonists forcing the tribes to go against their customary law and comply with the laws developed by the British administrations.

For example, during the era in which Kenya was a British colony, the idea of a land market was forced upon the Luo tribe. When the British colonial administration first seriously discussed the idea with the Luo in the Kenya Land Commission’s group interviews in 1932, Luo spokespersons – mostly men – voiced adamant opposition to the idea. The Luo believed that implementing a land market system would break up their homesteads, which were based on patrilineal kinship. They also feared a market that would create a society of lower classes and upper classes. One of the British commissioners commented about the Luo spokespersons:

“They realized that the introduction of a system of land titles would be the thin end of a wedge which would eventually break up the existing system of land tenure under customary law and also breakdown the existing system of inheritance under native law…”24 Some anthropologists have found the Luo customary law actually prohibits land from being mortgaged.

Today, there are mixed feelings amongst the Luo about using land mortgages. Some tribe members have been influenced by pro-market ideas through trade, travel and education. But many of the Luo tribe members who live in rural Kenya remain skeptical of land mortgages:

“Luo deem it a betrayal to alienate ancestral land for money. Indeed, money gained from selling inherited land of personal gain is called makech, bitter or evil.”25

---

25 (Shipton 1992) 365.
One aspect of the significant changes in land exchanges in Kenya brought about by the British colonists deeply affected the role of women in Kenyan society. In December 1953, Kenya’s Assistant Director of Agriculture, Roger Swynnerton, submitted the “Plan to Intensify the Development of African Agriculture in Kenya.” The two main aspects of the plan were to begin growing high-value cash crops and to implement a system of registering all farmland in African lands as private, individual property. This plan for Kenya was part of the “European freehold model.”

Changes such as this disadvantaged women in Kenya by removing the role of women with respect to land and crops under the traditional tribal culture and customary law, and implementing a system that placed the power in the hands of men, consistent with British culture at the time. For example, women in the Kipsigis society of the Kalenjin tribe in Kenya, became disadvantaged by British colonial laws that conflicted with their tribal culture and customary law, particularly in the areas of labor and production relations. When maize became a cash crop and large production of maize was adopted on a large scale in the 1930s, it replaced the traditional staple crop, millet. Some women continued to harvest millet, but the production and trade of maize became the business of men, Dorthe von Bulow wrote. Because maize was harvested for both sale and consumption by families, these women became obligated to work in their husbands’ fields as helpers. It also meant that the women had to negotiate with their husbands over how much of the harvested maize could be used for consumption by the family. Farmers in Kenya who grew cash crops such as tea also could not usually afford to pay for year-round labor to harvest their crops, so they relied on the women and children in their families to provide the labor free of cost. In addition, the Swynnerton Land Reform Plan of 1954 greatly

---

26 (Shipton 1992) 366.
27 (Shipton 1992) 366.
affected women’s rights as to the use of land. Title deeds were given primarily to men, who were thought of in British culture as the head of the household, in direct contrast to the pre-colonial Kalenjin view of women as the head of the household. This change meant that women could not make decisions about land without consulting their husbands, and only widows with sons to inherit property could obtain title deeds.\(^2\) The market structure changes imposed by the British colonists were also accompanied by a greater cultural influence from Europe.

Both Bulow and Maathai argued in their writings that the influence of Christianity and Western law and values that came about during the British colonization played a large role in the diminished status of women in Kenya. Under the colonies, many traditional practices were either condemned or prohibited. The age for initiation and marriage was lowered to erase tribal customs that were thought by the British to be immoral, such as pre-marital sex and infanticide. The colonists also condemned polygamy and monogamous marriage was promoted. However, monogamous marriage did not support the household structures of tribes in which multiple wives were needed to tend to children and to maintain the property:

Subsequently, the house property complex lost some of its logic, and women’s status as heads of houses and the concept of house property have gradually been replaced by the perception that men are heads of households and guardians of all household property.\(^2\)

Other scholars have called the transformation from polygamy to monogamous marriage “the emergence of the patriarchal nuclear family.”\(^3\) Under British colonization, the African notion of shared responsibility was replaced by the Western beliefs in exclusive rights: “As a result of


\(^{29}\) (Bulow 1992) 535.

\(^{30}\) (Bulow 1992) 535.
these changes, women’s economic status has been altered from one of relative autonomy to one of relative dependence.”

The Cultural Conflict Between the British and Kenyans

The British attempt to change Kenyan tribal cultures and the original tribal governance structure led to the development of Mau Mau, an anti-colonial group that was primarily Kikuyu. During the process of colonization, the British implemented a private land system and attempted to educate Kenyans on how to properly use their land. Under the private land system, the British colonists owned a disproportionate amount of land compared to Kenyans and used Kenyans for cheap labor. They believed that providing Kenyans with agricultural education, labor, and land was helping Kenyans develop their country to the level of Great Britain. With developments in public health, the population of Kenya increased and the land that had been designated to various subsections of the overall Kenyan population shrank or became unusable for agriculture. This strain on land resources, combined with resentment of British actions against the traditional tribal culture led to multiple uprisings of the Kikuyu against colonists. Beginning in 1945, nationalist African leaders such as Jomo Kenyatta of the Kenya African Union (KAU) tried to pressure the British government for more political rights and land reform, with more land in the cooler Highlands to be redistributed to Africans.

Another group of radical activists split off from the KAU to create a more militant national group known as Mau Mau fighters. The Mau Mau fighters, as well as groups from Maasai and Luo tribes, pledged to kill Europeans and Africans loyal to them. In 1952, Mau Mau rebels began attacking political opponents – both Africans loyal to the British government and

31 (Bulow 1992) 535.
European settlers – and raiding the farms of European settlers and destroying their livestock. The goal of the Mau Mau fighters was to drive European settlers out of Kenya forever. This led the British to declare a state of emergency and moved its military in to Kenya to defend and counterattack against the Mau Mau. The Mau Mau rebels were finally defeated by the British military in 1956. By that time, the uprising resulted in more than 13,500 Africans and more than 100 Europeans being killed. This was a turning point in British occupation of Kenya.

**Kenya Post-Independence**

In 1960, the British announced that they would hand over Kenya to a democratic African government. In 1963, Kenya officially became an independent country and received $100 million in grants and loans to buy the land of European farmers and give the land of Kenya to Kenyans. KAU leader Jomo Kenyatta, a Kikuyu, was elected to be the first president of Kenya.

However, Kenyan independence did not undo the problems created by the colonial influence in the country. Kenya had been unmoored by the colonists’ erasure of its traditional tribal culture and customs. Without a cultural foundation, African leaders continued a colonial governance structure and the Western culture remained.

After Kenya achieved independence from Britain, it became evident that the majority of the benefits from the government were going toward the African elite, and mostly to those of Jomo Kenyatta’s tribe, the Kikuyu. “The new leaders faced the same problems that had plagued the British at the end of their colonial rule – unemployment and poverty.” Kenyans were left with an economy that was based on the colonial model of cash crops, and they hoped to industrialize as the West had done. Consolidation of government became the topic of greatest importance to Kenya’s new government leaders. In 1964, Kenyatta became the leader of the

---

34 (“Kenya History”)
36 (Sobania 2003) 28.
Kenya African National Union (KANU) and became the president of a one-party state. They were able to accomplish this primarily because most of Kenya’s leaders put aside their differences for the sake of achieving independence from Britain. However, after independence was achieved, unity gave way to factionalism. In Kenya’s parliament, a man named Oginga Odinga, a Luo from Nyanza in western Kenya, was identified with the opposition. He had played a large role in Kenya’s independence and was the first vice president of Kenya. After independence, Odinga began to argue that the government needed to speed up the Africanization of jobs, the nationalizing of business and industry, and for a more fair distribution of land and wealth. In 1966, during an official KANU meeting, Odinga was forced from office. However, he was not silenced. After being forced out of office, Odinga founded an opposition party, called Kenya People’s Union (KPU), and continued to have a seat in Kenya’s parliament. However, after an incident in 1969 that threatened the life of Kenyatta and ended with the police shooting and killing eighteen people, Odinga and some of his followers were held in detention for eighteen months. In 1969, there were two assassinations of two different opposition leaders. These events did not end opposition to Kenyatta’s government; instead they created public fear and suppressed criticism of Kenyatta and the Kenyan government.

After President Kenyatta’s death in 1978, under Kenya’s constitution Vice President Daniel arap Moi was granted the presidency. Moi was a Kalenjin, a much smaller tribe. With this in mind, Moi began a philosophy nyayo, which means “footsteps.” In other words, Moi believed that he should follow in Kenyatta’s footsteps. At first, Moi’s presidency was rather quiet and the corruption that had begun toward the end of Kenyatta’s rule seemed under control. However, the same problems that had occurred under Kenyatta rule eventually returned under Moi’s leadership, and many Kenyans again began to voice their opposition.

37 (Sobania 2003) 29-30.
Student strikes at the university may have been over calls for better food and living conditions, but at the heart of these demonstrations was opposition to any number of factors that had come to characterize Moi’s rule – single-party rule, government corruption, economic misrule, and the list went on.\(^{38}\)

After a coup attempt in 1982, Moi began to sell state-owned assets to his political friends at low prices. Antipoverty organization leaders in Kenya were arrested for accusing the government of corruption and their organizations were shut down. It would take another ten years for the Kenyan people to select a new leader to replace Moi.

In December 2002, Kenya suffered from a poor economy with high unemployment, a government filled with corruption, and lack of international financial support.\(^{39}\) This led opposition politicians to finally rally for the single purpose of defeating President Moi’s selected successor, Uhuru Kenyatta, the son of deceased Kenya president Jomo Kenyatta. Thus in the 2002 elections the opposition party National Rainbow Coalition (NARC), led by economist Mwai Kibaki, won the victory. Commonwealth election observers described the 2002 election as orderly, free, fair, peaceful, and transparent. But Kenya’s third president faced great obstacles: “Following twenty-four years of Moi’s rule, the challenge facing Kenya’s third president is the extreme sense of optimism among the people: the expectation that he can immediately turn the economy around and bring an end to corruption overnight.”\(^{40}\) This optimism ultimately turned into disappointment. President Kibaki was able to develop Kenya’s economy, but created great social inequality because the majority of the economic benefits went to those who were already well off, particularly the Kikuyu.

President Kibaki oversaw great democratization and economic development in Kenya.

The Kenyan economy grew by more than 6 percent in 2006, the highest growth rate in more than 30 years; foreign investors and tourists poured into the country; and civil

\(^{38}\) (Sobania 2003) 30.
\(^{39}\) (Sobania 2003) 30.
\(^{40}\) (Sobania 2003) 30.
society, the press, and parliament came together to advance democratization. Kenya, it appeared, had been reborn.  

President Kibaki lost much of his support due to his heavy reliance on Kikuyu ministers. The Kikuyu are the largest and most well educated of all of the Kenyan tribes, primarily because they have had the upper hand in Kenyan governance since its independence. They are disproportionately represented in civil service, professional classes and the business community, which have improved greatly along with the economy.

Kenyan Culture Today

It is important to remember that, from the perspective of Kenyans, the traditional Kenyan tribal culture is not viewed as bad or abusive. It is seen as a way of life that has been accepted for hundreds of years. As Maathai argued, when outsiders – such as the British in the case of Kenya – completely alter a culture by prohibiting its traditional practices or condemning them as evil or immoral, this damages the self-esteem not only of individuals, but also of the entire community. She maintained that one of the biggest challenges faced by Kenya, and Africa as a whole, is overcoming its image to the outside world as poor and dependent.

This clash of cultures was evident during the 1985 United Nations World Conference on Women in Nairobi. Compared to prior conferences, this 1985 conference had double the number of African women in attendance, showing that the Women’s Movement had reached the Third World. This new incorporation of Third World countries also brought cultural divides, as described by Dorothy Butler Gilliam in her article “A Historic Gathering.” This cultural divide was particularly evident between Black American women and African women:

42 (Maathai 2009) 171-183.
As we tried to communicate with our African sisters, we found both sides had been inflicted with stereotyped views. To make matters worse, during a Third World Women of Color caucus late one night, the air became charged with hostility between African and Caribbean women and Black American women. ‘You think you know the issues!’ an African woman told an afro-wearing Black American woman. ‘You can’t speak for us African women!’

Throughout the 1985 conference, there was tension between African women and Black American women. For example, although polygamy was a somewhat controversial topic to African women, Black American women were unified in their disdain of the practice. The black American women were surprised when some of the African women attending the conference defended the practice of polygamy and described it as being “superior” to the culture of monogamy in the United States, which resulted in husbands in America having extra-marital affairs. However, later in the conference, tensions eased when African women were able to explain how polygamy has been somewhat of a base for the economy of the African home. This conference revealed that, in furthering women’s rights in public policy, an appreciation of cultural differences must play a huge role in the decision making process.

---

44 (Gilliam 1985) 159-160.
45 (Gilliam 1985) 162.
Comparison of Kenyan Public Policy on Women in its Constitutions

Kenya’s Original Constitution

Kenya’s first constitution dates back to 1963 when the country gained its independence from the United Kingdom. The 1963 Constitution stated that there should not be discrimination under the law. Article 70 of Kenya’s first constitution stated:

…Every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever, his…creed or sex… to each and all of the following namely – (a) life, liberty, security of the person and the protection of the law; (b) freedom of conscience of expression and of assembly and association; and (c) protection for the privacy of his home and other property and from the deprivation of property without compensation… 46

Although it seemed as though Kenya’s 1963 constitution gave women equal rights, the document also included significant exemptions known as claw back clauses. The claw back clauses took away gender equality in important areas, including citizenship issues; matters of personal law including marriage, divorce, burial, and inheritance; statutes regarding public service; and property ownership transaction laws. The constitution also basically exempted members of a certain race or tribe from its nondiscrimination provisions with respect to their use of tribal customary laws.47 As discussed earlier, tribal customary laws were usually based on patriarchal culture in which the primary decision makers were men and only men could inherit and control land and property, even though women were typically considered to be the heads of their households.

47 (The World Bank 2007)
The 2010 Kenyan Constitution: A New Beginning

August 4, 2010 is a date that many Kenyans will not forget. On that date, Kenyans adopted a new constitution with 67 percent of the vote in support through a referendum.48 This was a win for the Kenyan people, particularly Kenyan women. Kenya’s new constitution includes at least 30 different references to gender issues. The broadest provision in the new constitution, Article 27 Section 3, states that women are equal to men: “Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural, and social spheres.”49 Below are some other areas of Kenya’s new constitution where women made significant gains:

Citizenship

The new constitution explicitly grants women the ability to pass on their Kenyan citizenship to their children, regardless of whether their husbands are Kenyan.

Prior to 2010, section 89 of Kenya’s 1963 constitution granted the ability to transfer Kenyan citizenship to children only to Kenyan men.50 Children of a Kenyan father, born outside of Kenya after its independence from Britain could be granted Kenyan citizenship. However, children of a Kenyan mother and a non-Kenyan father born outside of Kenya after its independence could not be granted Kenyan citizenship.

The same principle applied to spouses in section 91 of Kenya’s 1963 constitution. Under Section 91, a woman’s citizenship was determined by the significant male in her life, either her father or her husband.51 Section 91 granted Kenyan men the right to transfer Kenyan citizenship

---

49 Kenyan Constitution. Art. XXVII, Sec. 3.
51 (Analysis of Gender Discriminatory Laws in Kenya) 10.
to their foreign wives. However, Kenyan women did not have the ability to transfer Kenyan citizenship to their foreign husbands. Therefore, if a Kenyan man married a Tanzanian woman, that wife could be granted Kenyan citizenship if she had been born outside of Kenya after its independence. However, if a Kenyan woman were to marry a Tanzanian man, that Tanzanian husband could not be granted Kenyan citizenship. So, under the 1963 constitution, if a Kenyan woman married a non-Kenyan man, she was no longer considered Kenyan by the Kenyan government.\(^{52}\)

**Personal Laws**

Under Kenya’s 2010 constitution, women are recognized as having equal access to land and have the right to inherit property, equal to their male siblings. The constitution also grants protection to matrimonial property even in the case of divorce.

This was not the case under Kenya’s 1963 constitution. It was not until 1997 that the Kenyan constitution was amended to outlaw discrimination on the basis of sex. However, the very next provision Section 82(4)(a), took back this gender equality when it came to adoption, marriage, divorce, burial, and transfer of property on death or matters of other personal law.\(^{53}\)

In addition, under the 1963 constitution, customary law typically overruled any protections given to women in the constitution. However, in Article 2 Section 4 of Kenya’s new constitution states the following: “Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”\(^{54}\) This protection for women applies to religious

---

53 (Analysis of Gender Discriminatory Laws in Kenya) 11.
54 Kenya Constitution. Art. 2, Sec. 4.
and customary laws that conflict with the laws of the new constitution, as well as any policies under international laws that Kenya has ratified.

*Kenya National Human Rights and Equality Commission*

In Article 59, Kenya’s 2010 constitution establishes the Kenya National Human Rights and Equality Commission, in order to ensure that human rights, including gender equality, are recognized throughout the country. It mandates that Kenya’s Parliament must enact legislation to create the Commission, and later to restructure the Commission into two or more commissions. The Commission is granted the authority under the constitution to monitor, investigate and report on human rights issues as well as to ensure compliance with international treaties and conventions relating to human rights.55

*Political Power*

The new Kenyan constitution states that not more than two-thirds of the members of any public body may be of the same gender.56 Under this provision, Kenya’s Parliament must have at least 74 female members and its Senate must have at least 16 women.

*Women’s Health*

Women are also guaranteed equal access to health care in the new Kenyan constitution. Article 43 (a) of the new constitution states: “Every person has the right to the highest attainable standard of health, which includes the right to health care services including reproductive health care.”57 This provision is a big step toward addressing the issue of maternal deaths. According to Human Rights Watch, tens of thousands of Kenyan women and girls die each year during

56 Kenya Constitution. Art. 81, Sec. b.
57 Kenya Constitution. Art. 43, Sec. a.
pregnancy and childbirth.58 The Article 26 Section 4 of the new constitution permits abortion, but only if, in the opinion of a trained health professional, there is a need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.”59

*Property Rights*

Under Kenyan traditional tribal laws, women typically were not able to inherit land. Kenya’s new constitution changes this. In Article 60 Section 1, the new constitution provides for the “elimination of gender discrimination in law, customs and practices related to land and property in land.”60

---

59 Kenya Constitution. Art. 26, Sec. 4.
60 Kenya Constitution. Art. 60, Sec. 1.
The United States and Women’s History

Women’s History Before Independence

The original United States Constitution, ratified in 1789, did not refer to women at all. By remaining silent on multiple issues, it allowed states to leave in place numerous laws imported from Britain that marginalized women, such as laws that excluded women from juries, prohibited married women from owning property or prohibited women from suing in their own capacity.

During the 1600s, British colonists settling in America brought English common law to the American colonies with them from England.61 As a result, most of the colonies based their laws on English common law. In some aspects, the common law was progressive; for example, its criminal code granted rights to an accused person that did not exist anywhere else in the world. However, English common law was not progressive when it came to women. Under the civil code, male citizens had the right to own property, and property owners were protected from others intruding on their property and from the state. The American colonists’ interpretation of the civil code differentiated between single women and married women, creating a large disparity between the rights of single women and the rights of married women in property rights and other matters. Under the civil code of English Common Law, single women were treated the same as men, except they did not have the right to vote or the right to sit on a jury. These rights disappeared once the woman married. “Because the single woman had no man to ‘protect’ her property, she needed legal rights to protect herself. Married women, on the other hand, had the same legal rights as idiots and children – virtually none.”62 Under a provision in the common law known as “femme covert,” a married woman’s legal rights were converted to her husband.63 The

62 (Hymowitz et al. 1978) 22.
63 (Hymowitz et al. 1978) 22.
law considered a married couple to be one person, and that one person was the husband. Under
this law, a married woman did not have property or money of her own. In fact, almost everything
that had belonged to a woman when she was single belonged to her husband once she married.
These laws were based on Christian beliefs that God gave authority to rulers over followers, and
specifically that God gave a father power over his wife and children. Inequality was thought to
be a natural occurrence and was widely accepted:

In the family, status was based on a person’s sex and relationship to the father. In the
outside world, women and children assumed the rank of the head of the household. There
was a place for everyone and everyone had his or her place.

In the Declaration of Independence, the Founding Fathers challenged the idea of God-
given power, asserting, “all men are created equal.” They did not, however, challenge the
concept of coverture. The American colonies adopted some changes in the common law that
were intended to give women protections that British women did not have. Most American
colonies made changes to the common law that gave women three additional rights: “In general,
colonial courts recognized a wife’s right to share her husband’s home and bed; a wife’s right to
be supported by her husband, even if he abandoned her; and a wife’s right to be protected from
violence at her husband’s hand.” However, these protections were nullified by the fact that the
same laws denied women the right to sue in court. “So long as women were denied direct access
to the courts, the few legal rights they possessed in theory remained essentially meaningless.”

The U.S. Constitution and Women’s Rights

It’s an historical fact that women were not included in the process of making the United
States Constitution, and women were not referred to in the document itself when it was ratified

---

64 Mary Welek Atwell, Equal Protection of the Law? Gender and Justice in the United States, (New York: Peter
Lang, 2002), 14.
66 (Hymowitz et al. 1978) 23.
67 (Hymowitz et al. 1978) 24.
Until the mid-twentieth century when advocates for women modeled their struggle on the civil rights movement and the Fourteenth Amendment became a more effective instrument to challenge gender discrimination, women stood in a different relationship to the state than men.68

It wasn’t until 1849 when states began to allow married women in the United States to own property.69 This was 72 years after the country gained independence from Great Britain in 1776. For a long period of time, women did not have the right to vote, could not hold property on their own, were forced to live a domestic life and were largely submissive to their fathers and husbands under this constitution.

In the 19th century, women in the United States lived in a culture dubbed as the “Cult of True Womanhood.”70 It was a value system for women in the upper and middle classes that portrayed an ideal femininity. Characteristics of it included “piety, purity, submissiveness, and domesticity.” A true woman was thought to be religious; to remain abstinent until marriage, submissive and obedient to her husband because men were thought to be superior, and a proper place for a woman was in the home where she would tend to her husband and children.71 A result of this was that in the 19th century and early 20th century most married women participated in unpaid domestic labor and avoided paid work in the market.

The women’s movement in the United States began on July 20, 1848.72 On that date, about 300 men and women met at a church in Seneca Falls, New York to discuss the position of women in the United States. The Seneca Falls gathering was the idea of activists Elizabeth Cady Stanton, who would later become a prominent leader of the 19th century women’s movement,

71 (Hymowitz et al. 1978) 64-68.
and Lucretia Mott, a Quaker leader in the movements to abolish slavery and to promote women’s rights. The purpose was to have participants debate and adopt a declaration on women’s rights, a series of resolutions on gender inequalities, and recommend actions to fix them. The Seneca Falls convention adopted the Seneca Falls Declaration, which was modeled after the Declaration of Independence. The opening paragraph of the Seneca Falls Declaration stated the following:

We hold truths to be self evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness, that to secure these rights governments are instituted, deriving their just powers from the consent of the governed.  

The women at the Seneca Falls Convention believed that the exclusion of women from the group that implemented the new United States government resulted in women not being included in the group of people whose rights were protect by the new government. The first grievance listed in the Seneca Falls Declaration was that, under the United States constitution, women were denied the right to vote. If the foundation of a just government was a social contract through which people gave powers to the state in exchange for the state’s protection, then the denial of the right to vote was at the heart of the gender inequality in the constitution. Without the right to vote, how could women have expected to receive protection from the state? The Seneca Falls document listed many more grievances against women under the social and legal structure of the United States government at that time, including the law of coverture, women’s lack of social opportunities, and the overall assumption that men are considered to be dominant over women.

Today, the Seneca Falls Declaration is thought to be a revolutionary document, and it even shapes the current feminist beliefs: “They (women) no longer wanted to ask their husbands to grant them rights but rather to make claims that they were entitled to civil rights – that they had

---

claims of rights against the state.”

There was one important result from the Seneca Falls Convention. It was the formation of an organized effort of women and men who would persistently pursue change in policies. However it is also important to note that despite the fact that many laws were modified – for example, many states implemented the Married Women’s Property Acts, which allowed married women to own property and control their income – the cultural belief that men were superior to women persisted.

**The U.S. Supreme Court and Interpretation of Women’s Rights**

Women pursuing change in United States policy worked not only through organizing a movement, but also through the United States Supreme Court. They understood that part of the Court’s purpose is to interpret the Constitution, and they tried to effect change through the Court’s interpretation of the United States Constitution. Through much of the late 19th century and the entire 20th century, issues on the interpretation of women’s status under the Constitution were brought to the Supreme Court numerous times.

Many of the Supreme Court cases filed by activists were based upon the 14th Amendment to the United States Constitution. The 14th Amendment was ratified in 1868 after the Civil War. The first section of the Amendment states the following:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person equal protection of the laws.

The original intent of the 14th Amendment was simply to ensure that states did not deny former slaves their rights as citizens. However, the ratification of the 14th Amendment was the first time the Constitution contained the word “male” instead of simply stating “the people” or “citizens.”

---

This was included in the second section of the Amendments stating the following:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.78

This section discussed the right to vote in terms of male citizens, which created an even larger threat to the fight for women’s basic citizenship rights. “With that word the amendment introduced the principle of discrimination by sex into the Constitution, with the implication that women were not citizens.”79 Before the Civil War, only state laws denied women the right to vote. With the ratification of the 14th Amendment, women now needed to add another amendment in order to obtain their right to vote.

Despite the additional hurdles, many female activists saw the first section of the 14th Amendment as a potential opportunity to argue before the Supreme Court for gender equality. The Supreme Court, however, did not agree; the Court did not believe that the guarantees contained in Section 1 of the 14th Amendment applied to women. In 1872, activist Myra Bradwell filed a lawsuit against the State of Illinois to be admitted to practice law, and ultimately appealed it to the United States Supreme Court.80 She argued that, as a citizen of the United States, the 14th Amendment guaranteed that no state could abridge the privilege and immunities that protected her right to choose her profession. However, the majority of the Court rejected her argument; they ruled that that the admission to practice law was not related to United States

---

79 (Hymowitz et al. 1978) 156.
citizenship and that it was up to individual states to rule on these matters. Another attempt was made in the following year. In the case of Minor v. Happersett, the Court ruled that the privileges and immunities in the 14th Amendment did not include women’s right to vote in state elections. “The Court suggested that although women were persons, and hence citizens, within the meaning of the Fourteenth Amendment, the right to vote was, like the occupational right claimed in Bradwell, not a privilege or immunity.”81 It would not be until 52 years later that the tide would begin to turn.

To this day, the United States Constitution does not explicitly mention women. In fact, it is the only written constitution of a major country that includes a bill of rights but does not have a provision explicitly stating the equality of men and women.82 The only provision in the United States Constitution that mentions gender is the 19th Amendment, ratified in 1920, which gave women the right to vote. The 19th Amendment states the following:

The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation.83

In contrast to the new Kenyan constitution, this provision in the United States constitution was written in a narrow manner. As a result, women in the United States have had to try a variety of approaches over many years to gain equality under the United States Constitution.

When women in the United States tried to use the 19th Amendment, granting women the right to vote, in a broader sense to gain more rights, the Supreme Court found it difficult to interpret the Amendment to extend beyond the freedom of contract and the right to vote.84 It wasn’t until much later that women’s groups were able to convince the Court to interpret the

---

81 (Sullivan 2002) 737.
82 (Sullivan 2002) 735.
83 United States Bill of Rights. Amendment 19.
84 (Sullivan 2002) 738.
Equal Protection Clause of the United States Constitution to guarantees of sex equality, by
arguing that sex discrimination is analogous to race discrimination.\textsuperscript{85} Over time, the Court
changed the way it evaluated gender discrimination. It was not until the 1970s that the Court
moved from strict scrutiny, which would strongly presume against sex-discriminatory laws, to
intermediate scrutiny, under which only an important or significant government interest would
be enough to maintain a sex-discriminatory law. This change in the Court’s approach made it
easier for women to get support for equal rights through Supreme Court decisions. By 1996, in
the case of \textit{United States v. Virginia}, the Supreme Court ruled that the State of Virginia would
have to admit women to the formerly all-male Virginia Military Institute (VMI). Applying the
new standard to gender discrimination, the Court said that the State of Virginia had failed to
provide an “‘exceedingly persuasive justification’” for placing potential female cadets in a
separate but unequal school for women, and so required Virginia to admit women to VMI.\textsuperscript{86}

Without explicit provisions in the United States Constitution on gender equality, the
Supreme Court’s path to decision-making on gender issues has not been direct.

The lack of explicit constitutional text mandating women’s equality forced each evolving
statement of the doctrine to reveal its dependency on precedent: at its base, the argument
for invalidating sex discrimination required analogizing it to race discrimination.\textsuperscript{87}

Although the analogy to race discrimination has been useful to gender activists in some ways, it
has been limiting in other ways.\textsuperscript{88} On one hand, sex is similar to race, in that women have faced
legal disadvantages and discrimination for hundreds of years, and sex can be the basis for a
stereotype or classification. On the other hand, unlike racial minorities, women have not gone
lived in entrenched residential segregation, but in fact lived in the same households as men. This

\textsuperscript{85} (Sullivan 2002) 739-745.
\textsuperscript{86} (Sullivan 2002) 741.
\textsuperscript{87} (Sullivan 2002) 742.
\textsuperscript{88} (Sullivan 2002) 742-745.
led some to believe that sexism would have less severe economic consequences than racism, so long as the policies of inheritance were neutral. In addition, in contrast to racial minorities, women are not a numerical minority: “Women are a numerical majority both demographically and after the Nineteenth Amendment, electorally, and could exercise majority voting power if they were to vote as a bloc.”89 It is evident from these contradictions that sex discrimination and race discrimination are not completely analogous.

As a result, Supreme Court cases on sex discrimination have not been consistent. This is because the Court uses a combination of the “real differences” test and intermediate scrutiny in making its decisions:

Where the Court finds a law predicated upon ‘real differences’ between men and women, it requires only minimum rationality…And where the Court does find sex discrimination, it may be upheld if closely tailored to an important government reason even if not essential to a compelling one, as required to uphold race discrimination.90

It is evident that, without explicit language in the United States Constitution, the Supreme Court will continue to be unpredictable in its decisions on laws that discriminate against women.

**Legislating Women’s Rights**

Without an explicit guarantee of gender equality in the United States Constitution, women activists have taken another route to gain equal rights in the United States, namely, through the United States Congress. Since the ratification of the 19th Amendment, the U.S. Congress has enacted multiple laws guaranteeing women equality in certain specific areas. For example, the Equal Pay Act of 1963 prohibits differences in pay based on sex for equal amount of work. Title VII of the 1964 Civil Rights Act, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. In 1972, Congress passed Title IX of the Education Amendments, which prohibits discrimination on the basis of sex in any educational program or

---

89 (Sullivan 2002) 743-744.
90 (Sullivan 2002) 745-746.
activity that receives federal financial assistance.91

However, one key piece of legislation was not ratified. In 1972, the United States Congress passed an Equal Rights Amendment to the United States Constitution. Section 1 of the proposed Amendment stated the following: “Equality if rights under the law shall not be denied or abridged by the United States or by and State on account of sex.”92 In order for an amendment to the United States Constitution to be ratified, it needs more than enactment by the United States Congress. In addition, three-fourths of the state legislatures must ratify it. Despite an extension of the deadline for states to ratify the Equal Rights Amendment, only 35 out of the needed 38 states voted to ratify it. Perhaps some state governments believed an amendment to the United States Constitution was unnecessary, in light of the multiple pieces of legislation and Supreme Court rulings favoring women’s rights. This belief though, is misguided, and the vagueness in the United States Constitution may be partly to blame.

---

92 (Sullivan 2002) 739.
United States Constitution: The Vague Document

A signature characteristic of the United States Constitution is that it consists of vague, open-ended, and broad standards. The reasoning behind making the United States Constitution a rather vague document was to leave room for interpretation and to allow decision makers to expand the scope of its clauses beyond the Founders’ original intent. This was intended to allow the document to remain relevant for a long period of time, if not forever.

Historical interpretation of the Equal Protection Clause illustrates the discretionary character of broad, vague, general standards: having pointedly excluded women suffragists at the outset, it has become the textual basis for enforcing women’s equality today.93 However, the problem with vague, open-ended provisions in the Constitution is that it allows discrimination to persist as a social norm. Specific provisions give a clearer direction for future decision makers charged with interpreting the Constitution.

A higher level of specificity in the United States Constitution may be necessary to enforce equality. Kathleen Sullivan wrote, discrimination based on sex, race, illegitimacy, alienage, or religion is likely to persist instead of self-correct, due to the United States’ long history of entrenched discriminatory social norms:

While Scorpio can go across the street to another store where the merchant will be less hostile, discrimination against women and similar groups is likely to be particularly pervasive, persistent, and entrenched; thus it is not only resistant to self-correction through moral improvement, but also (because of its pervasiveness) resistant to correction through market-based competition.94 Sullivan’s reasoning supports the argument that, in order for society to begin to change its cultural norms, a de jure action must take place. That de jure changes lead to de facto changes. The United States’ experience with racial discrimination demonstrates the need for an explicit provision in the U.S. Constitution on gender equality. Although racism persists to this day, the

93 (Sullivan 2002) 748.
94 (Sullivan 2002) 749-750.
United States’ cultural norms on race have improved dramatically since the Equal Protection Clause was ratified. With an entrenched history of American cultural norms that view women as inferior to men, it is necessary that a de jure change occur to bring about a stronger societal change. The United States Constitution should have an Equal Rights Amendment (ERA) written in a specific, affirmative manner, guaranteeing gender equality.

Many of the Amendments to the United States Constitution that have been ratified to prevent discrimination are written with negative language, including phrases such as “shall not,” “denied or abridged,” and “discrimination.” This creates problems because different individuals may interpret discrimination in different ways. What may seem like discrimination to one person may not be found to be discrimination by a decision maker such as a judge. Constitutional provisions written in negative language also create a path of piecemeal legislation and Court rulings, each dealing only with one small part of the overall problem. As a result, the amount of time it takes for American women to gain equality in multiple aspects of their lives is greatly extended, as they wade through the tedious legislative and judicial processes. This could be a primary reason why it has taken American women so long to gain equal rights, compared to women in countries that have an equal rights clause within their constitutions. An ERA for the United States Constitution must be written in the clearest way possible, to ensure efficiency.

As the new Kenyan constitution shows, in order to ensure equality, the language of an ERA in a constitution must be affirmative. Article 27 Section 3 of Kenya’s new constitution states the following: “Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.”

95 Defining and interpreting equality is easier than defining or interpreting discrimination. Affirmative language would fix the majority of the problems with gender equality in the United States quickly and

95 Kenya Constitution. Art. 27, Sec. 3.
efficiently without the time and expense of implementing legislation or going through the judicial process. However, as discussed on the next page, things in the United States are unlikely to change if the majority of the decision makers continue to be men.
The Problem of Political Representation in the United States and Kenya

Because the United States Constitution is written with vague, general, broad standards, this gives decision makers a considerable amount of discretion when they interpret the language in the Constitution. This may be a problem if the majority of the decision makers are not women: “Its efficacy in advancing actual equality therefore depends upon having women or their allies in the room doing the interpreting.”96 Currently, in the 112th United States Congress, women hold 90 out of a total of 535 seats, or 16.8 percent of the Congressional seats. Women hold 17, or 17 percent, out of 100 seats in the United States Senate and 73, or 16.8 percent, out of 435 seats in the United States House of Representatives.97 As a major First World nation, the United States is ranked only 68th out of 134 nations worldwide for female political representation.98

At the moment, the United States is in a better position than Kenya in terms of political representation of women in its governing body. Today, women fill 22 out of 222 seats in the Kenyan Parliament.99 However, the new Kenyan constitution is expected to greatly improve the representation of women in Kenya’s government. If the 2012 elections in Kenya go smoothly and the new Kenyan Constitution is fully implemented, women will fill at least 74 out of 222 seats in Parliament, or one-third of all of the seats.

As discussed below, the benefits of having specific constitutional provisions mandating gender equality have been demonstrated in a country that might initially be seen as an unlikely example of progress: the African nation of Rwanda.

---

96 (Sullivan 2002) 763.
An Example for All: Rwanda

In 1994, Rwanda suffered a horrific genocide, in which 800,000 people were killed in a span of 100 days.\textsuperscript{100} The majority of the killers in Rwanda’s genocide were from the Hutu tribe, and the majority of the victims were from the minority Tutsi tribe. At the time the genocide in Rwanda occurred, the country was known for being impoverished, having a patriarchal society, and infertile land. After the genocide, Rwanda was left in desperate circumstances.

Despite all of these challenges, Rwanda has made remarkable progress. In fact, Rwanda’s progressive changes may be partly because, in contrast to both Kenya and the United States, the genocide brought Rwanda to the point where it had no choice but to invest in its women through public policy.\textsuperscript{101}

After the genocide, 70 percent of Rwanda’s population was female. This imbalance created an obligation for the country to utilize its female citizens to improve the country after the disaster. In addition, because men had played a huge role in the genocide and women played a very small role, Rwandan men had been culturally shamed. Only 2.3 percent of those jailed for the killings were women. “As a result there was a broad sense afterward that females were more responsible and less inclined to savagery. The country was thus mentally prepared to give women a larger role.”\textsuperscript{102} In 2000, six years after the Rwandan genocide, newly elected Rwandan president Paul Kagame saw a need for women to revive the nation’s economy. He championed equal political representation for women in Rwanda’s government. As a result, the 2003 Rwandan Constitution contains a specific provision that requires that women make up at least 30 percent of Rwanda’s Parliament.

\textsuperscript{101} (Kristof et al. 2009) 211-212.
\textsuperscript{102} (Kristof et al. 2009) 211.
Today, women in Rwanda play huge roles in the economic, political and social aspects of the country. Rwanda is developing into an example of success for other African countries. “Rwanda is consciously implementing policies that empower and promote women – and, perhaps partly as a result, it is one of the fastest-growing economies in Africa. In some respects, in everything but size, Rwanda is now the China of Africa.”\textsuperscript{103}

Since the adoption of its 2003 constitution, Rwanda has surpassed the minimum number of women required by the constitutional equal rights provision. In 2008, Rwanda became the first country in the world to have a parliament with a majority of women.\textsuperscript{104} Today, 56 percent of the members of the Rwandan Parliament are female. Since the time of the Rwandan genocide, the country’s economy has at least tripled in size. In 2008, the population of Rwanda consisted of 52 percent women and 48 percent men, and women made up 55 percent of the workforce.\textsuperscript{105} In 2010, Rwanda’s real GDP growth rate increased to 7.2 percent and 8.6 percent in 2011.\textsuperscript{106} Today, Rwanda is one of the least corrupt, fastest-growing, and best-governed countries in Africa.\textsuperscript{107} This progress can be attributed in part to its constitutional provision guaranteeing equal representation for women in Rwanda’s government.

\textsuperscript{103} (Kristof et al. 2009) 211.
\textsuperscript{107} (Kristof et al. 2009) 212.
Gender Disparity in Education in the United States and Kenya

In the United States, more women than men enroll in undergraduate and graduate educational institutions. In 2007, women made up 54 percent of all students enrolled in college.\textsuperscript{108} A 2010 National Center for Education Statistics report projected that, by 2019, women will make up 59 percent of the total undergraduate enrollment across the country and 61 percent of graduate enrollment. Statistics show that this gap between men and women in the United States began to form in the early 1970s, when the rate of female college enrollment began to increase faster than the college enrollment of males.

Kenya, on the other hand, is experiencing the opposite form of gender disparity in education, with more boys remaining in school than girls.\textsuperscript{109} In some respect, Kenya’s gender disparity in education may be due to the challenge of cultural norms and overcoming the notion that women need only a limited education, since they will probably only grow up to marry and maintain land. As a result, girls in Kenya are less likely to complete school than are boys. Typically in the past, boys in Kenya attended school while the girls stayed home to learn how to do household chores and their matrimonial duties. Even when education was equally available to both genders, the education gap in Kenya remained because mothers would pass on to their daughters their burdens of maintaining the land and raising children. Statistics also show a decrease in the number of girls enrolled in secondary schools in Kenya, compared to the number of girls enrolled in primary school. The timing of this increase in the dropout rate for girls indicates that girls typically drop out of school to tend to their cultural duties in the home.

Overall, in Kenya, about 40 percent of men obtain some secondary education, in contrast to only


29 percent of women. There are more men enrolled in colleges in Kenya than women, however statistics show that more women are enrolled in private universities than men. The opposite is true for public universities in Kenya.
**Are Women Equal to Men in the United States?**

Despite numerous pieces of legislation, Supreme Court rulings in favor of women’s rights, and more women obtaining degrees in higher education than men, women in the United States are still not equal to men.\(^{110}\) In 2010, women earned on average 77 cents per dollar made by men. While some of this pay gap could be due to lifestyle choices, such as women choosing to work part-time to raise children, a recent Center for American Progress report found that more than 40 percent of the gender pay gap could not be attributed to such reasons. Today, nearly two-thirds of women are considered to be the primary breadwinner or co-breadwinner of the family. Women’s income comprises at least 25 percent of the family’s total income. Thus, the gender pay gap could create a severe economic disadvantage for women and their families.

A recent McKinsey study shows an increase in female participation in the United States labor force.\(^{111}\) Over the past 40 years, women in the United States went from holding 37 percent of all jobs to nearly 48 percent. This accounts for nearly one-quarter of the United States’ current GDP. A Goldman Sachs study also showed that reducing barriers to female labor force participation would increase the United States’ GDP growth by 9 percent.

---


Conclusion

The World Bank predicts that, by 2012, Kenya will have a higher growth rate of 5.0 percent if the elections of this year run smoothly and the economic shocks from the euro crisis are managed well. This would be an increase from Kenya’s 4.3 percent growth rate in 2011. Despite these facts and Rwanda’s improved growth rate since the ratification of its 2003 constitution, it is difficult to prove, based on those two countries alone, that an explicit equal rights clause in a country’s constitution directly correlates with economic growth. However, as the United States’ GDP growth has slowed significantly over the years, there has been debate as to whether other countries are simply catching up to the level of the U.S. or are surpassing it. Research shows that other countries are surpassing the United States, and it could be because their public policy fully capitalizes on their entire populations – both women and men.

In researching Kenya’s new constitution, it is evident that Kenya’s leaders did not look to the United States as an example in drafting its constitution. Chances are that Kenya looked toward other countries, such as France and Germany, which both have equal rights amendments in their constitutions. Since 1946, the French constitution has stated “the law guarantees to the woman, in all spheres, rights equal to those of the man.” The German constitution states “men and women have equal rights” in Article 3. Other countries that either prohibit discrimination on the basis of sex or have an equal rights clause in their constitution include India, Canada and South Africa, to name just a few. Kenya’s 2010 constitution mentions the terms “sex,” “gender,” “women,” or “woman” in at least 30 different places within the document. In contrast, Kathleen Sullivan writes, “the U.S. Constitution is the only major written constitution that includes a bill

---

113 (Sullivan 2002) 735.
114 (Sullivan 2002) 735.
of rights but lacks a provision explicitly declaring the equality of the sexes.” Since the
ratification of the U.S. Constitution, it took 131 years before the 19th Amendment, giving women
the right to vote, was ratified. When the first Kenyan Constitution was ratified in 1963, women
already had the right to vote. Now that the new Kenyan Constitution explicitly states that women
are equal to men in the eyes of the law, this has opened the door for cultural or de facto change,
reducing barriers to women in all aspects of society.

According to the World Bank, “where gender inequalities constitute barriers to women
entering or participating fully in markets, economic growth and private sector development will
be constrained with less investment, less competition, and lower productivity.” On top of this,
multiple studies have shown that women are better than men at saving money, and when they do
spend it, they tend to invest first in their families and communities. Consequently, if women are
fully invested in through a country’s public policy, it causes a ripple effect at not only the
microeconomic level but also at the macroeconomic level.

In the United States, women are on the path to being the majority of the country’s educated
population. With the U.S. economy increasingly becoming knowledge-based, the United States
must ensure that it can fully capitalize on its entire educated population by utilizing its
constitution to invest in women through its public policy, and remove all barriers to women. In
order to ensure full gender equality, the United States should adopt an Equal Rights Amendment
to its constitution that is written with affirmative language. This investment in women will
address most barriers to women in the United States in a comprehensive way, rather than using
the inefficient piece meal strategy of seeking justice a piece at a time through the United States
Congress and the Supreme Court

115 (Sullivan 2002) 735.
Works Cited


Constitution of Kenya


United States Constitution


