

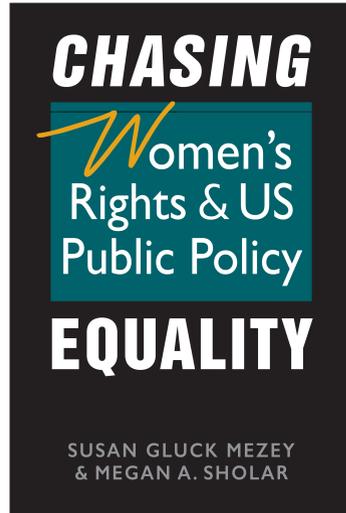
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Chasing Equality:
Women's Rights and
US Public Policy

Susan Gluck Mezey and
Megan A. Sholar

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1

Seeking Women's Rights in US Public Policy

FOR MUCH OF US HISTORY, WOMEN WERE EXCLUDED FROM THE political arena, and society afforded them few rights. Upon marriage, men took ownership of women's bodies and property, becoming their legal representatives in the public and private spheres. Lacking a formal setting in which to express their political opinions, women were generally viewed as apolitical beings. Yet scholars now recognize that women participated in political life and shaped political outcomes since the founding of the United States—despite largely being relegated to the private sphere. As the American Revolution loomed, women organized nonconsumption movements and boycotted English goods. When the war began, some women joined their husbands on the battlefield as nurses and cooks; a few disguised themselves as men to fight with the revolutionary army. In the newly independent United States, women continued to make their voices heard, marching in parades, attending political rallies, hosting salons to discuss politics, and publishing patriotic novels, poems, and plays (Skemp 2016).

Political Activism

In the aftermath of the revolution, many women turned their attention to the burgeoning abolition movement. At the 1840 World Anti-Slavery Convention in London, Lucretia Mott and Elizabeth Cady Stanton met for the first time. In spite of their significant work in the fight against slavery, they were not allowed to participate in the meeting because

they were women. Their outrage at being forced to sit in the balcony behind a partition contributed to their decision to organize their own convention to address women's inferior standing in society. At their 1848 convention in Seneca Falls, New York, the formal women's rights movement—and the first wave of feminism—began in the United States. The document that emerged from the convention, the Declaration of Sentiments, was modeled after the Declaration of Independence and proclaimed that “all men and women are created equal.” The delegates denounced the discrimination and exploitation that women faced in education, employment, and the family, and they demanded increased political and economic opportunities for women, including the rights to vote and own property (Flexner and Fitzpatrick 1996).

The organizers' demands were revolutionary for the time, and there was little chance that any of them would come to fruition in the mid-nineteenth century. Among them, suffrage proved the most controversial. While Stanton was adamant in her demand that women receive the right to vote, others such as Mott and Stanton's husband, Henry, feared ridicule if the issue were introduced at the convention. Ultimately, the resolution for suffrage passed, but it was the only plank in the Declaration of Sentiments that received less than unanimous support from convention attendees. Conventional wisdom holds that suffrage divided the participants because that demand was the most radical. More recently, some scholars have posited that Mott and other advocates of abolitionist William Lloyd Garrison rejected the proposal because they refused to participate in a political system that collaborated with slavery. Moreover, most of the women at the convention were more concerned with issues such as their limited educational and employment opportunities or their inability to control property and earnings (O'Connor 1996; Tetrault 2014). But when little progress was made on these concerns in the years after the convention, a growing number of activists recognized that the right to vote was a necessary first step on the road to equality, as it would provide women with a voice in the policymaking process and, they hoped, lead to equal rights in economic and social arenas.

The work that many of the convention participants had done in the abolition movement prepared them for the prolonged struggle for women's suffrage. One study found that women were especially effective at antislavery petitioning, collecting 50 percent or more signatories than men circulating similar petitions in the same locations. To achieve such success, women had to develop cogent political arguments to convince people to sign their petitions, a talent they taught other women in the movement. Through their antislavery work, women built activist

networks and learned the organizational and planning skills necessary to launch a large-scale campaign (Carpenter and Moore 2014). As a result of the end of the Civil War and the abolition of slavery, they could turn their attention more fully to the issue of suffrage. But questions regarding the construction of rights for newly freed African Americans ultimately divided the nascent women's movement.

The Thirteenth Amendment, ratified in 1865, abolished slavery in the United States. In anticipation of the citizenship rights for African Americans and women that many hoped would follow, abolitionists and feminists formed the American Equal Rights Association in 1866 to fight for universal suffrage. However, the ratification of the Fourteenth Amendment in 1868 created a rift in the equal rights movement, for although it granted citizenship to all people born or naturalized in the United States, it singled out men's right to vote. The first time the word *male* appeared in the US Constitution, the amendment signaled a major defeat for the women's movement. Suffragists were divided on how to respond. Leaders Susan B. Anthony and Stanton did not support the amendment, believing it would weaken women's claims to citizenship and derail the fight for women's suffrage. Others, such as Lucy Stone and Frederick Douglass, argued that even if women could not win their political freedom at that time, they should still support advancements for Black men—that “this hour belongs to the negro” (Re and Re 2012, 1614). The proposal of the Fifteenth Amendment, which prohibits denial of the right to vote “on account of race, color, or previous condition of servitude” but makes no mention of sex, cemented the collapse of the American Equal Rights Association and led to the formation of two independent women's suffrage organizations (Kraditor 1981; Evans 1989).

Women's Suffrage

In 1869, Anthony and Stanton formed the National Woman Suffrage Association (NWSA), which restricted membership to women and fought for women's political, economic, and social rights. The organization committed itself to passing a constitutional amendment guaranteeing women's suffrage, as well as improving divorce laws, elevating women's positions in the church, and ending discrimination in education and employment. In that same year, abolitionists Stone; her husband, Henry Blackwell; and Henry Ward Beecher created the American Woman Suffrage Association (AWSA), which focused only on the right to vote to avoid alienating more conservative pro-suffrage community

members. Unlike the NWSA, the AWSA concentrated its efforts on a state-by-state campaign for suffrage. For over two decades, these groups worked separately toward the same primary goal, often competing for resources and the support of donors and state and local suffrage organizations. By 1890, the organizations agreed to put aside their differences and merge to become the National American Woman Suffrage Association (NAWSA) (Kraditor 1981; Scott and Scott 1982).

With the formation of the NAWSA, suffrage dominated the women's rights movement for the next thirty years. As the abolition movement had influenced early suffrage activity, the Progressive and temperance movements contributed to the development of the suffrage movement in the late nineteenth and early twentieth centuries. The Progressive movement was a response to the significant changes that increased industrialization, urbanization, and immigration had brought to the United States by the late 1800s. Lamenting growing political corruption and social inequality, progressives sought to reform working conditions, end child labor, and improve living conditions for all—especially marginalized groups such as immigrants, prisoners, and people with mental illnesses. Many of the white, middle-class women in the movement felt that to achieve their goals, they had to emerge from the home and become involved with schools, communities, and all levels of government. By becoming active in the public sphere, these women believed they would be able to better fulfill what they viewed as their most important roles—that of wives and mothers (Baker 1984). Suffrage became a key demand of the movement, as women in progressive organizations sought the vote as a stepping stone to reforming the nation.

One of the reformers' top demands was temperance, believing that the abolition of liquor would help eradicate the poverty, health problems, and abuse of women and children. The Women's Christian Temperance Union (WCTU), founded in 1874 with the primary goal of banning the manufacture and sale of liquor, was one of the first progressive groups to advocate women's suffrage. By the early 1900s, the WCTU had convinced many of its 200,000 members that women's votes were necessary to influence legislators to support temperance. This argument was especially convincing in the South, where many women had been unmoved by previous calls for the vote because of justice or equality, and the WCTU became a significant organizing force for women (Bordin 1981; Giele 1995).

In addition to the extensive work of the Progressive and temperance movements, the widespread reach of women's clubs in the late nine-

teenth and early twentieth centuries helped attract more women to the cause of suffrage. With the development of labor-saving devices for the home, many white, middle-class women had time to join local literary clubs to study and discuss literature, art, and music with other women. As these clubs grew, they took up a variety of social causes, such as public sanitation, improved schools and libraries, and labor reforms for women and children. In 1890, sixty-three women's clubs established the General Federation of Women's Clubs (GFWC), which by 1914 had grown to one million members and declared its support for suffrage, hoping that women's votes would pave the way for the clubs' desired social reforms (Wells 1953; Blair 1980).

The suffrage movement garnered support from diverse groups across the United States, ranging from abolitionists and equal rights advocates to clubwomen and religious and temperance crusaders. To keep this fragile coalition together, suffragists often engaged in discriminatory practices that undermined the equal rights language of the movement. For example, some suffragists endorsed an educational requirement that would limit the number of immigrants and Black men who could vote. Likewise, the perceived need to limit the electoral influence of these so-called undesirable constituencies became the rallying cry of some activists, arguing that if nativist white women could vote, they would outnumber those groups at the ballot box (Kraditor 1981; Flexner and Fitzpatrick 1996). In 1901, when suffrage leader and president of the NAWSA Carrie Chapman Catt met with white politicians in the South who were concerned about suffragists' historical connection with abolitionists, she reassured them that based on the number of potential white women voters compared with Black men and Black women voters, "white supremacy will be strengthened, not weakened, by woman suffrage." As scholars point out, while there were also times when Catt showed support for racial equality, women's suffrage was her sole aim. Like many white suffragists at the time, she was willing to collaborate with racists if it furthered her cause, regardless of any personal feelings she had on the matter (Rosario 2021).

Early mainstream suffrage organizations, such as the AWSA and the NWSA, as well as their successors, the NAWSA and the National Woman's Party (NWP), founded by Alice Paul and Lucy Burns in 1916, were overwhelmingly white and generally discouraged—or outright prohibited—Black women from joining or participating (Darrah 2012). Many white suffrage organizers feared that Black women's involvement would alienate white male legislators and Southern suffrage groups that opposed Black enfranchisement. For a sizable number of women in the

movement, the efforts to keep Black women out of their ranks also reflected their own racist views (Wheeler 1993). Nevertheless, Black women played a significant—though often overlooked—role in the struggle for suffrage, both as individuals and as part of Black women’s clubs. One activist, Mary Ann Shadd Cary, testified before the House Judiciary Committee in 1874, declaring that as taxpayers and citizens, women should have the right to vote. In 1891, Mary Church Terrell joined other suffragists in Washington, DC, at the first convention of the National Council of Women, a group spearheaded by Anthony. Five years later, when Black reformers founded the National Association of Colored Women’s Clubs, Terrell became its first president and helped consolidate Black suffrage groups around the United States. She and her teenage daughter later joined Alice Paul’s “silent sentinels” to protest outside the White House. In 1913, Ida B. Wells-Barnett, best known for her journalistic work on the horrors of lynching throughout the South, founded the Alpha Suffrage Club, Chicago’s first African American suffrage organization. During the 1913 women’s suffrage parade in Washington, DC, Wells-Barnett, Terrell, and other Black women marched with their state delegations, defying the organizers’ attempts to force them to march in the back (Terborg-Penn 1978; Terborg-Penn 1998; Kraditor 1981; Jones 2020).

As Wells-Barnett’s actions demonstrate, Black women had to forge their own path toward voting rights because they were generally excluded from the larger movement led by white suffragists. Such divisions had long been the norm among women’s clubs. Activist groups often relegated Black women to the fringe of their movements, and organizations such as the WCTU and the Young Women’s Christian Association (YWCA) had segregated branches. As a result, Black women’s clubs proliferated in the late nineteenth and early twentieth centuries. From the beginning, these clubs had recognized the importance of the vote for furthering Black women’s rights, incorporating the issue alongside their social and economic reform efforts (Davis 1933; Neverdon-Morton 1989). At the same time, Black women could not separate race from gender like their white counterparts could, for their oppression was rooted in both identities. Taking an intersectional approach to their demand for rights, Black suffragists often stressed the importance of using their “vote for the advantage of ourselves and our race” (Hendricks 1994).

Throughout the first wave of feminism, activists used a variety of tactics to secure women’s right to vote, such as formulating (unsuccessful) arguments against the legality of male-only voting laws. Some focused on state-level campaigns, while others sought a federal amend-

ment. They staged parades, marches, and protests, and leading suffragists traveled the country giving speeches in favor of suffrage, but progress was uneven. In 1878, the first suffrage amendment was introduced in Congress. When Wyoming joined the union in 1890, it became the first state to guarantee women's suffrage. Over the next six years, three other states followed Wyoming's example. But between 1896 and 1910, no new states adopted women's suffrage, and suffrage bills at the national level failed to pass out of committees (Kraditor 1981; Banaszak 1996).

The nation's growing anti-suffrage movement played a major role in blocking women's progress. The opponents adopted several approaches. Some based their arguments on the idea of separate spheres for men and women, claiming that family life would collapse if women became part of the public sphere. Many elite white women worried that they would lose their long-held influence in the domestic sphere and among their social networks if they had to participate in public life. These women claimed that they did not need the vote because the men in their lives already represented them to the outside world. Business interests, such as those in the textile and manufacturing industries, feared that enfranchised women would support labor reform and eradicate female and child workers as a cheap source of labor. Similarly, liquor interests worried about the role women voters might play in banning alcohol. Political machine bosses in urban areas feared that women would advocate reforms that would disrupt the patronage system and loosen their grip on power. In the South, hostility toward the prospect of Black women gaining the right to vote often led to opposition of women's suffrage more broadly (Scott and Scott 1982; McDonagh and Price 1985; Flexner and Fitzpatrick 1996; McConnaughy 2013).

Despite the opposition, grassroots support for suffrage continued to grow, and a new generation of suffragists joined and then supplanted the first generation. Washington state's enfranchisement of women in 1910 launched a decade of activism that culminated in the adoption of the Nineteenth Amendment. In 1913, Paul and others who thought NAWSA's approach too timid formed the Congressional Union for Woman Suffrage to focus exclusively on a national constitutional amendment. Borrowing tactics from more militant suffragettes in England, these women openly campaigned against Democrats who opposed suffrage. In defiance of the NAWSA, the Congressional Union asked female voters in suffrage states to vote against Democratic candidates.

The NWP had declared itself a single-issue party focused on women's suffrage, with party members picketing the White House daily,

where Paul would quote and subsequently burn copies of President Woodrow Wilson's speeches. These actions eventually led to hundreds of arrests. Even in prison, the suffragists maintained their protests and engaged in hunger strikes to support their cause. At the same time, NAWSA president Catt had begun implementing her "Winning Plan" to campaign simultaneously for suffrage at the state and federal levels. With her eye on a federal constitutional amendment, she continued an aggressive state-by-state approach that would build the support needed for ratification.

Ultimately, Catt's methodical organizing and Paul's radical maneuvers made it impossible for lawmakers to continue to ignore suffrage. After passage by both chambers of Congress in 1919, the Nineteenth Amendment was sent to the states for ratification. By the summer of 1920, suffragists were just one state short of achieving their goal. Tennessee convened a special session to vote on the amendment, and it initially appeared as if the effort would fail. But after receiving a telegram from his mother urging him to support suffrage, Representative Harry Burn changed his stance and cast the deciding vote in favor of the amendment.

On August 26, 1920, the Nineteenth Amendment, declaring "the right of 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," officially became part of the US Constitution. Although this signaled a great victory for women's rights, there was still significant work to do, especially for women of color, most of whom continued to be disenfranchised by Jim Crow laws and prejudicial immigration and citizenship policies (Evans 1989; Ford 1991; Flexner and Fitzpatrick 1996).

Levels of Scrutiny

Women's rights activists struggled to overcome barriers to equal treatment under the law as far back as the nineteenth century, with suffrage one of their most important goals. When legislatures proved unwilling to satisfy their demands for equal rights, many advocates turned to the courts; unfortunately, they often found the judiciary reluctant to contravene the legislature's judgments about the proper roles of women and men in society. In assessing litigants' constitutional claims of inequality, most judges accepted the government's position that the challenged laws were constitutional because women and men were not similarly situated. In the early phases of the litigation over equality of rights, the

courts rejected women's challenges to restrictions on their ability to function in the public and private spheres, upholding limitations on practicing law, voting, earning a living, and being tried by a jury of their peers (Mezey 2011). Dismissing their claims of discrimination, the judiciary largely accepted the government's stance that the laws protected vulnerable and dependent women from the harms they would suffer by participating in the public sphere.

Spurred by the activities of the second wave of the feminist movement and guided by Ruth Bader Ginsburg, a litigator for the American Civil Liberties Union (ACLU) during the 1970s, women's rights advocates increasingly mounted constitutional challenges to such laws, primarily arguing they violated women's rights under the equal protection clause of the Fourteenth Amendment of the US Constitution, ratified in 1868. The clause, declaring that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws," restricts a state's ability to enact a law that differentiates among individuals or groups unless it is based on relevant differences among them. In interpreting this clause, the Supreme Court has struggled to reach a consensus on the proper approach to laws challenged as violations of the rights of women and other marginalized groups (Tussman and ten Broek 1949; Gunther 1972; Fiss 1976). Because immutable characteristics such as race and national origin bear no relationship to ability, nor are they relevant to valid legislative goals, the Court considers such laws suspect and applies a high (strict) level of scrutiny. In addition to immutability, it applies strict scrutiny to laws affecting individuals or groups who have a history of being subject to discrimination and are politically powerless. When reviewing a law based on these characteristics, the Court requires the state to show it has a compelling reason to enact it and there is no reasonable alternative to achieving its goal. Because the state has a heavy burden in justifying such laws, the Court almost always declares them unconstitutional. At the other end of the continuum are routine social and economic government policies as well as laws based on classifications with mutable characteristics (such as wealth) or related to ability (such as age). The Court applies minimal scrutiny (also known as rational basis) to such laws, evaluating them only to determine whether they are rationally related to legitimate government aims. Because these criteria are easily satisfied, the judiciary typically upholds the challenged policies (Mezey 2011).

In 1971, the Supreme Court seemingly shifted its approach to evaluating challenges to sex-based classifications when, for the first time, it appeared to depart from minimal scrutiny and declared a legal

distinction between the sexes unconstitutional, striking down an Idaho law preferring men to women as estate administrators (*Reed v. Reed*). Some 1970s opinions reflected the justices' increasing awareness that sex-based differences violated constitutional equality, but the high court nonetheless found the US Navy's preferential treatment of women in granting promotions and a Florida policy extending a local property tax exemption to widows reasonable and consistent with equal protection. Moreover, even with its growing recognition of women's roles in the workplace, the Court still upheld a California disability insurance program that excluded pregnancy benefits. Agreeing that the policy was based on pregnancy, not sex, a majority found it a legitimate cost-saving measure (Barnard and Rapp 2009).

The justices' stance in women's rights cases evolved over time. Mindful of the nation's history of discrimination against women, an increasing number were reluctant to apply minimal scrutiny to sex-based classifications after 1971. In *Frontiero v. Richardson* (1973), the Court upheld the plaintiff's challenge to the sex-based air force regulation. Yet, with only four justices willing to equate sex-based laws with racial classifications, the Court declined to apply strict scrutiny. In 1976, in striking down an Oklahoma law differentiating between men and women in "near-beer" purchases, the Court indicated it would apply a stricter scrutiny—called heightened or intermediate scrutiny—when evaluating the constitutionality of laws based on sex (*Craig v. Boren* 1976). Under a heightened scrutiny analysis, the government must show that the goal of the challenged law is important, and the classification is substantially related to achieving the goal, a difficult but not impossible burden for the government. Several years later, in *Mississippi University for Women v. Hogan* (1982), a majority rejected a women-only admissions policy in a state university's nursing program, seeming to raise the level of scrutiny even higher by requiring the government to show it has an extremely persuasive justification for a challenged law. In 1996, in disallowing the male-only admissions policy of a state-subsidized military academy, the Court appeared to adopt an even warier approach to sex-based classifications (*United States v. Virginia* 1996). Known as skeptical scrutiny, some observers questioned whether the justices had virtually adopted strict scrutiny for sex-based classifications (Delchin 1997).

From 1971 until 1996, the Supreme Court reviewed sex-based classifications more rigorously, suggesting that a majority had become dubious about the constitutionality of laws treating the sexes differently, including those privileging women. Over these twenty-five years, the

Court invalidated myriad laws stemming from traditional notions of women's and men's roles in society. Notably, it struck male and female preferential treatment laws regulating the age of majority, child custody, military allowances, retirement benefits, unemployment insurance, workers' compensation, community property, alimony, and jury selection. The rulings indicated its awareness that such policies were largely based on stereotypical assumptions about the sexes, with a majority understanding that allowing a woman's spouse or child to benefit from a pension fund or Social Security account acknowledges the value of her work and helps her achieve greater equality in the marketplace. Overall, in conceding society's historical discrimination against women, the Court more readily invalidated laws explicitly disadvantaging women. Perhaps the most significant accomplishment of the women's rights movement was to persuade the high court that sex-based laws, even as they claimed to privilege women, also reflected society's paternalistic attitudes toward them in the economic and social arenas and furthered inequality between the sexes. Most justices ultimately grew to believe that striking down such laws advanced women's goals of achieving a more sex-neutral legal environment and helped contribute to a more egalitarian society by serving notice that such laws were inconsistent with the tenets of equal protection (Mezey 2011).

Physical Sex Differences

Despite the Supreme Court's rhetorical commitment to equal rights and its increasingly skeptical view of sex-based policies, most justices nevertheless continued to believe that laws based on innate physical sex differences were constitutionally valid. In such cases, the Court was asked to decide whether the laws were based on physiological sex differences or assumptions about societal roles, with those challenging the law arguing the high court should disentangle the relationship between physical sex differences and society's norms about culturally derived roles. Stating it was applying intermediate scrutiny, a majority nevertheless upheld a male-only draft registration policy and a statutory rape law punishing men over seventeen for engaging in sex with women under seventeen; in a series of opinions on adoption laws, the Court largely allowed states to treat the sexes differently on the assumption that mothers were more committed to their children than fathers were. While purporting to use heightened scrutiny in such cases, the justices often accepted the government's asserted purpose for the law and

agreed that differentiating because of sex was reasonably related to its objectives (Mezey 2011).

In these cases, although several justices implied that classifications based on sex should be presumed invalid—as are racial classifications—the Court continued to uphold laws related to physiological differences between the sexes that stemmed from societal assumptions about sex roles. The cases largely arose over challenges to the Immigration and Nationality Act (INA), initially enacted in 1952, establishing that when a child is born on foreign soil to unwed parents—one a citizen and the other a noncitizen—the child’s citizenship largely depends on whether the mother or the father is the citizen (Satinoff 1998; Gallardo 2018). In appraising the constitutionality of the INA, the high court invariably deferred to Congress and affirmed the legislature’s plenary authority over immigration. Rejecting claims of inequality under the Fifth Amendment’s due process clause (the equal protection component of the Fifth Amendment), the Court permitted Congress to differentiate between unwed mothers and fathers, validating the legislature’s beliefs about women’s relationship to their children. In upholding sections of the INA, a majority ruled that Congress was legitimately acknowledging the reality of biological differences between the sexes with respect to pregnancy and childbirth and was not relying on stereotypical and overbroad generalizations about culturally determined roles. The Court held that challenged provisions of the law were justified because a mother is more likely to be the sole caretaker of a child and establish a relationship with that child, in part because she is present at birth, while the father is less likely to form such a relationship as he may not be present at the birth or play a role in his child’s life. Because it believed that the INA was substantially related to the government’s objective of affirming a biological relationship between a citizen parent and the child, the Court held it satisfied the heightened scrutiny test.

Decisions like this underscored the Supreme Court’s tenuous commitment to heightened scrutiny. The majority largely neglected to probe Congress’s assumption that women are intrinsically more willing and able to assume primary responsibility for their children while men seek to avoid accepting their duty to their offspring. Finally in 2017, the Court adopted a different approach to physical differences cases. In *Sessions v. Morales-Santana* (2017), it declared a section of the INA unconstitutional. Instead of simply accepting Congress’s traditional notions of women’s and men’s roles in the family, it explained that society’s views had advanced since the law was passed, and fathers were as likely as mothers to establish relationships with their children. In

declaring the challenged provision of the act invalid, the Court reaffirmed its original understanding of heightened scrutiny in sex-based classifications, requiring the government to show that the classification is substantially related to achieving an important goal, rather than allowing the government to simply assert, without evidence, that the relationship exists (Burt 2018; Rock 2018). Another opportunity to rule on a law arguably related to physical sex differences presented itself when the Court was asked to declare a provision of the Military Selective Service Act unconstitutional. The law, requiring men to register with the Selective Service System when they turn eighteen, had been upheld in 1981 as consistent with the Fifth Amendment. Even in the absence of a draft at the time, men were subject to fines and penalties for failing to register (Stiehm 1989).

A more recent challenge to the men-only military registration policy arose when two individuals and a group called the National Coalition for Men filed suit, arguing that unlike forty years ago when the Court held that the men-only registration policy was justified by women's exclusion from combat, women were now eligible for all military service positions, including combat, and there was no reason to exclude them from the draft registration requirement. When the case reached the Supreme Court, top military leaders and members of Congress spoke out in favor of revising the male-only registration policy; a congressionally chartered National Commission on Military, National, and Public Service recommended that women be included in the draft registration policy (*Federal News Network*, March 11, 2021).

In a press release, the plaintiffs' attorneys, the ACLU, emphasized that "putting an end to the men-only registration requirement would undo one of the last examples of overt sex discrimination in federal law." The current occupant of Ginsburg's position, the Director of the Women's Rights Project of the ACLU, reiterated the harm to women in continuing to allow such legal disparities to exist, saying, "like many laws that appear to benefit women, men-only registration harms women too . . . [because] it is based on outdated and sexist notions of women's and men's abilities to serve in the military, regardless of individual ability. Limiting registration to men treats women as unfit for this obligation of citizenship and reflects the outmoded belief that men aren't qualified to be caregivers in the event of a draft. Such sex stereotypes have no place in our federal law" (American Civil Liberties Union 2021e).

Donald Trump's administration urged the Court to uphold the sex-based distinction; Joe Biden's administration took no stand on the law but sought a delay in the Court's deliberations, asking it to allow Congress

to resolve the issue. In the last month of the 2020–2021 term, the high court declined to accept the case (*National Coalition for Men v. Selective Service System* 2021). By the end of 2022, the controversy remained unresolved, with the men-only registration policy still in place. Reprising the spirit of Ginsburg, Sonia Sotomayor and two other justices wrote separately to express concern about the effect of the policy on women’s status in the military, citing numerous gender equality rulings reflecting the Court’s decades-old stance that the government may not “discriminat[e] because of sex absent an ‘exceedingly persuasive justification’” (1815). Suggesting that the registration system was constitutionally problematic considering the thousands of women serving in the military in all capacities since 2015, they quoted the commission’s finding that “male-only registration sends a message to women not only that they are not vital to the defense of the country but also that they are not expected to participate in defending it” (1816). In the end, even these three justices agreed that denying the petition for review was correct given that Congress “was actively weigh[ing] the issue” and citing the Court’s customary deference to the legislature on military and national security matters (1816).

Equal Rights Amendment

Over the last five decades, courts have played a significant role in eliminating legal distinctions between women and men, leaving few laws standing that explicitly differentiate on the basis of sex. Yet a substantial number of women’s rights advocates remain dissatisfied with the gains that have been made and seek to expand equality by concentrating their efforts on ratification of a constitutional amendment that explicitly proclaims the standard of equal treatment under the law.

After the adoption of the Nineteenth Amendment in 1920, the fragile unity holding together the first wave of feminism disappeared. Having won the right to vote, some women turned their attention to other social causes, such as child labor, education, and maternal health; others chose to retreat from the world of activism. But most of the key figures in the suffrage movement continued to focus on the battle for women’s rights. On the cusp of the amendment’s ratification, the NAWSA became transformed into the League of Women Voters, a non-partisan organization promoting informed and active participation in elections and government. Believing that suffrage was just the first step to gender equality in the United States, the NWP also worked to secure

a constitutional amendment that would guarantee women equal rights with men and eliminate sex-based public policies. After a long series of drafts, the NWP's leader Paul co-wrote the Equal Rights Amendment (ERA) and assisted with its initial introduction in Congress in 1923. But aside from Paul and her supporters, the immediate response to the proposed amendment generally ranged from unenthusiastic to hostile. Not only had the passage of the Nineteenth Amendment prompted an anti-feminist backlash among conservatives fearful of women's greater autonomy, but many women's rights advocates also worried that the ERA would outlaw protective labor legislation for women. For others, the ERA was unnecessary because the Fourteenth Amendment already provided women constitutional protection. Facing an uphill battle, ERA proponents set out to change public opinion and gain congressional support (Cott 1990a; Cott 1990b; Boisseau and Thomas 2018).

After its first introduction to Congress in 1923, the ERA was reintroduced in every session through 1971. By the mid-1940s, activists had convinced several women's organizations to endorse the ERA, including the National Association of Woman Lawyers, the National Federation of Business and Professional Women's Clubs, and the GFWC, which had played a significant role in the battle for suffrage. Additionally, Republicans and Democrats added the ERA to their party platforms in 1940 and 1944, respectively. At the same time, opposition continued to emerge from the right and the left. Catholic organizations such as the National Council of Catholic Women and the National Catholic Welfare Conference lobbied members of Congress to withhold support for the amendment. The National Committee to Defeat the Un-Equal Rights Amendment, led by feminists in the Women's Bureau of the Department of Labor, brought together leadership from labor, the YWCA, and the National Councils of Catholic, Jewish, and Negro women. Without a large, organized movement to champion the ERA and push back against this opposition, legislative progress was incremental through the 1950s (Steiner 1985; Berry 1986; Freeman 1996; Boisseau and Thomas 2018).

The passage of the Civil Rights Act in 1964 marked a turning point in the battle over the ERA as Title VII of the act, prohibiting employment discrimination based on sex, led to significant changes in protective labor legislation. Within a decade of the act's passage, the Department of Labor, the Equal Employment Opportunity Commission, and the federal courts began to interpret Title VII as nullifying labor legislation that applied only to women. To meet those standards, in some cases they required that protections such as minimum wages and limits on hours be extended to all workers instead of eliminating them for

women. As a result, many women's rights activists who had previously opposed the ERA out of fear that women would lose protections in the workforce began to support it. Importantly, the National Organization for Women (NOW), founded in 1966, adopted the ERA as one of its top priorities; other groups such as the National Federation of Business and Professional Women's Clubs joined its lobbying efforts. Opponents remained—primarily in the form of conservatives who predicted the ERA would upend gender roles and destroy families—but the second wave of feminism was a powerful force.

By the early 1970s, women's rights activists had persuaded lawmakers and the public of the ERA's value. In 1971, the House approved the ERA by a vote of 354 to 23. After passing in the Senate 84 to 8 the next year, the amendment was sent to the states for ratification (Mansbridge 1986; Mayeri 2004). In its final version, Section 1 of the amendment read: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." The amendment required ratification by three-fourths of states (thirty-eight) within the seven-year time frame Congress had set. Pro-ERA forces had the initial momentum, and thirty states ratified it by early 1973. But two events halted their progress: the creation of the STOP (Stop Taking Our Privileges) ERA campaign and the legalization of abortion.

In 1972, Phyllis Schlafly founded the conservative interest group Eagle Forum and became the driving force in the STOP ERA movement. According to Schlafly, feminism sought to undermine traditional family values and force women out of their rightful, privileged place in the home. As she described it, the ERA would strip women—especially housewives and stay-at-home mothers—of the special protections they deserved, such as the right to be financially supported by their husbands. Schlafly claimed that if the ERA were ratified, widows would lose their Social Security benefits, women would be drafted into military combat, and women's bathrooms and other sex-segregated public facilities would be outlawed.

While Schlafly had already gained an impressive number of followers during the first year of her STOP ERA campaign, her efforts received a significant boost when the Supreme Court legalized abortion in *Roe v. Wade* (1973). In response to the ruling, an anti-feminist movement sprang up to challenge the feminists who had been fighting for reproductive rights, particularly abortion care. Sensing an opportunity to expand their coalition, anti-ERA activists made a concerted effort to connect abortion with the amendment in the minds of Americans. Opponents doubled down on their claim that the ERA would

destroy families, arguing that ratifying it would lead to abortion on demand funded by the government. Likewise, they tied the issue of gay and lesbian rights to the ERA and predicted that its passage would require courts to permit same-sex marriage. The strategy succeeded, and numerous conservatives withdrew their support for the ERA (Mansbridge 1986; Berry 1986).

Schlafly was able to convince many women (and men) that the ERA was a threat to their way of life. One of her most successful maneuvers was transforming the focus of the ERA debate from women's equal treatment under the law to the erosion of gender roles and the traditional family. Though most Americans at the time supported the former, they feared the latter. Schlafly sought to stoke this fear among voters and lawmakers in states that had not yet ratified the ERA. Logistically, she tapped into the organizational base of fundamentalist religious and politically conservative groups. Using telephone trees, she quickly mobilized her followers to lobby state legislators with home-baked goods and hand-written notes. Her campaign was aided by other conservative organizations, such as Concerned Women for America (CWA), that also made blocking ERA ratification a priority. CWA's founder Beverly LaHaye was married to fundamentalist Baptist minister Tim LaHaye, who helped form the Moral Majority. When LaHaye established the CWA in 1979, its stated goal was to promote biblical values in all levels of public policy. In the eyes of the CWA, the ERA was not compatible with such values because it would undermine traditional gender roles, eliminate special protections for women, and lead to taxpayer-funded abortions (Conover and Gray 1983; Mansbridge 1986; Klatch 1987; Marshall 1991).

Feminist groups tried to match this fervent opposition by organizing economic boycotts and staging protests in states that had not ratified the ERA. Supporters' activism thus far had focused primarily on the national level, and their state-level grassroots campaigns were weak compared with the anti-ERA movement—especially in the South. Moreover, there were divisions among women who generally supported the ERA. For some, the amendment was an important but largely symbolic gesture. Others believed that the ERA would bring about substantive legal changes—with potential positive and negative results. Many hoped it would help to close the gender pay gap, but they also feared losing child support payments and being forced to sign up for the military draft. In the end, the opposition proved too powerful to overcome. By 1978, only thirty-five states had ratified the ERA. Although Congress extended the seven-year deadline it had set in 1972, no new states ratified it during

those additional three years. In 1982, three states short of ratification, the ERA was finally defeated (Berry 1986; Mansbridge 1986).

Lawmakers have reintroduced the ERA in every session of Congress since its defeat. There was little movement for decades, but the 2010s witnessed a revival for its support in response to numerous overlapping factors. The #MeToo and #TimesUp movements brought increased media attention to the widespread sexual abuse and harassment women face. The 2016 documentary *Equal Means Equal* (dir. Kamala Lopez) highlighted the gender discrimination prevalent in the United States and made the case that the ERA could improve women's status by guaranteeing constitutional equality. Finally, the election of Donald Trump—with his misogynist rhetoric and numerous allegations of sexual misconduct—galvanized ERA supporters who worried that the new president would further undermine women's rights.

In 2017, Nevada became the thirty-sixth state to ratify the ERA, just two months after women's marches took place across the country in response to Trump's inauguration. Illinois followed suit in 2018, and in 2020, Virginia became the thirty-eighth state to ratify the amendment. With Virginia's ratification, the ERA reached the threshold needed to become part of the Constitution; however, it is still in limbo because the last three ratifications came long after the 1982 deadline. Opponents of the ERA see that deadline as firm, arguing that the ratification process must start over from the beginning. Proponents say that because Congress set the deadline, it has the power to change it and add the ERA to the Constitution immediately because it received the requisite number of votes. To bolster their claim, activists point to the Twenty-Seventh Amendment on congressional pay raises that was sent to the states for ratification in 1789 but did not receive the necessary votes to become part of the Constitution until 1992. Further complicating the issue is the fact that five states (Nebraska, Tennessee, Idaho, Kentucky, and South Dakota) rescinded their ratifications of the ERA between 1973 and 1979. It is unclear if such reversals are legal and, thus far, Congress has never accepted a state's attempt to undo its ratification of a constitutional amendment (Stewart 2018; Suk 2020). The courts have also not taken a stance on the validity of a state's rescission.

Anticipating Virginia's ratification vote, on December 16, 2019, Republican attorneys general from Alabama, Louisiana, and South Dakota filed suit in an Alabama federal district court against David Ferrero, archivist of the United States (in his official capacity as the person responsible for recording states' ratification votes and amendments). Claiming that the ratification deadline set by Congress is still

valid, they sought to block him from recording the amendment as ratified once Virginia voted and to demand he remove the votes of Nebraska, Tennessee, Idaho, Kentucky, and South Dakota based on their legislatures' instructions to rescind their ratifications. A statement by the attorney general of Alabama declared, "if this constitutional bait-and-switch is successful, there will be dire consequences for the rule of law. The people had seven years to consider the ERA, and they rejected it." A member of the ERA Coalition condemned the lawsuit, saying, "Alabama has filed this lawsuit to thwart the democratic process and the will of the overwhelming majority of Americans to enshrine the fundamental right to sex equality in our Constitution. The Attorney General of Alabama has done a disservice to women, including the women of Alabama" (*The Hill*, December 19, 2019).

Shortly thereafter, following Virginia's vote to ratify, ERA proponents filed suit in a Massachusetts federal district court, asking the archivist to properly record Virginia's vote and the amendment's ratification and refrain from negating the ratification votes from the five states. They primarily objected to the seven-year deadline that Congress imposed, a provision that was not included in the text sent to the states; moreover, they stated, the subsequent three-year extension (until 1982) was approved by Congress in a joint resolution, unattached to the amendment. No other proposed amendment, they claimed, was subject to the same extraconstitutional restrictions. On August 6, 2020, the Massachusetts district court judge dismissed their suit, and on June 20, 2021, the First Circuit Court of Appeals affirmed the district court in *Equal Means Equal v. Ferriero* (2021).

Meanwhile, Democratic attorneys general from the last three ratifying states—Nevada, Illinois, and Virginia—filed suit in the District of Columbia federal district court, supported by briefs from women's organizations, members of the legal profession, labor unions, state public officials, corporations, and religious groups. Most groups filing briefs favored ratification, but several anti-ERA groups (such as the Independent Women's Forum, supported by the Trump administration's Department of Justice), presented briefs against extending the deadline to ratify (*Bloomberg Law*, October 13, 2020). In addition, five other states (Alabama, Louisiana, Nebraska, South Dakota, and Tennessee), three of which had attempted to revoke their ratifying votes, asked to intervene on behalf of the archivist. On March 5, 2021, without addressing the legality of the attempted rescissions, the District of Columbia federal court judge dismissed the Democratic attorneys' general suit, holding that because the states missed the original

and the extended deadline for ratification, the archivist was not required to record their votes (*Virginia v. Ferriero* 2021). Two months later, the plaintiffs appealed to the District of Columbia Circuit Court of Appeals and, in February 2022, following the election of its Republican governor, Virginia asked to be dismissed as a party in the case. At the oral arguments before the circuit court on September 28, 2022, the circuit judges seemed to question their authority to order the federal government to publish the amendment as part of the Constitution (*Washington Post*, September 28, 2022; *Bloomberg Law*, September 28, 2022).

The battle for equality of rights is not over; half the states guarantee equal rights based on sex in their constitutions, and others such as Nevada and Minnesota are attempting to amend their state constitutions to include such language. Nor is the ERA a dead issue in Congress. In 2020 and 2021, the US House of Representatives voted in favor of removing the 1982 deadline for the ERA's ratification by the states; a companion bill has yet to make it out of committee in the Senate. With proponents and opponents of the ERA filing lawsuits to either approve or block ratification, it is likely that the Supreme Court will eventually interject itself into at least one of these legal challenges (Sullivan 2020; "Equal Rights Amendment" 2021).

As the conflict over ratification advances in the legislative and judicial branches, ERA advocates urge that "only a federal Equal Rights Amendment can provide the highest and broadest level of legal protection against sex discrimination" ("Equal Rights Amendment" 2021). They fear that without a robust guarantee of equality of rights enshrined in the Constitution, equal rights protections are constantly threatened, such as Wisconsin's 2009 Equal Pay Enforcement Act that was repealed when Republicans won the majority in the state legislature in 2012 (Stewart 2018). Advocates stress that the ERA can also bolster the ability of the law to address ongoing systemic harms to women, such as pay inequity, pregnancy discrimination, and sexual violence (Neuwirth 2015). They believe that a constitutional amendment barring sex discrimination might motivate law enforcement agents and prosecutors to address the hundreds of thousands of untested sexual assault kits warehoused in police departments. Because most reported assaults are committed against women, the failure to act on this evidence could perhaps be viewed as systemic sex discrimination (Filler-Corn et al. 2020). In short, ERA supporters believe the amendment could have immeasurable positive effects on the lives of women across the United States.

Opponents argue that adding the ERA to the Constitution is anti-theoretical to representative democracy because the final ratification vote was long delayed after being submitted to the states for their approval. In their view, the amendment is, at best, redundant because women and men have achieved constitutional equality. At worst, they declare, the ERA would eradicate the protections women have in the workplace and home and would ultimately expand the inequities between the sexes. Anti-abortion groups have allied themselves with the ERA opposition, claiming abortion rights groups would rely on the amendment to prevent states from regulating abortion as acts of sex discrimination. Similarly, groups seeking to limit transgender rights have joined in opposing the amendment, arguing it would enhance the rights of the nation's transgender community.

Conclusion

Since the early twentieth century, women in the United States have made significant political, economic, and social progress, in large part as a result of women's activism. It was women's unwavering pressure on policymakers throughout the first wave of feminism that led to the passage of the Nineteenth Amendment granting (white) women the right to vote. Similarly, the proliferation of groups fighting for women's rights during the second wave of feminism contributed to substantial policy reforms in employment, education, and reproductive rights. Throughout that period, women's growing political representation in the legislative, executive, and judicial branches has been both a cause and an effect of women's increased rights. For example, women legislators are more likely than their male counterparts to introduce bills related to women's issues (Thomas 1994; Swers 2002). As women gained greater autonomy and access to resources from legislation, they became increasingly likely to run for and win elected office, thus perpetuating a cycle allowing for the introduction of more women's rights legislation. Yet there is still much work to be done. Women's advancement has been uneven, and women of color, poor women, and women in the LGBTQ+ community continue to have less access to resources and hold fewer positions of power. The courts have contributed to myriad advances in women's rights but have not fully committed themselves to this project. Federal court judges, appointed for life, often reflect the political views of the president who appointed them. The battle over women's rights, especially in contraceptive and abortion care policies,

has taken center stage as these cases are increasingly brought to the courts, highlighting that, as the ongoing debate over the ERA demonstrates, gender equality in the United States is far from a settled issue.

Plan of the Book

Building from the historical analysis of women's rights activism and policymaking in this chapter, in the remainder of the book we explore how women continue to chase equality across an array of policy issues. Chapter 2 focuses on women's struggle to secure equal opportunities in education. In particular, we analyze the evolution of the role of the executive and judicial branches in implementing Title IX in the areas of athletic programs and sexual harassment and assault in schools.

In Chapter 3, we examine women in employment, highlighting the successes and failures of legislation aimed at combating discrimination in the workforce, such as Title VII and the Equal Pay Act. We pay particular attention to the gender pay gap and sexual harassment in the workplace, delving into the rise of the #MeToo movement and its effects on workplace outcomes for women. Moving beyond the traditional workplace, we discuss the efforts of professional athletes—especially the US women's national soccer team—to achieve equity. In Chapter 4, we turn our focus to work-family balance, exploring policies that address pregnancy and employment, family leave, and affordable childcare. While Congress initially played a significant role in these issues, the country still lacks a federal paid family leave policy or childcare plan, and it has largely fallen to state and local governments to fill these gaps.

Chapter 5 analyzes the development of family planning policies over the past century, focusing on women's rights advocates' struggle to remove government restrictions on their access to birth control. While there have been two major federal policies intended to expand contraceptive access, Title X and the Affordable Care Act, changes in governmental leadership have threatened these programs, and women's access to birth control remains tenuous. In Chapter 6, we look at the tumultuous history of abortion rights in the United States. Over five decades, the courts consistently upheld a woman's right to terminate her pregnancy, arising out of her constitutional right to privacy, albeit increasingly upholding government regulations to limit that right. As a result of a conservative shift in judicial appointments, the Supreme Court overturned *Roe v. Wade* (1973), the landmark case establishing

abortion rights in the nation. As the national debate over abortion continues to rage, states have virtually unfettered authority to determine the extent to which women have access to abortion care.

Finally, in Chapter 7, we summarize our observations regarding the progress women have made since the passage of the Nineteenth Amendment in 1920, as well as where we might be headed in the future. Drawing on the findings of each chapter, we analyze how the different branches and levels of government have shaped women's rights and how this might help us understand the best ways to further expand those rights.