SECOND EDITION

Elusive Equality

Women's Rights, Public Policy, and the Law

SUSAN GLUCK MEZEY

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For Michael

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Contents

Introduction: Women and Equality

My aim in writing this edition of *Elusive Equality: Women's Rights, Public Policy, and the Law* is to examine the current status of gender equality in the United States, specifically to determine whether the nation has become more egalitarian since the first edition was published.

The first edition showed that a number of contentious legal issues remained to be resolved and that women's struggles for equal opportunity were far from over. This edition, recognizing that society has made significant advances in gender equality, began with a sense of optimism, for it is no longer unusual to see women holding positions of prestige and authority. Today women are, among other things, lawyers, surgeons, judges, public officials, politicians, CEOs, scientists, investment bankers, professors, astronauts, physicians, generals, and admirals. There is also evidence that women are earning higher incomes and have higher levels of education than ever before.

At the same time, there are troubling signs that a good deal of this progress is ephemeral and not evenly distributed throughout society, with lower-income women, less educated women, gay women, and women of color not receiving their share of the gains. And women, no matter what their race, education, or age, continue to lag behind men in corporate executive positions, law partnerships, high-ranking military offices, prestigious university professorships, and as high-salaried sports figures. Moreover, disturbing signs of women's continued inequality are reflected in the persistence of pay inequity, the ongoing difficulties of managing work and family, and the continuous efforts to restrict reproductive freedom. At a minimum, an egalitarian society requires that women are paid according to their worth, have control over their reproductive decisionmaking, and receive assistance in balancing the responsibilities of work and family.

Law as an Instrument of Social Change

This book updates the story of the continuing struggle for gender equality in the United States, focusing on public policy issues affecting women's rights. Like the first edition, it is written from the perspective of liberal feminism—the prevailing paradigm of the modern U.S. women's movement. Focusing on federal court decisionmaking, it reflects the belief that removing the legal constraints that impede women's rights and opportunities is crucial to furthering the objectives of the women's movement and advancing gender equality. An essential component of social change, legal action plays an important role in eliminating many of the constraints that society imposes on the basis of gender, and thus the courts are an integral part of the struggle for gender equality.

Waves of Feminism

The first wave of feminism grew out of the abolitionist movement in the mid-1800s and subsided with the passage of the Nineteenth Amendment in 1920. In part, the successful conclusion of the struggle for the right to vote left the leaders of the woman suffrage movement uncertain about the direction of future movement activity. The upheaval of two world wars and the Great Depression, and perhaps also an awareness of the enormity of their tasks, frustrated their efforts to mount new battles to achieve a more equal and just society.

Women's rights advocacy reasserted itself in the latter part of the twentieth century, when women began to rally under the banner of feminism, an ideology seeking to empower women in their public and private lives. In the 1960s, the feminist movement, also known as the women's rights movement or the women's liberation movement, began the slow—and as yet incomplete—task of transforming society to end women's subordination to men. This second wave of feminism sprang from women's participation in the civil rights and antiwar movements of the early 1960s. Equally committed with men to bringing about an end to racial discrimination and the war in Vietnam, women discovered that their voices were often unheard and they were expected to remain silent while the men made the important decisions and took credit for successful collective actions. Women vowed that they would no longer accept their unequal status, and while continuing to fight for racial equality and peace, they began to call attention to the imbalance of power in the workplace and in the home. During this second wave of feminism, the success of women's rights advocacy was evident in the passage of a

panoply of federal laws banning pay disparity between the sexes and prohibiting discrimination on the basis of sex in employment, education, credit, and housing. Following in the steps of earlier social movements, feminists turned to the courts for assistance in enforcing their legislative gains. At the same time, women also mounted legal challenges against state and federal laws based on traditional and stereotypical notions of men and women's roles. Concomitant with these actions, women engaged in efforts to expand reproductive rights—again, largely through the courts—as part of a broader movement to enhance individual rights of privacy. Their multifaceted litigation efforts transformed most attacks on inequality into legal challenges, many of which succeeded in bringing about important societal changes.

More recently, in the early 1990s, a new type of feminism, known as third-wave feminism, emerged. Although adherents of this viewpoint do not always agree on the proper analysis of society's deficiencies, the appearance of the new wave indicated dissatisfaction with many of the premises of the 1960s brand of feminism and concern about the limits of its goals, methods, and achievements. Many of the third-wave feminists are the daughters of the second wave, seeking to forge their own images and beliefs, in part accepting the former generation's accomplishments and in part demanding a new approach that displays greater concern about inequalities based on class, race, ethnicity, cultural identity, and sexual orientation. Although some third-wave adherents acknowledge the contributions of the second-wave feminists and may even agree with many of their goals (such as reproductive freedom), third-wave feminists typically reject the significance of legal change and do not view litigation as a key feminist strategy. Rather, their strategies are based on the multiplicity of women's characteristics, concern with the role of the media and its portrayals of women, greater awareness of a global perspective, and increased acceptance of femininity and sexuality.

These waves of feminism, reflecting generational differences as well as different beliefs about the important issues of the moment, represent divergent views on the meaning of feminism and social change. Taken together, however, their supporters are all committed to the goal of greater egalitarianism and have important things to say about how to achieve it.

The Plan of the Book

In assessing the progress the women's movement has made in eliminating barriers to equal opportunity in the United States, this book bridges the gap between law and public policy. It presents women in their roles as citizens,

workers, students, wives, and mothers, discussing the role of legal change in reforming social, economic, and political institutions. It does so by exploring a wide array of policy issues affecting women and men, including sex-based legal classifications, the Equal Rights Amendment (ERA), single-sex education, women's participation in sports, employment discrimination, equal pay and comparable worth, fetal protection policies, the preferential status of pregnancy in the workplace, family leave, sexual harassment at work and in school, the balance between family and work, and women's reproductive autonomy. The chapters deal with constitutional sex equality; educational equity; women and employment, including sex discrimination, pay equity, sexual harassment, and pregnancy policies; and abortion rights.

Emphasizing the effect of the role of law on societal change, the book provides a comprehensive analysis of how women's rights are closely tied to the courts and public policy decisionmaking.

1 Seeking Constitutional Equality

In 1776, with the American colonies poised to declare their independence from England, Abigail Adams wrote to her husband, John, to voice her concern about equality for women in the newly emerging nation. "Remember the ladies," she urged him, "and be more generous and favorable to them than your ancestors. Do not put such unlimited power into the hands of husbands." She reminded him that "all men would be tyrants if they could. [And] if particular care and attention is not paid to the ladies we are determined to foment a rebellion, and will not hold ourselves bound by any laws in which we have no voice or representation."

Husband John replied a few weeks later, saying, "I cannot but laugh . . . your letter was the first intimation that another tribe, more numerous and powerful than all the rest were grown discontented."[1]

Abigail renewed her criticism in a later letter, declaring, "I cannot say that I think you are very generous to the ladies; for whilst you are proclaiming peace and good-will to men, emancipating all nations, you insist on retaining an absolute power over wives."[2] Despite these admonitions, neither Adams nor the other founders shared her preoccupation with women's rights and saw no reason to constitute women as equal citizens in the new nation.

Woman Suffrage

Women's rights advocates, inspired by the experiences of Lucretia Mott and Elizabeth Cady Stanton, who had been ordered to sit in the balcony at an international antislavery conference in London in 1840, held the first women's rights convention in Seneca Falls, New York, in July 1848.

The convention was called "to discuss the social, civil, and religious rights of woman." The *Declaration of Sentiments,* the document that emerged from the convention, echoed the *Declaration of Independence*

by proclaiming that "all men and women are created equal." The delegates demanded women's suffrage and other forms of civil and legal equality. Stanton and Mott, along with Henry Ward Beecher, Lucy Stone, Frederick Douglass, Susan B. Anthony, and Henry Blackwell, were also deeply committed to the antislavery struggle, and with the Civil War looming, most turned their attention to the conflict over slavery and the uncertain fate of the Union.

After the Civil War, women's rights advocates renewed their efforts to secure the right to vote, hoping that enfranchisement would lead to equality in other areas.[3] Most movement leaders supported the Reconstruction-era Fourteenth Amendment, hoping it would extend women's rights as well as those of the former slaves. However, because it only applied to men, the amendment, ratified in 1868, was a significant defeat for women. Indeed, it was the first time that the Constitution singled out men in guaranteeing rights.[4] Two years later, the Fifteenth Amendment, banning discrimination in voting on the basis of "race, color, or previous condition of servitude," was ratified. Women were ignored again, with the amendment silent about discrimination in voting on the basis of sex.

Ultimately, the failure to include women in the Fifteenth Amendment led to the collapse of the antislavery coalition. A new organization, the National Woman Suffrage Association, founded in 1869 by Stanton and Anthony, committed itself to women's rights, including a constitutional amendment to ensure suffrage. The same year, the American Woman Suffrage Association was founded by Stone to focus more narrowly on the battle over enfranchisement.[5]

The struggle for suffrage dominated the women's rights movement from the latter part of the nineteenth century into the early part of the twentieth.[6] Finally, the Nineteenth Amendment, known as the Susan B. Anthony Amendment, was ratified in 1920.[7]

Political and Social Equality

In addition to seeking political equality through the ballot, women also attempted to remove barriers to social and economic equality, such as limits on their right to choose an occupation. In *Bradwell v. Illinois*,[8] an 1873 ruling, the U.S. Supreme Court considered Myra Bradwell's challenge after she was denied admission to the Illinois Bar because of her marital status. She claimed that the privileges and immunities clause of the Fourteenth Amendment protected her right to earn a living.[9] Speaking for the high court, Justice Samuel Miller agreed that the Fourteenth

Amendment guaranteed rights of national citizenship but added that "the right to admission to practice in the courts of a State is not one of them. This right," he continued, "in no sense depends on citizenship of the United States."[10]

Bradwell relied on the Court's constrained interpretation of the privileges and immunities clause in the *Slaughterhouse Cases,*[11] decided the previous day. In the *Slaughterhouse Cases,* the Court had held that this clause protected only a narrow range of federal constitutional rights, such as the right to sail on navigable waters. Thus, the *Bradwell* Court concluded that the privileges and immunities clause did not guarantee a woman's right to become a lawyer and dismissed Bradwell's demand for equality.

Justice Joseph Bradley's concurring opinion reflected society's prevailing view that a woman did not have the same right as a man to pursue an occupation.[12] "Nature herself," he insisted, "has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." He concluded that "the paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator."[13]

In 1875, the Court decided *Minor v. Happersett,*[14] a voting rights case. The case arose when Virginia Minor challenged a Missouri law, claiming that the right to vote was a privilege of national citizenship protected by the Fourteenth Amendment.

Speaking for the Court, Justice Morrison Waite explained that the Fourteenth Amendment did not confer suffrage and that Minor could only prevail if women had a right to vote at the time the Constitution was adopted.[15] And because suffrage had been restricted to men at that time, he denied her claim. As in *Bradwell,* the Court adopted a narrow view of the privileges and immunities clause, saying that it did not add to a citizen's rights but "simply furnished an additional guaranty for the protection of such as he already had."[16]

Around the turn of the century, a number of states attempted to ameliorate the harsh working conditions of the time by enacting regulations to limit the working day; businesses argued that such laws exceeded the state's lawmaking authority. In 1905, in *Lochner v. New York,*[17] the Court struck a New York law prohibiting bakers from working more than sixty hours a week or ten hours a day; it held that the "right to make a contract . . . is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."[18] The Court reasoned that baking is not dangerous work and that the quality of the baked goods would

not improve if bakers worked fewer hours. Moreover, as adults, bakers could decide for themselves how many hours to work, and the Court believed there was no need to restrict their choice.

Lochner marked the beginning of an era of judicial support for laissez-faire economics that lasted until the 1930s.[19] However, three years later, in *Muller v. Oregon,*[20] the Court departed from this position by upholding an Oregon statute limiting female laundry workers to a maximum ten-hour workday. Arguing for the state, future Supreme Court justice Louis D. Brandeis presented a 113-page brief to the Court, contending that, unlike the male bakers, female laundry workers needed the state's protection. Known as the "Brandeis Brief," the document proclaimed that women were physically incapable of working more than ten hours a day.

The Court departed from its commitment to laissez-faire principles, allowing the government to interfere with the laundry workers' contracts because of women's limited physical capacity and societal roles. It believed that a woman's "physical structure and a proper discharge of her maternal functions . . . justify legislation to protect her from the greed as well as the passion of man."[21]

Some labor reformers welcomed *Muller,* but others believed the Court's ruling harmed women by justifying restrictions aimed only at them. They argued that by withholding job opportunities under the guise of protection, these laws limited women's availability for work and also made them more expensive to employ. Criticizing the Court's approach, Frances Olsen notes that "although the case might have seemed to exalt women, it effectively degraded them by treating the asserted differences as evidence of [their] inferiority."[22] And in her book on women's employment rights, Barbara Brown argues that most of these laws "were based on stereotypes about women's transient and secondary role in the labor market and their weak physical condition as well as on the desire of male workers to reduce competition for higher paying jobs."[23]

In 1924, the Court also upheld a New York law prohibiting women from working in restaurants between 10:00 P.M. and 6:00 A.M. In *Radice v. New York,* the Court accepted the state's argument that "night work . . . so injuriously affects the physical condition of women, and so threatens to impair their peculiar and natural functions, and so exposes them to the dangers and menaces incident to night life in large cities."[24] It did not question the logic of barring women from nighttime restaurant work while allowing them to work nights as performers, ladies' cloakroom attendants, or hotel kitchen help (all exempted from the law). It also did not inquire whether the statute was intended to preserve men's monopoly in the more lucrative nighttime restaurant jobs.

Forty years after *Muller,* in *Goesaert v. Cleary,*[25] a 1948 decision, the Supreme Court again considered the constitutionality of excluding women from certain occupations.

Under Michigan law, only women related to male bar owners could be licensed as bartenders. Speaking for the Court, Justice Felix Frankfurter derisively commented that as "beguiling as this subject is, it need not detain us long."[26] Perhaps because he did not consider the issue important, Frankfurter also did not question why the state allowed women to work as waitresses in the taverns. He was persuaded, he said, that it was reasonable to believe that women related to tavern owners would be protected from the dangers of bartending. Rejecting the insinuation that the law reflected the legislature's attempt to preserve the higher-paying bartending jobs for returning World War II veterans, Frankfurter concluded that there was no constitutional violation.

The Modern Equal Protection Clause

The equal protection clause of the Fourteenth Amendment puts states on notice that they must justify their decisions to treat persons as legally different. Under equal protection doctrine, differential treatment is constitutionally permissible only when it is based on relevant differences among individuals.[27] Because immutable characteristics such as race or national origin bear no relationship to ability and are considered irrelevant to valid legislative goals, the Court views laws based on such classifications as inherently suspect and scrutinizes them carefully, placing the government under a heavy burden to justify distinctions in law based on those criteria.

The Supreme Court first articulated the concept of a suspect classification based on race in *Korematsu v. United States,*[28] a case challenging the government's policy of interning persons of Japanese ancestry—citizens and noncitizens alike—during World War II. The Court warned that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."[29] However, despite the indications that racial discrimination was the primary reason for the internment camps and exclusion orders, the Court ruled that the policy was not based on race and accepted the government's defense that it was justified by military necessity and national security.

In the years following *Korematsu,* the Court established a new approach to laws based on race and national origin. Because the legislature's motives for enacting such laws are often suspect, the Court subjects them to a more careful analysis, applying "strict" scrutiny and placing

the burden of proof on the state to show that there is a "compelling" reason for the law. It also requires the government to demonstrate that the classifications (the means) are "necessarily" related to the goals (the ends) that the statute seeks to achieve and are the "least restrictive" means to achieve those goals.

When a law involves a nonsuspect classification, the Court applies a lesser form of scrutiny and merely seeks to determine if there is a "legitimate" reason for it and if the classification "rationally" relates to that reason. Called minimal scrutiny, this is the more common approach that is used to judge the constitutionality of economic and social regulations, as well as laws based on classifications with mutable characteristics (such as wealth or income) or those related to ability (such as age).

Thus, determining the proper level of scrutiny is crucial for the outcome of the case: laws reviewed under minimal scrutiny almost always receive the Court's approval. Conversely, because it strongly disfavors classifications based on racial or ethnic classifications, the Court almost always strikes such laws.[30]

During Earl Warren's tenure as chief justice from 1953 to 1969, the high court took a leading role in promoting racial equality in the nation. However, it did not extend this commitment to equality to women, as its 1961 decision, *Hoyt v. Florida,*[31] demonstrated.

Hoyt revolved around a Florida law creating a voluntary jury registration system for women. The defendant was convicted of second-degree murder by a jury of men for killing her husband with a baseball bat. She appealed her conviction on equal protection grounds, arguing that the law discriminated against her because female jurors would have been more sympathetic to her defense that she killed him because he was unfaithful. Speaking for the Court, Justice John Marshall Harlan pointed out that defendants are not entitled to juries of their choice but to juries "indiscriminately drawn from among those eligible in the community for jury service."[32] Florida did not exclude women from juries, Harlan noted; it merely exempted them from jury service at their option.

The Court reasoned that "despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life." And because she plays a unique role in the family, a woman should be allowed to "determine [for herself] that such service is consistent with her own special responsibilities."[33] Acknowledging that the state could have achieved its goal by limiting the exemptions to women with child care responsibilities, Harlan refused to declare the law "irrational."[34]