*[Equal Rights Amendment, 1972](https://jigsaw.vitalsource.com/books/9780190945763/epub/OEBPS/Contents.xhtml" \l "ts88) （P561-P568）*

An equal rights amendment, with wording slightly different from that passed by Congress in 1972, was sponsored in 1923 by the National Woman’s Party. It seemed to party members the logical corollary to suffrage. But that amendment was vigorously opposed by the League of Women Voters and other progressive reformers, lest it undermine the protective legislation for which they had fought so hard. A key question raised was what impact the amendment, if passed, would have on a military draft.

An equal rights amendment was introduced regularly in Congress virtually every year thereafter, but it received little attention until after World War II. In 1950 and 1953, it was passed by the Senate but ignored by the House.

By 1970 much protective legislation had been applied to both men and women. It was possible to support an equal rights amendment without risking the undoing of labor law reforms. The hope that the Supreme Court would apply the Fourteenth Amendment’s “equal protection of the laws” clause to cases involving discrimination on the basis of sex as firmly as it applied the clause to cases involving racial discrimination had not been fulfilled. When the current Equal Rights Amendment was introduced in 1970, it was endorsed by a wide range of organizations, some of which had once opposed it; these organizations included groups as disparate as the United Automobile Workers and the Woman’s Christian Temperance Union. Its main sponsor in the House was Martha Griffiths of Michigan; in the Senate, Birch Bayh of Indiana.

The Equal Rights Amendment was passed by Congress on March 22, 1972, and sent to the states for ratification. There was much initial enthusiasm; within two days six states had ratified. But the pace of ratification slowed after 1975, and only thirty-five of the needed thirty-eight states had ratified it by 1978. (Four state legislatures voted to rescind ratification, although the legality of that move was open to question.) In October 1978 Congress extended the deadline for ratification to June 30, 1982; the extension expired with no additional ratifications. The amendment was reintroduced in Congress in 1983 but has not been passed. Compare the language here to that of the Fifteenth Amendment and Title VII of the 1964 Civil Rights Act.

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. The amendment shall take effect two years after the date of ratification.

[*Title IX, Education Amendments of 1972*](https://jigsaw.vitalsource.com/books/9780190945763/epub/OEBPS/Contents.xhtml#ts89)

In 1972, women received 9 percent of the M.D. degrees awarded by universities in the United States, 7 percent of the law degrees, and 15 percent of the doctoral degrees. Women were 2 percent of college varsity athletes. It was common practice to encourage women students into specialties marked as appropriate for women: teaching rather than scientific research, for example, or nursing rather than medicine. It was estimated that colleges offered athletic scholarships to fifty thousand men, while women athletes received fewer than fifty. It was usual practice for the travel expenses of men’s athletic teams to be paid for from student fees (paid by both women and men), while women’s teams received 0.5 percent of schools’ athletic dollars. Women’s teams often had to raise their own travel funds, sometimes from bake sales and raffles. Title IX of the Education Amendments to the Civil Rights Act, passed in 1972, was brief but far-reaching.

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.…

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract… is authorized and directed to effectuate the provisions of… this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute.…

Title IX has proven to be a powerful tool in the fight for gender equity because it affects a wide range of educational opportunities and services. Title IX forbids sex discrimination in admissions policies (outlawing the common practice of using separate standards for men and women); in career training and vocational programs (which had previously been largely segregated by sex); and in employment. Title IX also forbids discrimination against pregnant or parenting students and requires schools to provide an environment that is free of sexual harassment.

Until recently, the most widely discussed consequence of Title IX has been its transformative effect on high school and undergraduate athletic programs. In the years since the passage of Title IX, the number of women participating in National Collegiate Athletic Association (NCAA) intercollegiate athletics has risen from approximately 32,000 in 1971 to roughly 203,600 in 2012–13, an increase of over 600 percent. (The number of men in intercollegiate athletics has also risen at the rate of 53 percent, from 173,000 to 265,600 athletes.) At the high school level, the change is even more striking: over three million girls have participated in high school sports in each of the last seven years, compared with fewer than 300,000 in 1971–72, an increase of nearly 1,000 percent. (During the same time period, high school boys’ participation in sports has risen by approximately 15 percent.) Thus, contrary to the widespread misperception that Title IX has decreased the opportunities for males to participate in sports, the number of male athletes has continued to increase and, most significantly, so has the funding for men’s sports. At Division I schools (with major football and basketball teams), although the number of men’s teams has declined, the amount of money spent on men’s athletics is still almost twice as much as the money spent on women’s athletics. Between 1995–96 and 2004–5, Division I schools increased their spending on men’s football by approximately $2.45 million per team, while the average funding increase for women’s teams (except basketball) was about $135,000 per team.

Title IX is enforced by the Department of Education’s Office of Civil Rights. Enforcement has been gradual. Not until 1975 were there full federal regulations applying to secondary schools and colleges and universities, and these have continued to evolve over time. The Title IX regulations governing athletic programs require that the total amount of athletic financial assistance awarded to men and women be proportionate to their respective participation rates in intercollegiate athletic programs. They require that male and female athletes receive equivalent—not identical—benefits, treatment, services, and opportunities. Title IX does not require that all teams be coeducational, or that the same number of teams be provided for men and women, or that men’s teams be cut in order for the institution to come into compliance with the law.

In 2002, the US secretary of education established the Commission on Opportunity in Athletics. At issue were the measures of fairness. After more than a year of intense public debate, the commission announced its wholehearted support for the goal of gender equity in sports, while suggesting that schools be offered more flexible terms of establishing their compliance with Title IX. The Department of Education relies on a “three-prong test” established in 1979, requiring schools to show that the ratio of male and female athletes is about equal to the ratio of all male and female undergraduates; that they have a “history and continuing practice” of expanding opportunities for women; or that they are “fully and effectively accommodating the interests and abilities” of women on campus. More than three quarters of colleges and universities are in comfortable compliance with Title IX, having added women’s teams and continued to support men’s teams. It is Division I schools, which reserve substantial numbers of slots for revenue-producing sports (even at the expense of cutting men’s minor sports), that have found it most difficult to meet Title IX’s expectations.

Recent reports confirm several arguments that women have made about Title IX’s effects on intercollegiate sports programs. Both men’s and women’s participation levels in college athletics have increased since the passage of Title IX. College and universities have responded to Title IX by increasing women’s participation rather than decreasing men’s participation. Men’s sports continue to receive funding and athletic opportunities out of proportion to their representation in the college population; 57 percent of undergraduates are women, yet they receive only 43 percent of the athletic participation opportunities. In addition, the NCAA’s 2012–13 report on sports participation shows that male athletic participation in intercollegiate sports—both the numbers of athletes and the number of teams—has reached an all-time high.



*By the turn of the twenty-first century, diversity in admissions and more equitable funding for women’s athletics had made new opportunities for women to hone their skills and overcome challenges, as these players at the University of California attest. (Photo courtesy of the Department of Athletics, University of California, Santa Barbara.)*

Argument continues about what constitutes equitable treatment. Is it fair for men to hold the majority of athletic scholarships (an imbalance largely due to the size of men’s football and basketball teams)? Is it fair for a university to support a women’s varsity rowing team but not a men’s varsity rowing team? What is the proper relationship between women’s sports and men’s sports? Between women’s sports and men’s “minor” sports? Perhaps most significantly, what is the wise relationship between expenditures on athletics and expenditures on academic programs?

TITLE IX AND SEXUAL ASSAULT

Students and their parents have used Title IX to fight sexual harassment at school and during school-sponsored activities. One of the earliest cases was brought against Yale University in 1977 by a group of female students who argued that harassment of students by professors—and the absence of procedures for students to file effective formal complaints—is a violation of Title IX. In 1999 the Supreme Court responded to the appeal of the fifth-grade girl who had been subjected to explicit sexual teasing by a classmate. He attempted to touch her breasts and genital area, he told her “I want to get into bed with you,” and he rubbed his body against her in the hallway. Her grades plummeted as she lost the ability to concentrate on her studies. Although she and her mother complained repeatedly to teachers and the principal, no action was taken. The Court ruled that school districts may be liable for damages when administrators are indifferent to repeated and known acts of student-to-student sexual harassment, during school hours and on school grounds (*Davis v. Monroe County Board of Education*, 119 S.Ct. 1661). The case raised the question of responsibility of schools to provide a harassment-free environment (see *Meritor Savings Bank v. Mechelle Vinson* et al.).

In 1990, the Jeanne Clery Act, named for a 19-year old freshman who was raped and murdered in her Lehigh University dormitory room in 1986, required colleges and universities to report crimes committed on campus. In 2010 it was strengthened, requiring institutions to issue timely warnings about crimes that pose an ongoing danger. The law also requires annual public campus security reports that include three years’ worth of crime statistics; the statistics must include both forcible and non-forcible sex offenses. The resulting reports were stunning in what they revealed about the frequency of rape and the laxity of punishment. The example of Christy Bronzkala, whose lawsuit against Virginia Tech after her rape by a football player triggered a test of the Violence Against Women Act (VAWA), is exemplary; the players were briefly suspended, but Bronzkala left the university. Few schools have expelled violators of campus behavior codes. When victims brought their complaints to police, they regularly encountered disbelief and humiliation. Even today, victims often feel that they have to choose between the dread of facing their assaulters in classes and on campus or transferring to another or dropping out of school.

By 2014, women student activists had forced the question. They organized public protests; they deployed social media to link activists on many campuses; they used student newspapers to publicize the violence they endured; they encouraged one another to file complaints with the Department of Education and the Office of Civil Rights under the Clery Act and Title IX. Through a new organization, “End Rape on Campus,” they waged a sophisticated lobbying campaign. They gained the support of members of Congress—among them, Senators Kristin Gillibrand and Claire McCaskill, who had already challenged the military for its weak response to sexual violence. Among the students who filed complaints with the Office of Civil Rights were Annie E. Clark and Andrea Pino of the University of North Carolina and Emma Sulkowicz of Columbia University—all profiled in articles in the *New York Times*. In May 2014 the Department of Education issued a finding that supported a student’s complaint that Tufts University had delayed investigating her assault and had not protected her from her assailant; the university refused the settlement proposed by the Department of Education and thus risked losing all federal funding.[\*](https://jigsaw.vitalsource.com/books/9780190945763/epub/OEBPS/Chap21.xhtml?favre=brett#fn89-1)



*In 2014, college students organized many public demonstrations addressing sexual violence on campuses, like this one at the University of Iowa on February 24. Photographer: James Soukup. (Courtesy of the* Daily Iowan.*)*

As this book goes to press, a White House task force has concluded that one in five female students are assaulted during their college years but only 12 percent of rapes are reported. The Department of Education has announced that it is investigating 55 colleges and universities for their failures to provide a “prompt and equitable response” to complaints of sexual harassment and violence, as Title IX requires. The list included some of the nation’s most distinguished public and private institutions. All over the country, women student activists continue to publicize the records of their own universities; at some they are appearing at recruitment tours to warn prospective students about the dangers they face.[†](https://jigsaw.vitalsource.com/books/9780190945763/epub/OEBPS/Chap21.xhtml?favre=brett#fn89-3)

What has been the history of Title IX enforcement and of sexual assault on your campus? Is your college among the 55 singled out for investigation? What programs to increase awareness of sexual violence and to prevent it are in place, and which to your mind are most effective? What have been the responses of students, men as well as women, to the reinvigorated movement for women’s safety?[\*](https://jigsaw.vitalsource.com/books/9780190945763/epub/OEBPS/Chap21.xhtml?favre=brett#fn89-2)

Public Law No. 92-318, 86 Stat. 235, codified at 20 U.S.C. §§ 1681–1688.

[\*](https://jigsaw.vitalsource.com/books/9780190945763/epub/OEBPS/Chap21.xhtml?favre=brett#fni89-1) See [www.endrapeoncampus.org](http://www.endrapeoncampus.org/); “Behind Focus on College Assaults, a Steady Drumbeat by Students,” *New York Times*, April 29, 2014; “Fight against Sexual Assaults Holds Colleges to Account,” *New York Times*, May 3, 2014.

[†](https://jigsaw.vitalsource.com/books/9780190945763/epub/OEBPS/Chap21.xhtml?favre=brett#fni89-3) See <http://changingourcampus.org/about-us/not-alone/>.

[\*](https://jigsaw.vitalsource.com/books/9780190945763/epub/OEBPS/Chap21.xhtml?favre=brett#fni89-2) This note was prepared with information from reports and press releases issued in 2007, 2008, and 2013 by the National Collegiate Athletic Association (NCAA), the National Federation of State High School Associations (NFHS), the Women’s Sports Foundation, the National Coalition for Women and Girls in Education, and the ACLU Women’s Rights Projects, which are available on their websites.

[Frontiero v. Richardson*, 1973*](https://jigsaw.vitalsource.com/books/9780190945763/epub/OEBPS/Contents.xhtml#ts90)

Sharron A. Frontiero was an Air Force officer who was dismayed to discover that she could not claim dependent’s benefits for her husband on the same terms that her male colleagues could for their wives. She and her husband brought suit, claiming that statutes requiring spouses of female members of the uniformed services to receive more than half of their support from their wives to be considered dependents, while all spouses of male members were treated as dependents, violated the due process clause of the Fifth Amendment and the equal protection clause of the Fourteenth Amendment.

Until 1971, the Supreme Court had never ruled that discrimination on the basis of sex was a violation of the equal protection clause of the Fourteenth Amendment. So long as a legislature had a “reasonable” basis for making distinctions between men and women, discriminatory laws were upheld. Between 1971 and 1975, in a stunning series of decisions, the Supreme Court placed the burden of proof that discrimination on the basis of sex was reasonable on those who tried to discriminate. Ruth Bader Ginsburg was a thirty-eight-year-old law professor working with the American Civil Liberties Union (ACLU) in 1971 when the court accepted her argument that an Idaho law requiring that fathers, rather than mothers, always be preferred as executors of their children’s estates was unconstitutional (*Reed v. Reed*, 404 US 71 [1971]).

The American Civil Liberties Union set up a Women’s Rights Project in 1972 with Ginsburg at its head to follow up on the implications of the *Reed* decision. Ginsburg wrote the brief and managed the argument in *Frontiero*; it was one of a brilliant series of cases that she argued in the early 1970s. With her colleagues, she helped persuade the court that a wide range of discriminatory practices were illegal. Her career as a litigator would lead to her appointment as a judge on the US Court of Appeals in 1980 and, in 1993, to her appointment to the US Supreme Court.

The Supreme Court ruled in favor of the Frontieros in a complex decision that used statistical information about woman’s place in the work force in a manner reminiscent of the Brandeis Brief. Speaking for three of his colleagues, justice William J. Brennan Jr. prepared a historically based argument, explaining the distance American public opinion had traveled since the *Bradwell* case. He drew analogies between discrimination on the basis of race, which the court subjected to strict scrutiny, and discrimination on the basis of sex.

In concurring with Brennan’s opinion, three justices observed that although they agreed with the Frontieros in this particular case, they were not yet persuaded that sex ought to be regularly treated as a “suspect category.” Only when—or if—the Equal Rights Amendment were passed could the court be sure that the public agreed that discrimination on the basis of sex ought to be evaluated as critically as discrimination on the basis of race. Note that the facts in *Frontiero* relate to discrimination against the husband of the wage earner, not directly against a woman. It is the family of the wage earner that is discriminated against. A similar case, also argued by Ginsburg, is *Weinberger v. Weisenfeld* (420 US 636 [1975]), in which the husband of a dead woman successfully demanded survivor’s benefits equal to those available to widows. Ginsburg and her colleagues stressed that both men and women benefited from gender-blind equal treatment under the law.

**MR. JUSTICE WILLIAM J. BRENNAN, JR., DELIVERED THE OPINION OF THE COURT:**

The question before us concerns the right of a female member of the uniformed services to claim her spouse as a “dependent.”…

At the outset, appellants contend that classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree.…

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of “romantic paternalism” which, in practical effect, put women, not on a pedestal, but in a cage. Indeed, this paternalistic attitude became so firmly rooted in our national consciousness that, 100 years ago, a distinguished Member of this Court was able to proclaim.… “The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”…

It is true, of course, that the position of women in America has improved markedly in recent decades. Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market, and perhaps most conspicuously, in the political arena.…

Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the member of a particular sex because of their sex would seem to violate “the basic concept of our system that legal burdens should bear some relationship to individual responsibility.…” And what differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.…

… Over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classification. In Tit[le] VII of the Civil Rights Act of 1964, for example, Congress expressly declared that no employer, labor union, or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of “race, color, religion, *sex*, or national origin.” Similarly, the Equal Pay Act of 1963 provides that no employer covered by the Act “shall discriminate… between employees on the basis of sex.”…

With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny. Applying the analysis mandated by that stricter standard of review, it is clear that the statutory scheme now before us is constitutionally invalid.…

**MR. JUSTICE LEWIS F. POWELL, JR., WITH WHOM THE CHIEF JUSTICE AND MR. JUSTICE HARRY A. BLACKMUN JOIN, CONCURRING IN THE OPINION:**

I agree that the challenged statutes constitute an unconstitutional discrimination against servicewomen… but I cannot join the opinion of Mr. Justice Brennan, which would hold that all classifications based upon sex… are “inherently suspect and must therefore be subjected to close judicial scrutiny.”… The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the constitution.… It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.

*Frontiero v. Richardson*, 411 U.S. 677 (1973)