

Nick Sweeney

## Importance of Gender Equality Legislation in 2021

### Introduction:

One way to look at gender equality in the United States is as a long, slow march toward progress. For much of American history, women have been treated as second-class citizens. Indeed, just over a century ago, women lacked the right to vote, control their own bodies, or even own property in some states (Williams, Historical Background of Sex and Gender, n.p). It has only been through a long series of legal milestones such as the Civil Rights Act, Title IX, and the Violence Against Women Act, that women have finally become more integrated and equal members of society. However, even in 2021 the problem of gender inequality is far from resolved. Women still earn less in their careers, are underrepresented in politics, and rely on unreliable political actors to secure the rights that they already have (Williams, Historical Background of Sex and Gender, n.p). Thus, In order to further achieve gender equality there are three challenges which require legislation: the legal instability of current rights; the lack of equality in politics; and the lack of equality in the economy.

### Assumptions:

My argument will be going off of some basic starting assumptions. For one, it is clear that in the past, laws supporting gender equality have been successful. Based on this, it is reasonable to assume that legislation can fix problems related to gender equality. We can see the truth of this when looking at how much things have changed since the passage of Title VII. Originally passed in 1964, the law bars sex based discrimination in the workplace (Williams: Gender, Formal Equality, and Employment; n.p). Andrea Beller in her 1984 analysis published in "Law and Inequality: A Journal of Theory and Practice" explains that Title VII was designed in accordance with the leading economic theories of the time to counter occupational, sex-based discrimination (Beller, 74). Beller's Analysis, published more than a decade after the implementation of Title VII, suggests that the law was indeed effective in increasing "women's entry into nontraditional occupations during the seventies, thereby decreasing the extent of occupational segregation by sex." (82) The success of this laws indeed shows that legislation can be effective in correcting a problem related to gender equality.

A second assumption I make is that the public generally supports gender equality legislation. If new legislation is to be passed in a democracy such as ours, it is certainly important that the public be supportive of the general principles behind it. Indeed, the public does seem broadly supportive of action to address gender equality. According to Pew Research, 57% of Americans in 2020 believed that the country had not gone far enough on equal rights for women (Barrosso, n.p, Key Takeaway #1). Similarly, a substantial majority of 76% feel that the gains of women have not come at the expense of men (key takeaway #3). This shows that the public is conceptually supportive of actions to further gender equality. The public even seems expectant that leaders will take action, with 81% of those who support further progress believing that the country will get there eventually (key takeaway #7).

## Context and Historical Background:

For a long time, the United States, a country supposedly based on principles of liberty and equality for all, was a place where women were treated as little more than the property of their husbands and male relatives. Under the legal principle of coverture, a woman had no more legal status than that of a child or of a slave (**Women and The Law n.p**). In her essay "The History of the Women's Suffrage Movement" Sandra Day O'Connor, the first female Supreme Court Justice, lays out some of this troubling early history. She explains that the founders never intended to create a system where women were treated as equal citizens (O'Connor, 658). She writes, "The Constitution, signed in September 1787, was produced by fifty-five men for a nation in which men were to govern...Although neither the Constitution nor the Bill of Rights explicitly denied equal rights to women, it seems fair to say that the Framers envisioned no role for women in the new American government." (**O'Connor, 658**). The essay goes on to explain how men and women operated in totally different spheres of society throughout the 19th and early 20th centuries, and how married women especially continued to live as second-class citizens with limited rights (658). The idea of women operating in different spheres of society existed not only as a social concept but was enforced by the law. For instance, many employment opportunities that were open to men were legally closed to women (Williams, Historical Background of sex and Gender, n.p). In the court case "Muller v. State of Oregon (1908)", the supreme court unanimously upheld a statute that barred women from working the same hours as men in mechanical positions (Williams, Historical Background of Sex and Gender. n.p). There were many such statues at this time, seeking to "protect" women from working in jobs they seemingly weren't suited for, something McBride and Parry point out in their book, *Women's Rights in the USA: Policy Debates and Gender Roles*, (**Mcbride and Parry, 215**)

O'Connor explains that while the growth of the women's movement in the 19th and early 20th century allowed women to have a voice politically (O'Connor, 658), it wasn't until 1920, after many decades of hard-fought activism and public pressure, that the 19th amendment was passed into the Constitution, granting women across the U.S. the right to vote (668). With the passage of the 19th amendment, women were finally able to have a say in government and demand that their rights be respected. O'Connor expresses this best, writing that after the 1952 elections it had become clear that women were a decisive independent voting bloc. After this point, it became clear to the American political system, they must take the needs of women into account or face real consequences (669). With this newfound political power, it is not surprising that before long Congress began to pass many of the important pieces of legislation which make up the foundation of legal gender equality today. Indeed, the civil rights era of the 60s and 70s saw a bevy of major legislation passed, such as Title VII, Title IX, The Equal Pay Act, the Pregnancy Discrimination Act, and others (Williams, Historical Background of Sex and Gender, n.p).

This history may be troubling for us to contend with as a country, but it can teach us a lot about the current state of gender equality in the United States. For one, we can see again just how successful legislation, such as the 19th amendment and the various civil rights era expansions were for the gender equality movement. The 19th amendment and O'Connor's example of the 1952 election especially show how important it is for women to have a fuller and more equal say in government. Similarly,

the strict legal discrimination women faced in the workforce as shown by “Mueller v. State of Oregon” is an example of how poor economic equality can be without legislation such as Title VII. Finally, America's troubling past shows that if we as a society don't keep moving forward, there is no reason to believe we won't slide back into some of the problematic realities of the past. Indeed, despite the impressive legislative expansion of gender equality since the civil rights era, progress seems to have slowed down recently and arguably the last major piece of federal legislation in this area was the Violence Against Women Act back in 1994 (Williams, Historical Background of Sex and Gender). As I will examine in the rest of the paper, it is vital that we don't allow this trend to continue.

### **Reason 1: Risk of Relying on the Judicial and Executive Branches**

As a result of the lag in legislation, women often are forced to rely on the discretion of the courts and of the executive branch to ensure that their rights are respected. Depending on these branches is risky because any positive steps can be reversed in the future.

We see an example of this in the prolonged fight over the interpretation of Title IX. Title IX stipulates, “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.” (Melnick, 2). The law itself is old, passed in 1972, and relatively narrow in scope, merely laying out that a person can't be excluded or discriminated against by educational institutions based on sex (2). Despite this narrow scope, however, it has been used by the courts and the executive branch to crack down on harassment and sexual assault within higher education (2-3). This is surely a noble purpose and few would disagree that the problems of harassment and sexual assault in higher education are serious and pervasive. The trouble with relying on Title IX for this task, however, is that the legislation itself says nothing about these issues. Thus, the enforcement of the anti-harassment and anti-assault policies rely entirely on the whims of the everchanging current occupants of the executive branch and the federal courts. This reality was shown to be highly unfavorable during the Trump administration. Indeed, under President Trump, the Department of Education scrapped the Obama-era regulations surrounding Title IX enforcement and came up with a whole new set of rules which have been derided as a step backwards by women's rights activists (1). Now that Joe Biden has been elected, Melnick predicts, he will almost certainly try to re-write the rules, however, that process can take years (1). This back and forth over government policy every time there's a new party in the White House is something many of us may be used to, but it shouldn't be something we accept in an area as important as equal rights.

Title IX enforcement, of course, isn't the only area where this is an issue. We are seeing right now with the new conservative majority on the Supreme Court, that much of the progress made in the last decades on equality is at risk. Indeed, many equal rights advocates point out that, with the confirmation of Justice Barrett to the court, the legal doctrine of Roe v Wade is especially at risk of being overturned (Kim, n.p). The threat to Roe is also pointed out in a scholarly article written by The Editors of the New England Journal of Medicine et al. In this piece, the authors contend that the threat to Roe v. Wade is severe and that in the almost 50 years since abortion was made legal,

there have been fewer abortions and 90% less death from unsafe abortion procedures (Editors et al, 979). The authors go on to point out the severe risk that comes with unsafe abortion. They contend that these unsafe abortions will become far more prevalent if the legality of the procedure is removed (979). The Biden administration has seemingly recognized this threat and has committed to codifying Roe into law ("Statement from President Biden and Vice President Harris on the 48th Anniversary of Roe v. Wade." n.p). This is exactly the sort of legislative initiative which is necessary if we are to ensure that equality is protected. Indeed, the threats that currently exist to rights such as abortion and physical safety on college campuses, could easily be fixed if congress were so inclined as to pass new legislation.

## **Reason 2: Inequality in the Political Sphere**

Another Challenge which requires legislation is the inequality that women face in political representation. McBride and Perry point out that despite women making up the majority of the electorate by a factor of over 10 million voters, they still make up a shocking minority of elected representatives: just 10% of governors; 19% of U.S. senators and representatives; and 18% of mayors as of 2016 (McBride and Perry, 57). In addition to this, women's "relative influence" in politics has not improved since the early 1990s, or around the time of the passage of the Violence Against Women Act (57). Now it is worth noting that these numbers have improved somewhat from 2016 and indeed women now make up over a quarter of the new Congress, and for the first time we have a female Vice President (Blazina, np). Still, given that women make up a majority of voters one would expect to have at least half of all representatives and senators be women. To McBride and Perry, this disadvantage that women seem to have in politics is at least partially a result of our political institutions themselves (58-59).

Fortunately, there are some legislative possibilities to ensure our government has more representative institutions. One proposal is the creation of a commission on women in politics similar to the U.N. Commission on the Status of Women. Such commissions have precedent in the U.S. and existed under the Kennedy, Nixon, and Carter administrations. During this time the commissions had success in driving the government to take action on issues such as equal opportunity in employment (83). Since the 1980's such commissions have fallen out of favor with presidential administrations (84-85). To bring back these commissions, Congress could act to pass legislation requiring them to exist in every administration.

Another method that McBride and Perry suggest to to ensure the political system works better for women, is to encourage more women to run for and obtain office through the establishment of multimember districts (86). Such districts, they explain, are used in many other developed democracies and "appear to yield more favorable outcomes for both black and anglo women" (86). The question of multi member districts as a way to combat gender inequality is something that was explored in a 2013 article by Clark and Caro which was published in the Cambridge University Press. This article, titled "Multimember Districts and the Substantive Representation of Women: An Analysis of Legislative Cosponsorship Networks" examines how electoral systems impact political representation when it comes to gender issues (Clark and Caro, 2). The study ultimately finds that, not only are women more likely to get elected in multimember districts, but once elected they are more incentivized to push for legislation that focuses

on gender related issues (2). Voting innovations were popular for a time in the late 20th century but, similar to the passage of new civil rights legislation, have fallen out of use somewhat (87).

### **Reason 3: Inequality in the Economic Sphere**

Another challenge which requires legislation is the current situation for women in the workforce and economy. Indeed, according to McBride and Parry, women still made over 20% less than men and they enjoy fewer benefits for the same work as of 2016 (211). Women, after all, constitute about half of the workforce and indeed by the 1950s “[women] working for wages had become the norm not the exception.” (219). This rise in women working led to the passage of the Equal Pay Act, Title VII and Executive Order 11375, all of which constitute the “Equal Employment Opportunity Policy in the United States” (220). These laws are old, however, and again rely mainly on the federal courts, and executive discretion to advance. On this issue at least Congress has taken some action, even if not incredibly broad in scope. In 2009 Congress passed the Lilly Ledbetter Fair Pay Act which changed how a person was allowed to sue for gender discrimination in pay. The law was inspired by the Supreme Court case “Ledbetter v. Goodyear Tire and Rubber Co.” (2007), in which the court ruled that to sue for unequal pay, an employee must file within 6 months of the first unequal paycheck. Justice Ginsburg wrote the dissent to this opinion and pointed out that the majority was essentially ignoring the realities of pay disparity (Ginsburg, 2). After all, as Ginsburg points out, pay disparity often accumulates over time and employees usually aren't made aware of how much their colleagues are paid. This can make it all but impossible for someone to know if they are being unfairly compensated (3). The majority opinion on the other hand, written by Justice Alito, claimed that the court was simply following the letter of the law and applying the statute as written (Alito, 24). The new law which Congress passed, signed by President Obama, allows an employee to sue for an equal pay violation within 180 days of the last paycheck instead of the first (Mcride and Parry, 239). This is also another good example of when legislation should be used instead of relying on the courts.

However, despite the EEO, and the occasional new legislation passed by Congress, the wage gap persists. Indeed, even today women earn only 82 cents for every dollar that men make according to the U.S. Department of Labor (Jones, n.p). Women also make less than their male counterpart of the same race for every level of educational attainment. Perhaps most alarming of all, the Covid-19 pandemic has set female participation in the labor force back 30 years (Jones. n.p). Some will claim that the only reason that women earn less than men is because they choose lower paying fields, or else choose to leave the workforce for long periods of time to take care of familial matters. This is a claim which is examined in depth by Lin and Rasdi in their 2019 study “Opt-Out or Pushed Out? Factors Influencing Married Women Professionals’ Decision in Leaving the Workforce ” published in the European Journal of Training and Development. The study finds that often it is not women “choosing” to leave the workforce, but rather it is them being forced out by “factors such as workplace inflexibility, long working hours,[or] high volume of work” (Lin and Rasdi, 785).

Given these troubling facts, new legislation that aims to enforce substantive and not just formal equality in the economy may be necessary. Substantive Equality being

something closer to “equal outcomes”, and formal equality being closer to “equal opportunity” (Williams, Substantive Equality, n.p)(Williams, Formal Equality, n.p). One substantive equality based approach that is often suggested to remedy the gender inequality in the economy is gender quotas. These are thought to be necessary because, as McBride and Parry point out, many organizations claim to stand for equality and yet promote only a “token” amount of women to serve in high up positions such as corporate board members, law firm partners, or tenured professors (241). Indeed, according to McBride and Parry, only 16% of corporate board members, 20% of legal partners, and 25% of tenured professors were women as of 2013 (241).

To fix this issue, one approach that should be explored is the use of quotas for these high-end positions. Indeed, many developed countries already employ such quotas. In a study conducted for the “European Management Journal”, Mateos De Cabo et al, explored the effectiveness of gender-based quotas for corporate boards and found some promising results. The authors explain that a litany of countries in Europe have implemented these boardroom gender quotas, with Norway, France, Spain, Italy, and Iceland among those who have implemented such policies. Most requiring that at least 30-40% of a corporate board be made of the less represented gender. (Mateos de Cabo, et al, 611-612). Some, such as Spain, implemented a so-called “soft law” quota which does not apply any penalties to non-compliant companies, but only says that the government may show preference to companies who are in line with the quotas (211). Most however, implemented, “hard law” quotas with progressive and potentially steep penalties for non-compliant companies. In France, Belgium, and Italy, non-compliant companies can even be dissolved (212). The study found that, unsurprisingly, the “soft quota” employed in Spain was not nearly as successful as the “hard quota” employed in Norway (611, 622). This suggests that substantive equality measures can be highly successful in tackling economic inequality if legislators are willing to give them the force of law.

### **Counter Argument:**

One argument that could be made in objection to my thesis is that formal equality has already been achieved by women and thus no further laws are necessary. There is some truth to this notion that formal equality has already been practically achieved and thus the question is worth addressing. While it is true that formal equality has mostly been achieved by women, there are many areas where this achievement is insecure or not particularly strong (Williams, Formal equality and the Law, n.p). For an example of this we can look again at the situation of Title IX enforcement. Is it really true that women have an equal opportunity to participate in education if they are subject to constant harassment and even sexual assault simply due to their gender? Indeed, one study by Harvard University found 60% of college aged women reported that they or a family member had faced harassment simply because they were a woman (Poll Finds Younger Women and College-Educated Women More Likely to Say They've Experienced Slurs, Offensive Comments, and Harassment. n.p). In addition to this, studies have shown that over 25% of women will face rape or a form of sexual assault while in college (Rainn, n.p). These statistics pretty clearly show that women are not truly given an equal opportunity to participate in education. As I have already discussed, the current framework that helps remedy the situation of harassment and

assault on campus is not secure and additional legislation is likely required to ensure an effective long-term response to these issues. This is again just one example of where formal equality for women is not secure.

As for the second counter argument, one might say that the substantive equality measures I propose are unlikely to be supported by the public. The argument that such policies are unpopular does indeed bear some truth as shown in a 2014 study conducted in the "Comparative Journal of European Politics". In this study Möhring and Teney examine the "contextual determinants of citizens' support for gender boardroom quotas across Europe" (Möhring and Teney, 560). The authors found that, indeed, support for quotas is low in many countries, especially ones with a high degree of formal equality (560). The study also found that "existing quota laws are positively related to citizens' support for boardroom quotas" (560). This suggests that measures such as these have the best chance of passing if there is high public support. With these facts in mind, the objection that substantive equality measures, such as quotas, won't have enough public support is a valid one. This assertion, however, can be refuted in a number of ways. For one, while it may be true that substantive equality runs into more obstacles than formal equality measures, there is still reason to think substantive measures can gain the support of the public. After all, numerous substantive measures, such as affirmative action have already been passed into law and have largely achieved their goals of elevating women into positions traditionally dominated by men (Bartlett 4). Similarly, the point that substantive equality measures such as affirmative action aren't popular isn't entirely true. Indeed when Gallup conducted a poll in 2018 which asked "Do you generally favor or oppose affirmative action programs for racial minorities? ...61% of Americans were in favor" (Newport, n.p). Now this is indeed a support for race based affirmative action, but it shows a broad support for the concept of affirmative action generally. On top of this, Möhring and Teney found in their study that "the more equal representation of women in politics and leading business positions, the lower is citizens' support for a gender quota for company board" (575). Since the U.S, as already shown, has low levels of equal representation in politics and leading business positions, it is logical to assume that support for quotas could actually be somewhat strong.

### **Conclusion:**

The arguments of this paper have a number of implications for society. For one, if the U.S does pass new legislation that corrects the problems I have identified, there could be significant benefit, not just for women, but for society at large. It seems reasonable to assume that if women are given equal opportunity in the economy, society will be better off as more people are able to reach their full potential. This assumption was examined in a 2017 study, published in the Journal of Intereconomics, which looked at what effect gender equality had on the GDP of countries across the European Union. (Maceira, 178). Maceira explains the view that gender equality is not only morally desirable, but also has serious potential benefits for societies (178). In the study, Maceira finds that improving gender equality would create millions of new jobs across the EU, raise per capita GDP, and would lead to general economic growth (183). This study was targeted to the European Union but given the general similarities between the

United states and the EU as both being large, developed democratic societies, there is every reason to believe these findings also imply that gender equality would have similar benefits in the U.S. For this to be achieved however, it is crucial that women be able to exercise their full influence in politics to fight for their rights. Indeed, even on a morality basis alone, how can the United States take pride in its democracy when all the glaring disparities which I have pointed out still exist in our political system. As McBride and Parry point out “American’s value democracy and the essential role of political participation in its exercise; the political environment is rich with concepts of majority rule, equality, individual rights and popular sovereignty” (57). Yet with the findings I examined in this paper regarding female representation in politics, this is clearly one area where our democracy is failing to live up to the ideal.

America has come a long way since the coverture and “separate sphere” ideology of the 19th and early 20th centuries. Problems remain to be addressed and morality, good sense, and the public demands that we address them. For over 100 years Americans have fought to secure gender equality through bold legislative action, this tradition has stalled somewhat in recent years but there is no reason it shouldn't be revived stronger than ever.



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