

# CONGRESSIONAL POWER TO EFFECT SEX EQUALITY

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From its passage by Congress in 1972 to its ratification failure in 1982, the Equal Rights Amendment (“ERA”) pivotally shaped sex equality discourse. While historians and legal scholars have examined and analyzed its demise, its failure has been deemed inconsequential for constitutional doctrine—conventional wisdom submits that a “de facto ERA” was achieved through judicial action. This Article argues that this dominant narrative has obscured the other half of the equation—the role of Congress in implementing the “de facto ERA.” Through original archival and legislative research, this Article offers a new account of congressional action aimed at entrenching the substantive guarantees of the sex equality principle. This Article introduces the Economic Equity Act to the sex equality narrative.

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Originally conceived as enforcement legislation for the ERA, this Article shows how congressional lawmakers used the omnibus Economic Equity Act for over a decade to articulate and advance their substantive vision of equality for women. Lawmakers introduced successive versions of the Act from 1981 to 1996, passing over thirty enactments. This Article argues that through the provisions of the Economic Equity Act, the women’s movement, lawmakers, and their constituents staked claims to the emerging meaning of sex equality and the terms of women’s economic citizenship—a critical chapter that has been written out of the histories of sex equality.

This Article argues that this account rewrites our history of sex equality in three important ways. First, this Article contends that the Economic Equity Act constituted a decisive turning point in congressional activity—away from legislation effecting “equality in theory” through facial prohibitions on sex discrimination, to legislation aimed at achieving substantive equality or “equality in fact.” Second, this account redresses a fundamental gap in the sex equality literature by showing how lawmakers advanced the Economic Equity Act in an effort to revise New Deal-era federal law and policy premised on the norm of the male breadwinner and female homemaker. Finally, this Article reveals the Economic Equity Act as a foundational chapter for understanding the historical and contemporary role of Congress in effecting sex equality. At stake for lawmakers advancing the Economic Equity Act were the terms on which the benefits and privileges of economic citizenship under federal law would be conferred in the wake of the societal changes precipitated by the modern women’s movement.

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INTRODUCTION: RETHINKING SEX EQUALITY'S CONTEMPORARY NARRATIVE

The second women's rights movement in the United States achieved monumental changes in law and society in the latter half of the twentieth century. Though the Equal Rights Amendment fell short of ratification, constitutional law scholars credit the Supreme Court's interpretation of the Equal Protection Clause—coined the “de facto ERA”—with accomplishing the same ends.<sup>1</sup> In the private sector, the Equal Pay Act, Title VII's prohibition on sex discrimination in employment, Title IX's prohibition on sex discrimination in education, and the Pregnancy Discrimination Act are similarly heralded as doing a prodigious amount of work for sex equality.<sup>2</sup> Nonetheless, in the context of the modern women's movement, the progress made toward equality at the federal level involved more than this Supreme Court doctrine in lieu of the ERA and the statutory prohibitions on discrimination in the private sector that dominate the typical sex equality narrative.<sup>3</sup> Absent from these accounts is acknowledgment that even if the ERA had passed, its mandate, as borne out in equal protection doctrine, could not have compelled the proactive revision of law and reconstruction of the legal order that a substantive vision of sex equality ultimately demands.<sup>4</sup>

Yet, in 1981, as the fate of the ERA was still unfolding, congressional lawmakers proceeded with just such an agenda—to revise and reconstruct

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<sup>1</sup> See, e.g., Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1334 (2006) [hereinafter Siegel, *Constitutional Culture*] (summarizing this “emergent understanding”). But see Bruce Ackerman, *Interpreting the Women's Movement*, 94 CALIF. L. REV. 1421, 1436 (2006) (“To be sure, the Court's performance converged . . . with the positions developed by ERA advocates in the ratification debates. Nevertheless, it is easy to underestimate the loss suffered when the Supreme Court substituted its ‘de facto ERA’ for the genuine article. Although a few legal cognoscenti will take a different view, ordinary people will continue to think that the ERA was a loser, not a winner . . .”).

<sup>2</sup> See *infra* notes 24, 25, 27, 28. These statutes are often referred to as the core prohibitions on sex discrimination in the private sector. See, e.g., Deborah L. Brake, *What Counts as “Discrimination” in Ledbetter and the Implications for Sex Equality Law*, 59 S.C. L. REV. 657, 658 (2008) (describing these enactments as “[t]he major federal statutes proscribing discrimination based on sex”).

<sup>3</sup> Another fundamental objective of the women's movement is securing reproductive freedom. See, e.g., Susan Estrich, *Politics and the Limits of Law: A Musing for Dean Sullivan*, 90 CALIF. L. REV. 813, 813 (2002) (discussing a “woman's right to choose, without which equality is unattainable” in conjunction with equal protection and Title VII).

<sup>4</sup> For a discussion of the limitations of the ERA for satisfying the feminist movement's vision of equal citizenship for women, see Serena Mayeri, *A New E.R.A. or a New Era? Amendment Advocacy and the Reconstitution of Feminism*, 103 NW. U. L. REV. 1223, 1228, 1291–92 (2009) [hereinafter Mayeri, *A New E.R.A.*]; Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1989–95 (2003) [hereinafter Post & Siegel, *Legislative Constitutionalism*].

the federal legal order in the name of sex equality. The centerpiece of this agenda was an omnibus bill called the Economic Equity Act (or “Equity Act”). The Act itself was originally intended to be “implementing legislation for the Equal Rights Amendment,”<sup>5</sup> just as the Reconstruction Amendments were followed by enforcement legislation.<sup>6</sup> But in the absence of an ERA, lawmakers forged ahead with the Equity Act for more than a decade.

Until now, despite being a principal part of the federal legislative agenda of the second women’s movement in the post-ERA period, the Economic Equity Act has gone virtually unnoticed in legal scholarship and is remarkably absent from contemporary sex equality narratives.<sup>7</sup> To be sure, the Economic Equity Act is recognized by political scientists as an integral part of the story of the rise of women in Congress in the 1980s.<sup>8</sup> But the Equity Act also reshapes the standard account of feminist legal reforms in the 1980s. From a legal perspective, the familiar sex equality narrative for the 1980s centers on the robust activity in the Supreme Court on behalf of women’s equality and reproductive rights, as well as on the continuation of state law reforms in areas such as no-fault divorce, spousal rape, rape shield laws, and domestic violence laws.<sup>9</sup> While not incorrect, this Article claims

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<sup>5</sup> Geraldine A. Ferraro, *The Amendment Would Ensure Long-Term Structural Change*, CENTER MAG., Nov./Dec. 1983, at 11, 12 [hereinafter Ferraro, *The Amendment*].

<sup>6</sup> Post & Siegel, *Legislative Constitutionalism*, *supra* note 4, at 2031 (noting the “[j]oint legislative and judicial enforcement of the Reconstruction Amendments”).

<sup>7</sup> In legal commentary, the Economic Equity Act has received scant attention. For the few citations in the legal literature that center on the political aspects of women’s advocacy in Congress, see, e.g., Julia L. Ernst, *The Congressional Caucus for Women’s Issues: An Inside Perspective on Lawmaking by and for Women*, 12 MICH. J. GENDER & L. 189, 200 (2006) (describing the multiple purposes of the Women’s Caucus, including developing “omnibus legislative proposals” such as the Economic Equity Act); June K. Inuzuka, *Women of Color and Public Policy: A Case Study of the Women’s Business Ownership Act*, 43 STAN. L. REV. 1215, 1234–35 (1991) (arguing for policy advocates to formulate an omnibus bill similar to the Economic Equity Act specifically focusing on women of color); Stacey H. Doré, Book Note, 18 HARV. WOMEN’S L.J. 333, 338 (1995) (reviewing BARBARA C. BURRELL, *A WOMAN’S PLACE IS IN THE HOUSE: CAMPAIGNING FOR CONGRESS IN THE FEMINIST ERA* (1994)) (identifying the Economic Equity Act as one of several legislative areas in which female lawmakers have exerted influence in Congress).

<sup>8</sup> Political scientist Irwin N. Gertzog has written about the Economic Equity Act in conjunction with his extensive work on women in Congress. IRWIN N. GERTZOG, *WOMEN & POWER ON CAPITOL HILL: RECONSTRUCTING THE CONGRESSIONAL WOMEN’S CAUCUS* 48–50 (2004) (lauding the “success” of numerous Equity Act bills and classifying many of the Act’s measures as “[g]roundbreaking”) [hereinafter GERTZOG, *WOMEN & POWER*]; IRWIN N. GERTZOG, *CONGRESSIONAL WOMEN: THEIR RECRUITMENT, INTEGRATION, AND BEHAVIOR* 158 (1995) [hereinafter GERTZOG, *CONGRESSIONAL WOMEN*]. Other political science commentators and scholars of women’s history have offered limited accounts of the Equity Act, often in conjunction with studies of either the ERA or women in Congress. See, e.g., MARY FRANCES BERRY, *WHY ERA FAILED: POLITICS, WOMEN’S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION* 76 (1986); BARBARA C. BURRELL, *A WOMAN’S PLACE IS IN THE HOUSE: CAMPAIGNING FOR CONGRESS IN THE FEMINIST ERA* 163–69 (1994); JOAN HOFF, *LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN* 273 (1991); GILBERT Y. STEINER, *CONSTITUTIONAL INEQUALITY: THE POLITICAL FORTUNES OF THE EQUAL RIGHTS AMENDMENT* 83–84 (1985).

<sup>9</sup> See generally CATHARINE A. MACKINNON, *SEX EQUALITY* (2001) (including discussions of, inter alia, rape, domestic violence, and divorce law reforms).

that this historical encapsulation is incomplete because it lacks any meaningful account of congressional action during this time period. Instead, the Equal Pay Act of 1963, Title VII and its progeny in the 1960s and 1970s,<sup>10</sup> and the Pregnancy Discrimination Act of 1978 constitute the familiar congressional landmarks in the march towards women's equality, which are then followed by the substantially more recent Family and Medical Leave Act of 1993 ("FMLA") and the Violence Against Women Act of 1994 ("VAWA"). The Economic Equity Act, introduced in successive iterations from 1981 to 1996, presents an important bridge between these two phases of congressional activity in the area of sex equality.

As this Article reveals, the women's movement did not forego congressional advocacy in the 1980s as the traditional narrative suggests. Moreover, that advocacy went far beyond efforts to pass another ERA and family leave legislation. Rather, the women's movement, in concert with congressional lawmakers, forged ahead with a long-term and far-reaching agenda to advance women's economic equality through the legal reforms advanced in the omnibus Economic Equity Act. Led by Senator David Durenberger in the Senate and the Congressional Caucus for Women's Issues<sup>11</sup> in the House, these lawmakers first introduced the Equity Act during the 97th Congress in 1981.<sup>12</sup> A version of the Act was introduced in each successive Congress through the 104th Congress in 1996.<sup>13</sup> Each provision of the Act had a counterpart in a separate bill to facilitate passage of individual parts.<sup>14</sup> As parts of the Act were enacted in correlating bills, new measures were added to the Equity Act for the next Congress.<sup>15</sup> Likely overlooked because of the Act's omnibus nature, in fact, a wide variety of measures advanced through the Economic Equity Act agenda were enacted.<sup>16</sup> Altogether, the progressive versions of the Equity Act comprise a rare perspective into a concerted fifteen-year span of lawmaking activity in the name of women's equality.

By uncovering the path of the Equity Act, this Article makes several contributions to the legal literature. As an initial matter, this Article forms the foundation for further study of this pivotal period of congressional activity. Each provision of the Equity Act had a counterpart in another piece of legislation; this counterpart legislation is where these provisions were tracked in congressional records. For the first time in a series of attached

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<sup>10</sup> Title VII paved the way for a series of facial prohibitions on sex discrimination in areas such as housing, education, and lending. *See infra* note 27.

<sup>11</sup> Founded as the Congresswomen's Caucus, it later changed its name to the Congressional Caucus for Women's Issues. This Article, like much of the literature about the Caucus, also alternately refers to it as the Women's Caucus. *See infra* Part I.C.

<sup>12</sup> *See infra* Table 1.

<sup>13</sup> *See infra* Table 1.

<sup>14</sup> *See infra* Table 3.

<sup>15</sup> LESLIE W. GLADSTONE, CONG. RESEARCH SERV., IB86093, THE ECONOMIC EQUITY ACT 1 (1987).

<sup>16</sup> *See infra* Table 2 for a summary of major enactments.

Tables, this Article puts the provisions of the Act into plain view.<sup>17</sup> Through legislative and archival research, I have matched these provisions with their corresponding bill and public law numbers. This research and analysis reveals a deliberate and coordinated effort in the name of sex equality that has been previously unrecognized. As this Article argues, through the provisions of the Equity Act, the women's movement, lawmakers, and their constituents staked claims to the emerging meaning of sex equality and to the terms of women's economic citizenship—a critical chapter that has been virtually written out of the histories of sex equality despite having profound implications for contemporary law and policy dilemmas.

This account rewrites our historical understanding of sex equality in three important ways. First, the Equity Act reveals a decisive turning point in legislative activity. From its inception, lawmakers proceeded with the Economic Equity Act as a way to move beyond “equality in theory” as embodied by the formal equality pronouncements of the ERA and the facial prohibitions of the antidiscrimination legislation of the 1960s and 1970s, to a concerted effort to achieve substantive equality or “equality in fact.”<sup>18</sup> The conventional narrative of the second women's movement centers on Title VII and the Equal Rights Amendment—and, in its absence, the “de facto ERA”—as the linchpins of women's contemporary economic equality.<sup>19</sup> But the Economic Equity Act makes plain that, in addition to these measures, legal reformers also were concerned with the way in which the law shaped women's financial lives beyond the question of access to jobs, workplace advancement, and formal political equality. Using the Equity Act, these reformers hoped to make incremental changes in non-employment laws (e.g., tax, pension, Social Security, insurance, and credit), all of which in the aggregate substantially affected the financial circumstances of women in the United States.<sup>20</sup>

Second, this account redresses a fundamental gap in the sex equality literature by showing how lawmakers advanced the Economic Equity Act in an effort to revise New Deal-era federal law and policy premised on the norm of the male breadwinner and female homemaker. While the ways in which the separate spheres ideology permeate the post-New Deal state and

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<sup>17</sup> See *infra* Tables 1–4. For an explanation of the methodology I employed to produce these Tables, see *infra* Appendix.

<sup>18</sup> See Mayeri, *A New E.R.A.*, *supra* note 4, at 1243–70.

<sup>19</sup> For the history of women's economic status generally, see, e.g., CLAUDIA GOLDIN, *UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN* (1990) (showing that the present economic status of women evolved gradually over the last two centuries and that past conceptions of women workers persist); ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA* (2003) (tracing changing ideals of fairness from the 1920s to the 1970s to show how a deeply embedded set of beliefs, or “gendered imagination” shaped seemingly neutral social legislation to limit the freedom and equality of women) [hereinafter KESSLER-HARRIS, *IN PURSUIT OF EQUITY*].

<sup>20</sup> See *infra* Table 3.

reverberate through modern federal law and policy are well-documented,<sup>21</sup> the deliberate and coordinated agenda of lawmakers to revise and reconstruct this legal order has not been similarly documented. This Article fills this void by uncovering the complex legislative process of the Economic Equity Act, revealing a sustained congressional effort deliberately aimed at dismantling the gendered constructs within federal law and policy, through the measures advanced in the Equity Act and related legislation.

Third, this Article claims that the Economic Equity Act is a foundational chapter for understanding the historical and contemporary role of Congress in effecting sex equality. Lawmakers first introduced the Equity Act during the intense period of mobilization for women's rights just prior to the June 30, 1982 deadline for ratification of the Equal Rights Amendment. But even after the failure of the ERA, lawmakers continued to advance the Economic Equity Act. For more than a decade, through a dynamic process in which congressional lawmakers responded directly to their constituents' demands by enacting legislation aimed at solving the problems that women were facing in their everyday lives, Congress embraced its representative role in realizing its constituents' expectations for sex equality. This Article argues that, by doing so, Congress sought to shape both the meaning of sex equality and the contours of congressional power to effect sex equality. By situating this intense period of congressional activity into the constitutional sex equality narrative, this Article offers new insights for contemporary debates about the sources of constitutional meaning and the dynamics of con-

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<sup>21</sup> For an extensive historical account of the ways in which the family wage model of the male breadwinner and female homemaker shaped New Deal-era federal law and policy, see generally KESSLER-HARRIS, IN PURSUIT OF EQUITY, *supra* note 19. See also SUZANNE METTLER, DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY (1998) (discussing the ways in which New Deal-era federal law and policy institutionalized gender politically, most clearly by incorporating men, particularly white men, into nationally administered policies and consigning women to more variable state-run programs). For historical accounts with respect to particular federal programs, see, e.g., Alice Kessler-Harris, *Designing Women and Old Fools: The Construction of the Social Security Amendments of 1939*, in U.S. HISTORY AS WOMEN'S HISTORY: NEW FEMINIST ESSAYS 87 (Linda K. Kerber, Alice Kessler-Harris & Kathryn Kish Sklar eds., 1995) (discussing gendered assumptions with respect to Social Security) [hereinafter Kessler-Harris, *Designing Women*]; Melissa E. Murray, *Whatever Happened to G.I. Jane?: Citizenship, Gender, and Social Policy in the Postwar Era*, 9 MICH. J. GENDER & L. 91 (2002) (discussing gendered assumptions with respect to the G.I. Bill).

There is also an extensive literature regarding reform proposals aimed at addressing the gendered underpinnings of federal law and policy. See, e.g., Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2004 (1996) (suggesting that "tax law changes, particularly in combination with other legal reforms, could improve the economic well-being of families with children or help ease women's labor-force participation"); Goodwin Liu, *Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing, and the Challenge of Reform*, 1999 WIS. L. REV. 1, 4 (1999) (arguing that "[e]liminating Social Security's bias in favor of wage over non-wage work" requires as a first step "assign[ing] independent economic value to non-wage work").



stitutional change, as well as the role of Congress and the bounds of federal legislative power.<sup>22</sup>

Ultimately, this Article contends that the post-ERA period presented multiple possibilities for providing economic security for women. At that moment in time, a powerful coalition of bipartisan lawmakers presented a comprehensive plan for providing economic security for women, including some measure of economic value for care work. But while feminist lawmakers sought to bolster economic security for families of all kinds, they faced mounting obstacles in a political climate increasingly skeptical of new demands on the public fisc. As lawmakers and the women's movement struggled to define the role of government in the pursuit of equality for women in the wake of the ERA's defeat, changing social and political conditions brought to the forefront this greater ideological struggle over the role of government in, and the basis for, conferring the benefits and privileges of citizenship.

While the Economic Equity Act animated the battles over sex equality itself, it ultimately suffered from the ideological conflicts of the post-ERA period. The failure of the ERA, the coalescence of enduring resistance to the post-New Deal welfare state, and the continued support for marriage as a means of privatizing family economic support through a male provider were factors that undermined the original goals of the Economic Equity Act, even as societal changes called for restructuring the federal system. The conflict and compromise related to the Economic Equity Act reveal the centrality of competing visions of the ideal family to the reconfiguration of economic citizenship that took place in the late twentieth century.

This Article proceeds in three parts. Beginning in Part I, this Article explores the social, political, and legislative conditions that coalesced in the 1960s and 1970s to set the stage for the advancement of the Economic Equity Act in Congress. Despite the many victories for the women's movement during this period, ratification of the ERA remained elusive. This Part explores the precursors to the Economic Equity Act, particularly the Women's Equality Act of 1971, as well as the series of congressional hearings that followed on the economic condition of women. At the same time, the women's movement moved from grassroots advocacy to an increasing capacity to advocate from within the legislative process. Accordingly, Part I also describes the establishment of the Women's Caucus, which constituted the first formal coalition of women in Congress.

Part II then examines the progression of the Economic Equity Act as lawmakers consciously shifted their focus from an initial emphasis on "displaced homemakers" to laws enabling women to enter the workforce. I argue that this careful exploration of the Equity Act exposes the ways in which the historic divisions between work and family life shadowed lawmaking about other women's economic issues at the end of the twentieth century.

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<sup>22</sup> See *infra* Part III.C.

Like its more famous cousins, the ERA and Title VII, the Equity Act signified a shift in thinking about women's proper place and their suitability for paid work. However, the Equity Act went beyond Title VII and the ERA by highlighting ways in which economic inequality stems from more than simply restrictions on employment or gendered workplace conditions. The Equity Act made clear that the vestiges of the separate spheres ideology would have to be remedied—in the home, in the workplace, and in the state at large—if women were to achieve economic equality. Part II concludes with the final chapters of the Equity Act. Lawmakers proceeded with the Equity Act, setting the stage for sweeping legislative enactments in the 103rd Congress. Immediately thereafter, the election of 1994 swept in a Republican Congress that stripped funding for Legislative Service Organizations including the Women's Caucus. While the Caucus later reemerged as a congressional members organization with outside organizational support, the political will for continuation of the Equity Act had been lost.

Part III discusses the implications of this sustained period of legislative activity. I argue that the story of the Economic Equity Act underscores the proposition that equality is dependent not only on facial prohibitions and interpretation of those prohibitions, but also on the specific and targeted deconstruction of a complex legal order predating the civil rights and women's rights movements of the latter half of the twentieth century. This Part also suggests, however, that while the Equity Act agenda was an integral part of the women's equality movement, it was not without its limitations. Accordingly, this Part explores the costs of the approach utilized by the Act's framers and the compromises regarding women, work, family, and the welfare state that defined the renewed terms of economic citizenship as forged in the late-twentieth century. Finally, Part III then turns to the theoretical and practical implications of this sustained period of lawmaking by addressing the questions raised for contemporary debates about the dynamics of constitutional change and the bounds of legislative power, as well as the consequences of this period of lawmaking for federal law and policy.

## I. CONGRESS, THE EQUAL RIGHTS AMENDMENT, AND THE ORIGINS OF THE ECONOMIC EQUITY ACT

### A. *The Equal Rights Amendment and the Women's Equality Act of 1971*

For the women's movement and for women's lives, the 1960s and 1970s were transformative.<sup>23</sup> During this time, Congress enacted an array of legis-

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<sup>23</sup> For excellent historical discussions of this period, see generally SARA M. EVANS, *TIDAL WAVE: HOW WOMEN CHANGED AMERICA AT CENTURY'S END* (2004); ESTELLE FREEDMAN, *NO TURNING BACK: THE HISTORY OF FEMINISM AND THE FUTURE OF WOMEN* (2002); RUTH ROSEN, *THE WORLD SPLIT OPEN: HOW THE MODERN WOMEN'S MOVEMENT CHANGED AMERICA* (2000).

lation prohibiting discrimination “on account of” or “on the basis of sex.” The Equal Pay Act of 1963 required equal pay for equal work regardless of sex.<sup>24</sup> Title VII of the Civil Rights Act of 1964 prohibited, inter alia, sex discrimination in employment.<sup>25</sup> In 1967, President Lyndon Johnson issued Executive Order No. 11375, which prohibited sex discrimination in employment by federal contractors.<sup>26</sup> A series of similar prohibitions on sex discrimination followed these groundbreaking enactments.<sup>27</sup> Congress also enacted the Pregnancy Discrimination Act of 1978 as an amendment to Title VII to prohibit discrimination on the basis of pregnancy, childbirth, or related medical conditions in employment.<sup>28</sup>

Furthermore, the Supreme Court issued a number of landmark decisions in the 1970s regarding sex-based classifications and reproductive rights. In 1971, in *Reed v. Reed*,<sup>29</sup> the Supreme Court extended Equal Protection Clause scrutiny to sex-based classifications. Two years later, in *Frontiero v. Richardson*,<sup>30</sup> the Supreme Court went a step further by calling for a heightened standard of review for sex-based classifications under the Equal Protection Clause. Also in 1973, the Supreme Court established a woman’s right to choose an abortion in *Roe v. Wade*.<sup>31</sup> In 1976, in *Craig v. Boren*,<sup>32</sup> the Supreme Court extended “intermediate” scrutiny under the Equal Protection Clause to sex-based classifications.

Even with these legislative and judicial accomplishments, the women’s movement during the twentieth century still sought the Equal Rights Amendment to the Constitution as the fundamental prohibition on sex discrimination. Legislators introduced various forms of an Equal Rights Amendment into Congress starting in 1923.<sup>33</sup> The 92nd Congress finally adopted the ERA and presented it to the states for ratification in 1972. As introduced into Congress in 1972, it stated:

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<sup>24</sup> See Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (2006)).

<sup>25</sup> See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 29 U.S.C. §§ 2000e–2000e17 (2006)).

<sup>26</sup> Exec. Order No. 11375, 3 C.F.R. 684 (1966–1970) (Oct. 17, 1967).

<sup>27</sup> Title VIII of the Civil Rights Act of 1968, popularly titled the Fair Housing Act, prohibited sex discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions. See Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601–3619 (2006)). Title IX of the Education Amendments of 1972 prohibited sex discrimination in any education program or activity receiving federal financial assistance. See Pub. L. No. 92-318, § 901, 86 Stat. 235, 373 (codified at 20 U.S.C. § 1681 (2006)). The Equal Credit Opportunity Act of 1974 prohibited creditors from discriminating against credit applicants on the basis of sex. See Pub. L. No. 93-495, 88 Stat. 1521 (codified as amended at 15 U.S.C. §§ 1691 to 1691f (2006)).

<sup>28</sup> See Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2006)).

<sup>29</sup> 404 U.S. 71 (1971).

<sup>30</sup> 411 U.S. 677 (1973) (plurality opinion).

<sup>31</sup> 410 U.S. 113 (1973).

<sup>32</sup> 429 U.S. 190, 218 (1976).

<sup>33</sup> H.R.J. Res. 75, 68th Cong. (1923).

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. This amendment shall take effect two years after the date of ratification.<sup>34</sup>

During the same Congress, the Women's Equality Act of 1971—considered an early version of the Economic Equity Act—was pending.<sup>35</sup> The ERA and the Women's Equality Act were intended to go hand-in-hand.<sup>36</sup> Indeed, Rep. Abner Mikva, the principal sponsor of the Women's Equality Act, proposed it as a supplement to the ERA.<sup>37</sup> The Women's Equality Act reflected the recommendations of President Richard Nixon's Presidential Task Force on Women's Rights and Responsibilities, and included a wide range of provisions seeking to address sex-based inequality.<sup>38</sup> As described by Senator Edmund Muskie, the Women's Equality Act “would remedy inequities in specific laws”—not as a “substitute for the ERA”—but rather as “an initial response” to the “much broader demand for a change in the status of women.”<sup>39</sup> The two were considered integrally related, as demonstrated by the House Judiciary Subcommittee's consideration of the ERA (House Joint Resolution 208) and the Women's Equality Act (House Bill 916) together in joint hearings.<sup>40</sup>

Historically, framers of the ERA envisioned accompanying legislation to effect post-ERA change. From the very beginning, Section 2 of the ERA stated, “Congress shall have the power to enforce this article by appropriate legislation.”<sup>41</sup> Though the wording of Section 2 of the ERA changed slightly between 1923 and 1972, the intent was the same—to authorize Congress to enact legislation to enforce the amendment. Executing a constitutional amendment through implementing legislation was not without precedent.

<sup>34</sup> H.R.J. Res. 208, 92d Cong., 86 Stat. 1523 (1972).

<sup>35</sup> H.R. 916, 92d Cong. (1st Sess. 1971). See also STEINER, *supra* note 8, at 84 (describing the Women's Equality Act as an “earlier version” of the Economic Equity Act).

<sup>36</sup> *Equal Rights for Men and Women 1971: Hearings on H.J. Res. 35, 208, and Related Bills and H.R. 916 and Related Bills Before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 92d Cong. 87 (1971) [hereinafter *Equal Rights for Men and Women*] (statement of Rep. Abner Mikva) (describing the Women's Equality Act of 1971 as “implementation under the 14th amendment”).

<sup>37</sup> *Id.* at 84–85, 87.

<sup>38</sup> See PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS & RESPONSIBILITIES, A MATTER OF SIMPLE JUSTICE (1970) (evaluating the status of women and recommending legal reforms to further advance opportunities for women); Post & Siegel, *Legislative Constitutionalism*, *supra* note 4, at 2002–03 n.178 (citing *Equal Rights for Men and Women*, *supra* note 36, at 96) (summarizing the provisions of House Bill 916).

<sup>39</sup> 117 CONG. REC. 37,495 (1971) (statement of Sen. Edmund Muskie).

<sup>40</sup> *Equal Rights for Men and Women*, *supra* note 36, at 1. See also LESLIE W. GLADSTONE, CONG. RESEARCH SERV., THE PROPOSED EQUAL RIGHTS AMENDMENT 8 (1983), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-8499:1>.

<sup>41</sup> S.J. Res. 21, 68th Cong. (1923); H.R.J. Res. 75, 68th Cong. (1923).

The Reconstruction Amendments, for example, were followed by implementing legislation.<sup>42</sup>

Indeed, the movement advocating for the ERA “argued that ratifying the ERA was not itself enough to secure equal citizenship for women, just as enforcing Title VII was not itself enough to secure equal employment opportunity for women.”<sup>43</sup> For example, the Women’s Strike for Equality held on August 26, 1970—the fiftieth anniversary of the ratification of the Nineteenth Amendment—“embraced such a demanding vision of equal citizenship that not even the Equal Rights Amendment, whose ratification the movement now sought, could satisfy it.”<sup>44</sup>

Despite these efforts to couple the ERA with implementing legislation, Rep. Martha Griffiths sidelined the Women’s Equality Act, as a strategic matter, in favor of advancing the ERA.<sup>45</sup> As political scientist Gilbert Steiner explained, “Martha Griffiths knew better than to try” to “[s]imultaneous[ly] advance[ ] in Congress . . . as compelling a matter as a constitutional amendment and as complex a matter as an economic equity act.”<sup>46</sup> At the time, opponents of the ERA were pitting the two against each other, arguing that the ERA was unnecessary because similar changes could be achieved through the Women’s Equality Act instead.<sup>47</sup> Historically, one of the persistent issues with the ERA had been the concern that it would eliminate protective legislation for women.<sup>48</sup> Therefore, many ERA opponents advocated for “specific bills for specific ills” instead of an ERA.<sup>49</sup> Consequently, it may have been necessary to downgrade the Women’s Equality Act in order to avoid a showdown between the Act and the ERA. By focusing solely on the ERA, Rep. Griffiths was successful in maneuvering the ERA to a floor vote in the House after it had languished in committee for decades.<sup>50</sup> With a vote of 354 to 24 in the House and 84 to 8 in the

<sup>42</sup> See *supra* note 6. Section 5 of the Fourteenth Amendment, which gives Congress the power to enforce the same amendment through “appropriate legislation,” U.S. CONST. amend. XIV, § 5, continues to be invoked as the basis for Congress’s power to enact certain legislation, such as the Americans with Disabilities Act and the Family and Medical Leave Act. Post & Siegel, *Legislative Constitutionalism*, *supra* note 4, at 2031.

<sup>43</sup> Post & Siegel, *Legislative Constitutionalism*, *supra* note 4, at 1991–92.

<sup>44</sup> *Id.* at 1990. This vision included three primary claims: “(1) free abortion on demand, (2) free 24-hour childcare centers, and (3) equal opportunity in jobs and education.” *Id.* at 1989 (quoting Judy Klemesrud, *A Herstory Making Event*, N. Y. TIMES, Aug. 23, 1970, § 6 (Magazine), at 6).

<sup>45</sup> STEINER, *supra* note 8, at 84 (citing *Equal Rights for Men and Women*, *supra* note 36, at 42).

<sup>46</sup> *Id.*

<sup>47</sup> Post & Siegel, *Legislative Constitutionalism*, *supra* note 4, at 2001–02.

<sup>48</sup> CELIA WOLF-DEVINE, *DIVERSITY AND COMMUNITY IN THE ACADEMY: AFFIRMATIVE ACTION IN FACULTY APPOINTMENTS* 18 (1997).

<sup>49</sup> *Id.* at 18–19.

<sup>50</sup> Martha Griffiths moved the ERA to the floor with a “Discharge Petition” on June 11, 1970. *Martha Griffiths and the Equal Rights Amendment*, NATIONAL ARCHIVES CENTER FOR LEGISLATIVE ARCHIVES, <http://www.archives.gov/legislative/features/griffiths/> (last visited Sept. 15, 2012).

Senate, Congress presented the ERA to the state legislatures for ratification with a seven-year deadline.<sup>51</sup>

*B. Formulating "A Comprehensive Economic Policy Which Includes Women as First Class Citizens"*

Despite formally separating the Women's Equality Act from the Equal Rights Amendment in order to maneuver the ERA to the House floor for its historic vote in 1972, Rep. Martha Griffiths continued to pursue economic equity reforms in Congress. Although she did not reintroduce the Women's Equality Act, Rep. Griffiths sought to lay the foundation for legislation of its kind. In 1973, she chaired hearings sponsored by Congress's Joint Economic Committee on the Economic Problems of Women.<sup>52</sup> Over the course of seven days, Representative Griffiths heard testimony from experts on the economic problems facing women in a host of areas regulated by federal law including "credit, insurance, taxes, transfer payments, Social Security and private pensions, earnings, and employment."<sup>53</sup>

In these hearings, Representative Griffiths began to tease out through testimony what has since been extensively documented by legal and historical scholars: the role that the family wage model of a male breadwinner and a female homemaker played in the structuring of federal law and policy, particularly in the New Deal era. In recent years, legal and historical scholars have documented the ways in which this separate spheres ideology—in which men were delegated to the public sphere of wage work, while women were relegated to the private sphere of home and care work—permeated the New Deal state and continued to reverberate through modern federal law and policy.<sup>54</sup> As Alice Kessler-Harris has shown, New Deal legislation and its progeny created a gendered construction of privileges and benefits of citizenship in the United States, an "economic citizenship" in which the cultural division of labor among the white middle class that assigned caregiving to women and paid work to men became the foundation on which the law and social policy of work, family, and welfare were built.<sup>55</sup>

This robust literature argues that "early welfare state programs such as the workmen's compensation statutes and, later, the Social Security Act inscribed the family wage system into law by providing workingmen with claims of right on the state, while providing mothers with discretionary aid

<sup>51</sup> 117 CONG. REC. 35,815 (1971); 118 CONG. REC. 9,598 (1972).

<sup>52</sup> *Economic Problems of Women: Hearings Before the Joint Economic Committee*, 93d Cong. (1973) [hereinafter *Hearings on the Economic Problems of Women*].

<sup>53</sup> *Id.* at 1.

<sup>54</sup> See *supra* note 21.

<sup>55</sup> KESSLER-HARRIS, IN PURSUIT OF EQUITY, *supra* note 19, at 10–12; see also Catherine L. Fisk, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America*, 51 BUFF. L. REV. 409, 423 (2003) (reviewing KESSLER-HARRIS, IN PURSUIT OF EQUITY, *supra* note 19).

programs such as mothers' pension statutes that reinforced dependency."<sup>56</sup> Barbara Nelson has characterized this disparity in entitlements as the "two-channel welfare state" in which men's wage work and women's non-wage work garner different judgments regarding their social value.<sup>57</sup> The result was to create what Suzanne Mettler has termed "divided citizens"—citizens divided by gender into two tracks of privileges and benefits under the federal system.<sup>58</sup>

In 1973, the operation of gender as a "core rationale for important distributive decisions" in federal law and social policy, while yet to be analyzed by legal and historical scholars, was "no longer invisible."<sup>59</sup> Accordingly, these hearings laid out an extensive record of the economic problems faced by women under federal law based on a sophisticated under-

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<sup>56</sup> John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 LAW & SOC. INQUIRY 717, 719 (2000) (citing LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890–1935* 145 (1994) (discussing the history of state regulation of single mothers in which a two-track system of public aid emerged with single mothers receiving "welfare" while other groups, such as the aged and the unemployed, received "entitlements")); See also GWENDOLYN MINK, *THE WAGES OF MOTHERHOOD: INEQUALITY IN THE WELFARE STATE, 1917–1942*, at vii (1995) (examining "the racial and cultural regulation of women in welfare policy and politics between the two World Wars"); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 7–11* (1992) (asserting that pensions for Civil War veterans and for widowed mothers in the early twentieth century were influential to the New Deal era reforms); Martha L. A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2181 (1995) (arguing that "continued adherence to an unrealistic and unrepresentative set of assumptions about the family affects the way we perceive and attempt to solve persistent problems of poverty and social welfare"); Kessler-Harris, *Designing Women*, *supra* note 21, at 89 (showing how the 1939 Social Security amendments were infused with "generalizations about male/female behavior"); Barbara J. Nelson, *The Origins of the Two-Channel Welfare State: Workmen's Compensation and Mothers' Aid*, in *WOMEN, THE STATE, AND WELFARE* 123, 124 (Linda Gordon ed., 1990) (arguing that the U.S. welfare state can be viewed "as fundamentally divided into two channels, one originally designed for white industrial workers and the other designed for impoverished, white, working class widows with young children"); CAROLE PATEMAN, *The Patriarchal Welfare State*, in *THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM, AND POLITICAL THEORY* 179, 179 (Carol Pateman ed., 1989) (calling for recognition of the "patriarchal structure of the welfare state" in which "women and men have been incorporated as citizens" in very different ways).

<sup>57</sup> Barbara J. Nelson, *The Gender, Race, and Class Origins of Early Welfare Policy and the Welfare State: A Comparison of Workmen's Compensation and Mothers' Aid*, in *WOMEN, POLITICS, AND CHANGE* 413, 419–20 (Louise Tilly & Patricia Gurin eds., 1990) (tracing the origins of a "two-channel welfare state" to the parallel development of Workmen's Compensation and Mothers' Aid between 1900 and 1920).

<sup>58</sup> METTLER, *supra* note 21, at 212 (arguing that the "New Deal established divided citizenship, separating the governance of men and women between two sovereignties [federal and state, respectively], each with its own particular ideological, institutional, and administrative character").

<sup>59</sup> KESSLER-HARRIS, *IN PURSUIT OF EQUITY*, *supra* note 19, at 293.

standing of the operation of gender, including some references to the common language through which this dynamic would be described today.<sup>60</sup>

In one exchange, James Dwight, an Administrator of Social and Rehabilitation Service in the Department of Health, Education, and Welfare, while setting-out the two forms of Aid to Families with Dependent Children (AFDC and AFDC-U), described the difference between the two as one being distinctly for female and the other being distinctly for male recipients.<sup>61</sup> In response, Representative Griffiths quipped, “[F]irst, I would like to remind you that breadwinner and father are not synonymous,” after which laughter is noted in the testimony.<sup>62</sup> She went on to illustrate her depth of understanding of the gendered underpinnings of these federal programs, saying, “The laws have been written on the theory that the father is the breadwinner, which is not necessarily true. And that is really the thing that has caused all of the[se] problem[s].”<sup>63</sup>

In another portion of the testimony, Wilma Scott Heide, then-President of the National Organization for Women (“NOW”), addressed a federal Labor Department policy that included “30 days paternity leave for the co-equal parent” for employees of the Labor Department.<sup>64</sup> In her testimony, Heide praised this policy because in her opinion it would “help eliminate the most basic of sex role stereotyping, i.e. the mother as the only or primary child care person.”<sup>65</sup>

But even though experts testifying at the 1973 hearing established the myriad ways women were financially disadvantaged as a result of a particular federal law or program predicated on the family wage model, at that time “not everyone thought anything could or should be done.”<sup>66</sup> Nevertheless, these hearings ultimately formed the blueprint for a package of legislation to

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<sup>60</sup> For example, there were numerous references to the terms “breadwinner” and “homemaker” throughout the testimony from the 1973 economic hearings. See *Hearings on the Economic Problems of Women*, *supra* note 52, at 221, 265, 273, 289, 291, 316, 340, 351, 354, 390, 397, 415, 421, 440, 445, 560.

<sup>61</sup> *Id.* at 421.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 560.

<sup>65</sup> *Id.* Also, at this time, Ruth Bader Ginsburg was advancing a sex-stereotyping theory in her campaign of sex discrimination cases. Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 88 (2010) (arguing that “Ginsburg pressed the claims of male plaintiffs in order to promote a new theory of equal protection founded on an anti-stereotyping principle” premised on the theory that “the state could not act in ways that reflected or reinforced traditional conceptions of men’s and women’s roles”). See also Ruth Bader Ginsburg, *Remarks for the Celebration of 75 Years of Women’s Enrollment at Columbia Law School October 19, 2002*, 102 COLUM. L. REV. 1441, 1443 (2002) (describing how her campaign in the courts took aim at “the long-prevailing ‘separate-spheres’ mentality, the notion that it was man’s lot, because of his nature, to be the breadwinner, the head of household, the representative of the family outside the home; and it was woman’s lot, because of her nature, to bear and alone raise children and keep the house in order”).

<sup>66</sup> KESSLER-HARRIS, IN PURSUIT OF EQUITY, *supra* note 19, at 293.



revise federal law and policy to address the economic problems of women.<sup>67</sup> For Representative Griffiths, the information gathered from these hearings was intended “to help Congress formulate ‘a comprehensive economic policy which includes women as first class citizens.’”<sup>68</sup> Representative Griffiths retired from Congress the following year.<sup>69</sup> But in 1981, ten years after introduction of the Women’s Equality Act in 1971, a coalition of lawmakers—led by the Congressional Caucus for Women’s Issues in the House and Senator David Durenberger in the Senate—heeded her call by introducing a package of comprehensive federal economic reforms on behalf of women reflecting many recommendations from these hearings, titled the “Economic Equity Act of 1981.”<sup>70</sup>

### C. *The Rise of Women in Congress and the Establishment of the Women’s Caucus*

But before the introduction of the Economic Equity Act in 1981, a group of women legislators in Congress decided to form a caucus organization to advance legislation pertaining to women. Established in 1977, the Congresswoman’s Caucus, later renamed the Congressional Caucus for Women’s Issues (“Women’s Caucus”), came to play a key part in the story of the Equity Act, consistently spearheading the legislation in the House over the years.<sup>71</sup>

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<sup>67</sup> To be sure, these hearings were not the only blueprint. *See, e.g.,* *Moritz v. Comm’r*, 469 F.2d 466 (10th Cir. 1972) (Appendix E), *cert. denied*, 412 U.S. 906 (1973); *Hearings on the Economic Problems of Women*, *supra* note 52, at 351 (referencing various presidential committees and commissions examining the status of women under federal law and policy); *see also* Ginsburg, *supra* note 65, at 1442 (describing Appendix E in *Moritz* as a “treasure trove” that could be used to “press for curative legislation and, at the same time, bring to courts contests capable of accelerating the pace of change.”). The *Moritz* Appendix E was a Department of Defense computer printout that listed, title by title, provisions of the U.S. Code containing differentials based upon sex-related criteria, which was included with a petition for certiorari to the Supreme Court submitted by then Solicitor General Erwin Griswold in 1973. Ginsburg, *supra* note 65, at 1442. Appendix E was most likely the starting point for the 1977 U.S. Commission on Civil Rights report on sex bias in federal law, developed by Ginsburg and Brenda Feigen-Fasteau. The report was intended to be a guide for Congress, the President, and the Justice Department for “erasing sex-based references and sex bias from our most basic laws.” U.S. COMM’N ON CIVIL RIGHTS, *SEX BIAS IN THE US CODE* iii (1977). The Commission’s report reviewed “800 sections of the [U.S.] Code which contained either substantive sex-based differentials or terminology inconsistent with a national commitment to equal rights, responsibilities, and opportunities (the equal rights principle).” *Id.* at 13. Later the Commission’s report would influence Ralph Neas, a member of Senator Durenberger’s staff, while he drafted the Economic Equity Act. *See* Lavinia Edmunds & Judith Paterson, *A Hard Act To Follow*, *SAVVY*, Feb. 1983, at 23.

<sup>68</sup> KESSLER-HARRIS, *IN PURSUIT OF EQUITY*, *supra* note 19, at 292 (quoting *Hearings on the Economic Problems of Women*, *supra* note 52, at 1).

<sup>69</sup> *See* Martha Wright Griffiths, *WOMEN IN CONGRESS*, <http://womenincongress.house.gov/member-profiles/profile.html?intID=94> (last visited Sept. 15, 2012).

<sup>70</sup> H.R. 3117, 97th Cong. (1st Sess. 1981); S. 888, 97th Cong. (1st Sess. 1981).

<sup>71</sup> GERTZOG, *CONGRESSIONAL WOMEN*, *supra* note 8, at xii–xiii.

The formation of the Women's Caucus in 1977 was a culminating event after years of developing a voice for women in Congress.<sup>72</sup> Many women in the House in the late 1940s, the 1950s, and the 1960s "avoided identification with what were generally considered to be 'women's issues'" because "[t]hey believed too close association with such issues would subvert their reputation as serious valuable legislators."<sup>73</sup> Rather, "most legislative proposals directly affecting women were introduced by male lawmakers."<sup>74</sup> This gradually changed, so that "[b]y the mid-1960s, female representatives had all but abandoned the reservations of their predecessors, introducing scores of bills crafted to help women."<sup>75</sup> Women representatives no longer had "compunctions about placing women's issues at the top of their agendas."<sup>76</sup>

In 1977, Elizabeth Holtzman, a Democrat from Brooklyn, and Margaret Heckler, a moderate Republican, led the effort to organize a caucus and served as initial co-chairs of the Caucus—providing a bipartisan orientation that was important for recruitment.<sup>77</sup> They formed the Executive Committee of the Caucus along with three at-large members and a treasurer.<sup>78</sup> Shirley Chisholm and Barbara Mikulski—both chosen as at-large members—also played key roles at its inception. Representative Chisholm "took an early interest in forming a congresswomen's group and participated actively in preliminary discussions of its structure and purpose."<sup>79</sup> Further, "her involvement assured observers in and out of Congress that the group's attention would not be confined to the interests of middle-class, white women"—an enduring criticism of the second women's rights movement.<sup>80</sup> Mikulski played a key role as "an important link to outside interest groups,"<sup>81</sup> as she

<sup>72</sup> For thorough accounts of the formation of the Women's Caucus and its activities throughout the 1980s and 1990s, see generally GERTZOG, CONGRESSIONAL WOMEN, *supra* note 8; GERTZOG, WOMEN & POWER, *supra* note 8.

<sup>73</sup> GERTZOG, CONGRESSIONAL WOMEN, *supra* note 8, at 10.

<sup>74</sup> *Id.* at 145. The ERA legislation was no different. Though the ERA had been introduced in the House as early as 1923, congresswomen did not support the ERA until the 1940s. *Id.* at 152–53.

<sup>75</sup> *Id.* at 145. Of course, the types of issues in these bills were not novel; "[o]n the contrary, many [of these issues] had been raised [already] by nineteenth century feminists—[w]hat had changed was their newfound political saliency." *Id.*

<sup>76</sup> *Id.* at 10.

<sup>77</sup> *Id.* at 183–84. The Caucus was steadfastly bipartisan, but many of its Republican women found themselves at odds with party leaders on many women's issues. See, e.g., Marjorie Hunter, *Woman in the News; Reagan's Choice for Health Chief: Margaret Mary Heckler*, N.Y. TIMES, Jan. 13, 1983, at D22 ("Mrs. Heckler is an ardent supporter of equal rights for women, at times breaking with leaders of her own Republican Party to push such issues as the proposed Federal equal rights amendment and equity for women in Social Security benefits and access to credit.").

<sup>78</sup> GERTZOG, WOMEN & POWER, *supra* note 8, at 10.

<sup>79</sup> GERTZOG, CONGRESSIONAL WOMEN, *supra* note 8, at 182.

<sup>80</sup> *Id.* See also Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 824–25 (2004) [hereinafter Mayeri, *Constitutional Choices*] (noting "feminism's persistent image as dominated by the interests of white, middle-class women").

<sup>81</sup> GERTZOG, CONGRESSIONAL WOMEN, *supra* note 8, at 184.

had developed an “excellent rapport with leaders of prominent women’s organizations.”<sup>82</sup> These organizations, including the National Organization for Women, the National Women’s Political Caucus, and the Business and Professional Women’s Clubs had been pressing for years for women in Congress to “organize a group to which they could communicate their objections and through which they could make their goals part of the national agenda.”<sup>83</sup> Yvonne Braithwaite Burke—who had just ended her term as chair of the Congressional Black Caucus<sup>84</sup>—and Shirley Pettis were also chosen for the Executive Committee as treasurer and at-large member, respectively.<sup>85</sup> Fifteen women lawmakers in the House (of eighteen total) formed the Caucus in 1977.<sup>86</sup>

The Caucus’s first significant undertaking and achievement was gaining a three-year extension of the deadline for ratification of the Equal Rights Amendment from 1979 to 1982.<sup>87</sup> Failing to receive the necessary ratification by three-fourths of the states, and in anticipation of the deadline expiration in 1979, Congress extended the deadline to June 30, 1982.<sup>88</sup>

In the same year, the Caucus also contributed to the passage of the Pregnancy Discrimination Act of 1978 through its lobbying efforts.<sup>89</sup> These and other such lobbying efforts began to lay the groundwork for the shift in gender perceptions that would be required for the success of many Equity Act provisions.<sup>90</sup> With the hope of altering discriminatory “federal employment and social security arrangements”<sup>91</sup> on an even larger scale, the Caucus turned its agenda to the Economic Equity Act of 1981.

#### D. *The Women’s Caucus, the Equal Rights Amendment, and an Agenda for Legislative Change*

Leading up to the ratification deadline, the Equal Rights Amendment was the primary focus of the women’s movement and many women’s organi-

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<sup>82</sup> GERTZOG, *WOMEN & POWER*, *supra* note 8, at 10.

<sup>83</sup> GERTZOG, *CONGRESSIONAL WOMEN*, *supra* note 8, at 184.

<sup>84</sup> See *Yvonne Braithwaite Burke*, *WOMEN IN CONGRESS*, <http://womenincongress.house.gov/member-profiles/profile.html?intID=28> (last visited Sept. 15, 2012); *Congressional Black Caucus Chairmen and Chairwomen*, *BLACK AMERICANS IN CONGRESS*, <http://baic.house.gov/historical-data/congressional-black-caucus-chairs.html> (last visited Nov. 1, 2012).

<sup>85</sup> GERTZOG, *WOMEN & POWER*, *supra* note 8, at 10.

<sup>86</sup> Barbara Gamarekian, *Women’s Caucus: Eight Years of Progress*, *N.Y. TIMES*, May 27, 1985, § 1, at 20.

<sup>87</sup> GERTZOG, *CONGRESSIONAL WOMEN*, *supra* note 8, at 188–92.

<sup>88</sup> H.R.J. Res. 638, 95th Cong., 92 Stat. 3799 (1978).

<sup>89</sup> GERTZOG, *CONGRESSIONAL WOMEN*, *supra* note 8, at 188.

<sup>90</sup> See *id.* (claiming that “the spotlight [the Caucus] threw on gender disparities in federal employment and social security arrangements helped the discriminatory character of these practices penetrate the consciousness of many who had given little thought to altering either policy”).

<sup>91</sup> *Id.*

zations.<sup>92</sup> However, for the Women's Caucus, the Economic Equity Act was also taking center stage, as the Caucus began to look beyond the ratification deadline of the ERA.<sup>93</sup> The Equity Act, rather than superseding the ERA, was presented as the natural extension of the ERA—whether or not the ERA gained ratification.

To be sure, the Caucus continued to press for ratification of the ERA. The ERA remained a focal point, and the Caucus was unequivocal in its stance that any federal legislative agenda should not be perceived as diminishing their support of state ratification of the ERA. At the outset, the Caucus made clear in its bulletin its position that the Act was not “a substitute for the Equal Rights Amendment.”<sup>94</sup> Underscoring their support of the ERA, the Caucus sent letters in the spring of 1982—as the June 30, 1982 ratification deadline was rapidly approaching—to “key state legislatures which ha[d] not yet passed the ERA, urging ratification of the ERA . . . .”<sup>95</sup>

However, the need to remain proactive as members of Congress, particularly in light of the uncertainty surrounding passage of the ERA,<sup>96</sup> echoed as a driving force in bringing about legislative action. With ratification dependent on the states and out of the hands of Congress, women in Congress made a concerted effort to declare that “Congress is *not* waiting for passage and ratification of the ERA to proceed with an agenda for legislative change”—an agenda that viewed the Economic Equity Act as a piece of

<sup>92</sup> Rep. Geraldine Ferraro, Speech to the Women's Committee of Local 372, New York City Board of Education Employees affiliated with Local 37, AFSCME 2 (June 1982) (transcript available in the Marymount Manhattan College Archives, Collection 3 Box 48) [hereinafter Ferraro, Local 372 Speech] (“For the past three years especially . . . [a]ll the major women's organizations, including NOW, and the National Women's Political Caucus, the League of Women Voters, as well as our friends in the labor movement, have concentrated their resources . . . on the passage of [the] ERA.”).

<sup>93</sup> *Id.* (“But even if the ERA is not ratified, the fact remains that life—and the fight for women's rights and for political power—will go on after June 30.”).

<sup>94</sup> *Special Report: Economic Equity Act (H.R. 3117/S. 888)*, UPDATE (Cong. Caucus on Women's Issues (formerly Congresswomen's Caucus), Washington, D.C.), Apr. 27, 1981, at 10, 10 [hereinafter *Special Report: Economic Equity Act*] (on file with author) (issues of UPDATE cited herein are available at the Schlesinger Library, Radcliffe Institute, Harvard University unless otherwise noted).

<sup>95</sup> *Caucus Vows to Continue to Press for ERA Ratification*, UPDATE (Cong. Caucus on Women's Issues (formerly Congresswomen's Caucus), Washington, D.C.), Apr. 5, 1982, at 1, 15 [hereinafter *Caucus Vows*]. See also *Congressional Sponsors Take New Initiative in Campaign*, NAT'L NOW TIMES (National Organization for Women, Washington, D.C.), Apr. 1982, at 1, 1. After the ERA failed, the Congressional Caucus for Women's Issues organized co-sponsors in the House for its reintroduction. *ERA Reintroduced in Congress*, UPDATE (Cong. Caucus on Women's Issues (formerly Congresswomen's Caucus), Washington, D.C.) July 19, 1982, at 1, 15.

<sup>96</sup> Historical accounts suggest that “[s]upport was eroding instead of increasing in the final stages of the [ERA ratification] campaign.” BERRY, *supra* note 8, at 3. See also JANE J. MANSBRIDGE, *WHY WE LOST THE ERA 2* (1986) (claiming that “[c]ontrary to widespread belief, public support for the ERA did not increase in the course of the ten-year struggle. In key wavering states where the ERA was most debated, public support actually declined”).

legislation of the same order of magnitude as previous enactments such as Title VII, Title IX, and the Equal Pay Act.<sup>97</sup>

Accordingly, while emphasizing that the “fight for the ERA [wa]s the single most important issue for women,”<sup>98</sup> members of the Caucus such as Rep. Geraldine Ferraro began to set the stage for the legislative battles the Caucus planned to wage:

[T]he ERA, as important as it is, has deflected attention from other important women’s issues. Toward that end, the Members of the Congresswomen’s Caucus have concluded that to have the greatest impact politically and legislatively, we need to focus our efforts on practical, effective solutions to the everyday problems facing American women today. . . . For that reason, the Caucus has introduced a comprehensive piece of legislation called the ‘Women’s Economic Equity Act’ . . . . to address specific economic discrimination problems that affect women.<sup>99</sup>

The Equity Act represented “the first time such a package has been put together to deal with women’s economic problems”<sup>100</sup> and was proffered as “an enormously significant advance in eliminating the economic inequities borne by women . . . .”<sup>101</sup> The Act was not “an exhaustive list of women’s economic needs.”<sup>102</sup> Rather, according to the Women’s Equity Action League, the Act was “intended to be the beginning of a Congressional commitment to eliminate the economic inequities facing American women at home, at work, or in retirement.”<sup>103</sup> While reiterating that “the Economic Equity Act is in no way a legislative attempt to supplant ratification of the Equal Rights Amendment,” Rep. Lindy Boggs, another co-sponsor of the Economic Equity Act, explained that the Caucus “must be realistic, and reform existing inequities through legislation wherever possible.”<sup>104</sup>

For many Caucus members, the connection between the Equity Act and the ERA was central to the Act’s importance. For instance, Rep. Barbara Mikulski stressed the economic aspect of the ERA in conjunction with the Equity Act: “ERA is an economic issue . . . . We are trying to rectify eco-

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<sup>97</sup> Ferraro, *The Amendment*, *supra* note 5, at 12.

<sup>98</sup> Ferraro, Local 372 Speech, *supra* note 92, at 2–3.

<sup>99</sup> *Id.* at 9.

<sup>100</sup> *Id.* at 10.

<sup>101</sup> *Special Report: Economic Equity Act*, *supra* note 94, at 10.

<sup>102</sup> *Id.* Contrary to this sentiment, however, one of the co-sponsors of the Senate version of the Act presented the Economic Equity Act as “an alternative” to the ERA. BERRY, *supra* note 8, at 76.

<sup>103</sup> *Economic Equity Act*, WEAL (Women’s Equity Action League, Washington, D.C.), Mar. 1982, at 1.

<sup>104</sup> Rep. Lindy (Mrs. Hale) Boggs, And (Economic) Justice for All . . . The Need for the Economic Equity Act, Address Before the Nat’l Assoc. of Women Lawyers (Aug. 7, 1981), in 68 WOMEN LAW. J. 37, 38 (1982).

conomic exploitation and injustice to women."<sup>105</sup> As the ERA ratification deadline rapidly approached, NOW issued a variety of pamphlets on the amendment's impact. These pamphlets demonstrate what proponents hoped to gain from the ratification of the ERA, but these hopes bore striking resemblances to the provisions contained in the Equity Act. For example, a 1981 pamphlet on the ERA and Social Security published by NOW stated: "Under ERA, a homemaker will be recognized for her economic contribution, requiring changes to aspects of Social Security, pension plans, retirement benefits and inheritance laws and providing fair and equitable treatment under the law."<sup>106</sup> In fact, the Equity Act contained provisions addressing pension equity and Social Security reforms for homemakers, child support enforcement, discrimination in insurance, and inequality in the workplace<sup>107</sup>—each of which proponents of the ERA believed the amendment would fix.<sup>108</sup>

The similarities between ERA advocacy and the provisions of the Economic Equity Act underscore not only the aspirations of the post-ERA legislative agenda, but also the intentions of congressional lawmakers to proceed with an agenda aimed at enforcing—or implementing—the ERA. Representative Ferraro openly told supporters that the "the Equity Act was originally conceived as implementing legislation for the Equal Rights Amendment."<sup>109</sup> Rep. Lindy Boggs even proclaimed that the "enactment of the Economic Equity Act [was] critical if we wish[ed] to guarantee equal rights for women under the U.S. Constitution."<sup>110</sup> Sen. David Durenberger, the primary sponsor of the Act in the Senate, called the Economic Equity Act "the instrument by which we will write the next chapter of equality."<sup>111</sup>

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<sup>105</sup> *Caucus Vows*, *supra* note 95, at 15. See also *Equal Rights Amendment Update*, UPDATE (Cong. Caucus for Women's Issues (formerly Congresswomen's Caucus), Washington, D.C.), Sept. 30, 1983, at 5, 5 ("The ERA is an economic issue, not a lifestyle issue"). According to the Caucus, hearings on the reintroduction of the ERA after the failed ratification efforts in 1982 "call[ed] for the ERA to rectify entrenched [sic] economic discrimination, underscoring such issues as sex discrimination in insurance, and inequities in the Social Security System." *Id.*

<sup>106</sup> NAT'L ORG. FOR WOMEN, ERA AND SOCIAL SECURITY: A SEX BIASED SYSTEM THAT NEEDS REVISION (1981) [hereinafter ERA AND SOCIAL SECURITY] (distributed in NAT'L NOW TIMES (National Organization for Women, Washington, D.C.), Sept. 1981).

<sup>107</sup> See Table 3 (97th Cong.–99th Cong.) (listing the provisions of the Economic Equity Act addressing these issues).

<sup>108</sup> ERA AND SOCIAL SECURITY, *supra* note 106; NAT'L ORG. FOR WOMEN, ERA AND HOMEMAKERS: PARTNERSHIP IN MARRIAGE (1981) (distributed in NAT'L NOW TIMES (National Organization for Women, Washington, D.C.), Sept. 1981); NAT'L ORG. FOR WOMEN, ERA AND MONEY: BUSINESS, CREDIT, INSURANCE, INHERITANCE (1981) (distributed in NAT'L NOW TIMES (National Organization for Women, Washington, D.C.), Sept. 1981); NAT'L ORG. FOR WOMEN, ERA AND MINORITY WOMEN: DOUBLE DISCRIMINATION—RACISM AND SEXISM (1981) (distributed in NAT'L NOW TIMES (National Organization for Women, Washington, D.C.), Sept. 1981).

<sup>109</sup> Ferraro, *The Amendment*, *supra* note 5, at 12.

<sup>110</sup> Boggs, *supra* note 104, at 37.

<sup>111</sup> Judy Mann, *A Chance to Improve Women's Economic State*, WASH. POST, Apr. 8, 1981, at C1 [hereinafter Mann, *A Chance to Improve*]; see also Judy Mann, *Equal Bene-*

*E. The Role of the Economic Equity Act in Congress*

1. *The Economic Equity Act: A Primer*

First introduced into the 97th Congress on April 7, 1981,<sup>112</sup> the first version of the Equity Act was assembled by a bipartisan group of House Representatives and Senators and introduced jointly in the House and the Senate.<sup>113</sup> The legislators assembled the 1981 bill “with the advice and assistance of a variety of women’s groups, including the League of Women Voters, National Federation of Business and Professional Women, the National Women’s Political Caucus, Older Women’s League, the National Council of Jewish Women, the National Council of Negro Women, and several others.”<sup>114</sup> Twelve major national women’s organizations endorsed the bill.<sup>115</sup> A version of the Act was introduced in each successive Congress through the 104th Congress in 1996.<sup>116</sup> Table 1 summarizes the bill numbers in each Congress and the date of introduction of each bill.

The Economic Equity Act did not function as a typical bill. Rather, the Equity Act was an omnibus bill consolidating a wide variety of standalone bills into a single legislative package for advocacy and tracking purposes. Accordingly, each provision of the Economic Equity Act had a counterpart in a separate bill.<sup>117</sup> This “dual method of introduction” was meant to “em-

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*fit*, WASH. POST, Mar. 16, 1983, at C1 [hereinafter Mann, *Equal Benefit*] (describing the Economic Equity Act as “the brainchild of Sen. David Durenberger”).

<sup>112</sup> *Economic Equity Act of 1981 Introduced in House and Senate*, UPDATE (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Caucus) Washington, D.C.), April 27, 1981, at 1, 1 (on file with author).

<sup>113</sup> Original Caucus sponsors included Sen. Nancy Kassebaum (R-KS) and Reps. Patricia Schroeder (D-CO), Margaret Heckler (R-MA), Geraldine Ferraro (D-NY), Shirley Chisholm (D-NY), Lindy Boggs (D-LA), Barbara Mikulski (D-MD), and Mary Rose Oakar (D-OH). In the Senate, Sens. Mark Hatfield (R-OR), Bob Packwood (R-OR), and David Durenberger (R-MN) introduced a companion omnibus bill. *Special Report: Economic Equity Act*, *supra* note 94, at 10.

According to the Caucus, “the package [wa]s not the product of one person or group” but rather the result of “combined efforts” by “[m]embers and staff of both the House and the Senate, working together in consultation with major women’s organizations . . . .” *Id.* Senator Durenberger and a member of his staff at the time, Ralph Neas, are generally credited with spearheading the Economic Equity Act and formulating an initial draft. *See* Mann, *Equal Benefit*, *supra* note 111, at C1 (“The EEA is the brainchild of Sen. David Durenberger (R-Minn.), who began working on an omnibus economic package for women in 1980. . . . Ralph Neas, [the] executive director [of the Leadership Conference on Civil Rights], previously worked for Durenberger and helped draft the EEA.”). The Caucus then expanded the package from Senator Durenberger in consultation with staff from both the House and the Senate and developed a system for coordinating advocacy on its constituent parts and keeping track of its progress. *See* Joan Hulse Thompson, *The Women’s Rights Lobby in the Gender Gap Congress, 1983–1984*, 2 COMMONWEALTH 19, 22–23 (1988).

<sup>114</sup> 135 CONG. REC. S10405-06 (1989) (daily ed. Aug. 15, 1989) (statement of Sen. Bob Packwood).

<sup>115</sup> *Special Report: Economic Equity Act*, *supra* note 94, at 10.

<sup>116</sup> *See infra* Table 1.

<sup>117</sup> *See infra* Table 3.

phasize the interrelationship between economic and equity issues, while at the same time possibly facilitating passage of individual parts of [the Act]."<sup>118</sup> As parts of the Equity Act package were enacted into law by one Congress, new provisions were added to the version introduced in the next Congress. As a result, there were eight different versions of the Equity Act reflecting the changing goals of the Women's Caucus over time, each with a different set of enactments. These enactments are summarized in Table 2. A full summary of each version of the Equity Act is contained in Table 3, along with bill numbers for correlating bills and public law numbers for corresponding enactments. Table 4 contains a list of major corresponding bills to the Economic Equity Act, which is intended as a reference to illustrate the variety and character of the bills advanced through the omnibus Economic Equity Act over time. A summary of the methodology used to determine correlating bill numbers and enactments originating from the Economic Equity Act is set forth in the Appendix.

Across its multiple iterations, the Equity Act addressed many areas affecting women including pension and retirement security, tax reform, discrimination in insurance, inheritance, dependent care, education, health care, credit and lending, women in business, and even employment and pay equity (despite gains achieved through Title VII and the Equal Pay Act).<sup>119</sup> Most of these provisions were fairly specific in order to remedy particular and immediate economic hardships that women were facing in these areas. Each version of the Act had its own unique character, demonstrating a shift not only in legislative priorities, but also in the political will of the legislators and their constituencies to imagine and support the various economic spheres inhabited by women.

## 2. *Understanding the Absence of the Equity Act from Conventional Legal Narratives*

From a legislative and methodological perspective, the Economic Equity Act was not without its limitations. As an omnibus bill, with measures passed in corresponding bills, the Economic Equity Act served as an effective advocacy and organizational tool within Congress and for coordinating with outside women's organizations and meeting demands of constituents.<sup>120</sup> However, even though it was consistently at the top of the Caucus's agenda in each Congress, as well as among the leading agenda items for stalwart women's organizations such as NOW,<sup>121</sup> few outside of Congress fully understood its operative effect. The Equity Act never passed as a whole; only

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<sup>118</sup> LESLIE W. GLADSTONE, CONG. RESEARCH SERV., IB86093, *THE ECONOMIC EQUITY ACT*, 1 (1987).

<sup>119</sup> See *supra* notes 24, 25.

<sup>120</sup> See *infra* Part II.B.4.

<sup>121</sup> It was also a major agenda item for NOW Legal Defense and Education Fund. See *NOW Legal Agency Looks Back on Its Bests, Worst for 1986*, CHI. TRIB., Dec. 26, 1986,



parts of it passed in each Congress as counterpart, standalone legislation.<sup>122</sup> Furthermore, because the content of the Economic Equity Act varied widely from Congress to Congress, it was a confusing piece of legislation for anyone not versed in its methodology. For example, the *Buffalo News* reported in 1993 that the Equity Act “has been stalled in Congress for more than a decade.”<sup>123</sup> Though this report later explained that the Equity Act was “an umbrella for several bills designed to improve the economic health of women, some of which have passed,” these reports did not do service to the dynamic and sustained legislative process embodied in the Equity Act, the wide-range of proposals advanced through the Equity Act, or the far-reaching impact that enacted provisions had on the economic circumstances of women.<sup>124</sup>

As a result, although the Equity Act received a fair amount of media attention, it did not enter the popular vernacular in the way that Title VII, Title IX, or the FMLA did, and certainly in no way comparable to the Equal Rights Amendment. The most accurate and sustained reporting appeared in the *New York Times* and the *Washington Post*, but even that proved insufficient to raise the profile of the Equity Act. In 1983, the *New York Times* described the mobilization in connection with the Act as “an offensive on women’s issues” that was “gathering, quietly but steadily, in the capital.”<sup>125</sup> The *Times* noted that in Congress, “the focus is not only the beginning of a new effort to pass an equal rights amendment, but a broadening of attention on women’s issues from the social to the economic.”<sup>126</sup> Yet, despite early predictions by Judy Mann of the *Washington Post* that it would become “a major legislative trophy,”<sup>127</sup> the Equity Act is now best understood by political scientists in connection with their study of women in Congress. Political scientist Irwin Gertzog, an expert on women in Congress and the Women’s Caucus, characterized the Economic Equity Act as “the most comprehensive effort to compensate women for the socioeconomic limitations imposed upon them.”<sup>128</sup> But despite this characterization, political science and ERA scholars have accorded it little historical significance, which likely contributed to the failure of the Economic Equity Act to appear on the radar of

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at C30 (listing the Equity Act enactments as one of the top ten advances for women in 1986).

<sup>122</sup> See *infra* Table 2.

<sup>123</sup> Pat Swift, *A Chance to Speak on Economic Bias Suffered by Women*, BUFFALO NEWS, May 8, 1993, at 5.

<sup>124</sup> *Id.* In another example, the *Boston Globe* declared in 1987, “Caucus for Women’s Issues Unveils Plan to Lesson Economic Hardship,” as if it were the first time this Act had been introduced into Congress, when in fact it was its fourth iteration. Yvonne Brooks, *Caucus for Women’s Issues Unveils Plan to Lessen Economic Hardship*, BOS. GLOBE, June 3, 1987, at 6.

<sup>125</sup> David Shribman, *Women Try New Paths on Rights*, N.Y. TIMES, Aug. 14, 1983, § 4, at 5.

<sup>126</sup> *Id.*

<sup>127</sup> Mann, *Equal Benefit*, *supra* note 111, at C1.

<sup>128</sup> GERTZOG, CONGRESSIONAL WOMEN, *supra* note 8, at 158.

other disciplines, receiving only scant mention from feminist and other legal scholars.<sup>129</sup>

Despite its scant attention, from a legal perspective, the Economic Equity Act has powerful implications for understanding the legal construction of the twenty-first century family, particularly from an economic perspective, as well as for understanding the underpinnings of the contemporary relationship between the individual, the family, the market, and the state. Its primary significance, however, lies in its long-term agenda, the comprehensive nature of the legislative proposals over the years, and the deliberate goals of the coalition of lawmakers advancing the Economic Equity Act.

## II. THE ECONOMIC EQUITY ACT, 1981–1996

### A. *From Equality in Theory to Equality in Fact: Addressing Women's Realities (97th Congress, 1981–82)*

#### 1. *Recognizing the Economic Value of Women's Traditional Roles by Assisting Mothers, Divorcees, and Widows*

Initially, the Act was weighted towards solving economic inequities faced by divorcees, widows, and working mothers. For example, as part of the first Economic Equity Act introduced in the 97th Congress, sections were enacted to establish a right to pension benefits by former spouses of military personnel, to amend the tax code to provide a dependent care tax credit, and to eliminate interspousal gift and estate taxes.<sup>130</sup> Other provisions that were not enacted still focused on mothers, divorcees, and widows including tax credits to employers for hiring displaced homemakers and a wide range of Social Security and additional pension reforms. These unenacted provisions were carried forward to subsequent versions of the Equity Act.<sup>131</sup>

These reforms stemmed largely from concerns regarding the economic security of the substantial number of women who engaged in full-time home and care work—particularly in cases of divorce or death of a spouse.<sup>132</sup> Poll-

<sup>129</sup> See *supra* notes 7–8.

<sup>130</sup> H.R. 3117, 97th Cong. (1st Sess. 1981); S. 888, 97th Cong. (1st Sess. 1981).

<sup>131</sup> See *infra* Table 3. For example, provisions such as the Displaced Homemaker Tax Credit and the Non-Discrimination in Insurance provision were carried forward from the version of the Economic Equity Act introduced into the 97th Congress to the version introduced in the 98th Congress.

<sup>132</sup> Historically, displaced homemakers and destitute widows have featured prominently in the language and structure of the state's conferral of benefits to women and families. As shown by Ariela Dubler, the conferral of government benefits in the United States has historically been in large part dependent on a woman's marital status and has been animated through the lens of women's dependency. See Ariela Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 *YALE L.J.* 1641, 1686 (2003) [hereinafter Dubler, *In the Shadow of Marriage*]. Mothers' pensions in the early twentieth century offer an illustrative example. See, e.g., LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WEL-*

ster Lou Harris reported in a congressional hearing on the pension equity proposals that “while 70% of adult women are working for pay or plan to by the end of the decade, 24% want to be full-time home-makers.”<sup>133</sup> The Women’s Caucus’s publication *Update* quoted Rep. Olympia Snowe as saying, “‘society claims to recognize and value the woman’s work at home but leaves them (economically) vulnerable’ in retirement.”<sup>134</sup> In other testimony on the child support enforcement provisions of the Act, Rep. Michael Bilirakis stated: “How can we say that homemaking is a valuable and viable choice for women when our laws are telling these women that the 10 or 15 or 20 years they put in as wife and mother in the home count toward nothing in the way of economic security? Those of us who feel strongly about the value of traditional women’s roles should put our money where our mouths are.”<sup>135</sup>

To be sure, the focus on mothers, divorcees, and widows risked reinforcing and entrenching traditional home-based gender roles and the status of those roles.<sup>136</sup> But the Caucus viewed it as necessary in order to begin the process of recognizing the economic value of women’s labor in the home

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FARE 1890–1935 37–64 (1994); SKOCPOL, *supra* note 56, at 424–79; *see also* MINK, *supra* note 56, at 27–52; Virginia Sapiro, *The Gender Basis of American Social Policy, in* WOMEN, THE STATE, AND WELFARE, *supra* note 56, at 37. But this framework also operated in less obvious areas such as accident compensation law. *See* John Fabian Witt, *supra* note 56, at 719–21; *see also* Nelson, *supra* note 56, at 123–45.

<sup>133</sup> *Special Report—Economic Equity Act Hearings*, UPDATE (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Caucus), Washington, D.C.), June 30, 1983, at 1, 9. *See also* *Economic Equality for Women, Before the H. Comm. on Ways & Means*, 98th Cong. 59 (1983) (testimony of Catherine East, Legislative Director, National Women’s Political Caucus). (“We support the Women’s Economic Equity Act, which addresses many of the inequalities in Federal laws and programs. Our legal, economic, and social systems have traditionally undervalued women’s contribution both in and outside the home. . . . We are particularly pleased that many of the reforms you are considering will recognize women who are primarily homemakers as equal contributors to their marriages.”).

<sup>134</sup> *Special Report—Economic Equity Act Hearings*, *supra* note 133, at 9.

<sup>135</sup> *Committee Considers Civil Service Pension Reform*, UPDATE (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Caucus), Washington, D.C.), Oct. 31, 1983, at 7, 8. For a discussion of earlier efforts to secure economic value for work at home, *see* generally Reva Siegel, *Home as Work: The First Women’s Rights Claims Concerning Wives’ Household Labor*, 103 YALE L.J. 1073, 1075 (1994) [hereinafter Siegel, *Home as Work*] (demonstrating that nineteenth-century feminists argued “that wives were entitled to property rights in their household labor”).

<sup>136</sup> According to ERA scholar Mary Frances Berry, “[t]he issues of pension reform and child support enforcement did not challenge women’s traditional roles and in fact were reinforcing.” BERRY, *supra* note 8, at 110. In this sense, these reforms could have the effect of “transforming the status regime without abolishing it.” Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1111 (1997). For a critique of the ways in which legal feminists and other scholars have proposed assigning value to home and care work in the modern era, *see* Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1899–1908 (2000). *But see* Martha Ertman, *Love and Work*, 102 COLUM. L. REV. 848, 848 (2002) (arguing that “work for love could provide a basis for citizenship just as work for wages does”).

and in the marketplace. For example, in connection with the spousal IRA proposal, the Caucus explained:

Why is it so important to achieve new benefits for homemakers at a time when fewer and fewer women are spending their lives as homemakers? Because the pervasive undervaluation of the work women do—as teachers, nurses, secretaries, clerks—begins with the public perception that the work done by homemakers is without economic value. This is simply not true—but we can only prove that by attaching a real value to the work women do in the home. That is one of the goals of the Economic Equity Act.<sup>137</sup>

In its national newsletter, NOW echoed this sentiment and addressed the long-term implications of devaluing women's work in the home: “[Society] must value the work at home as much as it does the work that produces paychecks. If it doesn't, then working women will be doomed to the burden of two jobs—in the market place, and at home.”<sup>138</sup> Accordingly, the Economic Equity Act proponents advanced legislative reforms aimed not only at enabling women to work, but protecting the economic security of women that have spent their lives as homemakers.<sup>139</sup>

These reforms played an important role in connection with state law reforms in the area of divorce, which the women's movement was simultaneously advancing.<sup>140</sup> For example, through several provisions of the Economic Equity Act (enacted in the Department of Defense Reauthorization Act of 1983) Congress amended the law to allow military pension benefits to be assigned in divorce decrees to ex-spouses, as well as established their entitlement to survivor benefits and health insurance in certain circumstances.<sup>141</sup> These reforms were enacted in response to the outcry over the Supreme

<sup>137</sup> Rep. Geraldine Ferraro, Speech to the Fifth Annual Women in Crisis Conference 2 (Feb. 27, 1984) (transcript available in the Marymount Manhattan College Archives, Collection 3 Box 49) [hereinafter Ferraro, *Women in Crisis* Speech].

<sup>138</sup> *Women's Work Not Properly Rewarded*, NAT'L NOW TIMES (Nat'l Org. for Women, Washington, D.C.), Nov./Dec. 1982, at 2, 2.

<sup>139</sup> These tensions were long-standing. Indeed, homemakers often served as political footballs during ERA debates. See BERRY, *supra* note 8, at 98–112 (examining the role of homemakers in ERA politics); see also Mary Ziegler, *The Bonds that Tie: The Politics of Motherhood and the Future of Abortion Rights*, 21 TEX. J. WOMEN & L. 47, 59–61 (2011) (describing how both opponents and proponents of the ERA sought to appeal to homemakers).

<sup>140</sup> See generally Herma Hill Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in DIVORCE REFORMS AT THE CROSSROADS 6 (Herma H. Kay & Stephen Sugarman eds., 1990) (summarizing legal changes in divorce law during the 1970s and 1980s); Deborah Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, in DIVORCE REFORMS AT THE CROSSROADS 191 (Herma H. Kay & Stephen Sugarman eds., 1990) (arguing that law should provide specific substantive norms for property division and spousal and child support instead of judicial discretion).

<sup>141</sup> See Department of Defense Authorization Act of 1982, Pub. L. No. 97-252, §1001–1004, 96 Stat. 718, 730–37 (1981).

Court's declaration in *McCarty v. McCarty*,<sup>142</sup> that federal law precluded a state court from dividing military retired pay pursuant to state community property laws. While the Court was sympathetic to the plight of military ex-spouses, it determined that the decision to amend the law was "for Congress alone."<sup>143</sup> Congress's legislative response was widely hailed for treating "marriage as an economic partnership," thus performing an important generative role in defining the sex equality norm.<sup>144</sup>

## 2. *On Neutral Laws and Differing Experiences*

This shift in lawmaking also brought with it a different focus with respect to pursuing equality for women. Overall, the Act was "designed to address some specific problems women face in our economy, due to both innate and overt discrimination."<sup>145</sup> The Act aimed to address areas in which women were economically disadvantaged, either because a current, sex-neutral law resulted in a gender disparity or because law altogether failed to address an economic disparity experienced by women. Representative Ferraro discussed this approach at a conference on women in business: "You know, there is not some big man up in the sky—or even in Washington—sitting there and telling women what we can't do—find adequate child care, obtain finance capital, purchase insurance at reasonable rates, make as much money as men."<sup>146</sup> Instead, Representative Ferraro argued, we have "a series of laws, regulations and federal budgets—neutral on their face—which in fact cause women to be discriminated against in the American economy."<sup>147</sup> Representative Ferraro was not alone in her observations. In a Congressional hearing four years later, Sen. David Durenberger pointed out:

There have been 1,722 senators since the beginning of our Republic; only 12 have been women. The result has been a pattern of policies that seem neutral on their faces, but when applied to real world situations create deep disparities between the opportunities available to men and those available to women.<sup>148</sup>

The legislative approach embodied in the Economic Equity Act sought not just equality in law, but in fact. The focus was no longer primarily de-

<sup>142</sup> 453 U.S. 210 (1981). See also Nancy Scannell, *Military Ex-Wives Are Up in Arms Over High Court's Pension Ruling*, WASH. POST, July 9, 1981, at DC5.

<sup>143</sup> *McCarty*, 453 U.S. at 236. For a more extensive discussion of this directive of legislative power in connection with the sex equality norm, see *infra* Part III.B.

<sup>144</sup> Mann, *A Chance to Improve*, *supra* note 111, at C1.

<sup>145</sup> Ferraro, *The Amendment*, *supra* note 5, at 12.

<sup>146</sup> Rep. Geraldine Ferraro, Remarks at Rep. James Florio's Conference on Women in Business (Apr. 7, 1984) (transcript available in the Marymount Manhattan College Archives, Collection 3 Box 50).

<sup>147</sup> *Id.*

<sup>148</sup> *Potential Inequities Affecting Women: Hearings Before the Senate Comm. on Finance*, 98th Cong. 41, 43 (1988) (statement of Sen. David Durenberger).

voted to laws that differentiated between the sexes or to stamping out overt sex discrimination through facial prohibitions, but was shifting to an examination of neutral laws that were having a disparate impact on women and to proposals for how to revise those laws to produce more equal outcomes. To be sure, the elimination of overt discrimination was not abandoned as a project. The first version of the Equity Act sought to prohibit discrimination in all types of insurance on the basis of race, color, religion, sex, or national origin—a quintessential facial prohibition on discrimination modeled after Title VII’s prohibition on discrimination in employment.<sup>149</sup> In another provision, the Act sought to “[e]liminate gender-based distinction in the U.S. Code provisions relating to military service, promotion, appointment, separation, and retirement.”<sup>150</sup> The initial Act even took aim at the administrative state in order to promote sex neutrality in the federal regulatory regime.<sup>151</sup>

But while the 1960s and 1970s saw a number of sweeping legislative successes in connection with sex discrimination, the limits of across-the-board legislation to effect substantive equality were becoming apparent. Legislative experience with facial prohibitions against discrimination, such as the Equal Pay Act, illustrated the need for further action. Equal pay for equal work (a compromise over equal pay for comparable work) was in reality not that meaningful in a heavily sex-segregated job market.<sup>152</sup> Title VII’s potential as a prohibition against sex discrimination in employment took time to realize in part because of initial inaction by the Equal Employment Opportunity Commission.<sup>153</sup> Further, vital parts of Title VII doctrine, such as sexual harassment law, only came about through advocacy in the courts.<sup>154</sup>

With the advent of the Economic Equity Act, the project of advancing women’s equality moved forward with a significant shift in methodology—

<sup>149</sup> *Special Report: Economic Equity Act*, *supra* note 94, at 13.

<sup>150</sup> *Id.* at 12–13. The Caucus specifically noted that the provision did not address women in combat, an issue which remained deeply contested, particularly in connection with the ERA. *Id.* See also Steven V. Roberts, *Congress Seeks Fast Compromise on Fiscal Bills*, N.Y. TIMES, Nov. 15, 1983, at A25 (“Probably the most popular potential alteration would stipulate that the [equal rights] amendment could not require the assignment of women to combat.”).

<sup>151</sup> In particular, the bill included a section to “codify a Presidential Directive of August 26, 1977, requiring all Executive departments and agencies to identify ‘regulations, guidelines, programs, and policies which result in unequal treatment based on sex’ and to develop proposals to eliminate any resultant sex-based discrimination.” *Special Report: Economic Equity Act*, *supra* note 94, at 13.

<sup>152</sup> See Vicki Lens, *Supreme Court Narratives on Equality and Gender Discrimination in Employment: 1971–2002*, 10 CARDOZO WOMEN’S L.J. 501, 506 (2004).

<sup>153</sup> Jane Sherron De Hart, *The New Feminism and the Dynamics of Social Change*, in WOMEN’S AMERICA: REFOCUSING THE PAST 493, 506 (Linda K. Kerber & Jane Sherron De Hart eds., 3d ed. 1991) (noting that in 1967, NOW “called on EEOC to enforce antidiscrimination legislation”).

<sup>154</sup> The theoretical work of Catharine MacKinnon established the foundation for this advocacy. See generally CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979) (arguing that sexual harassment is a form of employment discrimination and proposing a legal framework for addressing sexual harassment within the workplace).

away from a predominant focus on sweeping prohibitions on sex discrimination to a series of specific bills aimed at revising existing sex-neutral laws and implementing new programs to eradicate economic inequalities for women. Caucus sponsors such as Representative Ferraro—in crafting even the earliest versions of the Equity Act—realized that, “[a]s women’s role in our nation’s economy has changed, it has become increasingly clear that . . . [neutral] laws are simply not working for women [the] same way they work for men.”<sup>155</sup> Rep. Jim Oberstar made similar observations when advocating for proposed Social Security reforms in the Economic Equity Act of 1985: “The Social Security Act, on its face, no longer discriminates on the basis of gender. Yet, in application, many provisions of the law result in lower benefits to women, not only because of fewer years in the work force and lower wages, but also because provisions placed in the law years ago have not been reviewed and updated.”<sup>156</sup>

The Retirement Equity Act of 1984,<sup>157</sup> also part of the Economic Equity Act, is one example of a hands-on approach taken to revising neutral laws. In this case, the Retirement Equity Act revised sex-neutral laws that Congress passed in the Employee Retirement Income Security Act of 1974 (ERISA) to protect workers covered by pension and welfare benefit programs offered by their employers. As noted by Rep. Edward Roybal, when speaking in favor of the Retirement Equity Act’s amendments to ERISA, “while the passage of [ERISA] represented a tremendous step in securing pensions for our workers, it is clear that the next step is at hand, that the inequities against women permitted under the present law must be removed.”<sup>158</sup> There was nothing explicitly sex-based in the pension laws: rather, neutral provisions in ERISA were changed by the Retirement Equity Act to remedy their disparate impact on women. The minimum age for pension participation was reduced to twenty-one from twenty-five, which permitted women to accrue pension benefits earlier, offsetting lost time in the workforce later for many women due to childbirth and childrearing.<sup>159</sup> Another provision was put in

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<sup>155</sup> Rep. Geraldine Ferraro, Speech to the Women’s Studies Conference at SUNY-New Paltz, 1 (Mar. 31, 1984) (transcript available in the Marymount Manhattan College Archives, Collection 3 Box 50) [hereinafter Ferraro, Women’s Studies Speech].

<sup>156</sup> *Special Report: Members Speak on the Economic Equity Act of 1985*, UPDATE (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Caucus), Washington, D.C.), May 31, 1985, at 7, 8 [hereinafter *Members Speak on the Economic Equity Act*].

<sup>157</sup> Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984). See *infra* Table 2 for a more detailed description of these enactments. These enactments came on the heels of the Supreme Court’s pronouncement in *Arizona Governing Committee for Tax Deferred Annuity v. Norris*, 463 U.S. 1073 (1983), that employers could not pursuant to Title VII offer women smaller pension plans than similarly situated men. For further discussion of the interplay between the Supreme Court and Congress in the area of pension reform, see *infra* Part III.B.

<sup>158</sup> 129 CONG. REC. 17,890 (1983) (statement of Rep. Edward R. Roybal).

<sup>159</sup> *Special Report—Economic Equity Act Hearings*, *supra* note 133, at 9. This provision helps credit the several years with the highest workforce participation for women. *Id.* (“[F]or women the age group with the highest labor force participation (70% in 1981) is between 20 and 24.”)

place to protect spouses of pension-earning workers. This provision requires “the written consent of both the participant and the spouse to waive the survivor annuity option,” thus protecting the surviving spouse from unilateral waiver of a survivor benefit that would accrue to them under their deceased spouse’s pension.<sup>160</sup> This waiver was exercised by more than sixty percent of retirees.<sup>161</sup> These enactments predominantly impacted women, protecting their access to their husbands’ pensions upon their husbands’ deaths.

The sponsors of the Equity Act were concerned with how women of different races, classes, and ages would be impacted economically by sex-neutral laws (both on the books and in proposed reforms).<sup>162</sup> However, the Equity Act still came under fire for its tax, retirement, and small business provisions, which garnered criticism for being likely to impact only upper middle-class women, thus failing to take into account the needs of poor women and women of color.<sup>163</sup> For instance, spousal individual retirement accounts were criticized as “mink coat legislation” because the enactment was expected to help only upper middle-class women.<sup>164</sup> However, relying on statistics regarding the impoverished state of many women after a divorce or death of a spouse, the Caucus concluded that these proposals were worthy of its attention and support.<sup>165</sup> The Equity Act not only aimed to address the

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<sup>160</sup> *Id.* at 8. Under many pension plans, waiving the survivor benefit entitles the pension-earning spouse to a larger pension payment. *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> For example, in a 1983 speech Representative Ferraro discussed how neutral laws can mask unequal outcomes between men and women, as well as among women of different races or ages: “What is happening to women in our economy today very often gets hidden behind the apparent neutrality of . . . issues like the federal budget . . . When we in Congress receive the President’s budget . . . [i]t doesn’t break down programs by sex or age. . . . But [it] is going to have a different effect on a black single mother in Harlem than it will have on an elderly Italian-American widow who lives in my district in Queens. And [it] will have a different effect on these women than it will have on a man living in New York City.” Rep. Geraldine Ferraro, Speech on the Feminization of Poverty at the Assoc. for a Better New York Breakfast 1 (Dec. 14, 1983) (transcript available in the Marymount Manhattan College Archives, Collection 3 Box 49).

<sup>163</sup> See Julianne Malveaux, *The Political Economy of Black Women*, in RACE, POLITICS, AND ECONOMIC DEVELOPMENT: COMMUNITY PERSPECTIVES 33, 49 (James Jennings ed., 1992) (arguing that “[w]omen of color and poor women recognize little interest” in the tax, retirement, and pension provisions of the Economic Equity Act of 1984); Inuzuka, *supra* note 7, at 1235 (arguing for similar legislation to the Equity Act that “specifically address[es] women of color”).

<sup>164</sup> Ferraro, Women in Crisis Speech, *supra* note 137, at 2.

<sup>165</sup> *Id.* The Caucus was particularly concerned about women in the workforce who were either single heads of households or primary breadwinners. In 1981, the Caucus requested a Joint Economic Committee hearing on the economic status of women: “Citing statistics which demonstrate that 2/3 of all women in the paid labor force are single, widowed, divorced, separated or living with husbands whose incomes are less than \$10,000 per year, the Congresswomen’s Caucus asked the Joint Economic Committee to examine the factors which maintain the majority of American women in low paying occupations.” *Joint Economic Committee to Hold Hearings on Economic Status of Women*, UPDATE (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Caucus), Washington, D.C.), Feb. 1, 1982, at 1, 11.



economic needs of women in poverty, but also sought to keep women from falling into poverty.<sup>166</sup>

*B. From the Equal Rights Amendment to the Economic Equity Act: A Shift in Priorities (98th Congress, 1983–84)*

*1. The Economic Equity Act in the Post-ERA Era*

The 98th Congress witnessed not only the second iteration of the Economic Equity Act, but also the reintroduction of the ERA itself—coined “ERA II.”<sup>167</sup> On June 30, 1982, ERA I was ultimately defeated: despite extension of the deadline, no further states ratified the proposed amendment.<sup>168</sup> During the 98th Congress, the Equal Rights Amendment was reintroduced and “both chambers held extensive hearings before and after the House narrowly rejected ‘ERA II.’”<sup>169</sup> But just as earlier debates on the Equal Rights Amendment had influenced initial versions of the Economic Equity Act,<sup>170</sup> ERA II advocacy also influenced successive versions of the Equity Act. Pol-

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<sup>166</sup> Ferraro, Women’s Studies Speech, *supra* note 155, at 3. Support for the Economic Equity Act was also bolstered by the increasing attention given to studies documenting the feminization of poverty—i.e., the propensity of women to fall into poverty at a disproportionate rate when compared to men. See Barbara A. Mikulski, *A Woman Nominee: Yes, But . . .*, N.Y. TIMES, Mar. 6, 1984, at A23 (stating that Democrats “support the Women’s Economic Equity Act and they want to halt the feminization of poverty”). See generally HILDA SCOTT, WORKING YOUR WAY TO THE BOTTOM: THE FEMINIZATION OF POVERTY (1984) (examining the feminization of poverty worldwide); Martha M. Ertman, *Legal Tenderness: Feminist Perspectives on Contract Law*, 18 YALE J.L. & FEMINISM 545, 556 (2006) (responding to Vicki Shultz, *Life’s Work*, 100 COLUM. L. REV. 1881 (2000)) (“Indeed, the feminization of poverty has been a major strand of feminist theory and activism in the last generation.”); Diana M. Pearce, *The Feminization of Poverty: Women, Work and Welfare*, 11 URB. & SOC. CHANGE REV. 28, 28–36 (1978) (exploring the concentration of poverty among women and coining the phrase “feminization of poverty”); Diana Pearce, *Welfare Is Not for Women: Why the War on Poverty Cannot Conquer the Feminization of Poverty*, in WOMEN, THE STATE, AND WELFARE 265, 267–69 (Linda Gordon ed., 1990) (describing the uniqueness of female poverty). Admittedly, the term “the feminization of poverty” masks differences among women, including women of color, elderly women, and immigrant women. Cf. Evelyn Nakano Glenn, *Cleaning Up/Kept Down: A Historical Perspective on Racial Inequality in “Women’s Work,”* 43 STAN. L. REV. 1333, 1333 (1991) (“With the recent surge in public attention to the ‘feminization of poverty,’ feminist policy analysts have tended to subsume the economic privations of women of color under the general rubric of ‘problems of working women.’”); Angela Harris, *Theorizing Class, Gender, and the Law: Three Approaches*, 72 LAW & CONTEMP. PROBS. 37, 38 (2009) (explaining how “gender marks material differences between groups of people, as concepts like ‘the feminization of poverty’ indicate”).

<sup>167</sup> For an extensive discussion of the reintroduction of the ERA and its implications, see Mayeri, *A New E.R.A.*, *supra* note 4, at 1224–25.

<sup>168</sup> For thorough examinations of the politics of the ERA and its eventual defeat, see generally BERRY, *supra* note 8; JANET K. BOLES, THE POLITICS OF THE EQUAL RIGHTS AMENDMENT: CONFLICT AND THE DECISION PROCESS (1979); MANSBRIDGE, *supra* note 96; DONALD MATHEWS & JANE DE HART, SEX, GENDER, AND THE POLITICS OF THE ERA: A STATE AND THE NATION (1990); STEINER, *supra* note 8.

<sup>169</sup> Mayeri, *A New E.R.A.*, *supra* note 4, at 1224.

<sup>170</sup> See *supra* Part.I.D.

icy reforms deliberated in connection with ERA II were later reflected in the Equity Act and other legislative pursuits of the Women's Caucus. For example, the difficult question of "how Congress could bring the Social Security system into compliance with the ERA" presented ERA II proponents with "a choice between proposing very controversial solutions—such as a homemaker's tax or 'earnings sharing'—or declining to specify what solution Congress should adopt."<sup>171</sup> Proponents chose the latter route in ERA II hearings, "insisting that Congress would have discretion to choose whichever less discriminatory alternative legislators thought best."<sup>172</sup> In the next version of the Equity Act—in the 99th Congress—lawmakers incorporated "earnings sharing" and other Social Security provisions envisioned by ERA II proponents into the Act.<sup>173</sup>

The similarities between ERA advocacy (I and II) and the provisions of Economic Equity Act made plain the intentions of congressional lawmakers to proceed with an agenda aimed at giving substantive effect to the ERA.<sup>174</sup> Though ratification of the ERA did not come to pass, Congressional lawmakers nevertheless had constitutional foundations for their agenda—the "de facto ERA" that the Supreme Court enunciated in a series of opinions leading up to the first introduction of the Economic Equity Act in Congress.<sup>175</sup> Lawmakers in Congress proceeded with the Economic Equity Act as its interpretation of the ERA's mandate, and began to exercise its legislative power to effect sex equality.

By the time ERA II was introduced, however, many feminists agreed that "the ERA's time had come and gone,"<sup>176</sup> and that a shift toward further legislative pursuits in the name of sex equality was warranted. As described by legal commentator Wendy Williams in 1983, "to the extent that the law of the public world must be reconstructed to reflect the needs and values of both sexes, change must be sought from legislatures rather than the courts."<sup>177</sup> In the same year, Deborah Rhode similarly suggested that feminists move away from the ERA, which she described as "an increasingly divisive constitutional symbol," and focus on more concrete responses to structural inequities.<sup>178</sup> With growing consensus that the women's movement ought to focus on legislative means to pursue a more robust vision of equality, the Caucus and other congressional lawmakers proceeded with an expanded version of the Equity Act.

<sup>171</sup> Mayeri, *A New E.R.A.*, *supra* note 4, at 1261–62.

<sup>172</sup> *Id.* at 1262.

<sup>173</sup> See *infra* Table 3 (99th Congress). The proposal for earnings sharing in Social Security would "allocate half of a couple's combined earnings during marriage to each spouse for purposes of calculating Social Security benefits." Liu, *supra* note 21, at 3.

<sup>174</sup> See *supra* Part.I.D and *infra* Part III.B.

<sup>175</sup> See *supra* notes 29–30, 32.

<sup>176</sup> Mayeri, *A New E.R.A.*, *supra* note 4, at 1291.

<sup>177</sup> Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 175 (1983).

<sup>178</sup> Deborah Rhode, *Equal Rights in Retrospect*, 1 LAW & INEQ. 1, 72 (1982).

2. *Politics in the Advent of the Reagan Era: The Gender Gap and the Progressive Development of the Caucus*

The second introduction of the Economic Equity Act benefited from political pressure stemming from the gender gap in President Ronald Reagan's approval ratings, with polls that showed women's ratings as lower.<sup>179</sup> Many members of Congress who were not sympathetic to women's issues in the past were suddenly falling over themselves to throw their support behind gender-related legislation and causes.<sup>180</sup> While the rush to support women's issues had not been sufficient to garner adequate support for passage of ERA II in the House, it was sufficient to garner support for more limited proposals in Congress.<sup>181</sup> Members of Congress "scrambled to hold hearings" on the reintroduced Equity Act.<sup>182</sup> Thus, in 1983, congressional hearings were held on every part of the Economic Equity Act, attention that far outstripped that given to the previous iteration.

Though the Reagan Administration never formally endorsed the Economic Equity Act, it introduced a private pension reform bill six months after the pension equity provisions of the Equity Act were reintroduced.<sup>183</sup> According to the Caucus, this move "indirectly demonstrat[ed the Reagan Administration's] concern over the gender gap."<sup>184</sup> Though proposals differed from the Equity Act provisions, Representative Snowe nonetheless hailed the Administration's response as "welcomed by those of us who had spent many hours seeking to address this problem with the White House."<sup>185</sup>

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<sup>179</sup> Judy Mann, *Gender Gap*, WASH. POST, Jan. 21, 1983, at B1; Ferraro, Local 372 Speech, *supra* note 92, at 3.

<sup>180</sup> Dorothy Gilliam, *Reaching Out*, WASH. POST, June 11, 1983, at B1 ("[T]he Republicans are trying hard to woo women. . . . Many Republicans support the new Economic Equity Act."). Organizations with large Republican memberships, such as the National and International Federations of Business and Professional Women, were also pressing the Reagan Administration to support the Economic Equity Act. Judy Mann, *Bad Dream*, WASH. POST, Aug. 5, 1983, at B1.

<sup>181</sup> Women's organizations noticed a difference in the receptivity of lawmakers to women's issues. For example, Sally Laird, a lobbyist with the League of Women Voters, professed to a "new attitude" among many lawmakers: "They really want to look very closely at how legislation affects women. They start the conversation. We don't have to. And we love it." Stephen V. Roberts, *Slowly, A New Awareness of Women*, N.Y. TIMES, Mar. 3, 1983, at A22 [hereinafter Roberts, *A New Awareness*]. See also generally THE POLITICS OF THE GENDER GAP: THE SOCIAL CONSTRUCTION OF POLITICAL INFLUENCE (Carol M. Mueller, ed., 1988) (explaining the origins of the gender gap; its use by women's organizations, the media and political parties; and its implications for the election of women).

<sup>182</sup> Rep. Geraldine Ferraro, Address to N.Y. Council of Pioneer Women, 8 (Oct. 31, 1983) (transcript available in the Marymount Manhattan College Archives, Collection 3 Box 49).

<sup>183</sup> See *Administration Introduces Private Pension Reform Bill*, UPDATE (Cong. Caucus for Women's Issues (formerly Congresswomen's Caucus), Washington D.C.), Sept. 30, 1983, at 1, 1.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

One of the provisions of the Equity Act that was omitted from the Reagan Administration's pension bill—involving survivor protection for spouses of beneficiaries—was “not included due to its estimated cost.”<sup>186</sup> During the Reagan years, the persistent problem faced by Equity Act proponents was the differing views of the role of the state in providing social assistance. As described by the Caucus: “The parts of the Equity Act making the most progress are the parts which cost the least money. We are up against an Administration which thinks it can balance the federal budget by cutting programs women and children depend on the most.”<sup>187</sup> Indeed, President Reagan had already unveiled his economic program (popularly coined “Reaganomics”) in 1981, which advanced a reduction in government spending on social programs as one of its central tenets.<sup>188</sup> Accordingly, the parts of the Economic Equity Act that were most popular with the Reagan Administration were those that served to privatize the costs of women's dependency by capitalizing on a current or former marital relationship and concomitant claims to income such as child support, alimony, and even public and private pension benefits, which were enacted despite the cost concerns initially raised by the Reagan Administration.<sup>189</sup>

Though the Reagan Administration threw support towards some measures such as pension equity, the overall message remained that neither the Equity Act nor the ERA was necessary based on the premise that sex discrimination could be remedied simply by removing gender-specific language in existing laws and regulations.<sup>190</sup> First, on December 21, 1981, President Reagan created a Task Force on Legal Equity for Women to review “[f]ederal laws, regulations, policies and practices for language which is discriminatory.”<sup>191</sup> The Administration advanced a bill (S. 501) “designed to remove language from the U.S. Code which ‘unjustifiably differentiates’ between men and women”<sup>192</sup> as “its alternative to the Equal Rights Amend-

<sup>186</sup> *Id.* at 8.

<sup>187</sup> Ferraro, Women's Studies Speech, *supra* note 155, at 5.

<sup>188</sup> See DONALD RUTHERFORD, ROUTLEDGE DICTIONARY OF ECONOMICS 469 (2d. ed. 2002); Isabel V. Sawhill, *Reaganomics in Retrospect, in Perspectives on the Reagan Years, in PERSPECTIVES ON THE REAGAN YEARS* 91, 96 (John L. Palmer ed., 1986).

<sup>189</sup> See Table 2 (98th Congress) *infra*; see also Dubler, *In the Shadow of Marriage*, *supra* note 132, at 1644 (“Good husbands, therefore, would play a mediating role between women's material needs and the state's limited economic resources by privatizing wives' needs within the family.”).

<sup>190</sup> Accordingly, in his 1983 State of the Union address, President Reagan addressed economic equity for women, but declined to expressly endorse the Equity Act. See President Ronald Reagan, Address Before a Joint Session of the Congress on the State of the Union (Jan. 25, 1983), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=41698>.

<sup>191</sup> *Reagan Appoints Task Force on Legal Equity for Women*, UPDATE (Cong. Caucus for Women's Issues (formerly Congresswomen's Caucus), Washington, D.C.), Feb. 1, 1982, at 1, 11.

<sup>192</sup> *Senate Marks Up Gender Bias Laws*, UPDATE (Cong. Caucus for Women's Issues (formerly Congresswomen's Congress), Washington, D.C.), Sept. 30, 1983, at 7, 7 [hereinafter *Senate Marks Up Gender Bias Laws*]; Editorial, *No Alternative to E.R.A.*, N.Y. TIMES, Aug. 24, 1983, at A22.

ment (ERA) and the Economic Equity Act (EEA).”<sup>193</sup> This bill was generally supported by proponents of the ERA because—as noted by then NOW President Judy Goldsmith—“any attempt to reduce sex discrimination [is] worthwhile.”<sup>194</sup> However, the Caucus highlighted the qualified view expressed by Kathy Wilson, Chair of the National Women’s Political Caucus, at congressional hearings on the ERA; she argued that “while discriminatory language should be eliminated, ‘it is an insult to assume that language changes are enough.’”<sup>195</sup>

The Reagan era also forced the Caucus to reconsider its membership and its role in Congress. While the Caucus originally included only women members of Congress, the Caucus expanded its membership to include men in the latter part of 1981.<sup>196</sup> At this time, only twenty members of Congress were women, which was emphasized by Caucus co-chair Rep. Patricia Schroeder at the time of the change: “Simple math will tell you that 20 women out of 435 Members of Congress cannot change the multitude of discriminatory and inequitable laws.”<sup>197</sup> Furthermore, not all women were members of the Caucus; though Caucus leaders sought membership of four newly elected Congresswomen in the 97th Congress, these Congresswomen declined in part due to “fear that affiliation with the Caucus would place them at odds with the Reagan Administration.”<sup>198</sup>

The decision to admit men to the ranks of the Caucus was made in part to accommodate new congressional rules for Legislative Service Organizations prohibiting outside funding. To compensate for this lost funding, the Caucus decided to admit male Representatives to its membership.<sup>199</sup> According to Caucus co-chair Patricia Schroeder: “We’ve known for some time that we had to broaden our base of support . . . We need partnership with men in the women’s movement.”<sup>200</sup> Not long after opening the membership of the Caucus, male membership reached 100, including House Speaker Tip O’Neill.<sup>201</sup> Male members paid reduced dues, but also had a smaller role within the Caucus; their names would appear on Caucus correspondence and press releases, but they would be excluded from holding Caucus office, holding Executive Committee positions, or voting for Caucus officers or policy.<sup>202</sup>

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<sup>193</sup> *Senate Marks Up Gender Bias Laws*, *supra* note 192, at 7. *See also* Marjorie Hunter, *Reagan Proposes Sex Bias Changes*, N.Y. TIMES, Sept. 9, 1983, at A20.

<sup>194</sup> *Senate Marks Up Gender Bias Laws*, *supra* note 192, at 7.

<sup>195</sup> *Id.* at 8.

<sup>196</sup> *Congresswomen’s Caucus Expands Membership*, UPDATE, (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Congress), Washington, D.C.), Dec. 7, 1981, at 1, 1.

<sup>197</sup> *Id.*

<sup>198</sup> Gertzog, CONGRESSIONAL WOMEN, *supra* note 8, at 204.

<sup>199</sup> *Id.* at 210.

<sup>200</sup> *Id.* at 211 (quoting Marjorie Hunter, *Congresswomen Admit 46 Men To Their Caucus*, N.Y. TIMES, Dec. 14, 1981, at D10).

<sup>201</sup> *Id.* at 211.

<sup>202</sup> *Id.*

By “organiz[ing] their resources so as to improve the chances their voices [would] be heard” the Caucus “developed and articulated distinctive policy orientations which past House members, women as well as men, tended to ignore” with respect to “how national laws and their implementation affect women.”<sup>203</sup> In terms of issues, the Caucus continued to take “no official position on abortion, [but] it supported family planning and efforts to prevent unwanted pregnancies.”<sup>204</sup> “Proposals for new projects came from many sources—including the [Caucus] co-chairs, other Caucus members, women’s interest groups, and staff members,” but only the Executive Committee could approve matters for endorsement by the Caucus.<sup>205</sup> With this orientation, the Caucus pressed ahead with its agenda for economic equality.

### 3. *Some Early Successes and Long-Term Challenges of the Equity Act Agenda*

In the 98th Congress, sections of the Economic Equity Act were enacted to improve child support enforcement programs to increase collection of court-ordered payments, to permit former spouses of federal employees to receive survivor benefits, and to amend private pension laws to increase benefit eligibility for younger workers, widows, and surviving spouses.<sup>206</sup>

The Child Support Enforcement Amendments of 1984 were a particularly significant victory for the Women’s Caucus.<sup>207</sup> Census Bureau statistics showed that “[o]nly 35 percent of the 8.4 million women bringing up children with an absent father received any child support payment in 1981, and only 22 percent received full payment.”<sup>208</sup> In 1982, “almost \$4 billion in court-ordered child support went unpaid.”<sup>209</sup> To be sure, the ultimate passage of these Amendments in the cost-cutting climate of the Reagan era was undoubtedly aided by the fact that child support operated to privatize the costs

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<sup>203</sup> *Id.* at 8. Several women in Congress at that time discussed their ignorance prior to their election to Congress of how laws—neutral on their face—biased women. Steven V. Roberts, *6 Republican Women and a Special Constituency*, N. Y. TIMES, Aug. 3, 1983, at A14.

<sup>204</sup> Gertzog, CONGRESSIONAL WOMEN, *supra* note 8, at 219.

<sup>205</sup> *Id.* at 217.

<sup>206</sup> See *Wrap-Up of the 98th Congress*, UPDATE (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Caucus), Washington, D.C.), Oct. 12, 1984, at 1, 2–3.

<sup>207</sup> Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (1984). See also *Two Successes Show Promise of Economic Equity*, NAT’L NOW TIMES (Nat’l Org. for Women, Washington, D.C.), Nov./Dec. 1984, at 6 (citing the Child Support Enforcement Amendments as a success showing the “promise” of the Equity Act).

<sup>208</sup> Judy Mann, *Child Support*, WASH. POST, July 20, 1983, at C1 [hereinafter Mann, *Child Support*]. By 2007, with the help of these federal measures, more than seventy-five percent of custodial mothers received some payment, and almost fifty percent received full payment. TIMOTHY S. GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2007 3 (2009), available at <http://www.census.gov/prod/2009pubs/p60-237.pdf>.

<sup>209</sup> BERRY, *supra* note 8, at 109.

of childrearing within the family.<sup>210</sup> But after many decades dominated by the family wage model, in which women were reliant on marriage for economic support and were not guaranteed support upon divorce or death of a spouse,<sup>211</sup> the Child Support Enforcement Amendments established that not only marriage was an economic partnership in which women had claims to the family wage, but also that the costs of childrearing should be shared regardless of the relationship of the parents, and the federal government would impose this norm by bolstering the enforcement of state court child support orders.

In “a rare show”<sup>212</sup> of unity, the House and the Senate voted unanimously to enact the Child Support Enforcement Amendments, which were originally introduced by Rep. Barbara Kennelly as part of the Equity Act.<sup>213</sup> Yet the passage of the bill had been far from inevitable. The *New York Times* attributed the success of the bill to “the growing influence of women lawmakers on Capitol Hill,” naming in particular the Women’s Caucus and Rep. Barbara Kennelly of Connecticut, who “won a seat . . . on the Ways and Means Committee and used her position to turn its attention to the child-support issue.”<sup>214</sup>

The pension provisions of the Equity Act—enacted in the Retirement Equity Act of 1984 and the Civil Service Spouse Retirement Equity Act of 1984—also had a significant impact on the economic circumstances of women.<sup>215</sup> Just four years after the implementation of Equity Act legislation establishing a woman’s right to survivor benefits from her husband’s pension, the General Accounting Office estimated that the survivor benefit coverage rate for wives of private-pension retirees had already increased by fifteen percent.<sup>216</sup>

But again, there remained many provisions that were not enacted. According to the Caucus, the “disappointments of the Economic Equity Act in the 98th Congress include[d] defeat of the nondiscrimination in insurance bill in the House Energy and Commerce Committee and the failure of any of the major tax reform proposals to progress from the committee level.”<sup>217</sup>

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<sup>210</sup> See *supra* note 189 and accompanying text.

<sup>211</sup> See, e.g., *supra* notes 54–56 and accompanying text.

<sup>212</sup> Mann, *Child Support*, *supra* note 208, at C1.

<sup>213</sup> Steven V. Roberts, *Congress Stages a Pre-emptive Strike on the Gender Gap*, N.Y. TIMES, May 6, 1984, at § 4, 24.

<sup>214</sup> *Id.* See also Editorial, *Victory for Child Support*, WASH. POST, May 12, 1984, at A14 (concluding that credit for the Child Support Enforcement Amendments had to be “given to the female legislators of both parties and the women in high office in the administration whose advocacy, determination and hard work brought about passage”).

<sup>215</sup> Civil Service Retirement Spouse Equity Act of 1984, Pub. L. No. 98-615, 98 Stat. 3195 (1984); Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984).

<sup>216</sup> U.S. GEN. ACCOUNTING OFFICE, GAO/HRD-92-49, PENSION PLANS: SURVIVOR BENEFIT COVERAGE FOR WIVES INCREASED AFTER 1984 PENSION LAW 7 (1992).

<sup>217</sup> *The Economic Equity Act: Past, Present, and Future*, UPDATE (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Caucus), Washington, D.C.), Oct. 12, 1984, at 5, 6.

After two rounds of advancing the Equity Act agenda in Congress, the perils of a piecemeal approach were already becoming apparent both within Congress and in the women's movement at large. For example, Sen. Paul Tsongas, a co-sponsor of the first Economic Equity Act in 1981, noted the limits of legislative approaches in advocating for the reintroduction of the ERA in 1983: "[A] statute-by-statute, piecemeal approach to ending sex discrimination, whether at the Federal or State level, has not worked."<sup>218</sup> Further, activists in the women's movement knew that while many in Congress were nominally throwing their support behind the Economic Equity Act and other economic measures, "such expressions of sympathy and concern [would] be difficult to translate into legislative achievements," particularly on costly legislative proposals.<sup>219</sup>

Though NOW professed publicly that the achievements of the Economic Equity Act in the 98th Congress showed the "[p]romise of Economic Equity,"<sup>220</sup> in later years NOW also publicly bemoaned the drawbacks of a statute-by-statute approach: "We're never going to see equality for women in the basic economic arena if we continue to have to go law by law, program by program, statute by statute. It's imperative that we keep pushing for a total solution."<sup>221</sup> Nevertheless, in support of its endorsement of the Economic Equity Act in 1983, NOW noted that it was "fortunate" that the Equity Act was being pushed forward along with reintroduction of the ERA.<sup>222</sup> However, efforts to pass the reintroduced ERA stalled in the 98th Congress.<sup>223</sup> As a result, the Economic Equity Act became the chief vehicle for advocating for women's rights in Congress.

#### 4. *The Lawmaking Process of the Economic Equity Act*

By the end of 1984, the Caucus considered the Economic Equity Act "an institution in the U.S. Congress."<sup>224</sup> Put another way, the process of developing the Economic Equity Act agenda and advancing it in Congress year after year had become a tradition, with legislators committed to carrying the agenda forward in each Congress.<sup>225</sup> The agenda in each Congress was jointly developed by legislators and their staff in both the House and the

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<sup>218</sup> *NOW Vows New Campaign to Win ERA*, NAT'L NOW TIMES (Nat'l Org. for Women, Washington, D.C.), Mar. 1983, at 1, 1.

<sup>219</sup> Roberts, *A New Awareness*, *supra* note 181, at A22.

<sup>220</sup> *Two Successes Show Promise of Economic Equity*, *supra* note 207, at 6.

<sup>221</sup> *Congress Makes ERA Number One*, NAT'L NOW TIMES (Nat'l Org. for Women, Washington, D.C.), Winter 1987, at 1, 5.

<sup>222</sup> Lisa Lederer, *Economic Equity Act Introduced in Congress*, NAT'L NOW TIMES (Nat'l Org. for Women, Washington, D.C.), Apr. 1983, at 2, 2.

<sup>223</sup> Mayeri, *A New E.R.A.*, *supra* note 4, at 1224.

<sup>224</sup> *Id.* at 5.

<sup>225</sup> See *The Economic Equity Act: Past, Present, and Future*, *supra* note 217, at 6 ("The Economic Equity Act will be back in the 99th Congress proposing further reforms for equitable treatment of women in the areas of dependent care, pensions, insurance, and tax reform.").



Senate in consultation with major women's organizations.<sup>226</sup> As described in the *Washington Post*, the Economic Equity Act was considered at the time to be an inventive way of advancing the goals of women's organizations: "The genius of the new plan lay in the decision to create a megabill that would dramatize the economy's systematic discrimination against women and focus the fragmented lobbying efforts of a variety of women's interest groups."<sup>227</sup>

Members of Congress were also influenced by their constituencies. Single parents, including divorced and widowed women, sent piles of letters—often with pictures of their children attached—pleading with lawmakers to help with their dire financial circumstances.<sup>228</sup> These economic problems weighed on the minds of feminist lawmakers, who were inundated with stories of economic disaster resulting from divorce or death of a spouse, or simply from the difficulties of raising children as a single parent. Rep. Patricia Schroeder described the circumstances outlined in constituent letters that she and other Caucus members were receiving: "Women who write horror stories to Members of Congress are not writing about abstract injustices. . . . They are mothers who cannot collect child support, widows with no pensions, homemakers flung into the job market with no skills, pregnant women cracking under the strain of job and home."<sup>229</sup> In another example, Rep. Marge Roukema recalled in an interview "an incident on the campaign trail, when a woman approached her to complain about a lack of child support from her former husband"—in response, she became a lead sponsor of the child support enforcement legislation.<sup>230</sup>

These letters and campaign trail pleas directly influenced the provisions the lawmakers included in the Equity Act. Rep. Patricia Schroeder explained: "After years of urging, this Congress responded to the call for bread and butter economic reforms."<sup>231</sup> As described in a Caucus newsletter, "[o]ver 300 bills were introduced on women's issues ranging from disallowing business tax deductions for expenses incurred at private clubs that discriminate to increasing education and child care support for AFDC mothers."<sup>232</sup>

With so many disparate bills forming the Equity Act agenda, the Caucus also developed a consistent, recurring process for moving the agenda through Congress. As described by then-Rep. Olympia Snowe: "We sit down and develop strategies and priorities to get as many of the statutes through Congress as possible. . . . We've tried to develop a network among ourselves. We divide up the committees in question, we have vote counters,

<sup>226</sup> See *id.* at 5; Ferraro, Women's Studies Speech, *supra* note 155, at 3.

<sup>227</sup> See Edmunds & Paterson, *supra* note 67, at 23.

<sup>228</sup> *Economic Equity Act Gaining Momentum*, UPDATE (Cong. Caucus for Women's Issues (formerly Congresswomen's Caucus), Washington, D.C.), Oct. 31, 1983, at 1, 5.

<sup>229</sup> *Id.*

<sup>230</sup> Roberts, *supra* note 203, at A14. Representative Roukema further recalled: "I couldn't do anything for her [at the time], but I never forgot that." *Id.*

<sup>231</sup> *Wrap-Up of the 98th Congress*, *supra* note 206, at 1.

<sup>232</sup> *Id.*

Democrats lobby Democrats, Republicans lobby Republicans, and we try to keep everyone abreast of when they should be on the floor fighting for votes.”<sup>233</sup> But, as reported in the same article, “[t]he Federal legislative process moves slowly, and victories are few and far between. Some bills are introduced year after year before passage.”<sup>234</sup> The Caucus, however, seemed well aware of the sustained efforts that would be required to follow through with such a long-term and expansive agenda.<sup>235</sup>

### C. *The Economic Equity Act and the Family Economic Model*

#### 1. *Economic Equity and Family Leave (99th Congress, 1985–86)*

The Caucus defined its agenda for the 99th Congress with the Economic Equity Act as one part of a “two-pronged” attack: “first, to end overt discrimination through enactment of the Civil Rights Restoration Act and the Equal Rights Amendment; and second, to promote economic equality through the introduction and active support of the Economic Equity Act of 1985.”<sup>236</sup> Though the Civil Rights Restoration Act would top the legislative agenda of the Caucus in the 99th Congress due to the “immediacy of [the] problem” created by “the damage done to the civil rights statutes by the *Grove City* decision,”<sup>237</sup> the Caucus placed the Equity Act among its top initiatives.<sup>238</sup> Twenty-seven organizations endorsed the 1985 Economic Equity Act.<sup>239</sup> The Equity Act “continue[d] as the blueprint for improving wo-

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<sup>233</sup> Barbara Gamarekian, *Women’s Caucus: Eight Years of Progress*, N.Y. TIMES, May 27, 1985, §1, at 20.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* (“Each of the bills will be introduced separately, and members of the caucus will be fighting for them at each step along the way.”). In a Caucus newsletter summarizing the 98th Congress, the Caucus lauded the Economic Equity Act as “achieving some modest victories in the 97th Congress, attracting a great deal of attention and making some major strides for women in the 98th, and being looked to as a guidepost for the women’s agenda in the 99th.” *The Economic Equity Act: Past, Present, and Future*, *supra* note 217, at 5.

<sup>236</sup> *Agenda for the 99th Congress*, UPDATE (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Caucus), Washington, D.C.), Feb. 28, 1985, at 1, 1.

<sup>237</sup> *Id.* See also *Grove City Coll. v. Bell*, 465 U.S. 555 (1984) (finding that Title IX protection extends only to specific programs receiving funding rather than to the institutions that benefit from that funding).

<sup>238</sup> *Agenda for the 99th Congress*, *supra* note 236, at 1. “The Restoration Act would overturn the 1984 *Grove City* decision, in which the Supreme Court ruled that the antidiscrimination coverage of Title IX of the Education Amendments of 1972 extends only to the specific program that receives federal funds, rather than to the entire institution as had previously been the case.” *Caucus Sets Agenda for 100th Congress*, UPDATE (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Caucus), Washington, D.C.), Feb. 27, 1987, at 1, 15.

<sup>239</sup> See *Members Speak on the Economic Equity Act*, *supra* note 156, at 12.

men's economic standing"<sup>240</sup> and its introduction into Congress received national media coverage.<sup>241</sup>

The Caucus also advanced standalone legislation involving small businesses and, for the first time, the parental leave legislation that would later be enacted as the Family and Medical Leave Act ("FMLA").<sup>242</sup> Though the FMLA was not enacted until 1993, the hearings provided the Caucus with an opportunity to begin to shape the debate surrounding the legislation and lobby for its passage. In a 1985 House hearing on parental leave, Rep. Patricia Schroeder declared that it was "unacceptable that the United States is the only industrialized nation that does not have a national policy guaranteeing some type of parental leave."<sup>243</sup> In another hearing in 1986, she proclaimed: "It's time we drag ourselves into the 1980s and update our personnel policies to make work and family more compatible."<sup>244</sup>

In the 99th Congress, the Caucus successfully raised awareness of the law's outdated assumptions about women, work, and family. For example, in formulating tax policy, "[a]dministration officials conceded that their data on the impact of tax reform on middle-income families was based solely on a 'traditional' family model."<sup>245</sup> Caucus co-chair Rep. Patricia Schroeder urged the House Ways and Means Committee "to formulate tax policy with a wider view of American families" stating that "'traditional' families—where the husband is the wage-earner and the wife stays home to raise the children—make up only 10.7% of all families."<sup>246</sup> The Caucus's lobbying began to bear fruit when "in response to the criticism from [m]embers of Congress, the Administration . . . announced its willingness to work to develop a 'technical solution' to the plan's problem of equity for the two-earner family."<sup>247</sup> Ultimately, Equity Act gains in the tax arena during this period were embodied in the Tax Reform Act of 1986 and included closing a gap in

<sup>240</sup> *Agenda for the 99th Congress*, *supra* note 236, at 1.

<sup>241</sup> See Steven V. Roberts, *Congress Gets Bills to Raise Economic Status of Women*, N.Y. TIMES, May 15, 1985, at A20; Judy Mann, *Benefits for Women*, WASH. POST, May 15, 1985, at C3.

<sup>242</sup> *Caucus Sets Priorities for 1986*, UPDATE (Cong. Caucus for Women's Issues (formerly Congresswomen's Caucus), Washington, D.C.), Feb. 28, 1986, at 1, 10; Family and Medical Leave Act of 1993, Pub. L. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§2601–2654 (2006)).

<sup>243</sup> *Parental Leave Hearing Held*, UPDATE (Cong. Caucus for Women's Issues (formerly Congresswomen's Caucus), Washington, D.C.), Oct. 31, 1985, at 1, 1.

<sup>244</sup> *Parental Leave Bill Clears Committees*, UPDATE (Cong. Caucus for Women's Issues (formerly Congresswomen's Caucus), Washington, D.C.), June 30, 1986, at 1, 1.

<sup>245</sup> *Caucus Co-Chairs Advocate Tax Equity for Families*, UPDATE (Cong. Caucus for Women's Issues (formerly Congresswomen's Caucus), Washington, D.C.), June 28, 1985, at 1, 1.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* However, the Caucus was not satisfied with the President's proposals. In congressional hearings, the policies espoused in the Equity Act were ultimately pitted against the President's proposals. *Id.*

the standard deduction and increasing the earned income tax credit.<sup>248</sup> But, as with many Equity Act proposals, these gains in tax policy were just part of the Caucus's more extensive tax reform package.<sup>249</sup>

In a report on the accomplishments of the 99th Congress, the Caucus lauded the efforts of its members leading to the enactment of six Equity Act provisions, including "many of the 'nuts and bolts' issues for women, such as private pension reform, health insurance, and tax reform."<sup>250</sup> These reforms included the Tax Reform Act of 1986, which increased the standard deduction for single heads of household and increased the earned income tax credit for low-income taxpayers. Other bills strengthened spousal rights to military pensions upon divorce or death of a spouse, established funding for on-site daycare for low-income college students, and established COBRA health insurance coverage requiring the continuation of employment-based health insurance coverage for three years for widows and divorced spouses, and for 18 months for workers who have been laid off, terminated, or had their hours reduced, and their dependent children.<sup>251</sup>

## 2. *A Work and Family Platform (100th Congress, 1987–88)*

In 1987, the Economic Equity Act was once again declared "[t]he centerpiece of the Caucus agenda" for the 100th Congress.<sup>252</sup> This version was "more streamlined . . . contain[ing] just two titles—Work and Family—but . . . [it] address[ed] a broad spectrum of equity issues."<sup>253</sup> This version of the Equity Act signaled a pronounced shift towards merging the separate spheres, including a section for "issues such as pay equity, equal credit opportunity, and social security and pension reforms," as well as a section addressing "the need for quality, affordable dependent care, welfare reform, and nondiscrimination in insurance."<sup>254</sup> The Caucus also proffered the ERA, family leave legislation, and the Civil Rights Restoration Act, as well as a number of new initiatives in its 1987 agenda: namely, "welfare reform, child care, and women's health care."<sup>255</sup>

In 1987, at a press conference announcing the newest version of the Act, there was a clear shift towards a focus on enabling women to work.

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<sup>248</sup> See *Congress Gives Final Approval to Tax Bill*, UPDATE (Cong. Caucus for Women's Issues (formerly Congresswomen's Caucus), Washington, D.C.), Oct. 20, 1986, at 1, 12–13.

<sup>249</sup> See *Caucus Co-Chairs Advocate Tax Equity for Families*, *supra* note 245, at 1.

<sup>250</sup> *Wrap-Up of 99th Congress*, UPDATE (Cong. Caucus for Women's Issues (formerly Congresswomen's Caucus), Washington, D.C.), Oct. 20, 1986, at 1, 1.

<sup>251</sup> See *infra* Table 2 (99th Congress).

<sup>252</sup> *Caucus Sets Agenda for 100th Congress*, *supra* note 238, at 14.

<sup>253</sup> *Id.*

<sup>254</sup> See *id.*

<sup>255</sup> See *id.* at 1. The health care initiatives steered clear of family planning or abortion-related legislation. The Caucus's focus on women's health involved issues such as "spousal impoverishment, office health hazards, adolescent pregnancy, breast cancer, and diseases particular to women." *Id.* at 15.

Representative Schroeder stated: “Changing demographics in the work force and the family demand that government come up with policies that shore up families’ economic support systems. We are taking a step toward meeting this demand today with the introduction of the Economic Equity Act of 1987.”<sup>256</sup> The focus of this version of the bill was to improve the economic circumstances of “women by providing greater employment opportunities and child care options.”<sup>257</sup> In relation to proposed child-care legislation, Representative Schroeder further emphasized these concerns: “America has become a society in which everyone is expected to work—including women with young children . . . . Unfortunately, many of society’s institutions are out of sync with today’s reality and were designed during an era when it was thought that men were the breadwinners and women the homemakers.”<sup>258</sup>

As the Caucus pressed forward with the Equity Act, another battle raged in the 100th Congress: the overhaul of the nation’s welfare system.<sup>259</sup> “Concern [was] expressed by both the Administration and Congress over the shape of the current system, and various proposals [were] put forth to establish a new network of programs designed to propel welfare recipients into self-sufficiency.”<sup>260</sup> The Caucus supported welfare reform,<sup>261</sup> but was still concerned with maintaining support for women and children living in poverty: “The Caucus will sponsor several welfare reform bills which provide welfare recipients with not only the education and skills necessary to find employment, but which go further and address particular needs of women with children living in poverty.”<sup>262</sup> But the Caucus’s aims were met with some opposition. At a House subcommittee meeting marking up the bill, “[p]anel Republicans specifically objected to provisions in the legislation that would increase the federal share of benefits, extend benefits to two-parent families, and raise the minimum benefit level.”<sup>263</sup>

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<sup>256</sup> *Economic Equity Act of 1987 Introduced*, UPDATE (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Caucus), Washington, D.C.), June 30, 1987, at 1, 1.

<sup>257</sup> *Id.*

<sup>258</sup> *Subcommittee Looks at Changing Role of Women in the Work Force*, UPDATE (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Caucus), Washington, D.C.), Aug. 7, 1987, at 4, 4. *See also April Hearing Focuses on Child Care*, UPDATE (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Caucus), Washington, D.C.), Apr. 29, 1988, at 1, 1 (summarizing Sen. Snowe’s remarks articulating that the “two-parent, one-earner family is no longer the norm”).

<sup>259</sup> For a discussion of the long history of welfare reform efforts, see generally *WHOSE WELFARE?* (Gwendolyn Mink ed., 1999).

<sup>260</sup> *Work Begins on Overhaul of Nation’s Welfare System*, UPDATE (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Caucus), Washington, D.C.), Feb. 27, 1987, at 7, 7.

<sup>261</sup> *Welfare Reform Legislation Introduced*, UPDATE (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Caucus), Washington, D.C.), Mar. 31, 1987, at 4, 5.

<sup>262</sup> *Caucus Sets Agenda for 100th Congress*, *supra* note 238, at 14–15.

<sup>263</sup> *First Hurdle Overcome in House Welfare Reform Action*, UPDATE (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Caucus), Washington, D.C.), Apr. 30, 1987, at 1, 10.

Not only were partisan battles emerging in Congress over welfare reform,<sup>264</sup> but the Caucus found themselves out of step with a frequent ally, the National Organization for Women. NOW opposed the reforms proposed by both parties, suggesting that all of the proposals “do little more than exchange the non-working poor for the working poor.”<sup>265</sup> In particular, NOW singled out Democrats for proposing a bill that the organization considered to be deeply flawed.<sup>266</sup> NOW lost this battle with the enactment of the Family Support Act of 1988, which cemented work requirements into the welfare system.<sup>267</sup> Specifically, this Act was considered “a comprehensive restructuring of the welfare system to reduce long-term dependency on welfare programs” by making full Aid to Families with Dependent Children (AFDC) grants contingent on participation in Job Opportunities and Basic Skills Training (JOBS) for many AFDC recipients—essentially requiring these recipients to participate in educational activities, training programs, or job activities.<sup>268</sup> Even though the Economic Equity Act contained many structural support proposals, like daycare, that the Caucus considered to be “an important component in any legislation regarding welfare reform,”<sup>269</sup> only parts of the Equity Act’s daycare proposal passed despite the wholesale restructuring of welfare assistance.<sup>270</sup>

The Caucus also struggled with other initiatives. For example, another concern that influenced the Equity Act in 1987 was the predominance of women in part-time and temporary jobs without any employment-related benefits. The Part-Time and Temporary Workers Protection Act, part of the Equity Act, was discussed by Representative Schroeder in the Caucus newsletter: “I am disturbed by the trend I see that is creating a second-tier of employees that is largely made up of women. Women . . . account for two-thirds of part-time workers and three-fifths of all temporary workers.”<sup>271</sup> The proposed legislation provided for “pro rata health and pension benefits to

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<sup>264</sup> See *id.* at 1, 10 (describing “sharp philosophical elements” throughout party-line voting in committee meeting).

<sup>265</sup> Jennifer Jackman, *It’s Time to Face Reality*, NAT’L NOW TIMES (Nat’l Org. for Women, Washington, D.C.), Sept./Oct./Nov. 1987, at 4, 5.

<sup>266</sup> *Id.* (“Yet liberal Democratic Senators—seemingly oblivious to the direct connections between poverty and their often cited concerns of homelessness and hunger—have signed on as co-sponsors of the enormously flawed Moynihan Family Security Act.”).

<sup>267</sup> See Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343.

<sup>268</sup> RICHARD P. KUSSEROW, DEP’T OF HEALTH & HUMAN SERVS., *THE FAMILY SUPPORT ACT OF 1988: WHAT DO FRONT-LINE WORKERS KNOW? WHAT DO THEY THINK?* i (1992), available at <http://oig.hhs.gov/oei/reports/oei-05-89-01220.pdf>.

<sup>269</sup> Carol Kleinman, *Force in Congress Since ’81, Caucus Presses Biggest Agenda for Women*, CHI. TRIB., Aug. 24, 1987, at 6.

<sup>270</sup> See *infra* Table 3 (100th Cong.).

<sup>271</sup> *Subcommittee Holds Hearings on Part-Time and Temporary Workers*, UPDATE (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Caucus), Washington, D.C.), May 31, 1988, at 5, 5. See also Patricia Schroeder, *Does the Growth in the Contingent Work Force Demand a Change in Federal Policy?*, 52 WASH. & LEE L. REV. 731, 733 (1995) (noting that “two out of every three temporary workers are women”) (internal citation omitted).

employees working part-time” so long as their employer offered “health and pension plan coverage to employees working full-time.”<sup>272</sup> Though the Caucus advocated for this legislation in several iterations of the Equity Act, Congress did not enact these proposed reforms.

However, the Caucus did score a tremendous victory in the 100th Congress in connection with small business lending to women. In 1988, Congress held hearings on the barriers faced by women business owners, examining “issues ranging from problems women face in acquiring capital and technical assistance to flaws and inconsistencies built into the federal procurement system.”<sup>273</sup> As demonstrated in the hearings, even small business proposals were fraught with gendered overtones. For example, Rep. Jan Meyers noted that at the hearings it became clear that “programs for women business owners are often thought of as social programs.”<sup>274</sup> Nevertheless, the Caucus managed to secure enactment of many of the Equity Act provisions concerning women-owned small businesses in the Women’s Business Ownership Act of 1988.<sup>275</sup> The Women’s Business Ownership Act was a landmark—but also overlooked—intervention into the landscape of small business lending to women. Significantly, it extended the prohibition on sex discrimination in consumer lending to commercial lending as well, and also created the Small Business Administration’s Office of Women’s Business Ownership and its Women’s Business Center program.<sup>276</sup>

### 3. *The Family Economic Structure (101st Congress, 1989–90)*

The Caucus agenda for the 101st Congress remained similar to the agenda of the previous Congress. The Economic Equity Act remained a priority in the Caucus’s agenda, with provisions related to “pay equity, Social Security earnings sharing, pension reforms, increased child care services, and benefits for part-time and temporary workers.”<sup>277</sup> In addition, the Economic Equity Act included new legislation to provide prenatal care to low-income women, assist displaced homemakers, and expand assistance to victims of family violence.<sup>278</sup> The Caucus also continued to advocate for family

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<sup>272</sup> *Subcommittee Holds Hearings on Part-Time and Temporary Workers*, *supra* note 271, at 5, 5. These reforms, however, were controversial; critics argued that it would encourage part-time work over full-time work and be too costly for employers. See Gillian Lester, *Careers and Contingency*, 51 *STAN. L. REV.* 73, 117–18 (1998) (summarizing proposed reforms to part-time and temporary worker legislation).

<sup>273</sup> *Hearings Begin on Women and Business*, *UPDATE* (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Caucus), Washington, D.C.), Apr. 29, 1988, at 4, 4.

<sup>274</sup> *Id.*

<sup>275</sup> See Women’s Business Ownership Act of 1988, Pub. L. No. 100-533, 102 Stat. 2697 (1988).

<sup>276</sup> *Id.*; see *infra* Table 2 (100th Congress).

<sup>277</sup> *Caucus Agenda for 101st Congress Takes Shape*, *UPDATE* (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Caucus), Washington, D.C.), Feb. 28, 1989, at 1, 14.

<sup>278</sup> *Id.*

leave legislation.<sup>279</sup> Furthermore, this Congress witnessed the first introduction of the Violence Against Women Act.<sup>280</sup>

At a press conference introducing the Economic Equity Act of 1989, the Caucus continued to hail the Equity Act as the driving force behind legislation for women. Representative Snowe summarized this state of affairs: "Throughout the 1980s, the EEA was the engine driving legislation for women and families, and for good reason . . . sharp economic disparities, and the burdens they imposed, were a sad fact of life for women in America."<sup>281</sup> Sen. Alan Cranston concurred: "In past Congresses, the EEA has served as a blueprint and an agenda for Congressional action to eliminate economic inequities facing millions of American women and their families."<sup>282</sup> But he continued, "[m]uch has been accomplished, but much remains to be done."<sup>283</sup> Rep. Constance Morella called for Congress to "step up the pressure to ensure true parity" in the "economic and social status of women."<sup>284</sup>

In this Congress, the Caucus succeeded in securing enactment of Equity Act legislation that increased rights for foreigners who were victims of abuse by their American spouses. The two-year waiting period of "conditional" residency was waived for such cases.<sup>285</sup> Several other Equity Act enactments continued the steady stream of legislative reforms, including job training and housing assistance for "displaced homemakers" and prenatal, maternal, and child health-related initiatives.<sup>286</sup>

#### 4. *Modeling the Equity Act (102nd Congress, 1991–92)*

In the 102nd Congress, the Caucus continued to expand the proposals included in the Economic Equity Act, particularly with respect to women's participation in employment and small business.<sup>287</sup> Although family considerations still played a strong role in the discussions, economic obstacles to

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<sup>279</sup> *Mixed Results for Women as First Session of 101st Congress Ends*, UPDATE (Cong. Caucus for Women's Issues (formerly Congresswomen's Caucus), Washington, D.C.), Nov. 30, 1989, at 1, 1.

<sup>280</sup> *Domestic Violence is Target of Bill*, N.Y. TIMES, Dec. 16, 1990, §1, at 31. Barbara Boxer, a member of the legislative committee of the Caucus at the time, authored the House version of the Violence Against Women Act. Jane Ayers & Margaret Carroll, *Barbara Boxer Aims for the Senate's 'Mens Club'*, CHI. TRIB., Nov. 3, 1991, at 1.

<sup>281</sup> *Economic Equity Act Introduced*, UPDATE (Cong. Caucus for Women's Issues (formerly Congresswomen's Caucus), Washington, D.C.), Aug. 4, 1989, at 1, 1.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> Immigration Act of 1990, Pub. L. No. 101-649, § 701, 104 Stat. 5085 (codified as amended in scattered sections of 8 U.S.C.).

<sup>286</sup> See *infra* Table 2 (101st Congress).

<sup>287</sup> Caucus co-chair Patricia Schroeder observed that Congress was "now beginning to focus . . . on the tremendous inequalities that women have in the workplace in any number of ways." *Caucus Introduces Economic Equity Act*, UPDATE (Cong. Caucus for Women's Issues (formerly Congresswomen's Caucus), Washington, D.C.), Oct. 31, 1991, at 1, 1 (on file with author).



the participation of women in the marketplace became a more substantial concern: “Each year more and more women enter the workforce out of necessity. In many cases, women are raising children alone and are responsible for caring for elderly parents as well. To these women, and many others, a paycheck cannot be called a luxury—it is an absolute necessity.”<sup>288</sup>

The Act, as described by the Caucus, included provisions to “expand nontraditional job training for women, provide educational and professional opportunities for women in science and mathematics, increase procurement opportunities for women business owners, and establish a commission to investigate ways to break the ‘glass ceiling’ and allow women to advance through the management ranks.”<sup>289</sup> It also included “expand[ed] job benefits for part-time workers” and provisions ensuring that “the Social Security system does not penalize women who take time off from the workforce to care for dependent family members.”<sup>290</sup> Ultimately, several Equity Act initiatives were enacted, including provisions assisting women entering non-traditional job sectors, extending Federal Pell Grants for less than half-time students, and bolstering small business lending and technical support.<sup>291</sup>

Furthermore, the Equity Act inspired two additional omnibus bills functioning in the same manner—the Women’s Health Equity Act<sup>292</sup> and the Gender Equity in Education Act.<sup>293</sup> In particular, the Health Equity Act, building on health equity-related components of the Economic Equity Act, led to the establishment of the Office on Women’s Health in the Department of Health and Human Services and the eventual requirement (passed in the National Institute of Health (“NIH”) Revitalization Act of 1993) that women and minorities must be included in NIH clinical trials, where appropriate.<sup>294</sup>

#### D. *Politics, Ideology, and the Economic Equity Act*

##### 1. *A Coalescence of Political Will (103rd Congress, 1993–94)*

From 1983 to 1992, there were hundreds of legislative proposals championed by the Caucus. While the Caucus secured many notable enactments in areas such as retirement and pension equity, child support enforcement, small business lending, and more, the Caucus was unable to secure enact-

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<sup>288</sup> *Id.* at 18 (quoting Rep. Marilyn Lloyd).

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> See *infra* Table 2 (102nd Congress).

<sup>292</sup> Women’s Health Equity Act of 1991, H.R. 1161, 102nd Cong. (1991).

<sup>293</sup> Gender Equity in Education Act of 1993, H.R. 1793, 103rd Cong. (1st Sess. 1993). This bill, sponsored by Rep. Patricia Schroeder, died in committee.

<sup>294</sup> Pub. L. No. 103-43, 107 Stat. 122 (1993). See also *Bills Introduced*, UPDATE (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Caucus), Washington, D.C.), Oct. 31, 1991, at 2, 2; 156 CONG. REC. E2,051 (daily ed. Dec. 2, 2010) (statement of Rep. Louise McIntosh Slaughter).

ment of a majority of proposals advanced by the Equity Act agenda.<sup>295</sup> Further, even when proposals passed, “some went unfunded, which meant their reintroduction in the next Congress.”<sup>296</sup> Others were merely the “reclaiming of gains nullified by hostile Republican administrations.”<sup>297</sup> During the Reagan Administration, for example, private pension reform and improvements to child support enforcement—while imperative for women with pension-earning husbands or for women that were owed child support payments—nonetheless served to privatize the costs of dependency.<sup>298</sup> Indeed, “when measures designed to help women did succeed during the Reagan years, most were symbolic, inexpensive or both.”<sup>299</sup> Despite these limitations, together these enactments constituted a considerable change in the treatment of women under federal law and policy. Congress took women’s economic insecurity seriously, particularly in the event of divorce or death of a spouse, allowing claims to pensions (military, public, and private) and Social Security, and substantially improving child support enforcement, among other enactments.<sup>300</sup>

In the Bush Administration years that followed, the Equity Act provisions that were enacted helped women—particularly low-income women—train for, enter, and advance in the workforce and business arena. But these reforms were passed on the heels of the enactment of the Family Support Act of 1988, which imposed the first round of work requirements in the welfare system. President Bush did sign some legislation aimed at assisting low-income women in making the required transition from welfare to work. However, these reforms fell far short of the reforms ultimately sought by the Caucus to avoid—in the words of NOW—merely exchanging the poor for the working poor.<sup>301</sup> Further, President Bush twice vetoed the Family and Medical Leave Act.<sup>302</sup> Nevertheless, the “period also witnessed a few legislative innovations.”<sup>303</sup> Just as important, however, was the fact that “[t]hese years also saw the groundwork laid for policies and programs that would bloom one day in a more favorable political climate.”<sup>304</sup>

With the election of President Bill Clinton in 1992, accompanied by a surge in the number of women in the House, the time for significant progress in connection with the legislative agenda of the Caucus had arrived. In particular, the Caucus in the 103rd Congress was a formidable force, contribut-

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<sup>295</sup> GERTZOG, CONGRESSIONAL WOMEN, *supra* note 8, at 215 (“Most [proposals] were not enacted, but several were.”).

<sup>296</sup> *Id.* at 158.

<sup>297</sup> *Id.* at 215.

<sup>298</sup> *See supra* Part II.B.2.

<sup>299</sup> GERTZOG, CONGRESSIONAL WOMEN, *supra* note 8, at 219.

<sup>300</sup> *See Wrap up of the 98th Congress*, *supra* note 206, at 2.

<sup>301</sup> *See* Jackman, *supra* note 265.

<sup>302</sup> GERTZOG, CONGRESSIONAL WOMEN, *supra* note 8, at 221.

<sup>303</sup> *Id.* at 215.

<sup>304</sup> *Id.*

ing to 1992 being declared the “Year of the Woman.”<sup>305</sup> A record number of women served in the House and the Senate: the number of women in the House rose from twenty-eight to forty-seven.<sup>306</sup> The membership of the Caucus also increased with the 1992 elections.<sup>307</sup>

The increase in congresswomen elected and the increase in Caucus membership were not the only factors in what would become the single most productive Congress for the Caucus. Rather, “[a]t least as important as any of these developments was the election of a President who was sympathetic to [Caucus] priorities.”<sup>308</sup> President Clinton’s first term in office put in stark relief just how quickly the political tides can change in either direction, as well as how these changes can immediately impact the momentum of a social movement’s legislative agenda. During the first two years of the Clinton Administration, a record number of laws with the aim of benefitting women were enacted.<sup>309</sup> These enactments included major portions of two omnibus bills on women’s health and education equity that were inspired by—and contained some provisions originating from—the Economic Equity Act.<sup>310</sup> President Clinton signed into law the landmark Family and Medical Leave Act of 1993 within weeks of inauguration—a bill that had been twice vetoed by President Bush. Before the next election, President Clinton also signed into law the watershed Violence Against Women Act of 1994.<sup>311</sup> As a result of these legislative triumphs, Rep. Patricia Schroeder declared the 103rd Congress as quite possibly “the most productive ever for women.”<sup>312</sup> Other Caucus members stated that the Caucus had graduated from being “an effective catalyst and advocate for feminist goals” to an “agenda setter.”<sup>313</sup> As described by Gertzog, by 1993 “[f]eminist values and the language of femi-

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<sup>305</sup> *First Session Sees Historic Gains for Women*, UPDATE (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Caucus), Washington, D.C.), Nov. 30, 1993, at 1, 1 (on file with author). As aptly described by Irwin Gertzog, “notwithstanding the appeal of catchy phrases, the so called ‘Year of the Woman’ was only one important act in a far grander scenario of political change” and “its attachment to a single year minimized unjustifiably the successful political efforts women had been making routinely over time.” GERTZOG, CONGRESSIONAL WOMEN, *supra* note 8, at 5.

<sup>306</sup> GERTZOG, CONGRESSIONAL WOMEN, *supra* note 8, at 7.

<sup>307</sup> *Id.* at 222.

<sup>308</sup> *Id.* at 223–24.

<sup>309</sup> See *First Session Sees Historic Gains for Women*, *supra* note 305, at 1.

<sup>310</sup> *Id.*

<sup>311</sup> The Violence Against Women Act was passed as Title IV § 40001-40703 of the Violent Crime Control and Law Enforcement Act of 1994 H.R. 3355, 103rd Cong. and signed as Pub. L. No. 103-322.

<sup>312</sup> GERTZOG, CONGRESSIONAL WOMEN, *supra* note 8, at 226. According to Representative Schroeder, “[i]ssues of concern to women and families truly came of age during the first session of the 103rd Congress. We have never come so far so quickly. If we follow our present pace, the 103rd Congress will go down in history as the most productive ever for women.” *Id.* at 226 (quoting *First Session Sees Historic Gains for Women*, UPDATE (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Caucus), Washington, D.C.), Nov. 30, 1993, at 1, 1).

<sup>313</sup> GERTZOG, CONGRESSIONAL WOMEN, *supra* note 8, at 227–28.

nist legislative discourse were given a legitimacy that until 1993 they had lacked.”<sup>314</sup>

Ultimately, the Equity Act gained its highest profile ever both in and out of Congress—it garnered endorsements from twenty-five national organizations, as well as an administrative action plan in an effort to boost its effectiveness.<sup>315</sup> Overall, in the 103rd Congress the Caucus collectively championed sixty-six enactments (including numerous Economic Equity Act measures, as well as the watershed enactments of the FMLA and VAWA)—all designed to improve the lives of women and their families, exceeding the number passed by any previous Congress.<sup>316</sup>

## 2. *The End of a Legislative Era (104th Congress, 1995–96)*

After the 103rd Congress, however, the political climate underwent an about-face. The 1994 elections—characterized by Newt Gingrich’s “Contract with America”—resulted in Republican majorities in both houses of Congress for the first time in almost half a century.<sup>317</sup> Newly elected Republican leaders eliminated funding for House Legislative Service Organizations such as the Caucus.<sup>318</sup> “Black, Hispanic, and women House members interpreted the decision as an assault on diversity in Congress.”<sup>319</sup> Representative Schroeder decried this initiative as “abolish[ing] the one organization that exists to give women a stronger voice in the policy process.”<sup>320</sup>

Aside from eliminating funding for Caucus organizations, the new Republican leadership came into power on the platform of their “Contract with America.” Most devastating to the previous agenda of the Women’s Caucus was the deliberate omission of many social and other proposals that the Caucus had been trying to build support for among lawmakers.<sup>321</sup> Many of the Caucus’s social program victories over the last decade were the first to face the threat of cuts in the new Congress.<sup>322</sup>

The prior success of the Caucus had been attributed in part to a commitment to bipartisanship. Though the Caucus tended towards liberal causes, the omnibus Economic Equity Act flourished under the guardianship of the Cau-

<sup>314</sup> GERTZOG, *WOMEN & POWER*, *supra* note 8, at 50.

<sup>315</sup> *Economic Equity Act of 1993 Introduced*, UPDATE (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Caucus), Washington, D.C.), Aug. 6, 1993 at 1, 21.

<sup>316</sup> *103rd Congress Enacts Record Number of Measures for Women*, UPDATE (Cong. Caucus for Women’s Issues (formerly Congresswomen’s Caucus), Washington, D.C.), Sept./Oct. 1994 at 1, 1.

<sup>317</sup> Phil Gailey, *Newtered*, N.Y. TIMES, June 2, 1996, at 16 (describing how the 1994 Congressional elections swept in “a new Republican majority in the House and the Senate, the first in four decades, promis[ing] nothing less than a revolution” based on its “Contract With America”).

<sup>318</sup> GERTZOG, *WOMEN & POWER*, *supra* note 8, at 67.

<sup>319</sup> *Id.* at 70.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.* at 74.

<sup>322</sup> *Id.* at 75.

cus precisely because of that commitment to bipartisanship.<sup>323</sup> The omnibus bills “were ideal vehicles for promoting collective, even if not fully integrated goals,” encouraging members “to attach one or more provisions to a catchall bill and then articulate support for the entire measure even though it contained sections about which they were unenthusiastic.”<sup>324</sup> Bipartisanship was credited with achieving “family leave, the Women’s Health Equity Act and Economic Equity” as well as “moving forward on Title IX.”<sup>325</sup>

But after the 1994 elections, proposed welfare legislation “inflamed partisan divisions.”<sup>326</sup> The bipartisanship among women lawmakers was quickly deteriorating.<sup>327</sup> The Personal Responsibility and Work Opportunity Act of 1996 was enacted amid bitter debates among congressional women.<sup>328</sup> According to Gertzog, a moderate Republican congresswoman in the Caucus felt that “the differences between women in the two parties [rested] on a fundamental disagreement about the role government should play in addressing feminist concerns.”<sup>329</sup> As described by this congresswoman: “I think Republican women feel a greater responsibility to attend to the issues of economic opportunity for women. The Democratic women tended to look at social services for women. That’s important, but if these social services end up disempowering women, then they are a negative in their lives.”<sup>330</sup> As in the early 1980s, the division over the methods for addressing the economic challenges of women—and the state’s role in providing assistance—was at the forefront of these debates.

The increasing partisanship and the debate over welfare reform in turn put increasing pressure on Republican women and other Republican Caucus members. Even if Republicans supported many Equity Act provisions individually, it was increasingly difficult for these members to toe the party line of less government spending and simultaneously support the omnibus Equity Act—even as an agenda setting vehicle—because of its enormous price tag in the aggregate.<sup>331</sup>

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<sup>323</sup> See *supra* note 77.

<sup>324</sup> *Id.* at 30.

<sup>325</sup> GERTZOG, WOMEN & POWER, *supra* note 8 at 88 (quoting an anonymous member of the Congressional Caucus for Women’s Issues).

<sup>326</sup> *Id.* at 111–12. The welfare legislation also triggered disputes among Democrats generally. *Id.*

<sup>327</sup> See *id.* at 111 (stating that “[s]ix of the seven new Republican women not only refused to join the caucus but worked actively to undermine its credibility”).

<sup>328</sup> Pub. L. No. 104-93, 110 Stat. 2105 (codified in scattered sections of 7, 8, 20, 21, 25, and 42 U.S.C.); see also *NOW Calls for End to War on Poor Women*, NAT’L NOW TIMES (Nat’l Org. for Women, Washington, D.C.), May/June 1995, at 6, 6 (“The Personal Responsibility Act is part of the Republican Contract ON America and would radically change the country’s welfare system in a punitive direction.”).

<sup>329</sup> GERTZOG, WOMEN & POWER, *supra* note 8, at 85.

<sup>330</sup> *Id.* at 85.

<sup>331</sup> For example, in 1987, the *Boston Globe* reported that the version of the Equity Act introduced into Congress in 1987 had a price tag of \$2 billion. Brooks, *supra* note 124, at 6.

When the Congressional Caucus for Women's Issues, along with all other Caucus organizations, lost congressional funding in 1996, the Economic Equity Act lost impetus. The Act was introduced for the last time in the 104th Congress by Rep. Constance Morella; it was not reciprocally introduced into the Senate.<sup>332</sup>

### III. THE ECONOMIC EQUITY ACT AND CONGRESSIONAL POWER TO EFFECT SEX EQUALITY

#### A. *From the New Deal Era to the Post-Welfare State*

During the course of the fifteen-year span of the Economic Equity Act from 1981 to 1996, lawmakers articulated a capacious vision of what equality in fact at the federal level would entail. Through the deliberate and far-reaching range of legal reforms encompassed within the successive versions of the Economic Equity Act, lawmakers embarked on a wholesale revision and reconstruction of a federal system grounded in gendered notions of women's role in society. Through specific and targeted—albeit piecemeal and incremental—structural enactments, legislators sought to revise a complex legal order pre-dating the civil rights and women's rights movements of the latter half of the twentieth century. This endeavor extended well beyond what is traditionally viewed as classical antidiscrimination law—the facial prohibitions on discrimination—to a reevaluation of inequities existing in the legal order. This Article has consolidated a wide array of seemingly scattered enactments to show how—under the umbrella of the omnibus Economic Equity Act—these enactments formed part of a coordinated and deliberate agenda to achieve structural equality in the form of equal economic citizenship for women in the late twentieth century.

Through the Equity Act, lawmakers took aim at the gendered construction of law and society,<sup>333</sup> which was shaped by the traditional family model of a male wage earner and female homemaker that was entrenched in federal law and policy by the New Deal.<sup>334</sup> Legal and historical scholars have documented the ways in which the separate spheres ideology permeated the New Deal state and continue to reverberate through modern federal law and policy.<sup>335</sup> Twentieth-century New Deal era legislation entrenched the status quo

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<sup>332</sup> H.R. 3857, 104th Cong. (1996). Sen. David Durenberger, the long-standing sponsor of the Economic Equity Act in the Senate, did not seek re-election in 1994 and accordingly retired from the Senate on January 3, 1995 when his final term concluded at the end of the 103rd Congress. *Durenberger, David Ferdinand*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=D000566> (last visited Oct. 19, 2012).

<sup>333</sup> See *supra* Part II.

<sup>334</sup> See generally KESSLER-HARRIS, IN PURSUIT OF EQUITY, *supra* note 19; METTLER, *supra* note 21; Kessler-Harris, *Designing Women*, *supra* note 21. See also Keller, *supra* note 21, at 145; Murray, *supra* note 21, at 94.

<sup>335</sup> See sources cited *supra* note 21.

of the day from the perspective of the lawmakers that crafted it, creating a gendered construction of privileges and benefits of citizenship in the United States: “The cultural division of labor among the white middle class that assigned caregiving to women and paid work to men became the foundation on which the law and social policy of work, family, and welfare were built.”<sup>336</sup>

The Economic Equity Act embodied a deliberate process to take this system to task by moving beyond facial prohibitions on discrimination to a more complex undertaking: the incremental and piecemeal—but deliberate and steadfast—effort to revise laws having disparate effects on women and to enact targeted structural equity provisions advancing women’s equality.<sup>337</sup> As described in this Article, lawmakers were quite explicit about their intentions to shift from the pursuit of formal equality to the pursuit of substantive equality, as well as their intentions to restructure the gendered ordering of federal law and policy that assigned benefits based on a model of a male breadwinner and female dependent. Just as ERA advocacy moved from a focus on formal equality during the battle for ERA I from 1972–82 to a focus on substantive equality—or equality in fact—during the introduction of ERA II in 1983,<sup>338</sup> the Economic Equity Act embodied the legislative arm of this shift in feminist goals toward substantive equality.

This project largely entailed revising existing laws based on a legal order that was substantially constructed at a time when the family wage model of a male breadwinner and female dependent animated lawmaking.<sup>339</sup> As a result of the lobbying efforts in relation to the Economic Equity Act and related legislation aimed at women’s equality, Caucus lawmakers reshaped the conceptions held by lawmakers in Congress about women’s roles in the home, in the workplace, and in society at large. As described by Gertzog, who has comprehensively studied the Women’s Caucus, “Caucus activities have helped call attention to neglected and ‘invisible’ issues affecting women, and they have altered the frame of reference within which these issues have been understood.”<sup>340</sup> From Gertzog’s point of view, the Caucus successfully worked to uncover “patterns of behavior resulting in discrimination not immediately identifiable as gender-based,” to create “legislative remedies that speak to problems most citizens believe have nothing to do with gender,” and to explain these remedies to constituents by “[couching them] in terms they can understand, accept, and support.”<sup>341</sup>

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<sup>336</sup> Fisk, *supra* note 55, at 415 (summarizing arguments from KESSLER-HARRIS, IN PURSUIT OF EQUITY, *supra* note 19, at 4, 6).

<sup>337</sup> GERTZOG, CONGRESSIONAL WOMEN, *supra* note 8, at 149–59 (describing efforts of the Caucus as it shifted from egalitarian measures to affirmative measures).

<sup>338</sup> Mayeri, *A New E.R.A.*, *supra* note 4, at 1243–44.

<sup>339</sup> KESSLER-HARRIS, IN PURSUIT OF EQUITY, *supra* note 19, at 4–6.

<sup>340</sup> GERTZOG, CONGRESSIONAL WOMEN, *supra* note 8, at 237.

<sup>341</sup> *Id.*

In this way, the Economic Equity Act and the other legislative initiatives of the Caucus challenged the boundaries of what historian Alice Kessler-Harris calls the “gendered imagination.”<sup>342</sup> Kessler-Harris attributes the gendered construction of the New Deal state to a “gendered imagination” centered on the male breadwinner and female dependent that informed legislators, courts, and policymakers, as well as the general polity. The 1960s and 1970s were a period during which the “gendered imagination” began to shift—it was becoming imaginable that (white, middle-class) women would no longer relegate paid work to men in favor of caregiving.<sup>343</sup> The Economic Equity Act evidenced a shifting reform agenda that further pressed the bounds of the “gendered imagination.” While the early introductions of the Economic Equity Act centered almost exclusively on women in relation to their familial roles as wives (or ex-wives), mothers, and widows, gradually the provisions championed by lawmakers focused more expansively on merging the separate spheres of home and work, and eventually to expanding women’s opportunities in the marketplace and the structural support architecture necessary for women to compete effectively in the marketplace.<sup>344</sup> As lawmakers debated the reality of working women, the grip that the male breadwinner/female homemaker model held as an animating feature in congressional lawmaking gave way to the already emergent dual wage-earning family model. This is not to say that the contestation over women’s role in the family and in society has concluded, but it has continued along a shifting path that began in earnest in the 1960s and 1970s towards a fuller embrace of women as wage-workers.<sup>345</sup>

As society changed and the gendered imagination shifted, reformers railed against federal tax, Social Security, private pension, insurance and other laws that failed to recognize the realities of modern-day families—from two-income households to single mothers, divorcees and widows—thereby leaving women economically vulnerable as a result of the way these federal laws and related programs were structured. This process resulted in the revision of myriad laws that, while neutral on their face, negatively impacted women. For fifteen years, from 1981 to 1996, the Economic Equity Act embodied this process as driven by the Women’s Caucus and lawmakers in the Senate concerned with advancing women’s equality. The Equity Act

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<sup>342</sup> KESSLER-HARRIS, IN PURSUIT OF EQUITY, *supra* note 19, at 6.

<sup>343</sup> *Id.* at 18 (“[N]o one who has lived through the end of the twentieth century would argue that the gendered imagination remains what it once was.”). For more on the shift in the “gendered imagination,” see generally *id.*

<sup>344</sup> See *infra* Table 3. For a historical examination of the influence of the rhetoric of the separate spheres ideology, see Linda K. Kerber, *Separate Spheres, Female Worlds, Woman’s Place: The Rhetoric of Women’s History*, 75 J. AM. HIST. 9 (1988).

<sup>345</sup> See, e.g., Mick Cunningham, *Changing Attitudes toward the Male Breadwinner, Female Homemaker Family Model: Influences of Women’s Employment and Education over the Lifecourse*, 87 SOC. FORCES 299, 317 (2008) (summarizing sociological research on the decline in support for the male breadwinner, female homemaker family model in recent decades and concluding based on lifespan research that “the disappearance of gendered expectations regarding family roles does not appear to be on the near horizon”).



was central to their agenda, representing the vision that these lawmakers had for implementing equality in fact through structural legal reform.

But this agenda, this Article argues, went beyond the deconstruction of the gendered nature of federal law and policy of the post-New Deal era. This coalition of lawmakers also sought to enact laws and policies to enable women to participate on a more equal basis in the public sphere of work, education, and the marketplace. Child care tax credits and child care support services for low-income women, followed by efforts beginning in 1985 to pass family leave legislation, were intended to assist women in moving from the private sphere of home and caregiving to the public sphere. These efforts commenced the advent of a coordinated and sustained legislative effort to enact structural legal reforms to enable women to successfully compete in the marketplace. From non-traditional job training and education to workplace fairness and the massive small business reforms aimed at women, lawmakers identified and sought to remedy structural impediments to the advancement of women.

Accordingly, initial reforms focused on remedying economic disparities for divorcees, widows and working mothers, while later introductions of the bill and later legislative agendas began to view women in the context of work *and* family. The Economic Equity Act sought to merge the separate spheres and enable women to participate in the marketplace with structural support for familial obligations. These efforts and the incumbent shifts in thinking about women's role in society came about in the context of a larger economic shift in which the breadwinner wage became increasingly inadequate, and middle- and upper-class women went to work to maintain standards of living as wages fell.<sup>346</sup> During this time, women were increasingly seen as rightfully (and necessarily) doing paid market labor, not just home labor. The move toward more progressive thinking about women's role in the home, the workplace, and society set the stage for major movement with respect to the feminist legislative agenda when favorable political circumstances coalesced in the 103rd Congress.

Ultimately, congressional lawmakers sought to disrupt a state of affairs in which women lacked adequate support to leave the work of home for the work of the market. They also recognized the realities of women's career trajectories—often both interrupted and part-time—and tried to account for years spent at home childrearing through Social Security and private pension credits, and to bolster benefits for part-time or temporary workers. Finally, this agenda also brought to the forefront the acknowledgment that myriad factors interfered with the ability of women to enter and successfully compete in the public sphere, from domestic violence at home to inadequate

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<sup>346</sup> See ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* 31 (2003) (“For the middle class, however, women’s growing paychecks have made all the difference, compensating for the painful fact that their husbands’ earnings have stagnated over the past generation.”).

health care. At a time when structural approaches to remedying inequality have become central to equality debates, the Economic Equity Act is particularly salient as the foundation for contemporary, legislative structural reforms at the federal level in the name of sex equality.<sup>347</sup>

Although the Economic Equity Act encompassed a vast agenda for legislative change, it was not exhaustive.<sup>348</sup> Consequently, even though the Economic Equity Act is no longer a pillar of congressional advocacy for women's issues, the Caucus (though no longer funded by Congress), with support from Women's Policy, Inc.,<sup>349</sup> continues its active involvement in legislative pursuits on behalf of women.<sup>350</sup> At the time, the New Deal was not considered to be legislation pertaining to women, and yet its crafting based on the lawmakers' views of the family—as consisting of a male breadwinner and female homemaker—created startling economic inequities for women. The revision now required to undo the shadow cast by the norm of the male breadwinner and female homemaker during the New Deal has yet to be completed.<sup>351</sup> But the Economic Equity Act began this project in ear-

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<sup>347</sup> “Structural inequality has captured the attention of academics, policymakers, and activists.” Susan Sturm, *The Architecture of Inclusion: Interdisciplinary Insights on Pursuing Institutional Citizenship*, 30 HARV. J.L. & GENDER 409, 409 (2007). See, e.g., Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460–465 (2001) (arguing for a “structural regulatory regime” to address “second generation manifestations of workplace bias [that] are structural, relational, and situational”); Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 249 (2006) (developing “a framework and methodology for pursuing inclusive institutions and for building the architecture to sustain the practice of inclusiveness” in order to address “the [structural] problems causing racial and gender under-participation”). For an examination of federal structural intervention in particular, see Olatunde C.A. Johnson, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154, 185–86 (2011) (examining federal stimulus spending) [hereinafter Johnson, *Stimulus and Civil Rights*]; Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 421 (2007) (examining federal funding standards). See also Elizabeth F. Emens, *Intimate Discrimination*, 122 HARV. L. REV. 1307, 1311 (2009) (arguing that “law should take account of its role in intimate discrimination at a structural level and work to eliminate burdens and biases that currently shape who has access to intimate relationships and on what terms”).

<sup>348</sup> For a contemporary vision of equity reforms on behalf of women that ought to be advanced, see, e.g., Linda Kerber, *Equity for Women—Still*, CHRON. OF HIGHER EDUC. (August 29, 2010), <http://www.chronicle.com/article/Equity-for-Women-Still/124136/> (calling for “[t]he visionaries of our own time” to “focus on new harms, like, family-responsibility discrimination”).

<sup>349</sup> Women's Policy, Inc. is a non-profit organization that, while not formally affiliated with the Congressional Caucus for Women's Issues, shares many of its objectives, including ensuring “that the most informed decisions on key women's issues are made by policymakers at the federal, state, and local levels.” *Mission Statement*, WOMEN'S POLICY, INC., <http://www.womenspolicy.org/site/PageServer?pagename=aboutWPI> (last visited Nov. 11, 2012); see also *The Women's Caucus*, WOMEN'S POLICY, INC. [http://www.womenspolicy.org/site/PageServer?pagename=womens\\_caucus](http://www.womenspolicy.org/site/PageServer?pagename=womens_caucus) (last visited Nov. 11, 2012).

<sup>350</sup> See *The Women's Caucus*, *supra* note 349 (describing recent membership, leadership, and activity of the Caucus).

<sup>351</sup> See *supra* Part I.B. As evidenced by the recent stimulus legislation—enacted as the American Recovery and Reinvestment Act of 2009—these lessons are relevant to present-day lawmaking as well. See Johnson, *Stimulus and Civil Rights*, *supra* note 347,

nest and, accordingly, ought to take its proper place in the contemporary sex equality narrative.

Indeed, the conventional feminist narrative centers on the mid-1960s to the early 1980s as the period in which “U.S. feminism focused primarily on deconstructing and deinstitutionalizing the cultural mandate that women become homemakers and men breadwinners.”<sup>352</sup> However, from the perspective of some feminist scholars, “[b]y the mid-1980s, U.S. feminists’ attention had shifted away from work family issues.”<sup>353</sup> Without an understanding of the Economic Equity Act agenda, the Family and Medical Leave Act seems to stand as a lone event in 1993, far from the earlier efforts of the Equal Pay Act in 1963, Title VII in 1964, and the Pregnancy Discrimination Act of 1978. More recent efforts to support working families, such as the FMLA, did not stand alone; rather, these efforts were part of a larger, coordinated agenda that helps inform the present-day agenda as well. Accordingly, the story of the Economic Equity Act as told in this Article should join a burgeoning literature exposing the role that sex-stereotyping and the family wage model has played in law, policy, and judicial doctrine.<sup>354</sup> “The women’s movement had always viewed legislation as a central part of the anti-stereotyping project,”<sup>355</sup> but until now, a key component of this legislative project in the late-twentieth century—the Economic Equity Act—has been remarkably absent from the histories of sex equality.

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at 185–86 (“[T]he Recovery Act’s heavy emphasis on construction jobs may exclude African Americans, women, and other vulnerable groups.”); Melissa Murray & Darren Rosenblum, *Should Job Creation Favor Men?*, S.F. CHRON., May 19, 2009, at A11 (arguing that the “bailout and stimulus measures warrant additional scrutiny—from the perspective of gender equality” to avoid “repeating past mistakes by ignoring women’s economic status”), available at <http://www.sfgate.com/opinion/article/Should-job-creation-favor-men-3297786.php>. Women’s groups were concerned that—like New Deal era legislation—the stimulus package could have far-reaching consequences for the advancement of women’s equality for years to come. According to NOW, a cadre of women’s organizations successfully lobbied the Obama Administration to reframe the stimulus from being focused on “shovel-ready” projects to include human infrastructure as well. Kim Gandy, *Economic Recovery: What’s NOW Got to Do With It?*, NOW.ORG (March 6, 2009) <http://www.now.org/news/note/030609.html?printable>.

<sup>352</sup> JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 111 (2010).

<sup>353</sup> *Id.*

<sup>354</sup> See, e.g., SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* 225 (2011) (describing the avenues through which feminists have “vanquished the notion that law should reinforce women’s place ‘[as] the center of home and family life’”) (quoting *Hoyt v. Florida*, 368 U.S. 57, 62 (1961)); Franklin, *supra* note 65, at 88 (arguing that an anti-stereotyping theory undergirded Ginsburg’s foundational sex-based equal protection cases in the 1970s).

<sup>355</sup> Franklin, *supra* note 65, at 150. As explained by Franklin, the conventional narrative of legislative efforts to combat the norm of the male breadwinner and female homemaker included “publicly-funded childcare, Medicaid-funded abortion, affirmative action, programs designed to facilitate re-entry” into the workplace by displaced homemakers, and ultimately, the Family and Medical Leave Act. *Id.*

B. *The Economic Equity Act, the ERA, and Constitutional Change*

The path to women's equality—and the incumbent shifts in the gendered imagination—were both the result of complex legal, cultural, and political dynamics. Though the Economic Equity Act never entered the popular discourse on sex equality, it played a pivotal role for lawmakers and the women's movement vis-à-vis the ERA, and embodied much of what the women's movement and feminist lawmakers expected would follow from the sex equality norm. As discussed, the Women's Equality Act was a precursor to the Economic Equity Act and was originally intended to go hand-in-hand with an ERA.<sup>356</sup> When this legislation reemerged in 1981 as the Economic Equity Act, the Caucus proclaimed the Equity Act as part of the constitutional amendment process akin to the enforcement legislation authorized by section 2 of the ERA.<sup>357</sup> Rep. Ferraro publicly shared her view that “the Equity Act was originally conceived as implementing legislation for the Equal Rights Amendment.”<sup>358</sup> Rep. Patricia Schroeder, co-chair of the Caucus, similarly claimed that “the Economic Equity Act underscores the need for the [E]qual [R]ights [A]mendment”—“[t]he two are intertwined.”<sup>359</sup>

Because of its close relationship with the ERA, the aims of the Equity Act often reflected the substantive debates about sex equality both before the ERA ratification deadline in 1982, as well as afterward upon reintroduction of the ERA in 1983.<sup>360</sup> In this way, the Equity Act served as a central vehicle through which the women's movement, lawmakers, and their constituents staked claims to the emerging meaning of sex equality. Through the collaborative process of the Equity Act, members of the Women's Caucus and other lawmakers embraced their representational role and responded directly to their constituents to craft a legislative package aimed at solving the problems women faced in their everyday lives. Indeed, the Equity Act was quite explicitly the embodiment of an agenda aimed specifically at remedying particular and immediate economic hardships that women were facing. As described by Representative Schroeder and others, the process through which the Equity Act provisions were determined relied heavily on constituent letters and conversations on the campaign trail to identify the problems women were facing in their everyday lives and to respond to these problems with legislation designed to ameliorate them.<sup>361</sup> This process also involved collaboration with the women's movement regarding the legislative agenda of the Caucus, including with regard to crafting successive versions of the

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<sup>356</sup> See *supra* Part I.A.

<sup>357</sup> H.R.J. Res. 208, 92d Cong., 86 Stat. 1523 (1971). Section 2 formally provided Congress with “the power to enforce, by appropriate legislation, the provisions of this article.” *Id.*

<sup>358</sup> Ferraro, *The Amendment*, *supra* note 5, at 2.

<sup>359</sup> 129 CONG. REC. 5072 (statement of Representative Schroeder).

<sup>360</sup> See *supra* Parts I.C, II.B.

<sup>361</sup> See *supra* Part II.B.4.

Equity Act, which many major women's issues organizations then endorsed.<sup>362</sup>

These efforts raise important questions for contemporary debates about the sources of constitutional meaning and the dynamics of constitutional change. As Reva Siegel argues, “[n]ot only judges and courtroom lawyers . . . but elected officials and ordinary citizens regularly make claims about the Constitution.”<sup>363</sup> As she further contends, “[t]he judge-centered framework in which [many constitutional theorists] describe our constitutional tradition obscures communicative pathways that connect judicial reasoning inside the courts to claims made about the Constitution by persons outside the courts.”<sup>364</sup> Siegel “invites constitutional theory to develop more complex positive accounts of the practices through which nonjudicial actors participate in the production of constitutional meaning.”<sup>365</sup>

The Economic Equity Act, however, remains unexplored as a complex positive account, even though the Act itself was a unique vehicle through which the women's movement, lawmakers, and their constituents deliberated over the terms of women's equality. Furthermore, many of the Equity Act's legislative provisions formed a constituent part of the back-and-forth narrative between the Supreme Court and Congress in relation to the sex equality principle.<sup>366</sup> This narrative with respect to sex equality reform has many familiar landmarks. For example, the exercise of the legislative power of Congress to effect sex equality has been widely examined in connection with such watershed enactments as the FMLA and the VAWA, which were both initiatives supported by the Women's Caucus.<sup>367</sup>

<sup>362</sup> See *supra* text accompanying notes 113–114, 239.

<sup>363</sup> Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 299 (2001) [hereinafter Siegel, *Text in Contest*].

<sup>364</sup> *Id.* at 300. See also LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2004) (“Both in its origins and for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution.”). There are, of course, many other theorists engaging in this debate with a range of views. For an extensive discussion of popular constitutionalism debates, see David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2053–64 (2010).

<sup>365</sup> Siegel, *Text in Contest*, *supra* note 363, at 303.

<sup>366</sup> Examining congressional action in combination with Supreme Court jurisprudence on a particular issue can unmask the evolution of related norms. See, e.g., Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 464–77 (2011) (discussing norm evolution with respect to sex-role stereotypes in connection with the Pregnancy Discrimination Act of 1978 and related Supreme Court decisions that prompted the Act's passage and subsequently determined its reach).

<sup>367</sup> See, e.g., Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 441–44 (2000) (outlining debate with respect to VAWA and *Morrison*); Post & Siegel, *Legislative Constitutionalism*, *supra* note 4, at 1947–50 (outlining debate with respect to FMLA and *Hibbs*). See generally Reva B. Siegel, *You've Come A Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871 (2006) (reacting

But the Economic Equity Act account reveals that, at times, the Supreme Court challenged Congress to act in circumstances in which it viewed action as necessary and desirable for women's economic equality, but squarely within the power of Congress and beyond the power of the Court. For instance, the Supreme Court in *McCarty v. McCarty* declared that Congress intended military pensions only for the person who had served.<sup>368</sup> But the Supreme Court was not blind to the negative consequences of its ruling, and quite explicitly challenged Congress to act on a matter it perceived as outside the reach of its judicial power:

We recognize that the plight of an ex-spouse of a retired service member is often a serious one . . . . Nonetheless, Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone.<sup>369</sup>

After the decision, military ex-wives were “up in arms” over the Court's ruling.<sup>370</sup> Congress responded to this call to action by enacting several Equity Act provisions, which, inter alia, expressly allowed military pension benefits to be assigned to ex-spouses of service members—a decision hailed for “its treatment of marriage as an economic partnership.”<sup>371</sup> In this case, this legislation was enacted with the blessing of the Supreme Court.<sup>372</sup>

At other times, lawmakers advancing the Equity Act were emboldened by Supreme Court pronouncements to embrace their legislative role in crafting further affirmative legal reforms to change the operation of federal law and policy. For example, in the Social Security context, the Supreme Court

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to the Supreme Court's decision upholding the FMLA in *Hibbs*) [hereinafter Siegel, *You've Come a Long Way*].

<sup>368</sup> 453 U.S. 219, 235–36 (1981). See *supra* Part II.A.1.

<sup>369</sup> *McCarty*, 453 U.S. at 235–36 (citations omitted). In this way, the Court could be viewed as inviting Congress to “pick up the slack,” so to speak, and do its part to effect sex equality. See generally LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE (2004) (arguing that judges should and do stop short of enforcing the whole of the Constitution and that the Supreme Court should welcome rather than condemn the efforts of Congress to pick up the slack).

<sup>370</sup> Scannell, *supra* note 142, at DC5 (describing military wives' reaction to the Supreme Court's ruling and the pending Economic Equity Act provisions to address it); *Divorce and Military Pensions*, N.Y. TIMES, Aug. 7, 1981, at B4 (same).

<sup>371</sup> See Mann, *A Chance to Improve*, *supra* note 111, at C1.

<sup>372</sup> As recently illustrated in the case of pay equity, in other instances of statutory interpretation in the sex equality context, Congress has also acted in response to avowed limitations in Supreme Court holdings. Compare *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621–23 (2007) (holding that that employers cannot be sued under Title VII of the Civil Rights Act over race or gender pay discrimination if the claims are based on decisions made by the employer 180 days ago or more) with *Lilly Ledbetter Fair Pay Act of 2009*, Pub. L. No. 111-2, 123 Stat. 5 (2009) (amending the Civil Rights Act of 1964, stating that the 180-day statute of limitations for filing an equal-pay lawsuit regarding pay discrimination resets with each new paycheck affected by that discriminatory action).

handed down a trio of decisions in the late 1970s aimed at equalizing the distribution of Social Security benefits—particularly with respect to widows and widowers.<sup>373</sup> In the context of advocacy pertaining to both the ERA and the reintroduction of the ERA in 1983, advocates envisioned even further Social Security reforms that would restructure Social Security entitlements in an attempt to give economic value to home and care work.<sup>374</sup> In an attempt to achieve this far-reaching change, controversial discussions regarding “earnings sharing,”<sup>375</sup> for example, were seized upon by lawmakers and incorporated into multiple versions of the Equity Act; however, these proposals were never enacted.<sup>376</sup>

Instead, Congress enacted a more limited set of Social Security reforms in the Social Security Amendments of 1983.<sup>377</sup> These reforms reflected inequities resulting from the Social Security system which were articulated in constituent letters. It was essential for Congress to do this work as these inequities would require more than Supreme Court action to ameliorate. Like many reforms at the time, these reforms amended Social Security to improve benefits for divorced and surviving spouses.<sup>378</sup> In this way, Congress acted with its legislative power to proffer affirmative legal reforms, which are beyond the capacity of a court to fashion. Pension equity offers yet another example. After the Court in *Arizona Governing Committee for Tax Deferred Annuity v. Norris* ruled that employers who offer retirement annuity plans that pay smaller monthly benefits to women than to similarly situated men violated Title VII,<sup>379</sup> Congress enacted affirmative structural revisions to pension laws that went well beyond the pronouncement of the Supreme Court.<sup>380</sup>

This affirmative legislative power has most recently been recognized in the Supreme Court’s decision in *Nevada Department of Human Resources v.*

<sup>373</sup> *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (invalidating a Social Security policy granting AFDC benefits only to the children of unemployed fathers); *Califano v. Goldfarb*, 430 U.S. 199, 202 (1977) (striking down a Social Security provision with less survivors’ benefits for widowers than for widows); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 636 (1975) (invalidating the “mother’s insurance benefit” provision which provided benefits to widows (but not widowers) having minor children in their care).

<sup>374</sup> See *supra* Part.II.B.1.

<sup>375</sup> See Mayeri, *A New E.R.A.*, *supra* note 4, at 1261–62.

<sup>376</sup> See *infra* Table 3 (Social Security Modernization (or Equity) Act, 99th–102d Congress).

<sup>377</sup> Pub. L. No. 98-21, 97 Stat. 65 (codified as amended in scattered sections of 26 and 42 U.S.C.).

<sup>378</sup> John A. Svahn & Mary Ross, *Social Security Amendments of 1983: Legislative History and Summary of Provisions*, Soc. Sec. Bulletin 3,4 (1983).

<sup>379</sup> 463 U.S. 1073, 1089 (1983).

<sup>380</sup> See *infra* Table 2 (referencing pension changes in the Retirement Equity Act and Civil Service Spouse Retirement Equity Act in the 98th Congress, as well as the pension reform measure in the Tax Reform Act in the 99th Congress). Further, lawmakers expressed frustration at the Reagan Administration’s unwillingness to entertain legislation remedying inequalities in the pension system while the *Norris* case was pending. See, e.g., 129 CONG. REC. 17,890 (1983) (statement of Rep. Edward R. Roybal).

*Hibbs*,<sup>381</sup> which upheld Congress's power to enact the family leave provisions of the Family and Medical Leave Act of 1993.<sup>382</sup> As put by Reva and Neil Siegel, *Hibbs* is significant for having "expressly registered the sometimes deep divide between formal equality and substantive equality"<sup>383</sup> for women:

[I]n an America in which women are still required to serve as the principal caregivers in their families, mere formal equality in the administration of family leave benefits—for example, allowing no leave time for any employees—would "exclude far more women than men from the workplace" and therefore would not effectively "combat the stereotypes about the roles of male and female employees that Congress sought to eliminate" in passing the FMLA.<sup>384</sup>

The process of shaping the legal contours of the sex equality principle in the late twentieth century unfolded through a vibrant evolution that involved Congress as much as the courts. The generative process by which lawmakers in Congress formed an agenda and sought change in the name of sex equality illustrates not only the dynamic between Congress and the Supreme Court, but also the dynamic among the women's movement, lawmakers, and their constituents. These dynamics are especially salient because the legal foundation for the sex equality principle did not unfold through the constitutional amendment process. The ERA was not ratified and neither a Women's Equality Act nor an Economic Equity Act ever passed as enforcement legislation for an ERA. Instead, the Supreme Court—in what conventional wisdom submits is a "de facto ERA"—enunciated a constitutional sex equality norm through a series of opinions.<sup>385</sup> The trajectory of constitutional sex equality jurisprudence—through Supreme Court doctrine instead of Article V amendment—did not alter the view of congressional lawmakers that Congress had the power to "enforce, by appropriate legislation"<sup>386</sup> the sex equality norm enunciated by the Supreme Court.<sup>387</sup>

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<sup>381</sup> 538 U.S. 721, 740 (2002).

<sup>382</sup> Pub. L. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§2601–2654 (2006)).

<sup>383</sup> Reva B. Siegel & Neil Siegel, *Struck By Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 794 (2010).

<sup>384</sup> *Id.* at 794–95 (quoting *Hibbs*, 538 U.S. at 734, 738). *But see* *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1338 (2012) (holding that "Congress did not validly abrogate" states' sovereign immunity from suits for money damages in enacting FMLA's self-care provision).

<sup>385</sup> *See supra* note 1, Part I.A.

<sup>386</sup> U.S. CONST. amend. XIV, §5.

<sup>387</sup> *See Post & Siegel, Legislative Constitutionalism*, *supra* note 4, at 2020 (arguing that Congress was "exercising its distinctively legislative power under Section 5 of the Fourteenth Amendment" when it enacted the Family and Medical Leave Act of 1993 as a statutory right allowing employees to take unpaid family leave instead of as a prohibition on sex discrimination in the award of family leave); Mayeri, *Constitutional Choices*, *supra* note 80, at 832 ("The dual strategy's legacy [e.g., the simultaneous pursuit of a



This is not to say that the Women's Caucus was always successful. Not only did many Equity Act provisions and other Caucus proposals fail to see enactment, but also some enactments championed by the Caucus—such as certain provisions of the Violence Against Women Act of 1994—were struck down by the Supreme Court.<sup>388</sup> Nevertheless, by proceeding with an agenda centered on the Equity Act, Congress simultaneously challenged the bounds of sex equality doctrine and the bounds of its power to speak to that doctrine. With respect to sex equality, legal commentators have brought multiple contestations of constitutional meaning to bear on the constitutional sex equality norm, including the Nineteenth Amendment, the ERA (I and II), and the FMLA.<sup>389</sup> The Economic Equity Act is a relevant part of the dynamics that elaborated the emerging meaning of sex equality under the law in the late twentieth century.

### C. *Economic Citizenship in the Advent of the Twenty-First Century*

“A truly visionary . . . feminist jurisprudence would anticipate the future needs of women as women, not as men.”<sup>390</sup> In order to do so, historian Joan Hoff writes, “It is, therefore, of the utmost importance for women in the United States to continue to stretch the outer limits of the letter of the law until the legal system finally addresses their long-ignored socioeconomic concerns.”<sup>391</sup> The Economic Equity Act involved a process by which a coalition of congressional lawmakers imagined, advanced, and in some cases enacted legal changes to address the socioeconomic concerns of women. This Article has excavated the Equity Act to better understand the

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constitutional amendment and judicial reinterpretation of the Fourteenth Amendment] lies not only in the redefinition of sex discrimination under Section one of the Fourteenth Amendment; it also laid the procedural groundwork for the Supreme Court's affirmation of Congress's power to enact prophylactic anti-sex discrimination legislation under Section five of the Fourteenth Amendment.”)

<sup>388</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (holding that a provision of VAWA that created a federal civil cause of action for victims of gender-motivated violence against their abusers exceeded the scope of Congress's powers under the Commerce Clause and Section 5 of the Fourteenth Amendment).

<sup>389</sup> See Reva Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1030–1035 (2002) (writing with respect to the Nineteenth Amendment); Siegel, *Constitutional Culture*, *supra* note 1, at 1324 (writing with respect to ERA I); Mayeri, *A New E.R.A.*, *supra* note 4, at 1291–1300 (writing with respect to ERA II); Post & Siegel, *Legislative Constitutionalism*, *supra* note 4, at 2005–20 (writing with respect to the FMLA). The FMLA in particular, and the decision upholding congressional authority to enact that legislation, *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), are particularly relevant in this context. As described by Reva Siegel, “[t]hat Rehnquist wrote *Hibbs* as he did seems attributable to deep changes in public understanding of gender roles of a kind that transcend individual opinion. . . . *Hibbs* is quite frank in recounting this shift in constitutional perspective, as the nation's and as the Court's own.” Siegel, *You've Come a Long Way*, *supra* note 367, at 1897–98.

<sup>390</sup> HOFF, *supra* note 8, at 19.

<sup>391</sup> *Id.* at 373.

methods used by lawmakers—and obstacles faced by lawmakers—in advocating for a legislative agenda on behalf of women's equality and in advancing a reconfiguration of economic citizenship under federal law.

The ideological choices made by lawmakers at the helm of legislative advocacy for women in Congress marked critical turning points in determining the role of marriage, family, and work in the conferral of the benefits and privileges of the state. For instance, at the outset of this legislative project, legal reformers drafting the Equity Act acceded to a more limited vision of equal citizenship for women. Gone were the kind of sweeping reforms demanded at the advent of the second women's movement, such as calls for free 24-hour daycare.<sup>392</sup> While the Women's Caucus asserted the Act was "carefully crafted to meet the needs of American women," Judy Mann of the *Washington Post* immediately perceived that it was also "carefully crafted to meet the political needs of the time," even acknowledging early feminist demands in noting that "[n]othing in the bill involves the government in daycare."<sup>393</sup>

Lawmakers did not fundamentally question a system in which the benefits and privileges of economic citizenship were tied to work rather than "residence or citizenship"—a framework predicated on the family wage model that was thoroughly ingrained in post-New Deal federal law and policy.<sup>394</sup> This is not to say that reformers did not hope for a broader conception of citizenship over time. For example, Equity Act provisions were advanced to create Spousal Individual Retirement Accounts, to provide limited credit for childbearing years toward Social Security and pension earning, and to expand tax credits for childcare costs. But the agenda embodied in the Equity Act nevertheless advanced reforms largely within the citizen-as-worker model, evidencing a pragmatic approach to improving the lives of women within the confines of the state as ideologically constructed.

In this way, the agenda embodied in the Equity Act never moved beyond a piecemeal and incremental process. It is impossible to know whether the Equity Act as a whole would have been more successful if the ERA had passed, or had the political climate been more favorable toward new demands on the public fisc. The Equity Act's most ambitious (and controversial) provisions—to give credit in public entitlement programs toward a certain number of years spent out of the workforce for childrearing—never gained traction. Provisions that were enacted were largely premised on marriage to a wage-earning worker in order to accrue benefits for caregiving in

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<sup>392</sup> This demand was part of the tripartite platform of the Women's Strike for Equality on the fiftieth anniversary of the ratification of the Nineteenth Amendment in 1963. See *supra* note 44; see also Deborah Dinner, *The Universal Childcare Debate: Rights Mobilization, Social Policy, and the Dynamics of Feminist Activism, 1966–1974*, 28 *LAW & HIST. REV.* 577, 588 (2010). Congress passed comprehensive child care reform, but President Nixon vetoed it. Dinner, *supra*, at 614.

<sup>393</sup> Mann, *A Chance to Improve*, *supra* note 111, at C1.

<sup>394</sup> Fisk, *supra* note 55, at 423.

relation to the family wage.<sup>395</sup> Otherwise, as welfare reform ultimately demanded, working for wages was expected.<sup>396</sup> Accordingly, the remainder of the Equity Act agenda largely centered on enabling women to leave the work of home for the work of the market and to advance in that sphere.

The compromises made during this period of lawmaking continue to have ramifications for sex equality claims being made today. For example, in both the early years of the Equity Act, as well as during debates over the FMLA, lawmakers—and even President Clinton—found it difficult to gain momentum not just on proposals to use public programs to credit women for childrearing years, but also on proposals to use unemployment insurance or other publicly regulated programs to compensate women during a maternity leave from paid work.<sup>397</sup> In a political climate marked by austerity, lawmakers continue to advance proposals to strengthen family leave with a compensation scheme—with little success.<sup>398</sup>

During the fifteen years that lawmakers pursued a women's agenda centered on the Economic Equity Act, larger ideological struggles over the role of government were unfolding. As a product of the legislative branch, the political realities of the time indelibly marked the progression of enactments originating from the Equity Act. The enduring influence of Reaganomics—including the emphasis on smaller government, less government regulation, and less government spending—coupled with the deep divide of women and other lawmakers over the proper approach to (and propriety of) welfare re-

<sup>395</sup> Ultimately, welfare reform exposed the power of marriage as a mediating force in this debate—marriage promotion policies evidenced that “family values” still dictated marriage for those otherwise deemed dependent (e.g. single mothers). Dubler, *In the Shadow of Marriage*, *supra* note 132, at 1643–44 (discussing marriage promotion policies in relation to welfare reform and the privatization of dependency); see also Ariela Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 1021 (2000) (“[T]he notion that marriage proper constitutes the normative legal model for nonmarital relations endures.”). Accordingly, efforts to support women's economic independence still collide with efforts to privatize that dependency through marriage.

<sup>396</sup> See MARISA CHAPPELL, *THE WAR ON WELFARE: FAMILY, POVERTY, AND POLITICS IN MODERN AMERICA* 228–41 (2010) (describing the “new consensus” that had developed in the 1980s in favor of work-focused welfare reform that “reflect[ed] the near-universal view that poor single mothers should support their children by working for wages”).

<sup>397</sup> President Clinton issued a directive to the Department of Labor to propose a rule allowing states to use unemployment insurance for paid family leave, which the Department of Labor issued. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2283–84 (2001). Several state lawmakers introduced legislation pursuant to the rule, but none of these legislative proposals passed. Linda A. White, *Institutions, Constitutions, Actor Strategies, and Ideas: Explaining Variation in Paid Parental Leave Policies in Canada and the United States*, 4 INT'L J. CONST. L. 319, 336 (2006).

<sup>398</sup> See, e.g., Family Leave Insurance Act of 2008, H.R. 5873, 110th Cong. (2008) (providing up to twelve weeks of paid leave for family care or personal health reasons); Family Leave Insurance Act of 2007, S. 1681, 110th Cong. (2007) (providing up to eight weeks of paid leave under the FMLA); Healthy Families Act, S. 1085, 109th Cong. (2005) (requiring employers to provide employees with at least seven paid sick days per year in order to combat discrimination based “on persistent stereotypes about the ‘proper’ roles of both men and women in the workplace and in the home”); see also Healthy Families Act, H.R. 1902, 109th Cong. (2005) (companion bill introduced in the House).

form, served as mitigating forces to the effectiveness of the Women's Caucus and the Economic Equity Act. Accordingly, early debates in Congress over child support enforcement, Social Security and pension benefits for widows and divorcees, and how to address the problem of displaced homemakers foreshadowed the larger battle over poverty, dependency, and the role of government to provide for women (and men) in need. The overhaul of the modern welfare system that included both the Family Support Act of 1988,<sup>399</sup> and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996<sup>400</sup> made plain that battles over federal spending for guarantees of food and medical care for the worst-off in society, as well as for essential corollaries such as education, job training, and child care, were far from over.

The centrality of marriage as a path to the benefits and privileges of economic citizenship has also shaped the contours of contemporary sex equality claims. The marriage equality movement, for example, has resulted in an increasing number of federal marriage-based claims by same sex partners—reminiscent of the claims made in the early 1980s—to military and veterans benefits, pensions, Social Security payments, and other federal benefits. These benefits, as a result of Equity Act and other advocacy, are entitlements granted through marriage that carry forward even after divorce or death of a spouse. In the early 1980s, lawmakers advancing the Equity Act responded to the dire economic circumstance of many women who sought to lay claim to their husbands' (former or deceased) earnings and related benefits and entitlements.<sup>401</sup> Lawmakers succeeded in staking claims to economic citizenship in ways inherently defined by the status quo at the time, and in ways that operated to entrench the role of marriage in the federal system. Long denied the benefits and privileges that flow from marriage,<sup>402</sup> the contemporary marriage equality movement seeks equal access to marriage as, *inter alia*, a path to economic citizenship for same-sex couples and to the attendant privileges and benefits under federal law that the status of being married confers.<sup>403</sup> Whether marriage equality under federal law emerges through a Supreme Court challenge to the constitutionality of the Defense of

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<sup>399</sup> Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended in scattered sections of 42 U.S.C.).

<sup>400</sup> Pub. L. No. 104-93, 110 Stat. 2105 (codified in scattered sections of 7, 8, 20, 21, 25, and 42 U.S.C.).

<sup>401</sup> See *supra* Part II.A.

<sup>402</sup> The U.S. General Accounting Office has identified a total of 1,138 federal statutory provisions in which marital status is a factor in determining or receiving benefits, rights, and privileges. See Letter from Dayna K. Shah, Assoc. Gen. Counsel Gov't Accountability Office, to Sen. Bill Frist Re: Defense of Marriage Act, GAO.GOV, (Jan. 23, 2004), <http://www.gao.gov/new.items/d04353r.pdf>.

<sup>403</sup> See, e.g., *Cardona v. Shinseki*, No. 11-01 921 (Bd. of Veterans' Appeals Aug. 30, 2011) (Eskenzi, Arb.) (claim challenging denial of veterans' benefits under federal law to same-sex spouse) (appeal pending with the U.S. Court of Appeals for Veterans Claims); *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010) (claim seeking federal recognition of same-sex marriage, DOMA) (appeal pending with the 1st Cir.). *aff'd sub nom. Mass. v. Dep't of Health and Human Serv.*, 682 F.3d 1 (1st Cir. 2012).

Marriage Act of 1996,<sup>404</sup> which limits the definition of marriage as a “legal union between one man and one woman,” or through Congress’s repeal thereof, the demand for the equal citizenship that marriage confers can be heard through many channels of contestation.

The failure of the ERA, the coalescence of enduring resistance to the post-New Deal welfare state, and the continued support for marriage as a means of privatizing family economic support intervened at a time when societal changes called for restructuring of the federal system. The conflict and compromise related to the Economic Equity Act reveal the centrality of competing visions of the ideal family to the reconfiguration of economic citizenship that took place in the late twentieth-century. By reconstructing this history of Congress’s role in enunciating and effecting the sex equality principle, this Article aims not to add the unfinished business of the Equity Act to the congressional agenda,<sup>405</sup> but rather to explicate the breadth and depth of legal and policy responses considered—and in some cases implemented—in the quest for sex equality and equal citizenship for women and men in the late twentieth century and the attendant disputes, conflicts, and compromises that forged the terms of economic citizenship under federal law today. At the advent of the twenty-first century, this history suggests that difficult questions, choices, and challenges remain regarding the role of marriage, family, and work in the conferral of the benefits and privileges of citizenship under federal law.

#### CONCLUSION: IMPLICATIONS OF SEX EQUALITY’S REVISED NARRATIVE

This Article adds to the sex equality narrative a new account of congressional action aimed at entrenching the substantive guarantees of the sex equality principle through the Economic Equity Act. In the wake of the Equal Rights Amendment, a coalition of lawmakers in Congress advanced a capacious agenda through the omnibus Economic Equity Act in which they sought to both shape the meaning of sex equality under the law, and exercise their power to effect sex equality in the state at large. This endeavor extended well beyond what is traditionally viewed as classical antidiscrimination law—i.e., the facial prohibitions on discrimination—to a reevaluation of inequities existing in the legal order in an effort to achieve substantive equality for women. This Article has analytically consolidated the scattered proposals and enactments of the omnibus Equity Act to see this deconstructive undertaking over a sustained period of time. This exercise enables us to pin down for inspection the elusive path of federal legislative action aimed at revising the New Deal-era federal system predicated on the family wage model of a male breadwinner and female homemaker. Through the provi-

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<sup>404</sup> Defense of Marriage Act, Pub. L. No. 104-199, §§ 1–3, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)).

<sup>405</sup> See *supra* note 346.

sions of the Equity Act, the women's movement, lawmakers, and their constituents made claims to the emerging meaning of sex equality and the terms of women's economic citizenship—a critical chapter that has been written out of the histories of sex equality. At stake for countless women were many forms of basic economic support. At stake for the lawmakers who were advancing the Equity Act were the terms on which the benefits and privileges of economic citizenship under federal law would be conferred in the wake of the societal changes precipitated by the modern women's movement. Furthermore, during this critical chapter, these lawmakers, through strategic and intentional legislative activity, defined the role of Congress in articulating the sex equality principle. As demonstrated by recent cases seeking equal access to federal benefits for same-sex couples, the reconfiguration of economic citizenship sought by proponents of the Economic Equity Act continues to be advanced and built upon in claims to equal citizenship at the forefront of sex equality debates today.

TABLE 1. SUMMARY OF BILL NUMBERS AND INTRODUCTION DATES OF THE ECONOMIC EQUITY ACT BY CONGRESS, 1981–1996

Congress & Session Years	Bill Numbers	Date Introduced
97th Congress 1981–1982	H.R. 3117 S. 888	April 7, 1981 April 7, 1981 (legislative day, February 16)
98th Congress 1983–1984	H.R. 2090 S. 888	March 14, 1983 March 23, 1983 (legislative day, March 22)
99th Congress 1985–1986	H.R. 2472 S. 1169	May 14, 1985 May 20, 1985 <sup>406</sup> (legislative day, March 22)
100th Congress 1987–1988	H.R. 2577 S. 1309	June 2, 1987 June 2, 1987
101st Congress 1989–1990	H.R. 3085 S. 1480	August 2, 1989 August 2, 1989 (legislative day, January 3)
102nd Congress 1991–1992	H.R. 3526 S. 2677	October 8, 1991 May 7, 1992 (legislative day, March 26)
103rd Congress 1993–1994	H.R. 2790 S. 2514	July 28, 1993 October 6, 1994 (legislative day, September 12)
104th Congress 1995–1996	H.R. 3857 No Senate Bill	July 18, 1996

<sup>406</sup> During the 99th Congress, the Economic Equity Act was also introduced in the Senate as S. 888 on May 4, 1985. However, the Congressional Caucus for Women's Issues generally referred to S. 1169 as the companion bill for the 99th Congress.

TABLE 2. SUMMARY OF MAJOR ENACTED PROVISIONS OF THE ECONOMIC EQUITY ACT BY CONGRESS, 1981–1996

*97th Congress (1981–82)*

*Department of Defense Authorization Act of 1983 (Pub. L. No. 97-252)*

- Requires payment of the military pension of a member or former member of a uniformed service to a spouse or former spouse of the amount specified in a court's final decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement. Limits the total amount of pension subject to court order to 50%.
- Entitles members or former members with a former spouse to participate in the Survivor Benefit Plan.
- Entitles former spouses married twenty years or more during the member's service to coverage under the Civilian Health and Medical Program of the Uniformed Services barring other medical coverage.

*Economic Recovery Tax Act of 1981 (Pub. L. No. 97-34)*

- Increases the child and dependent care income tax credit to 30% of employment-related expenses for taxpayers with incomes of \$10,000 or less, beginning in 1982. Reduces the rate of such credit, but not below 20%, by 1% for each \$2,000 of taxpayer income in excess of \$10,000. Increases the maximum dollar amount of such credit.
- Reforms regarding the estate tax on agricultural property and farm loan provisions to facilitate fair inheritance of family-owned farms by widows.

*98th Congress (1983–84)*

*Retirement Equity Act of 1984 (Pub. L. No. 98-397)*

- Lowers the age limitation for participation in a qualified retirement plan from twenty-one to twenty-five.
- Treats breaks in service due to pregnancy, birth, or adoption of a child as completed hours of service according to a specified formula.
- Requires pension plans that provide life annuity benefits to pay such benefits in the form of a qualified joint and survivor annuity to the participant's spouse upon participant's death; benefits can be waived only with the written consent of a participant's spouse.



*Child Support Enforcement Amendments of 1984 (Pub. L. No. 98-378)*

- Provides enforcement assistance for all families in collecting court-ordered child support. The new law requires states to implement a system of automatic wage-withholding and interstate enforcement of support orders.

*Civil Service Retirement Spouse Equity Act of 1984 (Pub. L. No. 98-615)*

- Protects the right of former spouses of federal employees to survivor pension benefits and federal employee health plan coverage.

*Human Services Reauthorization Act (Pub. L. No. 98-558)*

- Creates a new dependent care block grant providing funding for public and private organizations to set up clearinghouses for dependent care information and referral services.

*Deficit Reduction Act of 1984 (Pub. L. No. 98-369)*

- Provides tax-exempt status for non-profit dependent care facilities.
- Allows alimony to be treated as income for IRA purposes.

*99th Congress (1985–86)**Tax Reform Act of 1986 (Pub. L. No. 99-514)*

- Private pension reform reducing the number of years a person must work to be fully vested in a private pension program from ten to five, or to seven years if the employer complies with a tiered vesting scheme that vests workers with 20% of employer contributions following three years of service.
- Private pension reform requiring increased coverage of workers, resulting in more low-paid workers benefitting from employer-sponsored retirement plans.
- Allows single heads-of-household a greater standard deduction than a single taxpayer with no dependents (making the single heads-of-household deduction more similar to the standard deduction for married couples filing jointly).
- Increase in Earned Income Tax Credit granted to lower-income taxpayers.

*National Defense Department Authorization Act for Fiscal Year 1987*

*(Pub. L. No. 99-661)*

- Includes military pension reforms permitting state courts to award the military pension survivor's benefit to a former spouse; lowering the age at which a surviving spouse of a service member may remarry without losing benefits from sixty to fifty-five; and eliminating the deduction for life insurance premiums when determining a "disposable retired pay," so that a former spouse will no longer be paying for a policy for which she may not be an annuitant.

*Higher Education Act of 1986 (Pub. L. No. 99-498)*

- Provides funding for on-site day care for low-income students.

*Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”) (Pub. L. No. 99-272)*

- Requires the continuation of employment-based health insurance coverage for three years for widows, divorced spouses, Medicare-ineligible spouses of retired workers, and their dependent children; and for eighteen months for workers who have been laid off, terminated, or have reduced hours, and their dependent children.

*100th Congress (1987–88)**Women’s Business Ownership Act of 1988 (Pub. L. No. 100-533)*

- Extends the prohibition on sex discrimination in lending in the Equal Credit Opportunity Act to commercial loans.

*Medicare Catastrophic Coverage Act of 1988 (Pub. L. No. 100-360)*

- Provides spousal protections under Medicaid.

*Omnibus Budget Reconciliation Act of 1987 (Pub. L. No. 100-203)*

- Increases block grants under Title XX of Social Security Act.

*Housing and Community Devel. Act of 1987 (Pub. L. No. 100-242)*

- Authorizes child care projects in public housing.

*101st Congress (1989–90)**Carl Perkins Vocational and Applied Technology Education Act Amendments of 1990 (Pub. L. No. 101-392)*

- Requires that 10.5% of the basic state grant in the bill be set aside for programs for displaced homemakers, single parents, and single pregnant women, and for programs to eliminate bias and stereotyping on the basis of sex and to encourage the entry of women into nontraditional programs.

*Cranston-Gonzalez National Affordable Housing Act (Pub. L. No. 101-625)*

- Permits single parents and displaced homemakers who have previously been part-owners of a house to participate in federal first-time homebuyer programs.
- Authorizes the development of child care services for residents of transitional housing.
- Authorizes up to ten demonstration projects for one-stop prenatal and postnatal care services in public housing projects.

*Omnibus Budget Reconciliation Act of 1989 (Pub. L. No. 101-239)*

- Increases funding for Title XX Social Services Block Grants providing funds to states for a variety of social welfare programs.
- Increases funding for the Maternal and Child Health Block Grant.

*Omnibus Budget Reconciliation Act of 1990 (Pub. L. No. 101-508)*

- Authorizes Medicare reimbursement funding for coverage of routine mammography screening for older women.

*Sense of Congress Resolution on Domestic Violence (H. Con. Res. 172)*

- Addresses child custody awards in cases where spousal abuse has occurred and favors a statutory presumption that placing a child in the custody of the abusive spouse is detrimental to the child's welfare.

*Immigration Act of 1990 (Pub. L. No. 101-649)*

- Waives the two-year waiting period of "conditional" residency for foreigners who marry American citizens when the foreigner is involved in an abusive marriage.

*102nd Congress (1991–92)**Civil Rights Act of 1991 (Pub. L. No. 102-166)*

- Title II, the Glass Ceiling Act of 1991, establishes a commission to examine the "glass ceiling" affecting women and minorities in the workforce and to recommend policies to promote advancement opportunities.

*Nontraditional Employment for Women Act (NEW) (Pub. L. No. 102-235)*

- Amends the Job Training Partnership Act to add program requirements relating to the training, placing, and retaining of women in jobs traditionally dominated by men. Establishes a \$1.5 million demonstration program for six states to develop and expand nontraditional employment programs.

*Higher Education Amendments of 1992 (Pub. L. No. 102-325)*

- Includes provision to increase the participation of women and minorities in math and science.
- Extends Pell grants to students attending less than half-time.

*Small Business Credit and Business Opportunity Enhancement Act of 1992 (Pub. L. No. 102-366)*

- Authorizes a study to determine the obstacles women and minorities face in obtaining surety bonds and to suggest ways to overcome those obstacles. Businesses wishing to obtain government contracts must have a surety bond, a type of insurance which guarantees that the work contracted for will be completed.
- Authorizes the Small Business Administration to make loans and grants to community based organizations to provide technical assistance for the startup and expansion of microenterprises. Authorizes appropriations.

*103rd Congress (1993–94)*<sup>407</sup>

*Congressional Employee Fairness Act (H. Con. Res. 78)*

- Establishes a commission to collect demographic data on the composition of legislative branch employees with respect to race, sex, wages, and employment practices of Members' offices. Annual reports on the composition of the Congressional workforce, including comparisons to previous years, must be submitted to the Congress.

*Federal Acquisitions Streamlining Act of 1994 (Pub. L. No. 103-355)*

- Requires federal agencies to establish a goal of procuring 5% of government awards or contracts from women-owned businesses.

*Small Business Administration Reauthorization and Amendments Act of 1994 (Pub. L. No. 103-403)*

- Establishes the Office of Women's Business Ownership.

*104th Congress (1995–96)*

- No enactments.

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<sup>407</sup> In addition to enactments that were part of the Economic Equity Act of the 103rd Congress, several measures included in the Economic Equity Act of the 101st Congress (and part of the Women's Health Equity Act) were enacted separately in the 103rd Congress as part of the National Institute for Health Revitalization Act.

TABLE 3. SUMMARY OF MAJOR CATEGORICAL PROVISIONS OF THE ECONOMIC EQUITY ACT WITH AVAILABLE CORRESPONDING BILL NUMBERS BY CONGRESS, 1981-1996<sup>408</sup>

*97th Congress (1981-82)*

Title I. Tax and Retirement

- A. Private Pension Reform Act (H.R. 1641)
  - 1. Retirement Benefits for Spouses
  - 2. Written Spousal Consent to Forego Survivor Benefits
  - 3. Assignment of Retirement Benefits for Child Support, Alimony, and Marital Property
  - 4. Lower Age Limit for Retirement Plan Eligibility from 25 to 21
  - 5. Accrual of Benefits under ERISA and Internal Revenue Code During Maternity or Paternity Leave
- B. Heads of Household: Zero Bracket Amount (H.R. 994)
- C. Public Pension Reform: Civil Service Ex-Spouses & Survivors (H.R. 3040)
- D. *Public Pension Reform: Military Service Ex-Spouses and Survivors* (Pub. L. No. 97-252)
- E. Displaced Homemaker Tax Credits (H.R. 835)

Title II. *Day Care Program: Tax Credits* (Pub. L. No. 97-34)

Title III. Armed Forces

- A. Remove Gender from Property Distribution Rules for Deceased Air Force and Army Members and Establish Distribution Formula
- B. Eliminate Sex from Promotion/Removal in Naval/Marine Reserve
- C. Annual Reports Concerning Status of Women in the Armed Forces

Title IV. *Agricultural Estate Taxes and Farm Loans* (Pub. L. No. 97-34)

Title V. Nondiscrimination in Insurance (H.R. 100, 323)

Title VI. Regulatory Reform and Sex Neutrality (H.R. 2991)

Title VII. Study of Enforcement of Alimony and Child Support (H.R. 4710)

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<sup>408</sup> Enacted measures are indicated in italics. Titles and Subtitles are taken from the House versions of the Economic Equity Act introduced in each Congress. For some provisions throughout the various versions of the Economic Equity Act, I was not able to find corresponding bill numbers.

*98th Congress (1983–84)*

## Title I. Tax and Retirement Matters

- A. *Private Pension Reform* (Pub. L. No. 98-397)
- B. *Spousal Individual Retirement Accounts—Use of Alimony* (Pub. L. No. 98-369)
- C. Displaced Homemaker Tax Credit (H.R. 2127, S. 1700)
- D. *Civil Service Pension Reform* (Pub. L. No. 98-615)
- E. Head-of-Household Tax Reform (H.R. 2126)

## Title II. Dependent Care Program

- A. Sliding Scale for Tax Credits (H.R. 1991)
- B. *Tax Exempt Status for Child Care Facilities* (Pub. L. No. 98-369)
- C. Refundability (H.R. 2093)
- D. *Information and Referral* (Pub. L. No. 98-558)

## Title III. Nondiscrimination in Insurance (H.R. 100, S. 372)

## Title IV. Regulatory Reform and Sex Neutrality (H.R. 2410)

## Title V. Child Support Enforcement

- A. *Amendments to Title IV-d, Social Security Act* (Pub. L. No. 98-378)
- B. Federal Mandatory Wage Assignment (H.R. 2411)

*99th Congress (1985–86)*

## Title I. Retirement Security

- A. *Private Pension Reform* (Pub. L. No. 99-514)
- B. Social Security
  - 1. Social Security Modernization (Equity) Act (Earnings Sharing) (H.R. 158, S. 3)
  - 2. Full Benefits for Disabled Widow(ers) (H.R. 159)
  - 3. Transition Benefits for Displaced Homemakers (H.R. 160)
  - 4. Disability Definition for Widow(ers) (H.R. 556)
- C. *Uniformed Services Former Spouses' Equity Act* (Pub. L. No. 99-661)

## Title II. Dependent Care

- A. Social Services and Child Care Assistance Act (H.R. 798, S. 803)
- B. *Child Care Program for Postsecondary Students* (Pub. L. No. 99-498)
- C. Public Housing Child Care Services Act (H.R. 2176, S. 805)

## Title III. Insurance

- A. Nondiscrimination in Insurance Act (H.R. 1793)
- B. *Health Insurance Continuation* (Pub. L. No. 99-272)

## Title IV. Employment

- A. Pay Equity Act
  - 1. Enforcement and Education (H.R. 375)
  - 2. Federal Study (H.R. 27, S. 519)
  - 3. Legislative Branch Study (H. Con. Res. 139)
- B. Demonstration and Pilot Programs in Education and Training for AFDC Mothers (H.R. 880, S. 19)
- C. Women in Business
  - 1. National Commission on Women's Business Ownership (H.R. 887, S. 872)
  - 2. Equal Credit Opportunity for Family and Household Purchases (H.R. 1575, S. 1486)

## Title V. Tax Reform

- A. Head of Household Zero Bracket Amount (H.R. 2477)
- B. *Earned Income Tax Credit* (Pub. L. No. 99-514)
- C. Dependent Care Tax Credit (H.R. 2527, S. 912)
- D. Deductions for Contributions to Retirement Accounts Based on Spouse's Income (H.R. 797, S. 200)
- E. Nondiscrimination in Business Expense Deduction Act (H.R. 876)

*100th Congress (1987–88)*

## Title I. Work

- A. Pay Equity
  - 1. Federal Equitable Pay Practices Act (H.R. 387, S. 552)
  - 2. Study of Legislative Branch Pay (H Con. Res. 120)
- B. Women in Business
  - 1. *Equal Credit Opportunity Act for Commercial Loans* (Pub. L. No. 100-533)
- C. Part-time and Temporary Workers Protection Act (H.R. 2575)
- D. Economic Security
  - 1. Social Security Modernization (or Equity) Act (H.R. 674, S. 3)
  - 2. Disability Definition (H.R. 203, S. 170)
  - 3. Pension Reform Act (H.R. 2613)
  - 4. *Community Property and Prevention of Spousal Impoverishment* (Pub. L. No. 100-360)
  - 5. Nondiscrimination in Insurance Act
  - 6. Federal Council on Women Act (H.R. 1636)

## Title II. Family and Dependent Care

- A. Child Care Opportunities for Families Act (Family Day Care Provider Assistance Act)
  - 1. Training for Family Day Care Providers (H.R. 1001, Sec. 402, S. 982)
  - 2. Improvement of Child Care Standards (H.R. 1001, Sec. 201, S. 934)
- B. Access to Dependent Care for All Families
  - 1. Dependent Care Tax Credit (Child Care Tax Act) (H.R. 2456, 5570)
  - 2. Mortgage Financing for Family Day Care Centers (S. 1300)
- C. Supply of Dependent Care for Lower-Income Families
  - 1. *Social Security Act Title XX Funding* (Pub. L. No. 100-203)
  - 2. State Dependent Care Grants Amendments Act (H.R. 2105, S. 222)
  - 3. *Child Care in Public Housing (Housing and Community Development Act)* (Pub. L. No. 100-242)



*101st Congress (1989–90)*

## Title I. Employment

- A. Pay Equity Technical Assistance Act (H.R. 41, S. 16)
- B. Legislative Pay Equity Study (H. Con. Res. 95)
- C. Part-Time and Temporary Workers Protection Act (H.R. 2563)
- D. Federal Council on Women Act (H.R. 1187)
- E. *Vocation Education* (Pub. L. No. 101-392)
- F. Women in Business Procurement Assistance Act (H.R. 2947, S. 2294)

## Title II. Economic Security

- A. Earnings Sharing by Married Couples (Social Security Modernization Act) (H.R. 203, S. 51)
- B. Disability Definition (Social Security Disabled Widow's and Widower's Equity Act) (H.R. 2731, S. 1872)
- C. Pension Reform Act (H.R. 3306)
- D. *Displaced Homemakers and Single Parents Homeownership Assistance Act* (Pub. L. No. 101-625)
- E. Housing Assistance for Domestic Violence Victims (H.R. 2951)

## Title III. Dependent Care

- A. Quality Child Care Demonstration Projects (H.R. 1618, sec. 212)
- B. Dependent Care Tax Credit (H.R. 994)
- C. Mortgage Financing for Family Day Care Centers (H.R. 2330, 1297)
- D. Flexible Work Force (H.R. 1618, sec. 303)
- E. *Transitional Housing Child Care Services* (Pub. L. 101-625)
- F. *Social Security Act Title XX Funding* (Pub. L. No. 101-239)
- G. School-Based Child Care (H.R. 2220, S. 2681)

## Title IV. Health Care (Later Severed to Become the Health Equity Act)

- A. *Older Women's Breast Cancer Prevention* (Pub. L. No. 101-508)
- B. *Maternal and Child Health Funding* (Pub. L. No. 101-239)
- C. *Public Housing Prenatal Services* (Pub. L. No. 101-625)
- D. Domestic Violence and Judicial Training (H.R. 2952, S. 1482)
- E. *Sense of Congress Resolution on Domestic Violence* (H. Con. Res. 172)
- F. *Immigration Reform for Battered Spouses* (Pub. L. No. 101-649)
- G. Long-term Care Volunteers (H.R. 2238, S. 1457)
- H. *Sense of Congress Resolution on Caregivers* (H. Res. 170, S. Res. 161)

*102nd Congress (1991–92)*

## Title I. Employment Opportunities

- A. *Nontraditional Employment for Women Act* (Pub. L. No. 102-235)
- B. Worker Retraining Act (H.R. 3707)
- C. *Women in Apprenticeship Occupations and Nontraditional Occupation Act* (Pub. L. No. 102-235)
- D. *Glass Ceiling Act* (Pub. L. No. 102-166)
- E. *Women and Minorities in Science and Mathematics Act* (Pub. L. No. 102-235)
- F. Advancement of Women in Science and Engineering Act (H.R. 3476)

## Title II. Women in Business

- A. Act for Microenterprise (H.R. 288)
- B. *Microlend for the Future Act* (Pub. L. No. 102-366)
- C. Women's Business Procurement Assistance Act (H.R. 3517, S. 1959)
- D. Equal Surety Bond Opportunity Act (H.R. 3534, S. 2611)
- E. *Small Business Access to Surety Bonding Survey Act* (Pub. L. No. 102-366)

## Title III. Economic Justice

- A. Pay Equity Technical Assistance Act (H.R. 386, S. 1856)
- B. Legislative Pay Equity Study (H. Con. Res. 222)
- C. Part-time and Temporary Workers Protection Act (H.R. 3793)
- D. Child Support Enforcement Improvements Act (H.R. 3677)
- E. Dependent Care Tax Credit Refundability (H.R. 3506)
- F. *Pell Grant Eligibility Expansion Act* (Pub. L. No. 102-325)
- G. Federal Council on Women Act (H.R. 2567)

## Title IV. Retirement Equity

- A. Pension Reform Act (H.R. 1735, S. 3184)
- B. Spousal Pension Equity Act
- C. Social Security Care Provider Act (H.R. 3328, S. 762)
- D. Social Security Modernization Act (H.R. 52)
- E. Former Military Spouses (H.R. 3525)
- F. Federal Employees Former Spouses (H.R. 108)

*103rd Congress (1993–94)*

## Title I. Workplace Fairness

- A. Equal Remedies Act (H.R. 224, S. 17)
- B. Federal Employee Fairness Act (H.R. 2721, S. 404)
- C. Congressional Employees Fairness Act (H.R. 2846)
- D. Sexual Harassment Prevention Act (H.R. 2829, S. 1979)
- E. Part-time and Temporary Workers Protection Act (H.R. 2188)
- F. Unemployment Insurance Reform (H.R. 1359)
- G. Federal Temporary Workers Protection Act (H.R. 98)
- H. *Legislative Pay Equity Study* (H. Con. Res. 78)

## Title II. Economic Opportunity

- A. *Women's Business Procurement Assistance Act* (Pub. L. Nos. 103-355, 103-403)
- B. Microenterprise Opportunity Expansion Act (H.R. 2308)
- C. Equal Surety Bond Opportunity Act (H.R. 1464, S. 1259)
- D. Commission on the Advancement of Women in the Science and Engineering Work Forces Act (H.R. 467, S. 2356)
- E. Self-Sufficiency Standard Act (Job Training) (H.R. 2788)

## Title III. Work and Family

- A. Child Care Public-Private Partnership Act (H.R. 1196, S. 495)
- B. After-School Child Care Act
- C. Dependent Care Tax Credit Refundability Act (H.R. 1947)
- D. Tax Incentives for Family-Friendly Workplaces Act
- E. Federal Parental Leave for Education Activities (H.R. 2437)

## Title IV. Economic Self-Sufficiency

- A. Child Support Enforcement
  - 1. Child Support Economic Security Act (H.R. 915)
  - 2. Interstate Child Support Act (H.R. 1961)
  - 3. Child Support Enforcement Improvements Act (H.R. 2396)
  - 4. Inclusion of Overdue Child Support in Consumer Credit Reports (H.R. 2346)
- B. Pension Reform Act (H.R. 2502, 4367)
- C. Social Security
  - 1. Social Security Reforms (H.R. 2536—39)
  - 2. Social Security Caregiver Act (H.R. 2540)
- D. Former Military Spouses Retirement Benefits Protection (H.R. 2258)
- E. Unremunerated Work Act (H.R. 966)

*104th Congress (1995–96)*<sup>409</sup>

## Title I. Workplace Fairness

- A. Part-Time and Temporary Workers (H.R. 3682)
- B. Federal Employees Fairness Act (H.R. 2133)
- C. Legislative Pay Equity Study (H. Con. Res. 194)
- D. Sexual Harassment Prevention Act (H.R. 3646)
- E. Sexual Harassment Information (H.R. 1859)
- F. Sexual Harassment Tax Equity Act (H.R.3530)
- G. Equal Remedies Act (H.R. 96, S. 296)
- H. Federal Temporary Workers Protection Act (H.R. 1724)
- I. Contingent Work Force Equity Act (H.R. 3657)

## Title II. Economic Opportunity

- A. Microenterprise Opportunity Expansion Act (H.R. 1019)
- B. Commission on the Advancement of Women in Science and Engineering Work Forces (H.R. 3726)
- C. Equal Surety Bond Opportunity (H.R. 3702, S. 666)
- D. Self-Sufficiency Standard Act (Job Training) (H.R. 3616)
- E. Community Reinvestment (H.R. 3826)
- F. Telecommunication Economic Opportunity Act (H.R. 503)
- G. HHS Women Scientist Employment Opportunity Act (H.R. 3791)
- H. Women in Enterprise Development Act (H.R. 3827)

## Title III. Work and Family

- A. Child Care Consolidation and Investment Act (H.R. 3860, S. 472)
- B. Child Care Public Private Partnership Act (H.R. 986)
- C. Dependent Care Tax Credit Refundability (H.R. 4154)
- D. IRA Deductions for Homemakers (H.R. 708, S. 287)
- E. Federal Parental Leave for Education Activities (H.R. 3704)
- F. Tax Incentives for Family-Friendly Workplace Act (H.R. 3836)
- G. Parental Equity Leave for Adopted and Foster Children (H.R. 2237)

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<sup>409</sup> In the 104th Congress, the Economic Equity Act was only introduced in the House. It was not reciprocally introduced in the Senate.

## Title IV. Economic Self-Sufficiency

- A. Child Support Responsibility Act (H.R. 785, S. 442)
- B. Interstate Child Support Enforcement Act (H.R. 95, H.R. 195, S. 456, S. 926)
- C. Child Support Enforcement Improvements Act (H.R. 3362)
- D. Single Parent Protection Act (H.R. 3529)
- E. Women's Pension Equity Act (H.R. 3510, H.R. 3511, S. 1756)
- F. Pension Reform Act (H.R. 1048)
- G. Social Security Caregiver Act (H.R. 3357)

## Title V. Economic Impact of Domestic Violence

- A. Workplace Violence Prevention Tax Credit Act (H.R. 3584)
- B. Insurance Protection for Victims of Domestic Violence Act (H.R. 1201, H.R. 3145)
- C. Fairness to Minority Women Health (H.R. 3179)
- D. Battered Women's Employment Protection Act (H.R. 3837)
- E. Domestic Violence Legal Services Eligibility (H.R. 3733)

TABLE 4. ALPHABETICAL LISTING OF MAJOR CORRESPONDING BILLS AND SESSIONS AS INDICATED IN THE ECONOMIC EQUITY ACT, 1981–1996<sup>410</sup>

Battered Women's Employment Protection Act, 104th  
 Child Care Consolidation and Investment Act, 104th  
 Child Care Opportunities for Families Act (or Family Day Care Provider Assistance Act), 99th–100th  
 Child Care Public Private Partnership Act, 102nd–104th  
 Child Care Tax Act, 100th  
 Child Support Economic Security Act, 102nd–103rd  
 Child Support Enforcement Improvements Act, 102nd–104th  
 Child Support Responsibility Act, 103rd–104th  
 Commission on the Advancement of Women in the Science and Engineering Work Forces Act, 102nd–104th  
 Contingent Workforce Equity Act, 103rd–104th  
 Continued Access to Group Health Insurance Act, 99th  
 Dependent Care Tax Credit Refundability Act, 103rd  
 Displaced Homemakers and Single Parents Homeownership Asst. Act, 101st  
 Domestic Violence Legal Services Eligibility, 104th  
 Equal Remedies Act, 104th  
 Equal Surety Bond Opportunity Act, 102nd–104th  
 Fairness to Minority Women Health, 104th  
 Family Housing Options Program Act, 101st  
 Federal Council on Women Act, 100th–102nd  
 Federal Employee Fairness Act, 103rd–104th  
 Federal Equitable Pay Practices Act, 100th  
 Glass Ceiling Act, 102nd  
 Homemakers' Equity Act, 99th  
 NIH Women Scientist Employment Opportunity Act, 103rd–104th  
 Insurance Protection for Victims of Domestic Violence Act, 104th  
 Interstate Child Support (Enforcement) Act, 102nd–104th  
 Medicaid Community Property and Respite Care Act, 100th  
 Microenterprise Opportunity Expansion Act, 103rd–104th  
 Microlend for the Future Act, 102nd  
 Nondiscrimination in Business Expense Deduction Act, 99th  
 Nondiscrimination in Insurance Act, 99th  
 Nontraditional Employment for Women Act, 101st–102nd  
 Part-Time and Temporary Workers Protection Act, 100th–104th

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<sup>410</sup> Many provisions in the successive versions of the Economic Equity Act do not indicate a correlating bill. Accordingly, this Table is intended as a reference to illustrate the variety and character of the bills advanced through the omnibus Economic Equity Act over time and is not intended to be exhaustive. Some bill names also varied; alternatives have been placed in parentheses.

Older Women's Breast Cancer Prevention Act, 101st–102nd  
Pay Equity Act, 99th  
Pay Equity Technical Assistance Act, 101st–102nd  
Pension Reform Act, 100th–104th  
Pension Vesting, Integration, and Portability Act, 99th  
Public Housing Child Care Act (or Services Act), 99th  
Public Housing One-Stop Perinatal Services Act, 101st  
Self-Sufficiency Standard Act, 103rd–104th  
Sexual Harassment Prevention Act, 103rd–104th  
Sexual Harassment Tax Equity Act, 104th  
Single Parent Protection Act, 104th  
Small Business Access to Surety Bonding Survey Act, 102nd  
Small Day Care Center Assistance Act, 101st  
Social Security Care Provider Act (or Caregiver Act, Caregiver Credit Act), 101st–104th  
Social Security Disabled Widow's and Widower's Equity Act, 101st–102nd  
Social Security Modernization (or Equity) Act, 99th–102nd  
Social Services and Child Care Assistance Act, 99th  
State Dependent Care Grants Amendments Act, 100th–101st  
Tax Incentives for Family-Friendly Workplaces Act, 103rd–104th  
Telecommunications Economic Opportunity Act, 104th  
Transitional Housing Child Care Services Act, 101st  
Uniformed Services Former Spouses' Equity Act, 99th  
Unremunerated Work Act, 102nd-104th  
Women and Minorities in Science and Mathematics Act, 102nd  
Women in Apprenticeship Occupations and Nontraditional Occupations Act, 102nd  
Women in Enterprise Development Act, 102nd and 104th  
Women's Business Ownership Act (or Women's Small Business Ownership Act), 99th  
Women's Business Procurement Assistance Act, 101st–103rd  
Women's Pension Equity Act, 104th  
Worker Retraining Act, 102nd  
Workplace Violence Prevention Tax Credit Act, 104th

APPENDIX. METHODOLOGY FOR DETERMINING CORRESPONDING BILL  
NUMBERS AND ENACTMENTS ORIGINATING FROM THE ECONOMIC  
EQUITY ACT, 1981-1996

A single source specifying and describing in detail both the proposed provisions and enacted provisions of the Economic Equity Act, as well as the bill and public law numbers associated with these proposed provisions and enactments, has not been previously available. The preceding Tables are the product of extensive legislative and archival research, which was necessary in order to connect each provision of the Economic Equity Act to its corresponding bill in Congress, and then in the case of enacted provisions, to a public law.

I began by constructing a table summarizing the provisions of the successive versions of the Act based on the original House bills, which did not contain correlating bill numbers, but sometimes contained correlating bill titles. I then reviewed available publications of the Congressional Caucus for Women's Issues, titled "Update." At times, the Caucus previewed or reviewed the Act for a particular Congress. If bill numbers and public law numbers were included, I added that information to the Tables. If they were not, I searched on Thomas ([www.thomas.gov](http://www.thomas.gov)) for correlating bill numbers and enactments, using substantive search terms and comparing bill titles and substantive provisions to confirm that a match had been found.

Finally, I cross-referenced three sources to check the validity of my findings. First, I reviewed Irwin Gertzog's books titled *Women and Power on Capitol Hill: Reconstructing the Congressional Women's Caucus* (2004) and *Congressional Women: Their Recruitment, Integration, and Behavior* (1995). In his substantive discussions of the Caucus, he references various enactments, as well as various failures, of the Act. Further, I referenced Barbara Burrell's book titled *A Woman's Place is in the House: Campaigning for Congress in the Feminist Era* (1994). Burrell sets forth a cursory listing of the successive versions of the Act through the 103rd Congress, placing a star next to areas that included enactments. While bill numbers, public law numbers, or bill titles were not included in her work, her designation of enactments offered a useful cross-reference. These sources provided cross-references for only a subset of the information in the Tables, but their consistency offers some validation that my methodology has produced a compilation that is as accurate and complete as possible based on the information available about the Act.