In Pursuit of Equality

Women,
Public Policy,
and the
Federal Courts

Susan Gluck Mezey

Loyola University

Contents

Introduction I

Feminism and Law 1 • Law and Equality 3 • Federal Court Litigation and Sexual Equality 4 • Outline of the Book 5 • Notes 7

1 The Constitution and Equality 8

Early Battles for Equality 8 • The Seneca Falls

Convention 9 • Women's Suffrage 10 • The Right to Practice

Law 11 • The Right to Vote 12 • The Right to Work 13 •

The Right to Serve on a Jury 15 • The Modern Equal Protection

Clause 16 • Levels of Scrutiny 16 • Developing a New Level of

Scrutiny for Sex-based Laws 17 • Classifying Cases 20 • Striking

the Sex-based Laws 20 • Upholding the Sex-based Laws: The

Compensation Cases 22 • Upholding the Sex-based Laws: The

Physical Differences Cases 25 • A Critique of the Court's Equal

Protection Doctrine 28 • Notes 30

2 Equal Employment Opportunity: Title VII— The Formative Years 35

Title VII of the 1964 Civil Rights Act 36 • Administrative Policymaking 38 • Sex Discrimination and the EEOC 41 • Provisions of Title VII 42 • Title VII Litigation 42 • BFOQs and Protective Legislation 43 • Customer Preferences 45 • The Supreme Court and Sex-plus Discrimination 47 • The Supreme Court and the BFOQ Defense 48 • Sex-segregated Advertising 49 • Notes 51

3 **Equal Employment Opportunity: Proving Discrimination** 54

Intentional Discrimination: Disparate Treatment Theory 55 • Mixed Motive Cases 56 • Unintentional Discrimination: Disparate Impact Theory 57 • Tests and Diplomas as Job Requirements 58 Height and Weight Requirements 61 · Subjective Employment Criteria 62 · New Ouestions about Disparate Impact Theory 63 • A New Direction for Disparate Impact Theory 65 • The Civil Rights Act of 1990 67 • Notes 71

4 **Equal Employment Opportunity: Remedies for Discrimination**

Affirmative Action 75 • Affirmative Action and the Executive Branch 76 • Affirmative Action and the Reagan Administration 77 • Affirmative Action Litigation 80 • Affirmative Action and the Supreme Court 81 · An Affirmative Action Plan for Women 82 • The Conflict Continues 86 • Notes 86

5 Wage Discrimination: From Equal Pay to Comparable Worth 91

Equal Pay Act Enforcement 92 • Substantially Equal Jobs 93 • Equal Skill, Effort, and Responsibility 94 • Factors Other Than Sex 95 • The Supreme Court Rules on Equal Pay 96 • Inadequacy of the Equal Pay Act 97 • Sex Segregation 97 · Comparable Worth 99 · Pay Equity and Title VII 100 · The Bennett Amendment 100 · The Narrow Interpretation of the Bennett Amendment 101 • A Broad Interpretation of the Bennett Amendment 102 • The Supreme Court Decides Gunther 103 · Comparable Worth after Gunther 104 · Disparate Impact and Comparable Worth 105 • Disparate Treatment and Comparable Worth 106 · Comparable Worth Legislation 107 · Notes 108

6 Pregnancy and Employment 111

The Executive Branch and Pregnancy Policy 112 • Forced Maternity Leaves 113 • Pregnancy Disability and the Equal Protection

Clause 115 • Pregnancy and Title VII 117 • Pregnancy
Disability and Title VII 118 • The PDA Reverses
Gilbert 121 • Enacting the PDA 122 • The Debate
Begins 122 • The Supreme Court and the PDA 123 • The
Supreme Court Approves Preferential Treatment 123 • The Supreme
Court Rejects Preferential Treatment 126 • Another Look at
Preferential Treatment 127 • Pregnancy Policy-making 128 •
The Equality Model 129 • A Critique of the Equality Model 129 •
The Preferential Treatment Model 130 • Reconciling
the Debate 130 • National Maternity Policies 132 • State
Maternity Policies 133 • The Family and Medical Leave
Act 134 • Notes 137

7 Equality in Education 142

The Separate but Equal Doctrine 142 • Lower Court Rulings against Sex Segregation 143 • Support for Separate but Equal in the Lower Courts 144 • Separate but Equal Survives 146 • Title IX and Gender Equality 148 • Provisions of Title IX 149 • Legislative Intent of Title IX 150 • Title IX Regulations 150 • Title IX and Athletics 151 • Private Rights of Actions under Title IX 152 • Damages under Title IX 154 • Employees Protected under Title IX 155 • Narrowing the Reach of Title IX 156 • Indirect Aid 156 • Program-Specificity 157 • The Congressional Response to Grove City 158 • The Debate over Abortion Stalls the Grove City Bill 159 • Notes 161

8 Sexual Harassment 166

Judicial Reluctance in Sexual Harassment Suits 167 • Reasons for Dismissing Sexual Harassment Suits 168 • Early Sexual Harassment Litigation 169 • A Sexual Harassment Suit Finally Succeeds 170 • Sexual Harassment Is Based on Sex 171 • Employer Liability 171 • The EEOC Guidelines 172 • Hostile Environment Harassment 173 • The Origins of the Vinson Case 174 • The Supreme Court Rules on Sexual Harassment 176 • A Final Note on Harassment in the Workplace 179 • Sexual Harassment in Academia 179 • Applying Title IX to Sexual Harassment 180 • Notes 183

9 Equality in the Professions 187

Evaluating Professionals 187 • Women in

Academia 188 • Proving Discrimination 189 • Judicial

Deference 191 • Academic Freedom 191 • Women in

Law 193 • Partnership Decisions 194 • Women in

Accounting 196 • Exclusion from Private Clubs 200 • Freedom of Association 201 • Applying the Roberts Test 202 • Distinctly Private Clubs 203 • Retaining the Right to Discriminate 204 • Women and Family Responsibilities 204 • Notes 206

10 Abortion: The Right to Choose Develops 210

History of Abortion Legislation 212 • Abortion Reform 213 • Right to Privacy Is Established 214 • Individual Privacy and Childbearing 215 • The Right to Abortion 125 • The State's Compelling Interests 216 • Hospital and Physician Approval 218 • The Dissents in Roe and Doe 219 • The Trimester Approach 219 • Attempts to Curtail Roe 220 • Saline Amniocentesis Abortions 221 • Criminal Liability for Physicians 222 • The Akron Ordinance 223 • Hospitalization for Second-Trimester Abortions 224 • Informed Consent 225 • O'Connor's Dissent 226 • Akron's Companion Cases 227 • A New Attack on Roe 227 • Informed Consent 228 • Physician's Duty 229 • The Thornburgh Dissent 230 • Notes 231

11 Abortion: The Right to Choose Narrows 235

Parental Consent 236 • Judicial Bypass 237 • Applying the
Bellotti Standard 239 • Parental Notice for Immature
Minors 239 • State Notice Laws 240 • Two-Parent
Notice 241 • One-Parent Notice and Judicial
Bypass 243 • Public Opinion and Parental Notice 244 • Public
Funding of Abortions 244 • The Supreme Court and Funding
Limits 245 • Congress and Abortion Funding 247 • Judge
Dooling and the Hyde Amendment 248 • The Supreme Court and
the Hyde Amendment 248 • The Harris Dissent 249 • Medicaid
Funding Restrictions Continue 250 • The Supreme Court Retreats
from Roe 253 • Oral Arguments 253 • The
Preamble 254 • Public Facilities 255 • Public

Funds 256 · Viability Testing 256 · The Concurring
Opinions 257 · The Webster Dissent 258 · The Impact of
Webster 259 · Abortion Clinics 260 · Public Opinion on
Abortion 261 · Post-Webster Politics 262 · State Abortion
Laws 263 · Back to the Supreme Court 264 · Notes 264

Bibliography 270

Index 281