Chapter 1
The Twenty-First Century Equal Rights Amendment

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.

--Equal Rights Amendment to the U.S. Constitution, proposed in 1972

Almost every constitution in the world declares equal rights for women. The U.S. Constitution does not. But the United States is now closer than ever to ratifying the Equal Rights Amendment (ERA), a proposed constitutional amendment that guarantees equality of rights without abridgment on account of sex. We, the women of America, face the most
significant constitutional opportunity in over a generation. The twenty-first-century Equal
Rights Amendment can offer a new deal for women. It can overcome the neglect of
mothers and families in American constitutional law and transcend the lines of political
party, race, class, and geography. This book explains how.

The Equal Rights Amendment, thought dead for almost fifty years, has resurfaced
with new force and promise in the anticipation of 2020, the centennial of the women’s
suffrage amendment. Two states resumed the ratification process after the election of
Donald Trump, even though 35 years had passed since the deadline that Congress set for
the ERA’s ratification. Now one state away from full ratification, the ERA is poised to
become the first constitutional amendment of the twenty-first century.

Why now? In 2016, the United States came closer than ever to electing its first
female president. Even though Hillary Clinton won the popular vote, our constitutional
system gave the Presidency to Donald Trump, whose campaign included proud misogyny.
Women’s marches mobilized millions of women across the nation, and two months later,
on the 45th anniversary of Congress’s adoption of the ERA, Nevada ratified it. Then, Illinois
ratified it in 2018, in an historic bipartisan effort that responded to the voices of the
#MeToo movement. State legislatures in Virginia, Louisiana, Arizona, and North Carolina
are introducing ERA ratification bills. It is only a matter of time before another state
ratifies the federal ERA, at which point we will have the 38 states required by Article V of
the U.S. Constitution to amend it. Responding to the ratification buzz in the states, U.S.
senators have introduced a bipartisan measure to remove the deadline on ERA ratification.
On April 30, 2019, the House Judiciary Committee held hearings on the ERA for the first
time since the 1980s, signaling an openness to overcoming the time limit.
The completion of ERA ratification in the twenty-first century will raise huge questions about its legal effects and political meaning. Today, the persistence of unequal pay and the failures of existing law to deliver real equality for women form the core of ERA mobilization. The #MeToo movement has brought sexual violence and the power imbalance that enables it to the center of public debate. Women are bringing the ERA back to the national political agenda as a response to the attacks on women in the last few years, including new restrictions on reproductive freedom. The ERA movement is a quest for new solutions to the enduring problems that perpetuate women’s unequal position in society, where existing law has been inadequate.

This book provides two sets of answers about the ERA’s meaning and effect. First, unearths the political visions and legal agendas of the ERA’s “founding mothers,” from the suffragists after suffrage in the 1920s, who introduced the ERA, to the Congresswomen of the 1970s, who moved the ERA forward. Second, it explores the effects and meanings of constitutional equal rights amendments that other countries adopted and implemented while the ERA was pending in the United States. Throughout the century that the ERA has been considered, the issues of sex equality in the workplace, motherhood, and reproduction have changed constitutional law throughout the world. Global developments can shed light on the divisions and misconceptions that divided American women and derailed ERA’s success in the past.

Beginning with the political visions of the ERA’s “founding mothers,” this book journeys across the world to learn from a century of constitutional achievements by women activists, lawyers, judges, and legislators to move women towards real equality, through law. This broader experience can open up our imagination as to how the ERA can
intervene when it comes to the persistence of pay inequity and sexual harassment, and the
impoverishment of American women’s reproductive lives. Effective solutions in law and
public policy to women’s enduring disadvantages require a deeper understanding of the
way childbearing and childrearing has affected women’s path towards full legal
personhood, equal to that of men.

The U.S. Constitution is one of the oldest constitutions throughout the world and the
most difficult to amend. It is an outlier in lacking a provision that declares the equal rights
of women. A significant barrier has been the division among American women over the
ERA, with some fearing that gender equality under the law might harm mothers and
families, and others fearing that protecting motherhood will derail the path to women’s full
personhood. In the United States, the ERA has forgotten mothers, in two senses. First, the
STOP ERA movement succeeded because it ignored the vision of the “founding mothers” of
the ERA, the women in Congress who advocated for a sex equality amendment that would
eradicate discrimination while also supporting mothers towards full equality. Second, the
needs of mothers are often forgotten in the ongoing public debate about ratifying the ERA
in the twenty-first century. Yet, the core problems at the center of ERA activism – the
persistence of unequal pay and the unequal power called out by #MeToo – will require
confronting the challenges women face because of their role in reproduction as mothers.
This book brings the forgotten mothers into the legal and political core of the Equal Rights
Amendment.

The constitutional commitment to sex equality in other countries around the world
has brought about public policies that ease the burdens of childbearing and childrearing on
mothers, supporting productive and fulfilling lives for the men, women, and children who
constitute the nation. Ratifying the ERA in the twenty-first century, decades after the time limit, can affirm the possibility of constitutional change in our country. If that happens, a transgenerational and transnationally informed amendment for women’s equality can open up other enduring barriers to a well-functioning constitutional democracy in America. Constitutional change can improve the lives of women, and also update our institutions to work effectively, legitimately, and in concert to meet the needs of the diverse and vibrant nation that the United States has become in the twenty-first century. In constitutional democracies that have added equal rights for women and men in the twentieth and twenty-first centuries, new public policies have supported working mothers and equal parenting for fathers, implemented robust equal pay practices, increased the representation of women in positions of political and economic power, and synthesized pro-life and pro-choice approaches to reproductive freedom.

Leading American legal thinkers assume that lawyers and judges are the heroes of constitutional rights. Lawyers and judges approach these rights as trumps against state action. By suing the government, the individual can get a law or policy struck down to stop the state from acting. But lawsuits, even helpful ones with merit, will not provide the hefty solutions to twenty-first century gender inequality. Unequal pay, sexual harassment, maternal mortality, and the burdens borne by working mothers, including lack of paid parental leave and affordable childcare, are complex public policy challenges. They generally don’t require constitutional lawsuits to strike down bad laws, they need constitutional lawmakers to strike up good policy. The real heroes of the Equal Rights Amendment are the women lawmakers who not only advocated for a constitutional amendment, but also worked on legislation and public policy, like Title IX, public funding
for childcare, and paid maternity leave — though not to complete success — to pursue the ideals of the ERA. The real goal of ratifying the ERA today is to affirm the enduring political legitimacy of this work and to lend political fuel in perpetuity for its continuation and completion.

Women make less money than men, hold fewer leadership positions, remain vulnerable to sexual assault, and have had declining levels of happiness in the last four decades. It’s not because we need to pull the brakes on what the government is doing to women, but because government is not doing what it can for women. The ERA can reverse this entrenchment of neglect. But we need to broaden our understanding of how constitutional rights work. By ratifying the ERA as the first constitutional amendment of the twenty-first century, we the women can remake government into the engine of real equality that our foremothers envisioned.