WLJ
WOMEN LAWYERS JOURNAL
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The E.R.A. Issue

Featuring "The Need for the Equal Rights Amendment" written by Ruth Bader Ginsburg in 1974

The 100-Year Fight for Equal Rights

Plus, the NAWL Resolution in Support of Ratification of the ERA to the US Constitution

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ON THE COVER
The Capitol building dome in Washington DC by night. Credit: iStock.com/WLDavies

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ABOUT *WOMEN LAWYERS JOURNAL*

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The *Women Lawyers Journal* (*WLJ*) is published for the National Association of Women Lawyers (NAWL) members as a forum for the exchange of ideas and information. Views expressed in articles are those of the authors and do not necessarily reflect NAWL's policies or official positions. Publication of an opinion is not an endorsement by NAWL. Articles about current legal issues of interest to women lawyers are accepted and may be edited based on the judgment of the editor. Editorial decisions are based upon potential interest to readers, timelines, goals and objectives of NAWL as well as the quality of the writing. The *WLJ* also accepts book reviews related to the practice of law. We reserve the right to edit all submissions.

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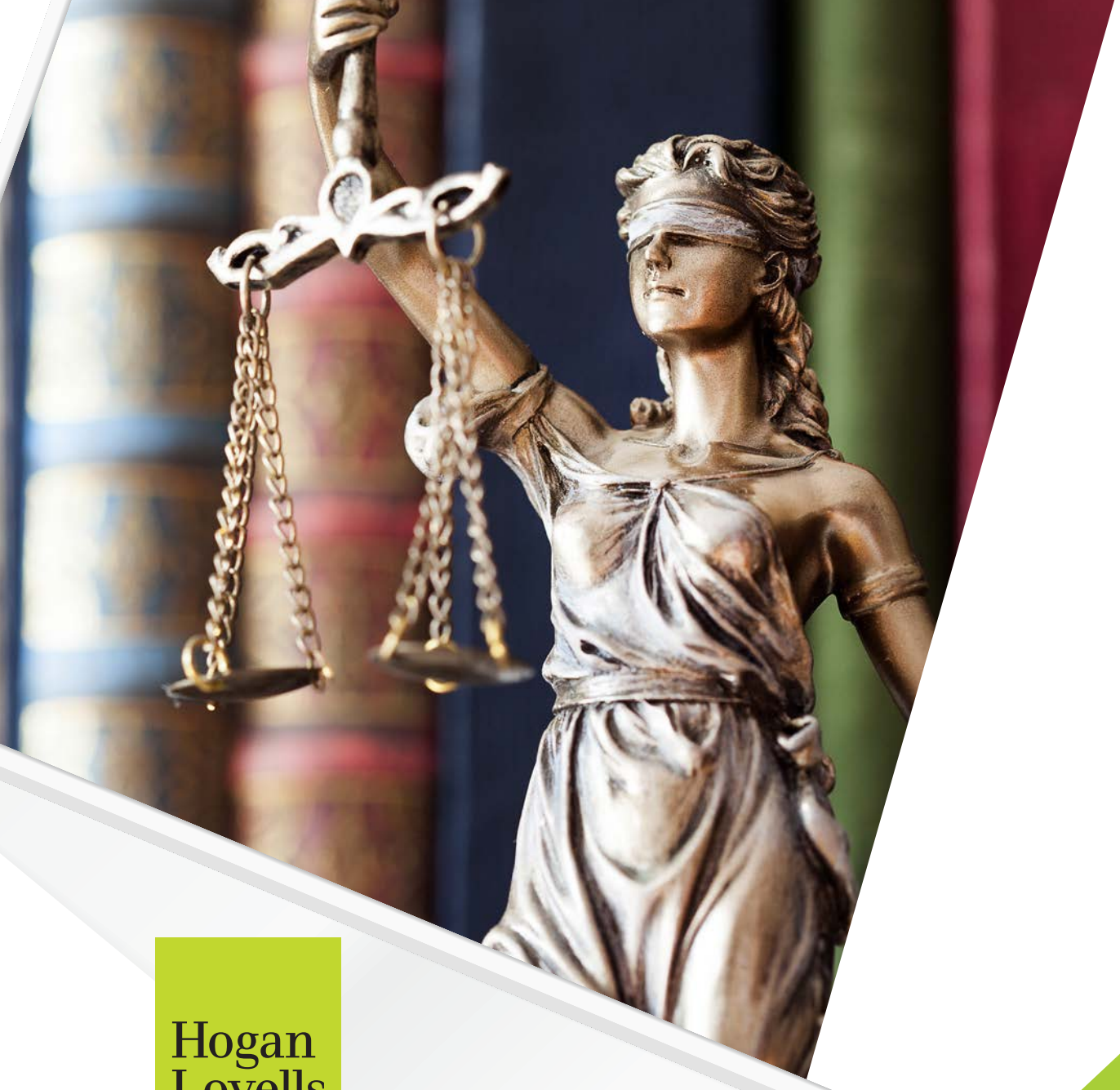

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ABOUT NAWL

The mission of the National Association of Women Lawyers is to provide leadership, a collective voice, and essential resources to advance women in the legal profession and advocate for the equality of women under the law. Since 1899, NAWL has been empowering women in the legal profession, cultivating a diverse membership dedicated to equality, mutual support, and collective success.

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- Opportunities to build a national network via programs that bring women together, both nationally and internationally, opening doors to an array of business development opportunities.
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- Continued learning with the *Women Lawyers Journal*®. This national publication provides a forum for the exchange of information and presentation of articles about women in the law and society.

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After 100+ Years Of the *Women Lawyers Journal*, a Call to Action

In May of 1911, just over ten years after NAWL was founded, NAWL published the first issue of the first volume of the *Women Lawyers' Journal*. With great pride, the editors of the first issue articulated the Journal's aim:

> *We hope to benefit each other and grow; we hope to further the best ends of all women lawyers in general; we hope to further the interests of all womankind.*

The inaugural issue of the *Women Lawyers' Journal* was devoted to such issues as the progress of women's suffrage, divorce legislation, child welfare issues, and pending legislation and representation in our legal system affecting women at the time.

The sense of urgency is as fresh and pointed today as it was then. The power of these articles lies in how timely, and timeless, these topics remain for women today.

As we reflect, we call on you, our readers and members, to take action. Renew your commitment to create and support coalitions and community with other women lawyers to further the advancement and interests of all women.

NAWL has proudly "met the moment" over the decades of its existence, be it advocating for human and civil rights legislation; pushing for ratification of the Equal Rights Amendment; fighting for pay equity for all workers; surveying working women and assessing data on their working conditions, pay, promotion opportunities, and progress in these areas; and vetting judicial candidates.

As we struggle with a pandemic and a demonstrated failure to secure civil rights for many of our citizens, we need more than resilience: we need positive growth beyond resilience. Are we thinking deliberately and differently? Are we open to others' voices and experiences so that we can learn and understand their realities? Are we ready to make and bring about changes that endure and that benefit those who have yet to experience true equality?

NAWL has helped so many of us find our voices. Now our voices matter more than ever. NAWL's advocacy on behalf of women has moved and inspired me to join in the causes that still need our support, including but not limited to pay equity, economic security, and freedom from domestic violence, sex trafficking, gender discrimination, and harassment in the workplace. Please recommit to joining NAWL's efforts.

Elizabeth A. Levy
Executive Co-Editor, *Women Lawyers Journal*

Elizabeth A. Levy is Co-Executive Editor and Board Liaison for the Women Lawyers Journal*, a NAWL Board Member, and the Co-Director of the ESL Program for Wayland Public Library.*

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RUTH BADER GINSBURG, 1933–2020

Justice Ruth Bader Ginsburg lived the mission of the National Association of Women Lawyers: the advancement of women in the legal profession and advocacy for the equality of women under the law. She was one of us, and she was an inspiration to us. In that spirit, in 2002, we honored Justice Ginsburg with NAWL's highest honor, the Arabella Babb Mansfield award. In 2019, NAWL celebrated the work of the ACLU Women's Rights Project, which Justice Ginsburg co-founded in 1972, granting the Mansfield award to an organization for the first time.

Ginsburg became a lawyer at a time when the legal profession was not welcoming to women. She began her legal education at Harvard Law School in 1956, where she learned to navigate life as one of only nine women students in a class of more than 500, the only mother in the group. She and her women counterparts were famously asked by Dean Griswold to explain why each had enrolled at the law school, taking the place of a man. Undeterred by the male-dominated, hostile environment, she excelled academically and became the first woman member of the Harvard Law Review.

Ginsburg's husband of 56 years and partner in life, Martin Ginsburg, supported her as an equal in intellect, and ambition. He was an ally, long before we had a term for it, who led by example. After Marty was treated for testicular cancer during his third year at Harvard Law School, Justice Ginsburg requested to spend her third year of law school in New York, in order to relocate with her family. When Harvard denied her request, she transferred to Columbia Law School, and graduated first in her class in 1959 as a member of the Columbia Law Review.

After struggling to secure legal employment as a woman, a Jew, and a mother, Justice Ginsburg clerked for U.S. District Judge Edmund L. Palmieri. She went on to teach at Rutgers University Law School and Columbia Law School, at the latter becoming the school's first woman tenured professor. In 1972, she co-founded the American Civil Liberties Union Women's Rights Project ("WRP"). During the 1970s, as the WRP's first Director, she argued six landmark cases on gender equality before the U.S. Supreme Court, helping establish the legal groundwork for prohibitions against sex discrimination.

Notably, in *Reed v. Reed*, 404 U.S. 71 (1971), the Supreme Court extended the protections of the Equal Protection Clause of the Fourteenth Amendment to women. Ginsburg also supported the challenge to an Oklahoma statute that set different minimum drinking ages for men and women in *Craig v. Boren*, 429 U.S. 190 (1976), filing an amicus brief and sitting at counsel table in this landmark litigation that established an "intermediate scrutiny" standard for gender discrimination. Recognizing that gender equality is in all of our interests, in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), she represented a widower denied survivor benefits under Social Security, which permitted widows but not widowers to collect special benefits while caring for minor children—and won.

In 1978, her last case as an attorney before the Supreme Court was *Duren v. Missouri*, 439 U.S. 357 (1979), which challenged the validity of voluntary jury duty for women, on the ground that participation in jury duty was a citizen's vital governmental service and therefore should not be optional for women. At the end of Ginsburg's oral argument, then-Associate Justice William Rehnquist asked Ginsburg, "You won't settle for putting Susan B. Anthony on the new dollar, then?"

Justice Ginsburg was appointed by President Jimmy Carter to the U.S. Court of Appeals for the DC Circuit in 1980. In 1993, she was appointed to the Supreme Court by President Bill Clinton. Confirmed by the Senate in a 96–3 vote, she became the second woman to serve on the nation's highest court. In 1996, writing for a 7–1 court, Justice Ginsburg wrote the majority opinion in *United States v. Virginia*, 518 U.S. 515 (1996), which struck down the Virginia Military Institute's all-male admissions policy and opened the institution to women. Holding that Virginia violated the Fourteenth Amendment's equal protection clause because it failed to show "exceedingly persuasive justification" for VMI's gender-biased admissions policy, Ginsburg wrote "generalizations about 'the way women are,' estimates of what is appropriate for

Credit: Supreme Court of the United States

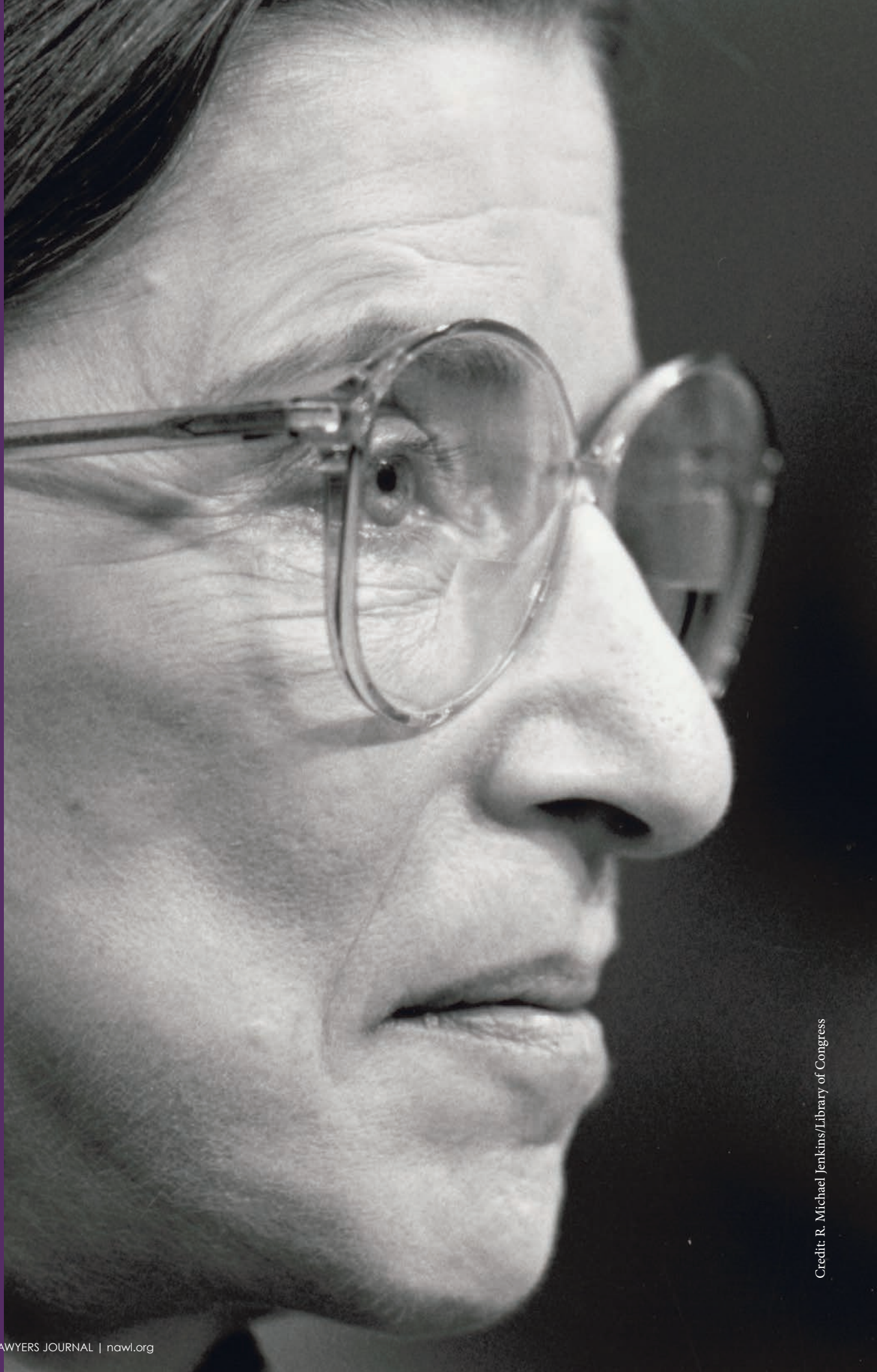
most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description."

Her colleague and friend, conservative Justice Antonin Scalia, praised Ginsburg's skills as an advocate: "she became the leading (and very successful) litigator on behalf of women's rights—the Thurgood Marshall of that cause, so to speak." An advocate for gender equality in practice, she was a consensus builder on the Court. Legal scholar Cass Sunstein characterized her as a "rational minimalist," who sought to build on precedent rather than pushing the Constitution towards her own vision.

After Justice Sandra Day O'Connor retired in 2006, Justice Ginsburg remained as the only woman on the Supreme Court. For the first time in her history on the Court, that year, she read multiple dissents from the bench—to demonstrate a more intense disagreement with the majority. On the bench, Justice Ginsburg remained a staunch advocate for reproductive freedom and gender equality. As the Court became increasingly hostile to women, and political machinations of anti-equality members of Congress more blatant, Justice Ginsburg resolved to remain on the Court as long as she was able. News reports confirm that in her final days, Justice Ginsburg dictated this statement to her granddaughter (and an attorney), Clara Spera: "My most fervent wish is that I will not be replaced until a new president is installed."

Indeed, NAWL will not settle. Political opportunists have wasted no time attempting to justify a swift nomination and floor vote on a replacement for Justice Ginsburg before the end of 2020, an act directly contrary to their own behavior and public statements in 2016, when Justice Scalia died more than 8 months before an election. We will not countenance a different result, especially with early voting having commenced in a number of states and less than 50 days to go before an election that will be a referendum on justice, the rule of law, and the future of our democracy. This nomination shall wait until 2021, after the people have spoken. Let the people vote, and the people shall decide.

We grieve the loss of Justice Ginsburg, to the profession, to women, and to this country. According to Jewish tradition, a person who dies on Rosh Hashanah is a tzaddik—a person of great righteousness. The Hebrew root of tzaddik is "tzedek (צדק)" which means "justice." May her memory be a blessing, to us all.



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THE NEED FOR THE EQUAL RIGHTS AMENDMENT

By Ruth Bader Ginsburg

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The notion that men and women stand as equals before the law was not the original understanding, nor was it the understanding of the Congress that framed the Civil War amendments. Thomas Jefferson put it this way:

> Were our state a pure democracy there would still be excluded from our deliberations women, who, to prevent deprivation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men.[1]

Midnineteenth century feminists, many of them diligent workers in the cause of abolition, looked to Congress after the Civil War for an express guarantee of equal rights for men and women. But the text of the Fourteenth Amendment appalled the proponents of a sex equality guarantee. Their concern centered on the abortive second section of the amendment, which placed in the Constitution for the first time the word "male." Threefold use of the word "male," always in conjunction with the term "citizen," caused concern that the grand phrases of the first section of the Fourteenth Amendment — due process and equal protection of the laws — would have, at best, qualified application to women.[2]

After close to a century's effort, the suffrage amendment was ratified, according to female citizens the right to vote. The most vigorous proponents of that amendment saw it as a beginning, not as a terminal point. Three years after the ratification of the Nineteenth Amendment, the National Women's Party succeeded in putting before Congress the equal rights amendment that has been reintroduced in every Congress since 1923. On the occasion of the amendment's initial introduction, the executive secretary of the National Women's Party explained:

> [A]s we were working for the national suffrage amendment … it was borne very emphatically in upon us that we were not thereby going to gain full equality for the women of this country, but that we were merely taking a step … toward gaining this equality.[3]

Persons unacquainted with the history of the amendment deplore its generality and the absence of investigation concerning its impact. The models of the due process and equal protection clauses should suffice to indicate that the wording of the amendment is a thoroughly responsible way of embodying fundamental principle in the Constitution. Before the amendment was proposed, the National Women's Party, with the aid of a staff of lawyers and expert consultants, tabulated state and federal legislation and court decisions relating to the status of women. Advisory councils were formed, composed of different economic and professional groups of women — industrial workers, homemakers, teachers and students, federal employees. Each council conducted studies of the desirability of equal rights and responsibilities for men and women. Reading debates on the amendment in the law journals of the 1920s is enlightening. The objections still voiced in 1973 were solidly answered then.[4]

Opponents of the amendment suggest the pursuit of alternate routes: particularized statutes through the regular legislative process in Congress and in the states, and test case litigation under the Fourteenth Amendment.[5] Only those who have failed to learn the lessons of the past can accept that counsel.

On the legislative side the cupboard was bare until 1963 when Congress passed the Equal Pay Act. That legislation was hardly innovative. An equal pay requirement was in force during World War II and then quietly retired when there was no longer a need to encourage women to join the labor force.[6] Equal pay was the subject of a 1951 International Labor Organization convention and was mandated by the Rome Treaty that launched the European Economic Community in 1958. Most significantly, mixed motives spurred congressional action. Some congressmen were sold on the bill by this argument: equal pay protects against male unemployment; without access to female labor at bargain prices, employers will prefer to hire men.[7]

The next year, sex was included along with race, religion, and national origin in Title VII of the Civil Rights Act of 1964. This was a significant advance, for Title VII is a most potent weapon against employment discrimination. But sex was added to Title VII via the back door. A Southern congressman, steadfast in his opposition to Title VII, introduced the amendment that added sex to the catalogue of prohibited discrimination. His motive was apparent, but his tactic backfired.[8]

In 1972, in Title IX of the Education Amendments of that year, Congress banned federal assistance to educational institutions that discriminate on the basis of sex. Title IX contains several exceptions, for example, admissions to all private and some public undergraduate schools are exempt, and its enforcement mechanism is weak.

These three measures, the Equal Pay Act, Title VII, and Title IX, are the principal congressional contributions. Not an impressive record in view of the job that remains to be done. A recent government computer search, the solicitor general told the Supreme Court this term, revealed that 876 sections in the United States Code contained sex-based references.[9] Similar searches in some of the states have turned up hundreds of state statutes in need of revision.[10]

Will major legislative revision occur without the impetus of the equal rights amendment? Probably not if past experience is an accurate barometer. Scant state or federal legislative attention focused on the discriminatory status identified by the National Women's Party in the 1920's. After Congress passed the equal rights amendment, it remained unwilling to ban sex discrimination in admissions to undergraduate schools, although the 1971 Newman report informed it that "discrimination against women, in contrast to that against minorities, is still overt and socially acceptable within the academic community." As a graphic illustration, the 1969 profile of the freshman class at a well-known state university cautions: "Admission of women on the freshman level will be restricted to those who are especially qualified."[11] A candid response came from the Air Force Academy this year: We will enroll women in 1975 if the amendment is ratified, the superintendent said. If the amendment is not ratified, women will have to wait a long time before they can expect to enroll.[12]

What Kind of Revision Can Be Expected?

A preview of the kind of revision that can be expected under the stimulus of the amendment has been provided by legislative analyses in some of the

Credit: Library of Congress/portrait by Simmie Knox

states. These analyses should reassure those who fear intolerable change in the wake of the amendment. They propose extension of desirable protection to both sexes; for example, state minimum wage laws would be extended to men; in no case do they propose depriving either sex of a genuine benefit now enjoyed.[13]

As a sample of laws destined for the scrap heap if the amendment is ratified, consider these: Arizona law stipulates that the governor, secretary of state, and treasurer must be male.[14] In Ohio only men may serve as arbitrators in county court proceedings.[15] In Wisconsin barbers are licensed to cut men's hair and women's hair, but cosmeticians may attend to women only.[16] Georgia law, still faithful to Blackstone, provides:

> The husband is head of the family and the wife is subject to him; her legal civil existence is merged in her husband's, except so far as the law recognizes her separately, either for her own protection, or for her benefit, or for the preservation of public order.[17]

Another embarrassment from the same state reads: "Any charge or intimation against a white female of having sexual intercourse with a person of color is slanderous without proof of special damages."[18]

Legislative inertia keeps laws of this kind on the books. Prof. Thomas Emerson summarized the situation this way: "It is not a weakness but a strength of the amendment that it will force prompt consideration of changes that are long overdue."[19]

If one turns to the contribution of the judiciary and litigation under the Fourteenth Amendment, Supreme Court decisions that span 1873 to 1961 tell us this: Until the Nineteenth Amendment, women could be denied the right to vote. Of course, they are "persons" within the meaning of the Fourteenth Amendment, but so are children, the Court observed in 1874.[20] The right to serve on juries could be reserved to men,[21] a proposition the Court declined to re-examine in 1971, although Justice Douglas urged his brethren to do so.[22] Women, regardless of individual talent, could be excluded from occupations thought more suitable to men — lawyering and bartending, for example.[23]

Typical of the attitude that prevailed well into the twentieth century is the response of one of our nation's greatest jurists, Harlan Fiske Stone, author of the celebrated *Carolene Products* footnote that supplied the rationale for the suspect classification doctrine. In 1922, when Chief Justice Stone was dean of Columbia Law School, he was asked by a

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Barnard graduate who wanted to study law, "Why doesn't Columbia admit women?" The venerable scholar replied in a manner most uncharacteristic of him: "We don't because we don't."[24]

Judges' Performance Poor to Abominable

Recently, two law professors evaluated the judicial record in sex discrimination cases up to 1971. They reported:

> Each of us is a middle-aged, white male — some might characterize us as fairly typical WASPs … Neither of us has ever been radicalized, brutalized, politicized or otherwise leaned on by the Establishment in any of the ways that in recent years have led many to adopt heretical views of various kinds.
>
> Each of us, however, was led last year … to begin to investigate the ways in which American judges have responded to various types of sex discrimination. Our research has been of the most traditional kind: finding, analyzing, attacking and defending judicial opinions …
>
> Our conclusion, independently reached, but completely shared, is that by and large, the performance of American judges in the area of sex discrimination can be succinctly described as ranging from poor to abominable. With some notable exceptions, they have failed to bring sex discrimination cases those judicial virtues of detachment, reflection and critical analysis which have served them so well with respect to other sensitive social issues … Judges have largely freed themselves from patterns of thought that can be stigmatized as "racist" … [But] "sexism" — the making of unjustified (or at least unsupported) assumptions about individual capabilities, interests, goals and social roles solely on the basis of sex differences — is as easily discernible in contemporary judicial opinions as racism ever was.[25]

In the 1971 term, a new direction was signaled when the Supreme Court responded affirmatively to two complaints of unconstitutional sex discrimination. In *Reed v. Reed*, 404 U.S. 71 (1971), the Court held inconsistent with the equal protection clause an Idaho statute that read: "As between persons equally entitled to administer a decedent's estate, males must be preferred to females." In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Court relied on the due process clause to hold that an unwed father who wished to retain custody of his children had to be given a hearing of the kind that would be accorded to any mother or any married father. The opinions in both cases were laconic; they provided an uncertain basis for predicting the Court's future course.

Frontiero Should Encourage Litigation

On May 14, 1973, in *Frontiero v. Richardson*, 411 U.S. 677, the Court moved forward more swiftly than many had anticipated; in effect, it served notice that sex discrimination by law would no longer escape rigorous constitutional review. The Court's eight-to-one judgment declared unconstitutional a fringe benefit scheme that awarded male members of the military housing allowance and medical care for their wives, regardless of dependency but authorized these benefits for female members of the military only if in fact they supported their husbands. The scheme was invalidated insofar as it required a female member to prove the dependency of her spouse.[26]

Four of the justices joined in a plurality opinion by Justice Brennan that declares that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." Adopting a position long urged by advocates of equal rights and responsibilities for men and women,[27] the plurality opinion says that

since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility …" And what differentiates sex from such non suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or to contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

Justice Stewart offered a one sentence concurrence tersely acknowledging that the statutes in question "work an invidious discrimination in violation of the Constitution." Further enlightenment on the standard of review by which he measures sex differentials in the law has been left for another day.

Also concurring in the judgment, Justice Powell, joined by Chief Justice Burger and Justice Blackmun, found it "unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding." In his view

> [b]y acting prematurely … the Court has assumed decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed [Equal Rights] Amendment.

The division of the Court in *Frontiero* may provide stimulating material for dissection in next year's law reviews. For present purposes, these points seem relevant: *Frontiero* is almost certain to encourage increased litigation attacking sex-based differentials in federal and state statutes and regulations on the basis of the Fifth or Fourteenth Amendment. Lower courts may well assume that Justice Stewart "knows [sex discrimination] when he sees it,"[28] and accordingly conclude that at least five justices can be relied upon to scrutinize sex classifications closely. Legislative response to *Frontiero* is more uncertain. However, past behavior suggests that Justice Powell's counsel resembles the position of the most political branch: If the equal rights amendment is adopted, the hard task of revision will be undertaken in earnest; absent ratification, comprehensive revision may continue to be regarded as "premature and unnecessary."

Reasoned appraisal of the amendment requires consideration of the realities of life for an increasing population of women in this latter half of the twentieth century. Fifty years ago, women comprised 20 per cent of the labor force. By 1972, they comprised 38 per cent. Approximately 44 per cent of all women sixteen years of age and over were working. Approximately 60 per cent of women workers were married and living with their husbands. Nearly 40 per cent were mothers with one

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With the disappearance of home centered economic activity, and the possibility now open to women to determine whether and when to bear children, perceptive persons of both sexes recognize that there is no justification for confining women to a role of their own.

or more children under eighteen. Of the 32 million working women in America, approximately 42 per cent worked full time the year round.[29] In sum, over the last fifty years the percentage of working women in the population has approximately doubled, and the projection is that this trend will accelerate.

The "Motherhood Draft" Has Ended

What accounts for this upsurge in women working outside the home? Well over a year before the January, 1973, headline Supreme Court abortion decisions,[30] the then president of the Association of American Law Schools, Prof. Alfred Conard, pointed to a critical factor. In a speech urging law schools to welcome women as enthusiastically as they welcome men, he put it this way — the women's draft had ended:

> Underlying the desire of women to perform legal services, and the demand for legal services performed by women lies a revolutionary change in the lives of women — the repeal of the women's draft. We have all seen the destructive effects of the men's draft — which hung over their heads like the sword of Damocles for eight years, sapping their attention and determination … We ought to realize that for the past two million years women have been subjected to a 25-year draft lottery — the motherhood draft. If they did not choose to be nuns — in or out of habit — they had very little control over the duration and frequency of their years of motherhood.
>
> This aspect of women's lives has changed dramatically …
>
> As a result of women's emancipation, we are going to have women play more important roles in the public and commercial life of our country and of the world.[31]

Contrast these remarks of Professor Conard with the yearning for the good old days evident in the recent comment of a New York member of Rotary. When representatives of the National Organization for Women spoke at his club early in 1973, he told them: "I'm a firm believer in nature. If women were intellectually equal to men, wouldn't equality have come about 1000 years ago?"[32]

The answer, of course, is that few women had even an outside chance until the era in which we are living. Historically, women have occupied a place in a world belonging to men. But in the thousand years that concerned the Rotarian, most women worked harder in their role than men or women do in the jobs they hold today. Before the mass production age, women's lives were crowded with economic as well as procreative activity. Women labored to supply the market with food and goods now machine cultivated or manufactured. This activity, coupled with shorter adult life spans and the constant burden of childbearing, explains the historic phenomenon.

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With the disappearance of home centered economic activity, and the possibility now open to women to determine whether and when to bear children, perceptive persons of both sexes recognize that there is no justification for confining women to a role of their own.

Some aspects of the traditional arrangement disfavor men, and some exact a toll from both sexes. Women who have paid serious attention to laws that appear to disfavor men agree with the position stated by Sarah Grimke, noted abolitionist and advocate of equal rights for men and women. She said in 1837: "I ask no favors for my sex. All I ask of our brethren is that they take their feet off our necks."[33] Favors rarely come without an accompanying detriment. Too often men of the law fail to grasp this basic point.

Do Women Have the Best of Both Worlds?

In an informal discussion with Harvard students in March, 1973, Justice Stewart wondered why there was so much pressure for the equal rights amendment.[34] He expressed the view that under the Fourteenth Amendment "the female of the species has the best of both worlds. She can attack laws that unreasonably discriminate against her while preserving those that favor her." How does that "best of both worlds" notion work out in practice?

Consider this illustration. In New York and many other states, women may claim automatic exemption from jury service — "the best of both worlds": a right to serve, but no obligation to do so. The result in New York state courts is that less than 20 per cent of the jury pool has been female. In 1970 a female plaintiff in a civil case challenged the exemption as unconstitutional.[35] The state supreme court judge said in his published opinion: Don't complain to me. Your lament should be addressed to the state of womanhood that "prefers cleaning and cooking, rearing of children and television soap operas, bridge and canasta, the beauty parlor and shopping to [civic responsibility]."

Not a very flattering image of the person alleged to enjoy the "best of both worlds"! Apparently, the judge did not consider whether a man, given the opportunity to avoid jury service for the asking, might prefer poker or golf or a day at the races to his civic responsibility. The point should be clear: If women wish to be classed as fully competent adults, they must share responsibilities as well as rights.

One more illustration — an instance of double-edged discrimination of a kind computer printouts of statutes tell us is pervasive. During a marriage that ended tragically after three years, the wife, a

The state supreme court judge said in his published opinion: Don't complain to me. Your lament should be addressed to the state of womanhood that "prefers cleaning and cooking, rearing of children and television soap operas, bridge and canasta, the beauty parlor and shopping to [civic responsibility]."

schoolteacher, was the principal breadwinner (a position she shared in 1970 with 3.2 million married women living with their husbands, or 7.4 per cent of American families). Her annual income was $10,000; her husband's $3,000. Last summer the wife died in childbirth. The young widower, struggling to care for his infant, maintain his home, and secure more remunerative employment, applied to Social Security for the survivor's benefits he thought were due to him under his wife's account. Those benefits, he was informed, are owed only to a widow.[36] A law that favors women? Who suffered discrimination in this situation — the widowed man, who did not receive the assistance identically situated widowed women receive, or the female wage earner, who paid in as much as her male counterparts but obtained less protection for her family?

Legislation for All Workers Should Be Enacted

A number of "horribles" have been raised in opposition to the amendment. Four of them dominate the literature of amendment opponents.

First horrible. Women will lose the benefit of protective labor laws. Today, challenges to these laws rarely emanate from male employers who wish to overwork women. Since the passage of Title VII, they have come overwhelmingly from blue-collar working women to overcome what they regard as a system that protects them against higher paying jobs and promotions. In the vast majority of Title VII employment discrimination cases, courts have understood these challenges.[37] Legislatures are beginning to abandon disingenuous protection for women and to extend genuine protection to all workers. Models are ample. In Norway, for example, where opposition to "special protection for women only" came predominantly from women's organizations, a 1956 workers' protective act assures safe and healthy conditions for employees of both sexes. Moreover, extension rather than invalidation of laws that benefit only one sex is a route recently traveled by the Supreme Court. In *Frontiero v. Richardson*, fringe benefits for married male members of the military were extended to married female members. The National Women's Party put it this way decades ago in 1926: protective legislation that is desirable

> should be enacted for all workers … Legislation that includes women but exempts men … limits the woman worker's scope of activity … by barring her from economic opportunity. Moreover, restrictive conditions [for women but not for men] fortifies the harmful assumption that labor for pay is primarily the prerogative of the male.[38]

Second horrible. Wives will lose the right to support. Only if our legislatures or courts act capriciously, spitefully, without regard for public welfare, and in flagrant disregard of the intent of the amendment's proponents.[39] In a growing number of states the equal rights amendment will occasion no change whatever in current support law. In these states, and under the amendment in all states, either husband or wife can be awarded support depending on the couple's circumstances. Who pays in any particular family will depend upon the division of responsibilities within that family unit. If one spouse is the breadwinner and the other performs uncompensated services at home, the breadwinning spouse will be required to support the spouse who works at home.

Amendment Enhances the Housewife's Role

Underlying the amendment is the premise that a person who works at home should do so because she, or he, wants to, not because of an unarticulated belief that there is no choice. The essential point, sadly ignored by the amendment's detractors, is this: the equal rights amendment does not force anyone happy as a housewife to relinquish that role. On the contrary, it enhances that role by making it plain that it was chosen, not thrust on her without regard to her preference.

Third horrible. Women will be forced to serve in the military. Only if men are, and assignments would be made on the basis of individual capacity rather than sex. With the draft terminated, it is high time for consideration of the other side of that coin. Women who wish to enlist must meet considerably higher standards than men; women in the service are denied fringe benefits granted men and do not receive equal vocational training opportunities. The reason for higher standards for women was

The equal rights amendment, in sum, would dedicate the nation to a new view of the rights and responsibilities of men and women. It firmly rejects sharp legislative lines between the sexes as constitutionally tolerable. Instead, it looks toward a legal system in which each person will be judged on the basis of individual merit and not on the basis of an unalterable trait of birth that bears no necessary relationship to need or ability.

given by an Air Force colonel in a deposition taken in December, 1972.[40] He explained: "We have had and we continue to have roughly twice as many women apply[ing]as we are able to … take. … We don't have an excess of men over what we can take."

Young women's groups uniformly testified during congressional hearings on the amendment that they did not wish exemption from responsibility for service. Conspicuous among these groups was the 200,000 member Intercollegiate Association of Women Students, a group appropriately characterized as "middle American."[41]

In 1948, long before women and the military became an emotion-charged issue in connection with the equal rights amendment, Gen. Dwight D. Eisenhower observed:

> Like most old soldiers I was violently against women soldiers. I thought a tremendous number of difficulties would occur, not only of an administrative nature … but others of a more personal type that would get us into trouble. None of that occurred … In the disciplinary field, they were … a model for the Army. More than this their influence throughout the whole command was good. I am convinced that in another war they have got to be drafted just like the men.[42]

Final horrible. Rest rooms in public places could not be sex separated. Emphatically not so, according to the amendment's proponents in Congress,[43] who were amused at the focus on the "potty problem." Apart from referring to the constitutional regard for personal privacy, they expressed curiosity about the quarter from which objection to current arrangements would come. Did the people who voiced concern suppose that men would want to use

women's rest rooms or that women would want to use men's? In any event, the clever solution devised by the airlines suggests one way out of the problem.

Thirty States Have Ratified the Amendment

Some persons have expressed fear of a "flood of litigation" in the wake of the equal rights amendment. But the dramatic increase in sex discrimination litigation under the Fifth and Fourteenth Amendments in the 1970s is indicative that, if anything, ratification of the amendment will stem the tide. The amendment will impel the comprehensive legislative revision that neither Congress nor the states have undertaken to date. The absence of long overdue statutory revision is generating cases by the hundreds across the country.[44] Legislatures remain quiescent despite the mounting judicial challenges, challenges given further impetus by the Supreme Court's decision in *Frontiero v. Richardson*. Ratification of the amendment, however, would plainly mark as irresponsible any legislature that did not undertake the necessary repairs during the two-year period between ratification and effective date.

To date, three fifths of the states have ratified the amendment; these thirty states represent a clear majority of the country's population.

One state, Nebraska, has attempted to withdraw its ratification. But New Jersey and Ohio took the same action with respect to the Fourteenth Amendment, and New York ratified and then withdrew its ratification of the Fifteenth Amendment. Congress at that time evidently concluded that ratification, once accomplished, could not be undone. New Jersey and Ohio were counted to constitute the requisite three fourths for promulgation of the Fourteenth Amendment. New York was counted among the states that ratified the Fifteenth Amendment.[45]

The equal rights amendment, in sum, would dedicate the nation to a new view of the rights and responsibilities of men and women. It firmly rejects sharp legislative lines between the sexes as constitutionally tolerable. Instead, it looks toward a legal system in which each person will be judged on the basis of individual merit and not on the basis of an unalterable trait of birth that bears no necessary relationship to need or ability. As the Federal Legislation Committee of the Association of the Bar of the City of New York explained:

> [T]he Amendment would eliminate patent discrimination, including all laws which prohibit or discourage women from making full use of their political and economic capabilities on the strength of notions about the proper "role" for women in society. Any special exemptions or other favorable treatment required by some women because of their physical stature or family roles could be preserved by statutes which utilize those factors — rather than sex — as the basis for distinction.[46]

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* When this article was first published in 1974, Ruth Bader Ginsburg was the first tenured woman law professor at Columbia University, coordinator of the American Civil Liberties Union's Women's Rights Project, and a member of the editorial board of the American Bar Association Journal. Before her death in 2020, she was an Associate Justice of the Supreme Court of the United States."

Endnotes

1. Gruberg, Women in American Politics 4 (1968).
2. See Flexner, Century of Struggle 142-55 (1959).
3. Hearings on H.R.J. Res. 75 before the House Comm. on the Judiciary, 68th Cong., 2d Sess. at 2 (1925).
4. Compare Lukens, Shall Women Throw Away Their Privileges?, 11 A.B.A.J. 645 (1925), with Matthews, Women Should Have Equal Rights with Men: A Reply, 12 A.B.A.J. 117 (1926).
5. See Freund, The Equal Rights Amendment Is Not the Way, 6 Harv. Civ. Rights Civ. Lib. L. Rev. 234 (1971).
6. See Tobias & Anderson, Whatever Happened to Rosie the Riveter: Demobilization and the Female Labor Force, 1945-47, a paper delivered to the Berkshire Conference of Women Historians, New Brunswick, New Jersey, March 2, 1973.
7. See Berger, Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women, 5 Val. L. Rev. 326, 331 (1971). On implementation of the act in the 1960s, see Murphy, Female Wage Discrimination, A Study of the Equal Pay Act 1963-70, 39 U. Cin. L. Rev. 615 (1970).
8. See Developments in the Law — Employment Discrimination and Title VII, 84 Harv. L. Rev. 1109, 1166-95 (1971).
9. Brief for Appellees, at 20 n. 17, Frontiero v. Richardson, 411 U.S. 677 (1973).

10. E.g., Wisconsin Legislative Council, Report on Equal Rights to the 1973 Legislature (February 1973); Taylor & Herzog, Impact Study of the Equal Rights Amendment — Subject: The Arizona Constitution and Statutes (1973); Symposium: The New Mexico Equal Rights Amendment — Assessing Its Impact, 3 N. Mex. L. Rev. 1 (1973).
11. University of North Carolina, Profile of the Freshman Class (1969).
12. New York Times, February 4, 1973.
13. See the references in note 1 0, supra. Comprehensive analysis of the purpose and probable impact of the amendment appears in Brown, Emerson, Falk, & Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L.J. 872 (1971).
14. Ariz. Const. art. 5, 1 and 2. But see Ariz. Const. art. 7, 2.
15. Ohio Rev. Code 1913.36 (cause may be submitted to the arbitration of three disinterested men).
16. Wisconsin Legislative Council, Summary of Proceedings, Special Committee on Equal Rights, September 28, 1972, at 4; Wis. Atty. Gen. Opinion, 25 A.G. 75 at 78, interpreting Wis. Stat. 158.01.14 (f).
17. Ga. Code Ann. 53-501.
18. Ga. Code Ann. 105-707.
19. Emerson, In Support of the Equal Rights Amendment, 6 Harv. Civ. Rights — Civ. Lib. L. Rev. 225, 232-33 (1971).
20. Minor v. Hapersett, 21 Wall. 162 (1874).
21. Hoyt v. Florida, 368 U.S. 57 (1961).
22. Alexander v. Louisiana, 405 U.S. 625 (1971).
23. Bradwell v. Illinois, 16 Wall. 130 (1873); Goesaert v. Cleary, 335 U.S. 464 (1948).
24. Epstein, Women and Professional Careers: The Case of the Woman Lawyer 140 (1968) (thesis on file at the Faculty of Political Science, Columbia University) (reporting interview with Frances Marlatt, Mount Vernon, New York, lawyer).
25. Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N. Y.U. L. Rev. 675 (1971).
26. Automatic qualification of wives as dependent, whether or not they are in fact, but requirement of proof of actual dependency of husbands is the prevailing pattern in federal and state employment benefits and social insurance legislation. For examples on the federal level, see Bixby, Women and Social Security in the United States, D.H.E.W. Pub. No. (SSA) 73-11700 (1972); Petition for Certiorari, Commissioner v. Moritz, No. 72-1298, Appendix E, (U.S. S. Ct. Filed March 22, 1973).
27. For earlier recognition that sex is appropriately ranked as a "suspect" criterion, see Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P. 2d 529 (1971); Note, 66 Nw. U.L. Rev. 481 (1971); Note, 84 Harv. L. Rev. 1499 (1971); Note, 86 Harv. L. Rev. 568, 583-88 (1973), Cf. Gunther, Foreward: In Search of Evolving Doctrine on a Changing Court: A Mode for a Newer Equal Protection, 86 Harv. L. Rev. 1, 34 (1972).
28. Cf. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
29. Statistics from U.S. Dept. of Labor, Bureau of Labor Statistics, U.S. Dept. of Commerce, Bureau of the Census, and U.S. Dept. of Health, Education, and Welfare (Office of Education).
30. Roe v. Wade, 410 U.S. 113; Doe v. Bolton, 410 U.S. 179.
31. Extract reported in 16 Law Quadrangle Notes 11 (1971).
32. New York Times, January 19, 1973, at 37, col. 7.
33. Grimke, Letters on the Equality of the Sexes and the Condition of Women; Addressed to Mary Parker, President of the Boston Female Anti-Slavery Society 10 (1838).
34. Harv. L. School Rec., March 23, 1973, at 15.
35. DeKosenko v. Brandt, 63 Misc. 2d 895,313 N.Y.S. 2d 827 (Sup. Ct. N.Y. Co. 1970).
36. Wiesenfeld v. Secretary of Health, Education, and Welfare, Civil Action No. 268-73 (D.N.J.); see Bixby, supra note 26, at 11.
37. E.g., Rosenfeld v. Southern Pacific Company, 444 F. 2d 1219 (9th Cir. 1971).
38. Matthews, supra note 4, at 117.
39. S. Comm. on the Judiciary, Equal Rights for Men and Women, S. Rep. No. 92-689, 92d Cong. 2d Sess. 17-18 (1972); see Citizens' Advisory Council on the Status of Women, Women in 1972, at 4-5 (1973).
40. Deposition Transcript at 37, 44, 45, Callahan v. Laird, Civil Action 51-500-M (D. Mass.).
41. See Remarks of Jacqueline G. Gutwillig (Lt. Col. U.S.A. Ret.) in Women in 1972, at 44, 46 (1973).
42. Hearings on S. 1614 before the Subcomm. on Organization and Mobilization of the House Comm. on Armed Services, 80th Cong., 2d Sess., No. 238, at 5563-64 (1948).
43. See S. Rep. No. 92-689, supra note 39, at 12; Brown, Emerson, Falk & Freedman, supra note 13, at 900-902.
44. See, e.g., Women's Rights Project Legal Docket issued periodically by the American Civil Liberties Union.
45. See Letter Opinion of J. William Heckman, Counsel, Subcomm. on Constitutional Amendments, S. Comm. on the Judiciary, to State Senator Shirley Marsh, Neb. State Senate, February 20, 1973.
46. The Equal Rights Amendment — As of 1972, in 11 Reports of Committees of the Association of the Bar of the City of New York Concerned with Federal Legislation, Bull. 2, at 38, 41 (1972).

The 100-Year

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Fight for Equal Rights

By Isabell Retamoza

"American women have no civil rights under the Federal and State laws, other than the right to vote, so when the word 'person' is used in connection with the rights, privileges, and immunities women are not included in its meaning."

—Women Lawyers Journal, *1958*

Last December, NAWL hosted a webinar, "The Equal Rights Amendment: Legal Issues and Implications," that argued for and discussed a potential constitutional amendment that has long been fought for to safeguard against injustice, violence, and discrimination on the basis of sex. Led by two inspiring and brilliant attorneys—Jessica Neuwirth, the co-founder and co-President of the ERA Coalition, and Linda Coberly, the Chicago Managing Partner for Winston & Strawn and the Chair of the Legal Task Force for the ERA Coalition—the webinar discussed at length a piece of potential legislation that most Americans think has already been established: the Equal Rights Amendment, which states that "Equality of rights under the law shall not be defined or abridged by the United States or by any state on the basis of sex."

This ostensibly simple and heavily contested plea is the cause for over a century of women devoting their lives and careers for equality for all under the law.

History of the Equal Rights Amendment

From the country's inception, all women in the United States have suffered the consequences of being omitted from the Constitution. However, from the very beginning, women have organized and fought

for equality under the law. One of these women was Alice Paul, who led a coalition of women to fight for the 19th Amendment; following its ratification in 1920, as the next logical step she proposed the Equal Rights Amendment at the 1923 National Woman's Party Conference in Seneca Falls, NY. The Equal Rights Amendment was introduced into Congress every following year, and support slowly grew. Finally, in 1972, almost 50 years later, Congress passed the amendment with a seven-year deadline for ratification.

"Equality of rights under the law shall not be defined or abridged by the United States or by any state on the basis of sex."

Twenty-two states rushed to ratify the ERA within the first year, and by 1977, the amendment needed to be ratified by only three more states. There seemed to be very little opposition to the ERA until Phyllis Schlafly's STOP ERA campaign. STOP stood for "Stop Taking Our Privileges," and Schlafly argued that the ERA would eliminate certain privileges for women, including laws against same sex marriage, gender separated restrooms, "dependent wife" Social Security benefits, and exclusion from the draft. The campaign was effective: Jessica Neuwirth said that "although it is widely contested that Phyllis Schlafly represented anything close to a majority, that dissident voice stopped the ERA ratification process in its tracks." However, thousands of women marched in Washington, DC, in 1978 to protest the 1979 deadline, and New York Congresswoman Liz Holtzman led a successful effort to extend the deadline to 1982. Efforts continued to ratify the ERA in the remaining states until the very last moment, but the ERA failed to meet the 1982 deadline, leaving the U.S. Constitution unamended. According to Jessica Neuwirth, "many women's rights activists say that it was just a handful of votes in a few states that kept the ERA from meeting the 1982 deadline."

The Equal Rights Amendment has been reintroduced in Congress every year since 1982. Alongside congressional efforts, national grassroots efforts to ratify the ERA in more states, spearheaded by organizations like the ERA Coalition, have led to the ratification of the ERA in Nevada in 2017 and Illinois in 2018. And finally, on January 15, 2020, the year of the centennial of the 19th Amendment, Virginia became the 38th state to ratify the ERA.

Obstacles Ahead for the Equal Rights Amendment

Despite the excitement and revived energy for the ERA, there are several questions and barriers following Virginia's success in ratifying the ERA.

The first obstacle is the deadline. The ERA failed to be ratified by three-fourths of the states before the 1982 deadline, and some argue that this failure invalidates the later ratifications. However, Article V of the Constitution, which states that a constitutional amendment will go into effect when three-fourths of the states ratify the amendment, does not mention deadlines or time limits. With Article V in mind, there is currently a bill in Congress to remove the deadline for the ratification of the ERA: "the article of amendment proposed to the States in that joint resolution shall be valid … whenever ratified by the legislatures of three-fourths of the several States" (H.J. Res. 79, 116th Cong., 2d sess.).

The second obstacle is past state rescissions. Another question is whether Virginia's ratification counts as the 38th when some states that had previously ratified the ERA have rescinded their

Alice Paul, c. September 3, 1920. Credit: Chronicle/Alamy Stock Photo


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Six suffragists at the 1920 Republican National Convention in Chicago, gathered in front of a building with suffrage banners. Mrs. James Rector, Mary Dubrow, and Alice Paul (left to right) hold center banner that reads: 'No self respecting woman should wish or work for the success of a party that ignores her self. Susan B. Anthony, 1872.' Credit: Photo 12/Alamy Stock Photo

ratification. However, there are strong legal arguments and historical precedent that discredit state rescissions. The main legal argument relies on the fact that Article V simply requires 38 states to ratify an amendment—which has happened in the case of the ERA—and does not mention rescission. The historical precedent comes from the 14th Amendment. When the 14th Amendment became a part of our Constitution, two of the states that were needed to reach the three-fourths threshold had attempted to rescind a prior ratification of the 14th Amendment, and yet all three branches of government treated the 14th Amendment as fully ratified and part of our Constitution.

Why Do We *Still* Need the Equal Rights Amendment?

The ERA Coalition conducted a poll in 2015 and found that 80% of Americans believe that men and woman are already guaranteed equal rights in the U.S. Constitution. Some argue that the 14th Amendment accomplished this goal. However, the 14th Amendment was adopted in 1868 to legislate against racial discrimination while women still

Activist Phyllis Schafly wearing a "Stop ERA" badge, demonstrating with other women against the Equal Rights Amendment in front of the White House, Washington, D.C., on February 4, 1977. Credit: Warren K. Leffler/Library of Congress

did not have the right to vote—a right that was not gained until more than 50 years later with the passage of another constitutional amendment. The 14th Amendment's Equal Protection Clause has been applied to women, but with some limitations. Justice Scalia argued this point: "Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It *doesn't*."

Current state and federal laws that seem to secure women's equality are not applied uniformly or consistently and thus are subject to discriminatory interpretation and ruling. Without the ERA, existing state and federal laws may be interpreted in ways that limit a women's ability to pursue justice under the law. In other words, women are not the "persons" for whom the U.S. Constitution ensures equality under the law. The ERA would guarantee equal rights to all citizens, regardless of the state legislature, Congress, or who is sitting in the White House, and protect against discrimination and injustice on the basis of sex.

"I would like my granddaughters, when they pick up the Constitution, to see that notion—that women and men are persons of equal stature—I'd like them to see that is a basic principle of our society."

Concluding Thoughts

In ratifying the ERA into the U.S. Constitution, we are would recognize over 200 years of gender discrimination and injustice under the law and fulfill the pleas and dreams of so many women who devoted their lives to fight for full equality under the law.

The ratification of the ERA would fix the Constitution, publicly affirming that at the highest level of the law it is no longer tolerated to treat women as second class citizens. Thus, ratification aims to rectify the institutional legacy of injustice and discrimination against women and all feminine identifying persons and to start a new era of true equality and justice for all persons under the law—an era that would be a culmination of every women's rights movement since the dawn of the United States.

Since 1911, this journal has served as a public forum and historical record for women's fight for equality under the law. The *Women Lawyers Journal* is also a testament to how far women have come despite a lack of full equality. NAWL was founded in a time when women were lawyers before they had the right to vote. And now, over 100 years later, NAWL has witnessed the Equal Rights Amendment ratified by its 38th state. NAWL was there when the original draft of the Equal Rights Amendment was first introduced by Alice Paul at the National Woman's Party Conference in Seneca Falls, NY—and we at NAWL are certain we will witness it finally ratified into the U.S. Constitution.

The Honorable Ruth Bader Ginsburg spoke at the National Press Club in 2014 on the future of the Equal Rights Amendment and women's equality: "I would like my granddaughters, when they pick up the Constitution, to see that notion—that women and men are persons of equal stature—I'd like them to see that is a basic principle of our society."

Resolution in Support of Ratification of the Equal Rights Amendment to the United States Constitution

WHEREAS, the United States Constitution does not explicitly guarantee equal rights and equal protection for the sexes; and

WHEREAS, the 14th Amendment to the United States Constitution and state constitutional statements of equality generally do not provide the strict scrutiny for sex-based classifications that is provided for classifications based on race, religion, and national origin; and

WHEREAS, state laws are not uniform and federal laws are not comprehensive, and these laws can be repealed or reduced; and

WHEREAS, the people of the United States continue to experience the negative effects of the lack of political parity between men and women, including unequal opportunity and pay, health care inequities, and disparate rates of poverty, rape, and domestic violence assaults; and

WHEREAS, the Equal Rights Amendment (ERA) provides that "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex"; and

WHEREAS, the ERA would help ensure that all people of the United States have the same constitutional protections regardless of sex and gender status; and

WHEREAS, the ERA was proposed in 1923 and passed by Congress in 1972, and now has met the constitutional requirement for ratification by 38 states with approval of Nevada (2017), Illinois (2018), and Virginia (2020), and five state rescissions that, by precedent, have never before been recognized as valid; and

Credit: United States National Archives and Records Administration

WHEREAS, the National Association of Women Lawyers (NAWL) has long supported the ratification of the ERA as one of the first national organizations to endorse the ERA; NAWL was present for the first reading and presentation of the ERA at the National Women's Conference in 1923 and subsequently printed the Amendment in its entirety in the *Women Lawyers Journal* that same year; when Congress finally passed the amendment in 1972, the campaign for ratification by the states became NAWL's major project for the following decade, spearheaded by Marguerite Rawalt who wrote in the *Women Lawyers Journal* in 1971, "Equal justice does not exist for women under the Constitution as interpreted to date. They are the one remaining 'class' and category not yet adjudged to come under the legal umbrella of the Constitution"; and

WHEREAS, the ERA is awaiting certification by the Archivist of the United States and publication as part of the United States Constitution;

NOW, THEREFORE, BE IT RESOLVED, that the National Association of Women Lawyers remains steadfast and committed to its support of certification and publication of the Equal Rights Amendment as part of the United States Constitution; and

BE IT FURTHER RESOLVED, that the National Association of Women Lawyers is proud to be an organizational partner of the ERA Coalition and to advocate and support the strategies and initiatives of the ERA Coalition, and urges our members, our leaders, and our communities to do the same; and

BE IT FURTHER RESOLVED, that the National Association of Women Lawyers supports the removal of the time limit on the states for ratification and certification and publication of the ERA by the Archivist of the United States as part of the United States Constitution; and

BE IT FINALLY RESOLVED, that we commit ourselves to advocate at the federal and state levels to ensure that the ERA is added to the United States Constitution to guarantee equal rights under the law to all citizens regardless of sex and gender status.

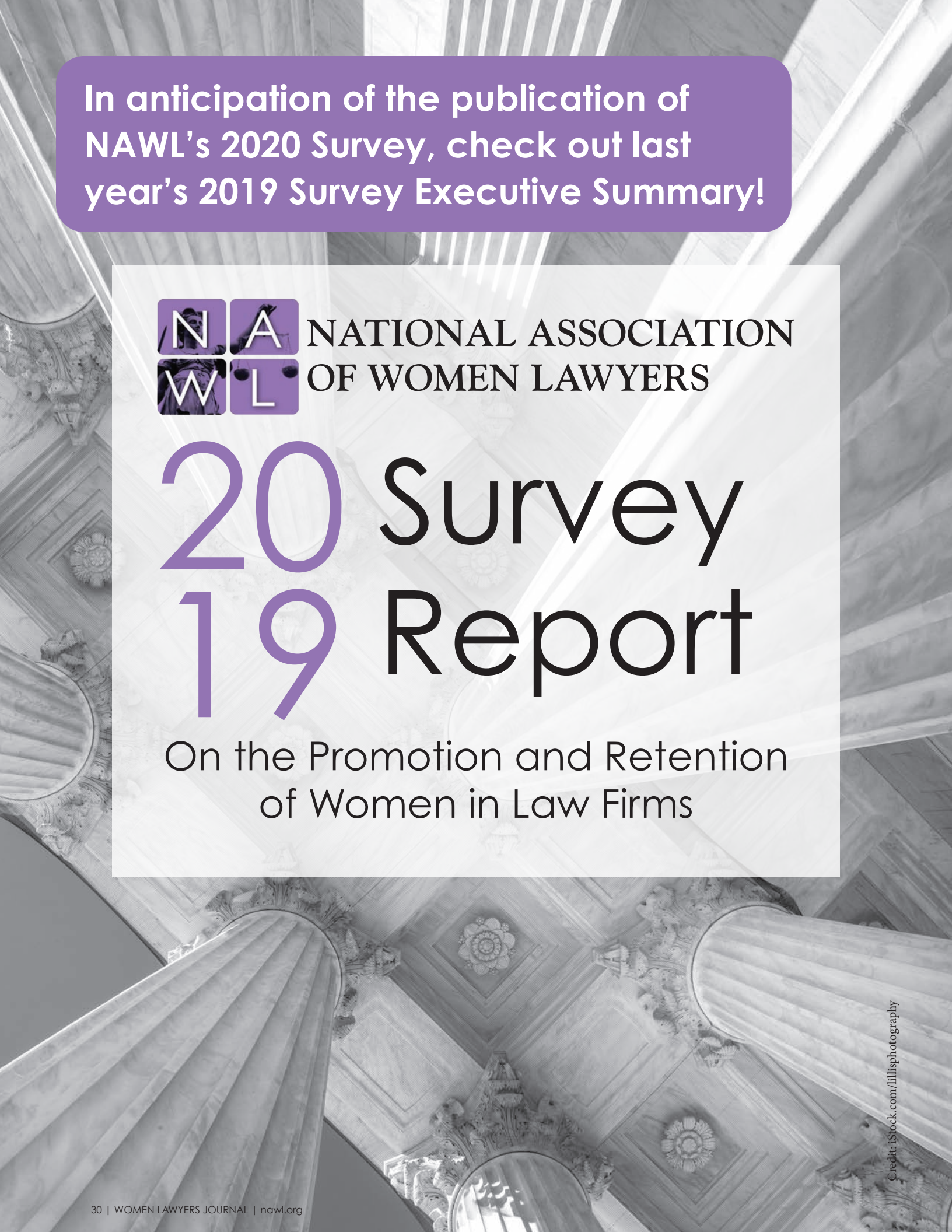
Signed this 6th day of March 2020.

In anticipation of the publication of NAWL's 2020 Survey, check out last year's 2019 Survey Executive Summary!

NATIONAL ASSOCIATION OF WOMEN LAWYERS

2019 Survey Report

On the Promotion and Retention of Women in Law Firms



Credit: iStock.com/lillisphotography

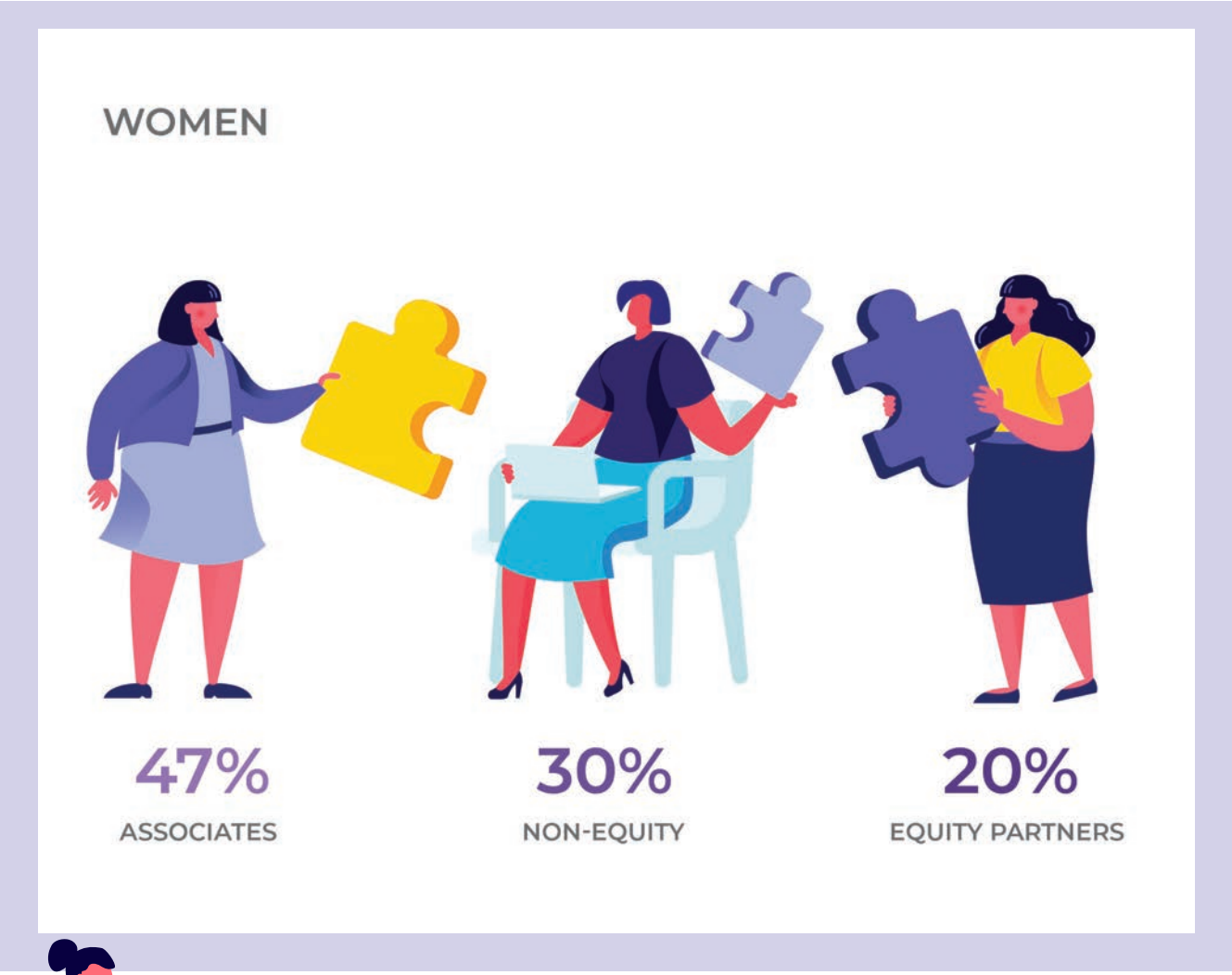
Report:

This report reflects the 12th year of data collection by the annual NAWL Survey on the Retention and Promotion of Women in Law Firms. The NAWL Survey provides objective statistics regarding the position and advancement of women lawyers in law firms, and it remains the only national survey that collects this industry benchmarking data in such detail. In addition to the key data points regarding representation of women among law firm partners, non-equity and equity, and hours and compensation data for men and women in various positions in the law firm, this year's survey further examines the mechanisms that may explain the disparities between men and women, such as policies and practices that hinder women's progress. Overall, the results suggest that firms need to be more active about disrupting subtle biases if they hope to significantly change these numbers.

NAWL surveys the AmLaw 200 every year and in the last three years has collected data from 66% of firms in that group, with nearly 50% of the group participating in any given year. While over the last 10 years, the representation of women has changed, for example, from about 16% women equity partners in 2007 to 19% in 2017, the numbers in the last three years reflect small changes despite NAWL's One-Third by 2020 Challenge and strong movement in the industry to address gender inequities. Women continue to be underrepresented among equity partners and firm governance in particular, and while women work as much as men, their client billings and compensation continue to lag behind those of similarly situated men. But there are signs of positive change, with firms adopting more women and family-friendly policies, investing more in training and support for women and diverse attorneys, and some recent activity, such as the make-up of new classes of equity partners, showing increasing representation of women.

Key Findings:

Men and women start off relatively equal as associates but diverge at non-equity and equity partner.

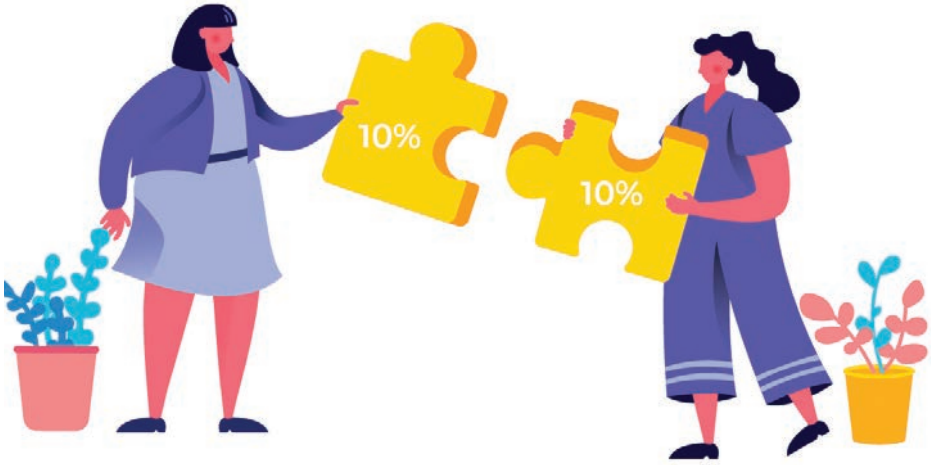


Compensation, billing rates, and billable and total hours worked are comparable for men and women associates, but this changes at non-equity and equity partner.

The representation of women as equity partners seems to have plateaued overall, but new equity partner classes and recent successions show promise.

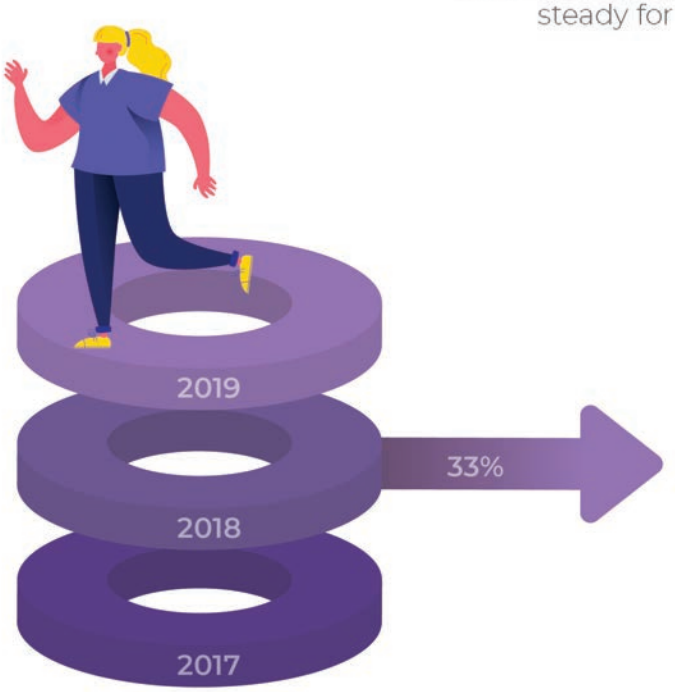
WOMEN REMAIN ABOUT

20% OF ALL EQUITY PARTNERS



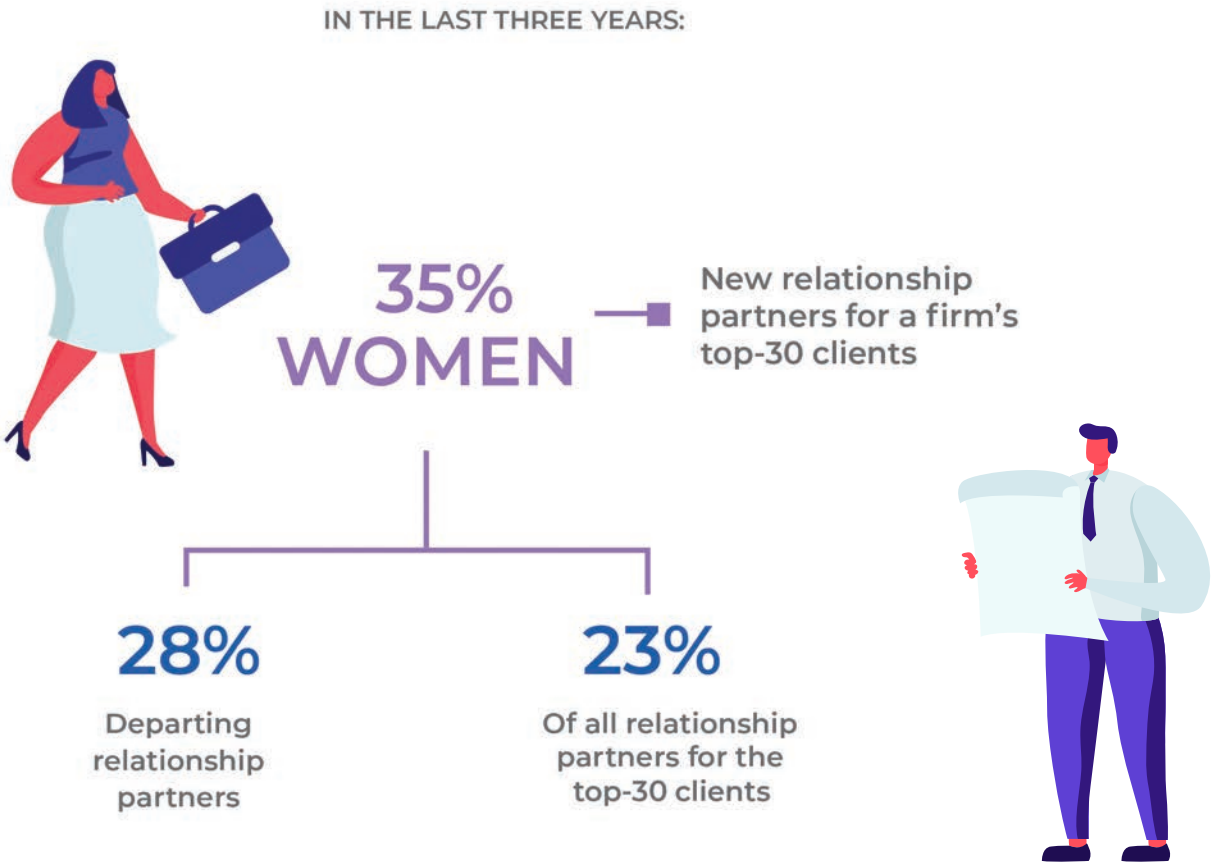
WOMEN

Women remain about 20% of all equity partners, with this representation holding steady for the last three years.



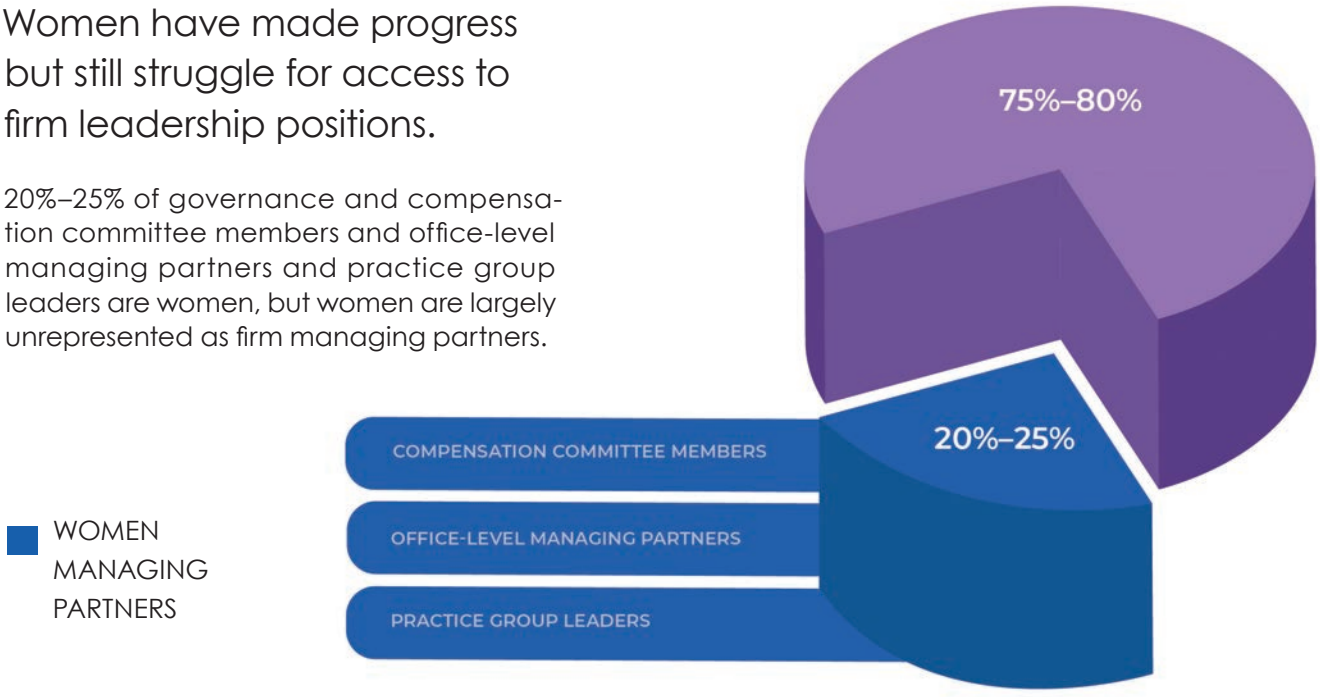
In line with NAWL's One-Third by 2020 Challenge, ***new equity partner classes*** have been about 33% women for the last three years.

In the last three years, 35% of new relationship partners for a firm's top-30 clients were women compared with 28% of the departing relationship partners and 23% of all relationship partners for the top-30 clients.

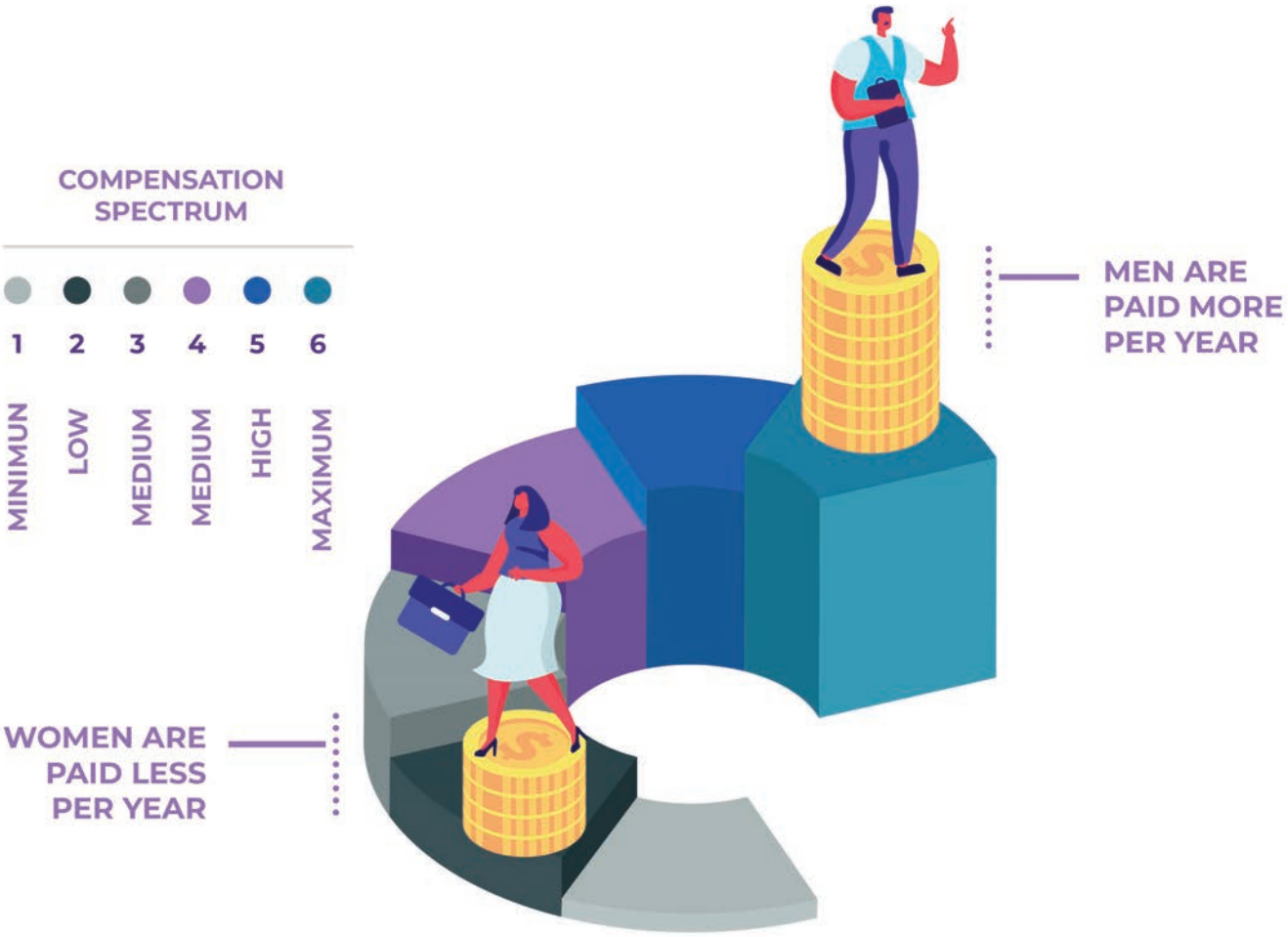


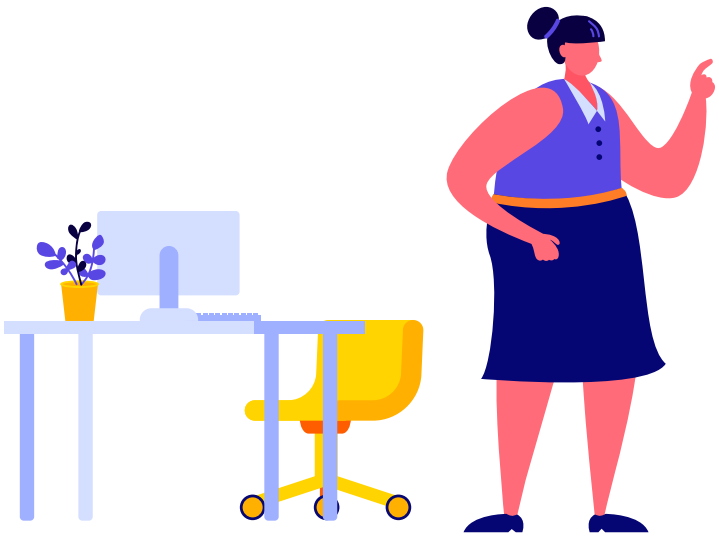
Women have made progress but still struggle for access to firm leadership positions.

20%–25% of governance and compensation committee members and office-level managing partners and practice group leaders are women, but women are largely unrepresented as firm managing partners.



Compensation is differently distributed for men and women, with men more likely to be represented at the higher end of the compensation spectrum.





Men are paid more per year than women, and this pattern existed without significant variance across the AmLaw 200 for all attorney types and levels.

Women work the same hours as men, but their billing rates and client billings fall short of men's.

93%

Firms reported that their most highly compensated attorney is a man.

A

0 WOMEN

Of the top 10 revenue-generating attorneys, most firms have zero women in that group.

B

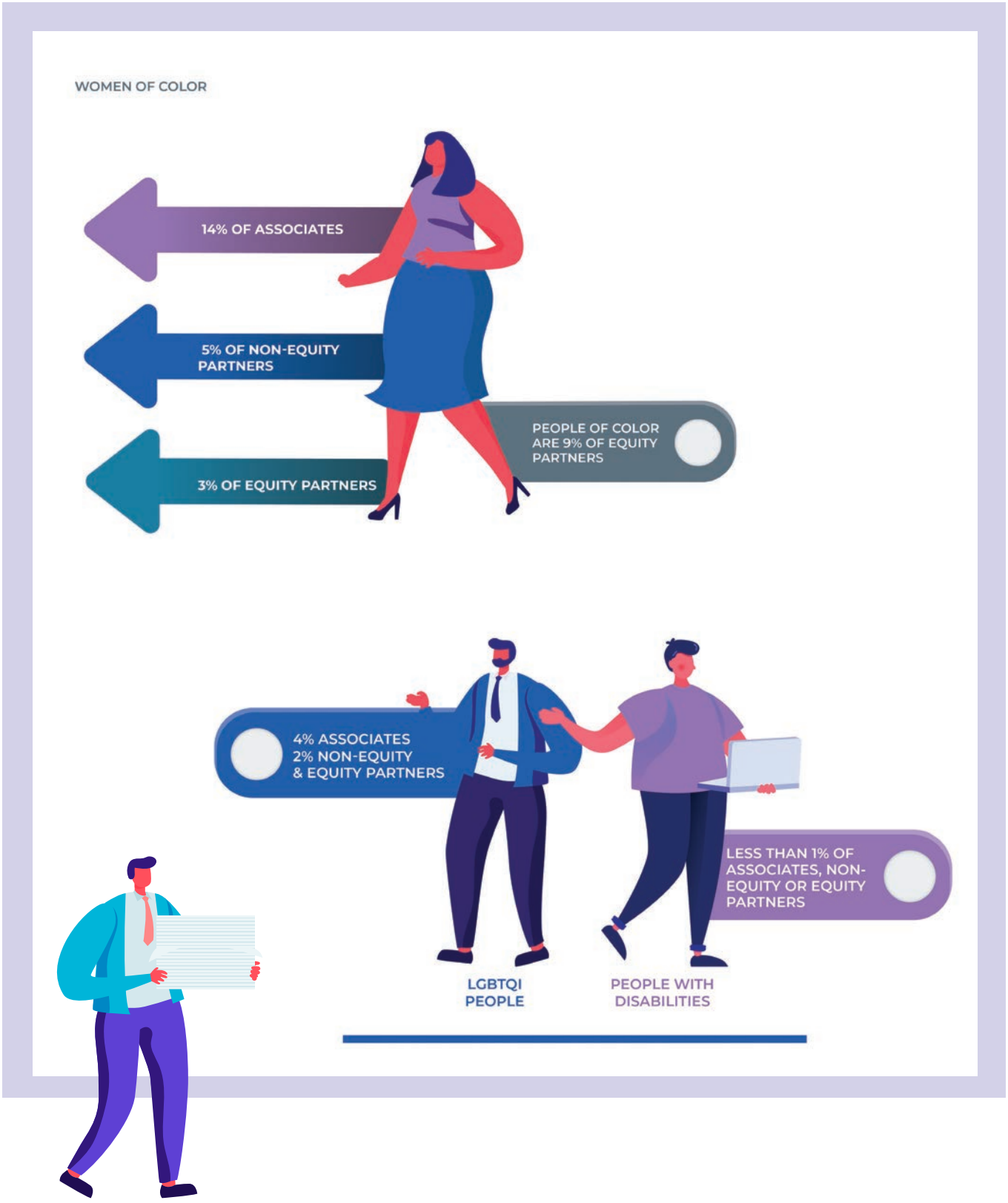
Top 10 attorneys

Of the top 10 most highly compensated attorneys, most firms have zero women in that group.

C

Women work the same hours as men, but their billing rates and client billings fall short of men's.

The representation of diverse attorneys continues to lag behind that of women overall.



Firm Efforts to Reduce Bias

Firms are more likely to engage in (and report on) bias reduction efforts at the earliest stages of an attorney's relationship with the firm (i.e., recruitment, with associates), when the disparities between men and women are relatively small, but less likely to engage in similar efforts across the career lifespan when men's and women's trajectories diverge.

Firms may need to rethink their women's and diversity initiatives to better understand what purposes they are serving and to more effectively utilize them in service of supporting and advancing women and diverse attorneys.

Conclusion

The progress women have made in law firms over the last decade has been slow and incremental at best, and law firms continue to face challenges supporting and promoting women and diverse attorneys. Despite universal adoption of women's initiatives, a ramping up of diversity initiatives, and increased awareness of the challenges women face in the law firm, there have been only small increases in overall representation of women and diverse attorneys, particularly at the more senior, higher-status positions in the law firm. As firms confront this reality, more interrogation of the processes and decision points that affect women's advancement is needed in order to identify where and why women's progress stalls during their careers. In addition, firms need to move away from current practices toward best practices in bias reduction in order to fully address the challenges women continue to face.

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Member Spotlight

Elizabeth Manno

Elizabeth Manno from Denver, Colorado, is Partner at the firm Perkins Coie, where her practice focuses on patent infringement and other intellectual property litigation, including trademark litigation. Manno has taken several leadership roles within NAWL, including the Chair of the Planning Committee for our Denver Conference in 2019 and the Chair of the Survey Committee. For her dedicated service and leadership in NAWL, in 2019, Manno received the Virginia S. Mueller Outstanding Member Award. So, because of her success in her career and leadership within NAWL, we wanted to reach out to Elizabeth to hear from her on her thoughts on her practice, leadership positions and career as a whole.

1. Why did you choose to pursue a career in law? What do you like most about your practice in intellectual property litigation?

I've always had a penchant for debate — many of my middle school teachers pointed it out — so I knew I wanted to be a litigator. I started out as a general commercial litigator but was staffed as a junior associate on some patent litigation cases. To my surprise, although I had never considered this practice area in law school and don't have a technical degree, I quickly discovered that I have a knack for breaking down highly complicated technologies in a way that others can understand, which is a critical part of patent cases. I also love the strategy that goes into intellectual property litigation. My clients' patents and trademarks are often some of their most important assets, and it's exciting to help them on some of their highest-value and most important disputes.

2. Why did you decide to join NAWL?

I knew NAWL was the organization for me right away. It's more than just a group of women who understand the eleven pairs of shoes stashed under my desk. NAWL conferences are a perfect mix of analysis of women's issues and substantive legal issues that help me in my practice. I leave every conference feeling energized.

NAWL events are always a supportive and collegial environment where it's easy to meet and connect with other women lawyers. For instance, I met NAWL's current President, Kristin Sostowski, early on in my involvement in the organization, and she immediately welcomed me into NAWL and looked for ways to get me more involved. I found out I had been promoted to Partner while at a NAWL conference, and the outpouring of support I received from the women there — some of whom I had just met — was amazing. I also appreciate how easy it is to get involved with NAWL. Everyone is welcome to join a committee to plan a conference, whether it's your first conference or you are a veteran member.

And why did you decide to take on a leadership position in NAWL?

I decided to take on a leadership position with NAWL because I believe in the mission of the organization of advancing women in the legal profession and advocating for the equality of women under the law. NAWL's history is fascinating: the fact that women in the U.S. became lawyers and formed the organization before they even had the right to vote is truly remarkable. I've gotten so much from the organization already as a member, and I want to give back and help the organization succeed going forward for the next generation.

3. As Chair of the Survey Committee, what impact do you hope the Survey has made and will make on women's advancement in the legal field? Why do you think the Survey is important?

When I joined NAWL and read about the Survey for the first time, I was surprised to discover that the rate of promotion of women in law firms, while it has improved over time, has essentially stagnated in recent years. The Survey has thus evolved to become an important tool not just for monitoring the progress of women in law firms, but also for identifying the best practices that law firms can use that actually yield results in advancing women and diverse attorneys. I'm excited to be involved with the Survey this year and hope that the data can be used not only to track progress but also to spur real change for women and diverse attorneys in law firms.

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