Collective Memory and the Nineteenth Amendment: Reasoning about "the Woman Question" in the Discourse of Sex Discrimination

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> The perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share.
>
> Justice Lewis Powell, *University of California v. Bakke*

> For women . . . new choices are available largely because of technology, for blacks because of the success of the civil rights movement.
>
> Robert Bork, *Slouching towards Gomorrah*

At a recent conference on affirmative action, I was struck by a characteristic, if not defining, feature of American conversations about race. Claims about race discrimination are located in national and constitutional history; they refer, whether explicitly or tacitly, to past wrongful acts of the American polity, particularly the law of slavery and segregation. Of course, claims respecting this history differ significantly: partisans may, for example, disagree about how best to expunge the nation's legacy of racial wrongdoing, or they may dispute the degree to which individual white Americans bear responsibility for it. But parties to disputes about racial equality share in common the understanding

that, in matters of race, the nation has a legacy of wrongdoing that it has constitutionally committed itself to transcend.

By contrast, claims about sex equality lack this historical structure. Legal and popular disputes about sex equality often focus on asserted differences in women's nature or choices. And when claims about sex equality are couched in historical terms, the narrative they invoke differs significantly from the race discrimination narrative. Where claims about race discrimination invoke a lengthy national history of state-sanctioned coercion, claims about sex discrimination often refer to a history of social attitudes that are the product of custom and consensus. The story one might cull from debates over sex discrimination goes something like this. The relations of the sexes are in the process of gradual transformation toward some more enlightened state. We need to abandon "archaic" or "outmoded" stereotypical assumptions about the sexes and recognize deeper similarities between them.

Of course, we could tell a story about women's status that is structurally homologous to the race discrimination narrative. Such a story would emphasize the many legal disabilities that defined women as second-class citizens from the time of the founding until the modern era. And such a story would locate in the campaign for suffrage and the ratification of the Nineteenth Amendment a constitutional commitment to rectify this history of subordination—a commitment, like the constitutional commitments of the Reconstruction Era, initially betrayed, but then, over the last several decades, progressively respected.

To be sure, variants of this story do surface in legal and popular debates over sex equality. But the story tying questions of sex discrimination to national and constitutional history is not the organizing paradigm for debates about sex equality, as it is in matters concerning race equality. In this essay, I want to examine how interpretation of the Constitution both reflects and produces the narrative structures that organize our intuitions about questions of gender justice. Specifically, I will be examining how judicial interpretation of the Nineteenth Amendment and the equal protection clause of the Fourteenth Amendment has isolated questions of women's citizenship from narratives of national and constitutional history.

Today, the Nineteenth Amendment is scarcely ever mentioned in conversations about women's civic status and constitutional rights. There is a "common sense" explanation for this silence. The text of the

Nineteenth Amendment states a nondiscrimination rule governing voting with which we now comply. Because restrictions on the franchise are no longer used to regulate the social status of women as a group, the suffrage amendment is for all practical purposes an irrelevance.

But how have we come to read the Nineteenth Amendment as a rule rather than a source of norms—a piece of constitutional text that can be understood without reference to the debates and commitments that led to its ratification? This essay argues that the prevailing understanding of the suffrage amendment reflects habits of reasoning about gender relations that it in turn helps sustain. At the level of common sense, we do not understand gender relations to have a political history in anything like the way we understand race relations to have a political history: the narrative structures through which we explain the relations of the sexes depict gender arrangements as the product of consensus and custom rather than coercion and conflict. Our understanding of the Nineteenth Amendment both reflects and sustains these habits of reasoning. Because of these habits of reasoning, we read the suffrage amendment as a text shorn of the semantically informing context that an understanding of the struggles over its ratification might supply. And interpretive construction of the suffrage amendment as a rule, rather than a transformative constitutional commitment, in turn sustains the prevailing understanding of gender arrangements as the product of evolving social consensus rather than legal coercion and political conflict. In short, the "collective memory" of gender relations has shaped and been shaped by the practices of interpretation through which we give meaning to the Nineteenth and Fourteenth Amendments. If we approach the Constitution through the field of collective memory, we can thus analyze the interpretive history of the suffrage amendment as part of the larger narrative processes through which this society naturalizes gender arrangements and insulates them from political contestation.

I. The Constitution as Vehicle of Social Memory

Many of our constitutive social understandings assume narrative form, and these narratives frequently involve stories about the past. By telling stories about a common past, a group can constitute itself as a group, a collective subject with certain experiences, expectations, entitlements, obligations, and commitments. The stories that help forge

group identity also supply structures of ordinary understanding, frameworks within which members of a society interpret experience and make positive and normative judgments concerning it. In short, narratives about the genesis of social arrangements help constitute social groups as collective subjects and, in so doing, construct their commonsense intuitions about the actual and proper organization of social relations. Scholars call this narrative matrix "collective" or "social" memory.[1]

To appreciate how narratives about the past construct the identity and understandings of collective subjects, it might be helpful to consider the process through which the authority of the Constitution is produced. We might ask: why do Americans experience themselves as authors of a constitution that in turn binds the government that "represents" them? Wouldn't it be more reasonable to observe that Americans who are born under the Constitution are "subject" to its authority? The experience of citizenship as authorizing government depends on an act of identification with "the Founding Fathers"—those who drafted and ratified the Constitution that constitutes us as a nation. Stories about the drafting and ratification of the Constitution supply the basis for claims about the authority of the state. We tell and retell these stories over time, recreating from generation to generation the experience of identification with the acts of the "Founders" on which the authority of the national government rests.[2]

From this vantage point, we can see that when lawyers interpret the Constitution, they engage the task as carriers of social memory,

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1. For an overview of some of the large body of literature on collective memory, see, for example, Susan A. Crane, "Writing the Individual Back into Collective Memory," *American Historical Review* 20 (1997): 1372; Natalie Zemon Davis and Randolph Starn, eds., "Memory and Counter Memory," special issue of *Representations* 26 (1989); Iwona Irwin-Zarecka, *Frames of Remembrance: The Dynamics of Collective Memory* (New Brunswick, N.J.: Transaction Publishers, 1994) (annotated bibliography); see also J. M. Balkin, *Cultural Software: A Theory of Ideology* (New Haven: Yale University Press, 1998), 203–15.

2. Of course, it is not the accounts that professional historians supply about the framing that dispose Americans to identify with the acts of the founding generation as acts of "We, the People." The disposition to identify with the Founders would seem to be part of a belief system learned at an early age. Each generation recounts the story of America's origins in an act of revolution (rupture) and constitution making (reintegration) to children at an early age. This story is part of the "civic religion" that each generation inculcates in its young, told in the family setting, at school, and in various national commemorative symbols, holidays, and rituals. See generally Michael G. Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: Knopf, 1986).

equipped with certain belief structures that will shape the way in which they understand law. But it also seems clear that when lawyers interpret the Constitution they are contributing to the stock of narratives that, passed from generation to generation, constitute our civic identity, norms, and purposes. Judicial decisions are thus products of social memory; at the same time, they are one of the many social institutions that produce social memory.

The same narrative processes that produce the national identity of "Americans" also play a crucial role in articulating relationships among Americans. Thus, for example, social memory plays a central role in the construction of racial identity—a dynamic readily apparent in the domain of constitutional interpretation. Racial understandings are transmitted from one generation to the next, often taking the form of stories about our nation's origins. A story of the founding as a compact among white, Anglo-Saxon, Protestant men defines nationhood and citizenship in race-exclusionary terms; the *Dred Scott* decision tells such a story about the founding compact.[3] Today, of course, American civic culture abjures this racialist account of the constitutional compact. That the original Constitution sanctioned slavery is depicted as a form of founding-error, a betrayal of the more fundamental principles that define the nation. We thus encounter an important modification of the founding narrative, one that has gained in currency in the decades since World War II. In this view, it took a war and major constitutional reform to redeem the nation from its morally compromised origins. When the nation's story of origins is retold in this fashion, a story about race is embedded in the travails of the nation's birth and bloody rebirth in the crucible of the Civil War.[4]

3. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

4. To illustrate, I quote a passage from *Bell v. Maryland*, 378 U.S. 226 (1963), a civil rights decision of the 1960s that overturned the convictions of a group of black students who were arrested for participating in a "sit-in" demonstration at a restaurant that discriminated against blacks. The opinion notes that the ideals of the Declaration of Independence were "not fully achieved with the adoption of the Constitution because of the hard and tragic reality of Negro slavery," and then goes on to observe:

> The Constitution of the new Nation, while heralding liberty, in effect declared all men to be free and equal—except black men who were to be neither free nor equal. This inconsistency reflected a fundamental departure from the American creed, a departure which it took a tragic civil war to set right. With the adoption, however, of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, freedom and equality were guaranteed expressly to all regardless of "race, color, or previous condition of servitude."

To be sure, stories about race and nationhood evolve with the political struggles of each generation. Stories about the meaning of the Civil War amendments told in the Supreme Court opinions of the Reconstruction Era differ from those of the 1960s, and these stories in turn differ from the stories told by the justices who sit today on the Court. In the 1960s, the Court identified slavery and segregation as the founding errors to be rectified through racial integration of the basic institutions of American life; but, in the 1990s, as these integrationist commitments have waned, the Court adverts to a "history of racial classification"[5] as the founding error the nation must expiate by restricting, or abolishing, race-conscious remedies.[6] Once the history of racial wrongs is abstracted to a "history of racial classifications," even Martin Luther King can be enlisted as an opponent of affirmative action.

Thus, as Americans tell and retell stories about race relations of the past, they are struggling over the narratives that rationalize race relations in the present: Stories about the past constitute racial groups as collective subjects who face each other with certain defining experiences, understandings, expectations, entitlements, and obligations. The central role that social memory plays in racial group construction is painfully visible in the debates over affirmative action. Consider, for example, the familiar objection to affirmative action, "My grandfather didn't own slaves," or a more sophisticated variant of this claim advanced by Justice Powell in *Bakke*, that we are "a Nation of minorities."[7] Such objections to affirmative action acknowledge that past gen-

> In the light of this American commitment to equality and the history of that commitment, these Amendments must be read not as "legislative codes . . . but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government." . . . The cases following the 1896 decision in *Plessy v. Ferguson* . . . too often tended to negate this great purpose. . . . [But since] *Brown* the Court has consistently applied this constitutional standard to give real meaning to the Equal Protection Clause "as the revelation" of an enduring constitutional purpose. 378 U.S. at 286–87 (Goldberg, J., concurring) (citations omitted).

5. See *Miller v. Johnson*, 515 U.S. 900, 922 (1995) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501 [1989]).

6. See Reva B. Siegel, "Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action," *Stanford Law Review* 49 (1997): 1142.

7. *Regents of the University of California v. Bakke*, 438 U.S. 265, 292 (1978) (footnotes omitted) ("During the dormancy of the Equal Protection clause, the United States had become a nation of minorities. Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a 'majority' composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared characteristic was a willingness to disadvantage other groups").

erations of white Americans inflicted injuries on black Americans that continue to have present effects in defining the social position of the races. Yet each seeks to rearticulate the subject position of white Americans with respect to that history so as to eschew responsibility for its rectification. The first repudiates individual responsibility by disclaiming lineal descent from the white persons who enslaved African Americans; the second repudiates collective responsibility by deconstructing the category of white persons understood as descendants of slave owners. In each case, the interposition of a "counter" historical narrative modifies racial genealogy so as to deny collective agency in matters of *racial* formation, while continuing to allow for the assertion of collective identity with respect to other features of the American past. Interestingly enough, each of these objections to affirmative action repudiates an understanding of white racial identity as entailing obligations to rectify past wrongs inflicted on African Americans without repudiating the commonsense understanding that the subordinate social position of African Americans is attributable to such historic injustices.

It is instructive to compare the complex struggles over the past that attend racial conflicts in American life with the narratives about the past that inform debates about gender justice. In this society, the forms of social memory that construct gender relations differ in kind from those that shape race relations. Justice Powell voiced this understanding when he observed in *Bakke,* "The perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share."[8] While the history of race relations in this country is generally understood as a story of publicly and privately inflicted injury and imposition, the history of gender relations unfolds in the more diffuse realm of customary time, involving consensually inhabited mores that are assumed slowly to have evolved over the centuries. For the most part, law does not play a role in the social memory of gender relations. Because governing narratives about the genesis of gender arrangements do not focus on acts of legal coercion, even those trained in law are disinclined to view law as playing a significant role in defining the social position of the sexes.

An anecdote or two might suffice to illustrate. Some years ago when I began work on a project concerning the common-law doctrine that gave a husband property rights in his wife's labor, I encountered diverse forms of resistance among legal academics to the very notion

8. *Bakke,* 303.

that household labor had a legal history. The family, I was told, was not a proper object of legal-historical inquiry because law did not exert social force in the family as it did in other arenas. There might be antiquated forms of family law "on the books," but family life was more importantly shaped by tradition and affect, custom and consent. The view that law exerted little constraining force in family affairs recurred in diverse forms. When I pointed out that nineteenth-century laws giving wives rights in their earnings did not abolish the common-law doctrine of marital service because the law continued to vest a husband with rights in the labor his wife performed for the family, I was told that it was ahistorical for me to expect total abolition of the common-law rule; no woman in the nineteenth century would have sought property rights in her household labor. (As I have since demonstrated in some detail, in the decades before and after the Civil War, the woman's rights movement in fact energetically advocated reforms that would have given wives rights in their household labor.)[9] On one occasion I was presenting a paper concerning wives' claims to earnings for work performed in keeping boarders—a problematic area of litigation because courts appreciated that recognizing wives' earnings claims for household work performed for nonfamily members might legitimate claims for remuneration of the same work performed for family members. As I pointed out how courts deciding the boarder cases had struggled to preserve a husband's right to his wife's household services, one legal historian in the audience criticized my modernization thesis, remarking, "My mother kept boarders and she never wanted any of the money." Like the claim that no woman in the nineteenth century would have demanded property rights in the labor she performed for the family, this claim also asserted that the expropriation of women's household labor was fundamentally a consensual affair.

In this context, it is interesting to consider Robert Bork's recent account of the genesis of contemporary gender arrangements:

> Once such things as the right to vote and the right of wives to hold property in their own names had been won, the difference in the opportunities open to women has been largely due to technology. I am old enough to remember my grandmother washing work

9. See Reva B. Siegel, "Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880," *Yale Law Journal* 103 (1994): 1073.

> clothes on a scrub board, mashing potatoes by hand, and emptying the water tray from the bottom of the ice box. There was simply no possibility that she could have had both a family and a career. Were she young today, she would find that shopping, food preparation, laundering and much else have been made dramatically easier so that she could, if she wished, become a lawyer or a doctor or virtually anything that appealed to her.[10]

In Bork's view, "For women the new choices are available largely because of technology, for blacks because of the success of the civil rights movement" (228). In short, law plays at best an incidental role in the social memory of gender relations, which are assumed to result from custom and consent; if constraints on women's choices appear in such narratives at all, they are frequently depicted as an impersonal effect of technology, rather than coercive legal or social arrangements. Again and again in such narratives, the possibility that conflict or coercion has played a role in defining women's lives is repressed and women appear as figures who give of themselves selflessly and without protest. The social memory of gender relations thus elaborates a scene that is private, consensual, and naturalized, that is to say, outside the public realm where matters of law and governance are conducted. For this reason, claims about collective agency that play so prominent a role in disputes over racial justice are notably lacking in disputes over gender justice. The claim "my grandfather didn't own slaves" differs from the claim "my mother kept boarders and she never wanted any of the money." The first acknowledges that publicly and privately inflicted injury occurred but disclaims responsibility for rectifying it; the second denies that publicly and privately inflicted injury ever occurred.

It is of course possible to tell a very different story about the genesis of gender arrangements. If, for example, one consults the pages of nineteenth-century woman suffrage journals, one encounters detailed accounts of the ways that law enforces women's subordination in the public and private spheres. Consider this 1875 narrative—striking for present purposes because it understands family relations as simultaneously affective and coercive, private and public:

10. Robert H. Bork, *Slouching towards Gomorrah* (New York: Regan Books, 1996), 195.

> As a mother, a woman goes through the tragedy of giving birth to her son, watches over and cares for his helpless infancy, brings him through all the diseases incident to childhood, is his nurse, physician, seamstress, washerwoman, teacher, friend, and guide, spending the cream of her days to bring him up to be a voter with no provision in law for her own support in the mean time, with not so much as "I thank you." Then he leaves home and marries a wife, whom it took some other mother twenty-one years to raise, educate, and teach to cook his meals, to make and wash his clothes, to furnish him with a bed, and to fill the house with comforts, of which he has the larger share, at her own expense. And all this done for him up to this period of his life without any cost to himself. Then he votes to help make a law to disfranchise his wife and these two mothers, who have unitedly spent forty-two years of the prime of their days for his benefit, without any compensation. And then he makes another law to compel his wife to do all the same kind of drudgery which his mother had done, with the addition of giving birth to as many children as in his good pleasure he sees fit to force upon her. And all her earnings and the fruit of her labor are his, his wife being the third woman who spends her life to support him. It takes three, and sometimes four women to get a man through from the cradle to the grave, and sometimes a pretty busy time they have of it, too. It is time we stated facts and called things by their right names, and handled this subject without kid gloves.[11]

As this woman suffrage advocate reminds us, acts of public and private coercion have long played a role in organizing the social relations of the sexes. Law does not stop at the family circle, but plays an important role in constituting it—defining women's lives in matters of sex and work, love and money, as well as affairs of state.

Viewed from this standpoint, questions of sex discrimination could easily be situated within a narrative of national wrong and rectification. Women were, after all, second-class citizens at the time of the founding, ineligible to speak as "We, the People" because denied the right to vote, subordinated in the family, and constrained in diverse spheres of social life. After demanding equal civic status over the

11. "A Wife's Protest," *Woman's Journal*, March 6, 1875, 74.

course of several generations, women finally persuaded the nation to repudiate its foundational understandings and to amend the Constitution to allow them to vote as equal citizens under law. In according constitutional protections to women's rights, the Court often draws analogies between race and sex discrimination. Yet it does not invoke this story of founding error and rectification, whether in construing the suffrage provisions of the Nineteenth Amendment or in interpreting the equal protection clause of the Fourteenth Amendment—the current constitutional "home" of doctrines protecting women's rights.[12]

The prevailing understanding of the Nineteenth and Fourteenth Amendments thus illustrates how the social memory of gender relations shapes and is shaped by acts of constitutional interpretation. In the quest for the vote, generations of American women resisted their pervasive legal disempowerment and raised core questions about the organizing principles and institutions of American life. Their struggle provoked wide-ranging debate that explored the relations of the sexes, both in the family and in the state. This national, multigenerational debate about the norms that should structure public and private life ultimately produced a constitutional commitment to revise foundational structures of the Republic. During the 1920s, at least some courts responded to the ratification of the Nineteenth Amendment in ways that reflected the social meaning and institutional preoccupations of the woman suffrage campaign. But this response was both hesitant and fleeting, and the meaning of the suffrage struggle soon faded from popular and legal consciousness. When, decades later, the Court finally began to develop a body of constitutional doctrine protecting women's rights under the Fourteenth Amendment, it did not build upon the memory of the woman suffrage campaign, but instead proceeded to elaborate a body of sex discrimination doctrine that is fundamentally indifferent to the history of women's struggles in the American legal system. Thus, the very body of law that currently protects women's rights is elaborated in terms that (1) efface the history of women's resistance to legal imposition and (2) obscure the specific institutional sites of that struggle. Lost, with this history, is a narrative matrix for reasoning about the social relations of the sexes and for conducting public conversations about the normative commitments they implicate.

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12. In a recent sex discrimination case, the Court has finally broken this pattern, as I discuss in part V of this essay.

Examining how the social memory of gender relations is expressed in contemporary constitutional law reveals one mechanism by which this society insulates the prevailing gender order from political contestation. Our propensity to explain the relations of the sexes through stories of evolving custom and consensus rather than conflict suggests that, as a society, we remain normatively invested in the naturalization of present gender arrangements and will do much to repress the normative dissonance that confrontation with their history would produce. At the same time, examining how the social memory of gender relations is made and sustained in law raises important questions about the possibility of its remaking through law. Thus, after exploring how interpretation of the Nineteenth and Fourteenth Amendments has isolated questions concerning women's status from narratives of national and constitutional history, this essay will conclude by considering what difference it might make for the Court to rejoin questions about sex discrimination to the history of American law and governance.

II. The Campaign for Woman Suffrage

The Nineteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex," and further provides that "Congress shall have the power to enforce this article by appropriate legislation." The amendment was ratified in 1920, 133 years after the founding and over 70 years after women first organized to demand suffrage. For generations, "the woman question"—as the debates precipitated by the campaign for woman suffrage were called—occupied a place in the national political imagination akin to the civil rights movement of the 1950s. Yet no consciousness of this history informs contemporary understandings of the Constitution. An anecdote should suffice to illustrate the point. Some years ago when I was teaching at the University of California–Berkeley law school, a colleague asked me about my research; I replied that I was thinking about the significance of the Nineteenth Amendment, and my colleague—a nationally prominent constitutional law scholar—replied, "Which one is that?"

Women's right to vote was not obtained by stealth or acclamation. Rather, it was steadfastly demanded, and denied, for seven decades, as Americans mocked and then, with growing earnestness, debated the

"woman question." For the generations of Americans who debated the question, gender restrictions on the franchise were tied to fundamental principles organizing government and family both. But the significance of denying, or granting, women the vote has disappeared from constitutional cognizance because of the manner in which courts have interpreted the amendment. Courts have adopted a rule-based construction of the amendment that reads its language acontextually—without reference to the sociopolitical commitments of those who opposed and advocated reform of the Constitution. Consequently, as currently interpreted, the Nineteenth Amendment bars sex-based restrictions on voting—no more.

This result, of course, was not inevitable. As a brief discussion will illustrate, the woman suffrage campaign concerned considerably more than voting, and the question of women voting was itself was understood to raise core questions concerning the structure of the family. These larger normative concerns of the suffrage campaign did play a role in shaping the Nineteenth Amendment's meaning for a brief period in the aftermath of its ratification, when courts in a number of cases interpreted the suffrage amendment to speak to questions other than voting. But, as I show, these interpretive understandings were only intermittently expressed, and ultimately gave way to the modern, acontextual interpretation of the amendment as a rule governing voting. I begin, then, by briefly revisiting the terms of the suffrage debate, before turning to examine how courts interpreted the woman suffrage provisions of the Constitution—in the immediate aftermath of ratification and then, decades later, in the course of developing the modern law of sex discrimination.

Today we understand the right to vote as a basic incident of citizenship in a democratic polity; the demand for woman suffrage was itself premised on this modern or "universal" conception of the franchise. From this modern standpoint, it is difficult to appreciate the conception of voting that supported the original, gendered definition of the franchise. More was at stake than stereotypical assumptions about the roles of the sexes. Gendered restrictions on the franchise rested on a particular understanding of government and family structure both.

At the time of the founding, the franchise was restricted to those thought to have sufficient independence to exercise wisely the prerogative to govern the new republic: white, property-holding men, gener-

ally heads of households.[13] In the view of the founding generation, the independence of judgment necessary to vote responsibly could only be achieved through property ownership. As John Adams explained,

> [V]ery few men who have no property, have any judgment of their own. They talk and vote as they are directed by some man of property, who has attached their minds to his interest. . . . [They are] to all intents and purposes as much dependent upon others, who will please to feed, clothe, and employ them, as women are upon their husbands, or children on their parents.[14]

In short, persons in relations of dependency were unfit to govern because they were governed by others.[15] The relations of governance and dependence Adams described were household relationships, and the concepts of authority he invoked were simultaneously economic and legal. During the eighteenth century, most propertyless people were dependents in a propertied household, a group that included wives, children, slaves, servants, apprentices, journeymen, and hired laborers.[16] Law amplified the effects of economic inequality. In this era,

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13. See generally Robert Steinfeld, "Property and Suffrage in the Early American Republic," *Stanford Law Review* 41 (1989): 335. Thus, Thomas Jefferson wrote to a friend in 1776 that he favored "extending the right of suffrage (or in other words the rights of a citizen) to all who had a permanent intention of living in the country. Take what circumstances you please as evidence of this, either the having resided a certain time, or having a family, or having property, any or all of them." Jefferson to Pendleton, August 26, 1776, in *The Papers of Thomas Jefferson,* ed. Julian Boyd et al., 60 vols. (Princeton: Princeton University Press, 1950), 1:503–5, quoted in Joan R. Gundersen, "Independence, Citizenship, and the American Revolution," *Signs* 13 (1987): 64.

14. Letter from John Adams to James Sullivan, May 26, 1776, *The Works of John Adams,* ed. C. Adams (1864), 9:376–77, quoted in Steinfeld, "Property and Suffrage," 340.

15. For a closer examination of this question during the Revolutionary Era, see Gundersen, "Independence, Citizenship," 63–65 ("For American leaders who abandoned virtual representation for direct representation, the association of women with dependency provided the way to disqualify women as voters").

16. See Steinfeld, "Property and Suffrage," 344 ("for the most part, inequality between the property owners and the propertyless was a domestic affair"); see also Toby L. Ditz, "Ownership and Obligation: Inheritance and Patriarchal Households in Connecticut, 1750–1820," *William and Mary Quarterly* 47 (1990): 236–37 ("The independence and civic standing of men in family-farm areas also rested on the capacity to marshal the labor of women, children, servants, and occasionally slaves. The status of independent proprietor thus entailed its complement, the status of household dependent: a person who lacked the formal capacity to participate in public life and who was subject to the authority of household heads").

the common law structured the "domestic relations" (husband/wife, parent/child, and master/servant, or apprentice) hierarchically, as relations of private governance between a head of household and his dependents.[17] The master of the household was to support and represent his dependents, who in turn were to serve him.

It was upon this understanding of "family government" that women's legal disabilities in marriage rested. At common law, a husband acquired rights to his wife's paid and unpaid labor and most property she brought into the marriage. A wife was obliged to serve and obey her husband, and a husband was subject to a reciprocal duty to support his wife and to represent her in the legal system. A wife was unable to file suit without her husband's consent and participation; he, in turn, was responsible for his wife's conduct—liable, under certain circumstances, for her contracts, torts, and even some crimes.[18] The common law thus made a married woman the legal ward of her husband, dependent upon him for representation in both public and private affairs.

To say the least, there was a degree of tension between the relations of dominance and subservience constituting the "domestic relations" and the principles of equality uniting household heads in the new republic. As Christopher Tomlins observes:

> Legal relations of household mastery were inscribed on what otherwise now professed itself a "free" contractarian legal and political culture. On the face of it, this was a meeting between incompatible tendencies. But those incompatibilities were resolvable along the lines of demarcation between polis and household, public and private, that already structured political and social life. The public realm was where economically independent heads of households met, their participation sanctified, democratized, and to a degree equalized in the polity's civic guarantees. Relations within households (master/servant, parent/child, husband/wife), in contrast, occurred within a separate domestic realm. These were

17. See Nancy Fraser and Linda Gordon, "A Genealogy of Dependence: Tracing a Keyword of the U.S. Welfare State," *Signs* 19 (1994): 13; Christopher Tomlins, "Subordination, Authority, Law: Subjects in Labor History," *International Labor and Working-Class Historian* 47 (1995): 70.

18. See Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (Ithaca: Cornell University Press, 1982), 47–55, 70–112.

> not relations between heads of household; rather, they were relations between heads and dependents. They were household head's private business, their hierarchical character more or less impervious to revolutionary discourses of *public* liberty.[19]

In this social framework, distribution of the franchise both recognized and conferred a special form of standing in the community.[20] And by the dawn of the nineteenth century, status-based restrictions on the franchise had become a point of controversy among men, with property-based restrictions challenged throughout the opening decades of the century, and race-based restrictions becoming a focal point of controversy in the aftermath of the Civil War.[21] It was during these nineteenth-century campaigns to extend the franchise among men that women first organized to demand the vote.

The woman's rights movement grew out of evangelical movements of the early nineteenth century, especially movements for temperance and abolition of slavery.[22] As the abolitionist movement began to supplement tactics of moral suasion with demands for political and legal reform, women in its ranks found themselves disabled from participating, and began more self-consciously to consider their own disfranchised position within the legal system.[23] It was a group of abolitionists who first convened at Seneca Falls, New York, in 1848 to protest women's disfranchisement and demand reform of the common-law marital-status rules. These early woman's rights advocates used ready-to-hand tools to challenge the gender-hierarchical organization of family and state: They claimed that family and state ought be organized in accordance with the egalitarian principles that ordered relations among male heads of household in the Republic. Indeed the movement announced its demands for suffrage and marriage reform in a Declaration of Sentiments that was explicitly modeled on the Declaration of

19. Tomlins, "Subordination, Authority, Law," 74.

20. See Judith N. Shklar, *American Citizenship* (Cambridge: Harvard University Press, 1991), 2, 27–28.

21. On challenges to property-based restrictions to suffrage, see Steinfeld, "Property and Suffrage," 353–60; see also Jacob Katz Cogan, "The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America," *Yale Law Journal* 107 (1997): 473.

22. See Eleanor Flexner, *Century of Struggle: The Woman's Rights Movement in the United States* (Cambridge: Belknap Press, Harvard University Press, 1959), 41–52, 181–86.

23. See Paula Baker, "The Domestication of Politics," *American Historical Review* 89 (1984): 634; Lori D. Ginzberg, *Women and the Work of Benevolence* (New Haven: Yale University Press, 1990): 91–97.

Independence.[24] Woman's rights advocates continued to work within abolitionist organizations until the immediate aftermath of the Civil War. They believed that constitutional reform during the Reconstruction Era would institutionalize principles of universal suffrage. It was only when the Republican Party expressly refused to include woman suffrage in postwar constitutional reform that the movement began to develop its own organizational structure.[25]

As the Republican Party drafted the constitutional and statutory provisions that would emancipate the slaves and protect the basic civil rights of freedpersons, its leadership was well aware that this new body of civil rights law would grant basic family-law rights to the newly emancipated slaves[26] and, in so doing, might call into question various forms of marital-status law.[27] Republican leaders such as Thaddeus Stevens took the position that while the Fourteenth Amendment might govern family law, provisions such as the equal protection clause would not disturb traditional forms of marital-status regulation.[28] But the architects of Reconstruction were more alarmed about giving women political than civil rights; they specifically drafted the Fourteenth and Fifteenth Amendments so as to enfranchise freedmen without enfranchising women.[29] To justify this partial extension of the

24. See "Declaration of Sentiments," in *History of Woman Suffrage*, ed. Elizabeth Cady Stanton et al. (Salem, N.H.: Ayer, 1985), 1:70–73; see also Linda K. Kerber, "From the Declaration of Independence to the Declaration of Sentiments: The Legal Status of Women in the Early Republic, 1776–1848," *Human Rights* 6 (1977): 115.

25. See Ellen Carol DuBois, *Feminism and Suffrage* (Ithaca: Cornell University Press, 1978), 55–66.

26. See Jill E. Hasday, "Federalism and the Family Reconstructed," *University of California Law Review* 451 (1998).

27. See Hasday, "Federalism and Family Reconstructed"; Patricia Lucie, "On Being a Free Person and a Citizen by Constitutional Amendment," *Journal of American Studies* 12 (1978): 350; Nina Morais, "Sex Discrimination and the Fourteenth Amendment: Lost History," *Yale Law Journal* 97 (1988): 1157 and n. 21; and Amy Dru Stanley, "Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation," *Journal of American History* 75 (1988): 480.

28. See *Congressional Globe*, 39th Cong., 1st sess., 1064 (1866) (statement of Rep. Stevens) ("When a distinction is made between two married people or two femmes sole, then it is unequal legislation; but where all of the same class are dealt with in the same way then there is no pretense of inequality"); see also Hasday, "Federalism and Family Reconstructed"; Morais, "Sex Discrimination," 1157 and n. 21.

29. See Ellen Carol DuBois, "Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820–1878," *Journal of American History* 74 (1987): 836–52, and *Feminism and Suffrage*, 58–62, 162–63. For an account of the strategic considerations underlying the Republican Party's decisions about expanding the franchise during the Reconstruction Era, see Joellen Lind, "Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right," *U.C.L.A. Women's Law Journal* 5 (1994): 154–67.

franchise, congressmen invoked the understanding that women were represented in the state through the male heads of household. As one Republican Congressman put it:

> *To constitute the required form of government, therefore, it is necessary that every citizen may either exercise the right of suffrage himself, or have it exercised for his benefit by some one who by reason of domestic or social relations with him can be fairly said to represent his interests.* In one of these cases he is directly represented in the government, and in the other indirectly. The indirect representation is that possessed by women, children, and all those under the legal control of others.
>
> However desirable it may be that every free agent should have by law an equal voice in the common government, yet the fact that women do not vote is not in theory inconsistent with republicanism. *The primary and natural division of human society is into families.* All forms of religion, all systems of law, recognize this arrangement. *By common consent or common submission, whether founded on reason and justice or not, is not material to the argument, the adult males are supposed to represent the family, and the government is not bound to look farther than this common consent or submission.* It receives as representation of the family those whom the family sets up in this capacity.[30]

Claims of this sort recurred throughout the debates on Reconstruction.[31]

Thus, in the nineteenth century, opposition to woman suffrage did not limit itself to the objection that (1) women were, by nature (divinely

30. *Congressional Globe,* 40th Cong., 2d sess., 1956 (1868) (Sen. Broomal) (emphasis added).

31. See, for example, *Congressional Globe,* 38th Cong., 1st sess., 2243 (1864) (Sen. Howe) ("I am willing to deprive those who are not males of the right of suffrage, because they exercise it by proxy, as we all know. Females send their votes to the ballot-box by their husbands or other male friends"); *Congressional Globe,* 39th Cong., 2d sess., 56 (1866) (Sen. Williams) ("[A]s a general proposition it is true that the sons defend and protect the reputation and rights of their mothers; husbands defend and protect the reputation and rights of their wives; brothers defend and protect the reputation and rights of their sisters"); and *Congressional Globe,* 39th Cong., 2d sess., 307 (1866) (Sen. Sherman) ("So far as the families, the women and children, are concerned, we know that they are represented by their husbands, by their parents, by their brothers, by those who are connected with them by domestic ties").

and biologically ordained), different from and subordinate to men, hence unsuited to vote. Other core objections to woman suffrage arose from the interlocking conception of state and family upon which the government of the early Republic was premised: (2) women did not need the vote because they were already represented in government by and through men, and (3) woman suffrage would destroy the family by introducing domestic discord into the marital relation and distracting women from their primary duties as mothers.[32]

In short, objections to woman suffrage grew out of an interdependent understanding of nature, family, and state. For example, in his popular tract *Women's Suffrage: The Reform against Nature* (1869), Horace Bushnell argued that "masculinity carries, in the distribution of sex, the governmental function" and depicted "the natural leadership, the decision-power, the determining will of the house and the state, as belonging to men," observing that "happily, it is just as natural to women to maintain this beautiful allegiance to the masterhood and governing sway-force of men, both in the family and in the state, as we could wish

For sources discussing the tradition that equated independence with household headship in the nineteenth century, see, for example, Rowland Berthoff, "Conventional Mentality: Free Blacks, Women, and Business Corporations as Unequal Persons, 1820–1870," *Journal of American History* 76 (1989): 757 ("[O]nly men . . . free to sustain the commonwealth ought to be citizens—not their dependent wives, children, tenants, employees, servants, or slaves"); Nancy F. Cott, "Marriage and Women's Citizenship in the United States, 1830–1934," *American Historical Review* 103 (1998): 1440, 1452 ("Independence . . . for the male household head existed in counterpoint to the dependence of others. Having and supporting dependents was *evidence* of independence"); and Laura F. Edwards, "'The Marriage Covenant Is at the Foundation of All Our Rights': The Politics of Slave Marriages in North Carolina after Emancipation," *Law and History Review* 14 (1996): 83 (In the antebellum South, "The figure of a household head was an adult, white, propertied male. . . . Dependency tainted all those who lacked sufficient property to control their own labor and maintain households of their own").

32. As one historian puts it: "Three categories of arguments emerge from a survey of anti-suffrage rhetoric. These were arguments regarding man's and woman's nature as ordained by nature and God; arguments about the nature of representative government, and arguments that detailed the consequences of voting on women, their families, and society" (Martha Ann Hagan, "The Rhetoric of the American Anti-Suffrage Movement, 1867–1920," Ph.D. diss., Washington State University, 1993, 106). Aileen Kraditor puts it a bit more acerbically: "Close to the heart of all antisuffragist orators, particularly congressmen, was a sentimental vision of Home and Mother, equal in sanctity to God and the Constitution. Although all four entities regularly appeared in antisuffragist propaganda, it was the link of woman to the home that underlay the entire ideology." *The Ideas of the Woman Suffrage Movement, 1890–1920* (New York: Norton, 1981), 15.

it to be."[33] Bushnell thus contended that "the male and female natures together constitute the proper man, and are, therefore, both represented in the vote of the man" (67), substantiating his claim about nature by pointing to the institution of marriage (where, under concepts of marital unity, women "are already represented in and by the vote of their husbands") (68). At the same time, he confidently dismissed the objection that many women are "single persons . . . and have therefore no husbands by whose vote their rights may be protected" with a rejoinder from nature: "What we have to say is, that all women alike are made to be married, whether they are or not" (70–71). From this standpoint point it was self-evident that woman suffrage "loosens every joint of the family state, and is really meant to do it, as we plainly see by many of the appeals set forth" (154).

Without disputing the question of gender difference (or disputing it only in degree), suffragists asserted that women were the equal of men in natural entitlement and capacity to exercise the franchise—a position explicitly premised on repudiating the republican conception of the state as an aggregation of households. As Mary Putnam Jacobi was to define the revolutionary core of woman suffrage, the movement understood the state as based on "individual cells," not households: "Confessedly, in embracing this conception as women, we do introduce a change which, though in itself purely ideal, underlies all the practical issues now in dispute. In this essentially modern conception, women are brought into direct relations with the state, independent of their 'mate' or 'brood.'"[34] Of course, suffragists did not rest their case on theory alone. They repeatedly—and heatedly—countered arguments that men represented women by pointing to women's subordi-

33. Horace Bushnell, *Women's Suffrage: The Reform against Nature* (New York: Charles Scribner, 1869), 52, 53, 54. For an example of antisuffrage discourse from the decade prior to the war that weaves arguments from nature, family, and the state in a remarkably similar fashion, see Cogan, "The Look Within," 488–89 (quoting speaker at the Massachusetts constitutional convention of 1853).

34. Mary Putnam Jacobi, *"Common Sense" Applied to Woman Suffrage* (New York: Putnam, 1894), 138. See also Elizabeth Cady Stanton, "The Solitude of Self (1892)," reprinted in Beth M. Waggenspack, *The Search for Self-Sovereignty* (New York: Greenwood Press, 1989), 159–60 ("In discussing the sphere of man we do not decide his rights as an individual, as a citizen, as a man [by] his duties as a father, a husband, a brother, or a son, relations some of which he many never fill. . . . Just so with woman. The education that will fit her to discharge the duties on the largest sphere of human usefulness, will best fit her for whatever special work she may be compelled to do").

nation in the state, the family, market, education, and church, asserting that the record uniformly demonstrated men's *in*capacity to represent fully and fairly women's interests.[35] Finally, suffragists sought in various ways to demonstrate that suffrage did not disrupt the family order, rightly conceived. The vision of family life they defended was not, of course, that of the common law: the movement was simultaneously seeking reform of the common-law rules of marriage that subordinated wives to their husbands. Rather, in various ways, the suffrage movement was exploring new, more egalitarian conceptions of the family that contemplated for women a far more prominent role in the nation's economic and political institutions.[36]

The challenge that suffrage advocacy posed to the gendered institutions of American life was a deep one. As the movement contested claims of virtual representation and undertook to demonstrate why women needed the vote, advocates offered an account of women's subordination that ranged well beyond the fact of disfranchisement. To cite but a few examples: Suffragists protested the sex-based restrictions on employment and compensation that impoverished women and drove them into marriage.[37] They deplored women's legally enforced dependency in marriage, particularly property rules that vested in husbands rights to their wives' earnings and to the value of wives' household labor.[38] They decried law's failure to protect women from physical coercion in marriage, including domestic violence, marital rape, and "forced motherhood."[39] They protested double standards of sexual propriety that punished one sex for conduct in which both were engaged.[40] And they challenged the exclusion of women from juries

35. See "Declaration of Sentiments," in Stanton et al., *History of Woman Suffrage,* 1:70–73.

36. See Siegel, "Home as Work," 1116 ("The joint property claim thus repudiated the rhetoric of protection in a bid for equal governance rights in the household, much as the movement's suffrage arguments repudiated claims of virtual representation in a bid for equal governance rights in the polity").

37. See, e.g., id., 1121.

38. See generally Siegel, "Home as Work."

39. See, e.g., id., 1104–6; DuBois, "Outgrowing the Compact," 842–43; and Reva B. Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy," *Yale Law Journal* 105 (1996): 2117.

40. See Jane E. Larson, "'Even a Worm Will Turn at Last': Rape Reform in Late Nineteenth-Century America," *Yale Journal of Law and the Humanities* 9 (1997): 8–10.

convened to judge the fate of those in the criminal justice system.[41] Over the decades, as the movement developed from a fringe protest group to a respectable voice in the spectrum of American political opinion, its arguments for the vote changed, to a degree, in political complexion. By the turn of the century, the movement was arguing that women needed the vote for purposes of "social housekeeping," detailing a range of progressive reforms that would improve the health and welfare of families living in America's growing cities.[42] At the same time, as it broadened its class base, the movement began to emphasize with greater vigor the range of social reforms needed to improve the lot of working-class women.[43]

III. Interpreting the Nineteenth Amendment

In 1920, some seventy years after women first demanded the right to vote at Seneca Falls, and over a half century after the Republican Party refused to include woman suffrage on the agenda of Reconstruction reform, the movement developed a sufficiently wide-ranging coalition to amend the Constitution. Ratification of the Nineteenth Amendment was the capstone of a multigenerational effort to change the terms of the original constitutional compact so that women might count, equally with men, among the ranks of "We, the People."[44] Why then has the amendment disappeared from legal and popular consciousness?

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41. See Deborah Rhode, *Justice and Gender* (Cambridge: Harvard University Press, 1989), 48–50. For examples of movement rhetoric protesting women's exclusion from juries, see Stanton et al., *History of Woman Suffrage,* 1:597–98 (1881) (Elizabeth Cady Stanton discussing the plight of women charged with infanticide in a speech before the New York Legislature); and id., 2:648 (1882) (Susan B. Anthony protesting her conviction for voting unlawfully); see also Siegel, "Home as Work," 1144 (demand for right to serve on juries figuring prominently in resolutions of the Tenth National Woman's Rights Convention).

42. See Kraditor, *Ideas of the Woman Suffrage Movement,* 66–71; see also Jane Addams, "Why Women Should Vote," in *One Woman, One Vote,* ed. Marjorie Spruill Wheeler (Troutdale, Ore.: NewSage Press, 1995), 195–202.

43. On the expansion of the class base of the suffrage movement in the first decades of the twentieth century, see Ellen Carol DuBois, *Harriot Stanton Blatch and the Winning of Woman Suffrage* (New Haven: Yale University Press, 1997), 94–106.

44. It was this understanding of the amendment that, in the view of some opponents, rendered it unconstitutional, as exceeding the legitimate scope of Article 5 amending processes. See George Stewart Brown, "The Amending Clause Was Provided for Changing, Limiting, Shifting, or Delegating 'Powers of Government.' It Was Not Provided for Amending 'the People.' The 19th Amendment Is Therefore Ultra Vires," *Virginia Law Review* 8 (1922): 237. The Supreme Court upheld the woman-suffrage amendment against such claims in *Lesser v. Garnett,* 258 U.S. 130 (1922). See Reva B. Siegel, "She, the People: Reading the Nineteenth Amendment as Norm and Rule," typescript, May 1998.

The answer would seem to lie primarily in the domain of constitutional interpretation. If the Nineteenth Amendment fails to speak to us today, it is because courts have construed the amendment as a rule governing voting whose meaning can be adduced without reference to the normative commitments leading to its adoption. It is taken to be a matter of common sense that because the text of the amendment states a nondiscrimination rule governing voting, the amendment concerns matters of voting only: As Frank Michelman recently remarked of the country's experience with the Nineteenth Amendment, "Has any of us heard of a lawyer or judge suggesting that it has any bearing on constitutional law respecting sex discrimination beyond the question of the vote . . . ?"[45] But it is by no means inevitable that the amendment should have been construed this way. The "rulelike" character of the suffrage amendment is not an intrinsic property of its text, but instead arises from the way courts have interpreted its text.

To illustrate the point, we might briefly consider another amendment whose text might be characterized as "rulelike" in character. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Yet, in *Hans v. Louisiana*,[46] the Court read the Eleventh Amendment to apply to suits against a state brought by one of its own citizens, and in *Monaco v. Mississippi*,[47] to suits brought by a foreign state against one of the states of the union. In extending sovereign immunity doctrine beyond the express terms of the Eleventh Amendment, the *Monaco* Court reasoned: "Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. *Behind the words of the constitutional provisions are postulates which limit and control.*"[48] This interpretive proviso is entirely commonplace. In adducing the meaning of constitu-

45. Frank Michelman, "Saving Old Glory: On Constitutional Iconography," *Stanford Law Review* 42 (1990): 1344 n. 24.

46. 134 U.S. 1 (1890).

47. 292 U.S. 313 (1934).

48. Id., 322 (emphasis added). The Court has recently reiterated its understanding that the principles giving rise to the Eleventh Amendment and not the Amendment's text alone should govern its meaning. See *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1129–30 (1996) (criticizing "blind reliance upon the text of the Eleventh Amendment").

tional language, courts generally refer to the norms and purposes for which the text was adopted.[49] Thus, the clause of Article 1 that gives to Congress the power "to make Rules for the Government and Regulation of the land and naval forces" (sec. 8, cl. 14) is uncontroversially interpreted to give Congress the power to regulate the air force, as well.[50] Reasoning from norms and purposes, the Supreme Court has given restrictive and expansive construction to the language authorizing Congress to enact legislation enforcing the Thirteenth Amendment's prohibition on slavery and involuntary servitude.[51] And in fact, in the immediate aftermath of the Nineteenth Amendment's ratification, at least some courts read the suffrage amendment in light of the normative commitments leading to its adoption, and so concluded that it had constitutional significance in matters other than voting. Indeed, the Supreme Court's first substantive discussion of the Nineteenth Amendment suggested that it articulated a normative commitment of wide-ranging constitutional significance.

In short, during the 1920s and 1930s the Nineteenth Amendment was read as a text arising out of a particular historical context: the product of a lengthy debate on the status of women in the American legal system. So construed, the amendment was understood by at least some courts to have normative implications for practices other than voting. Most intriguingly, a few courts understood the suffrage amendment to speak to matters concerning marital-status law, while others understood it to affect a variety of political rights women might exercise, such as office holding and jury service. But, as the case law reveals, these intuitions about the meaning of the constitutional amendment were only intermittently expressed, and ultimately gave way to the modern, functional understanding of the amendment, as governing matters of voting only. In short, in the period after ratification, we can observe the Nineteenth Amendment undergoing interpretive construction, initially read as a text arising out of a particular sociohistorical context and then

49. Cf. *Hans v. Louisiana,* 134 U.S. 1, 12–14 (1890) (analyzing the framer's understanding of state sovereignty in the course of interpreting the Eleventh Amendment). For one overview of the literature on purposive interpretation of the Constitution's text, see Robert Post, "Theories of Constitutional Interpretation," *Representations* 30 (1990): 21–23.

50. See Post, "Theories of Constitutional Interpretation," 21–22.

51. Compare *The Civil Rights Cases,* 109 U.S. 3 (1883) (holding that the Thirteenth Amendment does not authorize Congress to prohibit race discrimination in public accommodations) with *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968) (holding that the Thirteenth Amendment authorizes Congress to prohibit private discrimination in real-estate dealings).

progressively being stripped of its context to emerge as a rule capable of being applied without reference to the normative debates and commitments that led to its adoption.

The Supreme Court offered its first commentary on the meaning of the Nineteenth Amendment in 1923.[52] The occasion was the Court's decision in *Adkins v. Children Hospital*,[53] striking down the District of Columbia's minimum-wage law for women and children. While the Court had severely restricted protective labor legislation for men in substantive due-process cases such as *Lochner v. New York*,[54] it had upheld a minimum-hours law for women in the 1908 case of *Muller v. Oregon*.[55] On the face of it, *Adkins* presented a question concerning the application of substantive due-process doctrine, but, as we will see, this question in turn tacitly raised issues concerning the continuing authority of common-law marital-status traditions in the wake of the Nineteenth Amendment's ratification.

During the Progressive Era, substantive due-process doctrine protected employees' freedom to contract along sex-differentiated lines. In *Lochner*, the Court held that legislation restricting the hours that men might work infringed upon their liberty of contract, but in *Muller*, the Court reasoned that legislation restricting the hours of women's employment was a constitutional exercise of the police power, justified in view of important physical differences between the sexes, particularly women's role in bearing children.[56] *Muller* presented this new constitutional rationale for regulating women's employment as an extension of the ancient common-law tradition that restricted the contractual capacity of married women. Even if the old coverture rules governing wives' contractual capacity were now being repealed, *Muller* reasoned, differences in women's physical and social roles warranted continuing differential treatment of the sexes.[57]

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52. The Supreme Court upheld the constitutionality of the amendment against federalism objections in *Lesser v. Garnett*, 258 U.S. 130 (1922).

53. 261 U.S. 525 (1923).

54. 198 U.S. 45 (1905).

55. 208 U.S. 412 (1908).

56. *Muller*, 422–23 ("The two sexes differ in structure of body, in the functions to be performed by each. . . . This difference justifies a difference in legislation").

57. The Court began its opinion in *Muller* by noting, "The current runs steadily and strongly in the direction of the emancipation of the wife" and observed that Oregon had reformed the common law to allow wives to make contracts as if single (id., 418). But the Court then asserted that even if legislatures were reforming the marital-status rules of the common law, there was still reason to treat women's contracts differently than men's: "Though

The question presented in *Adkins* was whether the Court would apply *Muller*'s reasoning to uphold a sex-based minimum-wage law or strike the statute down on liberty-of-contract grounds generally applicable to men. Opponents of labor-protective regulation and at least some proponents of women's rights pointed to the ratification of the Nineteenth Amendment as reason for questioning the continued viability of a sex-differentiated constitutional rule—a position adopted by the lower court in striking down the statute.[58] Of course, if the case for sex-differentiated analysis of protective labor legislation rested on the basis of physiological difference alone, passage of the Nineteenth Amendment would seem to have scant bearing on the question; but if in fact, *Muller*'s discussion of women's physiological differences perpetuated, in new idiomatic form, the ancient marital-status traditions of the common law,[59] then ratification of the Nineteenth Amendment might well signify the obsolescence of this normative regime.

In *Adkins,* the Supreme Court held the sex-based minimum-wage statute unconstitutional in an opinion written by the newly appointed justice George Sutherland. Before joining the Court, Sutherland had advised Alice Paul of the National Women's Party on the campaign for woman suffrage as well as the drafting of an equal rights amendment,[60] and his opinion for the Court emphasized women's evolving legal status as a basis for distinguishing *Muller* and analyzing the sex-based minimum-wage statute in accordance with the same liberty-of-contract principles that governed men's work:

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limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against full assertion of those rights" (id., 422). As I have elsewhere argued, "In Muller, the Court employed claims about women's bodies to reach a result which some decades earlier it might have justified by invoking the common law of marital status." See Reva B. Siegel, "Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection," *Stanford Law Review* 44 (1992): 323.

58. See Joan Zimmerman, "The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and *Adkins v. Children's Hospital,* 1905–1923," *Journal of American History* 78 (1991): 188; *Children's Hospital of the District of Columbia v. Adkins,* 284 F. 613, 618 (1922) ("No reason is apparent why the operation of the law should be extended to women to the exclusion of men, since women have been accorded full equality with men in the commercial and political world. Indeed, this equality in law has been sanctioned by constitutional amendment").

59. See Siegel, "Reasoning from the Body," 322–23.

60. See Zimmerman, "The Jurisprudence of Equality," 212–13, 219–20.

> But the ancient inequality of the sexes, otherwise than physical, as suggested in the Muller case, has continued "with diminishing intensity." *In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point.* In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, *we cannot accept the doctrine that women of mature age, sui juris, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances.* To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which *woman is accorded emancipation from that old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.*[61]

Thus, in *Adkins,* the Court read "the great—not to say revolutionary—changes . . . in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment"[62] as expressing a transformative constitutional commitment to recognize women as men's equals in the American legal system. But the opinion does not discuss this emergent sex-equality norm in abstract or formal terms. Rather, it construes the "changes . . . culminating in the Nineteenth Amendment" *sociohistorically,* as repudiating "the ancient inequality of the sexes" and "accord[ing]" women "emancipation from th[e] old doctrine[s]" of the common law.[63] The entire logic of the *Adkins* opinion depends on this finding of normative conflict between the suffrage amendment and marital-status law. In separately authored dissents, Justice Taft and Justice Holmes each argued that "[t]he 19th Amendment did not change the physical strength or limitations of women upon which the decision in Muller v. Oregon rests."[64] But this commonsense objection has force

61. *Adkins v. Children's Hospital,* 261 U.S. 525, 553 (1923) (emphasis added).

62. Id.

63. Id.

64. Id., 567 (Taft, J., dissenting); see also id., 569–70 (Holmes, J., dissenting).

only if one reads *Muller*'s discussion of physiological sex differences acontextually, ignoring the connections *Muller* draws between the gender norms of the coverture tradition and women's family role. It is because the majority in *Adkins* read *Muller*'s argument for regulation of women's employment as giving new expression to the marital-status traditions of the common law that the *Adkins* majority concluded that the case for a sex-differentiated approach to liberty-of-contract doctrine had been eroded by the transformations in women's legal status culminating in ratification of the Nineteenth Amendment.

Adkins does not apply the Nineteenth Amendment to matters of employment or marital-status law in any simple sense. Rather, *Adkins* invokes the commitments of the woman's rights campaign that culminated in ratification of the suffrage amendment and then treats this positive account of the ratification campaign normatively: as a reason for similarly transformative interpretation of the due-process jurisprudence of the Fourteenth Amendment. So construed, the suffrage amendment both reflects and embodies emancipatory commitments with implications for the interpretation of diverse bodies of law.

The Supreme Court was not the only court to read the Nineteenth Amendment expansively or to suggest that ratification of the suffrage amendment amounted to a repudiation of the marital-status norms of the common law. At least one federal district court concluded shortly after the *Adkins* decision that the suffrage amendment of its own force disestablished coverture doctrine. The judge refused to apply the common-law doctrine absolving a wife of responsibility for crimes committed jointly with her husband, reasoning that "since the adoption of the Nineteenth Amendment to the Constitution, it seems to me that the rule of common law has no application to crimes committed against the United States."[65] A judge concurring in a federal tax case reached a similar conclusion, rejecting the government's claim that under common-law coverture principles a wife's tax domicile was her husband's.[66] Quoting *Adkins* to the effect that "woman is accorded emancipation from the old doctrine that she must be given special protection or be

65. *United States v. Hinson*, 3 F.2d 200, 200 (S.D.Fla. 1925).

66. *McCormick v. United States*, T.D. 43804, 57 Treas. Dec. 117, 125–26 (1930) (Cline, J., concurring); see also Sophonisba P. Breckinridge, *Marriage and the Civic Rights of Women: Separate Domicile and Independent Citizenship* (Chicago: University of Chicago Press, 1931), 4–5. I am indebted to Gretchen Ritter for drawing my attention to this decision.

subjected to special restraint in her contractual and civil relationships,"[67] the judge asserted that the Nineteenth Amendment "covers the right of a woman to select and establish a residence wherever she chooses to vote."[68] Other courts deciding questions concerning coverture law invoked the suffrage amendment as authorizing liberalizing interpretations of the common law. For example, a New Jersey chancery court concluded that the legal changes culminating in ratification of the Nineteenth Amendment warranted giving a narrow construction to a clause in the state's married women's property act that preserved coverture restrictions on a wife's capacity to contract.[69] While the New Jersey statute still required wives to obtain a husband's joinder for contracts involving the sale of land,[70] the court reasoned that traditions in equity allowing a wife to act as a separate agent with respect to her separate property had been "enlarged and extended by both courts and legislative bodies to the point where, since the adoption of the Nineteenth Amendment to the federal Constitution, practically all of the disabilities of women, both married and single, have been removed, so that to-day she has practically all the rights and privileges of the male citizen."[71] The New Jersey court invoked the Nineteenth Amendment both positively and normatively: It described ratification of the suffrage amendment as the culmination of efforts to disestablish traditional forms of gender status regulation and then treated ratification of the suffrage amendment as normative authority justifying the extension of these egalitarian commitments in private law, much as *Adkins* gave effect to the normative commitments of the suffrage amendment in the interpretation of public law. The court thus allowed enforcement of a divorced woman's contract for sale of land, even though the contract appeared to be invalid under state law because the woman entered the agreement during the life of her marriage without her husband's consent.

67. *McCormick*, 125 (quoting *Adkins*, 261 U.S. at 553).

68. Id. The majority reasoned within common-law principles, concluding that the woman had established a domicile for tax purposes that was separate from her husband's because the husband had consented to the arrangement.

The Virginia Supreme Court also concluded that a married woman had the right to select her own domicile for state tax purposes, in passing giving weight to the concern that continued adherence to the marital-unity principle would be "subversive of the statutory right of voting." See *Commonwealth v. Rutherfoord*, 169 S.E. 909, 913 (Va. 1933).

69. *Hollander v. Abrams*, 132 A. 224 (Ct. Chancery N.J. 1926).

70. Id., 228.

71. Id., 229.

But such decisions were exceptional. Few courts read the Nineteenth Amendment as authorizing further extension of sex-equality norms in the private-law arena. To illustrate, one federal court expressed its astonishment that the "law of Tennessee, as to tenants by the entirety is purely the old common law," announcing, "in this age of the Nineteenth Amendment, rights of women, feminism, women office holders, and general emancipation of the sex, it is almost shocking to learn that in one form of conveyancing, 'the husband and wife are one person in law.'"[72] While the court recognized a deep normative conflict between the suffrage amendment and the common-law coverture rules, it voiced this sense of normative dissonance without treating the suffrage amendment as authorizing a liberalizing interpretation of the common law. In this regard, it assumed what was shortly to become the "common sense" view of the amendment: that it had no direct bearing on matters concerning the interpretation of marital-status law. Indeed, shortly after its decision in *Adkins* striking down a sex-based minimum-wage law, the Supreme Court upheld a New York statute prohibiting nighttime employment of women in restaurants, weakly distinguishing *Adkins* and resting its decision on the authority of *Muller v. Oregon*.[73]

It is possible to detect this same ambivalent dynamic at work in the legislative arena. Immediately after ratification of the Nineteenth Amendment, Congress, at the urging of the women's movement, adopted the Cable Act, which provided that women who married certain foreign nationals would retain their American citizenship.[74] This move to restrict the application of the coverture domicile rules to matters of national citizenship was self-consciously presented as warranted by the ratification of the Nineteenth Amendment.[75] As one congressman put it: "in my judgment there was no particular force in the demand for this bill until the nineteenth amendment became part of the

72. *McNeil v. Connecticut Fire Ins. Co.*, 24 F.2d 221, 223 (W.D.Tenn. 1928).

73. See *Radice v. People of the State of New York*, 264 U.S. 292, 294–95 (1924).

74. See Act Relative to the Naturalization and Citizenship of Married Women, ch. 411, 42 Stat. 1021 (1922). According to the act, an American woman still lost her citizenship if she married a foreigner who was ineligible for United States citizenship, for example, an Asian man. On the exceptions to the Cable Act and thus the persisting connection between women's marital status and citizenship, see Cott, "Women's Marriage and Citizenship," 26–27.

75. See Cott, "Women's Marriage and Citizenship," 25–26; Virginia Sapiro, "Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States," *Politics and Society* 13 (1984): 1, 12–13.

organic law of the land. . . . At that moment the doctrine of dependent or derived citizenship became as archaic as the doctrine of ordeal by fire."[76] But, the Cable Act repealed the doctrine of dependent citizenship for some American women only; those who married men of the "wrong" race or nationality remained subject to the old common-law domicile rules, and forfeited their American citizenship.[77] Similarly, in this period, state law reform of the coverture domicile rules was generally quite limited. A number of states adopted legislation allowing married women to choose their own domiciles for purposes of voting; these state statutes repealed the common-law principles governing the domicile of married women in matters of voting *only*, otherwise leaving the common-law rule intact.[78]

Thus, as we have seen, in the period after ratification the Supreme Court and the United States Congress interpreted the suffrage amendment as reflecting and embodying a commitment to disestablish the gender-status norms of the common law; but neither the Court nor the Congress acted consistently on this understanding. A few federal and state courts interpreted the suffrage amendment as disestablishing the marital-status traditions of the common law. But this understanding of constitutional reform never gathered significant momentum. During the 1920s and 1930s, the Nineteenth Amendment was, however, given effect outside the voting context in matters deemed to concern "political" rights, such as the right to hold office and to serve on juries.

At least some state courts understood the suffrage amendment to embody a general sex-equality norm in matters concerning political participation. So, for example, the Supreme Court of Maine declared that after ratification of the Nineteenth Amendment, the governor could appoint a woman justice of the peace.[79] While the state legislature had responded to the ratification of the Nineteenth Amendment by enacting a statute declaring that the right to hold state office could not be denied on account of sex, the state's constitution had earlier been interpreted to bar office holding by women. The Maine Supreme Court declared this

76. Quoted in Sapiro, "Women, Citizenship, and Nationality," 12.

77. See note 74 above.

78. See, e.g., 1929 Me. Acts 268; 1922 Mass. Acts 315–16; 1927 N.J. Laws 235; 1929 N.Y. Laws 984; 1923 Ohio Laws 118–19; 1923 Pa. Laws 1034; Va. Code Ann. sec. 82a (Michie 1924). For a discussion of these laws, see Breckinridge, *Marriage and Civic Rights*, 4–5. I thank Gretchen Ritter for drawing my attention to these laws.

79. See *Opinion of the Justices*, 113 A. 614 (Me. 1921).

prior construction of the state constitution superseded by the Nineteenth Amendment. Among the several reasons given was the pronouncement, "Every political distinction based upon consideration of sex was eliminated from the Constitution by the ratification of the amendment. Males and females were thenceforth, when citizens of the United States, privileged to take equal hand in the conduct of government."[80]

Similarly, in the years following ratification, the Nineteenth Amendment was interpreted in a series of cases concerning sex-based restrictions on jury service, restrictions long complained of by the women's movement. The common law barred women from serving on juries, excluding women, as Blackstone observed, "propter defectum sexus"—on account of defect of sex.[81] Did ratification of the Nineteenth Amendment eliminate this ancient restriction on women's participation in the civic life of the community? In some states, legislatures responded to the suffrage amendment by revising the statutes governing juror qualifications to indicate that women were now eligible to serve. (As one court observed: "The spirit of equality of the sexes which [the Nineteenth Amendment] breathes moved the Legislature of New Jersey in 1921 to amend our act concerning jurors so as to include . . . women as well as men.")[82] In jurisdictions where the legislature took no such action, courts divided about the effect of the suffrage amendment on juror eligibility. Some courts concluded that, after ratification, women should serve as jurors because state statutes directed that jurors be drawn from the pool of electors—even if the relevant statutes referred to those eligible as "men."[83] But in other states, courts ruled

80. Id., 617. For other office-holding cases, see, for example, *In re Opinion of the Justices*, 135 N.E. 173 (Mass. 1922) (by striking sex restriction on voting from Massachusetts constitution, Nineteenth Amendment removed only source of law that might have precluded women from holding office); *Preston v. Roberts*, 110 S.E. 586 (N.C. 1922) (woman qualified to serve as notary public and deputy clerk of the superior court; disqualification to hold public office removed by Nineteenth Amendment); *Dickson v. Strickland*, 265 S.W. 1012, 1023 (Tex. 1924) (wife of former governor not disqualified from holding public office by reason of sex or marital status, citing Nineteenth Amendment). But see *State ex Rel. Buford v. Daniel*, 99 So. 804 (Fla. 1924) (upholding statute providing that county welfare board shall be composed of five men and four women, over dissenting opinion arguing that rule is unconstitutional under the Nineteenth Amendment).

81. William Blackstone, *Commentaries on the Laws of England* (1768; reprint, Chicago: University of Chicago Press, 1979), 3:362.

82. *State v. James*, 114 A. 553, 556 (N.J. 1921).

83. See, for example, *State v. Walker*, 185 N.W. 619, 625–26 (Iowa 1921); *Cleveland, C., C. & St. L. Ry. Co. v. Wehmeier*, 170 N.E. 27, 29 (Ohio 1929); and *Browning v. State*, 165 N.E. 566, 567 (Ohio 1929); see also *Palmer v. State*, 150 N.E. 917, 919 (Ind. 1926) (no gender referent in statute setting forth juror qualifications; ratification of the Nineteenth Amendment made women electors, hence eligible for jury service).

that the Nineteenth Amendment concerned the franchise only and did not affect other political and civil disabilities imposed on women. Thus, in construing an 1895 statute specifying that jurors were to be drawn from "male residents of the parish," the Louisiana Supreme Court reasoned that ratification of the Nineteenth Amendment might make women electors, but it did not make these new electors jurors: "The Nineteenth Amendment . . . refers not to the right to serve on juries, but only the right to vote."[84] The court emphasized that "[t]here is no statute of Louisiana declaring women eligible to serve on juries," and pointed out that "[a] trial by jury, at common law, and as guaranteed by the Constitution, has been universally declared to mean a trial by jury of men, not women, nor men and women." (418) Reasoning along similar lines, the Supreme Court of Illinois read a gender restriction into a *gender-neutral* statute that declared electors were to serve as jurors, reasoning, "The word 'electors,' in the statute here in question, meant male persons, only, to the legislators who used it."[85] The fact that the Constitution had been amended to make women electors was, in this court's view, irrelevant: "The Nineteenth Amendment to the Constitution of the United States makes no provision whatever with reference to the qualifications of jurors."[86] This view of the Nineteenth Amendment as a rule governing voting *simpliciter* was to prevail in the ensuing decades—and was, in later years, tacitly adopted by the Supreme Court, which never mentioned the Nineteenth Amendment in its cases upholding, and then striking down, statutes providing women automatic exemptions from jury service.[87]

Apart from the decisions just described, there is little other case law discussing the significance, or practical force, of the amendment in the ensuing decades. Not surprisingly, it is not until the late 1960s, with the rise of the so-called second-wave feminist movement, that discus-

84. *State v. Bray*, 95 S. 417, 418 (La. 1923).

85. *People ex rel. Fyfe v. Barnett*, 150 N.E. 290, 292 (Ill. 1926).

86. Id., 291.

87. See *Hoyt v. Florida*, 368 U.S. 57, 61–62 (1961) (upholding statute giving women absolute exemption from jury service unless they expressly waive the privilege, reasoning that "[d]espite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life"); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (statute providing women automatic exemption from jury service, waivable in writing, is unconstitutional under the Sixth and Fourteenth Amendments). *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding that state's use of gender as basis for peremptory strikes in jury selection is unconstitutional under equal protection clause).

sion of the Nineteenth Amendment begins to appear in the case law again. These initial scattered references suggested that the Nineteenth Amendment had force *outside* the voting context—again, intriguingly, in matters concerning marital-status law. For example, in 1968, a prominent federal jurisdiction decision rejected cases equating a wife's domicile with her husband's for diversity-jurisdiction purposes. In the court's view, the jurisdiction cases impermissibly perpetuated old common-law doctrines of marital status: "Whatever the ancient doctrine, a wife is capable of acquiring a domicile separate from that of her husband; at least to this extent legal equality of the sexes is embodied in the Fourteenth and Nineteenth Amendments."[88]

In this period, it was still not at all clear what form constitutional protection of women's rights might take. While momentum was developing for a new constitutional amendment guaranteeing women equal rights under law, litigants continued to pursue alternate constitutional strategies. And, as the Supreme Court had not yet struck down a sex-based law on equal-protection grounds, plaintiffs raising sex discrimination claims based them on both Fourteenth and Nineteenth Amendment grounds.[89] In this period, plaintiffs also invoked the Nineteenth Amendment as a constitutional basis for challenging criminal abortion statutes, arguing, for example, that "the effect of [a criminal abortion] statute in compelling them to bear unwanted children is to perpetuate an inferior status which the Nineteenth Amendment was intended to

For an argument that the Nineteenth Amendment should be read to bestow on women the full complement of political rights (for example, the right to hold office, serve on juries, and even serve in militias), see Akhil Reed Amar, "Women and the Constitution," *Harvard Journal of Law and Public Policy* 18 (1994): 471–72, and "The Bill of Rights as a Constitution," *Yale Law Journal* 100 (1991): 1202–3; see also Vikram David Amar, "Jury Service as Political Participation Akin to Voting," *Cornell Law Review* 80 (1995): 241–42. For a historical account of the Nineteenth Amendment's interpretation in the jury cases, see Jennifer K. Brown, "The Nineteenth Amendment and Women's Equality," *Yale Law Journal* 102 (1993): 2175; Gretchen Ritter, "A Jury of Her Peers: Citizenship and Women's Jury Service after the Nineteenth Amendment," typescript, May 1997.

88. *Spindel v. Spindel,* 283 F.Supp. 797, 813 (E.D.N.Y. 1968); see also *Gill v. Gill,* 412 F.Supp. 1153, 1154 (E.D.Pa. 1976) (quoting and following Judge Weinstein's opinion in *Spindel*).

89. See, for example, *Ex Parte Mathews,* 488 S.W.2d 434 (Ct.Crim.Ap.Tex. 1973) (striking down sex-differentiated age-of-majority law in juvenile code on equal-protection grounds that was challenged on Fourteenth and Nineteenth Amendment grounds); *Johnson v. State,* 476 P. 2d 397, 398 (Okla.Crim.App. 1970) (upholding sex-differentiated age of majority law in juvenile code against Fourteenth and Nineteenth Amendment challenge); accord *Benson v. State,* 488 P.2d 383, 384 (Okla.Crim.App. 1971); *Coyle v. State,* 489 P.2d 223, 224 (Okla.Crim.App. 1971).

eradicate."[90] The claim may sound strange today, but at the time it was advanced the Court had not yet held that women have a constitutional privacy right that protects decisions about abortion, nor had it yet given shape to sex discrimination jurisprudence under the equal protection clause. (In retrospect, the Nineteenth Amendment challenge to criminal abortion statutes is especially striking because it asserts a right against state action imposing an *inferior status*, reasoning about equality in sociological rather than formal terms.)

In 1970, a law review article appeared, entitled "Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment."[91] Its author suggested that courts had construed the amendment narrowly in the wake of its ratification—just as the Reconstruction amendments had been construed—but that the time was ripe to reconsider its meaning. He then reviewed the history of the suffrage campaign, and concluded that "the 19th amendment really had very little to do with the vote, but instead established the total equality of women with men. Under such an interpretation, there is a national right in all women to suffer no discriminations of any kind *because of their sex*" (50). In this view, "The 19th amendment to the Constitution, while on its face dealing only with women's suffrage, can be interpreted as an emancipation proclamation which extends the guarantees of all three Civil War amendments to all women" (26). As Justice Ginsburg recalls, "[T]here was always a view that once the Nineteenth Amendment was passed and it made women full citizens, that was, in effect, an Equal Rights Amendment. . . . Many people thought that you could put the Fourteenth Amendment together with the Nineteenth Amendment and that was essentially the Equal Rights Amendment. But it didn't happen."[92]

In short, during the opening years of the ERA campaign, it was still uncertain how women's claims for equal civic status would find constitutional grounding. But, by the early 1970s, the new campaign to amend the Constitution and secure for women equal rights under law

90. *Young Women's Christian Ass'n v. Kugler*, 342 F.Supp. 1048, 1056 (D.N.J. 1972). For discussion of the abortion litigation strategy, see Sylvia A. Law, "Rethinking Sex and the Constitution," *University of Pennsylvania Law Review* 132 (1984): 970–73 and n. 55; see also W. William Hodes, "Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment," *Rutgers Law Review* 25 (1970): 51 n. 101.

91. Hodes, "Women and the Constitution."

92. Comments of Justice Ruth Bader Ginsburg in *John Marshall Law School Alumni News*, December 1994, 45.

had moved the Court to find a constitutional basis for protecting women's rights that it had not discerned in the previous century. That constitutional basis proved to be, not the Nineteenth Amendment, but instead the equal protection clause of the Fourteenth Amendment.

IV. Burying "the Woman Question" in the Discourse of "Sex Discrimination": Heightened Scrutiny under the Equal Protection Clause

As we have seen, by 1970 there was a sketchy body of precedents that viewed the Nineteenth Amendment as recognizing women's equal civic status. Building from these fragments, or returning to the history of the suffrage campaign itself, the Court might have employed the suffrage amendment as a basis for developing a more substantial body of constitutional protections for women's rights. Instead, beginning in 1971, the Court struck down, for the first time, a sex-based statute under the equal protection clause of the Fourteenth Amendment.[93] In retrospect, the Court's choice to ground constitutional protections for women's rights in the equal protection clause is not terribly surprising. In the wake of the civil rights movement of the 1950s and 1960s, the Court had construed the clause expansively, to give unprecedented protections against race discrimination to African Americans and other minority groups. Equal-protection jurisprudence was alive and growing at a prodigious pace, while the Nineteenth Amendment had languished mute for decades.[94]

What is striking, however, is the Court's failure to link the Nineteenth and Fourteenth Amendments in developing a body of constitutional protections for women's rights. There was ample precedent for this kind of synthetic interpretation of the Constitution's provisions. To cite one prominent example, when the Court ruled in *Brown v. Board of Education* that the equal protection clause of the Fourteenth Amendment forbade de jure race discrimination in public education, it declared that the same principles of equal protection binding the states under the Fourteenth Amendment bound the federal government under the due process clause of the Fifth Amendment. The Court's ruling in *Bolling v. Sharpe*[95] thus "incorporated" a twentieth-century inter-

93. *Reed v. Reed*, 404 U.S. 71 (1971).

94. This same set of circumstances would have influenced litigators as well.

95. 347 U.S. 497 (1954).

pretation of a nineteenth-century amendment into a constitutional provision dating from the late eighteenth century. Along very different lines, the constitutional right of privacy that the Court was developing in the late 1960s and early 1970s was held to rest on the "penumbras" of several constitutional provisions. Employing a synthetic interpretive approach, the Court might have held that the Nineteenth Amendment's grant of equal civic status to women would find substantive elaboration under the equal protection clause of the Fourteenth Amendment.[96]

Had the Court proceeded in this fashion, it might have returned to the ratification history of the suffrage amendment and observed that generations of Americans had debated the way law should regulate women's status in diverse spheres of social life. It might then have recalled the core objection to woman suffrage: that woman were represented in the state through male household heads and that women's participation in matters of civic governance was fundamentally inconsistent with their role as wives and mothers. The Court could then have pointed out that, after seven decades of protest, Americans finally amended the Constitution, decisively repudiating the republican conception of the state as an aggregation of male-headed households and recognizing that women were entitled to participate directly in democratic self-governance, as equal citizens under law. Had the Court proceeded to give effect to the normative commitments of the Nineteenth Amendment through the equal protection clause of the Fourteenth Amendment, it would have grounded equal-protection jurisprudence in the history of women's struggle for equal rights, acknowledging that women resisted their pervasive disempowerment over the centuries, identifying the specific social sites of that struggle, and recognizing that, in ratifying the Nineteenth Amendment, the nation had made a commitment to transform the basic ordering principles of the Republic.

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96. For similar observations about the interpretation of the Nineteenth Amendment, see Amar, "Women and the Constitution," 472 (reading Nineteenth Amendment to alter Article 2 references to president as "he"); Amar, "Bill of Rights," 1202–3 (discussing synthetic or holistic interpretation of the Constitution with specific reference to the Nineteenth Amendment).

Bruce Ackerman has advanced a richly developed theory of synthetic constitutional interpretation, engagement with which is beyond the scope of this essay. For his most recent elaboration of his views, see Bruce Ackerman, *We the People: Transformations* (Cambridge: Harvard University Press, 1998); see also Bruce Ackerman, "Constitutional Politics/Constitutional Law," *Yale Law Journal* 99 (1989): 515–47.

The question of emancipating women from the status constraints of the family would have been central in that narrative, as it was in the *Adkins* opinion. So conceived, the equal protection jurisprudence would have been grounded in a sociohistorical understanding of women's subordination in the American legal system.

But the Court did not proceed in this fashion. Instead, in the early 1970s, the Court began haltingly to construe the equal protection clause to bar certain forms of sex-based legislation, and it did so without reference to the debates over women's status that culminated in ratification of the Nineteenth Amendment. Considered from this vantage point, the modern law of sex discrimination was founded in an act of historical erasure. What is more, in basing constitutional protections for women's rights on the equal protection clause, the Court never revisited the ratification history of the Fourteenth Amendment in an effort to determine whether, or to what extent, its framers understood the language they had adopted to protect women against sex discrimination. A credible case can in fact be made that the authors of the Fourteenth Amendment understood Section 1 to employ language of sufficient generality that it might reach certain forms of gender status regulation.[97] Given that, since *Brown*, the Court had been interpreting the equal protection clause in ways that quite arguably exceeded expectations of its framers, this return to the ratification history of the Fourteenth Amendment would at least have had the salutary effect of grounding its protections in the history of the struggle for women's rights. But the Court did not look to history. Rather, it proceeded on what is still the "commonplace" assumption, that the framers of the Fourteenth Amendment gave no thought to questions of women's rights. Unfortunately, this view is often held without careful analysis of the historical record (concerning, for example, the intentions of move-

97. For one such argument, see Morais, "Sex Discrimination," 1153. There is no doubt that the framers of the Fourteenth Amendment understood that it could have implications for groups other than African Americans. See William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge: Harvard University Press, 1988), 163 ("Those who discussed the amendment were aware of its implications for other groups, such as Chinese, Indians, women, and religious minorities"); Mark G. Yudof, "Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics," *Michigan Law Review* 88 (1990): 1387–89, 1396–97 (discussing scattered references to women in debates over the Fourteenth Amendment). See also pp. 147–48 of this essay. Evaluating the significance of the framers' statements and intentions for contemporary understandings of the Fourteenth Amendment is, however, a complex undertaking, beyond the scope of this essay.

ment allies in the Republican Party, prevailing distinctions between civil and political rights, congressional floor debates on the reach of the amendment, etc.), and generally seems to reflect the presentist assumption that the campaign for women's rights began in earnest sometime in the late 1960s.

Thus, while not as significant as its neglect of the Nineteenth Amendment, the Court's decision to extend the protections of the equal protection clause to women without considering the ratification history of the Fourteenth Amendment once again effaced the struggles of the woman's rights movement. Of course, reckoning with that history would have exposed weaknesses in the intentionalist case for interpreting the equal protection clause to prohibit sex discrimination; yet those deficiencies might have been cured by synthetic interpretation—by implementing the Nineteenth Amendment's commitment to sex equality through the equal protection clause of the Fourteenth Amendment, reading the later amendment to modify the normative framework of its predecessor, much as the Court has implemented the equal protection commitments of the Fourteenth Amendment through the due process clause of the Fifth Amendment.[98] On this view, the struggle for constitutional recognition of women's rights begun in the era of the Civil War was resolved in 1920, resulting in a national commitment to disestablish gender inequality as carefully deliberated as the commitment to disestablish race inequality expressed in the Reconstruction amendments.

But the Court built the case for applying the equal protection clause to sex discrimination in very different terms. The best account we have of the reasons underlying the Court's decision to review sex-based state action with heightened scrutiny appears in a plurality opinion authored by Justice Brennan in the case of *Frontiero v. Richardson*.[99] In this opinion, Justice Brennan argued that under the equal protection clause, sex-based state action should be reviewed with "strict scrutiny," just as race-based state action was. Such a holding would have created a strong, virtually irrebuttable presumption that all sex-based legislation was unconstitutional. (Brennan, however, failed to secure a majority of the justices to join his opinion; several took refuge in the argument that as the ERA was currently being considered for ratification, it

98. Cf. Amar, "Women and the Constitution," 471–72.

99. 411 U.S. 677 (1973).

would be unseemly for the Court to interpret the Constitution in a manner that would effectively preempt state decisions about whether to amend the Constitution.)[100]

In his *Frontiero* opinion, Justice Brennan made the case for strict scrutiny of sex-based state action on the grounds that sex discrimination was sufficiently like race discrimination so as to warrant similar constitutional treatment. History did play a role in this argument. Justice Brennan began his argument by announcing, "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination";[101] yet, Justice Brennan's purpose in invoking the history of women's treatment in the American legal system was to establish an analogy between the case of race and sex discrimination. Pointing to expressions of separate-spheres ideology in the opinions of the Supreme Court ("The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator"),[102] Justice Brennan then observed:

> As a result of notions such as these, our statute books gradually became laden with gross, stereotypical distinctions between the sexes and, indeed, throughout much of the 19th century the position of women was, in many respects, comparable to that of blacks under the pre–Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. . . . And although blacks were guaranteed the right to vote in 1870, women were denied even that right . . . until adoption of the Nineteenth Amendment half a century later.[103]

It is striking that, even as Justice Brennan recounts the nation's "long and unfortunate history of sex discrimination," he represents the history of women in the American legal system as legally relevant only insofar as their "position . . . was . . . comparable to blacks." It is the collective memory of *race* relations that makes women's experience in the

100. See id., 691–92 (Justices Powell, Burger, and Blackmun, concurring).

101. Id., 684.

102. Id., 685 (quoting *Bradwell v. State,* 16 Wall. 130, 141 [1873] [Bradley, J., concurring]).

103. Id., 685.

American legal system visible as a "history of sex discrimination" and invests that history with normative significance it is otherwise assumed to lack. Thus, the race/gender analogy generates a narrative that simultaneously represents and effaces the history of women's treatment in the American legal system, even as it completely occludes the historical experiences of women of color.

This dynamic of recognizing and effacing history is replicated at the level of constitutional doctrine, as well. In the quoted passage, Justice Brennan invokes the history of women's treatment in the American legal system in order to demonstrate the similarity of race and sex discrimination, an analogy he completes by arguing that sex, like race, is "an immutable characteristic determined solely by accident of birth" and "frequently bears no relation to ability to perform or contribute to society."[104] In short, the history Justice Brennan recites has no independent constitutional significance; it is recited only to construct the analogical nexus between race and sex discrimination and thus to establish a constitutional basis for reviewing sex discrimination claims otherwise presumed not to exist under the equal protection clause. Consistent with this, in the two decades of cases decided after *Frontiero*, the Court never again revisited the nation's "long and unfortunate history of sex discrimination" or referred to the Nineteenth Amendment—a pattern unbroken until decisions of the past several terms, as I will discuss below. Instead, development of the Court's sex discrimination jurisprudence proceeded without grounding in the nation's legal or constitutional history.

It was not until 1976 that a majority of the Court concluded that sex-based state action warranted heightened or "intermediate scrutiny" under the equal protection clause—a standard like, but somewhat less rigorous than, the "strict" scrutiny standard the Court employs in reviewing race-based state action. The Court chose what can at best be described as a curious case in which to make this historic pronouncement. In *Craig v. Boren*,[105] a teenage boy argued that an Oklahoma statute prohibiting the sale of "nonintoxicating" 3.2 percent beer to males under the age of twenty-one and to females under the age of eighteen discriminated against him on grounds of sex. Against the history detailed in Justice Brennan's *Frontiero* opinion, the "injury" the

104. Id., 686.
105. See 429 U.S. 190 (1976).

plaintiff "suffered" was appallingly trivial. Even given the ACLU's strategy of bringing sex discrimination claims raised by men as well as women,[106] the Court had before it other, more significant cases in which it could have announced this new, heightened standard of equal-protection review. In the years between *Frontiero* and *Craig*, the Court had upheld a statute denying employment disability insurance to pregnant women (reasoning infamously that pregnancy classifications were not sex classifications because they divided the world into pregnant and nonpregnant persons).[107] The Court had, without so much as mentioning the Nineteenth Amendment, struck down a statute exempting women from jury service.[108] It had addressed questions concerning gender-differentiated social security benefits, marital inheritance rights, and age-of-majority statutes, as well as women's service in the military.[109] Any of these cases raised issues concerning the history of women's treatment in the American legal system more pressing than those at issue in *Craig*.

Nonetheless, it was on these facts—concerning the right of a teenage boy to purchase watered-down beer when girls of his age could—that the Court announced the new standard to govern sex discrimination claims under the equal protection clause. For the government to regulate in a sex-based manner, it would henceforth have to demonstrate that the sex-based classification bore a "substantial" relationship to an "important" government interest.[110] In announcing this standard, Justice Brennan's opinion for the Court did not so much as mention the legal and constitutional history he had invoked in the *Frontiero* opinion; indeed, given the plaintiff and the injury at issue in the

106. See David Cole, "Strategies of Difference: Litigating for Women's Rights in a Man's World," *Law and Inequity Journal* 2 (1984): 54–58.

107. See *Geduldig v. Aiello*, 417 U.S. 484, 496–97 n. 20 (1974) ("The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes").

108. See *Taylor v. Louisiana*, 419 U.S. 522 (1975).

109. See *Kahn v. Shevin*, 416 U.S. 351 (1974) (upholding statute granting widows a property tax exemption not granted to widowers); *Winberger v. Wiesenfeld*, 420 U.S. 636 (1975) (striking down provision of Social Security Act that granted survivors benefits based on earnings of a deceased man to his widow, but provided no survivors benefits based on earnings of a deceased woman to her widower); *Stanton v. Stanton*, 421 U.S. 7 (1975) (striking down age-of-majority statute requiring a parent to pay child support to girls until eighteen and boys through the age of twenty-one); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (allowing differential treatment of male and female naval officers, in view of restrictions on women's eligibility for service and combat).

110. *Craig*, 197.

Craig case, it would have been somewhat difficult to state the relevance of this history. Instead the opinion fleshed out the new standard of review by enumerating a list of constitutionally impermissible attitudes. Government actors could no longer engage in sex-based regulation when such regulation "foster[ed] 'old notions' of role typing" or relied on "'archaic and overbroad' generalizations" about the sexes.[111] As the Court summarized the logic of its new sex discrimination cases: "increasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas' were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised on their accuracy."[112]

Thus, in explaining its new standard of review, the *Craig* opinion refers to history, but not to the nation's legal or constitutional history. Instead, the opinion's prohibition on sex discrimination is situated in a history of evolving social attitudes: the Court exhorts state actors to shed "'old notions' of role typing," "archaic and overbroad generalizations," and "increasingly outdated misconceptions" concerning the sexes. Testing sex-based state action for evidence of such "outdated misconceptions" is the announced purpose of *Craig*'s heightened standard of review. Henceforth, for state actors to regulate on the basis of sex, they would have to defend their use of sexually discriminatory means by demonstrating that it was substantially related to an important government purpose. By requiring a showing that sex classifications in law rationally advance permissible ends, rather than reflect archaic stereotypical norms, the standard of heightened scrutiny aims to free the nation from what the *Frontiero* opinion referred to as its "long and unfortunate history of sex discrimination." Indeed, in this view, heightened scrutiny performs a kind of commemorative act, tacitly invoking a regrettable past the nation is aspiring to transcend.[113] But the history the doctrine of heightened scrutiny strives to transcend remains utterly unparticularized, lying in the realm of what we might call "old-fashioned ways of thinking." No examination of this history guides the operations of heightened scrutiny. History plays no role in

111. Id., 198.

112. Id., 199.

113. See, for example, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136, 1425 (1994) (nation's "'long and unfortunate history of sex discrimination' . . . warrants the heightened scrutiny we afford all gender-based classifications today"); *United States v. Virginia*, 116 S.Ct. 2264, 2274 (1996) ("Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history").

identifying the group of plaintiffs heightened scrutiny protects or the kinds of state action it prohibits.

As the Court understands sex discrimination, anyone, male or female, may be its victim; indeed most of the major sex discrimination cases were brought by male plaintiffs.[114] How is it that men, as well as women, may complain that they are the victims of sex discrimination? To recall: the *Frontiero* plurality opinion pointed to two kinds of rationales for subjecting sex-based state action to heightened scrutiny—that women had suffered a history of discrimination and that sex was an immutable trait bearing no relation to ability to perform. While the "immutability" and "history of discrimination" rationales for heightened scrutiny are generally viewed as complementary, they in fact reflect two competing impulses in contemporary antidiscrimination law. The history-of-discrimination rationale is concerned with the treatment of particular social groups (racial and ethnic minorities, women), while the immutability rationale is concerned with the treatment of individuals (all who possess a "race" or "gender"). The impulse giving rise to the history-of-discrimination rationale seeks to remedy, or at least to alleviate, entrenched patterns of group-based subordination, while the impulse giving rise to the "immutability" rationale seeks to eliminate distinctions among citizens predicated on group membership.[115] It is in fact the immutability rationale, and not the history-of-discrimination rationale, that best explains the body of equal-protection doctrine the Court has elaborated. *Heightened scrutiny protects individuals against sex-based classification by the legal system.*

The Court has made no effort to connect the kinds of state action triggering heightened scrutiny to the history of women's treatment in the legal system. To the contrary: Heightened scrutiny is triggered by *any* form of state action that employs a sex-based classification. All state action employing sex-based classifications receives the same degree of scrutiny, whether the law regulates access to 3.2 percent beer, institutions of higher learning, or women's bodies. Moreover, the Court has

114. As explained in *Virginia,* "the Court . . . has carefully inspected official action that closes a door or denies opportunity to women (or to men)." *United States v. Virginia,* 116 S.Ct. 2264, 2275 (1996).

115. Other criteria *Frontiero* invokes to build the case for heightened scrutiny can be similarly distinguished. "Political powerlessness" is an indicator of group-based subordination, while the high "visibility" of the sex characteristic is, like immutability, relevant to building the case that sex discrimination subjects individuals to arbitrary distinctions on the basis of group membership. See *Frontiero v. Richardson,* 411 U.S. 677, 684–86 (1973).

defined the type of regulatory distinctions that count as sex-based classifications without attention to history or social meaning. Reasoning formalistically, it has ruled that policies regulating pregnancy do not employ sex-based classifications because such policies discriminate between pregnant women and nonpregnant persons (a group including both men and women); hence laws excluding pregnant women from employment or criminalizing abortion do not receive heightened scrutiny under the equal protection clause.[116] Similarly, the Court has ruled that statutes awarding civil-service employment preferences to veterans are not sex-based, because the preferences advantage a group, at the time of the Court's decision, virtually, but not exclusively, male.[117]

And when the state regulates on what the Court deems to be a "facially neutral" basis, the Court adopts an exceedingly deferential posture in reviewing the legislation. In such cases, the Court has announced that it will defer to legislative judgments about social policy so long as there is no evidence that the facially neutral state action was motivated by a discriminatory purpose, a concept that the Court has defined as tantamount to malice (state action undertaken "at least in part 'because of,' and not merely 'in spite of,' its adverse effects" on women).[118] In so defining the triggers for heightened scrutiny, the Court has made no effort to consult the history of women's treatment in the legal system. It matters not that many nineteenth-century doctrines of marital-status law were couched in "facially neutral" terms (e.g. the doctrine of interspousal tort immunity that precluded "spouses" from suing each other for battery).[119] Nor is it relevant that, under the pressure of heightened scrutiny, many of the most infamous marital-status doctrines of the common law have recently been redefined in gender-neutral terms. A rule exempting spouses from criminal prohibitions on rape or treating spousal battery more leniently than other forms of assault or valuing "homemaker" services or defining child support will not trigger heightened scrutiny, no matter how closely its history may be tied to the marital-status rules of the common law.[120]

116. See *Geduldig v. Aiello*, 417 U.S. 484, 494–97 (1974).

117. See *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 280–81 (1979).

118. Id., 279.

119. See Siegel, "The Rule of Love," 2156–58.

120. See id., 2188–96.

In its preoccupation with formal acts of classification, the law of sex discrimination in fact converges with the modern law of race discrimination as that body of doctrine was "tamed" in the 1970s;[121] as I have elsewhere argued, both bodies of equal-protection doctrine now define discrimination without attention to history—in particular, ignoring the ways that disestablishing a body of status law may cause status-enforcing state action to evolve in rule structure and justificatory rhetoric.[122] Yet, the tendency to equate discrimination with classification took decades to become fully entrenched in the law of race discrimination. The modern law of race discrimination began with a several-decade struggle over the disestablishment of America's apartheid system, in public education and elsewhere. In hundreds of cases, minority plaintiffs challenged overt practices of racial classification, but they also challenged apartheid's less formalized manifestations, contesting the state's claim to have eradicated the legacy of segregation ("present effects of past discrimination") in diverse social institutions.[123] It was not until the 1970s that the Court began restrictively to equate race discrimination with racial classification,[124] and, again, not until this era, that the Court began, with considerable hesitation, to treat the race discrimination claims of white plaintiffs as commensurable with the race discrimination claims of minority plaintiffs. By contrast, at no point in the litigation of sex discrimination claims was there ever a sustained effort to disestablish entrenched status relations in particular social institutions. For the most part, it would seem, the eradication of formal gender classifications was taken by itself to signify the eradication of historically subordinating practices. (Thus, the law of marriage was taken to be cleansed of sex discrimination when stripped of sex classifications, although the governing norms of the institution remained unexamined and, now, effectively immunized from equal-

121. It was not until 1976 that the Supreme Court ruled that plaintiffs challenging "facially neutral" state action that had a disparate impact on a subordinated group would have to prove that the challenged action was motivated by discriminatory purpose. See *Washington v. Davis,* 426 U.S. 229 (1976); see generally David A. Strauss, "Discriminatory Intent and the Taming of *Brown,*" *University of Chicago Law Review* 56 (1989): 935; Siegel, "Equal Protection," 1129–46.

122. Siegel, "Equal Protection."

123. See, e.g. Daniel J. McMullen and Irene Hirata McMullen, "Stubborn Facts of History—the Vestiges of Past Discrimination in School Desegregation Cases," *Case Western Law Review* 44 (1993): 75.

124. The Court struggled with the question as early as the 1970s but did not decisively resolve it until its decision in *City of Richmond v. J.A. Croson,* 488 U.S. 469 (1989).

protection scrutiny.)[125] Further, as I have observed, from the beginning, men as well as women figured as sex discrimination plaintiffs, with the result that claims of sex discrimination were often only tenuously connected to an historically subordinated group and the history of its treatment in the legal system. No doubt, those who litigated the early sex discrimination cases share responsibility for this along with the Court. But no matter how one allocates responsibility, the result remains: the modern law of equal protection understands sex discrimination formally, as involving practices of sex-based classification, and has never critically scrutinized the institutions and practices that have played an historic role in perpetuating women's secondary status in the American legal system.

In short, doctrines of heightened scrutiny may serve a commemorative function, recalling a past they aspire to transcend; but the past that doctrines of heightened scrutiny construct has little to do with the history of gender status regulation in the American legal system. It may be that "our Nation has had a long and unfortunate history of sex discrimination," but as the Court has elaborated equal-protection doctrine, it has not tied the "history of sex discrimination" to the institutions and practices that generations of suffragists protested, and generations of Americans defended, as they debated "the woman question."

V. *What Difference Would Remembering Make?*

The interpretive judgments I have described both reflect, and perpetuate, social memory of a certain sort. The justices who forged sex discrimination law in the 1970s were no doubt raised in a world where few would have had cause to know much about the history of women's subordination in the American legal system or the history of the quest for women's rights. With women's access to the academy and the bar severely restricted throughout most of the twentieth century, both scholarly and popular consciousness about such matters was scant. These same conditions shaped the understandings of those advocates who argued sex discrimination claims before the Court.

Thus, it was not as an advocate before the Court, but over two decades later as a member *of* the Court, that Ruth B. Ginsburg would

125. See Siegel, "The Rule of Love," 2193 and n. 275.

self-consciously situate claims about the law of sex discrimination in an historical framework.[126] Her opinion for the Court in the *Virginia Military Institute* case,[127] decided in 1996, broke with prior case law and grounded the doctrine of heightened scrutiny in national and constitutional history, revisiting the Founding through a narrative of wrong and rectification:

> Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago [in *Frontiero*], "our Nation has had a long and unfortunate history of sex discrimination." Through a century plus three decades and more of that history, women did not count among voters composing "We the People"; not until 1920 did women gain a constitutional right to the franchise. . . . And for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any "basis in reason" could be conceived for the discrimination. . . .
>
> In 1971, for the first time in our Nation's history, this Court ruled in favor of a woman who complained that her State had denied her the equal protection of the laws.[128]

In her *Virginia Military Institute* opinion, Justice Ginsburg does not invoke history to demonstrate that sex discrimination resembles race discrimination. But she does employ a mode of reasoning about equal protection often encountered in the Court's opinions about race discrimination. The *Virginia Military Institute* decision invokes a history of constitutional wrongs to demonstrate why the nation has a deep moral obligation to protect women's constitutional rights. It took some two

126. Some of Justice Ginsburg's pathbreaking sex discrimination briefs for the ACLU invoke the "history of discrimination" argument to establish the race/gender analogy adopted in *Frontiero*, but the history of women's treatment in the American legal system remains peripheral to their main constitutional arguments. See, e.g. Brief for Appellant, 15–16, *Reed v. Reed*, 404 U.S. 71 (1971); Brief of American Civil Liberties Union Amicus Curiae, at 11–20, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (beginning argument with a section entitled "Historical Perspectives" that compares the law's treatment of women and blacks in a passage from which Justice Brennan's opinion drew, nearly verbatim).

127. *United States v. Virginia*, 116 S. Ct. 2264 (1996).

128. Id., 2274–75.

decades, and more than twenty-five opinions, for the Court to ground equal-protection analysis of sex discrimination questions in a narrative emphasizing collective agency and responsibility in this way. Differently put, it took the appointment of a nationally prominent woman's rights advocate to the Court for the Court to reason about questions of sex discrimination this way. If we analyze the dynamics of social memory at work in the Court's sex discrimination cases, it would appear that the analytical framework of equal protection law has been deeply shaped by relations of gender inequality the doctrine purports to rectify.

What difference would a memory of constitutional wrongs make to the adjudication of women's constitutional rights? To begin with, the memorialization of wrongs is itself a symbolic practice of rectification, for when a community voices collective acknowledgment of collective wrongdoing, it defines itself in opposition to its own past practices. Considered in the best light, equal-protection law functions in just this way; unlike other bodies of constitutional doctrine, equal-protection law defines the nation *against* its own "history and traditions," and almost exclusively through its aspirational ideals.[129] If we consider the ways that law functions as a vehicle of social memory, it is possible to see how this process of redefining national identity might work. Were the Court to recount the narrative of constitutional wrong and rectification it tells in the *Virginia Military Institute* case in its equal-protection opinions of the next decade, the social memory of future generations of Americans might well differ from the memory of those who inaugurated modern sex discrimination jurisprudence.

Would such narratives of collective agency ultimately engender a deeper sense of national responsibility in matters of women's rights? We can only speculate about the answer to so large a question, with intuitions, in all likelihood, reflecting our judgments about the nation's conduct in matters of race during the last few decades. But the significance of memorialization does not hinge on this "big" question alone. Social memory shapes collective intuitions about gender justice in more local and particularized ways.

Stories about the past shape our "common sense" intuitions about

129. It is for this reason that considerations of past practice lack the authority in matters of equal protection that they possess in other bodies of constitutional doctrine. Cf. Cass R. Sunstein, "Homosexuality and the Constitution," *Indiana Law Journal* 70 (1994): 1.

the present; more concretely, the stories we tell about gender relations in the past shape our understandings of gender relations in the present. As Vicki Schultz has demonstrated, the nation is inclined to view racial segregation in the workplace within a framework of discrimination, while it assumes that gender segregation in the workplace is the product of women's choices.[130] Consider an example or two drawn from the Court's sex discrimination cases of the 1980s. In a case evaluating an affirmative action plan for a county road-dispatcher position for which no woman had ever been hired, Justice Scalia observed: "It is absurd to think that the nationwide failure of road maintenance crews, for example, to achieve . . . female representation is attributable primarily, if even substantially, to systemic exclusion of women eager to shoulder pick and shovel. It is a 'traditionally segregated job category' . . . in the sense that, because of longstanding social attitudes, it has not been regarded *by women themselves* as desirable work."[131] Along similar lines, Justice Powell defended sex segregation at a state university by observing, "Coeducation, historically, is a novel educational theory. . . . [M]uch of the Nation's population during much of our history has been educated in sexually segregated classrooms," and then observed of that history: "The sexual segregation of students has been a reflection of, rather than an imposition upon, the preference of those subject to the policy."[132] As these opinions should illustrate, stories explaining how the world came to be organized profoundly affect commonsense intuitions about the justice of the social order, exculpating or implicating a wide range of institutional practices. The view that gender relations are the product of an evolving social consensus remains quite prevalent today, continuing to obscure the role that more coercive forces play in maintaining the gender stratification of social life.

Because narratives about the past can raise questions about the legitimacy of particular institutions and practices, they can also identify ways in which the social forms of gender injustice vary from, and intersect with, the social forms of racial injustice. At present, American antidiscrimination law rests on an analogy between race and sex dis-

130. See Vicki Schultz, "Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument," *Harvard Law Review* 103 (1990): 1749.

131. *Johnson v. Santa Clara County*, 480 U.S. 616, 668 (1987).

132. *Mississippi University v. Hogan*, 458 U.S. 718, 736–37 (1982) (Powell, J., dissenting). This Powell opinion supplied the framework for the legal arguments the Virginia Military Institute recently employed to justify its gender-exclusionary admissions policy.

crimination in which it only halfheartedly believes. In constitutional parlance, sex discrimination deserves heightened scrutiny because it is like race discrimination, but sex discrimination only deserves "intermediate" rather than "strict" scrutiny because, in the last analysis, sex discrimination is in fact unlike race discrimination. Intuitions about the difference between race and sex discrimination, and intersections between them, might more usefully be informed by an understanding of the particular social processes whereby race and gender inequality have been enforced.

Modern equal-protection jurisprudence understands discrimination as a practice of classification—a conceptual artifact, perhaps, of the struggle to disestablish Jim Crow.[133] But, dimly, equal-protection doctrine also grasps that discrimination is an expression of status relations. When we think about discrimination in a status framework, it is clear that different kinds of status relations are enforced through different networks of meanings, institutions, and practices; further, persons who are members of multiple status groups are subordinated in distinctive ways. Finally, as I have elsewhere argued, status regulation is dynamic, continually changing shape as it is contested.[134] Pursuing this inquiry in the case of gender, we would find that family law played a central role in subordinating women and has enforced the status position of women of different class, ethnic, and racial backgrounds in various ways that have in fact changed shape over the centuries.

We might arrive at this understanding by interpreting the Fourteenth Amendment's guarantee of equal protection sociohistorically, rather than formally. But we could also arrive at this understanding by asking ourselves, in simple narrative form, what was at stake in the protracted struggle over "the woman question." Exactly what commitment did the nation make when, after seven decades of protest, it finally broke with the foundational understandings of the Republic and amended the Constitution to make women equal citizens with men? Not surprisingly, the story of the debates over the Nineteenth Amendment would lead us to the same sites of status conflict—prominent among them, the family—that sociohistorical analysis under the equal protection clause would. In this way, recovering the story of "the woman question" from "our nation's long and unfortunate history of

133. Cf. Siegel, "Equal Protection," 1142–44.

134. See, for example, id. 1116–19, 1141–48.

sex discrimination" might well alter our judgments about the nature of "sex discrimination" itself—a regulative concept that operates far beyond the courtroom walls.

No doubt, the ways that contemporary generations of Americans would give concrete social meaning to the normative commitments of the Nineteenth Amendment might vary from understandings of those who ratified it. This is as it should be in a nation that celebrates its highest constitutional moments in opinions like *Brown v. Board of Education.* The struggle of each generation to make sense of the nation's foundational constitutional commitments, and to take responsibility for its compromised record of respecting them, is a crucial part of the American tradition, one that gives meaning to the Constitution as a constitutive institution in the nation's life.[135]

135. With such a synthetic reading of the Nineteenth and Fourteenth Amendments, we might ask: Even if the nation has abandoned most sex-based forms of regulation, has it yet emancipated women from the status constraints of the family? In what ways does state regulation of family life *still* presuppose, and perpetuate, duel standards of citizenship for "independent" and "dependent" household members? We could ask such question in matters concerning work, parenting, and the distribution of property, or the physical security of persons in intimate relations.