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Women and the Constitution:

SYMPOSIUM PAPERS

THE CARTER CENTER OF EMORY UNIVERSITY

WOMEN AND THE CONSTITUTION: SYMPOSIUM PAPERS

From

*Women and the Constitution:
A Bicentennial Perspective*

*Atlanta, Georgia
February 10-13, 1988*

Convened by

**Rosalynn Carter
Betty Ford
Lady Bird Johnson
Patricia Nixon**

Presented by

The Carter Center of Emory University
In Conjunction with
Georgia State University
The Jimmy Carter Library

Executive Committee

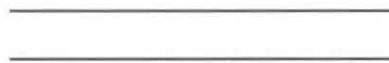
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**WOMEN AND THE CONSTITUTION:
SYMPOSIUM PAPERS**

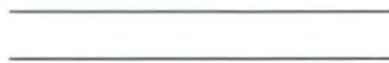


Dayle E. Powell, Director
Women and the Constitution: A Bicentennial Perspective

Joan M Grayson, Program Coordinator



Women and the Constitution: Symposium Papers
Edited by
Joyce M. Pair



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Foreword: Rosalynn Carter

A remarkable event occurred in Atlanta, Georgia, in February 1988. Some two thousand people gathered together for a symposium that drew more than one hundred and fifty of the most outstanding scholars on women's issues, as well as many of the best known women leaders in the country. These people were all part of a symposium convened by the Carter Center of Emory University, in conjunction with Georgia State University and the Jimmy Carter Library, called *Women and the Constitution: A Bicentennial Perspective*.

As a result of these combined efforts, The Carter Center published a collection of the major speeches and addresses given at the symposium. We also introduced a volume of curriculum materials with an accompanying teacher's guide. However, this volume of symposium papers marks one of our most important publications to date. Its significance lies partly in the fact that so many authors contributed to its publication. They were drawn from many fields, primarily from academia but also from government service, from the practice of law, from the bench, from corporate America, and from public policy institutions.

This collection of papers is also significant for the diversity of its topics. Here the reader will find not only an historical account of women's issues, such as suffrage, but also an analysis of contemporary issues, including reproductive rights, pornography, and affirmative action. There is also a section with contributions from youth predicting where women will take America by the year 2000. This section resulted from a national essay contest conducted in conjunction with the symposium.

This volume will also introduce the reader to invisible women—Mercy Otis Warren, for one—who played important roles in shaping our Constitution, and highly visible, if often ignored, African-American women who endured double and even triple layers of discrimination. The reader will be saddened by accounts of the exclusion and mistreatment of women and inspired by the success stories and visions of what women will accomplish in the next century.

This collection of symposium papers, and the other three volumes, would not have been possible without the efforts of so many people. Notable among them is Dr. Naomi Lynn, Dean of Public and Urban Affairs at Georgia State University, who served as chair of the

Program Committee. All the members of that committee worked to select the most qualified authors and the best paper proposals suited to the project.

Special thanks to Dr. Joyce Pair, who has edited these papers for publication. Dr. Pair began as a volunteer for the symposium and has continued to work with us during the past two years. Through her capable organization, she has made the production of this volume a pleasure for all those connected with it.

Of course, we are grateful to each author whose work is included herein for her or his scholarship and dedication to advancing women's issues.

Without the help of these and so many other women and men this publication, like its three companion volumes, would not have been possible.

Preface: Dayle E. Powell

At the Carter Center we have had a concern about women's issues and about education for a number of years. The personal commitment of President and Mrs. Carter to these issues was evidenced during their administration and has continued in their lives after the White House. Mrs. Carter was a strong and highly visible campaigner for the Equal Rights Amendment. President Carter demonstrated his commitment by not only supporting the Equal Rights Amendment but also by appointing more women to public office than any other President. So it is fitting that *Women and the Constitution* has been one of the most successful program initiatives at The Carter Center.

When Mrs. Carter agreed in 1986 to serve as the convener for the symposium, she brought to the task her dedication and enthusiasm. She also asked Betty Ford, Lady Bird Johnson and Pat Nixon to join her in the effort, and all agreed. Soon there were numerous committees handling everything from the academic program to logistics and hotel accommodations. Hundreds of volunteers donated thousands of hours to ensure the success of the symposium, which was held in February 1988.

But the symposium was only the first phase of a larger commitment to women's issues. It was always our intention that the symposium leave a legacy for our children and our grandchildren so that they, unlike we, would not have to wonder about women's roles in the development of the Constitution. We wanted to leave behind carefully documented materials they could study in school or on their own initiative.

Immediately following the symposium we printed *Women and the Constitution: Speeches and Addresses* to make available the texts of remarks by such leaders as Justice Sandra Day O'Connor, Coretta Scott King, Bella Abzug, Geraldine Ferraro, Mary King, and Barbara Jordan. We also offered a series of audio tapes of the panel presentations. More than five thousand tapes were distributed nationally.

We now present the four-volume set of curriculum materials. The *Student Textbook* and *Teacher's Guide* are both authored by Marjorie Wall Bingham, one of the country's foremost women's studies curriculum writers. Dr. Bingham and her staff at the Upper Midwest Women's History Center have an established track record of producing authoritative, well written works about women's issues. Now they lend their talents to a volume that explores topics ranging from the legal positions of women in colonial times to the Seneca Falls Convention and to the current women's rights movement.

The *Symposium Papers* were written by some outstanding scholars and edited by Dr. Joyce Pair. In them can be found, for example, Dr. Johnnetta B. Cole's paper, "African Women: Education and Two Hundred Years of

the Evolution of the United States Constitution." They also contain some first hand accounts of what women have endured to change the Constitution. "With All Deliberate Speed" is the contribution by Leola Brown Montgomery, whose daughter Linda was the plaintiff in *Brown v. Topeka Board of Education*, the famous Supreme Court school desegregation case. She describes how the experience made the Constitution a living document to her and warns us that we can never become complacent with respect to our rights.

We again offer the original text of *Speeches and Addresses*, first published in 1988. In it the reader will find words of wisdom as timely today as then, such as Bella Abzug's conclusion that "the women's movement has put 'women in movement' everywhere," or Geraldine Ferraro's admonition, "If you don't run, you can't win."

Women and the Constitution is a versatile package designed to function as the principle material for a program in women's studies. It can also be used to enrich courses in civics, American history, and American government. In addition, the speeches and papers make it a useful reference tool. We will be introducing the materials to educators at the Carter, Johnson, and Ford Libraries in 1990-1991. We will also donate the complete volumes to the National Archives and to the Educational Resources Information Clearinghouse (ERIC), a national educator's computer network, to make them more accessible to the public. This dissemination of materials will mark the last phase of the project.

We have so many people to thank for their contributions to this initiative: the First Ladies, the members of the various committees, the volunteers, the staff, the authors, and the editors. But I want to single out two categories of special contributors.

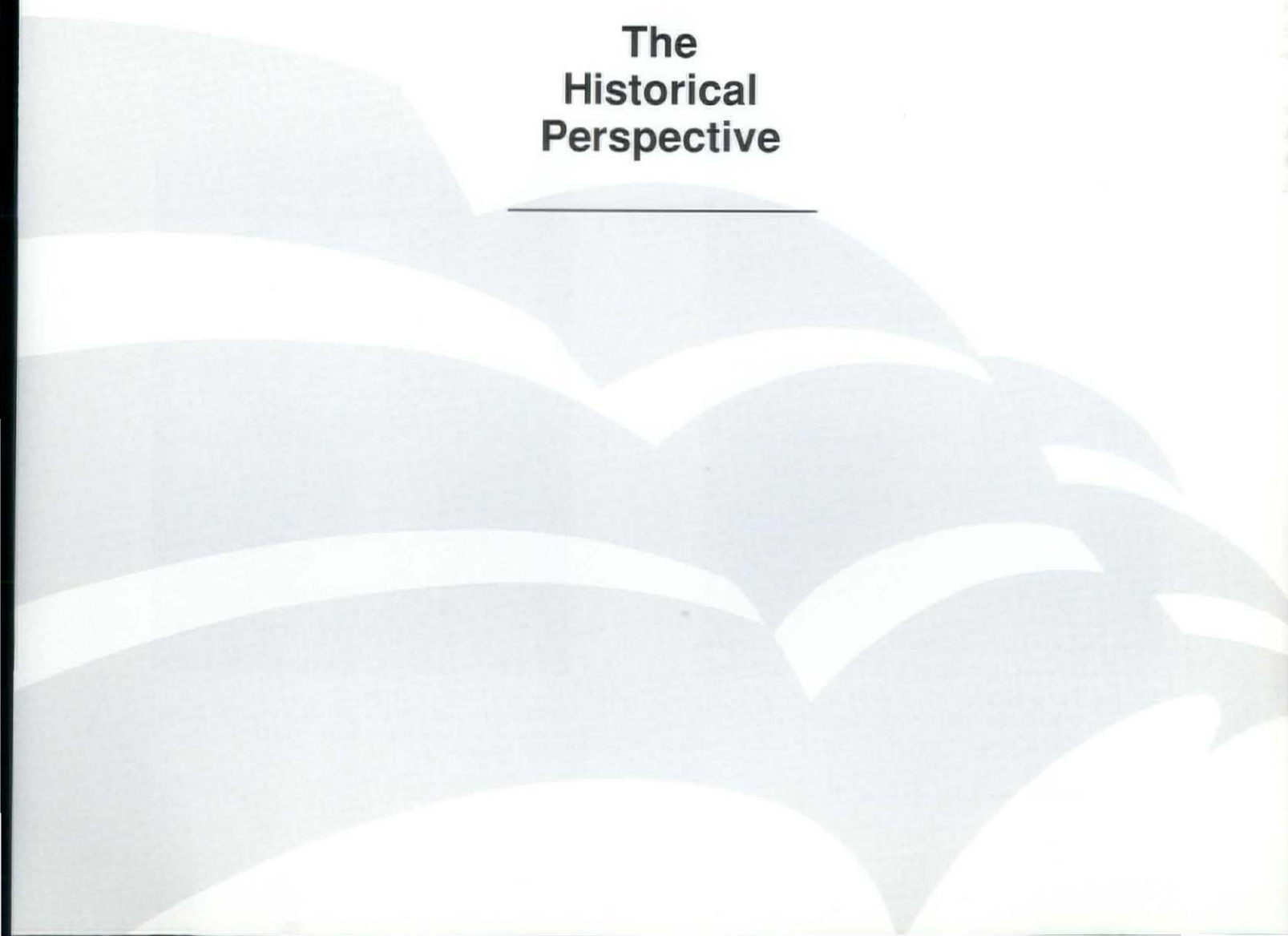
Women and the Constitution would not have been possible without generous funding. We are fortunate to have the support of a number of funders including Avon Products, Inc., Ford Motor Company, Hearst Corporation, Good Housekeeping Magazine Division, Charles H. Revson Foundation, Ford Foundation, Gannett Foundation, Inc., Georgia Endowment for the Humanities, John D. and Catherine T. MacArthur Foundation, National Endowment for the Humanities, and the Ruth McLean Bowman Bowers Foundation.

Finally, there was a core group of people dedicated to this project from beginning to end. It included Linda Kurtz, Marjorie Fine Knowles, Naomi B. Lynn, Janice Mendenhall Regenstein, Donald B. Schewe, Joan Grayson, Linda Helms, George Ann Hoffman, Ronnie Van Gelder, Carrie Harmon, and Mary Zaharako.

It takes a lot of effort from many sources to bring together as large an undertaking as *Women and the Constitution*. We were fortunate to have had both tremendous support and generous funding.

World

**The
Historical
Perspective**





Martha Dandridge Custis Washington
First Lady of the United States 1789-1797
Courtesy of National Archives



Abigail Smith Adams
First Lady of the United States 1797-1801
"Remember the Ladies," she chided her husband,
President John Adams
National Gallery of Art, Gift of Mrs. Robert Homans



Dolly Payne Todd Madison
First Lady of the United States 1809-1817
Courtesy of National Archives



Mercy Otis Warren 1728-1814
Anti-federalist and prolific writer, this Colombian Patriot
wrote a three-volume historical account of the
constitutional period.
Courtesy of Museum of Fine Arts, Boston



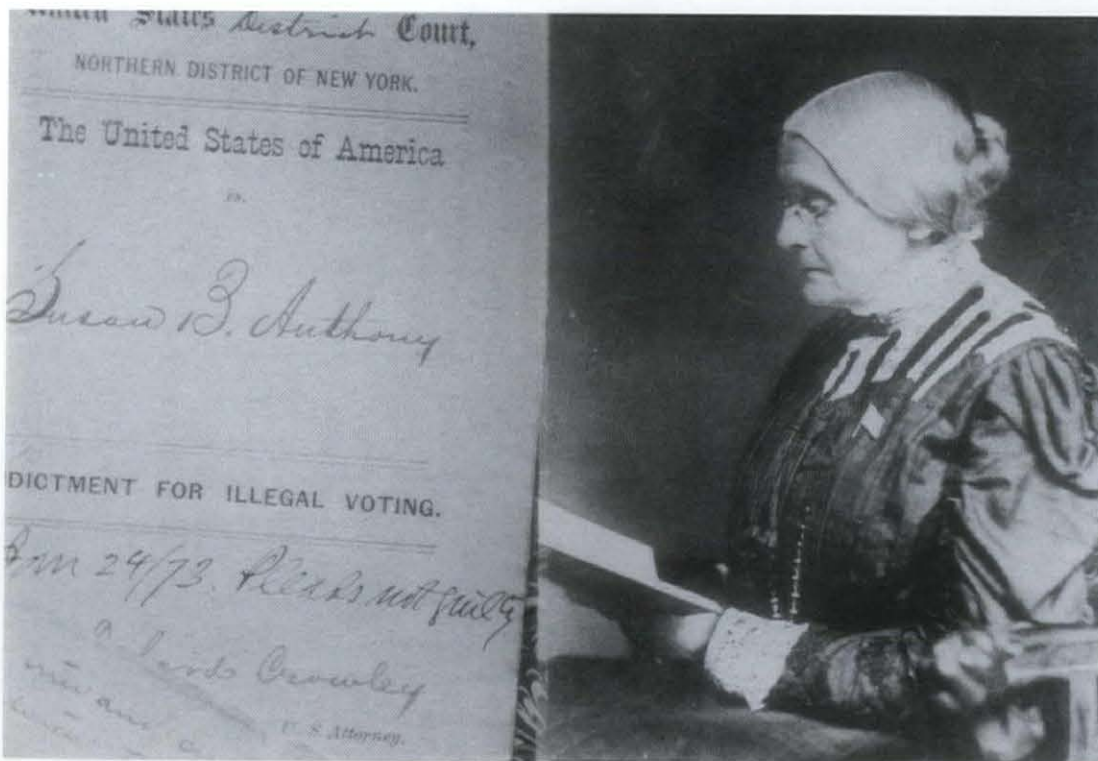
"Ain't I a woman?," asked Sojourner Truth. This pre-Civil War evangelist, abolitionist, and feminist electrified audiences with her speeches.

Courtesy of Sophia Smith Collection, Smith College



Wyoming allowed its women to vote in 1869 partly to encourage families to settle in the sparsely populated state. Utah, Idaho, and Colorado followed its lead.

Courtesy of Library of Congress



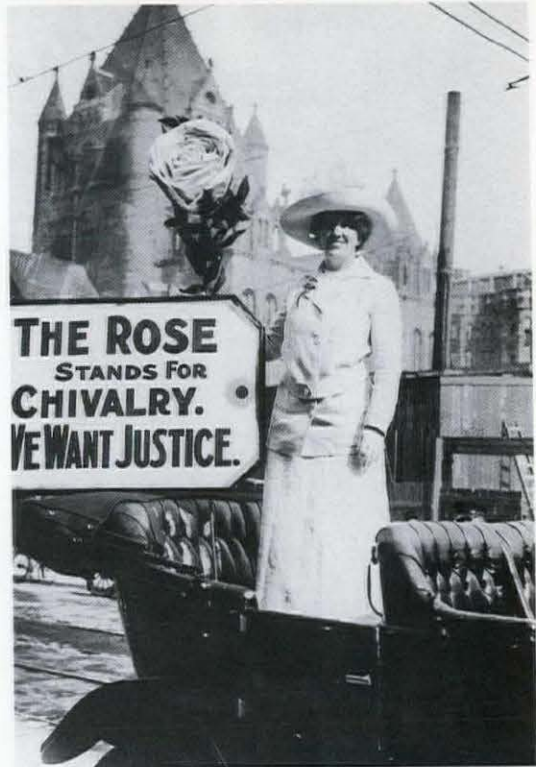
Susan B. Anthony

Indicted for voting in 1872, devoted sixty years of her life to the cause of suffrage. The Nineteenth Amendment was named for her even though she died without having a chance to vote.

Courtesy of National Archives, New York Branch



Suffrage Parade, 1910, New York, New York
Courtesy of The Schlesinger Library, Radcliffe College



Suffrage float, circa 1910
Courtesy of The Schlesinger Library, Radcliffe College



Suffrage float, July 4, 1914 parade in Waltham, Massachusetts
Courtesy of The Schlesinger Library, Radcliffe College



Alice Paul, author of the first Equal Rights Amendment, sewing ratification star onto suffrage banner, 1920
Courtesy of The Schlesinger Library, Radcliffe College



Margaret Sanger, 1941
Advocate of women's right to birth control. Was indicted for mailing newsletters containing information about contraception. A nurse, she fled to England for several years before returning to face trial and conviction. She later established medically staffed birth control clinics.
Courtesy of The Schlesinger Library, Radcliffe College



Amelia Earhart, 1926, woman pioneer of aviation.
Courtesy of The Schlesinger Library, Radcliffe College



Sharon Christa McAuliffe, the first teacher in the space program.
Courtesy of National Aeronautics and Space Administration

The Woman Behind the Man: Josephine Goldmark And Her Contributions to the Advancement of Women

By Lois L. Duke

Scholars have long acknowledged that research records do not always show significant contributions made by reformers responsible for progressive change and social advancement. Even when many such individuals are identified, it is not uncommon for the documented accounts superficially to list accomplishments; for example, historical data may be cited to refer to achievements which are stated in a mere sentence or two.

Scholars researching political leadership have generally overlooked the role of women. Susan Carroll notes that even when women have appeared in leadership positions, they frequently have been portrayed as insignificant while the leadership function of their male counterparts is not only well documented but also accepted as natural (1984, p. 143). James MacGregor Burns also notes that "This leadership bias persists despite the political influence of the likes of Eleanor Roosevelt, Golda Meir, Indira Gandhi, or Margaret Thatcher" (1978, p. 50). Josephine Clara Goldmark is such an individual who exerted leadership not previously recognized in the literature. In her dedicated years of effort and research in the advancement of improved working conditions for the American worker, especially women, Goldmark's accomplishments have been significant beyond the accolades and recognition she has received as evidenced by past accounts. Previous research on Goldmark has not produced a conclusive study. Most of what the literature reveals about Goldmark is gleaned through a review of her own research efforts, which deal primarily with labor reform and legislation, and the books she wrote about her family and other reformers. This study reviews Goldmark's background and early history and assesses her political leadership in an attempt to categorize her influences on the political and social climates of American society in general and the American worker specifically.

Josephine Clara Goldmark was born in Brooklyn, New York, 13 October 1877, the seventh daughter and youngest of ten children. Accounts describe her family as being a reputable one; her mother came from a well-to-do Jewish family which had emigrated from Prague to Indiana in the mid-nineteenth century. Goldmark's father, Joseph Goldmark, was a medical doctor who was born in Poland and received his early education in Hungary. He was a member of the Austrian parliament and took an active role in the revolution of 1848. After the failure of the protest, Joseph Goldmark came to New York City where he pursued his medical career. His research with explo-

sives led to several patents and produced a significant share of the safety caps and cartridges used by Union forces in the Civil War. Joseph Goldmark died when Josephine was only three, but the family was left financially secure (James, 1971, pp. 60-61; Uglow, 1982, p. 197; Garraty, 1974, pp. 433-434).

Goldmark's writings include her book, *Pilgrims of '48*, which was published in 1930 and is an account of her father's role in the Vienna Revolution. In the book she describes the political, social, and cultural environment of old Austria and the lives of the "Forty-eighters," who sought the liberties of the new world while leaving behind the despair of the suppressed revolution. She emphasizes the liberal tradition these immigrants brought to the shores of the United States and the American heritage of these men and women (Goldmark, 1930, pp. 169-290). Goldmark's 311-page account of the Czech immigrants is written from old letters, unfinished publications, her father's official documents, and interviews with his contemporaries.

Goldmark's eldest sister, Helen, was married in 1809 to Felix Adler, founder of the Society for Ethical Culture. In 1891, another sister, Alice, married Louis D. Brandeis, a Boston lawyer who in 1916 became a justice of the U. S. Supreme Court. Still another sister, Pauline, was the assistant secretary of the New York Consumers' League (James, 1971, pp. 60-61; Uglow, 1982, p. 197; Garraty, 1974, pp. 433-434). The personal contacts cultivated through her sisters Alice and Pauline most influenced Goldmark's writings and research. By way of Pauline, Goldmark was introduced to Florence Kelley, the general secretary of the National Consumers' League. Goldmark began as a volunteer assistant to Kelley, later serving as publications secretary for the League and Chairman of its committee on the legal defense of labor laws (James, 1971, pp. 60-61; Uglow, 1982, p. 197; Garraty, 1974, pp. 433-34). Through Alice, Goldmark's later association with Louis D. Brandeis became a reality.

Josephine Goldmark's real contribution to improving social and working conditions for women was in the methodical and precise manner in which she worked quietly behind the scenes to record and document the need for reform. The literature reveals the results of her research. She depicted the life of the working woman in the twentieth century, citing the previous work of physicians, sociologists, criminologists, and other experts knowledgeable of the social environment at the time. Goldmark succinctly consolidated American reports in this area with those from European countries culminating in well-documented studies showing the need to alter working hours and conditions for American women.

Even though Goldmark has second billing to her brother-in-law Louis D. Brandeis in the decision of the United States Supreme Court in *Muller v. State of Oregon*, that Goldmark's name is on the brief is noteworthy. Goldmark was not an attorney, but the words on the brief, "Assisted by Josephine Goldmark, Publication Secretary

National Consumers' League," attest to the fact that Goldmark contributed significantly to Justice Brandeis' legal arguments in the case. The case grew out of an incident in which a man named Curt Muller, who owned and operated a laundry in Oregon, felt he had the sole right to negotiate with the women who worked in his laundry as to how many hours they worked each day (Brandeis and Goldmark, 1969).

In 1903, the Oregon state legislature had passed a law prohibiting the employment of a woman "in any mechanical establishment or factory or laundry in this state more than ten hours during any one day" (Baker, 1984, p. 9). Accounts document women's working as many as seventeen hours in one day and sometimes work weeks of seven days. Curt Muller ordered his overseer to require a female employee, Mrs. E. Gotcher, to work more than ten hours in one day. Ironically, this event occurred 4 September 1905, Labor Day (Baker, 1984, p. 9). Muller was charged with violating the state laws; he was found guilty and fined the sum of \$10. With the backing of the laundry owners association in the state, Muller appealed. Oregon's highest court affirmed his conviction, and the case was appealed to the U. S. Supreme Court (Baker, 1984, p. 9).

Ms. Florence Kelley, head of the National Consumers' League which was headquartered in New York City, was concerned with improving working conditions and the endorsement of laws which benefitted the workers. The League depended on legislative action and used publicity, propaganda, and lobbying activity (Chambers, 1963, pp. 3-8). Along with her associate Josephine Goldmark, Kelley first approached an attorney by the name of Joseph Choate about representing the woman who worked in the laundry. Choate responded he could not see why a "great husky Irish woman should not work in a laundry more than ten hours in one day, if her employer wished her to do so" (Chambers, 1963, p. 11). Kelley and Goldmark then asked Louis Brandeis if he would represent Mrs. Gotcher. He consented but refused a fee; he also asked that he be invited by the Oregon attorney general to take the case for the state. Kelley complied with both requests; League friends in Oregon arranged for the invitation from the state.

Brandeis had argued his first case before the Supreme Court more than eighteen years earlier and had appeared before the Supreme Court many times since. His strategy in the *Muller v. Oregon* case was to file two briefs: (1) a traditional brief based on law and precedents; the state had the power to impose restrictions, etc. (2) a second brief which would be one to set forth a case based ethically on reasonableness (Chambers, 1963, pp. 12-13).

Brandeis asked Kelley and his sister-in-law to help him gather facts about how the number of hours worked affected health and efficiency. At that time, little such data existed. The two women in turn sought help from their women friends; a total of about ten to twelve women researched the data; all came from socio-economic backgrounds far above the poverty level (Chambers, 1963,

pp. 12-13). The women obtained most of their data from the library at Columbia University and the New York Public Library. Many of the European reports had to be translated quickly. Then the data had to be edited and written in the format of a brief which could be presented to the Supreme Court (Chambers, 1963, pp. 12-13).

Brandeis' arguments in his presentation to the Supreme Court addressed the single question of whether an hours-limitation law violated the Fourteenth Amendment that no state "shall deprive any person of life, liberty, or property, without due process of law." That is, did this deny the laundry the right to contract for labor, which was protected under the Fourteenth Amendment. Brandeis argued that the Fourteenth Amendment did in fact protect the right to sell or purchase labor, but took the argument a step further by claiming that such a right is subject to "a reasonable restraint of action" (Brandeis and Goldmark, 1969). Brandeis then used the research Josephine Goldmark and the other women had compiled to point out how infant mortality, worker safety, efficiency, and general health and well-being relate to number of hours worked. Report after report (included in the brief) was cited in Brandeis' argument that excessive hours should be replaced by "reasonable restraints on working hours" (Baker, 1984, p. 14).

Chief Justice of the Supreme Court Melville Fuller assigned the case to David Brewer. The decision was handed down February 24, 1908, and all nine justices accepted Brandeis' arguments. (The justices at the time included Fuller, Brewer, John Marshall Harlan, Edward Douglass White, Rufus W. Peckham, Oliver Wendell Holmes, Jr., William R. Day, William H. Moody, and Joseph McKenna.) Brewer pointed out that even though the court had previously ruled against establishing regulations for the workplace, "yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a state may, without conflicting with the provisions of the Fourteenth Amendment, restrict in many respects the individuals' power of contract" (Baker, 1984, pp. 15-16). For the first time, the Supreme Court acknowledged the need for facts to establish the reasonableness of social legislation (Mason, 1946, p. 25).

After the *Muller v. Oregon* case, a number of states passed laws regulating working hours and conditions. In 1911, twelve states enacted or strengthened their laws dealing with working conditions for women. Brandeis was named to the Supreme Court in 1916 and stepped down as the League's Counsel; he was replaced by Felix Frankfurter, who at the time was a law professor at Harvard. As had Brandeis, Frankfurter also represented the League free of charge (Baker, 1984, p. 138). Goldmark assisted Frankfurter in the preparation of briefs supporting the ten-hour law in Illinois (Garraty, 1974, pp. 433-434). Again Goldmark is credited, this time by Frankfurter, in the brief as "Assisted by Josephine Goldmark, Publication Secretary National Consumers' League" (Frankfurter and Goldmark, 1916, title page). The Bunting case raised the issue of

whether or not a limit could be set on working hours for men (Baker, 1984, p. 138). Again, Goldmark meticulously documented the harmful effects of long hours of work on health, the relationships of fatigue to disease, the negative effects of injurious physical surroundings on the worker, and the bad effect of long hours on safety and morals. She also set forth the benefits to the worker of shorter hours and the positive effects shorter hours have on production (Frankfurter and Goldmark, 1916, pp. III-IV). The Bunting case was also upheld by the Supreme Court, and established a maximum number of hours men could work (Baker, 1984, p. 140).

Goldmark's next major work was another joint project with Brandeis. The two completed a study of fatigue in factory work, a study published in 1912 (Goldmark, 1912, pp. 3-326). The work explains the nature of fatigue and the effect fatigue has on the work force and argues for reducing the long work day in industry. Goldmark cites random examples of worker abuse. She writes, "Young boys of fourteen years may still be employed all night long in Pennsylvania, West Virginia, and other great glass producing states; girls upon reaching their sixteenth birthday in New York State may be employed twelve hours a day during five days of the week in factories, and unlimited hours in stores, during the season of 'rush' before Christmas" (1912, p. 4). In her introduction, Goldmark points out that only fifteen states at the time had enacted laws to check the overwork of women in the exhausting service of the modern department store; and conspicuous by their absence from among these were states with large commercial centers, such as Maryland, New York, Ohio, and Rhode Island (1912, p. 5). Her research at that time credits England as leading the other European countries in protecting working children in 1833, followed by France legislating for the worker in the late 1840s, Switzerland following suit in the 1870s; Austria, Poland, and Germany in the 1880s and 1890s; and finally Italy at the turn of the century. She cites Massachusetts (first legislation enacted in 1874) and the other New England states as being the first in America to pass legislation protecting the worker (1912, p. 8 and p. 310).

The 326-page report cites numerous examples from countless reports and studies to document the abuses of the American worker in a system lacking legal regulations. Goldmark writes of a federal investigation into work conditions in the cotton textile mills in North and South Carolina. As she notes, "Among those who thus worked at night after and in addition to a twelve-hour day, was a family of five children, consisting of three boys, aged ten, fifteen and seventeen years, and two little girls of eleven and thirteen years. Their names were entered upon both the day roll and night roll of the mill" (1912, p. 274).

Goldmark's work is credited as an important influence in the social movement to curtail hours in American factories (James, 1971, pp. 60-61; Uglow, 1982, p. 197; Garraty 1974, pp. 433-434). As she so eloquently argued in her conclusion to *Fatigue and Efficiency*, "Even one

whole generation is too short to measure the ravages of anti-physiological living; and when overwork unfits man or woman for normal parenthood, it is in a deep sense, anti-physiological and anti-social. It touches not alone the welfare but the very fibre of human society, that congregate 'whole,' which it should be our passionate concern to recognize, in the stirring words of the Supreme Court, as 'no greater than the sums of all its parts' for 'when the individual health, safety and welfare are sacrificed or neglected, the state must suffer'" (1912, pp. 286-287).

Working with Mary P. Hopkins, Goldmark compared an eight-hour plant and a ten-hour plant. The results of this 210-page research report were published in 1920. The authors substantiated that the eight-hour system is the more efficient. Using tables and charts to depict recorded outputs based on machine work, dexterous handwork, and heavy handwork, the authors show there is a steady maintenance of output in the eight-hour system and a decline of output in the ten-hour system (1920, pp. 3-210).

The study was commissioned by the Federal Public Health Service in conjunction with the Committee on Fatigue in Industrial Pursuits of the National Research Council. The investigation of the ten-hour plant covered two periods, one of eight weeks from July 17, 1917, to September 8, 1917; and a second period of two years beginning in December 1917 and still in progress at the time the report was written. The investigation of the eight-hour plant covered a period of six months, from September 1917 to March 1918 (Goldmark and Hopkins, 1920, pp. 9-11).

The two factories used essentially the same machinery; the ten-hour plant was involved with making brass fuses for three-inch shells. The operations studied at the eight-hour plant consisted of observing processes in the making of automobiles (1920, pp. 9-11). The researchers distinguish and document how their study divided the work into handwork and machine work. They define handwork as that related to the demands made on the neuro-muscular system, requiring chiefly muscular exertions, and those demanding exertions of dexterity and skill. They define machine work as that represented by the lathe type of machine operation, which demands both muscular effort and dexterity (1920, pp. 11-13). In their conclusion, the authors point out: (1) Lost time is reduced to a minimum under the eight-hour system with work beginning and ending on schedule; under the ten-hour system, work stops regularly before the end of the shift and thus lost time is frequent. (2) Fatigue is an important contributor to accidents in the workplace. (3) Labor turnover is directly associated with distasteful working conditions. (4) There was an average increase of production after the introduction of recesses. (5) Holidays cause an increase in output (1920, p. 26).

Goldmark also researched the nursing profession. She is credited with establishing higher professional standards in American health services and with up-grading nurses' training (James, 1971, pp. 60-61; Uglow, 1982, p. 197;

Garraty, 1974, pp. 433-434). Working under the auspices of the Rockefeller Foundation, she completed a nearly 600-page study in 1923 entitled *Nursing and Nursing Education in the United States*. This report analyzes public health nursing and traces the evolution of the public health nurse historically; achievements in public health nursing (reduction of maternal and infant mortality); the working conditions in public health nursing agencies; comparison of industrial nursing with private duty nursing; and the training of the nurse (hospital school training, university training, and postgraduate nursing course schooling). Goldmark includes in her report detailed descriptions of some typical days in the lives of nurses working in rural settings, in small towns, in a large city, and in a welfare station. In her example of rural nursing, she portrays the hardships of a rural tuberculosis nurse whose territory is an entire county, about 3,000 square miles, in a far western state. One or two of the roads are described as excellent, but most are dirt and are impassable with an automobile during much of the year due to rainfall. Therefore, the nurse must either walk or ride horseback to reach a number of the small communities (1923, p. 57). Goldmark describes the performance of Miss C, a nurse:

"Our first visit was to a woman with far advanced tuberculosis, living on the edge of the county seat. . . . The patient had been ill for two years, and had lately been sent home from a sanatorium to die. She was about 35, running a high temperature, coughing and expectorating. . . . Patient using paper squares for expectoration and putting them in paper bag, as taught by Miss C. and sanatorium. Thermometer kept in carbolic solution in vaseline bottle, as directed by nurse. Nurse took away bag and fixed a new one on place. Took temperature and pulse, asked about husband and children, and complimented patient on her carefulness. The nurse was sympathetic, understanding and helpful, cheering patient" (1923, p. 58).

Goldmark elected to study the country of Denmark in the 1930s because she felt the country had adequately provided the basic needs and securities for its people despite the economic woes brought about by a world depression (Goldmark, 1936, pp. I-X). She describes the Danes as a people who had made a remarkable recovery in the area of agriculture and Denmark as a democracy which had distinguished itself in the international arena. Goldmark's research provides insight into Danish co-operative dairies, beginning with the first in 1882 which grew out of a need for the owners of small and medium sized farms to find a means to process their milk in greater volume (1936, p. 42). She describes how these strong local groups organized into large associations which ultimately led to district, provincial, and national federations. With the exception of the co-operative breeding associations, none of the co-operatives ever received financial support or subsidy from the government (1936, pp. 45-46). Goldmark traces Denmark's industrial growth,

its parliamentary struggle, and its unique contribution to education through its folk high schools which, for the most part, taught liberal subjects (1936, p. 183). She cites education, a national policy of subsidizing unemployment funds, old age pensions, and national health insurance as examples of Denmark's ability to solve its economic, political, and social problems while providing needed services for its citizens (1936, p. 138).

Josephine Goldmark lived in and around New York City for most of her life, but she spent her last years with her sister Pauline in Hartsdale, New York. In 1950 when she was seventy-three, Goldmark died of a heart ailment in the White Plains (New York) Hospital. Her last book, *Impatient Crusader*, was a biography of Florence Kelley and appeared posthumously in 1953 (James, 1971, pp. 60-61; Garraty, 1974, pp. 433-434; Goldmark, 1953). In the work Goldmark portrays the woman whom she followed as secretary of the National Consumers' League, which Kelley organized in 1899. The League grew out of the dominant American social problems of the times, problems attributed to the "revolutionary transformation of the nation into a highly mechanized, industrialized and urbanized society" (Chambers, 1963, p. 4). Goldmark traces the social reform the League advocated and the leadership role Kelley played in the battle for legislation to protect the worker, women's suffrage, prohibition of child labor, and federal help for mothers and babies.

Josephine Goldmark was a grass-roots leader who contributed to social change in this country. She was committed to the causes for which she worked; she was persistent, courageous, and selfless, criteria established by James MacGregor Burns who maintains that leadership is actually a relationship between leaders and followers (1978, pp. 18-23). Burns states that leadership is exercised "when persons with certain motives and purposes mobilize, in competition or conflict with others, institutional, political, psychological, and other resources so as to arouse, engage, and satisfy the motives of followers" (1978, p. 18). According to Burns, the leader must not only act on her own values and motivations, but on followers' values and motivations as well. Burns categorizes leadership as transactional or transforming. He maintains that transactional leadership occurs when one person takes the initiative in making contact with others for the purpose of an exchange of valued things, as in an act of bargaining. In this type of leadership, there is no mutual pursuit of goals or objectives. Transformational leadership, on the other hand, occurs when one or more persons engage with others in such a way that leaders and followers raise one another to higher levels of motivation and morality (1978, pp. 4 and 19-20). Burns argues that both forms of leadership contribute to human purpose; however, he maintains that transformational leadership is more concerned with end-values, such as liberty, justice, and equality. He cites "grass-roots leaders," to include parents, teachers, and peers, as far more pervasive and widespread in their role as transforming leaders than generally recognized. He offers as

a test of their leadership function their "contribution to change" (1978, pp. 426-427). The test of Josephine Goldmark's true leadership is the transforming power she exhibited in her relationships with those who followed her.

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The Visible Woman: Abigail Adams

by Edith B. Gelles

In late eighteenth-century America, women were invisible; they usually did not participate in public life—in politics, in work outside the home, in religious leadership. They could not own property or vote. By the mid-twentieth century, women of two hundred years ago were still invisible; historians showed little concern for the existence of women in the past. The activities that engaged women's lives did not seem important or interesting when compared with wars, diplomacy, economics, and government. Women's domestic work, the birthing and rearing of children and caring for households, was ignored in the historical record until the rise of the recent women's movement which has changed the focus of our attention to the past. It is now assumed by feminist historians—and the momentum is gaining in the historical community at large—that women's domestic work was as significant and as difficult as men's work. The private sphere is becoming visible, and, with that shift in emphasis, value is placed on women's lives and work (Cott; Kerber; Norton; Ulrich).

Despite the dearth of attention to domesticity in American history, one woman has remained in the public eye; Abigail Adams has been a popular figure and almost as well known as many of the founding fathers. Several reasons account for continued interest in her life. First, Adams wrote many hundreds of letters over her lifetime which were preserved by her family and which have been reprinted in books and on microfilm. Her letters are so eloquently written that they qualify as literature and her words are frequently quoted. Second, Abigail Adams was related to famous men. Her husband, John Adams, was one of the founders of the nation and became the second president of the United States. Her son, John Quincy Adams, was a great statesman who, in addition to serving as the fifth president, was a diplomat and member of Congress for more than two decades. The fame of her husband and son has given Abigail Adams visibility (Gelles, "Abigail Industry"). Also, Abigail Adams lived through the most dramatic and turbulent eras of the American past. She was born in 1744 when the American colonies still belonged to Great Britain; when she was in her thirties the Revolutionary War occurred, and the colonies separated from the Empire. Adams then lived through the early years of the national struggle to survive, and for many years she observed events at the center of power because of her husband's offices. For these reasons—because she left a literary legacy in her letters, because she was related to famous men, and because she lived in dynamic times—Abigail Adams has been an

intriguing figure to historians and biographers.

Abigail Adams was born 11 November 1744 in Weymouth, Massachusetts, a village not far from Boston. Her father, the Reverend William Smith, was the minister of the first Congregational Church of Weymouth. Her mother, Elizabeth Smith, in addition to many duties as a minister's wife, raised and educated Abigail and her two sisters, Mary and Elizabeth, as well as a son, William. Abigail Adams grew up in the country where most people farmed or fished for a living, where life was simple and could be harsh.

Adams' education was typical for young ladies; she learned to read literature, both classical and spiritual, and some French. She was taught simple arithmetic, important for household accounts, and to write a polished letter. From the earliest age she was educated about religion, not only because her father was a minister but also because religion was fundamental to the way that eighteenth-century people viewed the universe. Most basic to her education as a woman, Abigail Smith learned how to sew, cook, and to manage a household—to be a wife and mother, for that would be her occupation in life.

The great milestone in Abigail Smith's young life was marriage to John Adams in 1764. She had met the young lawyer when she was sixteen years old, and they courted for three years during which they wrote many letters that survive. After their marriage, Abigail and John Adams moved to the farm in nearby Braintree that John had inherited from his father. In the next ten years, John Adams built his law practice while Abigail Adams bore five children, four of whom survived. During that same ten years, political events were developing that would shape the course of history and in the process change the direction of the Adamses' life.

The breach between Great Britain and the American colonies, which began to show when Britain passed the laws that restricted colonial trade, lured John Adams into the politics of revolution, marking a turning point for the Adamses as his service to the nation became a lifetime commitment. First elected to the Continental Congress in 1774, he continued to be re-elected as a Massachusetts delegate until 1777 when the Congress sent him to France as part of the joint commission to negotiate a French alliance. He continued to serve in diplomatic missions in France and the Netherlands until he was appointed as first American minister to Great Britain in 1784 (Shaw; Smith).

For the entire period of the Revolutionary War, almost a decade, John Adams was away from home; during that time, Abigail Adams took over responsibilities in the family as well as maintained her own work. She learned to manage the farm, to hire laborers, and to earn money by selling some items that her husband sent from France. She also became adventurous, speculating in currency and purchasing land, though she had to do so in John Adams' name because a woman could not own property. Adams became a competent administrator and manager of the family economy, although she always regarded the role as

aberrant for a woman and as her patriotic contribution to the war (Gelles, "Abigail Adams").

In addition to the multiplication of Adams' responsibilities during the war, she and her children faced many dangers. In the early years of the war, fighting took place around Boston and the communities where she lived. Soldiers sometimes passed by the road near her house, and she wrote to her husband: "Our house has been in a state of confusion—Soldiers coming in for lodging, for Breakfast, for Supper, for Drink, etc." People who escaped when the British took Boston in 1775 came too: "Sometimes refugees from Boston Tired and fatigued, seek assilum for a Day or Night, a week—you can hardly imagine how we live." She did not know whether or not she and her family would have to flee: "Perhaps, the very next letter I write will inform you that I am driven away from our, yet quiet cottage." Despite the precariousness of her situation, she remained courageous and firmly patriotic. She wrote her husband, "I would not have my Friend imagine that with all my fears and apprehension, I would give up one Iota of our rights and privileges" (qtd. in Butterfield, Garrett, and Sprague, I, 204, 217, 184).

Boston remained under siege for much of 1775-76. Adams' household at that time consisted of her and four young children, the eldest barely twelve years old and the youngest only three, their tutors, and several young servant girls. She was brave, but she was lonely. She allayed that loneliness by writing letters; she wrote to John Adams as she would have spoken to him, and her letters became therapeutic. She intuitively knew that writing her experiences and her feelings was a kind of emotional balm, that by writing she discharged the full emotional impact of loneliness. Letter-writing also provided a method of self-creation; by writing about courage, she could become courageous. She could become her own model by describing an image that she then might follow (Gelles, *Portia*).

Adams did not suspect that her letter writing, which grew profuse in quantity as her husband's absence was protracted during the Revolutionary War, would survive as a literary corpus and an historical document. She wrote privately as a lonely wife, but the letters that were preserved serve as a public record of her life and as a representation of the lives of women like her. She wrote to John Adams in June 1775: "Tis expected [the British] will come to night, and a dreadful Battle must ensue. The constant roar of the cannon is so distressing that we can not Eat, Drink and Sleep. . . . I shall tarry here till tis thought unsafe by my Friends." Several days later she continued, "I think I am very brave upon the whole. If danger comes near my dwelling I suppose I shall shuder" (qtd. in Butterfield, Garrett, and Sprague, I, 222). Her accounts vividly convey the events: "I have been kept in a continual state of anxiety and expectation ever since you left me. It has been said to morrow and to morrow for this month, but when the dreadful to morrow will be I know not—but hark! the House this instant shakes with the

roar of Cannon—I have been to the door and find tis a cannonade from our Army. . . . No Sleep for me to Night." The siege continued for four days, and each day, as in a journal, Adams wrote her description to her husband. "I have just returned from Penn's Hill where I have been sitting to hear the amazing roar of cannon and from whence I could see every shell which was thrown," she wrote. Then, as if describing a fantasy without meaning or danger to herself, she continued, "The sound I think is one of the true Species of the Sublime. Tis now an incessant Roar. But O the fatal ideas which are connected with the sound. How many of our dear country men must fall? I sometimes think I cannot stand it—I wish myself with you, out of hearing as I cannot assist them" (qtd. in Butterfield, Garrett, and Sprague, I, 352-54). The siege and the immediate danger did not subside until the British evacuation of Boston in spring 1776.

After the first years of the war, Adams and her family were never again in such immediate danger. The battle-grounds shifted to the west and the south, and the people of Massachusetts experienced the war at a distance (Higginbotham 148-174). Meanwhile, John Adams continued his diplomatic missions in Europe, seeking funding and military assistance for the embattled colonies. When the hostilities ended and the colonies obtained their independence, he served as a commissioner at the Paris Peace Conference in 1783. Hoping to be appointed by Congress as the first American minister to Great Britain, he remained in Europe rather than returning home. Adams was faced with a dilemma; she would have preferred that her husband resume a private life as a lawyer. However, when after two years he still did not return despite her pleas that he do so, she decided to make the arduous journey to Europe. This decision was a capitulation; however, as an eighteenth-century wife she had few options. With her decision to join John Adams in Europe, Abigail Adams also became committed to a public life in politics.

For a woman who had never travelled beyond the narrow environs of Boston, the experience of living in foreign countries was both enlightening and difficult. For nearly one year the Adamses lived near Paris while John Adams awaited the appointment to London. Adams did not speak French, nor did she understand the culture with its different religious and social practices. She did enjoy going to concerts as well as attending art shows and some theater. She did not enjoy social gatherings where she could not understand the conversation or the manners (Rice). In London, where the language and the culture were familiar, she adapted more comfortably; for three years (1783-1787), Adams attended to her official role as the wife of the American minister. She was presented to King George III and Queen Charlotte and was indignant at the condescension of their manner. She wrote to her sister that "at home I feel myself your friend and equal," but in England "I am looked down upon with a sovereign pride, and a smile of royalty is bestowed as a mighty boon.

As such, however, I cannot receive it. I know it is due my country and I consider myself as complimenting the power before which I appear as much as I am complimented by being noticed by it. With these ideas, you may be sure my countenance will never wear that suppliant appearance which begs for notice. Nor would I ever set my foot there, if the etiquette of my country did not require it" (qtd. in Adams 270). Adams' statement expresses as great a source of the revolutionary conflict with Great Britain as did the trade laws. The American values of individual autonomy and worth, as she described them, provided a distinctive separation of American character from English.

For the entire time that Adams was in Europe, she condemned the class structure that denied dignity and freedom for individuals on the basis of their birth. "I shall never have much society with this kind of People," she wrote. "In houses, in furniture, in gardens and pleasure grounds, and in equipage, the Wealth of France and England is displayed to a high pitch of grandure and magnificence; but when I reflect upon the thousands who are starving and the millions who are loaded with taxes to support this pomp and show, I look to my happier country with an enthusiastic warmth and pray for the continuance of that equality of rank and fortune which forms so large a portion of our happiness" (qtd. in Adams 289). Adams had a special sympathy for women: "In Europe all the lower class women perform the most servile labour and work as hard without door as the men," she wrote to her aunt. "In France you see them making hay, sowing, plowing, and driving their carts along. It would astonish you to see how laborious they are and that all their gain is coarse bread and a little ordinary wine, not half so good as our cider. The land is all owned by marquises, counts and dukes for whom these poor wretches toil and sweat. In England there is wretchedness and oppression enough to make a wise man mad" (letter of 3 September 3, 1785, qtd. in *Adams Papers*, Microfilm 365).

Adams had travelled to Europe with her daughter, also named Abigail. Her eldest son, John Quincy, by this time a student at Harvard, and the two younger sons had been left behind in Massachusetts, cared for by Adams's sister Elizabeth, so that they, too, could prepare for Harvard. Together, mother and daughter explored the sights of old England, attended theater and concerts, and made friends with people who sympathized with American independence. In addition, England supplied a romance. Young Abigail met and married within a year; within another year, Adams was a grandmother (Gelles, "Gossip"). "I have a fine grandson," she wrote to a friend on May 14, 1787. "Is that confessing myself old?" (qtd. in *Adams Papers*, microfilm 370). When the time came to leave England, Adams did not regret it. She missed her sons and sisters, her home and friends. Once again she hoped that her husband would return to a quiet family life, but that was not to be. During the years of the Adamsees' sojourn in England, a new constitution had been drafted in America and a new government was in the process of formation.

John Adams' role would be significant; so would the role of Abigail Adams.

Adams moved in 1789 to New York City, the first capital under the new government, as the wife of the first vice president. By now accustomed to the pomp and ceremony of government service, she plunged into a dizzying schedule of social events, none so elaborate as those in England but done in the best style the Americans could support. Adams was for eight years vice presidential consort and for four the First Lady of the President of the United States. Since the government was not in session all year round, Adams's time was divided between months in the capital and months at home in Quincy. Moreover, Adams became the first resident of the new White House in Washington, D. C., when it became habitable (barely) during John Adams' administration.

From Adams' time to our own the subject of her influence on her husband's policies as president has been debated. Because she was a smart and articulate woman, and because her letters describe political events, her reputation as an outspoken, even domineering, wife has persisted. In her own time she was referred to as "Mrs. President of the United States" (Gelles, "Abigail Industry"). In our time, some historians and biographers have claimed her as a "co-president" who shaped her husband's political career. For many reasons these claims seem unlikely. In her own time, Adams' husband was beset with political enemies who tried to destroy—and eventually they were successful—his reputation. One tactic they used was to accuse him of being so weak that his wife had to make policy. The authors of the indictments of "Mrs. President" were attempting to insult John Adams by emasculating him. More recently, as women have become more important in the historical record, Abigail Adams appears as a vigorous foremother of a modern sensibility about women. Such a claim for Adams as "Mrs. President" exaggerates her political power.

Adams was an extraordinarily attractive woman, but she was a woman of her times; therefore, she believed that woman's role was domestic. Because she was intelligent, erudite, and articulate, she could understand and comment upon political issues, but she did not shape her husband's policies. She was his strongest supporter and she listened to him, but she did not advise him. She read the papers and talked with political people, but she did not attend cabinet meetings or committee meetings. She was a staunch proponent but not an originator of John Adams' ideas and policies. She was no more the architect of his thoughts than of his career which she had resisted at every turn. As wife in a patriarchal marriage in an era when marriage was patriarchal, she was not a rebel against her role or her husband. She duly subordinated her wishes to his plans and she took his politics for her own (Gelles, *Portia*).

Adams filled her role as First Lady with dignity but at a cost to herself. She was often ill, but she recuperated and performed her duties. To her sister she described her life of "splendid misery": "I keep up my old Habit of rising at an

early hour. If I did not I should have little command of my Time. At 5 I rise. From that time till 8 I have a few leisure hours. At 8 I breakfast, after which until Eleven I attend to my Family arrangements. At that hour I dress for the day. From 12 until two I receive company, sometimes until 3. We dine at that hour unless on company days which are tuesdays & thursdays. After dinner I usually ride out until seven. Tomorrow we are to dine with the Secretaries of State &c with the whole Senate" (qtd. in Mitchell 91). The cabinet consisted of five men, and there were thirty-two senators. Counting Vice President Jefferson, Adams entertained at least thirty-eight guests. Another time she wrote, "The day is past, and a fatiguing one it has been. The Ladies of Foreign Ministers and the Ministers, with our own Secretaries & Ladies have visited me to day, and add to them, the whole Levee to day of senate & house. Strangers etc. making near one Hundred asked permission to visit me, so that from half past 12 till near 4, I was rising up & sitting down. Mr. Adams will never be too big to have his Friends," she added, perhaps as a mild expression of vexation for having to entertain John Adams' company (qtd. in Mitchell 98-99).

John Adams was defeated in 1800 for a second term in the presidency, and the Adamases finally retired to Quincy. In the remaining seventeen years that she lived, Abigail Adams experienced both joy and tragedy, and in either case she attributed the condition to Providence. Her son Charles died at the age of thirty-two, probably of alcoholism. In 1812, her daughter developed breast cancer for which she endured an "amputation" without the benefits of anesthesia. She lived for several years before succumbing to the disease. John Quincy Adams' career, on the other hand, flourished. He was appointed ambassador to Moscow, leaving his children in the care of his parents for several years, and returned to become Secretary of State under President Madison. Adams outlived both her sisters, but she did not live to see her son become president.

Abigail Adams' last years were filled with the activities that had occupied her early years. She cared for her ever-expanding and contracting household; she read books; she attended to the many people that she knew; she gardened. She continued to write letters to her constituency that had broadened to grandchildren, friends who lived in all parts of the world, and her children as they travelled abroad. Her letters to the time of her death in 1818 remained consistently vibrant, representing the character of a woman who, in addition to confronting hardships and grief, expressed caring, wisdom, intelligence, hope, confidence, and acceptance of the human condition. The brightness of her affections as they are revealed in her letters accounts for the popularity of Abigail Adams as an important figure in American history. She participated in the events of the revolutionary and early republican eras not only as an exemplary woman but also as a witness to her times. Her letters give visibility not just to her life but also to the lives of other women in late eighteenth- and early nineteenth-century America.

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Female Suffrage in New Jersey, 1790-1807

by Irwin N. Gertzog

The fact that women voted in New Jersey during the post-Revolutionary War Period is not widely known and, among those who are aware of it, insufficiently appreciated. History texts sometimes make fleeting references to it, and studies of voting in the United States treat it as a peculiar and unimportant aberration. Few attempt to explain or even describe the circumstances under which women secured the right to vote, the frequency with which eligible women went to the polls, and the reasons why the state legislature later repealed women's suffrage (see Porter, 1918, and Williamson, 1960, for example). This article, a partial summary of a larger study of women voters in New Jersey during the late eighteenth and early nineteenth centuries, addresses the questions alluded to above. First, why did New Jersey confer the franchise on women in the late eighteenth century when no evidence indicates that other states in the Union at the time even considered taking such a step? Second, once given the vote, to what extent did eligible women make use of it? Third, what circumstances prompted New Jersey lawmakers to disenfranchise women in 1807?

ENFRANCHISING NEW JERSEY WOMEN

Most explanations for why New Jersey women were given the vote in the post-Revolutionary period are linked to two central facts. The first is that the New Jersey Constitution of 1776 contained an unusually permissive suffrage provision. The second is that an influential Quaker lawmaker who believed in the equality of women successfully imposed his egalitarian values on colleagues in the state legislature.

The 1776 New Jersey Constitution conferred the vote on "all inhabitants" who met specified property and residence requirements. No prohibition was explicitly imposed on women residents who satisfied the property requirement ("50 pounds clear estate"), and nothing in the document limited the vote to males only. In short, the Constitution was silent with respect to the relationship between gender and voting rights. One reason for the convention's use of so broad a term as "all inhabitants" is that delegates were pressured to employ it by New Jersey citizens who, until then, had been unable to satisfy more proscriptive eligibility requirements. Many of these residents were expected in the months ahead to provide much of the money and manpower needed to end British rule through the force of arms. By using the term "all inhabitants," the framers of the Constitution would be sending a signal to the men who would finance and fight the war that the new state was prepared to be generous in the distribution of political rights. Wider public support for the new Constitution and the revolution was expected in return (Erdman, 1929, pp. 31-32; Pole, 1956, p. 189; Turner, 1916, pp. 166-67).

Another explanation for the permissive language is that the delegates meeting in New Brunswick could not take the time to fashion more specific, non-restrictive terminology. Their convention was itself an act of rebellion, and its participants had already ordered the arrest of the colonial governor. When word reached the New Brunswick conferees at the end of June 1776 that General Howe and his British forces had anchored off New Jersey's Sandy Hook, they feared that the British army might force them to end their convention before a Constitution could be drafted. In the face of this military threat, the rebels hurried their work and adopted a document that failed to incorporate details that a more deliberative body would almost certainly have demanded (Erdman, 1929, p. 47; Turner, 1916, p. 166).

These explanations would be more persuasive if New Jersey was the only state whose first Constitution neither limited the vote to men nor explicitly excluded women. In fact, the Constitutions and laws of several of the thirteen original states were similarly silent on the relationship between gender and the franchise (Porter, 1918, p. 20). Political leaders in these states, and perhaps in New Jersey as well, apparently assumed that it was unnecessary to prohibit female suffrage. They seem to have concluded that since women could not vote before the Revolution, no one would expect them to do so after independence. As we now know, these expectations were borne out in all states save New Jersey.

There is little evidence that women voted in the years immediately following the Revolution, but when the legislature revised its election law in 1790, the term "he or she" was adopted to refer to eligible voters. The credit for effecting this change is generally given to Joseph Cooper, a lawmaker from Gloucester County. Cooper was a Quaker whose religious sect had a significant following in a territory which had once been known as West Jersey. At the time, that region consisted of Cape May, Hunterdon, Cumberland, Burlington, and Salem Counties, in addition to Gloucester, and it generally constituted an area that we know today as southern New Jersey. Quakers made up the most numerous religious sect in the last three of these counties, and the conservative economic and political orientations of its devotees dominated most of that region (Pasler and Pasler, 1969, pp. 198-99). Quaker doctrine with respect to the role of women in religious life, however, was decidedly untraditional. Unlike virtually all other religious groups in the country at the time, the Quakers believed in some measure of political and social equality between men and women, and Cooper seems to have held this view as fervently as any of his co-religionists.

It has been said that the Gloucester County lawmaker was a member of the legislative committee appointed to draft what became the 1790 Election Law, and that he used his position on the panel, along with the high regard in which he was held, to persuade colleagues to recognize the valuable contribution women could make to society and to the state. Accordingly, female suffrage in New

Jersey has been attributed to the influence of the large number of Quaker residents within its boundaries, along with the leadership of Joseph Cooper (Pole, 1953, pp. 52-53; Turner, 1916, p. 168; Whitehead, 1858, p. 102).

An investigation into Cooper's role in passing the Election Law and into the circumstances under which the term "he or she" was inserted into the Law suggests that the conventional account of these events is at least partly incorrect and almost certainly incomplete. In the first place Cooper, although a member of the legislature at the time, was not a member of the committee that drafted and reported out the Election Law (McCormick, 1953, p. 93). It is true that Cooper authored an important election statute passed in 1797, and it is also true that the 1790 measure was introduced by a Quaker from Gloucester County. But the latter's sponsor was not Cooper, and there is no evidence that he was the driving force behind its adoption.

Second, appealing though it may be to attribute egalitarian motives to those who helped New Jersey women secure the vote, there seems to be a more compelling explanation for female suffrage than the one offered in the few sources that explore the subject. This interpretation has its roots in the bitter political battle that took place the year before, during the winter and spring of 1789, when New Jersey was selecting its Representatives to the first United States Congress. The state legislature declared that the four New Jersey seats in the U.S. House of Representatives would be chosen at large, rather than from single-member districts. Accordingly, a group of conservatives, most of them businessmen, many of them Quakers, all of them destined to be members of the Federalist Party, and a large majority of them from the southern counties, organized a slate of candidates which reflected their sponsors' economic, partisan, and regional preferences. The slate came to be referred to as the "Junto" ticket (McCormick 1949, p. 242).

The tactics employed by those who crafted and supported the Junto ticket included, first, gaining control of the election process in the southern counties and keeping the polls there open for weeks beyond their customary closing dates. Given the considerable length of time it took many residents to travel to election sites, polls were often open for two or more days. However, Junto sponsors went well beyond the accepted practices of the period to ensure that voters sympathetic to their House candidates would have sufficient time to cast their ballots. Second, they awaited the election results from the northern counties before counting votes recorded in the southern counties so they could determine how large a margin the Junto ticket would be required to overcome in order to carry the state (McCormick, 1949, p. 244). And, third, they subsequently arranged to have the state legislature ignore the vote count from Essex County, an opposition stronghold, which had kept its polls open for an even longer period of time than Junto politicians had managed to get away with, accepting votes from February

11 to April 27 (McCormick, 1949, p. 247).

These events must surely have influenced the state legislature when it convened the next year to consider a new election law. The measure finally adopted limited the number of days during which polls could be opened, and described the manner in which votes should be counted. But the lawmakers, a majority of whom apparently possessed the same conservative, proto-Federalist preferences that had fueled the Junto victory in 1789, did not confine their attention to election machinery. They also conferred the vote on those women who could meet residence and property requirements. However, while inserting the term "he or she" when referring to potential voters, they limited the reach of the entire statute to only seven of the thirteen counties. Four of the seven contained the highest concentration of Quaker residents, and all seven boasted considerable if not overwhelming incipient Federalist Party strength. The lawmakers also provided for establishment of polling places in each township within the seven counties, thereby assuring greater turnout in them than in the remaining six, where voting sites were less numerous and less accessible (Acts of the Fifteenth New Jersey General Assembly, 19 November 1790, p. 670).

Apparently, these legislators reasoned that if they were to continue to win elections in the future, women, an element of the population which until then had been disfranchised, should be granted the right to vote in those counties in which loyalty to conservative principles was an article of faith. The remaining six counties, some already showing radical, Jeffersonian predilections, would thus be forced to overcome with the votes of males alone the numerical advantages conservative candidates secured from both male and female supporters in the seven, heavily Federalist counties. Thus, the egalitarian motives alleged to have prompted Quakers and others to have conferred the vote on New Jersey women were probably less important in achieving that result than the struggle for economic and political power within the state.

FEMALE VOTER TURNOUT

Just how often women voted in elections after 1790 is difficult to establish. Some believe that female turnout was generally light (Dinkin, 1982, p. 42; Prince, 1967, p. 134). On the other hand, many scholars distinguish between the years preceding and those following 1797. They maintain that from 1790 to 1797, the year in which an election law extended the vote to women in the six counties unaffected by the earlier statute, female turnout was barely perceptible (McCormick, 1953, p. 78; Pole, 1953, p. 44; Whitehead, 1858, p. 102). Several point out that because women did not actively seek the vote, they were disinclined to take the trouble to go to the polls once they had received it. Supporters of this view base their conclusion on observations that the newspapers of the period made little or no mention of women's election day activities. A high turnout, these historians reason, would

have certainly occasioned explicit press coverage (Pole, 1953, p. 44; Turner, 1916, p. 170). They could be right, of course, but the newspaper accounts upon which they tend to rely were published in counties that had not yet extended the vote to women, Essex and Middlesex Counties, for example. Publications appearing in, say, Burlington and Gloucester Counties before 1797 are not cited by those who have studied female suffrage during this period.

Most of these same commentators agree, however, that following passage of the 1797 Act, women began to appear at the polls in considerable numbers (Pole, 1953, p. 53; Turner, 1916, p. 186). Frequent allusion is made by Pole and others to an item in the *Newark Centinel of Freedom* estimating that seventy-five women in the then-Essex County community of Elizabeth voted in the 1797 state legislative contest. Later, the *Trenton True American* reported that female turnout rose to "alarming heights" in the election of 1802, possibly making up as much as 25% of the total vote cast. This increase in female participation is explained as a product of the feverish get-out-the-vote drives by emerging political parties (Pole, 1953, p. 59). By the late 1790s, fledgling Federalist and Jeffersonian Republican party organizations had begun to appear, and contests for office had become more competitive. According to many who have written about the period, both parties increased their efforts to capture the women's vote (Griffith, 1799, p. 33; Pole, 1953, p. 53; Whitehead, 1858, p. 103). Thus, the parties are portrayed as opportunistic, and women voters are viewed as willing, mindless pawns, characteristics which are rarely attributed by these commentators to males, many of whose electoral choices seem to have been dictated by the people by whom they were employed (Pasler and Pasler, 1969, pp. 198-199).

It seems reasonable to conclude that women probably voted as frequently as one might expect any newly enfranchised group of people to vote, people who had not yet become habituated to participate in elections. Moreover, their turnout was apparently affected by the same legal and political factors that normally influence the participation of any aggregation of would-be voters. More women tended to go to the polls when contests were hotly contested, when counties had more rather than fewer polling sites, when voting was by secret ballot, rather than by open declaration of preference, and when more important rather than less important offices were at stake. Thus, newspapers reported a heavy female turnout for the 1800 presidential election, with Jeffersonian Republicans celebrating the role of New Jersey women in that contest even though their candidate had not carried the state (*Centinel of Freedom*, 17 March 1801). An unexciting 1807 legislative contest in one Burlington County community saw women make up only 12 percent of the total vote (DeCou, 1929, p. 50). These proportions may seem small, but New Jersey women of the period were forced to confront several important deterrents to voter participation. One involved the manner in which they

were forced to cast their votes. Many counties chose officials by voice vote. And most polling places were located in taverns. The locations meant that a woman who had not had much experience with politics would have to go to a tavern alive with men in high spirits, and, in the presence of candidates who were buying drinks for potential supporters, announce their choices (Pasler, 1964, pp. 53-54). This must surely have been a daunting experience for even the most determined women. In fact, the order in which names appear on the few available voting lists of the period suggests that women came to the polls in groups, thereby providing one another with the psychic support and the courage to announce their candidate preferences in what must often have been an unsavory setting.

Whatever the proportion of women who made use of the franchise, most historians have concluded that they did not object to the loss of their voting rights (McCormick, 1953, pp. 98-99; Turner, 1916, p. 185). This inference is based, in part, on the fact that women did not insert items in the newspapers to decry the injustices of the 1807 Election Act. The claim is further justified by observations that memorials from women to the state legislature demanding reinstatement of female suffrage were conspicuous by their absence. But the fact that women's names rarely appeared as authors of any newspaper item, and the fact that petitions and memorials to the state legislature bore women's names in connection with only a few, circumscribed issues (Kerber, 1986, p. 87), requests for divorce for example, make these inferences questionable.

DISENFRANCHISING NEW JERSEY WOMEN

Historians tend to agree about the reasons why women were deprived of the right to vote in 1807. Most suggest that the public grew increasingly dissatisfied with the frequency with which one or the other of the political parties tried to exploit women by "herding" them to the polls, where they voted mindlessly for candidates about whom they knew virtually nothing (McCormick, 1953, p. 99). Added to this growing irritant was the occurrence in 1807 of a corrupt referendum in Essex County in which women were said to have played a visibly ignoble part (Prince, 1967, p. 134). The referendum pitted the residents of Elizabeth against those of Newark in determining the location of the county seat. It seems that Essex County needed a new courthouse and jail and each of its two largest communities vied for a site within or near its boundaries. When county officials could not agree on which of the two to favor, they persuaded the state legislature to authorize a referendum so that the citizenry of the entire county could decide the issue (Turner, 1916, p. 181). The voting took place over a three-day period, with the polls established first in Springfield for a day, then moved to Elizabeth, and finally set up in Newark for the final day of balloting. Residents of the contending communities shamelessly moved from site to site and

voted at each, sometimes cloaked in a disguise. It was reported that male youths, dressed as women, cast multiple ballots, and that both men and women were guilty of registering their choices on two or more occasions. A few darkened their faces with charcoal and voted in the guise of free blacks (Prince, 1967, p. 134); Turner, 1916, p. 182). When the ballots were counted, Newark had won, but the total number of votes recorded in some precincts was suspiciously, even outrageously, high. Sixteen hundred people had voted in Newark in the 1806 election; five thousand voted in the referendum a few months later. Three hundred had voted in the last legislative contest in the town of Springfield; more than 2,400 recorded a choice in the referendum. The fraud was so palpable that the state legislature eventually threw out the result (Turner, 1916, p. 183).

According to most published accounts, the drive for reform was now irresistible. In October 1807, the legislature limited the vote to "free, white, male citizens. . ." of twenty-one years of age (Acts of the 32nd New Jersey General Assembly, 16 November 1807, p. 14). All at once state lawmakers had disenfranchised free blacks, non-citizens, and women, an action they believed was justified by the need to rationalize the administration of elections and to reduce political corruption. That most of the illegal activities associated with the referendum had been engaged in by white males seems not to have mattered. What was important to lawmakers was that the potential voting power of three "easily manipulated" and marginal groups should not be abused by unscrupulous elements of the white, male majority. And the way to resolve the problem was simply to deny members of these groups the right to vote. Like the conventional explanation for how New Jersey women secured the franchise in 1790, this account, too, is incomplete.

The need for election reform was certainly highlighted by misdeeds in the Essex County referendum. But several fundamental changes had taken place within New Jersey since 1790, and these changes altered the distribution of power within the state. In 1801, the Jeffersonian Republicans replaced the Federalists as New Jersey's dominant political party, and the locus of power moved to the northern, more populous counties (Pasler, 1974). In 1804, the legislature voted to free the slaves within the state on a gradual basis, and, since the great majority of slaves resided in the northern counties, that region stood to increase significantly its voting power vis-a-vis the southern counties. Since many of the northern Jeffersonian Republicans had never been comfortable with women's suffrage, and since southern conservative Federalists were probably fearful that the much larger number of northern voters would be swelled further by an increase in black voters, legislators from both regions agreed to strip the vote from both groups.

Even if southern legislators had not been party to this possibly inexplicit bargain among lawmakers, the disenfranchisement of women would almost certainly have

occurred before long. For what was happening in New Jersey cannot be isolated from similar developments in other states. By the beginning of the nineteenth century, almost all of the states were extending the vote to larger and larger proportions of white males. At the same time, however, state after state took steps legally to deny their marginal populations the same right. Virtually every northern state disenfranchised free blacks and aliens (Wesley, 1947, p. 154). For women, a return to second-class citizenship occurred only in New Jersey because they had never been empowered to vote in any other state.

In sum, women were given the vote in 1790 less because of the egalitarian spirit characteristic of Quakerism than because of the clash of economic, partisan, and regional forces, and the struggle for political control of the state. Once they got the vote, women were not simply hustled to the polls when signaled to support pre-designated candidates. They seem to have responded to the same political forces that motivated males. When polls were readily accessible, when elections were closely contested, and when the stakes were high, they turned out. Later, they lost the vote not so much because, out of a weakness believed to be common to their sex, a few had engaged in illegal behavior in an Essex County referendum. They were deprived of the vote largely because as women, unable to hold public office and forbidden by the norms of the period from resorting to tactics fostering political mobilization, they could not protect themselves from a resourceful majority who wanted to reform the election process and who believed that, in the process, it was in their own interests to disenfranchise politically marginal groups.

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Martha Laurens Ramsay: Prototypical Citizen in the Constitutional Era

by Joanna B. Gillespie

Born in 1759 to Henry and Eleanor Laurens of Charleston, South Carolina, Martha Laurens was aware as a child of her merchant-father's troubles due to the Stamp Act and his growing disenchantment with England. After his wife's death in 1770, Henry Laurens took his three sons to England for schooling, leaving Martha and an infant sister with her father's brother, James, and his wife who had no children of their own. In 1775, due to James Laurens' declining health, he moved his household to England where they were marooned by the outbreak of war. Later they moved to Nismes, France, not returning to Charleston until 1785, after Henry Laurens had served as minister plenipotentiary for U.S. peace negotiations, with his daughter, Martha, as his secretary. When she was twenty-seven, Martha Laurens became David Ramsay's third wife; she bore him eleven children in the next fifteen years, and she educated her eight surviving children along with various nieces and nephews, boarders, and children of her slaves. Though Martha Ramsay's inherited standard of living was eroded by inflation and her husband's unsound investments, the Ramsays were still counted among Charleston's important residents. She died in 1811 at age fifty-one. *Memoirs of the Life of Martha Laurens Ramsay* (cited by page number herein) was compiled in 1811 by David Ramsay, a physician and historian, from his wife's diary, letters, and religious writings. The *Memoir*, one of the very few biographies about women from the southern part of the country, was reprinted well into the nineteenth century and considered a classic of the pious memoir genre, the one type of popular literature other than novels that focused on women.

Had she been asked in 1788, the year South Carolina ratified the new constitution, Martha Laurens Ramsay would have defined citizenship for her, a woman, as "laboring diligently in my family and station" (166). She had been married a year to David Ramsay, an enthusiastic supporter of the new federal Constitution. Her diligence in family and station had earlier exposed her to varying aspects of citizenly service, such as being her father's hostess at diplomatic dinners in Europe during peace negotiations at the end of the Revolutionary War. It would be channeled, as her own family grew, into devising curricula for and administering the family school during the 1790s, along with assisting her husband's scholarly and medical labors. In the early days of nationhood, a new approach to female roles and domesticity was beginning to emerge as women evolved new definitions of citizenship. This study describes women's citizenry, or proto-citizenship, in the early republic, using Martha Laurens Ramsay's

life as example.

The word *citizen* as Ramsay knew it applied only to men and then only if those husbands or fathers were white and owned property. Women were citizens at one remove in the new nation. Indeed, if she had tried to articulate a theory of citizenship that included females, Ramsay might have begun by drawing from two of the major streams of thought shaping her mental world: a religious personalism as rationale for citizen responsibility, privileges, and participation (the Enlightenment influence within overarching Protestantism having just begun to be ignited by the torch of evangelicalism); and, as the framework for citizenship in a republic, the lofty, classical ideal of a balanced social order where no single group would be able to wield dominating power over another (Wood, 1976; McDonald, 1985; Kloppenberg, 1987). Of course, the categories of race and gender were not yet included in that ideal of balance (Matthews, 1986).

Martha Laurens Ramsay, however, was one American woman who could assure herself that the kind of citizenship she enjoyed through her famous father and her author husband, "virtual representation" (Gunderson, 1987, p. 63), made *her* contributions valuable, even if her daughters' generation had already begun to question such constrictions around citizenship. In 1793 a salutorian of the Young Ladies' Academy in Philadelphia pointed out that since "citizens of either sex" had the right to plead their own causes before the Bar, females should be able to participate in government through "a senate of women" (Ruether and Keller, 1983, 407-408). Ramsay might well have been amused at such youthful audacity because she never doubted her own usefulness to the nation through her "relative duties" (36).

Women such as Martha Ramsay, born into the natural aristocracy of the new nation, already enjoyed confidence in their influence. They even realized a certain sense of power in the moral and ethical context of political decisions through their impact upon fathers, husbands, and sons. However, Martha Ramsay's life and words also reveal the actual process by which a woman, taking new, principled, and progressive approaches to the activities of family management and education, could piece together, "quilt-fashion," an identity that encompassed the ideals and responsibilities of citizenship (Atkinson, Buchanan, & Miles, 1985, p. 3). The key to this new consciousness was intentionality, an individual's conscious choice of a specific self-identity (and actions) as the essential building block. The war was over and the nation's independence from Britain established. Newspaper rhetoric, constitution writing, and sermons were all expressed in a language entwining intention and structures, organization and emotion (Bloch, 1985). Women such as Martha Ramsay developed a proto-citizenship in a self-appointed, educational, and spiritual guardianship first within the family and then beyond the family into the society itself.

In Dr. Ramsay's encomium, his forty-seven page biography introducing the *Memoirs of the Life of Martha*

Laurens Ramsay, responsible, enlightened family management, or "kinkeeping" (Hareven, 1952), is presented as female virtue incarnate. In Dr. Ramsay's phrase, "relative duties" (36), and his wife's exemplary performance within the family as well as outside its bounds, were a justification for her apotheosis: "Never was there a daughter more devoted, attached, and obedient to her parent; and her conduct flowed not from instinct, accident or example, but from principle (emphasis added; 36-37). Mere mechanical fulfillment of domestic management duties would no longer be enough for the new American woman; principle—that is, conscious, rational intent—was the important factor.

Conscious of her birthright as a female pillar of the republic, and "ever ready to reciprocate the tender charities of domestic endearment," Ramsay had from adolescence exercised spiritual and relational oversight among her kin; when she became a mother, her understanding of relative duties deepened to "the exact bound of maternal prudence" (205, 204). She had, however, also assimilated the civic paternalism of her father and his generation of Charleston oligarchs. Growing up in an ethos of domestic and patriotic leadership, absorbing a quasi-official mandate to think and speak to the welfare of the wider society, her adult kinkeeping ineluctably expanded on "an overflowing tide of affection" (204) beyond family spokespersonship. Internal kinkeeping—the actual physical and emotional management of parent-child, aunt-niece, husband-wife relationships—in any household was rooted in a Protestant Christian cultural imperative, and the extra-family or community dimension was as well based on religious precept, which Ramsay often pondered in her diary (Gillespie 1989).

The newly-articulated dynamic of kinkeeping as basis for proto-citizenship was one of David Ramsay's contributions to an evolving American self-definition: Martha Ramsay's "conduct flowed from principle," not from instinct or any less rational impulse. Intention was the defining quality of contribution by any citizen in a democracy; Ramsay's impulse was political. The emerging dialogue about citizenship in this constitution-writing period consisted of just such invisible but psychologically significant themes; the application of rational, conscious intent to something formerly taken for granted as instinctive made an act political. David Ramsay (and probably Martha Ramsay as well) consciously intended to elevate intentional, principled kinkeeping as the standard for women's intelligent, religious, republican citizenship (an interpretation that foreshadowed Kerber's "women of the republic" view [1980].) Her husband's editing of Ramsay's "literary remains" (Hennen, 1846, p. iv) coincidentally served another personal-authorial goal: to make a contribution to the new nation's mythology by adding her to the pantheon of model citizens celebrated in heroic biographies or memoirs. "I wish that this custom of celebrating our great characters may become universal," he wrote a fellow historian (Brunhouse, 1965, p. 146). His intention-

ality, to be one of the shapers of the nation's cultural fabric, led him to published visibility for himself and others he wanted his countrymen to view as exemplars (see Susman on the need for myth-creation in certain historical eras). Ramsay herself, however, might rather have subscribed to Richardson's more modest aphorism about kinkeeping in *Clarissa*: "A worthy daughter would rather wish to appear amiable in the eyes of her own Friends and Relations than in those of all the world besides" (Richardson, 1980, 169). In Ramsay's eyes, from the view of her class and social heritage, relatives and her duty toward them was the measure of her public worth.

Principled intention about relative duties led Ramsay to sprinkle her letters with moralizing maxims. "I was so much attached to my father, and to the uncle and aunt who brought me up," she confided to her son at Princeton, "that I lived in the habit of greatest intimacy with them . . . [as is] generally the case with virtuous and affectionate children" (214-215). Her parental sigh for more frequent communication—"just wait till you have children of your own"—was seductive rather than remonstrative: "The consciousness of having been a good son will fill you with inexpressible delight . . . when standing in the relation of a parent yourself" (202).

The religious and intellectual taproot of Martha Ramsay's proto-citizenship was located in the seventeenth-century piety of English women who had filled her youthful imagination: the memoirs of Elizabeth Bury, Elizabeth Rowe, Elizabeth Carter, and Hannah More (see Pennington, 1810; Burder, 1835). Their Protestant-Calvinist interpretation of domesticity as a religious, as well as social, calling hallowed the formerly unexamined female role of household manager, providing the ground also for an expanded culture of Christian friendship; in turn, that idea legitimized women's mental and spiritual exploration of the bonds of heavenly and earthly citizenship (Brown, 1982 & 1987). In each expansion of woman's domestic role, the mechanism was principled intention. Enlarging the purview of these natural relationships by accretion, so to speak, principled intent edged women such as Ramsay toward proto-citizenship.

The responsibility for producing republican virtue in the new nation influenced Martha Ramsay's choice of educational content and method. As family educator, she was intentionally modern. Ramsay's pedagogy, consciously modelled on Locke and the many modern theorists that she read, was progressive and pragmatic. Her husband recalled that "Soon after she became a mother, she studied with deep interest most of the esteemed practical treatises on education in French and English, that she might be better informed about the nature and extent of her new duties" (21). She was the true Enlightenment kinkeeper, the ambitious mother evaluating all the current approaches. "Mrs. Ramsay is among the number of those who are anxiously waiting for the publications of your lectures to young ladies," her husband wrote on 29 September 1788 to Dr. Benjamin Rush about his *Thoughts*

upon *Female Education* (cited in Brunhouse, 1965, pp. 122-123). Ramsay hoped to imitate the novelist Richardson's camouflaged didacticism in instilling "a right bias to energies and sensibilities" in her pupils without raising their resistance to being instructed; she was the progressive parent who planned to fascinate them into learning rather than relying on fear or force (205).

Ramsay also welcomed the new intellectual stance encouraging the ordinary citizen's "emergence from nonage"—that is, the refreshing idea that individuals themselves had the ability to use their own senses and understanding in evaluating information (Howe, 1987; Fliegelman, 1982, pp. 40-50). "Before you read much further in history," she advised her daughter Eleanor, "read Priestley's Lectures on the subject . . . [but Bear always in mind that he is a Socinian . . . profit by his science, while, you lament his errors in divinity]" (171). Ramsay favored learning through experience: "We hear good sermons, we read good books, but whole years of hearing and reading do not teach us so much . . . as the running dry of one spring of earthly enjoyment" (194). As a teacher, she would persuade and demonstrate. Young children, she cautioned her oldest daughters, learn "a great deal" by osmosis, observing "whether you curb your temper, whether you begin wisely to observe those laws of self denial which will make you happy to yourself, and pleasant to those about you" (169). She would not dictate from the unquestioned authority of a parent but take pride in elucidating the children's own self government. "Ask yourself what am I about?" she instructed, when they should perceive "the encroachments of vice"; they were to be their own monitors and ask themselves "where is my conduct tending?" (168). No pains were too great if they contributed to her children's advancement, her husband recalled; she tried to "keep them constantly in good humor; gave them every indulgence compatible with their best interests, partook with them in their sports, and amused their solitary hours so as often to drop the 'mother' in the 'companion' and 'friend'" (39). She made learning their first letters seem like play, literally, with the Lockean multi-sided alphabet block; with Locke, she believed children should learn languages other than English very early in life, should speak French as children in France spoke it (Axtell, 1968).

Martha Ramsay's own education had been unusually broad. As a Charleston heiress, she learned Latin from her brothers' tutors and absorbed the new scientific interest in taxonomy and botany. As an adolescent, she had begged her father to send globes for the new study of geography from England; he, of course, indulged her, meanwhile chiding her not to neglect other basics in her education such as needle skills and "plumb puddings" (Laurens, IX, p. 440), saying, "When you are measuring the surface of this world, remember you are to act a part on it, and think of a plumb pudding and other domestic duties" (Laurens, 1774, IX, p. 457). She read philosophy, *Watt's Logic*, biography, astronomy, chronology, travel literature, and

the best fiction, though in the *Memoir* list of her "astonishingly great" book consumption, her editor-husband cites only titles demonstrating her theological sophistication. She commended Plutarch to her children as a balance to novels; she constantly exchanged books with correspondents, recommending a wide range of authors (20, 189, 199). Her mental world continued to expand in adulthood; for example, enthralled with the democratic symbolism of a round-form church, she did the first drawing of the design for the (as it became known) Circular Church she had joined after marrying David Ramsay in Charleston (SCHC, 1803); she made book abridgements, a typical means of self-education in the eighteenth century; and she absorbed the vocabulary of medical research texts in order to assist her husband's diagnoses, as well as helping to edit his histories of South Carolina and the Revolutionary war (28-30). Ramsay's modernity atop "the fault line of gender" (Smith-Rosenberg, 1987; Scott, 1986) aligned her with other self-appointed "Americanizers" of education. A New England counterpart, the Rev. Enos Hitchcock, announced in his fictionalized education treatise, *Memoirs of the Blooms Grove Family* (1791), "We have already suffered much by too great an avidity for British customs and manners; it is now time to become independent in our maxims, principles of education, dress and manners, as we are in laws & government" (15).

American citizens must be responsible for the wider political family through "social affections," a bond that could be curricularly produced through education in virtue, that is, the conscious shaping of "the right bias to sensibilities and energies" (205). "Liberty cannot be preserved if the manners of the people are corrupted," local newspapers such as the *Massachusetts Centinel* warned (1786, VI). Conscious, principled intention, the essential component of citizenship, of enlightened pedagogy, and of kinkeeping, was also essential for the "culture of the heart," the domestic education that established a family foundation of virtue. A mother's love for her children, instinctive but without focused patriotic intent, was by no means sufficient. Linking female nurture with the culture of the heart, literally, and thence with citizenship, Hitchcock cited breast feeding as a standard for the virtuous woman citizen: "In America there are comparatively few mothers so unnatural as, of choice, to put their children out to nurse" (Hitchcock, 1790, p. 47). Mother's milk itself was a contribution to the constitution, metaphorically speaking. The virtuous Mrs. Blooms Grove, Hitchcock's female exemplar, "wouldn't put her precious babes in the hands of a mercenary nurse" or "suffer one who knows little more than how to yield nourishment to an infant" to have the all-important first influence on her child (emphasis added). "The quality of the food fixes the state of the constitution," was Hitchcock's avuncular pun (47, 49). According to David Ramsay's boast, his wife endorsed this severe republican standard in her fifteen years of childbearing: "she suckled

all her children without the aid of any wet nurse; watched over them by night and day; and clung to them every moment of sickness or pain" (22). Though of course praying fervently for her children, Ramsay's childrearing illustrates the metamorphosis in parenthood in the new republic. Parents were accepting more personal watchfulness and responsibility for children's welfare, relying less fatalistically on divine favor (Dye & Smith, 1987, p. 330). Once again, intention was the central element.

Educational citizenship meant that children should be taught "to subject their passions to the dominions of reason and religion, to practice self denial, [and] to resist the importunity of present pleasure and pain for the sake of what *reason* pronounces fit to be done or borne (emphasis added, p. 22). Ramsay wove together the strands of religion, knowledge, and behavior, rather than separating them. Use the "excellent understanding God has given you," she adjured David, Jr., to "regulate your conduct and harmonize your passions" (203). Virtue could be rationalized and learned, step by step: "Every act of self denial will bring its own reward with it, and make the next step in duty and in virtue easier" (203). She was determined to produce children who were virtuous and a nation that was a "dominion of reason and religion"; the politico-religious motto from the Charleston *South Carolina Gazette* writings of Rev. Daniel McCalla, a columnist-friend who wrote under a variety of classical pseudonyms such as Onesimus, for example (meaning helpful or profitable), was an article of faith in Ramsay's proto-citizenship: "Democracy is the only form of Government ever approved by God" (McCalla, 1810, II, p. 183). As "... one who had a long and intimate intercourse with many of the first characters in her native country and in Europe" (p. x), Ramsay heartily supported most of the McCalla education ideas. His one stricture related to gender, however, would have roused her ire: "... the laws and government and other political subjects which occur in learning this science may very well be omitted by young ladies. Their particular province in society by no means requiring a knowledge of these matters, and their native dignity and importance rather lessened than increased by them, they ought to be omitted, at any rate, till maturity of judgment and experience shall qualify them to apply. This, however, can very seldom be the case" (McCalla, 1810, II, pp. 181-182).

Fortunately, the *Memoir* itself is an implicit rebuttal to this dismissive view of women, although beyond producing it Dr. Ramsay himself could not go. He, too, was unable to endorse patriotic actions for women other than the wider implications of relative duties (pp. 38-39). Nevertheless, as husband of a daughter of a former president of the Continental Congress, David Ramsay would not have concurred that female dignity was lessened by knowledge of laws and politics—rather the opposite. As a daughter and sister of revolutionary heroes, Martha Ramsay embodied a sense of responsibility for the nation equal to her husband's. Understanding government from the inside as she did, she was, nevertheless, too well bred, too conscious

of being her father's daughter and kinkeeper to the nation to articulate a controversial public stance such as Mary Wollstonecraft did. In her mind, laboring diligently in family and station would carry the day by example, avoiding tendentious and divisive argument. Ramsay viewed her life itself as women's kind of independence. "The being that discharges the duties of her station is the autonomous woman," in Wollstonecraft's own dictum (cited in Bell & Offen, 1983, pp. 1, 61).

Martha Laurens Ramsay was not a rebel, as we today might wish, nor did she record much humor or winsomeness; perhaps if she had been less high-minded she might have expressed herself more informally. Her Laurens heritage may even have made relative duties sometimes burdensome, but she was staunchly loyal first to her patriarch and then to her husband. The same passionate pride once located in her father's reputation and statesmanship was transferred, in her middle years, to David Ramsay's wordmanship. For example, instead of steering David, Jr., into grandfather Laurens' financial footsteps, although she commended that paternal model of religious, patriotic, and commercial integrity, she envisioned her son in some sort of profession, "inheriting your father's literary reputation" (202). Like all mothers who want the best for their own, she desired that David, Jr. should "fit [himself] to rank among men of literary and public consequence" (207). Leadership in public rhetoric and political idealism must replace Grandfather Laurens' entrepreneurial pursuits for the post-War Ramsays.

When David, Jr., away from home for the first time at college, displayed non-republican fascination with fashion in dress and less-than-total dedication to his studies, his mother responded with full parental alarm. Since he enjoyed the great privilege of college, his insensitivity to his parents' financial sacrifice was insufferable: "Many young men with less means than you," his mother wrote, "have felt it a great privilege to go through a collegiate course, and have afterward come to be eminent, respectable and wealthy" (204). His youthful opinions were lightweight: "Persons about your time of life, are apt to think themselves very wise; and to pay very slender attention to the advice of their superior; this is a very great error," she fumed in a letter of 11 September 1810 (210), continuing "At your time of life every false appearance of pleasure is taken for a reality, the restraints of virtuous industry and hard study a burden too heavy to be borne" (211). Ramsay, already terminally ill as she wrote these letters, perceived David, Jr.'s generation, born in the 1790s and, therefore, having no memory of the War or its brutal hardships, as lacking citizenly virtue. "The Charlestonians carry their idleness, their impatience of control, their self-consequence with them wherever they go," she lamented (211). Her son must never become one of those "Carolinian triflers whose conduct has brought a college like Princeton into disrepute," whose conduct would embarrass a father "whose fond ambition it is to see his son distinguished in life," as well as embarrass a mother

who had herself prepared him in Greek and Latin for Princeton (207, 202, 205).

Ramsay's republican idealism extended beyond principle to fiscal realities: she and her husband were barely able to sustain a mode of living at only the margins of the aristocratic circle in which she had been raised. By the late 1790s, even if republican frugality had not been a point of principle with them, the Ramsays could no longer afford to fraternize with the first families of Charleston who had been her father's close associates—the Manigaults, the Izards, the Hegers, the Rutledges, the Pinckneys (Rogers, 1969; Bridenbaugh, 1958; Spruill, 1972). Ramsay championed America's innocence of class distinction in the rhetoric of frugality. "I feel more pride, more consciousness of being a lady, by having every thing about my person [and my household] in the plainest style of decency, than . . . by endeavoring to cover our moderate circumstances by a tinsel veil of finery," she lectured her son (216). Enos Hitchcock would similarly introduce his fictional Bloomsgroves to the readers as "not titled Lady and Lord but in the plain style of Republicanism, Mr. and Mrs." (p. 33). Ramsay's goal for her oldest son was in line with such wholesome, unpretentious patriotism: all he needed was to "lay in a sufficient stock of knowledge, and to attain such literary honors as may be the foundation of future usefulness," which, through the lenses of virtuous patriots, would be the equivalent of a fortune. What she could not abide was the thought of his being unfocused and aimless, "a fashionist, to sport various changes of apparel, to drink, to smoke, to game" (217).

A moral issue undermining serenity in the republic, especially in Charleston, was the institution of slavery. For a Laurens, slavery induced grave ambivalence (Laurens, 1774, III, pp. 373-37). Henry Laurens had built his fortune before 1760 on slave importing; however, by 1783 he had become a "lonely" Southern-white advocate of abolition (Wallace, 1915, p. 454). Martha Laurens Ramsay's revolutionary-hero brother had twice, before he was killed in 1782, submitted a bill in the South Carolina House of Assembly that would free and arm several thousand slaves to help fight Britain. Henry Laurens empathized with his son's dramatic but failed gesture; "It is certainly a great task effectually to persuade rich men to part willingly with the very source of their wealth. . . . You have encountered rooted habits and prejudices, than which there is not in the history of man recited a more arduous engagement" (cited in Wallace, p. 454). Martha Ramsay's transplanted-Pennsylvanian husband, David, praised John Laurens' racial-equality idealism by writing: "Zealous for the rights of humanity, he contended that personal liberty was the birthright of every human being, however diversified by country, color, or capacity" (Ramsay, 1786, p. 25).

For her part, Martha Ramsay counted family slaves as part of her relative duties; Sunday catechism in her household meant black and white children at the same time (24). Educating her Negro "relatives" suggests that she was both a conscientious mistress and a troubled

Christian citizen in a society that was largely unwilling to concede the humanity of blacks. The one mention of slaves in the diary, as it appears in the Memoir, is an 1806 thanksgiving that financial exigencies had not forced the Ramsays to sell their remaining slaves and thus cast them beyond their protection: "The providential mercy of God did again interpose for us, and the servants whom we feared to lose, and who feared to lose us, are still in our possession, and under circumstances which give us reason to hope that they will still continue in our service and in their comfortable situations" (163). In her father's will, he entrusted one of the slaves he intended to free to the custodianship of David and Martha; he knew they would fulfill his intention, even in their state of pecuniary embarrassment (Wallace, 1915, p. 451, n. 2).

Early American women's experience can be reconstructed through the life of Martha Laurens Ramsay; virtue itself assumes specific associations with gender in the early nineteenth century, not only because of new women's organizations but also in the accompanying development of proto-citizenship. Women like Martha Ramsay were increasingly credited, first by implication and then rhetorically, with a religiously significant, political, contribution: forming men, future citizens. To bend Paine's aphorism that America held the world in her hands, Ramsay participated in bringing to birth a world that was beginning to be seen as woman's to mold (Lewis, 1987, 700-703). Public virtue, becoming the province of women and nurtured through the Bloomsgrovian, domestic "culture of the heart" and the new intentional domesticity of educated women like Ramsay, gradually expanded into "a large abstract national ideal. . . anchored in the private realm of family, church and school" (Bloch, 1987, pp. 54-55). Men, meanwhile, were busy with fortunes made and lost, laws and lawsuits, new canals and the first "manufactories"; apparently they were comfortable viewing male virtue in terms of a commercial contribution to the nation, as long as the women were fulfilling the other virtuous necessities (Kramnick, 1988). "Nothing short of a general reformation of manners would take place, were the ladies to use their power in discouraging our licentious mannners . . . in public places especially," the *Baltimore Weekly* editorialized at the turn of the century. If the women discharged their religious, educational, marital, and system-maintenance proto-citizenship, "public decency will become a fashion, and public virtue the only example" (1 April 1801, pp. 241-21). Martha Ramsay would wholeheartedly support that kind of fashion; public virtue was what she intended her relatives to incarnate. David Ramsay's personal and political intent as her editor in the *Memoirs* was to insure that her influence and example be forever available to other women to lead them in the proto-citizenship that was part of public virtue.

Martha Laurens Ramsay's own kinkeeping intent was based on an entry in her diary: "Christ said to his disciples in general ye are the lights of the world. If so, how

defective [are those] who aren't at least the light of their own family" (emphasis added, 159). Women raised in privilege who wanted to use their talents significantly turned to "the discharge of relative duties" as the appropriate expression of proto-citizenship. Ramsay's embodiment of virtue may have convinced even her husband to rise above his ideological disapproval of "modern theorists who contend for the equality of the sexes" (37) and credit women more generously than other historians in the new nation. A brushstroke of gender-egalitarianism graces his *History of South Carolina*: "The name of the family always depends on the sons; but its respectability, comfort and domestic happiness . . . on the daughters. . . . The happiness as well as the cheerfulness of a family is increased in proportion to the number of daughters" (Ramsay, 1809, II, pp. 229-230).

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Winning the Vote: The Battle at the State Level

by Keith Curry Lance and Elizabeth M. Almquist

The first U.S. women's rights convention was held at Seneca Falls, New York, in 1848. Yet, woman suffrage was not extended nationwide until the Nineteenth Amendment to the U.S. Constitution was ratified in 1920. In the interim, the National American Woman Suffrage Association (NAWSA) waged a long Congressional campaign for a federal woman suffrage amendment which has received considerable scholarly attention. In striking contrast, however, its concurrent, frequent, and often successful skirmishes with state legislatures over woman suffrage laws have escaped equally rigorous scrutiny. Such scholarly neglect is especially curious in light of the fact that the proposed Equal Rights Amendment failed not for lack of support in Congress but because it was not ratified by enough states. This study combines and weighs various explanations of state woman suffrage success and suggests lessons which might be learned from those historic successes and applied in future campaigns to ratify Constitutional amendments in general and the Equal Rights Amendment in particular.

State woman suffrage successes may be described in terms of their level and timing. In addition to full suffrage, six types of partial suffrage were granted by states. In the context of Congressional passage and state ratification of the federal amendment, they may be assigned to two levels, token and limited suffrage. School, tax and bond, and municipal suffrage were token types, because they had little, if any, effect on federal and state action on the Nineteenth Amendment. Most of the twenty-eight token victories were won by the turn of the century. Presidential, primary, and territorial suffrage were limited types, because they had some effect on federal and state action on the Nineteenth Amendment. Most of the eighteen limited victories were won within five years of the federal amendment's ratification. Of course, full suffrage had considerable effect on federal and state action on the Nineteenth Amendment. The fifteen full victories were scattered between 1890 and 1920.

Previous efforts to explain state woman suffrage successes have credited them to energetic advocacy by NAWSA, the absence or failure of opponents to woman suffrage, or the political or demographic context of the battle. The resource mobilization (RM) perspective may be used to combine these explanations, providing a more complete explanation of these successes. According to the RM perspective, social movements are part of a society's central political process. The primary tasks of a social movement organization (SMO) are to exploit that process, mobilize supporters, and neutralize opponents (McCarthy and Zald, 1973). Previous efforts to explain state woman suffrage success in terms of what its advocates

or opponents did or the political or demographic context in which they operated are consistent with this approach to the study of social movements. A review of these previously suggested explanations will help to clarify the explanation proposed by combining them.

NAWSA MOBILIZATION

The resource mobilization (RM) perspective focuses on distinct social movement organizations (SMOs). Formed by the merger of two rival SMOs, the National Woman Suffrage Association and the American Woman Suffrage Association, NAWSA coordinated previously competing strategies focused at state and federal levels, respectively. Its strategy was to pursue woman suffrage at both levels, using accumulated state successes to increase electoral pressure on Congress to pass the Nineteenth Amendment and to create a favorable climate for its ratification by the states.

While there is little direct evidence of the human and economic resources mobilized by NAWSA, the organization of its affiliates and their activities provide strong indirect evidence. Indicators of organization include when and to what extent affiliates were organized in a state. These affiliates engaged in three major types of activity: meeting in conventions, lobbying for bills in state legislatures, and forging alliances with other SMOs, such as the Women's Christian Temperance Union.

STATE POLITICAL STRUCTURE

The structural context of political decision-making varied from state to state. Five features of state politics expected to favor woman suffrage are more competition among parties, greater citizen access to legislators, more professional legislatures, simpler legislative procedures, and more restricted electorates. The first three features are implicated in a wide variety of recent state policy decisions. Competition among parties, which may be indicated by how frequently the majority party changes, seems to encourage action on a wide variety of issues, including consumer rights (Sigelman and Smith, 1980), public employment (Gryski, 1980), and welfare policy (Lewis-Beck, 1977). Citizen access to legislators, as indicated by the ratio of legislators to citizens, has been identified as a characteristic accounting for women's share of state legislator seats (Almquist, Darville, and Freudiger, 1980). The professionalism of a legislature is indicated by the legislative timetable and compensation for state legislators. State legislatures with more frequent and longer sessions, longer terms of office, and higher pay were more likely to have enacted recent changes in state laws pertaining to women (Almquist and Lance, 1981).

Simpler legislative procedures and more restricted electorates are credited for state successes throughout the woman suffrage literature (Kraditor, 1959; Grimer, 1967; Catt and Shuler, 1923). Full suffrage required a state constitutional amendment; partial suffrage required only statutory legislation. Each method, however, presented procedural obstacles. For constitutional amendments, potential procedural obstacles included the size of the

majority required for passage, approval by two sessions, ratification by popular referendum, and a limit on the number of amendments allowed per election. For statutory legislation, the potential obstacles were the absence of the initiative, ratification by popular referendum, the size of the majority required for passage, and constitutional lobbying restrictions.

States limited the size and composition of the electorate through the use of tests of citizenship, tax payment, and literacy. NAWSA leaders were outraged that while women were denied votes certain vaguely suspect classes of men—the illiterate, the Negro, and the foreign-born—were enfranchised. Beyond provoking a sense of relative deprivation, these blocks of voters were regarded as potential political pawns of the coalition of vested interests opposed to woman suffrage. Fearing the impact of these voters on the chances of state success, NAWSA leaders believed it was in the interest of woman suffrage to prevent them from voting.

INTERESTS OPPOSED TO WOMAN SUFFRAGE

The possibility that a social movement might be constrained by groups whose political or economic vested interests it threatens is entirely consistent with the assumptions of the RM perspective. The woman suffrage literature records widespread claims that a coalition of vested interests opposed woman suffrage (Catt and Shuler, 1923; Flexner, 1959). The liquor industry was the pivotal member of this coalition, because owners feared that woman suffrage would lead to Prohibition. Drug stores and tobacco dealers, which sold alcohol-based products, were linked to the liquor industry by common economic interests. Railroads and meat packers, the other major cogs in many state political machines, were linked to the liquor industry by common political interests. Consequently, the threat of woman suffrage to the liquor industry was not only a threat to the economic status quo but also to the balance of political power in the states. It is of little surprise, therefore, that the chances of state success were assumed to be better where the interests of these industries were smaller.

STATE DEMOGRAPHICS

The demographics of states is an explanation suggested only indirectly by the woman suffrage literature. Scholars of the movement explain state woman suffrage successes in terms of the influence of certain demographic conditions on NAWSA mobilization, state politics, and anti-suffrage interests. Many Protestant denominations lent active support to the Populist and Progressive movements which made political parties compete more, gave citizens greater access to their legislators, made legislatures more professional, simplified legislative procedures, and restricted electorates. NAWSA's Committee on Church Work appealed to the clergy for support on the rationale that women voters would augment the political power of the churches to legislate moral reform. The lobbying of church members by this committee as well as the

Women's Christian Temperance Union (WCTU) is credited with mobilizing the church vote for woman suffrage.

State woman suffrage successes have also been credited to native whites who promoted Populist and Progressive reforms of state politics, reduced the influence of anti-suffrage interests, and even directly supported NAWSA. Political reforms are attributed to the Populist and Progressive movements' being "lily-white," especially in the South (Kraditor, 1965, p. 168). NAWSA leaders perceived that, by the turn of the century, the native white majority was anxious enough about the rising tide of immigration to have second thoughts about allowing foreign-born men to vote before becoming citizens. This development denied anti-suffrage interests an alien vote to mobilize against woman suffrage. This anxiety contributed to the growth of NAWSA between 1890 and 1920. Increasingly, the enfranchisement of women was regarded as a means of ensuring a white majority in the South and a native majority in the North and West.

Movement scholars also associate state woman suffrage successes with the settlement of states. Apparently, more recently settled states tended to have political climates more favorable to woman suffrage as well as fewer entrenched interests opposed to it. Early Western successes, for instance, are credited to woman suffrage's being easier to legislate in territories than in states (Grimes, 1967, p. 53). Conversely, repeated defeats of woman suffrage in northeastern states are blamed on urbanization, which made possible the corrupt political machines supported by anti-suffrage interests (Catt and Shuler, 1923, 74). The woman suffrage literature presents conflicting impressions about the impact of state settlement on NAWSA mobilization; however, generally, more settled states had older NAWSA affiliates, but newer affiliates in less settled states seem to have been more active.

ANALYSIS AND FINDINGS

To measure the effects of these explanations and the relationships among them, a model of state woman suffrage success was developed using available data and was analyzed using several statistical techniques. (See Lance, 1984, for details regarding how each explanation was measured, how data were gathered and reduced to manageable proportions, and how the model was tested.) Because the findings of this study for level and timing of success are somewhat different, they are reported separately. In addition, the relationships that pertain to level of success are illustrated by Washington and Georgia, two states which differed greatly in level of success. After that, findings pertaining to timing of success are discussed and illustrated with reference to Wyoming and Oklahoma. In each case, key findings are underlined.

FINDINGS: LEVEL OF STATE WOMAN SUFFRAGE SUCCESS

For level of success, the findings of this study support all four types of explanations: state political climate, NAWSA mobilization, opposing interests, and state

demographics. Of the five aspects of state politics, three—electoral restriction, legislator access, and procedural simplicity—were found to have measurable effects on the level of woman suffrage success.

States with less restricted electorates achieved higher levels of success. This finding refutes the widely reported and generally accepted contention of NAWSA leaders that immigrant and minority voters were responsible for referendum defeats of woman suffrage amendments. Apparently, immigrant and minority men, long used as scapegoats for such defeats, were not as easily manipulated as expected.

States in which citizens had greater access to their legislators achieved higher levels of woman suffrage success. This finding indicates that the effectiveness of NAWSA's lobbying for woman suffrage bills increased with citizen access to state legislators.

States with simpler procedures for enacting statutory legislation and for amending their constitutions achieved lower levels of woman suffrage success. This unexpected relationship may be attributed to East-West differences in the maximum available level of success. The West is often noted in the woman suffrage literature to illustrate the contribution of simpler legislative procedures to success. Indeed, legislative procedures were simpler in the Western territories than in the Eastern states. Territorial suffrage, however, was a lower level of success than full state suffrage. While these two types of suffrage were comparable within their own jurisdictions, territorial suffrage did not have the impact on the campaign for federal suffrage that state suffrage did.

States with more active NAWSA affiliates achieved higher levels of woman suffrage success. This finding is consistent with the RM perspective, insofar as it draws attention to the structural context of SMO activity.

States with older and more centralized NAWSA organizations achieved higher levels of woman suffrage success. These findings reflect the RM perspective's concern that resources be budgeted to achieve maximum effect at minimum cost. States which organized earlier had more resources available for other types of activity during later years. Likewise, states in which supporters were organized more centrally avoided competition for and waste of resources, which were problems for states in which there was more duplication of effort.

States in which anti-suffrage interests were greater achieved higher levels of woman suffrage success. This second unexpected relationship is also explained by East-West differences in maximum available level of success. Territorial suffrage, long the maximum available level in the West, was lower than full state suffrage, which was always available in the East. Likewise, anti-suffrage interests were less entrenched in the territories of the Western frontier than in the more settled Eastern states.

States with larger native white populations achieved higher levels of woman suffrage success. A predominance of native whites tended to increase the level of state

success by promoting less restricted electorates, even though it discouraged NAWSA organization and activity. (As has been explained, the indirect relationship between native whites, anti-suffrage interests, and level of success is somewhat spurious.) Compared with their direct effect on suffrage success, these indirect effects are sizeable. Thus, in the South lower levels of success were achieved due to the threat posed by woman suffrage to the political status quo, and in spite of the organization and activity of Southern suffragists.

States with fewer Protestants achieved higher levels of woman suffrage success. Notably, they had similarly unexpected indirect effects through state political conditions, NAWSA activity, and anti-suffrage interests. These findings challenge the conventional wisdom which credits large Protestant majorities with establishing state political climates favorable to woman suffrage, curbing the influence of anti-suffrage interests, and supporting NAWSA. Instead, Protestants seem to have been more important as a political constituency when they were threatened demographically. In states with tenuous Protestant majorities, their consciousness-of-kind was probably high. Because of their smaller numbers, better voter turnout might not guarantee Protestant political supremacy. In these circumstances, Protestants may have mobilized in favor of woman suffrage as a means of ensuring that supremacy. On the other hand, in states with large Protestant majorities, their consciousness-of-kind was probably minimal. Because of their larger numbers, poor voter turnout posed little threat to Protestant political supremacy. In these circumstances, they had little to gain by supporting woman suffrage.

Settlement had no direct impact on the level of state woman suffrage success. Less settled states, however, were likely to achieve higher levels of success, because they tended to offer greater citizen access to legislators, less restricted electorates, and better organized and more active NAWSA affiliates. These indirect effects on woman suffrage success explain why western states tended to achieve higher levels of success than eastern states.

Washington and Georgia clearly exemplified the findings for level of state woman suffrage success. After a few false starts, Washington achieved a high level of success. Its legislature first voted on territorial suffrage in 1883. The bill passed and women voted until the Territorial Supreme Court overturned the law in 1887. Two subsequent revisions of the law met the same fate. The first lasting success was a measure extending school suffrage to women in 1890. Next, full state suffrage was granted in 1910. Then, after a decade with women in the mainstream of state politics, Washington ratified the federal woman suffrage amendment in March 1920. By contrast, woman suffrage was almost completely unsuccessful in Georgia. No bill extending any type of woman suffrage was ever passed by the state legislature. In the long history of the woman suffrage movement in Georgia, only two bills were ever brought to a vote of that body.

Less than five years remained in the battle for a federal amendment when these votes were taken, and both were adverse. Consequently, it is no surprise that Georgia failed to ratify the federal amendment.

Legislators were more accessible in Washington than Georgia; however, legislative procedures were simpler and the electorate was more restricted in Georgia than Washington. Between 1890 and 1920, the average ratio of state legislators to population for Washington was just over 1:6,000; for Georgia, about 1:11,000. Although the procedures for amending the constitutions of Washington and Georgia were the same, statutory legislative procedures in the two states differed in two ways. In Washington, only some legislation was subject to initiative and referendum. In Georgia, the absence of the initiative prohibited popular demand that the legislature address controversial issues; yet, referendum endorsement could be required of any legislation. This possibility served equally well as a threat to minimize a bill's chance of ever coming to a vote and as a means of quashing it, if it was passed by the legislature. Both states required citizenship and literacy qualifications of voters, but only Georgia required payment of a tax by voters.

NAWSA was both better organized and more active in Washington than Georgia. Washington was organized earlier and had no competing state level WSAs. Its first State WSA was organized in 1871 and, after a lapse in activity, re-organized in 1895. Its only other state level WSA was a College League which was organized in 1909. Though a separate entity, the College League acted in close cooperation with the State WSA. Georgia was organized later and had three competing state level WSAs. Its first State WSA was not organized until 1890 and had to compete with two other state level WSAs. A Men's League was organized in 1913 and a state Woman's Party branch in 1917. While the Men's League often cooperated with the State WSA, the Woman's Party engaged in militant activities which were incompatible with the mainstream politicking of NAWSA's state affiliates.

Neither state's woman suffrage leaders had measurable linkages with other social movements. Likewise, the number of woman suffrage conventions held in each state (relative to the duration of the movement) was comparable. The only major difference in activity between Washington and Georgia was the number of woman suffrage bills brought to a vote (relative to the duration of the movement). Five bills were brought to a vote in Washington before full suffrage was won in 1910. Notably, three of these bills were passed by the legislature but overturned by court decisions. In Georgia, which never extended any type of woman suffrage, only two unsuccessful eleventh-hour votes were taken.

Anti-suffrage interests were greater in Washington than Georgia. Between 1890 and 1920, the liquor industry, the pivotal member of the anti-woman suffrage coalition, produced over \$11 million worth of liquor in Washington, but only about \$4 million worth in Georgia.

Protestants were the more predominant demographic group in Georgia, while native whites were relatively numerous in Washington. In Georgia, organized Protestants comprised 40.5% of the state population; in Washington, only 11.5%. Conversely, Washington's population was 76% native born and 96% white; Georgia's population, 65% native born and 55% white.

FINDINGS: TIMING OF STATE WOMAN SUFFRAGE SUCCESS

For timing of success, the findings of this study support only two types of explanations: state politics and state demographics. Among the several aspects of state politics, three—party competition, electoral restriction, and legislative professionalism—were found to have measurable effects on timing of success.

States with more restricted electorates achieved earlier woman suffrage success. This finding supports the contention of NAWSA leaders that restricting the state electorates to native whites prevented opponents of woman suffrage from exploiting illiterate, immigrant, and minority voters.

States with more professional legislatures achieved earlier woman suffrage success. This relationship confirms that the greater the time and resources available to address legislation, the earlier the timing of success.

States with less competition among political parties achieved earlier woman suffrage success. Woman suffrage benefited more from the political clout exercised by one strong party than from the debate engendered by competition among two or more rival parties. In addition, legislators in states dominated by a single party may not have felt threatened by the prospect of adding a whole new group of voters to the electorate.

Of the three demographic conditions, only the predominance of native whites had a direct effect on timing of success. All three demographic conditions, however, had indirect effects on timing of success.

States with relatively large native white populations achieved earlier woman suffrage success. Notably, however, they favored political climates which discouraged earlier success indirectly. These findings are consistent with the conventional wisdom concerning the timing of success in the West and the South. The woman suffrage literature credits native white Populists for early success in the West and blames white racists for later (and only negligible) successes in the South. Woman suffrage was regarded as a guarantee of native white supremacy in the West and a threat to tenuous white supremacy in the South.

The relative size of a state's Protestant population had no direct effect on the timing of its woman suffrage success. Indirectly, however, relatively small Protestant populations encouraged earlier suffrage success by promoting more restricted electorates and more professional legislatures, but delayed such success only insofar as they promoted competition among parties. These mixed findings raise questions about the effect of party competition, but are otherwise consistent with earlier state policy analyses as well as the RM assumption regarding the primary im-

portance of a social movement's political context.

Degree of settlement had no direct impact on the timing of state woman suffrage success. More settled states were slightly more likely to achieve earlier successes, but only insofar as they had less competition among parties and more restricted electorates. Like the previous finding, this one is consistent with the structural context assumption of RM.

Wyoming and Oklahoma exemplified these findings for timing of state woman suffrage success. The speed with which woman suffrage was enacted in Wyoming was unmatched by any other state. As a territory, it extended the franchise to women in 1869. This unprecedented action has been attributed to the efforts of a lone lobbyist, Esther Morris of New York. Upon joining her husband and sons in the new territory, she enlisted the cooperation of William H. Bryant, president of the first Legislative Council (the territorial equivalent of a Senate), which passed a bill conferring woman suffrage that very year. In 1871, one lame attempt to repeal the law was made, but none thereafter. When Wyoming became a state in 1890, woman suffrage was an undisputed part of its constitution. During the Congressional debate over Wyoming's admission as a state, the only speeches against woman suffrage were made by Representatives from Tennessee and Alabama. Wyoming ratified the federal woman suffrage amendment in January 1920. By contrast, Oklahoma's major woman suffrage victory was won relatively late. While school suffrage was won on the state's first woman suffrage vote in 1890, full suffrage was not secured until 1918. Oklahoma ratified the federal woman suffrage amendment just a month after Wyoming.

Compared with Oklahoma, Wyoming had a more professional legislature, less competition among parties, and a more restricted electorate. Both state legislatures met biennially, and sessions could be longer in Oklahoma (60 days) than Wyoming (40 days). Yet, Wyoming's legislators held office longer and were better paid than those of Oklahoma. In both states, by 1910, senators held office for four years and representatives for two years. Earlier, however, Oklahoma's senators had held office for only two years. During the period under study, salaries for Wyoming legislators ranged from \$50 to \$80 per diem; for Oklahoma legislators, from \$40 to \$60 per diem.

Competition among political parties was far greater in Oklahoma than Wyoming. Control of the Oklahoma Senate changed once, control of its House changed twice, and control of its Governorship changed three times. Notably, the House and Governorship were controlled by Republicans, Democrats, and third parties at various times. By contrast, party competition in Wyoming was minimal. Between 1890 and 1920, its legislature was always Republican, and control of its Governorship shifted only once—from Republican to Democratic—in 1912. This lack of party competition prevented legislators from making woman suffrage a political hot potato and allowed NAWSA to place the blame for legislative

inaction squarely on the shoulders of the party in power.

Between 1890 and 1920, Wyoming had a slightly more restricted electorate than Oklahoma. Oklahoma only required that voters be citizens, but Wyoming required that they pass a literacy test as well as be citizens. This additional qualification disenfranchised many immigrant and minority voters, whom NAWSA leaders regarded as pawns of the anti-woman suffrage coalition.

Demographically, native whites were more predominant in Wyoming than Oklahoma. Wyoming's population was 79% native born and 96% white; Oklahoma's population, 82% native born and 83% white. These differences are small, but as reported earlier, even small differences in native white population had momentous impact on the timing of suffrage success.

FINDINGS: LEVEL AND TIMING OF STATE WOMAN SUFFRAGE SUCCESS

More restricted electorates and state demographics are notable for their effects on both level and timing of woman suffrage success. Of all the variables affecting the structural context of the battle for woman suffrage in the states—state politics, NAWSA mobilization, and anti-suffrage interests—only restricted electorates affected both level and timing of success.

States with more restricted electorates achieved woman suffrage earlier, but these successes were at relatively low levels. Taken alone, the finding for timing of success supports the allegation of NAWSA leaders that woman suffrage was less successful in states where their opponents could exploit the votes of immigrant and minority men. In light of the finding for level of success, however, another interpretation seems more plausible. Perhaps early successes were achieved in states with restricted electorates simply because woman suffrage posed less of a threat where other means of restricting the electorate were available. This interpretation is consistent with the low levels of these early successes. Surely, the political cost of woman suffrage was least in states where women could be disenfranchised for reasons other than sex or at least excluded from voting in elections of any political consequence.

States with larger native white populations achieved higher levels of woman suffrage success, and to an even greater extent, earlier successes. Of the three demographic conditions, only the relative size of the native white population affected both level and timing of state woman suffrage success directly. To the extent that native white majorities were threatened, however, they made higher levels of success easier to achieve by promoting less restricted electorates and better organized and more active NAWSA affiliates. Threatened native white majorities also made earlier successes possible by reducing competition among parties and restrictions on electorates and by increasing the professionalism of state legislatures.

As reported above, larger Protestant majorities favored higher levels of state woman suffrage success. To the extent that such majorities were threatened, however, they made higher levels of success easier to achieve by

favoring greater citizen access to legislators and more active NAWSA affiliates as well as, unexpectedly, more complex legislative procedures and more extensive anti-suffrage interests. In addition, threatened Protestant majorities encouraged earlier suffrage successes by reducing restrictions on electorates and by increasing the professionalism of state legislatures.

Notably, most of the demonstrated relationships of native white and Protestant populations with state politics, NAWSA mobilization, and anti-suffrage interests challenge the conventional wisdom of the woman suffrage literature. Generally, intervening structural conditions favoring woman suffrage coincided with smaller rather than larger native white and Protestant populations. The explanation given earlier for the relationship between Protestants and level of success applies equally well here. When the majority status of native whites and Protestants was secure, they were politically apathetic. Only when they perceived a demographic threat from some ethnic or religious minority which woman suffrage might mitigate did they advocate it.

Degree of settlement had mixed, indirect effects on level and timing of state woman suffrage success. Less settled states favored higher levels of success by providing greater citizen access to legislators, less restricted electorates, and better organized and more active NAWSA affiliates. They discouraged earlier suffrage successes, however, to the extent that they had more competitive political parties and less restricted electorates. These mixed findings indicate that Western successes and Southern failures may be explained more clearly as consequences of political than cultural differences between the two regions.

CONCLUSIONS

The findings of this study support five conclusions about how the Nineteenth Amendment was won. These conclusions probably apply to amending the U.S. Constitution in general and, almost certainly, to winning the Equal Rights Amendment in particular.

Dealing with constitutional issues at the state level is essential to amending the U.S. Constitution. The process for amending the federal constitution is essentially conservative, insofar as it requires the support of a great many states to enact a change. Woman suffrage, for example, was not achieved at the federal level until it was first accomplished at the state level. The Nineteenth Amendment was not passed by Congress and ratified by enough state legislatures until seventeen states had granted full suffrage; thirteen states some kind of limited suffrage; and nine states some kind of token suffrage. Enactment of full or limited suffrage by thirty states meant that women in almost two-thirds of the states were already casting votes in federal elections before the Nineteenth Amendment was won.

How quickly a legislative victory can be won depends mostly—if not entirely—on predetermined timetables and emergent events affecting state legislative activity. In the

case of woman suffrage, for instance, NAWSA organization and activity had no measurable impact on the timing of suffrage successes. Instead, it was determined by how long women could be kept from voting for other reasons, how long legislatures met and legislators served, how long the majority party could remain in power, and how long legislative machinery took to transform a bill into a law.

Resource mobilization by social movement organizations does play a role, however, in determining the scope or impact of state legislative acts. As with timing of state woman suffrage success, the level of such success is affected strongly by the varying structural context of state politics. In addition, though, level of suffrage success was also influenced by how well NAWSA organized and mobilized its supporters.

One of the unanticipated findings of this study, which is nonetheless entirely consistent with the RM perspective, is that mobilizing resources is less a matter of how much than how well. In some states, there was a lot of organizing in support of woman suffrage, but it did not prove to be good organizing. The influence of pro-suffrage supporters and their resources was greater in states in which they were more centrally organized, not those in which NAWSA affiliates were most prolific.

Similarly, NAWSA affiliates were extremely active in some states, but such activity was not always balanced to generate the best results. Among the more actively pro-suffrage states, those whose activities led to higher levels of success were the ones in which NAWSA activities were balanced between the expressive needs of their members (e.g., state woman suffrage conventions), the instrumental needs of the organization (e.g., lobbying for woman suffrage bills), and the need for profitable links with other social movement organizations (e.g., the Women's Christian Temperance Union).

Finally, two clear conclusions emerge from the often mixed findings regarding the effects of state demographics on suffrage success through state politics and NAWSA mobilization.

State legislative actions which are perceived as potential threats to the political or economic status quo—or whose consequences for it cannot be anticipated—are unlikely to be successful. Enfranchising women was a lost cause in the South, for example, because introducing a new category of voters in those states was feared as a potential threat to the racial status quo.

The fate of state legislative proposals is determined more by socio-political considerations than cultural ones. Woman suffrage has long been identified with the Populist and Progressive ethics associated with native whites and Protestants. Instead, however, it seems to have benefited less from the support of these groups where they were more populous and more from their elevated consciousness-of-kind and electoral machinations where their pre-eminence was threatened by other groups.

All of these conclusions, but particularly the last two, confirm the RM assumptions that social movements are

part of a society's central political process and that the structural context in which they mobilize their resources is at least as important as—indeed, sometimes more important than—that activity itself.

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The Columbian Patriot: Mercy Otis Warren and the Constitution

by Larry M. Lane and Judith J. Lane

On the principles of republicanism was this
constitution founded; on these it must stand.

Mercy Warren
History. . . (III: 423)

Historical accounts of the founding years of the American republic have traditionally stressed the contributions of famous men; the few politically active women of the period are only now beginning to receive the attention they deserve. During the late eighteenth century, there were a number of thoughtful, educated, and politically active women who voiced their beliefs with eloquence, courage, and unflinching common sense. One of these rare and too often neglected stars in America's early political firmament was Mercy Otis Warren, a significant figure in the intellectual life and political affairs of the early years of the nation. Her influence extended far beyond her native Massachusetts—largely the result of her widely circulated political writings and her personal relationships with many of the prominent political figures of the time. She was a significant participant both in the revolutionary establishment and in the constitutional founding of the republic. With singular grace, Warren balanced the conflicting requirements of the socially accepted role of women in her time and the demands not only of her inquiring intellect but also of her marked literary and political talent.

Mercy Warren was a curious amalgam of the traditional and the unorthodox. She had the rare good fortune to be educated at the side of her brothers as they prepared for college under the tutelage of her uncle, Reverend Jonathan Russell. He supplied books and educational guidance which opened to her the world of classical literature, politics, religion, and philosophy routinely denied girls of that era. At the same time, although her education was unusual, she self-consciously accepted and appeared genuinely to enjoy the conventional role of woman as homemaker, housekeeper, wife, and mother (Norton, 1980: 39).

Warren was the devoted mother of five sons, steadfastly believing her first responsibility was their nurture and education. She also enjoyed a remarkably loving relationship with her husband who after many years of marriage still addressed her in correspondence as "my dearest friend," and when he was sixty-four wrote her what could only be described as a love-letter calling her "my little angel" (Fritz, 1972: 259). Warren was thoroughly feminine, and yet she was called to activities beyond the normal sphere of an eighteenth-century matron. Warren's

youth was spent in a politically aware and active family. Her married life had at its core a deeply shared commitment by both her and her husband to the politics first of Massachusetts and later to the newly-formed republic of America. As her political circle broadened from immediate family and relatives to include close friends, local political associates, revolutionaries, constitution-makers, and leaders of the new republic, her area of influence subtly widened.

During the Revolutionary period, Warren's unusual mix of characteristics went beyond what Linda Kerber has termed "The Republican Mother"—skilled, educated, dedicated to civic virtue and morality, integrating political values into domestic life (1980: 11, 229). She was, according to Kerber, "virtually the only prominent American example who could be trotted out against the complaint that intellect necessarily meant rejection of domesticity and of domestic work" (1980: 227). Throughout her life, Warren insisted on combining her conventional domestic life with her abiding interest in ideas and events outside her Plymouth, Massachusetts, home. She was both homemaker and political propagandist, mother and revolutionary.

While it was not extraordinary for women such as Warren in relatively affluent circumstances to engage in educational and literary pursuits, and it was not unheard of for such women to express political opinions, these activities conventionally were confined to the immediate family circle, or at most to personal correspondence and diaries (Kerber, 1980: 10-11). Warren's orbit of interest extended well beyond closeted opinion and state politics as she became a respected author of poetry, politically inflammatory plays, and later a significant three-volume work of history covering the entire scope of the American Revolution. Not only was she exceptional because she was a direct and prominent participant in the swirling tide of events that gave birth to the Revolution; she was unique as a woman writing political propaganda excoriating the British and their colonial loyalists. During the Revolution, she publicly challenged the enemy: "Be it known unto Britain," she wrote, "even American daughters are politicians and patriots, and will aid the good work" (DePauw, 1975: 160).

Warren and her husband, James, along with John and Abigail Adams, Benjamin Church, Samuel Adams, John Hancock, and her brother, James Otis, Jr., formed the nucleus of a group of patriots who kept alive the ideal of liberty in the face of ever-tightening English colonial demands. The Warren's Plymouth dinner table was the scene of more than one meeting convened to discuss the narrowing alternatives open to colonists as their liberties were increasingly threatened by a myopic mother-country. Warren's revolutionary activity, in the forefront of political events, makes fully appropriate the title of "First Lady of the Revolution," bestowed on her by her sympathetic biographer, Katharine Anthony (1958).

The years of the first fledgling steps of the republic and

the framing of the Constitution must have been especially poignant for Warren. By 1787, she was an "old revolutionary," a vocal member of the generation of men and women who had fought for the Revolution but who were being eclipsed by younger men who were dissatisfied with the ineffectiveness of the political system established under the Articles of Confederation (Maier 1980). As she argued publicly for liberty and republican principles, Warren contended in this endeavor with a host of brilliant, articulate, and argumentative men. Again, Warren found herself involved in a role beyond the feminine norm. She became virtually the only woman politically active and influential at the national level in 1787-1788.

On August 2, 1787, Warren wrote to her friend Catherine Macaulay, the prominent English historian, about the ongoing Constitutional Convention: "Every man of sense is convinced a strong, efficient Government is necessary; but the old patriots wish to see a form established on the pure principles of Republicanism" (C. Warren, 1929: 378). Warren cherished the memory of the Revolution and the struggle against arbitrary authority and distant, monarchical government. She had a "bone deep" dislike of aristocracy, and she shared with other like-minded citizens a profound suspicion of the secrecy surrounding the Constitutional Convention in Philadelphia (Anthony, 1958: 155). Warren expressed a theory of republicanism which was drawn directly from classical political philosophy. Her first principle was that the government was the servant and not the master of the people. As Warren stated it, "the origin of all power is in the people" (Storing, 1981: 4, 274). Secondly, the republic had to be small in order to maintain its community solidarity and commonality of interest—her model was the city-state of ancient Greece. She believed in the importance of local affiliations within a small territory, accompanied by the requirements of citizenship, civic virtue, and participation in the governing process. In her view, public service in the public interest needed to be governed by "disinterestedness," not by personal ambition (Main, 1961b). Within the republic, political morality, virtue, and clearly defined standards of right and justice were essential (Kenyon, 1973).

Warren's positive view of what a republic should be was accompanied by a specific, vehemently articulated litany of political evils to be avoided in a republican polity. These included personal ambition and interest, avarice, luxury, aristocracy, nobility, tyranny, and despotism. The potential for political corruption was a primary concern. A major issue, perhaps a principal cause, of the Revolution had been the perception by the colonists of English governmental corruption (Wood, 1972; Bailyn, 1968). As early as 1773, in her propaganda play, *The Adulateur*, Warren protested against the corruption of office holding (M. Warren, 1980). In 1787, she was still greatly concerned about evidence in America of the private ambition for power and "a rage for the accumula-

tion of wealth by a kind of public gambling instead of private industry" (C. Warren, 1929: 379). The sins of personal ambition and private interest seemed to her to be leading to a falling away from the morality that was fundamental to a republic (Smith, 1966: 115).

Warren had long been concerned about an appropriate constitution for the new nation which would guard against political corruption. In 1775, she had advised John Adams that a constitution should be created "with such symmetry of Features, such Vigour of Nerves, and such strength of sinew, that it may never be in the power of Ambition or Tyranny to shake the durable Fabrick" (Fritz, 1972: 150). In 1787, she felt even more cause for concern. In Philadelphia, what Fred Barbash has called "one of the greatest all-male clubs in history" was debating and constructing a new constitution for the nation (1987, A9). Symmetry and vigor and sinew were being created, but the document that emerged from the Convention caused Warren and others grave concern about its fostering of ambition and its "awful squintings," as Patrick Henry phrased it, towards monarchy (Elliot, 1901, III: 43-64).

In Warren's view, the inescapable problem with the proposed Constitution was that it failed to meet the standard of pure republican principles. Warren was concerned that the document was not the product of the revolutionary generation but of younger men who saw opportunities for advancement and power (Maier, 1980). She was further disturbed when her good friend and confidant, Elbridge Gerry, declined to add his signature to the final product (Fritz, 1972: 244). For Warren, this Constitution, with its accompanying arguments for energy of government and a strengthened executive, clearly opened the door to arbitrary central authority, aristocracy, and corruption.

Even more disturbing to Warren was the failure of the proposed Constitution to protect the rights of individuals through some version of a bill of rights. The fearful prospect of a lost republic motivated Warren to join with her husband in forming the nucleus of an embryonic political party which came to be identified with the Anti-Federalists (Main, 1961b, 119). In 1787, at age sixty, Warren reentered the political wars in opposition to the aggressive and ambitious men who were responsible for "the fraudulent usurpation at Philadelphia" and who were distorting and endangering her image of the republic that she believed America should be (Storing, 1981: 4, 283).

In the rapid pace of the ratification process, the Anti-Federalist opposition to the Constitution in Massachusetts was unable to block ratification; however, an example of recommended amendments was established in the Massachusetts convention which substantially influenced ratification actions in other states. Once again, Warren's political activity and influence transcended her local base. Under a pen name (A Columbian Patriot), she authored a pamphlet which effectively summarized the Anti-Federalist position. Her comprehensive argument (eighteen indictments in three categories) against the proposed

Constitution (Smith, 1966: 109; Storing, 1981, 4: 270-287) was published in time to be widely utilized in the ratification debates in New York, where more than 1600 copies were distributed, a circulation which exceeded that of The Federalist essays of Hamilton, Madison, and Jay (DePauw, 1966: 113).

Nationally, although the Anti-Federalists lost the ratification battle, their arguments and reasoning provided an essential foundation for the new republic in their concepts of republicanism, citizenship, public virtue, and morality (Rohr, 1986: 10). In expressing these fundamental arguments, Mercy Warren was articulate, representative, and influential. She, as the Columbian Patriot, is cited by James McGregor Burns as the spokesperson for the entire Anti-Federalist argument (1982: 58ff). For Burns, this is a qualified compliment, since he uses Warren's essay to illustrate the lesser sophistication of the Anti-Federalist position when compared with the more persuasive arguments of the Federalists. Still, it may be fairly said that the Anti-Federalist's arguments and Warren's idealism were necessary, even if not alone sufficient, for the future governance of the American nation. The successful republic was the product of an essential mix of the ideals of republicanism and the realities of political action to establish and govern the country.

During the summer of the Philadelphia Convention, Warren expressed a certain resignation about the outcome when she wrote to Elbridge Gerry, the one delegate she fully trusted: "... yet some of us have lived long enough not to expect everything great, good, and excellent from so imperfect a creature as man ... therefore [I] shall not be disappointed either at the mouse or the mountain that this long labor may produce" (Fritz, 1972: 244). Still, Warren believed this Constitution was too important to leave to chance or to the invention of others. At about the same time she was writing to Gerry, she was also expressing her concern and her hope to Catherine Macaulay: "God grant that a system may be devised that will give energy to law and dignity to Government, without demolishing the work of their own hands, without leveling the fair fabric of a free, strong and National Republic, beneath the splendid roof of royal or aristocratic pageantry" (C. Warren, 1929: 379).

Following ratification, Warren became a willing participant in the remarkable closing of ranks of all parties behind the idea and reality of the Constitution and the government that was formed under its provisions (Wren, 1985: 389-408). In this, Warren was a political realist. She did not abandon her republican ideals. Instead, she continually held reality to the standard of those ideals. When reality fell short or moved away from her vision of republicanism, as it did in her assessment of the actions of Washington, Hamilton, and Adams, she addressed the issues and sought remedies. By the mid-1790's, the Warrens of Massachusetts had become staunch supporters of the party of Jefferson and Madison, participating fully in the development of a new dynamic in the politics of

the nation.

In Warren's support for the newly-ratified Constitution, she demonstrated her "old Otis respect for political realities" (Fritz, 1972: 255). She and most of the Anti-Federalists were appeased by the quick passage of the Bill of Rights, which they believed came as a direct result of their activities during the ratification campaigns. On April 2, 1789, Warren advised John Adams that she was persuaded "that the new government will operate very quietly unless the reins are held too taut" (Fritz, 1972: 254). Over time, she found it possible to go even further than acceptance: "Mrs. Warren not only accepted the Constitution after amendment, but no Federalist exceeded her extravagant praise" (Smith, 1966: 109). Eventually, she was able to write in her *History*: "But the system was adopted with expectations of amendment, and the experiment proved salutary, and has ultimately redounded as much to the honor and interest of America, as any mode or form of government that could have been devised by the wisdom of man" (1970, III: 368-369).

Such a salutary outcome had not been assured from the beginning. In Warren's view, the twelve ascendant years of the Federalists (1789-1800), with their monarchical and aristocratic tendencies, were an aberration and not an indictment of the Constitution. She made this point forcefully in one of her later letters to John Adams: "The principles of that Constitution have been admired, but the deviations from them detested, and the corrupt practices and arbitrary systems of that Government are become abhorrent" (Adams, 1972: 331). Warren believed that the Federalists in general and John Adams in particular had attempted to hold the reins "too taut" and had "relinquished the republican system, and forgotten the principles of the American revolution" (1970, III: 392). For Warren, the true spirit of the Constitution was adequate to its worldwide significance and to the principles of republicanism. In fairness to the Federalists, they had successfully created and established a governmental system which had fostered effective governance and which also provided a framework within which republicanism could ultimately prevail (Kenyon, 1973: 85). Thus, the Constitutional system provided a foundation for democracy which was realized by the victory in 1800 of Jefferson and his party. A Federalist framework with a republican spirit and leadership became the formula for the achievement of the political and economic requirements of the young republic. For Warren, political union and a vigorous economy were important (Anthony, 1958: 169-170; Smith, 1966: 106-107). To have them in a republican context was essential.

In 1805, Warren completed the documentation of her beliefs and her first-hand knowledge of the events of the latter half of the eighteenth century with the publication of her remarkable *History*, the first two and one half volumes of which were devoted specifically to the events prior to and during the Revolution. This was a thoroughly documented, well researched, and effectively written

chronicle completed over a period of twenty years, which drew heavily on her first hand acquaintance with many participants, as well as published sources. The last half of her third volume covered events from the end of the War until 1801, and was completed by Warren at age seventy-seven. The work has been characterized by one historian as "a vast morality play—strikingly similar to the plays she wrote in the 1770s" (Cohen, 1980: 203, 210).

Warren's *History* aroused the now famous ire of John Adams. Adams felt that his contributions had been neglected by his long-time friend and, worse, that she had sullied and blackened his reputation. The publication of Warren's *History* precipitated an extraordinary exchange of correspondence between Adams and Warren in which the two former friends and political allies freely assaulted each other's good name and reputation (Adams, 1972). Adams' reaction to the *History* was predictable. Ever sensitive and insecure, Adams was convinced of the propriety of his political decisions but apprehensive about the final verdict history would make concerning his administration. In her *History*, Warren was unable to disguise her political biases as she took Adams to task for his apparent preference for things monarchical after his ministerial assignments abroad, and for his support of the Alien and Sedition Acts. Their exchange of letters concerning her printed remarks is revealing—both of the intensity of their individual political beliefs and of their extraordinary sensitivity to the opinion of the other. Warren's strength of character was fully revealed when she finally and defiantly said to Adams: "Though I am fatigued with your repetition of abuse, I am not intimidated" (Adams, 1972: 454).

Warren's *History* was the only history of the times written by a contemporary woman. It was also the only contemporary treatment of the period written from a Republican point of view (Fritz, 1972: 294). Aside from Warren, the historical record of the period was produced by Federalists. Thus, as William Raymond Smith points out, the last half of Volume III reads like a minority report on the founding of the republic (1966: 101). She wrote her history, as Bernard Bailyn states it, "entirely in the spirit of the Revolutionary pamphleteers" (1967: 64). This assessment demonstrates Warren's life-long political consistency—in her forties and fifties she was a revolutionary agitator; in her sixties she was an Anti-Federalist activist, and a poet and playwright; in her seventies she was a republican historian. Her *History* serves to underscore that always, until the end of her life, she was first and foremost a devoted republican, faithful to her principles and to her sense of morality and the dignity and rights of man.

Following his election to the Presidency, Thomas Jefferson wrote compassionate and encouraging words to James Warren:

I have seen with great grief yourself and so many venerable patriots retired and weeping in silence over the subversion of those principles for the

attainment of which you had sacrificed the ease and comforts of life; . . . I pray you to present my homage of my great respect to Mrs. Warren. I have long possessed evidence of her high station in the ranks of genius and have considered her silence a proof that she did not go with the current (Anthony, 1958: 198).

Mercy Warren responded to Jefferson herself: "It is true, Sir, that she has not gone with the current. None of her family has ever gone with the current, though borne down by a strong tide for want of suppleness to the system of the late Administration; with becoming firmness they have met its frowns, nor have ever wavered in the storm" (Anthony, 1958: 198). Indeed, Warren spent her entire life going against the current. She consistently overcame the obstacles of her gender, her times, and her own occasional sense of inadequacy and inappropriateness. In 1814, in the final year of her life, she was still standing on principle as she actively supported Mr. Madison's war against the British, speaking out against the popular sentiment in Massachusetts and against her own family's financial interest. For Warren, not going with the current meant that although her political principles had to live in the real world, they must never be sacrificed to political expediency. In this, she personified the unique and extraordinarily difficult requirements of the American political experiment. The constitutional system requires active politics and the contention of interests and ambition; however, it also requires the disinterestedness of public service and the ideals of civic virtue and community interest. The Constitution requires not just checks and balances among institutions, but also checks and balances among the conflicting imperatives of morality and power. This is difficult in any polity, or in any personality, but Warren consciously attempted to find that balance. The difficulty of the task can be found in her own words (Main, 1961a: 186):

Our situation is truly delicate and critical. On the one hand, we stand in need of a strong federal government, founded on principles that will support the prosperity and union of the Colonies. On the other, we have struggled for liberty and made costly sacrifices at her shrine and there are still many among us who revere her name too much to relinquish, beyond a certain medium, the rights of man for the dignity of government.

The turn of the century brought political vindication for Warren. In a broad sense, the election of Jefferson completed the American constitutional symmetry. The triumph of the Democratic Republicans represented the political merger of energy and liberty, of power and democratic morality. The genius of Warren was to align herself actively with this synthesis and to represent it in her life. In this, she had the better of her argument with John Adams, who, as Gordon Wood notes, was "isolated from the main line of American intellectual development" (1972: 569). She had the better of her disagreement with

Hamilton, who was at once "premature and out of date" in his desire to model the government after the British "Court" system of the eighteenth century (Banning, 1984: 27-28). Clearly, the near future of the American experiment belonged to Warren's republican principles and to the political philosophy of Jefferson and Madison.

The long term future of the American republic was another question. In addition to her other qualities, Warren was something of a pessimist about the capacity of the American people to continue in liberty, freedom, and republicanism. In an early poem written in 1778, she had asked: "Shall freedom's cause by vice be thus betray'd?— / Behold the schedule that unfolds the crimes / and marks the manners of these modern times" (1980: 246). Years later, she characterized the American people as "too proud for monarchy, yet too poor for nobility, and it is to be feared, too selfish and avaricious for a virtuous republic" (1970, III: 370). She was continually distressed by what she perceived to be the weakness of the American moral fabric and the selfish spirit of the times. In this she stood with Jefferson who, in his first inaugural address, called on the American people to guard "against a rising tide of individualism and acquisitiveness" (Morris, 1987: 29).

Warren has been likened to an Old Testament prophet crying out "against the sins of her generation" (Smith, 1966: 110). However, her Puritanism was subdued and secondary. She never called for a return to an idealized golden age of virtue. She consistently demonstrated a greater concern for the present and the future than for the past (Cohen, 1980: 200), and in fact saw the future with remarkable prescience. Two months before her death at age eighty-six, she wrote her last letter to John Adams: "Will things remain thus? I say, No. There are seeds of other revolutions which, in a few short years or months, may pour out torrents of blood and misery on a guilty world" (Adams, 1972: 510). Thus, her consistent exhortation to the American people was the necessity of upholding republican principles and living in righteousness and virtue. In this, she spoke the languages of her Puritan religion and of her unwavering republicanism—languages that are fundamental to the American political experience (see Bellah et al., 1985).

Warren survived the political struggles of Revolution, Constitution, and the early years of the republic with her integrity and her faith intact. She hoped that the daring experiment of a nation founded on strictly republican principles, peopled by a virtuous citizenry, could and would work, and it was to that end that she devoted her political life and talent, first as a revolutionary republican, later as a constitutional realist, and finally and always as an advocate for what she believed to be truth and civic virtue. As a writer and political thinker, Warren was an unswerving force for vital qualities in the context of the

American constitutional system—unquestionably a founder and heroine of the republic.

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From Three Fifths to Zero: Implications of the Fifteenth Amendment For African-American Women

by Mamie E. Locke

During the summer months of 1787, in Philadelphia, fifty-five men argued, debated, suggested, compromised, and eventually hammered out a document that would form the basis of the government of the United States of America. In 1788, the requisite number of states had ratified this document: the Constitution. The Constitution has been called a living, flexible piece of work that is the cornerstone of American democracy. It has been argued that the Constitution established the privileges and rights of citizenship; raised to new heights the rights of individuals; and revered the fundamental principles of life, liberty, and the pursuit of happiness. In the bicentennial year of the ratification of the United States Constitution, I ask a simple question: Was the primacy of individual rights and equality truly reflected in the Constitution? My response is also simple: No. Several groups were omitted for various reasons, and at the bottom of the heap of omissions is found the African-American woman.

In his controversial remarks on the bicentennial of the Constitution, U.S. Supreme Court Justice Thurgood Marshall argued that the meaning of the Constitution was not "fixed" in 1787. Further, the wisdom, sense of justice, and foresight of the framers who are being hailed in celebration was not necessarily profound, particularly since they created a defective government from the beginning. Marshall further stated that there were intentional omissions, namely blacks and women (2).

I propose to discuss here a group of people encompassing the characteristics of being both female and black. The framers were careful to avoid using terms designating sex or color. The words slave and female are not in the original document. What is in the document are such phrases as "persons held to service or labor" (Art. IV, sec. 2), or "three fifths of all other persons" (Art. I, sec. 2). These persons held to service or labor and designated as three-fifths were African-Americans—female and male. Thus, the African-American woman starts her life in this new government created by men of "wisdom, foresight and a sense of justice" as three-fifths of a person. The struggle for wholeness was begun almost immediately; yet, the African-American woman usually found herself on the periphery of such struggles. She participated, yet watched as she moved from three-fifths to zero with the passage of the Fifteenth Amendment in 1870.

Once, when a speaker at an anti-slavery meeting praised the Constitution, Sojourner Truth, that prolific sage of the nineteenth century, responded in this way:

Children, I talks to God and God talks to me. I goes

out and talks to God in de fields and de woods. Dis morning I was walking out and I got over de fence. I saw de wheat a holding up its head, looking very big. I goes up and takes holt of it. You b'lieve it, dere was no wheat dare. I says, 'God, what is de matter wid dis wheat?' and he says to me, 'Sojourner, dere is a little weasel in it.' Now I hears talkin' bout de Constitution and de rights of man. I come up and takes holt of dis Constitution. It looks mighty big, and I feels for my rights, but dere ain't any dere. Den I say, 'God, what ails dis Constitution?' He says to me, 'Sojourner, dere is a little weasel in it' (qtd. in Bennett, 146).

Thus, although the Constitution when written advocated equality, opportunity, and the rights of all, it condoned the institution of slavery, where men and women alike were reduced to property. Or were they persons? In *The Federalist* #54, James Madison argued that slaves were considered more than property, but also as persons under the federal Constitution. According to Madison, "the true state of the case is that they partake of both these qualities; being considered by our laws, in some respects, as persons, and in other respects, as property . . . the Federal Constitution . . . views them [slaves] in the mixt character. . . ." (337). In this essay, Madison sought to explain the use of such "weasel" phraseology as "three fifths of all other persons" and "the migration or importation of such persons" (Art. I, sec. 9). When anti-slavery advocates compromised their principles and allowed the institution of slavery to be sanctioned by the very foundation of the new government, the Constitution, they relegated the African-American to an insignificant status. The three-fifths compromise, by counting African-Americans for the purpose of taxation and representation, created an interesting paradox: It gave to African-Americans the dual status of person and property—however, more property than person.

What did all this mean for the African-American woman? Involuntary servitude had a tremendous impact on African-Americans as it was both an economic and a political institution designed to manipulate and exploit men and women. As active participants in the labor market during the slavery era, African-American women not only worked in the plantation fields and in the masters' homes but in their own homes as well. They took on many roles and had to be virtually everything to everybody. They were, *inter alia* mothers, lovers (willing and unwilling), laborers, and producers of labor.

After 1808, the supply of slaves abated somewhat due to congressional legislation prohibiting the importation of Africans. Consequently, the source of additional slave labor was to be accomplished through natural increase. Once again the onus was on African-American women who fell prey to further victimization and exploitation. Fertility was viewed as an asset; yet, these women had no control over the children born to them. They, too, were the property of the slaveowners, to be bought and sold at

the owners' commands.

The de-feminization of African-American women made it easy for them to be exploited. They "were never too pregnant, too young, too frail, to be subject to the harsh demands of an insensitive owner" (Horton 53). African-American women were not allowed the same protections accorded to white women. They were expected to work hard for the slaveowner and maintain their own homes as well. Their status can be summed up in the folk wisdom given to Janie Sparks by her grandmother in Zora Neale Hurston's *Their Eyes Were Watching God*:

... de white man throw down the load and tell de nigger man to pick it up. He pick it up because he have to, but he don't tote it. He hand it to his womenfolks. De nigger woman is de mule of the world so far as Ah can see. . . (29).

The seeds of this reality of life for the African-American woman were planted in slavery. Hence, African-American women had few illusions that they held the favored position accorded white women.

African-American women were not complacent or accepting of their lot in life. They engaged in resistance in many ways (Davis 3-14; Hine and Wittenstein). They also initiated their own groups such as literary, temperance, and charitable societies, as well as education groups and, of course, anti-slavery groups. Although some white feminists such as Lucy Stone and Susan B. Anthony invited African-American women to participate in the women's struggle, the reform groups also actively discriminated against African-American women. Their dislike of slavery did not extend to an acceptance of African-Americans as equals. For example, attempts by African-American women to participate in a meeting of an anti-slavery society in Massachusetts nearly caused the collapse of that group. According to some historical documents, African-American men were more readily accepted into the inner sanctums of abolitionist societies than were African-American women. It is no surprise, then, that the most well known advocates of women's rights among African-Americans were males, i. e. Frederick Douglass, James Forten, Sr. and Jr., Robert Purvis, and others. The most prominent female was Sojourner Truth (Terborg-Penn 303). African-American women did, however, through their own initiative, participate in both the anti-slavery and women's movements.

Armed with beliefs such as "it is not the color of the skin that makes the man or woman, but the principle formed in the soul" (Stewart 565), women such as the Forten sisters, Maria Stewart, and Milla Granson, to name a few, spoke out against racial and sexual injustices. For example, Maria Stewart often attacked racial injustice in the United States. Her outspokenness was accepted and applauded by African-American men until her criticisms were aimed at them for not doing as much as they could for the race. Stewart then realized the limitations placed on her as an African-American woman. She could speak out on behalf of civil rights and abolition but could not

address sexism among African-American men. This dilemma, or duality of oppression, is a burden African-American women still bear.

In the period preceding the Civil War, African-Americans and white men and women worked together as abolitionists. All saw a future where slaves and women would be liberated and elevated to equal status under the Constitution of the United States. Political abolitionists and Garrisonian abolitionists (followers of William Lloyd Garrison) debated the role and significance of the Constitution. Many felt the political system was corrupt and that this corruption stemmed from the Constitution. As a Garrisonian, Frederick Douglass felt that supporting the Constitution was also supporting slavery. He argued that supporting the Constitution meant that one supported two masters, liberty and slavery. This argument was also supported by abolitionist Wendell Phillips. Phillips felt that one should not hold an office where an oath of allegiance had to be taken under the Constitution. He argued that since the Constitution was a document upholding slavery that anyone who supported it was a participant in the moral guilt of the institution of slavery (Lobel 148).

Douglass later moved away from the Garrisonian view and supported the political abolitionists' natural law theory. This view of the Constitution justified participation in the political process (Garrisonians argued for not supporting the government) which would allow radical lawyers and judges to argue against and eventually end slavery. It is the natural law interpretation of the Constitution that led Douglass to assert that the three-fifths compromise "leans to freedom" (qtd. in Lobel 20). But did it? According to Chief Justice Roger Taney in the case of *Dred Scott v. Sanford*, those of African descent were not citizens under the Constitution. Taney re-emphasized the Declaration of Independence's and Constitution's denial of African-American citizenship, for the Constitution, he argued, clearly showed that Africans were not to be regarded as people or citizens under the government formed in 1787.

Armed with political agitation, men and women, whites and African-Americans, toiled long and hard toward the quest for equality and liberation. This agitation culminated in a bloody Civil War which ended with the South in ruins and another struggle in store. Who would secure political rights in the post-war period: white women, African-Americans, or both? Where would the African-American woman be once the smoke cleared?

Democratizing America, it has been said, has not been the result of the Constitution, or equalitarian ideals of voters, or even the demands of non-voters, although each has played a role, albeit a secondary one. What, then, has brought about democratic change in American society? To some observers, the motivating force behind the major democratic reform has been partisan advantage. Those reforms thought to be advantageous to a political party have passed; others have been shelved (Elliott 34).

An all-important question following the Civil War was "what is to be done with the freedman?" Senator Charles Sumner of Massachusetts felt African-Americans should be given the ballot and treated like men. Thaddeus Stevens of Pennsylvania said they should be given forty acres of land and treated like human beings. Abraham Lincoln suggested deportation, but was told implementing the idea was virtually impossible (Bennett 186-187). Two groups saw advantages of using the freedmen for their own purposes. First, leaders of the women's rights movement saw an opportunity to channel constitutional discussions around universal suffrage. They had supported passage of the Thirteenth Amendment to end slavery and continuously pointed out that universal suffrage was a direct outgrowth of the principle of unconditional emancipation. The doors that had formerly been closed to African-Americans were slowly opening. As both the federal and state constitutions were amended to accommodate the African-American, women pushed forward, hoping that they could pass through the same doors as the freedmen (Dubois 845; Papachristou 48). Women were not as lucky as the freedmen. With the doors closing to them, conflict was brewing that would lead to an irreparable schism between women and African-Americans.

The second group looking for personal gain on the backs of the freedmen was the Republican Party. Republican leaders saw an opportunity to consolidate their power base by enfranchising the freedmen. It was felt that African-Americans would support the party with their vote out of gratitude; the wheels were put into motion to enfranchise the freedmen. Were women to be included? Would suffrage be universal? In 1863, Angelina Grimke Weld stated that the civil and political rights of women and African-Americans were closely connected. She said she wanted to be identified with African-Americans because women would not get their rights until African-Americans received theirs (Weld 80). Did this include African-American women, or just men and white women?

Abraham Lincoln opposed suffrage for African-Americans as did his successor, Andrew Johnson. In a letter to the *New Salem Journal* in 1836, Lincoln wrote that he supported suffrage for all whites, male and female, if they paid taxes or served in the military. Twenty-two years later, he confirmed this view by stating that he in no way advocated social and political equality between whites and blacks and that he was as much in favor as anyone of whites having a superior position over blacks (Catt and Shuler 70). Johnson affirmed Lincoln's beliefs. In an 1866 meeting with George Downing and Frederick Douglass, Johnson made his position clear:

While I say that I am a friend of the colored man, I do not want to adopt a policy that I believe will end a contest between the races, which if persisted in will result in the extermination of one or the other. . . . yes, I would be willing to pass with him through the Red Sea to the Land of Promise, to the land of liberty; but I am not willing . . . to adopt a policy which

I believe will . . . result in the sacrifice of his life and the shedding of his blood (qtd. in Fishel and Quarles 276).

Despite Johnson's position, the radical Republicans circumvented his actions, to the point of impeaching and nearly convicting him.

After the Thirteenth Amendment ended slavery, the Fourteenth Amendment was proposed, an Amendment that created controversy between the women suffragists and males. Several states proposed changes to their constitutions, advocating suffrage for African-Americans and women. In Kansas, both proposals were rejected; in New York, the proposal for women's suffrage was rejected. The major area of contention was the wording of the Fourteenth Amendment which specifically granted suffrage to males. For the first time the Constitution explicitly defined voters as men:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State. . . . But when the right to vote at any election . . . is denied to any of the *male* inhabitants of such State, being twenty-one years of age, and citizens of the United States. . . the basis of representation therein shall be reduced in the proportion which the number of such *male* citizens shall bear to the whole number of *male* citizens twenty-one years of age in such state (emphasis added, Sec. 2).

Speaking before the 1866 annual meeting of the Equal Rights Association, Frederick Douglass argued that acquisition of the franchise was vital for African-American men whereas it was merely desirable for women (Terborg-Penn 305). Although Douglass attempted to keep white women aligned behind African-Americans, the rift between the two groups was widening.

The greatest controversy arose over the proposal and passage of the Fifteenth Amendment. White women continued to press for universal suffrage where males told them to wait until after the suffrage amendment for African-American males had passed. This time period was deemed the "negro's hour." This controversy over the Fifteenth Amendment polarized the Equal Rights Association, for the Amendment aided the freedmen and rejected women. Where did this leave African-American women? They remained on the periphery as discussion centered on the African-American male and white women.

The Equal Rights Association drifted into two factions, the old abolitionists headed by William Lloyd Garrison, Wendell Phillips, and Frederick Douglass, and the ardent suffragists headed by Susan B. Anthony and Elizabeth Cady Stanton. The former group argued support of the Fifteenth Amendment for African-American males and encouraged women not to jeopardize the freedmen's opportunity to obtain suffrage. The latter group, in its opposition to the Amendment, started its own newspaper, *The Revolution*, and joined forces with George Train, a racist Democrat (Papachristou 56). Their association with

Train exacerbated the already growing rift between the two groups.

The suffragists used *The Revolution* and other forums to voice their opposition to passage of the Fifteenth Amendment. The following excerpt summarizes their point of view and includes their view on the position of African-American women:

Manhood suffrage? Oh! no, my friend, you mistake us, we have enough of that already. We say not another man, black or white, until woman is inside the citadel. What reason have we to suppose the African would be more just and generous than the Saxon has been? Wendell Phillips pleads for black men; we for black women, who have known a degradation and sorrow of slavery such as man has never experienced (qtd. in Papachristou 57).

The issue of African-American women was further discussed in an exchange among Douglass, Anthony, Stanton, and others at a meeting of the Equal Rights Association where the issue of debate was the Fifteenth Amendment. Douglass argued that the same sense of urgency did not exist for women as for the freedmen. He indicated that women were not treated as animals, insulated, hung from lampposts, or had their children taken from them simply because they were women. When asked if the same treatment had not been accorded African-American women, Douglass replied yes, but because they were black, not because they were women. Thus, Douglass underscored the primacy of race over sex. Elizabeth Stanton argued that if African-American women in the South were not given their rights then their emancipation could be regarded simply as another form of slavery (Papachristou 64; Tanner 81). Even though African-American women were victims of both racism and sexism, they were being put in a position of having to choose which was more debilitating. Responding to Douglass' remarks, Phoebe Couzins stated:

While feeling extremely willing that the black man shall have all the rights to which he is justly entitled, I consider the claims of the black woman of paramount importance. . . . The black women are, and always have been, in a far worse condition than the men. As a class, they are better and more intelligent than the men, yet they have been subjected to greater brutalities, while compelled to perform exactly the same labor as men toiling by their side in the fields, just as hard burdens imposed upon them, just as severe punishments decreed to them, with the added cares of maternity and household work, with their children taken from them and sold into bondage; suffering a thousand-fold more than any man could suffer (qtd. in Papachristou 64).

Couzins was one of few women who identified with the plight of African-American women and spoke on their behalf. She, as did other suffragists, advocated universal suffrage and felt the Fifteenth Amendment should not be

passed unless women were also included. She felt that men were not any more intelligent nor any more deserving than women:

The Fifteenth Amendment virtually says that every intelligent, virtuous woman is the inferior of every ignorant man, no matter how low he may be sunk into the scale of morality, and every instinct of my being rises to refute such doctrine (qtd. in Papachristou 64).

African-American women were themselves divided over the issue of suffrage. Sojourner Truth spoke for those doubly oppressed by race and sex:

There is a great stir about colored men getting their rights, but not a word about the colored women; and if colored men get their rights, and not colored women theirs, you see the colored men will be masters over the women, and it will be just as bad as it was before. So I am for keeping the thing going while things are stirring; because if we wait till it is still, it will take a great while to get it going again (qtd. in Lerner 569).

Truth supported the Fifteenth Amendment, yet she voiced concern about men's being granted suffrage over women.

On the other hand, even though Frances Harper favored suffrage, she supported the Fifteenth Amendment. She asked if white women would be open enough to encompass African-American women as a part of their struggle, to which Anthony and others replied yes. Harper further stated that if the country could only address one issue at a time, then she would rather see African-American men obtain the vote (Papachristou 64). The debate raged, but when the smoke cleared, African-American men obtained the vote and all women remained disenfranchised.

It has been argued that the Reconstruction Era focused more extensively on African-American women than had any previous period (DuBois 846). However, it is apparent that the focus was more on the rights of men and white women. African-American women were pushed to the periphery of any discussions, or nominally acknowledged, despite the fact that they existed as persons who were both female and black. According to Bell Hooks, the support of African-American male suffrage revealed the depth of sexism, particularly that of white males, in American society. White women began to urge white men to support racial solidarity over black male suffrage, placing African-American women in a predicament of who to support—racist white women or African-American male patriarchy (Hooks 3). As Sojourner Truth knew, sexism was as real a threat as racism.

Because they were excluded from the constitutional furor of the Reconstruction period, especially the controversy surrounding the Fourteenth and Fifteenth Amendments, white female suffragists introduced racist themes into their struggles. They claimed that enfranchising black men created "an aristocracy of sex" because it elevated all

men over all women. Women suffragists criticized the Fifteenth Amendment because "a man's government is worse than a white man's government" and because the amendment elevated the "lowest orders of manhood" over "the higher classes of women" (Dubois 850). They, of course, meant white women.

Passage of the Fifteenth Amendment did not grant universal suffrage, just as the framers were not the proclaimed visionaries who created "a more perfect union." Passage of the Fifteenth Amendment elevated African-American men to a political status that thrust them into the patriarchal world. White women remained on their pedestals, cherished positions to be revered and envied. The African-American woman had once again been omitted from the Constitution of the United States, except this time she was not even three-fifths; she was zero.

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The Education of Women in Connecticut in The Colonial Period

by Erika E. Pilver

A recent column in the *Berkshire Eagle*, a western Massachusetts newspaper, begins, "Many people believe that sexism in our schools disappeared years ago. It did not." The column, reporting on a recent survey, notes that from kindergarten through college girls and boys are treated differently and concludes that "sexist treatment in classrooms contributes to achievement attitudes, life expectations and behavior" (Lyons, 1987, A7).

An examination of the education of women in Connecticut during the Colonial Period (1635-1800) shows that while women advanced in some ways, they lost in others. Education in the New England colonies dates to the earliest days of settlement, due not to any altruistic reasons but for the benefit of the state. Literate citizens were needed in leadership positions and on a large scale were more economically valuable and more disciplined and law-abiding.

A hierarchy of educational opportunities existed from the beginning. Harvard College was founded in 1636 for the purpose of training ecclesiastical leaders, and Yale in 1701 for training leaders for both church and state, both with funds committed by the public legislature. Grammar schools were mandated in Connecticut to prepare boys for entrance to these institutions. Dame schools existed to teach both boys and girls their letters, so that boys could be qualified for the grammar schools and girls learn the necessary skills to take their places in society. Individual instruction was common throughout the period. Near the end of the seventeenth century, elementary or English Schools developed as an intermediate step between dame and grammar schools. Private and public schools also proliferated. Education in the latter half of the seventeenth century was interrupted by the Revolutionary War, but not seriously affected in other ways. The development of New England from frontier to a commercial and then industrial society meant increased leisure and ease for many, which was evidenced by more emphasis on class consciousness, diverse opportunities, and imitation of other cultures. As a consequence, education became more complex in both quantity and quality. Some boys were still educated as leaders, and their schooling continued to encompass the traditional languages and the classics as well as included the newer sciences. For other young males, educational opportunities did not end with the dame school but also included the newer scientific and business subjects which would prepare them for increasingly complex vocational as well as the new business careers. There was disagreement as to whether women, always wives or insignificant, should be ornaments or companions. Therefore, their schooling was expanded to

include not only the traditional housewifely skills but also those of coquette and mother. Only radicals thought of women as persons in their own right; exceedingly few of them expressed their views.

Through the entire time period, the alternatives open to women, that is, the degree of conformity of role, behavior, and manner required of them, seems to be tied to two factors: first, the supply of women available—the ratio of men to women was six to one in the frontier period, about equal by the 1770s, and more men than women by 1800; and second, the amount of leisure time available—little or none at the beginning, and much at the end. Therefore, women in the 1600s had a great deal more freedom of role, behavior, and manner than did women of the second half of the eighteenth century and thereafter. Throughout, however, women were first taught wifely skills (roles as wife and helpmeet) and later taught womanly arts (roles as hostess in a more complicated and sophisticated society). There were, throughout, exceptions: women in the less-than-mainline churches such as Quaker (or Moravian, in areas outside New England) and individual women whose menfolk were of a more liberal bent. As to whether or not women's early education in Connecticut led to activism the answer is a qualified yes. Connecticut did not, during this period, have any firebrands or even women who were well-known for their advanced thinking, such as Massachusetts' Abigail Adams or Mercy Otis Warren. Nor did the state, so far as has been discovered, have groups which were in the forefront of patriotic movements. However, Connecticut women were always, for their time, literate and even well-educated, which meant they could read and correspond. So they were incited, and incited each other, to patriotic actions during the 1770s. Having been trained in wifely skills, they eschewed British tea, cloth, and other imports for patriotic, not only economic, reasons, and were proud to do so. Their traditional obligation for the moral fiber of their personal worlds led many to cozen or harry their men to their moral duty of joining the patriots and/or going to war. When the new Republic was formed, and women were called to their new role as mothers of the Republic, Connecticut women were ready.

Connecticut, although it had its critics both early and late, is seen by most as in the forefront of New England education, as public formal education in New England is seen in the forefront of the New World. Linda Auwers, who examines literacy rates through the signatures on early legal documents, finds that "The Connecticut River Valley enjoyed the highest levels of literacy in New England" (1980, p. 204); Vera M. Butler, in her examination of early newspaper advertisements, reports that Connecticut schools tried innovations with more intense enthusiasm than did Massachusetts (1969); and Edwin G. Dexter in a comprehensive 1906 history of education in America which is excerpted either directly or indirectly by many contemporary writers, quotes a study that declares "no state has a more honorable educational record, taken

altogether, than Connecticut. No other of the old states can show such a connected series of public and private transactions relating to schools and education. . . . The State affords the best possible opportunity to study continuously the history of popular education from the feeblest beginnings" (1906, p. 44). There can be no suspicion that the lack of educational opportunities for women in Connecticut can be due to a lack of commitment to education in general.

The school system in New England had two roots: England and the Netherlands (Drake, 1955, p. 68). In the seventeenth century, England had church, charity, and private elementary schools, parish, dame, hedge, and private adventure schools, as well as tutorship. The Netherlands had town schools. The English had another custom as well, that of binding-out paupers, orphans, and children of indigent or indolent parents to a master who would instruct the child in reading and writing and in a trade. Apprenticeships were in these cases compulsory, but they could also be voluntary.

Importantly, there was no question of the separation of church and state. Often, the leader of the town and the leader of the ecclesiastical organization were, especially in the seventeenth century, one and the same. The situation is best described by Buckley and Morris in a review of how Connecticut developed its public school system:

The early government of the Connecticut Colony was an interweaving of church and state. The town was the unit of local government, with the town meeting its controlling body. All 'free men' of the town could vote in town meeting, which managed some functions of local government and elected delegates to the General Court, the legislative body for the colony. There was also an ecclesiastical society, set up by the General Court, to handle the community's church affairs. In addition to this religious function, this society was charged with the maintenance of schools, and the care of roads and cemeteries. Since for some years after the first settlement, most men otherwise qualified for voting were members of the Congregational Church, a town meeting and a meeting of an ecclesiastical society were almost indistinguishable. As population increased in the colony, this system of government had to be modified, however reluctantly. Privileged groups usually dislike to share their privileges. The final separation of church and state in Connecticut was brought about by the adoption of the constitution of 1818, but elements of Congregational domination of social and political life remained for years after that date (1976, p. 4).

Students of history agree that the purpose of education was to teach children to read the English tongue and other language skills, to discipline the mind and build character, and to instill moral (which at that time meant religious) principles. In line with these goals and in keeping with early Puritan thinking, the colonial school

system was one of harsh discipline. William E. Drake, in a 1955 review of the American school system, characterizes the colonial schools as providing meager education at all levels, lacking democracy, using harsh discipline, having poor teaching and low scholastic standards, and having more "zeal for the church than for humanity" (p. 64). Walter H. Small, in a seminal study of early New England schools, notes that schoolmasters as late as the early nineteenth century were instructed to open and close the school day with prayer and Bible reading. At that time, the Bible was still the principal text in many schools. Women teachers as well as schoolmasters often preached rather than instructed, and even the primers were still full of Bible stories and allusions. In fine, no point of view could be taught without ecclesiastical sanction, sanction that served the state as it worked toward the preservation of the status quo. Drake points out that not until the Revolution were denominational interests divisive, and the post-Revolutionary period that needed to discipline people to the will of the state saw the need for a unifying system of education, to be found only in a comprehensive school system.

That Connecticut recognized this need can be shown by the early date at which the colony turned its attention to the support of education. It recognized that education was a function of government and also that it was the duty of the colonial government to assist financially in the education of its youth.

Local schools pre-dated colony action, but not by much. Since the early records of the town of Hartford are lost, it is not clear which of Connecticut's two principal towns, Hartford or New Haven, had the first grammar school. (It is thought that the first grammar school in any of the New England colonies was the Boston Latin School founded by John Cotton in 1635.) The Rev. John Higginson opened a school in Hartford in the 1636 to 1639 time period. In 1642 the town voted to pay the tuition fees for boys whose parents could not afford to do so and also to make up any deficit if the fees fell below a certain amount. Records from then on contain various activities by the town in support of schools, schoolmasters, and schoolhouses.

The first Code of the colony of Connecticut was voted by the General Court (the legislative body) in 1650. A section headed "children" ordered that the selectmen of each town "shall have a vigilant eye over their brethren and neighbours" to ensure that all families "teach by themselves or others" their children and apprentices "so much Learning as may inable them perfectly to read the English tounge, and knowledge of the Capitall Lawes" and that all Masters of families doe once a weeke at least, catechise their children and servants in the grounds and principles of religion . . . and further, that all Parents and Masters doe breed and bring up their Children and Apprentices in some honest lawfull calling, labour or imployment, either in husbandry, or some other trade proffitable for

themselves and the Commonwealth, if they will not nor cannot traine them up in Learning to fitt them for higher imployments (Code of Laws of the General Court of Connecticut, May 1650, p. 521).

The selectmen were ordered, if they found negligence in these matters, to admonish "such Masters of families" and if the negligence was not remedied, were empowered, with the concurrence of two magistrates, to take the children or apprentices away and "place them with some masters for yeares, boyes till they come to twenty one and girles to eighteen yeares of age compleat" (p. 521). Clearly parents, especially husbands and fathers, were responsible for teaching all children under their roofs and both boys and girls had this opportunity.

Latin Grammar schools taught Latin, Greek, and sometimes Hebrew, as well as advanced reading, writing, and mathematics. Shorthand and navigation were added in the late 1730s. The curriculum was similar to that of the early cathedral schools of medieval times and was tailored to exactly the same purpose: entrance into the university. These schools were not numerous and many of them, at least in the early years, had considerable difficulty financially, with sufficient enrollment, and finding sufficiently educated schoolmasters. Small finds about three dozen schools in New England by the end of the seventeenth century, of which six were in Connecticut, two in New Hampshire, and the remainder in Massachusetts. He calls them "the bedrock of future educational systems" (1902, p. 31). Nevertheless, by the end of the eighteenth century, the public Latin Grammar School had practically disappeared from New England.

One of the more successful Latin Grammar schools was the New Haven school, which was saved from oblivion by a bequest from the estate of Edward Hopkins, a former governor of Connecticut (his wife was the subject of a treatise against the education of women) who had returned to England as a merchant and died there. Relieved in 1660 of its financial worries, the school could be particular about upholding the purpose of the Latin Grammar School of its day. In 1680 its trustees clarified one of its positions in a vote "that all girls be excluded as improper and inconsistent with such a grammar school as the law enjoins and is the design of this settlement" (Small, p. 277). In other words, a school which trained youths for university and for leadership in church and state was not a proper place for females. In 1684, Hopkins also excluded some males who sought admission. The school, its trustees declared, was "principally for the instruction of hopeful youth in the Latin tongue, and other learned languages, so far as to prepare such youths for the college and public service of the country in church and commonwealth . . . [and] no boys be admitted into the said school for the learning of English books, but such as have been before taught to spell their letters well and begin to read, thereby to perfect their right spelling and reading, or to learn to write and cypher, or numeration and addition and no further, and that all others either too

young and not instructed in letters and spelling, and all girls be excluded as improper and inconsistent with such a grammar school" (Small, p. 278). The grammar schools preferred and the elite schools required that students be able to read, write, and do elementary arithmetic. These schools were usually closed to girls.

Where, then, did boys and girls acquire basic education? Either in the home or in what are called dame schools. The dame school existed in three forms: 1) the private neighborhood dame school, early present in every town although accounts are rare as they were informal, *ad hoc*, and usually taught either by mothers who took in children to teach with their own or spinsters who had no other means of livelihood; 2) the semi-public dame school, under sanction of the town, with some slight assistance from the town treasury, but mainly dependent also on the tuition of the pupils, as was the private school; and 3) the real public dame school, finally merging into the regular summer school with a woman teacher, and then into the public primary school.

One of the few records extant of a private dame school is from New Haven in 1651. Court records indicate that a little girl was brought into court for "prophane swearing." She was charged with using such expressions as "by my soul" and "as I am a Christian." At the trial, her mother pleaded innocence, testifying that "she had lerned some of her ill-carriage at Goodwife Wickhan's, where she went to school" (Small, 1902, p. 164). This type of school—private, small, and strictly neighborhood—was typical of the early dame school. It was a necessity of the times, since boys were not admitted to schoolmaster's schools until they could read and write, and girls were often not admitted at all. Therefore, the quality of dame schools varied greatly, depending on the education, interest, skill, and facilities of the women who held them. Scholars agree the result was often a schoolmarm without professional training, sometimes uneducated, and often semi-illiterate. Girls were primarily taught to read and sew, boys to read. If the dame was competent, both were taught writing and, perhaps, arithmetic. In one reminiscence, a man recalls that after he had read and spelled a little, he was usually put to shelling beans or some other useful occupation (Small, p. 183). It is reported that a Mary Eden, who had a school in Salem "taught the boys to sew and knit, to keep them quiet and orderly. Her severe mode of punishment was to pin the delinquents to her apron" (Fennelly, 1962, p. 8). The dame schools lasted until well into the nineteenth century before merging with the public school, and even then it savored little of the primary school of the late nineteenth century.

Between the dame school—elementary, of dubious and varied quality, and available to boys and girls—and the Latin Grammar School—superior, taught by schoolmasters educated at Harvard, Yale, or some other early or English university, and available only to boys with an elementary education—were the other schools mentioned in the Connecticut Code referred to variously as grammar

schools, English schools, summer schools, public dame schools, and sometimes simply as schools. Instructors varied from women with some but not necessarily formal education and never with training in education, to male university graduates. Teaching in these schools was often a stepping stone or way station to the ministry or to supplement a minister's income. Some made it a career, but evidence presents a record of incompetence and instability on the elementary level. Drake characterizes this type "poor in worldly goods and often poor in spirit, frequently shiftless, migratory and drifted into a state of inebriety" (1955, p. 93).

It is difficult to judge whether education above the dame-school level mandated by the general laws of the colony was meant to include girls. Generally, although not always, it can be said that the better the school, the less likely it was that girls would be admitted. The laws of the colony and the votes of the towns relating to schools used the word "children" and did not exclude females, yet it is abundantly clear that girls did not ordinarily continue to attend the town schools. Superintendent Small studied the records of nearly two hundred New England towns during their first century of existence and found fewer than a dozen schools (other than dame schools) to which girls were in any way admitted.

The town of Farmington illustrates how difficult it is to interpret the provisions for schooling: In 1687 twenty pounds was voted "for the maintenance of a school for the year ensuing, for the instruction of all children as shall be sent to it, to learn to read and write the English tongue." Some question seems to have been raised as the record for the following year indicates: "Whereas the town at a meeting held (in 1687) agreed to give twenty pounds as is there expressed, to teach *all such* as shall be sent, the town declare that all such is to be understood only *male* children that are through their horn book" (emphasis theirs (Small, p. 277)). The fact that a question had been raised and the emphasis given in the explanation suggest that some parents wished to send female children to the school.

As the land became more settled and less of a frontier, more people had leisure, and class distinctions began to appear. During the eighteenth century, therefore, a more complicated school system was developed. Again, the extent that girls were educated and in what fashion are difficult to discover. However, three generalizations can be made: Most girls had a minimum of education, which enabled them to read, write, and cipher; opportunities of public schooling varied greatly and depended on the individual towns; and individual girls were exceptions who received extensive educations either in private academies or through tutoring, depending on their father's wealth and inclination.

It seems, therefore, that the public facilities provided by the towns in Connecticut in the eighteenth century to the time of the Revolutionary War were gradually upgraded to provide at least six to eleven months' basic education and that this education was open to both girls

and boys, although boys attended more frequently and for longer periods than girls. The six to eleven month period is also somewhat misleading because of the innovation of moving schools, meaning that although a school teacher (female) or a schoolmaster (male) was hired and a school kept for a period, the school was moved to different locations every two or three months around the town so that all children had an opportunity to attend by being able to walk to it. Apparently a common public school for girls, taught by a hired school teacher, was the summer school. Summer seemed a popular time to send girls to school, since boys were busy in the fields. In 1746, for example, it is recorded in Norwich that the town meeting voted "that there shall be two women's schools kept from the first of April next to the first of October ensuing." One was kept in the town house and the other in the house "built for that purpose" (Small, 1902, p. 180). In 1750, Harwinton voted a sum of forty pounds—one-half by rate and one-half by tuition—for hiring two women to teach children to read.

Some girls, lucky enough to have fathers in a position to provide education and inclined to do so, received schooling and, on rare occasions, education that was as good as that received by boys. Jonathan Trumbull, a wealthy merchant of Lebanon and later Governor, had four sons and two daughters. In 1743, when his oldest son was six, he and twelve other townsmen established a subscription school that was the first academy in Connecticut. Its enrollment was limited to thirty, and the schoolmaster was Nathan Tisdale, a native of the town and a Harvard graduate. Tisdale and the school developed a high reputation. All the Trumbull children attended; however, while three of the four sons went on to Harvard, the daughters, after completing their preparatory studies with Mr. Tisdale, were sent to a finishing school in Boston (Weaver, 1956).

Finishing schools were common for the time for daughters of families that could afford them or felt their daughters' present or future station in life would benefit. At first, finishing schools commonly taught fine needlework, writing, perhaps arithmetic, and, later, other more complicated womanly arts such as painting, music, dancing, and perhaps French. In the mid-1700s, no finishing schools of any note were available in Connecticut, and fathers who wished to provide their daughters this opportunity sent them mostly to Massachusetts and Rhode Island.

The circumstances of Linda Foote exemplify the full extent to which women's education was normally circumscribed and the degree to which her opportunities beyond the traditional rested on exceptions. In December 1783, the president of Yale, Ezra Stiles, examined Foote in Latin and Greek. He certified that she, at age twelve (thirteen to fifteen was the normal entrance age into Yale or Harvard), "has made commendable progress . . . and she is fully qualified, except in regard to sex, to be received as a pupil of the Freshman Class of Yale University" (Marr, p.

98). Stiles, obviously, a forward-looking man, accepted Miss Foote as his private pupil, and she pursued the full course of study under his direction.

The English grammar, or writing school, set up by requests of parents whose sons were not destined to go to the universities but who wished them educated for practical careers, taught boys skills such as reading and writing, vulgar and decimal arithmetic and extraction of the roots, simple and compound interest, how to purchase and sell annuities, leases and estates, the Italian method of bookkeeping, gauging, navigation, longimetry, surveying, and other technical subjects of the period. While these subjects were available to boys from about 1760, not until after the Revolutionary War were more opportunities than finishing school open to girls. Some English grammar schools were open to girls but not on a coeducational basis. Nathan Hale reports that he taught young women from 5 to 7 a. m., before his regular classes convened (Small, p. 289). In New London in 1773, Thomas Smith advertised a school for either sex, but not both. John Mix, Jr. opened an English school in 1789 and admitted young ladies to certain classes and for needlework; he maintained as well an evening dance school.

Unfortunately, side by side with the better academies, sprang up what Willystine Goodsell calls "a weedy growth" of private "female seminaries, meagerly financed, meagerly staffed and equipped, offering a course of study taught by ill-educated women which was little if any superior to the private day and boarding schools" (Goodsell, 1931, p. 11).

As the century drew to a close and the state's district schools became more numerous, girls as well as boys routinely attended them. When the girls first went from the dame and private schools to the town schools, they took their knitting and needle work with them, until some towns, reports Small, directly forbade this practice. By the end of the 1700s, Connecticut maintained no Latin Grammar Schools (Hartford and New Haven had been turned over to boards of trustees and no longer received public funds). A system of schools covered what presently are called elementary grades and, in larger towns, secondary schools as well. Buckley and Morris conclude that "they might be ill housed and scantily equipped, textbooks might be few and dull, teachers might be untrained, and their methods of teaching and maintaining discipline abhorrent to modern theories. But much of the cost of maintaining them came from public funds, and the children [girls as well as boys] whose parents wished them to gain an education could do so at little or no expense (1976, p. 7).

Women's economic roles, political roles, and education are parallel threads. The education of women, always tied to how much and for what end society needs them, is related to how and to what purpose they are educated. Anthropologist Ruby Leavitt writes, "The most important clue to woman's status anywhere is her degree of participation in economic life and her control over property and

the products she produces" (cited in Gornick & Moran, p. 396). In addition to the educational barriers described above, married women had no legal standing in law. Following English Common Law, husband and wife were one person and that person the husband. However, widows enjoyed considerable autonomy and freedom of choice and often were in no hurry to remarry. Women were free to bind their husbands by pre-nuptial agreements. Even married women found it easier to run away and start over than would be possible later. DePauw notes that before 1750, America had few trained lawyers, and wives were permitted to do many things which, strictly speaking, were illegal (1975, p. 47). Women had active and varied economic roles and active if unofficial political roles. While a woman's status was generally fairly low and her work very hard, her status was far higher than in European societies of the same period. In frontier society, ideology gave way to the necessities of survival. Because women were absolutely necessary and very scarce, their status rose. As settlement progressed, women became more numerous and less necessary to the eco-structure, and, therefore, more regulated. Settlement and leisure brought a more jealous reining in of power by men and a greater attention to what was suitable or, more accurately, not suitable for women.

The political unrest of the French and Indian Wars and in New England, the Separatist Movement in the Congregational Churches, somewhat mitigated the growing social stratification and provided opportunities to women. As the church became less important politically, women's roles in it multiplied. As church and state drifted apart, men's attendance declined, and women became the keepers of the family morality. The years of unrest leading to the Revolutionary War, and the war itself, increased women's options. Their economic and political importance was again evident, as they organized the Daughters of Liberty, urged women to eschew products imported from England, and provided clothing for soldiers. They took over men's jobs at home and in town, and some served their husbands at the battlefield and in battle. A shortage of men after the war, more competition on the part of women, and more pressure on them to conform defined their roles more narrowly, although their educational opportunities were greater. The last fifteen years of the century led to the second phase of women's education, which mirrors the duality of women's place in society: at once an advance and a retreat, managed by men but with the complicity of women.

Deborah Ann Thomas delineates three categories of post-Revolutionary literature on the education of women and the sublimation of writings by radical women of the late 1700s who became the ideal that DePauw and Kerber call the Republican Mother (Thomas, 1982; DePauw, 1975; Kerber, 1980). Thomas' conservative category felt that education should make a woman more womanly, that is, meek, compassionate, gentle, kind, loving, and virtuous; conservatives thought women weak intellectually as

well as physically; they needed to cultivate the womanly virtues to compensate for their inferiority. Liberals believed education could make women stronger to withstand frivolous and worthless pursuits, and to fit them for taking over family responsibilities when death or absence of their husbands made it necessary; liberals favored educating women in schools in subjects similar to those taught men, so they could be companions rather than ornaments. Conservatives and liberals agreed that women's education should fit them for family life; they merely disagreed on how. Thomas characterizes radicals as the only ones who saw or admitted seeing the contradictions between the kind of education favored by liberals and women's expected roles in society. Such radical women were few; they saw that the time had come for change, and wished that women could be judged on qualifications, not sex. The radical view, Thomas notes, called "not only for better education for women, but also for equality" (1982, p. 70).

The conservatives won in the end; the new republic needed a new motherhood to bring up loyal sons. Women gained the right to expanded educational opportunities, but public opinion retained the conservative ideal of woman in the home as wife and mother, rather than giving her a right to define her own role. The Republican Mother was a good device to convince women they could have an expanded education and play part in the new Republic without giving up traditional wifely roles. Liberals as well as conservatives could be satisfied with the Republican mother and her sphere. Women could be educated for family solidarity as Republican Mothers, or they could choose a more ornamental role as showcase for their husbands' rising economic and social standing. In the end, women were still passive, protected, isolated, and objects of adoration.

Just as the Equal Rights Amendment could not have been defeated without the help of women in the twentieth century, women must bear some responsibility for the trivialization of women's education and its slow development. In mitigation of their inaction, their failure to seize the moment, it must be said they had neither the education nor the experience to ready them for opportunity; the forward-looking ones were too few to prevail. However, their failure to seize that moment at the birth of the nation has left for their descendants a haunting legacy of second-class citizenship where advances are hard-fought and, in the absence of vigilance, transitory; it is also a legacy of continued acceptance by women themselves of inferior abilities and/or limited opportunities. The legacy, described in the *Berkshire Eagle* of November 14, 1987, is one where "the sexist treatment of women in the nation's classrooms is both overt and subtle. It is socializing and training women to assume a no-risk, back seat role in the educational process. The result is lower life expectation and a tremendous waste of intellectual resources."

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Ernestine Rose: Child of Israel and Champion of Human Rights

by Gladys Rosen

The two hundredth anniversary of the American Constitution provides a special impetus to look at women's role in its development. As a document, the Constitution has been subjected to the norms and procedures associated with interpretation of text. Indeed, the Constitution's words do not define themselves, and over the years differences in decisions have emerged from generations of interpreters of the Constitution. Whatever the social and political changes of the past two hundred years, we know that the Constitution was designed to help shape a government powerful enough to benefit Americans but not so powerful that it routinely hurts them.

Nevertheless, despite Abigail Adams' well-known plea to her husband in spring 1776—"in the Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favorable to them than your ancestors. Do not put such unlimited power into the hands of the husbands. . . . If particular care and attention is not paid to ladies we are determined to foment a revolution" (Letter to John Adams, 31 March 1776)—the Constitution did not direct attention to the ladies and left it to future generations of activists to continue the struggle for equality and access to power for women.

Many early feminists began their commitment to the women's cause as theorists and writers. During the earliest period of feminist involvement, it was ideas and published works which led to political activism. Indeed, feminism is defined by the *Oxford Dictionary* as "opinions and principles of the advocates of the extended recognition of the achievements and claims of women." Yet, for some of the early leaders of the movement, the liberation or emancipation of women involved more than political participation and the change of any number of laws; it had to extend to economics, reproductive and sexual rights, education, household, and cultural emancipation. Outstanding among the nineteenth-century feminists who championed social reform and the battle for human rights was Ernestine L. Rose, stormy petrel and eloquent "Queen of the Platform" on the most controversial issues of her time. She was a far cry from the Jewish women of earlier periods of American history. From the fragmentary facts gleaned from letters, wills, and tombstone inscriptions, women's role during the Colonial and Revolutionary Periods was all too accurately delineated by the words of Dr. David de Sola Pool in his study *Portraits Etched in Stone*, an examination of tombstone inscriptions:

Most of the women who be at rest in this, God's acre, have as little biography as a child for whom life has scarce begun. For what life other than one of

routine domestic proprietary did women lead in 1725 or even 1825. No public office, no community service, no business distinction was theirs. . . . Much as they may have excelled in the sphere in which they dominated and which was the only one freely open to them, most of these Jewish women are little known to history and hardly remembered by their descendants (181).

Ernestine L. Rose may accurately be characterized as the direct antithesis of "most Jewish women."

Born in 1810 in the ghetto of the Polish village of Piotrkow, Ernestine Louise Potowski was the only child of the town rabbi. By her own admission "she was a rebel at the age of five" (Suhl 10). As a child, she revealed an astonishing penchant for clarity and logic; she asked the hard questions which demanded logical answers and insisted that the Torah was not the exclusive province of the male. In the world of the ghetto she soon came to be known as "a girl with a boy's head" for learning, a dubious distinction for a woman at the time (Suhl 9; a Yiddish folk saying). By age fourteen, she was in open rebellion against prevailing concepts of male superiority and insisted on equality for both sexes. Acting on her beliefs, she refused to accept her father's plan to assure her future by using the inheritance left to her by her mother who had died when Ernestine was sixteen as a dowry for betrothal to an older man not of her choosing. Because her father, a rabbi, was the legal authority for the Jewish community, she had no choice but to take the case to the Polish court. There her claim was upheld, and the money was awarded to her without restriction. Having established her reputation as a rebel and heretic, Ernestine Potowski realized there was no longer any place for her in the Jewish community of Piotrkow. Her inheritance made it possible for her to investigate the world beyond Piotrkow, beyond Poland. She left by herself; her first stop was Berlin. Although a major cultural center of Europe, Berlin nevertheless imposed similar unenlightened restrictions on Polish Jews as did the country of Rosen's birth. Security from a Prussian citizen was a prerequisite to remaining in the country. Instead of simply applying for security through the usual channels, Rose obtained an audience with the Prussian king to protest the oppressive law. Although he did not remove the restriction, the king did grant her permission to stay and engage in any business she chose. She remained in Germany for two years, learning the language and inventing an odor-absorbing paper which became her source of income.

Leaving Germany for Holland, Rose continued her high-level involvement on behalf of justice for the downtrodden. She became involved in the case of a woman who was the victim of a gross miscarriage of justice (she had been imprisoned for a crime she had not committed). In the style of Rose's German encounter, she carried the woman's appeal to the King of Holland who ordered the woman's immediate release.

With brief stops in Belgium and Paris, Rose went on to

London in the wake of the revolution of 1830. In England, the revolution had taken the shape of a clamor for social reforms. At this time, Rose met Robert Owen, the foremost social reformer of the day. She proved to be a dedicated disciple, and she carried the principles of his social philosophy with its emphasis on human rights into all future areas of her political involvement. In an 1854 speech delivered two decades later, she said, "I stood on the woman's rights platform before that name was known and 20 years ago I presided over an Association [Owen's Association of All Classes of All Nations] for the protection of human rights which embraced all colors, and nations, and sects, and I stand on the same platform still" (Suhl 32). Not only did Ernestine Potowski find in London a meaningful philosophy under the aegis of Robert Owen, but also she met her husband, William Ella Rose, jeweler and silversmith, who was to share her life and support her devotion to the cause of human well being.

In May 1836, Ernestine and William Rose embarked on the most important trip of her life, the voyage to America. In the United States Rose would achieve the kind of influence and status not even dreamed of by those Jewish women who preceded her to these shores. Following in the footsteps of Frances Wright, a Scottish-born noblewoman, Rose became the second foreign-born woman in the United States to speak from the public platform on such subjects as education, slavery, equality, and women's rights. Almost from the moment of her arrival, Rose began her American adventures as reformer and activist.

In 1836, in support of a New York State bill entitled "An Act for the Protection and Preservation of the Rights and Property of Married Women," Ernestine Rose drew up a petition that she took from house to house to obtain signatures. The fact that five months of effort produced only five signatures did not quell her sense of outrage that married women in America had no legal existence and no elective franchise yet were obligated to pay taxes. Even more irksome to her than the disabilities and male opposition to change was the fact that most women were quite willing to accept the *Godey's Lady's Book* dictum that "home is the empire of woman" (Suhl 125). Rose's commitment and enthusiasm for the social reforms introduced by the Owenites immediately launched her on to the lecture circuit, first for an organization of free-thinking reformers, The Moral Philanthropists. As many as 2,000 people would attend lectures and debates on improvement of society, education, and human rights.

In the 1840s when Utopianism was in the air, Ernestine Rose joined a large group of men and women in founding a new experimental community in Skaneateles in upper New York State. Like a previous effort by Robert Owen, the community was intended to remove all sources of social discord for the benefit of all. The prime mover was John Anderson Collins, a general agent for the Mass Anti-Slavery Society. For three years Rose lectured on the road for social reform and for the benefit of Skaneateles

which in 1846 failed, as had most Utopian experiments, despite her efforts to keep it afloat. Rose continued to travel and lecture on behalf of other issues of social concern: the Married Women's Property Bill, political equality for women, and elimination of slavery. Physical breakdowns resulting from her hectic schedule caused only temporary delays in her lecture circuit.

The year 1848 was characterized by political revolution abroad and a major shift in the movement towards change in women's status. For Ernestine Rose and her fellow feminists it was a year of triumph; the battle for the Married Women's Property Bill was won after twelve years of struggle, and the first woman's rights convention was held in Seneca Falls, New York. *The Declaration of Sentiments* which was read by Elizabeth Cady Stanton was based on the Declaration of Independence. It began with the words: "We hold these truths to be self evident: that all men and all women are created equal," and it included a demand for elective franchise, an idea regarded as too radical by some of the women. In the end, it was abolitionist Frederick Douglass who made the decisive plea to include as a goal securing women's right to vote. The Seneca Falls Convention, referred to by some newspapers as "The Reign of Petticoats," marked the transition of the women's movement from sporadic agitation of individuals to the mass movement which continues to evolve today.

In 1850, in the midst of explosive anti-slavery arguments and demonstrations, the National Woman's Convention was held in Worcester, Massachusetts. That year and at subsequent conventions Ernestine Rose eloquently fought for women's rights, rights defined not as a gift of charity but as an act of justice. It was this attitude which she continued to express as one of the main speakers at the Women's Rights conventions held in Albany in 1854 and at those which followed. She was described as "Queen of the company - a woman of eloquence and pathos, and she has as great a power to charm an audience as many of our best male speakers" (*Albany Transcript* qtd. in Suhl 154). During her speeches, she was as likely to be heckled as praised, but she refused to be silenced. In the open and democratic process of forging and crystallizing the ideology of the movement, Rose played a leading role as she continued to maintain her position: "There is one argument why a woman should obtain her rights, namely, on the broad grounds of Human Rights" (*Cleveland Plain Dealer* qtd. in Suhl 148).

Her humanitarian ideals extended with characteristic commitment and passion to abolition of slavery. Regarded with suspicion because of her unorthodox, free-thinking, religious views and her devotion to woman's rights, Rose did not hesitate to deliver anti-slavery lectures at every opportunity. Even when she went to South Carolina for her health in 1847, she spoke so openly as an Abolitionist that she barely escaped being tarred and feathered. Her lecture tours carried her to the west as well as the north-east and gave her the opportunity to speak for anti-slavery societies and to promote the cause of woman's rights. Even

those such as the *Indianapolis Daily State Sentinel* who disagreed with her "peculiar doctrines" went on to say that "she is in every sense a true orator, her voice being full and melodious, not, in the least, marred by a slight foreign accent" (*Indianapolis State Sentinel* qtd. in Suhl 173). Even when she went abroad for a complete rest from her severely taxing and hectic schedule, Rose could not resist a few lectures on the subjects which animated her life.

During the Civil War years, Rose, although a Democrat, worked for Lincoln's election since the Republican Party seemed to hold out greater hope for the abolition of slavery. For a while, the struggle for woman's rights took a back seat to the needs of the government during the Civil War. Indeed, women activists regrouped and emerged as the Women's National Loyal League with Elizabeth Cady Stanton as its president in order to support the Union and to fight slavery.

Interestingly, Rose, crusader that she was for unpopular causes, had little interest in Jews except as fellow human beings. Yet where she was shocked by anti-Semitism among the free thinkers she knew, she reacted strongly. In 1863, in the midst of the war for the liberation of the Negro slave, she took time out to defend the honor of the Jewish people against the blatant anti-semitic diatribes of her good friend the liberal editor of the *Boston Investigator*, Horace Seaver:

Mr. Editor, I almost smelt brimstone, genuine Christian brimstone, when I read in the *Investigator* - 'Even the modern Jews are bigoted, narrow, exclusive, and totally unfit for progressive people like the Americans among whom we hope they may not spread. . . . ' Indeed! That hope smacks too much of the Puritan spirit that whipped and hung the Quaker women, to be found in the liberty-promoting, freedom-loving *Investigator*. You 'hope'. Now suppose, as we always desire to promote what we hope for, you had the power as well as the inclination, would you prevent their spreading? How? Would you drive them out of Boston - out of 'progressive' America,' as they were once driven out of Spain?

But where is the danger of their 'spreading?' In this city, Philadelphia, Cincinnati, and other places, they have synagogues, and have no doubt spread as much as they could, and no calamity has yet befallen any place in consequence of that fact; and wherever they are they act just about the same as other people. The nature of the Jew is governed by the same laws as human nature in general (*Boston Investigator* qtd. in Suhl 220-221).

There followed a ten-week correspondence in the course of which she accused Seaver of as much folly as bigotry and finally recommended that the subject be dropped.

After the Civil War, the resurgence of the fight for women's suffrage resulted in a split with those who did not wish to deflect any energies from the fight to assure Negro

independence and equality. Even Frederick Douglass, long-time supporter of the vote for women, opposed Rose's proposal that henceforth (from May 1869) the Equal Rights Association become the Woman's Suffrage Association. He pleaded the need to continue to focus on the Negro cause and support the "Negro's hour" point of view. The vote to form the Women's Suffrage Association resulted in a split in the women's movement between Stanton's National Woman's Suffrage Association and Lucy Stone's American Association.

It was at this time that Rose, with her husband, sailed to Europe in an effort to restore her health. This departure marked the end of her reign as Queen of the Platform. Rose lived in Europe, in Paris and London, with one brief visit to the United States, until her death in 1892. Her friends, under the leadership of Susan B. Anthony, found time to arrange a farewell testimonial for her that May before her departure; the editors of the *Boston Investigator* also surprised Rose with a "handsome testimonial in money" (Suhl 243). Her contribution to human freedom was recognized as well on the front page of the *Hebrew Leader*, a weekly for conservative German Jews, which referred to her as "earliest and noblest among workers in the cause of human enfranchisement, and the best female lecturer in the United States."

Yuri Suhl, Ernestine Rose's biographer, notes that "compared to Ernestine's active public life, William lived a life of relative obscurity. . . . He gloried in Ernestine's achievements, sought out every newspaper item about her, clipped it and pasted it lovingly into a scrapbook. His main contribution to the reform movement was to make it possible for Ernestine to do her work." This appraisal of the marriage of Ernestine and William Rose offers an interesting nineteenth-century feminist reversal of the more recent, "Behind every successful man there is a good wife." Ernestine Rose truly broke every traditional mold for women during her long and eventful life. Perhaps the best way to summarize her contribution to expanding women's roles in America is to quote from her own letter to Susan B. Anthony:

All that I can tell you is, that I used my humble powers to the uttermost, and raised my voice in behalf of human rights in general, and the elevation of women in particular, nearly all my life" (Suhl 247).

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Hail Columbian Patriot: The Woman Who Spoke for a Bill of Rights

by Mary Neville Woodrich

"Is all yet locked up in silence and secrecy," Mercy Warren wrote Ann and Elbridge Gerry in Philadelphia the hot summer of 1787 (MHS 64: 162). Mercy Warren wrote from her house on Court Street in Plymouth where she had lived with her husband and five sons through the Revolution. Gerry was a delegate from Massachusetts to the closed-up Convention, and Ann Gerry and baby Catherine had accompanied him to Philadelphia.

The secrecy of the Convention offended Mercy Warren. She knew history; in fact, she was writing a history at that moment. The secrecy of governments through history she regarded as an affront; she wanted better for her new nation. She wrote in her history with acerbity of the Philadelphia Convention's aloofness, "lest these consultations and debates should be viewed by the scrutinizing eyes of a free people" (MWH 3: 357). In September, the Convention produced an astonishing document, the new Constitution. Mercy and James Warren in Plymouth read it eagerly. The opening words, "We, the People of the United States," were glorious to those who had worked to overthrow a king and set up a nation. However, Warren wrote another letter to a friend in England who also wrote history. On September 28, 1787, she wrote Catherine Macaulay, "Our situation is truly delicate. On one hand, we stand in need of a strong federal government. On the other, we have struggled for liberty and made costly sacrifices" (MHS 64: 162).

Instead of the quick ratification the signers wanted, a debate was beginning about the new Constitution. Elbridge Gerry fired an early salvo, a letter on November 3, to the Massachusetts *Centinel* about the need for amendments. Gerry had not been a signer at the Convention. "Everything went on well till that damn'd letter," Henry Jackson wrote General Knox (MHS 64: 147). Every state except Rhode Island deliberated about ratification. Five states ratified, but Massachusetts argued, finally ratifying only with recommendations for amendments. New York and Virginia waited. In the New York papers brilliant polemics for ratification appeared from "Publius": "To the People of the State of New York. . . . The people must cede to it [government] some of their natural rights in order to vest the government with requisite powers" (Jay, No. 11). Rumor assigned the name, "Publius," to various writers, Alexander Hamilton, or James Madison, or perhaps John Jay.

In February 1788, a strongly worded pamphlet circulated with an opposite point of view about the Constitution. Signed "A Columbian Patriot," the essay stated unequivocally, "There is no provision by a bill of rights to guard against the dangerous encroachments of power"

(ACP 10). There was speculation about the identity of "Columbian Patriot." Warren, who must have been amused by the stories, sent another letter to her friend Catherine Macaulay in London the following May: "If you wish to know more ideas of your friend on the hasty adoption of the new form of Government, I will whisper to you, you may find them in the printed pamphlet entitled "Observations on the New Constitution by A Columbian Patriot" (MHS 64: 157). Rufus King, a Massachusetts delegate and signer of the Constitution in Philadelphia, wrote a friend, John Alsop: "Elbridge Gerry has come out as a Columbian Patriot—a pitiful performance" (MHS 64: 143). The Warrens and the Gerrys knew better, of course. Another critic described "Columbian Patriot" as a stylist "with an extensive vocabulary of denunciatory phrase" (MHS 64: 144). Mercy Warren might have laughed aloud at that. What was her style? It had been satirical before the Revolution, when she wrote plays ridiculing royal Governor Hutchinson and the sycophants surrounding him. She liked to think that her style in the history of the Revolution she was writing had some grace. Certainly her writing always contained truth. "Of Truth, which searchest the most hidden springs" was the motto she had never forgotten from Raleigh's *History of the World* she had read as a girl (Preface).

Warren had every right to comment publicly on the new Constitution. Following the contemporary usage of Latin or fanciful pseudonyms, Warren was "Columbian Patriot"; however, she was eager to use her own name and would do so in her history. Certainly she was a patriot. Her credentials were impeccable. Her brother, James Otis, was called the spark of the Revolution and had made the famous Writs of Assistance speech. Her great friend was Abigail Adams, and her husband, James Warren, served on the Navy Board through the Revolutionary War. Her eldest son, a Marine on the *Alliance*, one of the first American frigates, lost a leg fighting the British.

Certainly Mercy Warren knew she was qualified to examine the Constitution. She believed women had intelligence and should use it. Although the times dictated few educated women, she had an education gained with her much loved brother Jemmy at the feet of his tutor. Steeped in history, Latin, and literature, James Otis later attended Harvard, and Mercy Otis stayed on the Cape until age twenty-six when she married Jemmy's college friend, James Warren.

Warren had read John Locke and other Enlightenment philosophers, and she believed with them in the natural rights of people to form and uniform governments. After she and James Warren read the Constitution, she demanded to know what the Convention intended. She wrote, "This is an attempt to force the Constitution upon the states before it could be thoroughly understood" (ACP 11). Her nineteen pages contain much skepticism and some irony. She wrote, "We are told by a gentleman of too much virtue and real probity to suspect he has a design to

deceive . . . that 'the whole Constitution is a declaration of rights' . . . but mankind must think for themselves" (ACP 10). She went on to think for herself, alarmed at this turning away from republicanism and apprehensive about the fate of the states. Was this "so bold a step in the annihilation of independence and sovereignty of thirteen distinct states" (ACP 10). She admitted that after the "long war" there had "appeared a boldness of spirit that set at defiance all authority" (ACP 10). However, she wrote, "we are not yet prepared to ask a king" (ACP 15). Words used in her revolutionary plays to describe British tyranny seemed again apt: "aristocratic junto," "partisans of monarchy," "despotism," even (ACP 10, 11). She asked point blank of the new plan, "Is it monarchy, aristocracy, or an oligarchy," and lamented, "There are men who tell us . . . we must have a master" (ACP 6). Then, for her credo, she declared, "The rights of individuals ought to be the primary object of government and cannot be too fiercely guarded by the most explicit declarations in their favor." Where was this guarantee in the Constitution? She did not find it, writing "*Sic Transit Gloria Americana*" (ACP 10, 1). Such anti-Federalist comment influenced public opinion. Although the Massachusetts Convention had already ratified, Virginia and New York were deliberating, and 1,630 copies of the pamphlet *Observations on the New Constitution* circulated in New York State, with the pamphlet reprinted in the *New York Journal*.

The Warrens and Gerrys were fascinated by politics and were as partisan as the Warrens and Adamses had been in earlier times. The Adamses were now in England, and Catherine Macauley wrote Mercy Warren that Mr. Adams had become "a very warm Federalist" (Fritz 247). The Warrens and Gerrys were very warm anti-Federalists. In the pleasant country village of Cambridge and in nearby Boston, they were not shy about expressing political opinions. A contemporary satirical piece on the Philadelphia Convention may have amused them:

I believe in the infallibility and all-sufficient wisdom and infinite goodness of the late Convention. I believe that aristocracy is the best form of Government. I believe to speak, write, read, think or hear anything against the proposed Government is damnable heresy (MHS 64: 149).

The Warrens would have been interested in Elbridge Gerry's objections at the Convention, objections to the "duration of the Senate" and to "the power of the Representatives over their compensation" (MHS 64: 144) that had led him, with two others, not to sign. However, he "could get over all these [objections], if the rights of the citizens were not rendered insecure" (Bowen 252). Mercy Warren cited "Columbian Patriot's" objections in ironically "asking pardon for differing from such respectable authority, who have been led into several mistakes" (ACP 10).

The Warrens and Gerrys would have concurred that there must be amendments; the Constitution must have amendments. Mercy Warren warned, "There is no

provision by a bill of rights to guard against the dangerous encroachments of power" (ACP 10). After the Warrens returned to Plymouth, Gerry wrote James Warren in a light vein: "Do not let () be deterred from visiting us, for fear she and () maybe again be distinguished by the appellation of the Anti-Federal ladies" (Gardiner 208). In the manner of the time, Gerry was careful not to compromise Mercy Warren and Ann Gerry by inserting names.

In June 1788, Virginia at last ratified the Constitution, in spite of Patrick Henry's passionate opposition. In a speech of June 18, 1788, Henry had declared at the convention, "You prostrate your rights to the president. This power is dangerous and destructive" (Henry 558). Virginia's Convention voted 89 to 79 for the Constitution with amendments, and the Virginians included amendments. New York followed with ratification July 26, 1788. Alexander Hamilton was a brilliant opponent; still, the vote for ratification was a close 30 to 27. Actually, only nine states were required to assure the passage of the Constitution and the new federal republic, and, in the celebration that followed, many held that a bill of rights must be forthcoming.

Mercy Warren had been involved, even immersed, in these proceedings without the slightest prospect of taking any real part. She would not be voting nor be a delegate. No woman would vote or be a delegate. This cultural phenomenon was accepted generally by men and women alike, as it was accepted that a slave would be counted as three-fifths of a person to determine Congressional representation. Warren could have considered many times how unjust and restrictive was the custom. Occasionally, a modest rebellion occurred. Mercy Warren and Abigail Adams had allowed themselves a small protest at the time of the Continental Congress. Adams had quoted to Warren a letter directed to John Adams declaring, "We would not hold ourselves bound by any laws in which we had neither a voice nor representation" (AFC 397). Adams had asked Warren to join her in her rebellion. Their manifesto was minimized by John Adams and treated as mere playfulness, although James Warren might have been much more sympathetic. Even a government with a bill of rights would not then correct the inequity. However, as "Columbian Patriot" pointed out, there should be "security . . . in the . . . system . . . for the rights of conscience and the liberty of the press" (ACP 7). The new federal republic, unique in a world of monarchs, was like a brand new democratic steam engine, ready to go, with a vital piston missing—a bill of rights. In the first election under the new Constitution, white, male legislators in each state chose the senators; white, male voters in each state voted for the representatives; and electors of each state (Warren's "aristocratic junto") voted for president and vice president. The ceremonial swearing-in took place in New York City April 30, 1789. Warren had a high opinion of George Washington's moderation and a regard for John Adams as an old friend (although Adams would write her ten angry letters years later upon publica-

tion of her *History of the Rise, Progress, and Termination of the American Revolution*). Elbridge Gerry was elected Representative from Massachusetts, obliging him to go to Congress, he told the Warrens, "to procure those amendments I had so warmly urged" (Gardiner, p. 219). James Madison had been elected Representative from Virginia. Like Gerry, he went to Congress with his mind on amendments. He was a Federalist when he wrote as "Publius" with Alexander Hamilton and John Jay for ratification of the Constitution, but he was an Anti-Federalist when he had second thoughts about a bill of rights. A letter from Jefferson in Paris had advised a bill of rights for the "legal check which it put in the hands of the judiciary" (*Oxford History*, p. 35). On June 17, 1789, James Warren wrote Gerry, "My curiosity is excited to see the nature and effect of Mr. Madison's plan for amendments" (Gardiner, p. 230).

During this period Mercy Warren was writing her *History*, including her brother, James Otis, and the part he played before the Revolutionary War. Otis' passionate speech against British Writs of Assistance had been a stand for the freedom of one's house against general warrants. Mercy Warren was sensitive to the new Constitution's lack of protection of this freedom called for by her brother: "Now one of the essential branches of English liberties is the freedom of one's house. . . . This Writ would totally annihilate this privilege. . . . A man's house is his castle, and whilst he is quiet he is as well guarded as a prince in his castle" (Commager, 1973, p. 46). Warren came to the end of Volume I of her *History* with the dismal winter of Valley Forge. She told her husband she hoped she had audacity enough for her bold undertaking to go on to three volumes.

In summer 1789, James Madison brought forth from Congress a bill of rights. On September 25, Madison's amendments were proposed to the states by Resolution of the Congress. No more fitting day could have been chosen by the "Columbian Patriot"; Mercy Warren was born September 25, 1728. In the next two years, the Bill of Rights traveled through the states as it was submitted for ratification. In Plymouth, Mercy Warren, historian, continued to work on her *History*. She was in Volume II, and she wrote concerning the rivalry of nations:

What were once the ancestors of the most refined and polite nations, but rude, ignorant savages? Nature has been equal in regard to the whole human species. There is no difference in the moral or intellectual capacity of nations. . . . This gradual rise from the rude stages of nature may be traced by the historian, the philosopher (MWH 2: 126).

Hoping to obtain a position for her son Henry, Warren wrote on May 29, 1779, to her friends John and Abigail Adams, who were living at Richmond Hill near New York City. The reply from the vice president was daunting: he "had no patronage, and neither your children nor my own would be sure of it if I had it" (Fritz 257). Still, Mercy Warren had confidence that she and Abigail Adams

would always be friends; theirs was a true meeting of the minds. They had worried about each other's children, read the same books, and corresponded for years as Portia (Abigail) and Marcia (Mercy). Although Warren may not have been completely confident as to how Vice President Adams would fill his position, she had no doubt that President Washington would conduct his high office well. She wrote in her *History*, "Perhaps few other men would have kept together the shadow of an army, under such a combination of difficulties as the young republic had to encounter" (MWH, 1, p. 350). In June 1790, she decided to collect the poems she written throughout her life and dedicate them to President Washington. She wrote for and received permission that he was "duly sensible of the merits of the respectable and amiable writer" (qtd. in Fritz, p. 258). During the week she spent in Boston seeing to the printing of *Poems, Dramatic and Miscellaneous*, James Warren sent her a love letter: "If we had peas or rubies & diamonds we would give them to you, we have strawberries & cream at your service. . . . adieu, for why should I attempt to express the full of my affection for you" (qtd. in Fritz, p. 259).

A happy event in the Warren family was the marriage of son Henry to a second cousin, Mary Winslow, and their setting up housekeeping in Plymouth. Winslow, the dashing son, had received a Second Lieutenant's commission in the army, and in the autumn of 1791 set off with his regiment to meet General St. Clair at Fort Washington on the Ohio River where he led a show of strength to counteract British influence. The Warrens could not have been happy about this last event, for Mercy Warren was writing of the Indians in her *History*:

They were the original proprietors of the soil; and if they have not the civilization, they have the valor. If they have not patriotism, they have a predilection to country, and are tenacious of their hunting grounds. There appears a probability they will be hunted from the vast American continent by Europeans of every description, aided by the interested Americans, who consider valor in an Indian, only as a higher degree of ferocity (MWH, 2, p. 122).

Meanwhile, the Bill of Rights had reached Virginia, although Massachusetts still had not ratified. The Virginia Legislature ratified forthwith and had the honor on December 15, 1791, of making the Bill of Rights an integral part of the Constitution.

The glorious news hardly had time to reach Mercy and James Warren when other, crushing news arrived. General St. Clair had suffered a terrible defeat by the Miamis, and Winslow Warren was killed. After a time, Mercy Warren went on with her *History*, writing, "The decline of health, temporary deprivation of sight, the death of the most amiable children. . . 'the shaft flew thrice, and thrice my peace was slain'. . . prompted [me] to throw by the pen in despair" (MWH, 1, Preface). From Maine had come the news of the illness and death of the youngest Warren son,

George, and Charles had died in 1785 in Spain. On Mercy Warren's birthday in 1792, Henry and Mary Warren's first child was born, a little girl named Marcia, the name her grandmother had taken in her correspondence with Abigail Adams.

In 1791, Mercy Warren completed her three-volume work, *History of the Rise, Progress, and Termination of the American Revolution*. She traveled to Boston to talk to James Freeman, a Unitarian minister who would assist in getting the book published. In Volume III, Mercy Warren had softened her views of the Constitution with its Bill of Rights:

Perhaps genius has never devised a system more congenial or better adapted to the conditions of man, than the American Constitution. At the same time, it is left open to amendment when ever its imperfections are discovered by the wisdom of the future generations or when new contingencies may arise (MWH, 3, p. 423).

The inclusion of the Bill of Rights in the Constitution had fortified Mercy Warren's hope and confidence for the nation. Her credo—"the rights of individuals that cannot be too fiercely guarded"—had found its place at the very core of the law. James Warren, quite carried away in enthusiasm, wrote "This is certainly the Golden Age returned to bless the Western Hemisphere" (Gardiner, p. 230). Mercy Warren was less sure, for she had added in her *History*, "Yet it is necessary to guard against the intrigues of artful and ambitious men" (MWH, 3, p. 424). Hopeful, but believing his country might have to fight the British again, James Warren died in 1809. In October 1814, Mercy Otis Warren died at age eighty-six.

When the time arrived to celebrate the Sesquicentennial of the Bill of Rights, an egregious error was discovered; Massachusetts, Georgia, and Connecticut had never ratified the document. On March 2, 1939, Massachusetts ratified the Bill of Rights, followed by Georgia March 18, 1939, and Connecticut April 19, 1939. The Bicentennial of the Bill of Rights in 1991 could bring Mercy Otis Warren, the sole woman heard on the Constitution at its origin, into her own. Perhaps Warren's ardor for "the freedom of the human mind" (ACP, p. 3) will impel her country to remember and recognize this woman dissenter, this great patriot.

Note:

The following abbreviations are used in textual citations:

ACP Observations on the New Constitution by A
Columbian Patriot

AFC Adams Family Correspondence

MHS Massachusetts Historical Society

MWH History of the Rise, Progress, and Termination of
the American Revolution

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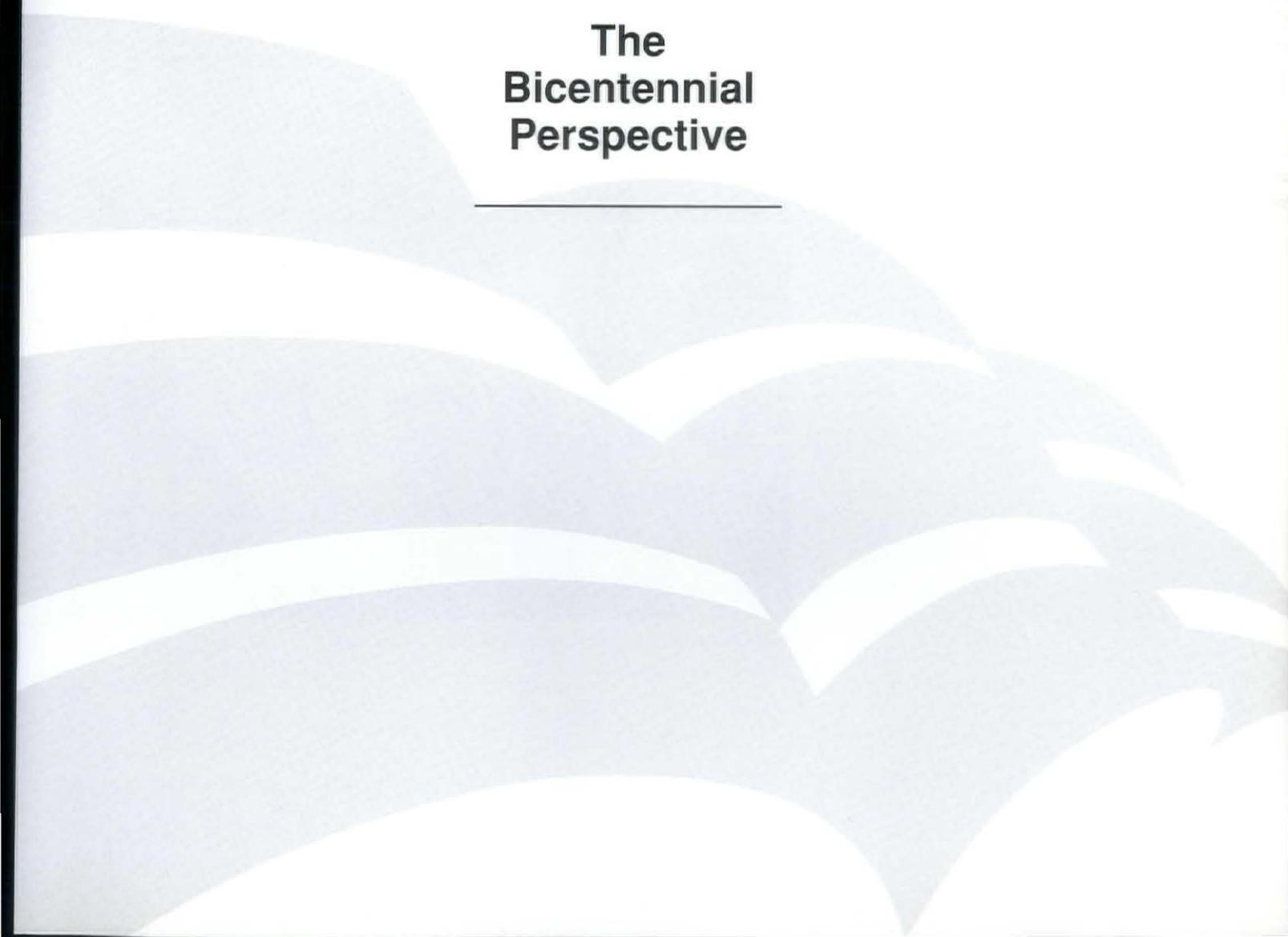
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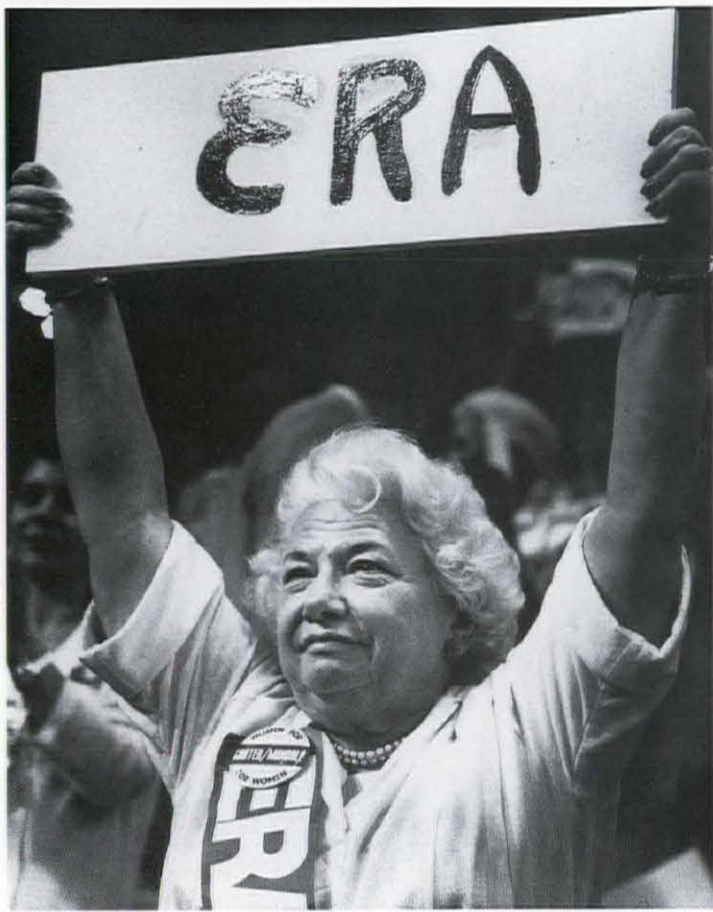
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De la

**The
Bicentennial
Perspective**





Liz Carpenter
Campaigns for the Equal Right Amendment
at the 1978 Democratic National Convention.



International Women's Year Conference, Houston, Texas, 1977.
Courtesy of Betty Lane Studio



First Ladies Rosalynn Carter, Lady Bird Johnson, and Betty Ford at the LBJ Ranch, 1987.

Courtesy of The Carter Center of Emory University



Committee members gather with Rosalynn Carter at the home of Jean Robitscher Bergmark to plan for the *Women and the Constitution* symposium, 1987.

Courtesy of The Carter Center of Emory University



Liz Carpenter, Liane Levetan, and Sarah Weddington gather in 1987 to plan for the *Women and the Constitution* symposium.

Courtesy of The Carter Center of Emory University



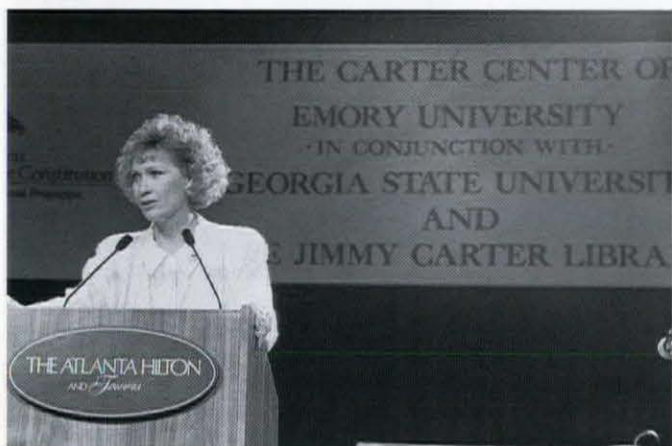
Rosalynn Carter, Betty Ford, and Lady Bird Johnson
at the LBJ Ranch, make plans for *Women and the Constitution:
A Bicentennial Perspective*. 1987

Courtesy of The Carter Center of Emory University



Former President Jimmy Carter
Women and the Constitution: A Bicentennial Perspective
February 10-13, 1988, Atlanta, Georgia

Courtesy of The Carter Center of Emory University



Dayle E. Powell
Women and the Constitution: A Bicentennial Perspective
February 10-13, 1988, Atlanta, Georgia

Courtesy of The Carter Center of Emory University



Rosalynn Carter
Women and the Constitution: A Bicentennial Perspective
February 10-13, 1988, Atlanta, Georgia

Courtesy of The Carter Center of Emory University



Supreme Court Justice Sandra Day O'Connor
Women and the Constitution: A Bicentennial Perspective, February 10-13, 1988, Atlanta, Georgia
Courtesy of The Carter Center of Emory University



Lady Bird Johnson
Women and the Constitution: A Bicentennial Perspective, February 10-13, 1988, Atlanta, Georgia
Courtesy of The Carter Center of Emory University

Review of State Constitutions: Implications for Women's Rights: Differences and Similarities in States' Interpretations of Constitutional Questions

by Dorothy T. Beasley

1.

Sign on placard depicting the world globe states:
"All moments, all events are part of our sacred pathway. Right now is our point of power. All is well."

A local columnist recently wrote a column entitled "Presidency is Woman's Work." Here is part of his story: "Some of the guys were talking politics over a few beers the other night, and I brought up the fact that I believe we will, one day, have a woman president. They got in the Kiwanis Club, didn't they? There was a lot of comment. . . . Bubba belched and said, 'Gimme another beer, Leon. This fool is crazy to be talkin' about something like that.' As I said to Bubba, 'No, I ain't, either.' It's coming. . . . We've already got women mayors, women governors, and I got my gas pumped by a woman at a service station the other day. Her name was Mildred, and it was written right there on her shirt, and she asked, 'Check under that hood?' the same as any man would. . . . I said to Bubba, 'There's going to be a woman in the Oval Office as sure as you're sittin' on the bar stool,' to which Bubba replied, 'Oh, yeah? Then tell her to do the windows before she leaves.' I guess Bubba has a right to be bitter. His wife fired him last week down at the plant" (Lewis Grizzard, *The Atlanta Journal-Constitution*, 30 August 1987).

And so we return to the statement: "All moments, all events are part of our sacred pathway. Right now is our point of power. All is well."

- a) Women HAVE been given a voice and a vote but only in the years since the U.S. Constitution was written and adopted. Now women are part of "We The People," which is a more perfect democracy than was created two hundred years ago.
- b) The Nineteenth Amendment guaranteeing the right to vote without regard to sex was adopted in 1920 as the law of the land. Georgia ratified the amendment March 27, 1970! Women began serving on juries by a Georgia statute passed in 1953.
- c) Last week a portrait was hung in the State Capitol of Viola Ross Napier, the first woman legislator in Georgia and, in 1922, the first woman to argue as an attorney before the Court of Appeals and the Supreme Court. The mayor of Macon, Georgia, presented his remarks, saying that placing Napier's portrait in the Capitol signified that it was now

"okay" for women to be in state government in Georgia.

This chronology demonstrates, and undoubtedly the chronology is paralleled in state law all over America, that the PRESENT is indeed women's "point of power."

2.

The Georgia state constitution, as many do, has a unique feature not shared by the U.S. Constitution: it is recent, speaking the will of the people in 1983, when it was adopted. Thus it, like other states' constitutions, probably is a more current source for pointing the way to the rights which state government is to protect. If these rights which are asserted are protected by state government, then there is no need to apply to, or resort to, national government. To illustrate, there are several provisions in Georgia's Bill of Rights which do not exist as such in the federal constitution:

- a) "All citizens of the United States, resident in this state, are hereby declared citizens of this state; and it shall be the duty of the General Assembly to enact such laws as will protect them in the full enjoyment of the rights, privileges, and immunities due to such (i. e., Georgia) citizenship" (Par. VII). Thus, whatever rights a Georgia citizen has, a woman has.
- b) "The social status of a citizen shall never be the subject of legislation" (Par. XXV). If social status embraces the concept of a woman as a woman, then this may not be legislated.
- c) "The separate property of each spouse shall remain the separate property of that spouse except as otherwise provided by law" (Par. XXVII). Although the exception could be used nearly to swallow the protection, the provision nevertheless states a fundamental policy which places a burden on the legislature if it seeks to depart from it.
- d) "No person shall be denied the equal protection of the laws" (Par. II). This clause was first put into Georgia's Bill of Rights in 1983, so its meaning may be construed in the context of these current times.
- e) "The enumeration of rights herein contained as a part of this Constitution shall not be construed to deny to the people any inherent rights which they may have hitherto enjoyed" (Par. XXVIII, the last in the Bill of Rights). Are natural rights included?

Thus, there are many opportunities for what may be perceived as "women's rights" to be litigated in Georgia courts and demanded to be protected under Georgia's constitution.

3.

The problem we face today is getting attorneys to raise the issue of women's rights, to invoke this question! We keep pointing out that we on the appellate court cannot address the question if it is not raised and ruled on in the trial court. For example:

- a) "Defendant also contends that, because the investigator failed to identify defendant as the Fred

Henderson who made the statement, he was deprived of his right to confrontation under the Sixth Amendment. In his brief, defendant raises also the state constitutional right, but no objection on this basis was made below and it will not be considered for the first time on appeal *McKissic v. State*, 178 Ga. App. 23, 24 (3) (341 SE2d 903) (1986) *Henderson v. State*, 182 Ga. App. 513, 517 (356 SE2d 241) (1987).

b) "The same would be true of an application of the state constitution which, when its restrictions are less protective of individual rights than the federal constitution's principles as expounded by the U.S. Supreme Court, must yield to the supreme law of the land. Defendants did not advance the state constitutional claim, nor was such addressed by anyone. So we would consider it as having been abandoned below also *Kingston v. State*, 127 Ga. App. 660, 661 (2) (194 SE2d 675) (1972); *Cox v. City of Lawrenceville*, 168 Ga. App. 119 (308 SE2d 224) (1983). See *Solesbee v. Balkcom*, 339 U.S. 9, 11 (70 SC 457, 94 LE 604) (1949). The appellate court corrects errors of law committed by the trial court where proper exception is taken. *Velkey v. Grimes*, 214 Ga. 420 (105 SE2d 224) (1958); *Butler v. State*, 172 Ga. App. 405, 406 (1) (323 SE2d 628) (1984). Thus, whether the state constitutional guarantees were secured in the circumstances of this case we are not prepared to say. Since it was not drawn in question, this is not the proper case for this court to explore that possibility" *State v. Camp*, 175 Ga. App. 591, 593 (333 SE2d 896) (1985).

c) "As Justice Stephens clearly explained in his concurring opinion in another state search and seizure case, *Massachusetts v. Upton*, 466 U.S. 727, 735 (104 SC 2085, 80 LE2d 721) (1984), the state courts should first address the claim of right under the state constitution. Otherwise they ignore a 'fundamental premise of our constitutional system of government.' *Id.* He pointed out that not only is that a fundamental error insofar as structure of government is concerned, but it is a large waste of court time and it potentially delays final resolution of the case." *Wells v. State*, 180 Ga. App. 133, 138 (348 SE2d 681) (1986) Beasley, J., concurring specially.

A state may not only have broader or at least more specific provisions that are harder to wiggle out of, when a right is being asserted, but attorneys are given leave to be braver in finding such a right in the state constitution. The U.S. Supreme Court must keep in mind that its fashioning of a newly recognized right will be applicable to a whole nation of people, whereas a state supreme court's pronouncement will affect only one state. Besides, state constitutions can be changed more easily; we in Georgia are on our tenth. So states can be more expansive, less ginger, in their approach to rights.

4.

Not only attorneys should turn first to the state constitutions; citizens should as well. They hold the "primary" political office, that of citizenship, says Mortimer Adler in his excellent Bicentennial book on the Constitution, *We Hold These Truths*. Also, officeholders at every level of government in the state should first consider their state constitution. The daily decision-making of these officials is rarely challenged in court, and they are sworn to uphold the state constitution as well as the federal. A record 130 women (a 1/5 proportion) have been appointed to current cabinets by state governors in thirty-nine states as of December 31, 1987 (according to a thirty-nine state study released in January 1988 by the National Women's Political Caucus). The sensitivity to what may be called the assertion of a woman's right may also be greater in the state supreme courts, as there are likely to be more women on such courts. The woman's perspective will be represented in the collegial decision-making process. Not, of course, that a woman judge may necessarily be an advocate, but the perspective and understanding are there. Last week, for example, I was asked to be on a panel of women judges at the University of Georgia Law School to talk about how a woman becomes a judge and what the experience is like. The discussion was sponsored by the two women law students' organizations.

5.

State constitutions are being awakened, insofar as protecting rights is concerned. Here are some examples of their resurrection:

- a) At the 1987 annual Taft Seminar for Teachers at the University of Georgia, two speakers treated the subject. One spoke on "Federalism & Our Constitutional System: State-National Connections," and the other spoke on "The Emerging Significance of State Constitutions."
- b) Georgia State University *Law Review's* Fall/Winter 1986/87 issue is devoted to "Symposium: The Georgia Constitution and the New Ascendancy of State Constitutional Law."
- c) Justice Harold G. Clarke of Georgia's Supreme Court published an article in Spring 1987 in the Georgia State Bar Journal entitled "Independent State Grounds: How to Win Through the First Door Out."
- d) The title of the annual lecture given in May 1987 at the National Judicial College in Reno, to state court judges from all over the United States, was "Adjudicating State Constitutional Rights." Judge Joseph R. Quinn, Chief Justice of Colorado, the lecturer, said, ". . . state constitutional adjudication will assume an increasingly more visible role in American law in the years ahead, and . . . the future protection of the rights of Americans is more likely to become the 'first and final province of state courts relying on state law.'"
- e) Just two weeks ago Chief Justice Rehnquist spoke to

the Conference of Chief Justices of all of the states and, I am told, reminded them of *Michigan v. Long*, 463 U.S. 1032 (1982) written by Justice O'Connor, in which the Court made clear that: "If the state court decision indicates clearly and expressly that it is . . . based on bona fide separate, adequate, and independent grounds, [the Court] . . . will not undertake to review the decision." The Court, itself, seems to be urging the founding of rights guarantees in state constitutions.

f) Yesterday, I had a letter from a law professor at a well-known law school who is working on this subject. He finds its increasing significance so important in the development of American law that, he wrote, "I plan to spend the rest of my life working in this area."

6.

A major point is that LAW SCHOOLS AND POLITICAL SCIENCE DEPARTMENTS MUST START TEACHING STATE LAW AND STOP NARROWLY, AND ERRONEOUSLY, TEACHING THAT CONSTITUTIONAL LAW MEANS U.S. CONSTITUTIONAL LAW. We are living under a *federal* system of governments, with dual sovereigns and dual citizenship.

7.

Another result of using state constitutions as sources of fundamental rights is that ideas may flow in two directions in the federal system. It is not necessary that states construe their state constitutions the same as the U.S. Supreme Court construes the U.S. Constitution. States may look to what the Supreme Court says, as persuasive, when construing the same or similar expressions of state constitutions. But the opposite flow of ideas is also possible: the U.S. Supreme Court may be persuaded by state constructions of state constitutions that the same meaning should be ascribed to the U.S. Constitution!

The influence of states, in the development of their own constitutions, will provide a rich source of judicial thinking as to what the fundamental rights are which are to be protected in this country. The scholarship, experience, training, and research into history of the supreme courts of every state can provide a deeper understanding of the American court. For example, the right to privacy was recognized and protected more than half a century ago by Georgia's Supreme Court, in *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190 (50 SE 68) (1905). But I am not aware of any cases in Georgia where the state constitution has been used to advance rights of particular interest to women.

We do know that our constitution is broader, not only in its language, as illustrated here, but also in how it is interpreted by our courts and legislature. For example, protections against double jeopardy are much more extensive in Georgia than the U.S. Constitution requires. Also, there is an express right not to be abused in prison, or while under arrest (See 34 *Emory Law Journal* 341, "The Georgia Bill of Rights: Dead or Alive," Spring 1985).

Thus, the field of state law is like the farmland which lies dormant all across America right now, waiting for spring, when it can be activated to produce the vegetables and fruit and grain which nourish the people. So the state constitutions lie dormant, to a great extent, waiting for someone to till the soil, plant the seeds, and tend the crops to harvest, as they relate to those many issues which are still ahead of us in the United States. Some of these issues are, for example:

- a) issues relating to the creation of life, to in vitro fertilization and surrogate motherhood;
- b) issues relating to the control over death, to who lives, who dies, and who decides;
- c) issues relating to the family and to the break-up of families such as what is a fair division of property, considering not only what each has contributed in financial measure but also in labor and non-financial support to the marriage;
- d) issues relating to equal economic opportunity, education, housing (of particular importance because a growing percentage of the homeless are women and children), teacher tenure and academic opportunity, and taxation discrimination.

TO CONCLUDE, when women sense discrimination and no law apparently covers the issue, to gain redress they must take up their state constitution to see whether or not it can arguably be made to apply. They must look first to the roots, the grass roots, of their own states.

Amending the Constitution to Include Women's Rights

by Beverly Beeton

Understanding the efforts to amend the Constitution to include women's rights requires an understanding of the historical context.¹ The Anglo-American view in the eighteenth century defined women as dependent beings. In keeping with Blackstone's statement of the common law, upon marriage a woman's legal existence was suspended or, as he phrased it, incorporated into that of her husband, and she was said to be in a state of coverture. The indivisibility of sovereignty as it related to the family, as well as to government, was the dominant view in the eighteenth century when the United States Constitution was framed. In short, upon marriage a man and woman became one, and the one was the husband. This concept of household suffrage persisted through most of the nineteenth century. In some respects, the legal status of single and widowed women was better than that of married women; yet, they were not considered whole people with unqualified political or property rights.

It was not until mid-nineteenth century that sustained efforts began to re-define human rights and universal suffrage to include women. Harriet Taylor, in her 1851 article on the enfranchisement of women, and John Stuart Mill, in his essay on the subjugation of women and in his legislative fights in Parliament, most forcefully articulated the political rights of women to a wide audience in England (Taylor 289-311; Mill 181-182). In 1867, when Disraeli's conservatives were pushing an electoral reform bill, Mill made an unsuccessful bid to extend the franchise to women. As Mill's rhetoric demonstrates, the struggle for female rights has been in the mainline liberal tradition. Women's rights rhetoric, goals, assumptions, and methods have largely been drawn from the liberal credo. This ideological base was British in origin, but the early campaign for women's political rights centered in the United States.

Organized efforts in the United States demanding women's rights date from the 1840s. Just two decades earlier, property qualifications had been swept away, and suffrage rights had been extended to most adult, white, male citizens. However, it was not until women became involved with the abolition of slavery and other reform movements of the 1840s that the campaign was begun to attack the sexual barricade to political participation. Using rhetoric from the liberal-whig catechism and borrowing directly from the Declaration of Independence, the pioneer women's rights leaders, who gathered in 1848 at Seneca Falls, New York, argued that women's human and political rights were natural, inalienable, inherent rights. Defining women as people for the purpose of political rights, they initiated the campaign to secure the ballot.

During the decade prior to the Civil War, the Seneca

Falls advocates expanded their activities into the surrounding states, holding meetings and gaining support for their ideas in Massachusetts, Ohio, and Pennsylvania. In these years the women's rights movement was closely tied to the abolition movement; abolition leaders, both men and women, generally supported women's rights and spoke at suffrage conventions. Most suffrage activities were suspended during the Civil War as abolitionist and women's rights workers threw themselves into the war effort, but at the close of the war some of the reformers, acting under the auspices of the American Equal Rights Association, resumed their demand for equal rights and the political franchise for women and freedmen.

While the Radical Republicans were formulating a proposed Fourteenth Amendment to the Constitution to guarantee freedmen political power, the Kansas legislature submitted two amendments to that state's constitution: one proposition was black male enfranchisement and the other was female enfranchisement. Initially, the prospects for suffrage were hopeful because Kansas had shown evidence of moving towards broadening of the electorate by including school suffrage for women in its 1861 state constitution. This optimism, however, was premature. As the summer wore on and the campaign intensified, the editors of the national and local Republican and reform newspapers tended to support the idea of political privileges for black men but generally neglected comment on the subject of the ballot for women.

Finally, neither women nor black men gained the political franchise in this vigorous Kansas campaign in 1867. Nonetheless, as a result of this effort the woman suffrage movement began to assume the form that it would take for the next thirty years. Aggressive women's rights advocates such as Elizabeth Cady Stanton and Susan B. Anthony felt betrayed by equal rights reformers such as Horace Greeley, Wendell Phillips, George T. Curtis, and Theodore Tilton with whom they had worked for years before and during the Civil War. In the Kansas fight, these men had used their influence to support suffrage for black males but had ignored or only mildly supported woman suffrage. As Stanton analyzed it: "The philosophy of their indifference we thoroughly comprehended for the first time and saw as never before, that only from woman's standpoint could the battle be successfully fought, and victory secured" (Stanton, Anthony, Gage, and Harper 2:267). At this point, these women abandoned their long reliance on male reformers and moved in the direction of a genuine women's movement.

During the Kansas campaign, Hamilton Willcox, a representative of the New York Universal Franchise Association (Willcox 2-3) had proposed that women in all the territories be enfranchised, and the *New York Times* had published this scheme for testing woman suffrage. In 1868-1869, when the Radical Republicans were trying to persuade Congress to go beyond the already ratified Fourteenth Amendment and guarantee freedmen's right to vote, similar measures were introduced attempting to

provide women with access to the ballot. However, there was little support in Congress for the suggestion that the proposed Fifteenth Amendment include a prohibition against denying or abridging citizens' right to vote on the basis of sex, and even less enthusiasm for a separate amendment, recommended by Kansas Senator Samuel C. Pomeroy, specifically enfranchising women.

Willcox's scheme for testing woman suffrage in the territories, which was given legislative form by the Indiana Republican congressman George Washington Julian, intrigued a few congressmen. Experimenting with woman suffrage in the territories was appealing to some because it appeared to be safe. Neither the political stability of the established states nor the national political scene would be seriously altered because territorial voters could not vote for their own governors or for the president. Moreover, since Congress controlled the territories, the experiment could easily be halted if it seemed to go awry. It appeared that the impact women would have on politics and the possible de-feminizing impact that politics would have on women could be safely tested in the territories. Two side effects which Willcox and others predicted were the movement of "surplus women" from the East to the West and the elimination of the Mormon men's practice of marrying multiple wives (Willcox 13).

Population redistribution or Mormon plural marriage was not the primary concern of women who advocated equal rights; they insisted women had inherent natural rights. When equal rights suffragists convened in Washington, D. C., in January 1869 to lobby for federal legislation enfranchising women, Elizabeth Cady Stanton called for the passage of a constitutional amendment guaranteeing women's political rights as the proposed Fifteenth Amendment did for freedmen. In addition, Universal Franchise Association representatives testified before the House Committee on Territories in favor of Julian's bill to enfranchise women in the territories, while the vice president of the District of Columbia branch of the Association, Belva McNall Lockwood, lobbied for the passage of this legislation. Yet, by spring it was apparent that while the idea that suffrage based on citizenship without regard to race or color was gaining acceptance, the barrier of sex was still strong. The idea of a constitutional amendment for woman suffrage was being completely ignored and the proposal to test the concept in the territories now seemed to have small chance of success. As Julian's bill now read, it was limited to Utah Territory where the concern was with using woman suffrage as a means to eradicate Mormon polygamy which, along with slavery, was referred to as a "relic of barbarism" ("William H. Hooper," 130).

Many women suffragists were convinced, and consequently angry, that their abolitionist and Republican allies were insisting it was "the Negro's hour." Thus, some suffragists felt betrayed, and as a consequence this issue, coupled with basic philosophical disagreements on goals and methods, split supporters of equal suffrage into two

camp. The National Woman Suffrage Association, an aggressive, all-woman organization, was formed under the leadership of Elizabeth Cady Stanton and Susan B. Anthony; the more moderate supporters of woman suffrage rallied to the banner of the American Woman Suffrage Association headed by Lucy Stone, Henry B. Blackwell, and Julia Ward Howe. While the National group demanded immediate woman suffrage, the American Association conceded that it was indeed the Negro's hour; thus, they accepted deferred action for women's right to the ballot (Flexner 151-154).

The New York-based Stanton-Anthony faction persisted in the fight for a national constitutional amendment fashioned after the Fifteenth; nonetheless, almost a decade would pass before such a proposal would again be introduced in Congress on the occasion of the centennial of the American Revolution, and not until 1920 would it finally be adopted. The Boston-based Stone faction was more traditional, insisting on a state-rights position with regard to woman suffrage. The American Association members believed each state constitution should be modified to allow for the enfranchisement of women (Flexner 152-3). This schism on goals and methods would persist until 1890, when the two factions would be merged into the National American Woman Suffrage Association.

While the supporters of the American Equal Rights Association were aligning themselves into new woman suffrage organizations, and various proposals to test woman suffrage in the territories were being discussed in the national Congress, one after another the territorial legislatures of Dakota, Wyoming, Utah, Colorado, New Mexico, and Idaho considered the feasibility of granting the ballot to women. When brought to a vote, the idea was rejected everywhere except in Wyoming and Utah. Thus, while the first two woman suffrage organizations were centered in upstate New York and in Boston, legislation enfranchising women was first enacted in the Rocky Mountain region of the American West. During the period 1869-1896, Wyoming, Utah, Colorado, and Idaho enfranchised women.

At the National American Woman Suffrage Association Convention in 1896, Susan B. Anthony summarized in her opening remarks the past quarter of a century of suffrage activity:

The thought that brought us here twenty-eight years ago was that, if the Federal Constitution could be invoked to protect black men in the right to vote, the same great authority could be invoked to protect women. The question has been urged upon every Congress since 1869. We asked at first for a Sixteenth Amendment enfranchising women; then for suffrage under the Fourteenth Amendment; then, when the Supreme Court had decided that against us, we returned to the Sixteenth Amendment and have pressed it ever since. The same thing has been done in this Fifty-fourth Congress which has been done in every Congress for a decade, namely, the introducing

of a bill providing for the new amendment. . . .

You will notice that the seats of the delegation from Utah are marked by a large United States flag bearing three stars, a big one and two smaller ones. The big star is for Wyoming, because it stood alone for a quarter of a century as the only place where women had full suffrage. Colorado comes next, because it is the first State where a majority of the men voted to grant women equal rights. Then comes Utah, because its men in convention assembled—in spite of the bad example of Congress, which took the right away from its women nine years ago—those men, having seen the good effects of woman suffrage for years, voted by an overwhelming majority to leave out the little word “male” from the suffrage clause of their new State Constitution, and their action was ratified by the electors. Next year, if I am here, I hope to rejoice with you over woman suffrage in California and Idaho (Stanton, Anthony, Gage, and Harper 4:252).

Within the year, Susan B. Anthony did get to rejoice over the enfranchisement of women in Idaho, but it would be fifteen years before suffragists would be able to celebrate success in California. By then, Anthony was dead. In 1896, it seemed as though the suffrage movement was really underway; that autumn, Idaho voters approved the amendment of their state constitution and suffrage workers were canvassing California hoping for a similar result. However, the “liquor combine,” as Anthony called it, was victorious in California (Larson 2-19; Stanton, Anthony, Gage, and Harper 4:589-97).

Historians often label the period from 1896 to 1910 as the doldrum years for woman suffrage because no additional states enfranchised their female citizens during this period and the campaign for a federal amendment languished. Arrival at this nadir was not a sudden event. Passage by Congress of the Edmunds-Tucker Bill taking the ballot from the women of Utah Territory in 1887 and the Senate’s two-to-one vote the same year defeating the Anthony amendment the first time it came to a vote were omens tending to demoralize the National Woman Suffrage Association which soon began merger negotiations with the American Association. Also, the mood of Americans had changed. In the heyday of Radical Republicanism in the post-Civil War era, when the ideas of enfranchising women in the territories had first been discussed and the women of the Wyoming and Utah territories had been granted admittance to polling places, liberal equalitarian arguments had held some sway. However, during the final three decades of the nineteenth century, the appeal of humanitarian, equalitarian arguments was eroded by the naturalistic view of life which sanctioned inequality. The sympathy for equality which had been forceful during the Reconstruction era when the Fourteenth and Fifteenth Amendments were adopted had given way to the concept of a restricted ballot; by 1896, with the *Plessy v. Ferguson* Supreme Court decision,

inequality became constitutional.

Moreover, a general reaction occurred against change and experimental schemes, especially those related to the family and sex roles. This conservatism was further manifested in movements such as Comstockery and the Purity Crusade. The nation moved to a more conservative social and political stance, marked by the 1886 violent reaction to the labor demonstrations in Chicago’s Haymarket Square. The suffrage movement modified itself also.

The national suffragists’ experience with the question of woman suffrage in Utah helped move them closer to what is referred to as the Victorian Compromise and a preoccupation with the franchise. The National Woman Suffrage Association, which had been the most critical of the monogamous marital system, had been pressured not to allow the organization to be used by Victoria Woodhull to promote free love or by Belva Lockwood to defend the Mormon women in words often interpreted as a defense of plural marriage. Even Stanton’s views on divorce were not generally accepted. This suffrage organization was discredited in conservative days because of its identification with the non-traditional family structure and critiques of monogamous marriage. Faced with attacks from all sides if they attempted to analyze the traditional family structure, women’s rights advocates tended to confine themselves more and more to one subject—the vote. Suffrage became the panacea. Thus, a feminist ideology of woman’s role in society, which might have resulted in much greater change in society than woman suffrage produced, was not forthcoming.

After the unification of the two suffrage organizations, equalitarian arguments within the suffrage movement were no longer emphasized; the assumed moral superiority of woman came to the fore. In the early days of the movement, Elizabeth Cady Stanton and Susan B. Anthony had argued the case for female participation in the political life of the nation on the basis of natural human rights. Later in the nineteenth century, when Carrie Chapman Catt emerged as leader of the movement, the arguments shifted to focus on the unique insights of women and the supposed purifying impact that would result from female participation in politics. The suffragists attempted to turn the Victorian cult of true womanhood to their advantage. Women did not insist that they were equal to men but focused on how they were unique, especially in the moral realm.

The idea that women’s interests differed from those of the rest of the electorate frightened some segments of the society and resulted in the formation of aggressive anti-suffrage organizations often backed by brewers who feared prohibition. This resistance to votes for women was based on fears, confirmed by the suffragists’ own promotional literature, which advertised that women would likely use the ballot to reform society, especially to eliminate alcohol sales; moreover, they would ignore the persuasion of political bosses. In short, if women were allowed to vote they would naturally use their political power to purify

society and clean up politics because, according to the ethics of the day, women were the morally superior sex. Consequently, it was assumed by many, including promoters of woman suffrage, that the bright light of womanly purity and virtue could raise anything, even men and politics, to a more Godly level.

After the merger of the two suffrage associations, which was completed in 1890, the second generation of suffragists began to take over as Susan B. Anthony and Lucy Stone gradually stepped aside. This new generation tended to concentrate more on the ballot than on a general critique of woman's role in society. In addition, the association moved further in the direction of advocating individual state action as supported by the Boston group and away from Anthony's idea of a national constitutional amendment. No longer was there constant pressure on Congress through committee hearings and lobbying. At Alice Stone Blackwell's suggestion, the Suffrage Association only convened in Washington, D. C., in alternate years. As Anthony had feared, hopes for a federal amendment faded; after 1893, no Congressional committee gave it a favorable report, and it disappeared as a national political issue until 1913.

While the national suffrage movement continued to give lip service to the idea of a federal amendment, the idea was submerged as most of the organization's energy and time was spent on state campaigns, most of which were failures, until 1910 when success was realized in Washington state and the next year in California. With these two victories, some suffragists became convinced the suffrage bandwagon was rolling again. However, other more militant suffragists such as Harriet Stanton Blatch labeled these endless state campaigns "political crocheting" designed to keep women busy and out of the way of the national legislators. In 1914, some of these militant women, who had adopted the more aggressive tactics used in England, bolted the National American Woman Suffrage Association and demanded passage of the Anthony amendment. These dissident feminists coalesced around Alice Paul, a young woman tutored in such dramatic tactics as were employed by the Pankhursts in England, to persuade the government to act on woman suffrage. Faced by this new threat from within its own ranks, the National American Woman Suffrage Association was revitalized when Carrie Chapman Catt took the presidency. She employed the organizational experience she had developed in Colorado and Idaho campaigns to whip the Association into a tightly organized, effective force, and she again focused its efforts on passage of an amendment to the national Constitution.

The fact that the woman suffrage movement was rejuvenated and once again sought the passage of a federal amendment, combined with the shift to the left of general American attitudes in the Progressive Era, resulted in passage in 1920 of the Anthony Amendment as the Nineteenth Amendment to the Constitution prohibiting the denial of the right to vote on the basis of sex. As soon

as the Nineteenth Amendment was adopted, women's rights activities attempted to have the Constitution amended to assure women equal rights. Today, sixty-eight years later on the Bicentennial of the Constitution, we are still awaiting passage of this amendment. How many more generations will pass before it is realized?

Notes

¹This article is based on Beverly Beeton's *Women Vote in the West: The Woman Suffrage Movement, 1869-1896*. (New York: Garland Publishing, Inc., 1986).

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Reproductive Freedom: Toward the Year 2,000

by Gayle Binion

The theme of this session is the future of the United States Constitution with respect to women. Central to the issues that must be addressed in this context is reproductive freedom. For years we have been told that the major issues in reproductive freedom, for the next century, are raised by modern medical technology. Included therein are such issues as resolving legally who is the mother when one woman provides the egg and another woman the gestation necessary to produce a child. This issue needs to be faced and resolved as do the issues of biomedical ethics involved in modern technological capabilities in the reproductive process. However, as important as the issues created by twenty-first century technology are the issues still not fully resolved involving either no particular technology or relatively traditional technology. Among the most interesting of these are the issues which in recent years have occasioned a split within the feminist community. These issues generating intra-feminist dialogue and debate include

- 1) minors' rights to reproductive choice,
- 2) pregnancy leave, and
- 3) surrogate parenting.

Before we explore the dialogue on these three controversial issues, it must be noted that those of us who support the *Roe v. Wade*, 410 U.S. 113 (1983), decision and believe in the bodily integrity of women even in matters of reproduction have cause for concern about the security of that principle. Several months ago, a judge in Washington, D. C., in *In Re A. C.* 533 A.2nd 611 (D. C. Court of Appeals 1987,) forced a woman terminally ill with cancer, who was six months pregnant, to undergo a Cesarean section to effect the delivery of her fetus so that she would not die pregnant. She opposed the surgery, her husband and family opposed the surgery, and her doctors opposed the surgery. The administrators and lawyers at George Washington University Hospital believed that they had an obligation to operate. Under court order a Cesarean was performed. The non-viable fetus died immediately; the pregnant woman died shortly thereafter, her death hastened by the surgery. What is especially troubling about this case is that nowhere in this country can a competent adult, except for pregnant women, be forced to have surgery against his or her will.

It must also be noted that some two dozen cases like that of *A. C.* in Washington have occurred in this country in recent years. The case cited most often as authority for such judicial orders occurred here in Georgia in *Jefferson v. Griffin Spaulding County Hosp. Auth.* 247 Ga. 86 (1981) and is, inaccurately, thought to demonstrate the rationality of such practices. In that case the hospital argued that there was a 99% probability that without a Cesarean, the

fetus, allegedly in fetal distress, would die. What is rarely noted is that in that case, despite the granting of the judicial order, the woman actually gave birth naturally. Mother and child were fine. I do not mean to suggest that Cesarean deliveries are never necessary, but Cesarean sections, like any other surgical procedure, should be performed only with the truly informed consent of the patient. The fact that the Georgia decision is cited approvingly by other courts, without their recognition of the actual outcome of that case, suggests the casual disregard for the bodily autonomy of pregnant women demonstrated by numerous judges.

While *Roe v. Wade* did empower the state to restrict abortions during the third trimester, unless necessary to preserve the life or health of the pregnant woman, contrary to the ruling in *A. C.*, it in no other way permitted the state to gain control over the body of a pregnant woman. Vigilant attention must be paid to this intrusion of state authority into the most fundamental right of all, the right to bodily autonomy, the right that should be understood to underlie reproductive freedom. Again, the decision as to whether to undergo a Cesarean delivery should be treated by the law as it treats any other surgery, the decision is left to the competent adult based on informed consent.

It should also be noted that the principle that every adult but a pregnant woman has bodily autonomy has recently surfaced politically in California. On the ballot in June 1988 may be The Humane and Dignified Death Act which will allow doctors to assist terminally ill patients in hastening their own deaths. If passed, this law would cover everyone but children and pregnant women. While the exclusion of children might easily be justified on the basis of their inability to make this choice competently, the exclusion of pregnant women from the law's coverage reinforces the dangerous proposition that the bodies of pregnant women belong to the state. It simultaneously reinforces the principle that fetal rights are more important than those of live adult women. In sum, before we can even turn our attention to the tensions within feminism on some of the contemporary issues of reproductive freedom, we must take account of the assault on the autonomy of pregnant women over their own bodies.

Perhaps most controversial in contemporary society is the issue of the rights of minors to reproductive freedom. Many states have passed parental consent statutes which require that pregnant young women under the age of eighteen obtain either the consent of one or both parents or a court order to obtain an abortion. It is likely that the United States Supreme Court will uphold such statutes as long as they include an expeditious process by which a minor can circumvent parental authority and obtain a judicial order based on either her maturity or the determination that an abortion would be in her best interests. *Planned Parenthood Association of Kansas City v. Ashcroft*, 462 U.S. 476 (1983), suggests this principle. The Court, is, conversely, more readily inclined to approve of state

statutes which involve not parental consent but parental notification (*H.L. v. Matheson*, 450 U.S. 398 [1981]). While the high Court is still resolving the constitutionality of many of the consent laws, most recently rejecting (by a four to four vote which upheld the decision of the lower court) a law in Illinois that contained an unconstitutional cooling off period, the principle that the state can have some type of narrowly drawn parental consent statute appears well established. It is, nevertheless, bad public policy and should be fundamentally reconsidered by the Supreme Court.

Some see parental consent statutes as encouraging familial communications and even those who are pro-choice on abortion support these statutes on the basis of the more limited constitutional rights of teens. While the Supreme Court, has, in recent years, generally lessened the protections for minors' rights under the Constitution, there is, nevertheless, an assumption that the state may not limit these rights without a showing that it is doing so to effect a very serious state interest. Is this the case with restrictions on the right of reproductive choice and, if so, what interest is the state actually furthering? The data suggest that familial communications are not improved by parental consent statutes. Fifty percent of pregnant teens who seek abortions talk to their parents about their pregnancies; for those under fifteen years of age the figure rises to 75%. These data do not improve with the existence of parental consent statutes.

What is more demonstrable is that the purpose and effect of parental consent statutes is the prevention of teen abortions. And in this goal the states do succeed. Data from Minnesota demonstrate that during the first year after the passage of its parental consent law, the childbirth rate for girls under eighteen increased 38% whereas the birth rate for women over eighteen did not increase at all. This is evidence that the consequence of parental consent laws is an increase in teenage births. Similarly, in California, since 1953, minors have been able to obtain prenatal care without parental consent. A statute passed last year which requires parental consent for an abortion did nothing to alter the availability of confidential prenatal medical care for teens who choose to carry a pregnancy to term. Only the decision to abort triggers the involvement of a teen's parents; the decision to become a mother can be effected on her own with the assistance of the medical community. Prevention of abortion, and not familial communications, seems the more likely explanation for parental consent laws.

Is the prevention of abortion on minors a legitimate and significant state interest? Even if one starts with the assumption that despite the constitutional right of reproductive choice it might be possible to justify the state's protecting the minor by disfavoring the abortion option, data demonstrate that childbirth is sixteen times more likely to cause death than is an abortion and that the childbirth death rate for teens under fifteen is 2 1/2 times that of a woman of twenty-four. On the basis of

secular public health concerns, the state cannot justify such use of its police power. Add to these data the fact that 80% of teenage girls who have babies drop out of high school, and 30% are on public assistance within one year of giving birth, and one must once again question the constitutional legitimacy of the states' goal of prevention of teenage abortions.

In sum, while some who favor reproductive choice, generally, may mistakenly believe that family autonomy is furthered by parental consent laws, education as to the actual impacts of these statutes should reveal a legislative agenda that is inimical to the fundamental rights and interests of pregnant teens.

With regard to the issue of pregnancy leave, serious division among feminists occurred in 1986 when the U.S. Supreme Court reviewed the case of *California Federal Savings and Loan v. Guerra*, 479 U.S. 272 (1986). At issue was the constitutionality of California's child-bearing legislation under which a pregnant woman's job is protected for up to four months of unpaid child-bearing leave. Those with feminist sympathies who opposed the law, including the national organization of the American Civil Liberties Union, did so because in their view any law that is based on pregnancy involves sex discrimination per se. As such, they viewed the California law as in conflict with federal legislation.

In the 1978 Pregnancy Discrimination Act, Congress modified the Title VII of the Civil Rights Act of 1964 and prohibited employers from discriminating on the basis of pregnancy. Under the California law, child-bearing is treated differently from other temporary incapacities to perform one's job, in that there is no general job protection for those who need leaves for other reasons. Opponents of the California policy, therefore, challenged it as conflicting with federal law because of its discrimination on the basis of pregnancy. While the position of the ACLU and others reflected a legitimate concern about the history of discrimination against women on the basis of pregnancy, and a fear that using pregnancy as a criterion in the law, even when beneficial to women, will necessarily backfire, I believe that they paid insufficient attention to the impact aspect of legislation wherein pregnancy or childbirth is used as classifying variables.

Faced directly in the course of argumentation in the *Cal. Fed.* case, particularly with respect to several of the *amici* briefs filed, is the fact that the workplace in American society is organized around the reproductive needs of only men. The issue in *Cal. Fed.* was, thus, not fundamentally about the discrimination in favor of pregnancy over other temporary disabilities in the California law that was challenged, but rather it was about quality of reproductive choice. No man, with perhaps the exception of a Roman Catholic priest, risks his livelihood when he decides to become a parent. Alternatively, virtually every woman in the American work force, in contrast with women in nearly every other developed society, must take this risk. The right of reproductive choice as guaranteed by the

U.S. Constitution includes not just the right to abort, that is, the right not to have children, but does as well protect the right to have children. The California statute on pregnancy leave did no more than equalize, to a limited degree, the equality of reproductive choice between men and women.

The decision of the Supreme Court upholding the California statute on the basis of an equality of reproductive choice was important, but it was only a small victory. Still needed is a national legislative policy, such as Representative Schroeder and Senator Dodd's *Family Medical Leave Act* which will protect the jobs of employees who take limited unpaid leaves for childbirth, child-rearing, adoption, or the care of a sick child or elderly relative. While in modified form this bill has a chance to pass in both houses of the Congress, what will still be needed, and is commonplace in European countries, is paid leave for childbirth.

Although the tension within the feminist community over *Cal. Fed.* represented an honest disagreement as to the consequences for women of differing strategies for equality, I believe that it also reflected a fundamental difference in philosophy. While those who opposed the statute did so because of their concern for suspect classifications in the law and a belief that women should be treated like men, its supporters, to a significant extent, saw the issue as one of impacts of legislation on women and also implicitly of the right of women as a group to demand from our political system a different kind of orientation to public policy and to jurisprudence. In its most profound posture, *Cal. Fed.* was about modeling society to accommodate the rightful needs and interests of both men and women and not about treating pregnancy differently from other temporary disabilities. The opinion of Justice Marshall in the case may serve as a model and as an extremely valuable precedent for the feminist jurisprudence of the next century.

In its decision of February 3, 1988, declaring surrogate parenting contracts "invalid," "unenforceable," "illegal," and "perhaps criminal," the Supreme Court of the state of New Jersey reached the proper judgment (*In the Matter of Baby M*, 109 N.J. 396 [1988]). Immediately at stake was the adoption and custody of Baby "M" who was born to Mary Beth Whitehead and William Stern nearly two years ago under a surrogate parenting contract. More generally at stake was the future of such surrogacy arrangements. If the decision of the highly respected New Jersey court sets the pattern for the courts in other states, surrogate parenting arrangements may well disappear in the United States.

While the New Jersey Supreme Court did award custody to the child's natural father on the basis of the "best interests of the child" standard, this part of its decision reflected the unchangeable fact that the child had lived with the Sterns for virtually all of her twenty-two months of life. More germane to the surrogacy issue, the Court in invalidating the contract under which Mary Beth Whitehead had borne the child, reversed virtually

every element of the trial court's decision in the case. Superior Court Judge Harvey Sorkow, had, in spring 1987 (*In Re Baby M*, 525 A.2nd 1128 (N.J. Superior Court [1987])), ruled the contract valid, declared it in the best interests of the child to live under the custody of her father William Stern, stripped Mary Beth Whitehead of all parental rights, and permitted William Stern's wife to adopt Baby M. In contrast, the New Jersey Supreme Court not only ruled that such contracts amount to baby selling in contravention of state law against such practices; it also restored Whitehead's parental rights, including her right to maintain a relationship with her daughter.

Perhaps most important in the Baby M decision, but not receiving coverage in the news, is that the New Jersey Supreme Court prohibited any lower court in the state from granting even temporary exclusive custody of an infant to anyone but a natural mother without a demonstration that the natural mother is incapable of caring for the child. This latter ruling will have application beyond surrogacy cases but will prevent other Baby M situations of custody having already been established with the father prior to a final adjudication of the relative rights of the natural parents.

Does the New Jersey decision, if followed elsewhere, necessarily signal an end to surrogacy contracts? If so, does it unconstitutionally interfere with the right of reproductive choice? While the Court did allow for voluntary surrogacy agreements in which no money changes hands and which allow the natural mother to change her mind before relinquishing the child, it, in effect, prohibited such contracts. If one cannot be compensated, or as is said in contract law, receive consideration, for an agreement to perform a service, then there is no formal contract and thus no agreement that can be enforced in a court of law. Consistent with the New Jersey court's ruling, some informal, voluntary, and legally uncontested arrangements may continue on the basis of the trust between the parties, but the law should continue to frown on the practice and this disfavoring of surrogacy arrangements ought not to be seen as undermining the right to reproductive choice.

While the desire of an infertile couple to have a child who is biologically linked to at least one of them is understandable, a surrogate parenting arrangement in which a woman bears a child for them through artificial insemination with the husband's sperm and is, in advance of conception, gestation, or delivery, irrevocably committed to waiving her parental rights does in fact run contrary to public policy on at least two counts. First, there is little question that the practice entails the selling of children. No matter how these contracts are framed, the surrogate's fee, usually around \$10,000, is, in the main, not paid until the baby is delivered to the father, and the natural mother relinquishes her parental rights, permitting the child to be adopted by the wife of the natural father. Proponents of these arrangements argue that the service is womb rental, not baby selling, but if a stillborn baby is delivered after nine months of womb rental the surrogate is rarely paid

anything. (Mary Beth Whitehead was to receive only 10% of her fee under such conditions.) Although prior to the New Jersey action only Louisiana had specifically made surrogate parenting contracts illegal, the basic concept of exchanging or arranging the exchange of a baby for money is illegal everywhere in the United States.

The second sense in which surrogate contracts contravene public policy is that they circumvent normal adoption law. A mother cannot irrevocably waive her parental rights prior to the birth of a child. In fact, in no state in the union has such a waiver been held binding in a private adoption if made less than ten days after the birth of the child. The period during which a natural mother may change her mind in a private adoption is more commonly closer to six months. Such policies reflect our concern about the regrets that a birth mother may later have about a very hasty decision made under difficult circumstances, as well as perhaps a basic suspicion we hold as a society about the motives that may operate in the world of private, profit-making adoption practices. In any case, laws governing adoption do and should supersede surrogacy agreements, and despite the myopic view of Judge Sorkow in the New Jersey trial court, are violated by the provisions of surrogacy contracts and hence the contracts should be deemed void.

A feminist objection to these criticisms of surrogacy contracts is often made on the basis of their infringement on the freedom of women to contract about the reproductive uses of their own bodies. But this argument is based on assuming that the legally premature waiver of the inalienable right of reproductive choice, as well as the right to a relationship with one's offspring, as is done in a surrogacy contract, furthers the right in a meaningful way. It is further asserted that if a woman makes a contract to perform this service then she must live up to it or she endangers the progress of women over the last century. We are reminded that it is only in the last one hundred years that women have been allowed to make contracts and a failure to honor them reinforces the stereotyping of women as not responsible.

While it is axiomatic that adult women should have contract rights which are absolutely equal to those of men, the issue in surrogate parenting is whether the substance of such a contract directly contravenes legitimate public policy. One would not argue that for women to be taken seriously as parties to contracts that they must honor, and if they do not, be legally compelled to honor, a contract to commit arson, robbery, murder, or suicide. More to the point, would one argue that women should be compelled to honor a contract to sell their body parts? The surrogate parenting issue must be seen within the context that there are some things that cannot be bought and sold and thus contracts to do so are void. Certainly among these non-negotiables are human beings. I am suggesting that such contracts are invalid for legitimate reasons of public policy both with respect to baby selling and circumvention of adoption law and, therefore, courts should not enforce

them. I am not, however, recommending that women should be surrogates but just not be paid.

Only two years ago many states, including California, were on the verge of enacting statutes to enforce surrogacy contracts and to free surrogacy agencies from their fear of criminal prosecution for baby selling. The public notoriety of the Baby M case, and several other cases now receiving considerable media attention, has forced many to reconsider this solution to the problem of infertility. A likely outcome of the Baby M decision is that legislatures across the country, perhaps beyond the nearly thirty states already considering the issue, will act to declare such practices contrary to public policy. It is possible that we will follow the lead of England, France, West Germany, and Australia, where the legal disfavoring of these agreements ranges from unenforceability of the contract as to the parties directly involved to criminal illegality with respect to third parties making commercial surrogacy arrangements.

Reproductive freedom issues are far from entirely resolved and those which remain debatable, even among feminists, are not necessarily tied to twenty-first century technology, ovum transplants, and the like. The autonomy of pregnant women over their bodies must be reinforced in our jurisprudence or the entire foundation for reproductive choice will be undermined as will the principle of the equal protection of the sexes in American law. Beyond that we must reconsider the disagreements within the feminist community over such issues as minors' rights to reproductive choice, pregnancy leave, and surrogate parenting. If we look closely at the impacts of these policies and not simply at the facial characteristics of the law nor the goals alleged by the policy makers, we can yield a more meaningful understanding of the law and also continue to develop a more satisfactory feminist constitutional jurisprudence.

Women's Rights and State Constitutions

by Agnes Thornton Bird

To discover how the rights of women were dealt with in the various state constitutions adopted by the original thirteen states and the other newly added states is not an easy task. Women were virtually non-persons in these constitutions; because they were rarely mentioned, it might be thought that words such as men, freemen, and citizens were used in the generic sense and included women in the rights conferred. On the face of it, a state constitution, like the United States Constitution, was not a particularly discriminatory document where women were concerned. However, even the slightest knowledge of the history of this country makes one very aware that women, although on the scene as keepers of the hearth and home, were not on stage as actors in the great drama of the birth and development of this nation; they have not been recorded as makers of history and, except for an occasional voice of protest, they were seen but not heard.

We know that, with rare exceptions, women could not vote. When the state constitutions listed qualifications for voting and used the word men, they were intentionally excluding women. Moreover, a woman could not serve on a jury; public appointive and elective offices were not open to her. She suffered grave legal disabilities in family relations, in property ownership, and in making contracts, even though in these areas most state constitutions were either silent or seemed sex-neutral and appeared to leave open the issue of women's rights. Why, then, were women's rights almost completely unrecognized and unprotected in this country? Only by examining our legal heritage can we understand the true position of women in the legal and social systems in this country.

The early colonists who came from England and settled along the eastern seaboard brought, along with their material goods and religious beliefs, their deep commitment to the common law of their mother country and their claim to all of the great rights and privileges of Englishmen. The common law and the claim went with the settlers as they crossed this continent and became the basis of law and legal thinking in all but the eight community property states; however, even in these eight, the common law has had a great impact. (These eight states inherited their legal systems not from England but from Spain, Mexico, and France, but it is primarily in the ownership of property that the lot of a married woman is improved.) So pervasive has been the commitment to the common law of England that, even today, judges in the United States, in federal and state courts, and in community property as well as common law states, make frequent references to the common law as it applies, or as it no longer applies, to the problems and situations currently before them.

The common law had evolved in England over many centuries; because judges originally had no statutes to guide them in deciding cases, they relied on a combination of church law, general attitudes in the community, and, of course, their own innate feelings of right and wrong. As decisions were made and written down, these formed the case law, setting precedents which were to guide future judges in deciding similar cases. Some of these cases, even the very early ones, continue to be cited today, not only by English judges but by American judges as well. The story of the importation of the common law to this country clearly shows why there was no necessity for state constitutions to deal with, or even mention, the rights of women; their legal position had been so thoroughly defined by centuries of legal and social development in England that few Englishmen or Americans questioned the correctness of that position. In public life and in the eyes of the law, a woman was virtually a non-person. When laws did include mention of her, she (particularly the married woman) was most often classed with infants, imbeciles, the insane, and the incarcerated as suffering from legal disabilities or for needing certain protections. Moreover, women generally accepted their place. A section of the Tennessee Code of 1871 typifies and illustrates these laws regarding "Persons laboring under the disabilities of coverture, infancy, or unsoundness of mind. . ." (Law of Attachments).

A positive legislative act or a judicial opinion by the highest court in a state was, and is today, required to change the common law; since the framers of most state constitutions accepted the common law as it defined the legal position of women, there was no need to include any specific references to women; there was no need to list the legal and political disabilities which they suffered, and apparently few of the writers of the state constitutions considered it necessary to make changes or to remove these disabilities. Two of the more striking exceptions to this almost universal disregard of women's rights appear in the constitutions of Wyoming and Utah, adopted respectively in 1890 and 1896 as each was admitted to the Union. The constitution of Utah gave males and females equal privileges in civil, political, and religious matters, while Wyoming is known as the Equality state because its constitution gave women voting rights.

The disabilities of married women were even greater than those of single women, but so great was society's contempt and/or pity for a woman who could not find a husband that few women chose single life. A woman lost her legal identity at marriage. "[T]he husband and wife are one person in law; that is, the very existence of the woman is suspended during the marriage," stated William Blackstone in 1765 in describing the common law's view of a married woman; after outlining the disabilities and losses a woman suffered upon marriage, which he considered to be for her benefit, he could in all seriousness add as his final sentence on the subject: "So great a favorite is the female sex of the laws of England!" (Blackstone, 1765,

p. 442, 445). That this attitude was firmly implanted in America is seen in John Adams' mocking reply to Abigail Adams' plea that, in writing the constitution for the new nation, he should not forget the ladies and should alleviate some of the legal disabilities they suffered. He wrote that he could not but laugh at her suggestions and that, while he was aware of other insolent and disobedient groups growing discontented with their lots—mentioning children, students, apprentices, Negroes, and Indians—he was surprised that he now must add women to this list (Perates & Cary, 1987, pp. 1-2). Despite the ringing pronouncements of equality and justice and liberty in the Declaration of Independence and in the Preamble to the Constitution, clearly these words did not apply to women. Indeed, Thomas Jefferson is reported to have written that women should be excluded from public deliberations and even from most gatherings of men (cited in Davidson, Ginsburg, & Kay, 1974, p. 2), and also that women should not “wrinkle their foreheads with politics,” but be content to “soothe and calm the minds of their husbands returning ruffled from political debates” (cited in Brodie, 1974, p. 238). The newly independent states continued to consider married women as *femes covert*, inferior of intellect and dependent upon men, and their unmarried sisters as *femes sole*, with only a few rights in private matters. While men's political rights increased with independence, women continued to have virtually none.

Occasionally, a brave woman would defy the conventions of the day and attempt to step beyond the limits of the woman's role and claim rights and privileges reserved to men. Myra Bradwell was such a woman. Around 1870 she applied for a license to practice law in Illinois; her application was denied by the state Supreme Court solely on the grounds of gender. She applied to the United States Supreme Court where again she lost; the opinion from the court quoted the opinion of the Illinois court in which an effort was made to find how a female lawyer could possibly fit into the Anglo-American legal and traditional role of women. The Illinois court also looked at the constitution and the statutes of the state in effect at the time and noted that Illinois had adopted by statute the common law of England and most of the statutes of England “passed prior to the fourth year of James the First,” and further stated:

It is also to be remembered that female attorneys at law were unknown in England, and a proposition that a woman should enter the courts of Westminster Hall in that capacity, or as a barrister, would have created hardly less astonishment than one that she should ascend the bench of bishops, or be elected to a seat in the House of Commons. . . . That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth (*Bradwell v. Illinois*, 1873).

Myra Bradwell could not practice law in Illinois in 1873, not because the constitution and the statutes of the

state forbade her doing so but because a woman attorney was unknown almost three centuries earlier at the time of the reign of James the First of England.

One may look appropriately and in some detail at one state's constitutions and some of the statutes passed pursuant to them, as these relate to women's rights, during the first century of this nation's existence. I have chosen Tennessee because it is my adopted state and a typical common law state (the constitutions and statutes of the common law states varied but have had many similarities where women's rights are concerned). Before becoming, in 1796, the sixteenth state to join the Union, the area which was to become Tennessee had originally been a part of the colony and then of the State of North Carolina. In 1789, North Carolina relinquished control over the area; it then became a territory of the United States, and by 1796 a constitution was written and adopted and Tennessee was admitted as a state. The fundamental law has been rewritten twice: once in 1832 and again in 1870. The constitution of 1870, although a more detailed document, bears a close relationship with the constitution of 1834, even as that document closely resembles the 1796 constitution, and that one borrowed heavily from the constitution of North Carolina in effect at the time. The North Carolina constitution was similar, where women's rights were concerned, to the constitution of the other twelve states that made up the original thirteen states.

These three Tennessee constitutions were written and adopted without the help of the women of Tennessee. The Preliminary Act which preceded the calling of the convention which wrote the 1870 constitution indicated the absence of any participation by women. “Male persons” were to vote for or against the call of the convention and were to choose the delegates to the convention. While the proposed constitution was to be ratified by the “people of the State” in a manner as the convention provided, the male delegates found no reason to depart from the traditional adherence to the male-only franchise in providing for ratification (Thompson & Steger, 1873, pp. 61-64). In the all-important matter of franchise, while the 1870 constitution contained a provision (Article XI, Sec. 5) that elections should be free and equal and the right of suffrage would not be denied to any person entitled to it, a later provision (Article IV, sec. 1) gave only male persons the right to vote, with the payment of the poll tax as a prerequisite. (By the same provision, only males paid poll taxes and were subject to the performance of military duty.) The constitution of 1834 allowed free white men to vote (Article IV, Sec. 1), while the constitution of 1796 limited the vote to free men possessing freehold estates (Article III, Sec. 5). While the term “freemen” might have been used in the generic sense, a definition of that term was given in a case decided by the Tennessee Supreme Court as being “one entitled to all of the privileges and immunities of the most favored class of the community” (*State v. Claiborn*, 1838, p. 341). Needless to add, women were not members of this class. Lest there be any

questions concerning the composition of the electorate after these constitutions were adopted, legislators repeated at length throughout the statutes they passed the male-only requirement. At times, more than having the right to cast the ballot was involved. The right to be counted as a person sometimes depended on one's maleness. For instance, by statute, counties were laid off in districts according not to the number of people therein but to the number of qualified voters (Acts of 1835, Ch. 1, Sec. 2).

Only in the homestead provision (Article XI, Sec. 11) of the 1870 constitution were women specifically mentioned, in a provision which set aside a homestead to be secure from debts and to inure to the benefit of the widow. Other provisions were intended to apply only to males; i. e., the constitution of 1834 had given the right to keep and bear arms only to free white men (Article I, Sec. 26), and the first constitution limited this right to freemen (Article I, Sec. 26); however, the constitution of 1870 extended this right to all citizens (Article I, Sec. 26). We can safely conclude, despite the seeming neutrality of the word, citizen did not include women here.

The 1870 constitution contained a provision which gave the governor the power to appoint the "requisite number of men of law knowledge" to hear a case when a Supreme Court judge disqualified himself (Article VI, Sec. 11). Acts of the legislature had previously contained this provision (Act of 1835, Ch. 68), as well as an additional one which allowed the governor to appoint "lawyers" to be special judges of the Supreme Court (Acts of 1829, Ch. 96, Sec. 5). Since, according to statute, a license to become a lawyer was to be given only to a "man of good reputation" (Acts of 1809, Ch. 6, Sec. 6), this reference to lawyers and men of law in the constitution effectively eliminated women from consideration for these positions. The purpose, however, was probably to eliminate the layman from being placed in these important judicial positions; men in Tennessee at that time did not expect a woman to become a lawyer any more than they expected her to hold either elective or appointive office. No express constitutional provision excluded women from running for or holding office, but a statute in effect following the adoption of the 1870 constitution stated that "free white males" were eligible to hold office under the authority of the state (Code 1871). The fact that such a statute did not appear earlier is not an indication that a woman could then run for office; she was not specifically barred because no one imagined that she would seek office. When a woman in Tennessee succeeded in being elected to the position of notary public, the Tennessee Supreme Court voided her election, explaining:

By the English or common law, no woman, under the dignity of a queen, could take part in the government of the State, and they could hold no office except parish offices.

Although a woman may be a citizen, she is not entitled, by virtue of her citizenship, to take part in the government, either as voter or as an officer,

independent of legislation conferring such rights upon her.

It follows that unless there is some constitutional or legislative provision enabling her to hold office, she is not eligible to the same.

In the absence of a constitutional restriction, the Legislature may confer the power upon her, but it requires a positive provision in one or the other to make her eligible [to hold public office] (*State v. Davidson*, 1893, pp. 533-34).

Since no positive provision could be found in either the constitution or the statutes, the Court held that a woman had no right to hold public office in Tennessee.

Tennessee legislators took little note of the growing national movement where women were struggling to gain some legally recognized rights. In 1839 the neighboring state of Mississippi passed the first of the Married Women's Property Acts; by the end of the century, most states had enacted similar laws, granting married women certain rights in their own or in jointly-owned property. The Tennessee Married Women's Emancipation Act (TCA 36-601) was not passed until 1913; it was a major piece of legislation and affected the laws of domestic relations, contracts, property, and procedure. However, the Courts in interpreting this Act could not quite believe the Legislature intended what the statute plainly said and, in most instances, granted a woman the rights enunciated therein only upon the death of her husband. It was not until sixty years after the passage of the Act that the Tennessee Supreme Court in 1974 declared that the "Married Women's act (Ch. 26, Acts of 1913) fully and effectively eradicated the common law disability of coverture. . . . We abolish the last vestige of the common law disability of coverture in Tennessee" (*Robinson v. Trousdale County*, 1974, p. 632). Here the Legislature had spoken positively but the courts had chosen to ignore the change for sixty years.

From our vantage point, perhaps the cruelest discrimination of all was the fact that the Tennessee woman was not considered to be a person. She lived under a constitution written and ratified by males which proclaimed that all power resided in the people, that the existing government was founded on the authority of the people, and, furthermore, that in order to maintain the government the right of suffrage was guaranteed. At the same time, however, the constitution and the statutes effectively barred her from exercising any of this power and authority. Since there was no philosophical nor legal concept at that time as a basis for considering women as being part of the people upon whose authority and power a free government was based, it followed inexorably that women would not be allowed to vote or to hold office or to serve on juries; it was inconceivable that women would have any part to play in the affairs of government.

Women's inferior legal position in Tennessee, as well as in the rest of the United States, was the heritage of the English common law as it was brought by the colonists

and integrated into statutes and case law of the various states. The common law might be blamed for holding its heavy hand over women, impeding their efforts toward attaining legal equality; however, it must be acknowledged that men and women alike in this country shared, during most of the history of America, the predilection of the legislatures and judges to honor and follow the common law, and the common law had been a product of the common experience and feelings of the people. The constitutions have, on the whole, not been overtly discriminatory toward women; and it has not been necessary, in most instances, to amend them when statutes have been passed granting long-denied rights to women. However, it seems clear that in most instances the framers accepted the disabilities the common law imposed on women and saw no need to write positive provisions into the constitutions giving women any rights beyond those given them by the common law. By their silence, the framers of the state constitutions perpetuated the inferior legal position given women by the common law.

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American, Bureaucratic, and Constitutional Values: The ABCs After The ERA

By Vicky J. Borrego

The one constancy of contemporary American society seems to be change itself. Yet, have we really come as long a way as some would try to convince us through snappy advertising jingles? What of the value systems that represent the soil from which the seeds of social change grow? If we still have a long way to go, what lessons about how and where social change takes place can be learned from the failure of the passage of the Equal Rights Amendment? Is there a greater likelihood of permanent and lasting social change springing from value systems found in the broader American society, the public bureaucracy, or the constitutional amendment process?

The concept that organizations have underlying value systems that may be shared, may contribute to a distinctive organizational culture, and may be transferred to other organizations has been recently addressed. Peters and Waterman (1982) articulate a growing interest in understanding how value systems relate to corporate America by examining those values held in common among the best run companies. Also, as Allaire and Firsirotu comment, "Indeed, the proposition that organizations have cultural properties, that they breed meanings, values and beliefs, that they nurture legends, myths and stories, are festooned with rites, rituals and ceremonies has been gaining rapidly in popularity" (1984, p. 194). This renewed interest in value systems as a mechanism for comparing and contrasting social change is intriguing. Are there inherent value systems that, once determined, assist women and minorities in designing a strategy for social change? What "patterns of the past" (Fesler, 1982) have a bearing for women and minorities making choices for the future?

Many problems of definition exist in discussing value systems, especially when crossing multi-disciplinary boundaries; however, it is possible to find "a convenient definition according to one's particular needs and sensitivities" (Allaire & Firsirotu, 1984, p. 194). While values may be difficult to define, most know them when we see them. Values are standard; they guide conduct. They lead us to make decisions, evaluate, persuade others, and rationalize. Values may have motivational functions, bringing us success, prestige, and material comfort such as those values discussed by Rokeach (1973). Values have adjustment functions, in that they may assist us in getting along with others. They serve as both ego defense mechanisms and functions of self actualization.

Individual American Values

Scott and Hart (1980) suggest that a dynamic process is occurring in that predominant American values are

changing when those held by the individual come into conflict with those found in organizations. This conflict explains a range of problems including a loss of productivity, a sense of alienation, a dissatisfaction with jobs, and the erosion of the United States in the world economy.

What of the similarities among people and their value systems? Do they combine to form a single pattern of dominant values? Can these commonly held values distinguish citizens of one country from another? These basic questions need to be addressed in order to determine social change strategies for women and minorities. Public opinion surveys and other studies have led to the identification of values that make up the "American character" (Inkeles, 1983, pp. 25-39). These values include viewing the United States as the promised land with built-in traits; self-sufficiency, self-reliance, and independence; volunteerism; and, finally, an emphasis on trust. The perception of the United States as the promised land is a theme that appears repeatedly in a wide range of literature and rhetoric. The danger of viewing the country as a divinely inspired nation seems obvious; yet, "the nation continues to command the allegiance of an overwhelming majority of its citizens—few of whom wish to emigrate to another country" (Davidson & Oleszek, 1987, p. 41). The belief in self-sufficiency, self-reliance, and independence, or Yankee ingenuity, seems to be interwoven through the American social fabric. Rags-to-riches, Horatio Alger success stories as well as the anyone-can-be-president legends are passed from generation to generation. Americans value their own efforts rather than relying simply on fate or luck alone.

Volunteerism and the propensity for cooperation with neighbors on which de Tocqueville commented remain prevalent values in the American character. In spite of a fierce sense of independence and individualism, Americans have a strong commitment to communal action, especially in the face of crises and disasters. Aspects of the American spirit of volunteerism have been described along with other individual factors that motivate involvement (Bellah, 1985).

Inkeles (1983) identifies frankness in relationships as an American value, with friendliness and openness conspicuous traits. Americans feel betrayed when their trust is not returned (Davidson & Oleszek, 1987, p. 41).

Other values help comprise the American value system, including innovation, anti-authoritarianism, and boastfulness, as well as a preference for the concrete, a sense of efficacy, and a certain discomfort in coping with emotion or aesthetic expression (Davidson & Oleszek 1987, p. 41). No mention is made of typically American values being specifically related to differences between people based on race or sex.

Public Bureaucracy Values

The discussion of values related to American public administration has been a varied and rich one. The bicentennial celebration, combined with the transforma-

tion from the infancy of the public administration discipline into a youthful adulthood, has produced some thoughtful analyses. As indicated in the discussion below, where the Constitution is spartan at best in providing legal guidance as to how the general welfare is to be promoted, it is nonexistent in addressing issues of the administrative state.

Interest is being renewed in organizational literature on value systems as expressed beliefs shared commonly throughout an organization and leading to a more successful (profitable) enterprise. While numerous problems exist with definitions and with the marked absence of an integrative theoretical framework, values found in public organizations may usefully represent broad metaphors reflecting the larger societal culture (Allaire & Firsirotu, 1984). The usefulness may become more apparent when contrasting predominant bureaucratic values with those found in the Constitution.

Herbert Kaufman identifies three core values of American public administration that have been pursued at different periods of history: representativeness, neutral competence, and the quest for executive leadership (Cited in O'Toole, 1987, p. 20). The first value, representativeness, reflects the distrust of royal governors and the concept of taxation without representation.

The first civil service reform came with the Jacksonian era and the removal of politics from personnel decisions, suggesting an indication of a government value of responsiveness (Nalbandian & Klingner, 1987). The Pendleton Act of 1883 "established a unique and unmistakably American framework..." (O'Toole, 1987, p. 19) while removing the civil service from the vagaries of graft, patronage, and political corruption. The value of morality in government became evident during the Jacksonian era.

The Depression signified another major transition in which responsiveness as a dominant value came into conflict with others, including efficiency and neutral competence. As Mosher (1982) states, "with the Depression and the emergence of a creative, initiating government and bureaucracy, the values of political neutrality and personnel administration in the form of rules, regulations, and procedures (Cited in Nalbandian & Klingner, 1987, p. 21).

The scientific management movement at the turn of the century produced the dominant value of efficiency in government and business organizations alike. Tremendous advances were being made in the natural sciences through employment of Western scientific management methodology. Government leaders thought such efficiency would yield similar advances in the bureaucracy. President Franklin Roosevelt's interest in the efficiency value and use of scientific management in American public administration is best articulated in the classic collection of essays produced by some of its key proponents (Gulick & Urwick, 1937). The President's Committee on Administrative Management concluded that efficiency in government depends on two conditions: the consent of the governed and

the practice of good management. The first condition, believed the Committee, is assured according to the Constitution. The second condition "must be built into the structure of government just as it is built into a piece of machinery" (U.S. President's Committee, 1937, p. 3).

Several issues emerged in adopting efficiency as the key value and major goal of the science of administration. One issue, further discussed below, critical to explore in American public administration is the conflict that results from carrying out the goal of efficiency in a highly inefficient, representative democracy. Proponents of the efficiency value for public bureaucracy were well aware of this issue and felt that removing politics from administration would tend to foster efficiency (Nalbandian & Klingner, 1987, p. 20). Neutral competency was also designed to correct for this major conflict between an inefficient and highly politicized democracy on the one hand and an efficiently run, elite professional civil service system on the other.

Neutral or impartial career service as a value concept has been discussed by theorists as both a requirement needed to compensate for adhering to bureaucratic principles within a democratic society and a natural outcome of exercising perfection in bureaucracy. Max Weber discusses the bureaucratic officer as conducting his office with formal impersonality by applying the rules to the facts of the situation divorced from values, personal feelings or passion (Cited in Gerth & Mills, 1946). The idea that the public official is technically trained to carry out the functions impartially, exercising a high degree of objective reasoning totally separated from politics and a personal framework, is a central one. As Frederick Mosher (1982) states, the current bureaucratic climate, the view of its mission, and the effectiveness in carrying it out are products of its professional structure and value systems.

Herbert Simon (1947) proposed that a distinction be made between values and facts within the context of the manager as a decision maker. Using his model, "the correctness of a decision will depend upon the value premises (the decision maker) has selected and there is no criterion of right or wrong which can be applied to his selection" (1947, p. 224). The manager operates within a world of "bounded rationality," according to Simon. These are very attractive notions; however, to what degree the pragmatist can link the theories to their real-life operation remains to be seen. As Nalbandian and Klingner point out, "The ideal of politically neutral administrative techniques promised efficiency and morality simultaneously" (1987, p. 21). What more could be asked in an attempt to balance a professional civil service system within a pluralist democracy?

The protection of individual rights became a major focus of the Depression era. A major transition occurred in the emergence of values that were in conflict with those of efficiency, neutral competence, and rationality. The protection of individual rights as a predominant value appears reasonable in American society for some time to

come. The judiciary's response has been to prevent the erosion of individual constitutional rights from the manner in which the administrative state tends to change diversity to uniformity (Rosenbloom, 1987).

From the range of values that have evolved follows the conclusion that competing and conflicting values emerge in the public bureaucracy. No reason exists to believe that these conflicts will lessen; rather, they will increase as the bureaucracy attempts to be responsive to demands for social equity. Some would argue that attempting to remove values from administration has been pointless, that no public bureaucracy can be truly value-free. It is of interest to note that all of these discussions of value systems inherent in the public bureaucracy exhibit a lack of gender and race specific language.

Contemporary interest in organizational cultures and shared value systems may result in movement toward a framework that acknowledges the presence of dominant value systems. Seemingly, the public bureaucracy is really a "little society" and, as a reflection of a larger whole, has an essence not unlike the whole. What of conflict between the predominant value system of the public bureaucracy and that of the large society? How would these conflicts be resolved? Additional research may provide answers.

Constitutional Values

The U.S. Constitution has been marked by four life passages, with each representing a distinctive focus. The first Constitutional era may be called either a miracle, as George Washington referred to it, or an example of political compromises. The second life passage might be called the muckraking era and the period that produced an economic interpretation of the Constitution (Beard, 1913). The third era may be referred to as modern realism, in that the debate ranges from leaving it alone to calling for major reform (Burns, 1987). The current Constitutional life passage may best be summarized as viewing the document as a process rather than an end product (Carter, 1986). Viewing the Constitution as a dynamic process rather than a static set of statutes, Carter has summarized possible values suggested by this process in the absence of any overt Constitutional value system (1986).

Carter states that decisions can be evaluated based on the effectiveness with which they harmonize four potentially conflicting forces: the words and histories of the rules of law in question, the facts of the case, the social context from which the case emerges, and the publicly articulated and shared norms of social responsibility. The qualities of open-minded sensitivity to the complexity of the situation are highly valued within both administrative and judicial decision making contexts.

Carter suggests that the acceptance of responsibility for administrative and judicial decisions may be considered a value inherited through two centuries of the practice of constitutional law. The American legacy tends to avoid the application of rules mechanically rather than explor-

ing the deeper significance and societal implications. Carter uses birth control and abortion as examples of issues forced upon the courts in the absence of constitutional guidance. A disturbing trend has been to leave the politically unsavory and complex decisions, including abortion and affirmative action, to the last branch of government that will offer a decision. Long-range implications for the public policy process and citizen participation deserve a more comprehensive examination.

The internal inconsistencies found in the Constitution and its lack of a coherent theory should lead to the willingness of both the courts and administrators to explore "arrays of imperfect options" as Carter suggests (1986, p. 445). Such options are preferred over no law at all and may be better than policy failure through mechanical applications of rules. A pragmatic approach uses the "law of the situation" (Follett, 1926, p. 69) rather than operating from the perspective of society as it ought to be or as imagined.

As Carter states, "to defend a decision merely because it is 'lawful' often masks a cowardly avoidance of responsibility for the human consequences of the decision" (1986, p. 445). Such avoidance was the case with the Dred Scott decision, which contributed to the volatile environment leading to the U.S. Civil War. By avoiding a difficult decision in stating that Congress could not bar slavery in the territories and because the bench was made up of five Southerners, the constitutional process became fallible to the abuse of power. The vantage point of the administrator or judge does not shield either one from the responsibility of how power is employed. It may be that the abuse and imprudent use of power, however, may be an enticement. Discretionary decision making cannot be masked through legal language.

The lack of a coherent theory, the internal inconsistencies, and a patchwork of cohesion-defying Supreme Court rulings have left more room for interpretation than is comfortable for some. Beginning with Watergate, political scientists have emphatically stated that a constitutional crisis has resulted around issues relating to executive authority (Ostrum, 1974, p. 134). These constitutional values, suggested through the practices of administrative and judicial decision-making, again notably lack any reference to sex or gender differences. The suggested values are generally neutral in tone, which also seems to be the case when exploring American and bureaucratic value systems currently found in society. Many, however, believe there exist unacceptably unanswered constitutionality questions on the meaning of sexual and racial equality. Is it essential, for example, to ensure racial and sexual equality by reforming the Constitution through an amendment process? Or does large scale, permanent social change occur by focusing on the individual level, with each person responsible for changing herself, then improving opportunities for others within their sphere of influence? The question of kinds of equality that are protected by the Constitution and what

means are used to ensure them has been discussed as one of thirteen major questions that should be clarified through constitutional reform (Burns & Morris, 1983).

Two other questions raised by Burns and Morris have special meaning here. The first question has to do with women's rights, in that women are not mentioned in the original Constitution. The Nineteenth Amendment to the Constitution prohibits only one form of sex-based discrimination—that no state deny women the franchise. With the defeat of the Equal Rights Amendment (ERA), to what degree can the Constitution be interpreted as providing sexual equality? A related question of major importance to an understanding of equality protected through constitutional law is in the treatment of minorities. As Burns and Morris put it, somewhat delicately, "is it imprudent to depend so heavily on federal judicial sensitivity to minority concerns" (1987, p. 34). While the Constitution has historically protected various economic and regional groups, including slave holders, religious minorities, and political dissenters, against national interference, it has failed other groups. These groups include Hispanics, as in the case of Gregorio Cortez, and other racial groups such as Native Americans, Japanese-Americans, and members of alleged "radical" groups suspected of "subversion," as stated by Burns and Morris (1987, p. 34).

Can the process used to amend the Constitution to reflect more closely changing social values be at fault? If the process itself is faulty, should not the process itself first be corrected? An examination of the failure of the ERA to gain passage may point to some conclusions that can be made about social change and value systems.

Complex reasons lie behind the defeat of the ERA. A recent discussion lists six reasons, ranging from problems with the ratification process itself through the charisma of an individual personality (Steiner, 1985). The ratification process has been referred to as being a stacked deck with procedures for constitutional amendments described as obstacle-ridden and anti-majority (Brest, 1975, p. 978). For example, of the twenty-six amendments adopted to the Constitution, ten came as a package with the original document; only by bending the rules were the Thirteenth, Fourteenth, and Fifteenth Amendments ratified (Steiner, 1985, p. 30).

When the Supreme Court found a constitutional right to privacy to protect nearly all abortions in the *Roe v. Wade* decision, the abortion issue and the ERA became politically intertwined. This unfortunate "commingling," as Steiner puts it, is still very much present. It seems unlikely that the two issues will ever be viewed separately; therefore, resolution of one means that the other issue must be resolved as well.

The question of drafting women and their roles in combat became an additional issue that, according to Schlafly, drove "the nail in the coffin of the ERA" (Cited in Steiner, 1985, p. 73). An added complication was the 1978 Soviet invasion of Afghanistan. This seemingly un-

related event awoke new anxieties about women and the draft when President Carter resumed registration for military service without conscription (Steiner, 1985, p. 71).

Mistakes made to ensure organizational survival may have been a major reason for the defeat of the ERA (Steiner, 1985). Goals conflicted between the establishment of a national women's organization (NOW) and the ratification of the ERA. This conflict may have been both the ERA's downfall and the fall from favor of NOW among most mainstream women. By taking aggressive stands on issues that may have tended to detract from the ERA debate, including the abortion issue and homosexual rights, the NOW organization may have survived as an organization while frightening many.

The effectiveness of organized opposition is another reason, although a minor one, cited for the failure of the ERA. For the most part, widespread support existed for the amendment among more than two hundred groups of mainstream Americans. In spite of the widespread support, effective opposition tended to reflect that of the charismatic personality of Senator Sam Ervin, Jr. Senator Ervin felt the wording of the amendment itself to be a problem: "The word 'sex' is imprecise in exact meaning, and no proposed constitutional amendment ever drafted exceeds the House-passed equal rights amendment in scrimpiness of context. The amendment contains no language to elucidate its meaning to legislators or to guide courts in interpreting it. When all is said, the House-passed equal rights amendment, if adopted, will place upon the Supreme Court the obligation to sail upon most tumultuous constitutional seas without chart or compass in quest of an undefined and unknown port" (Congressional Record, 1970, 116, p. 2970). The fact that Senator Ervin was becoming a legend through his role as Chairman of the Senate Watergate Committee hearings cannot have hurt the public's view of his opinion. Thus, Senator Ervin as merely a small town constitutional hero who happened to be chairing internationally televised media events all one summer long may have had a significant effect on the outcome of the ERA.

At least three major conclusions can be drawn from having explored social change and its relation to three value systems. To reiterate, nowhere are there indications of sex or race specific values among the three systems explored, providing a hopeful sign that we should be encouraged by the seeming absence of values that limit human potential and possibilities at the institutional level.

First, value systems appear prevalent in society, in the public bureaucracy, and embedded in the Constitution as implemented through Supreme Court decisions. Further, public bureaucracy may never have been value-free and to have suggested as much may have served as a major distraction from more productive pursuits during the era that established public administration as a discipline worthy of serious study. As Sayre states, "public administration doctrine and practice is inescapably culture-bound. It is also bound to more specific values: to varying

conceptions of the general public interest, to particular interest-group values, to the values of a specific administrative organization or bureaucracy at a specific time" (1982, p. 179). The values discussed are not static ones, nor are they all present during the same era.

A second conclusion that may be drawn from this exploratory look at value systems is that there may be some overlap and relationship between prevalent values. Nalbandian and Klingner suggest that such may be the case by stating that "procedures, processes, regulations, and norms structuring the way the core operates codify past value compromises" (1987, p. 31). They call these compromises "historical value traces" in the form of personnel processes and procedures. Since no gender or race specific values were found at the institutional levels explored, something else may be at work. This something else may well be individual values that are in conflict with the larger value system. It could be that many of the problems in organizational life are due to the fact that people have significantly different value systems from which they function; however, current personnel, communication, and other inter-organizational systems are not structured to take individual differences into account (E. A. Borrego, 1988).

And last, the search for an integrative framework to understand better the interplay between value systems may be valuable. Is it better to work for social change at the individual level through gaining more access for women and minorities in the bureaucracy and advancing through it? Or would a broader-based, macro-level perspective provide higher results, such as another national movement to amend the Constitution? The two change strategies may not be mutually exclusive. It has been suggested that the division between organizational life and individual life is rapidly disappearing. Organizations fulfill a range of needs outside simply economic ones. They are social entities; when viewed as such, it becomes possible to visualize organizations that may be both humane and efficient at the same time (E. A. Borrego, 1988).

It seems that the best way that social change can be attained is by knowing that an individual contribution has been made towards it. Women and minorities are currently able to help each other both visualize and master the possibilities in ways never before available. By using the individual as the starting point from which change occurs, the rest will follow.

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African American Women: Education and Two Hundred Years of the Evolution of the United States Constitution

by Johnnetta B. Cole

Imagine, if you will, a West African woman in the last quarter of the eighteenth century, living about the same time that the U.S. Constitution was adopted and ratified. We must forget the Tarzan movies and the demeaning images of savagery and cannibalism, but we must not forget that this woman was a *citizen* in a country that functioned under a set of values, laws, and morals. This woman was, by and large, as well educated as her European counterpart in that she had learned the roles, customs, rights, and limitations of women in her society. There is nothing to indicate that the African woman was less a citizen than the women of other cultures of this period. In fact, evidence indicates that African women of that era may have enjoyed far broader rights and powers than their European sisters. Imagine this woman, educated to an African explanation of the world and her role in it. This woman has been bonded to her community and her fellow citizens by a common system of religion, morality, and social behavior.

Without rehashing the horrors and history of the middle passage, let us imagine this woman caught up in a cataclysmic series of events that literally strip her African self from her; language, adornment, and self-expression stripped—rituals, relics, and worship stripped—modesty, protection from rape, and security for her progeny stripped—social status and legal redress stripped—talents, knowledge, and skills rendered useless. This woman was not merely reduced from citizen to chattel but also she was subjected to a savaging of the person that was so horrible that psychologists compare it to the Nazi concentration camp experience. As Norman Coombs in *The Black Experience in America* states:

... the African who became an African slave underwent an experience which had some marked similarities to those of the German Concentration Camp. He too underwent a kind of shock procurement. . . . The American slave system, besides exploiting the African's labor, possessed and violated his person (48-49).

To understand slavery we must try to imagine the pain and suffering of having one's person stripped and being forced to re-educate one's self in a hostile and limiting environment.

Among African Americans there are legends of maidens who walked into the ocean determined to swim home rather than submit. The slave catchers said that Ibo women were useless as slaves because even when force-fed

they died of melancholia. Also, there were those brave African women who chose to endure. They decided to struggle to keep their genes entangled in human evolution. In *Invented Lives*, Mary Helen Washington quotes Harriet Jacobs' slave narrative:

If slavery had been abolished, I also could have married the man of my choice; I could have had a home shielded by the laws. . . . All my prospects have been blighted by slavery. I wanted to keep myself pure; and under the most adverse circumstances I tried hard to preserve my self respect; but I was struggling alone in the powerful grasp of the demon slavery (35).

Imagine that woman alone and naked on an auction block. She, and countless others, was an intelligent, productive citizen, stolen and transported to a place where re-education was a prerequisite for survival. She was forced to come to a place where a new constitution was being imposed without her knowledge, advice, or consent.

While having to re-educate one's self is no easy task, the African woman was no poorer educated than 90% of white women in America who were also illiterate and who lived at the legal and economic mercy of white males. It would be nearly fifty years before white women would be allowed to attend college in the New World. Meanwhile, the majority of the men shaping and framing the constitution were college trained; more than half were lawyers. Harvard, Yale, and Princeton were all represented. These men were drawing up a constitution that denied citizenship and access to life, liberty, and the pursuit of happiness to more than half of its residents. As Roy Blount, Jr., points out in a *New York Times* article, the "We" in "we the people" was extremely presumptuous (6).

During the course of its history, the U. S. Constitution has managed to accommodate many of us who were excluded from the "We" of the original document. Yet, as Supreme Court Justice Thurgood Marshall pointed out in his now-famous Hawaii speech,

... the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for individual freedoms and human rights that we hold as fundamental today (166).

Former California Supreme Court Chief Justice Rose Elizabeth Bird writes in a *Washington Post* article entitled "Unequal Justice,"

We still haven't decided as a people whether women as well as men are created equal. . . . The fact that women were not included in the original document only points up the difficulty that they have faced in their attempt to gain a measure of recognition and independence. The words of the Constitution articulate an ideal of equality. But it has taken many years for our society to accept the ramifications of that promise (45-46).

It is interesting that both Justice Marshall and former

Chief Justice Bird belong to groups excluded from the original Constitution; they exemplify the contradiction present at the signing of the U.S. Constitution. None of the original signers could have imagined Bird or Marshall filling the positions they have held.

When the West African woman was dragged onto an American slave-auction block in 1787 she had more experience in civic decisions than the free white women living in America. In terms of positions of authority, the historical records document that several African women governed in various regions of Africa with competency and imagination. J. A. Rogers, in *The Great Men of Color*, lists Hatshepsut, the ablest queen of far antiquity (c. 1500 b.c.); Makeda, Queen of Sheba and consort of Solomon (c. 960 B.C.); Cleopatra VII, Queen of Egypt (69-30 B.C.); and Nzingha, the Warrior Queen of Angola (1582-1663), recognized by the Portuguese as a shrewd negotiator and a fierce warrior, who led an army of women. Of course, all of the women stolen from Africa were not queens and warriors, but they had all been citizens in their respective societies. Even those who were slaves in their native lands had more rights than they would meet in America.

African Americans, Native Americans, women, and white men without land or money were excluded from participation in the secret discussions that produced the Constitution, and no provisions were made by the shapers of the Constitution for the education of these individuals. Education was left to the discretion of the individual states. The failure to address this issue has forced those excluded from the original Constitution to view education as a vital tool in building a free and open society.

The very purpose of education is to inculcate youth with the dominant values of society; thus, education tends to maintain the status quo. Education can also be used by oppressed groups as a means to challenge and call for change. However, such change is never accomplished with ease because of biased attitudes, opinions, and myths about disenfranchised groups. Further, the conditions and facilities provided to educational institutions that serve the disenfranchised have never been equal to those of the dominant group. Thus, to compare the knowledge, wisdom, and learning ability of any disenfranchised group with that of the dominant group is profoundly unfair. To judge the educational potential of any group that has been denied civil and human rights is unfair. Frazier and Sadker, in their *Sexism in School and Society*, quote Mary Astell's "An Essay in Defense of the Female Sex":

... a man ought no more value himself for being wiser than a woman, if he owes his advantage to a better education, than he ought boast of his courage for beating a man when his hands were bound (108).

The Constitution was framed by landed, educated white males. These men, educated in the patriarchal framework of the Greek classics and the Old Testament, were white men with common interests and a vision, determined to keep their power, land, and control. These

individuals would have continued to jockey for more power had not the Shays Rebellion threatened to turn the thirteen colonies into thirteen warring nations.

The U.S. Constitution was debated in secret and built on compromise; it was an agreement of convenience. We must remember that there were many white men who failed to embrace it with open arms. James A. Michener, in his novel *Legacy*, gives a veteran of the Shays Rebellion these words:

It was written by rich men for the protection of their wealth. They keep their slaves. The Western land, on which many of them gambled, jumps in value making them all richer still. Their manufactures are protected, and every article in the document favors them and oppresses us. The poor farmer gets no relief, so the constitution by rich men, for the rich, should be rejected (35).

The constitutional conveners had to launch what was possibly the nation's first public relations campaign. The "Friends of the Constitution" had to lobby for nine months before they could get the document ratified. Measured against two hundred years of history, no one should be surprised to discover that the Constitution adopted in 1787 was far from perfect. Although not perfect, today most scholars have concluded that our Constitution is the best document possible considering the times and climate under which these men worked. As Mortimer J. Adler writes in *We Hold These Truths*,

What was achieved in the eighteenth century by American statesmen, a group of brilliant men unequaled since in this country's history, must be measured against the conditions and circumstances of the time in which they were living. Judged in that way we can have nothing but high praise for what they then produced and handed down to succeeding generations as a basis for carrying their work forward (131).

One might also argue that this upper-class fraternity of white males took an unusual set of political, social, and economic circumstances as an opportunity to seize the times, and by so doing they secured disproportionate power for an elite group of white males for that period of history and for many years to follow. For example, these men were able to govern for 130 years before having to worry with the woman's vote. Justice Bird, in the article cited above, notes:

The fact that women were not included in that original document only points up the difficulty they have faced in their attempt to gain a measure of recognition and independence. The words of the Constitution articulate an ideal of equality, but it has taken years for our society to accept the ramifications of that original promise. . . . without a clear mandate in the Constitution such as that which the Equal Rights Amendment would have provided, the courts have struggled to create theories on which to grant or deny relief to litigants who claim a violation of their rights

based on their sex (46-47).

Indeed, the amendment process is vital, for as John Buchanan writes in a recent issue of the *Kettering Review*, . . . the genius of the Constitution was its inclusion of the amendment process. Understanding it to be an imperfect document, the drafters provided an orderly way to 'perfect it as we went along' (33).

Those who benefit from exploitation have been the staunchest defenders of the view that the Constitution is perfect, while those of us who have had to pay the price of exploitation have worked to turn an imperfect document into a more perfect one. If the framers of the Constitution could have retained in their work more of the principles for which the Revolutionary War was fought, perhaps tragedies such as America's growing rate of female poor could have been avoided, for the exclusion of women from the original draft continues to affect the lives of women in this country.

Although the consensus provided by the Constitution has helped to create this powerful nation, hindsight enables us to recognize the seeds of many ills that have confronted and continue to confront America. As Justice Marshall says,

Moral principles against slavery for those who had them were confronted with no explanation of the conflicting principles for which the Revolutionary War had ostensibly been fought. . . . Objections went unheeded, and opponents eventually consented to a document that laid a foundation for the tragic events that were to follow (166).

Many scholars have pointed out that pressure from those excluded forced the original compromise and most of the amendments. Michener says that Daniel Shays, the Massachusetts revolutionary, and Cudjoe, a Black slave, cast their shadows across the convention deliberations. Also, he recounts Jefferson's seemingly flippant statement about the Shays rebellion made while Jefferson lived in Paris:

God forbid we should ever be twenty years without such a rebellion. What country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance. Let them take arms! What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is its natural manuvre [sic] (Michener 68).

Regardless of how we feel about Jefferson's statement, we should not ignore the fact that this great compromise was reached in an effort to stave off rebellions and revolutions. Many praised it as a document capable of bringing about orderly change; others saw it as a document to be used to deflect and defuse legitimate dissent. Its unique ability to absorb rebellions has allowed America the stability to develop and grow as a nation. Yet, the slow, deliberate speed of the process frustrates those anxious to enjoy full and immediate citizenship.

We return now to imagine again the hapless West

African woman on an American auction block in 1787. She has been cast into a country where she has no better rights than a brood mare, into a country whose laws treat her rape as trespass, into a country capable of reducing people to five-eighths of a human being with the stroke of a pen. She is defenseless and her race, gender, and class place her in triple jeopardy. Today, most of us react in horror at the idea of a permanent underclass; yet, the African American slave of 1787 was destined by the original Constitution to remain in the slave class described by William Z. Foster in *The Negro People in American History*:

The richest merchants and wealthiest planters North and South set out essentially to create a united state in which they, acting jointly, would own the land and the industries and completely control the government. The Negroes would remain slaves permanently, and the white workers, deprived of the franchise and other civil rights would be merely objects for unbridled capitalist exploitation (57).

History teaches us that the Federalists representing the wealthy merchant/planter class won out at the constitutional convention. Representatives of these same interests were members of the United States' ruling party until 1800.

Black women began life in America at the bottom of the slave class. No immigrant passed through Ellis Island with less, and the founding fathers had no intention of abdicating their power. Thus, the idea of an underclass is not a new idea. Black women and men were brought to America to belong to an underclass:

They [slaves] were human beings living in a society that never wearied of testifying to its belief in human equality. They were treated, in some respects, more like dumb animals than like human beings, like mules, or horses, or sheep, except as Benjamin Franklin once pointed out, that there was a difference: sheep did not make insurrections (Robinson 46-47).

As if class and racial oppression were not enough, African American women were also saddled with the burden of gender discrimination in a male-dominated, patriarchal society. The legacy of courage left by these heroic women was amassed, deed by deed, day by day, without praise or encouragement. Most of us know about the poetry of Phillis Wheatley, the daring feats of Harriet Tubman, and the oratory of Sojourner Truth, but few have considered the acts of will required to work like a draft animal and give birth to children destined to become draft animals. Yet, today's population of descendants of slaves is testimony to the tenacity, foresight, and wisdom of millions of African American women. Women like Tubman and Truth are "sheroes" of epic proportions, legends the equal of Cleopatra and Nzingha. Many more have been ignored, for there are untold numbers of nameless women who endured and struggled for a future that they knew they would never see. As Foster states,

Slavery was particularly harsh upon Negro women.

They bore the responsibility of raising their families and working regularly in the fields, side by side with the men. . . . Not unnaturally, Negro slave women also played important parts in the oft-recurring slave insurrections and other forms of slave resistance (159).

Reality belies the image of the fat, happy, slave woman. Indeed, such stereotypes have been consciously and unconsciously fashioned from the behavior of able, competent African women. The strength and capability of African women must have seemed strange to Europeans who were trying to justify their efforts to turn white women into mindless creatures. Foster adds,

For the Negro woman to assume this family authority was facilitated by the fact of the high degree of honor and esteem in which she had been held in African tribal life. The authoritative position of the Negro slave woman also reflected itself in the organization of the masters' household. This was almost always in control of a Negro woman housekeeper with exceptional authority over all the other servants and over the rearing of the slaveholder's children (159).

Those hefty, happy, Hollywood creations bear little resemblance to the women who stole food and information from the big house, were midwives and messengers, served as spies against the slaveholders' organizers, and who were friends and leaders within the community of slaves. Perhaps the most important of her many roles was that of teacher and student.

One of the most valuable contributions by West African women was the socialization of their children. By passing their knowledge on, they expressed a willingness to embrace the future and a strong unwillingness to accept their horrible condition as hopeless and unchangeable. These women had no classroom or budget, but they taught important life and death lessons with word and deed. Perhaps slave women consciously taught their children African history and culture, but their lessons were no doubt far more basic and more survival-oriented. A slave woman taught her children to be alert when whites were present and to study their faces the way that she did. She taught them to plant codes in the songs they sang and to plant secret gardens in the woods. She gave swift practical lessons, designed to impart information quickly and permanently. She stole snatches of formal education from the slaveholder's children and taught what Black people still refer to as Mother Wit. She preached principles designed to aid in the survival of one's mind, body, and spirit. She taught herbal medicine and stoic resistance. She taught in slave-quarter churches and in secret, forbidden meetings. She taught an art of endurance.

It did not take long for the male slaves to be influenced by white male patriarchal values. In some instances, the rights of African American women were being questioned by men of the same slave community to which she belonged.

The records show that Afro-American women have struggled for liberation from the moment they set foot on

U.S. shores. This constant struggle contributed to the Civil War and, indirectly, affected the course of all education in our country. In *Sexism in School and Society*, Frazier and Sadker write:

The major force that opened the doors for higher education to women was the Civil War, and the major thrust behind this new privilege was not ideological commitment, but rather economic need. As the young men of the country were drawn away from the campuses and onto the battlefields, colleges were confronted with shrinking enrollments and potential financial collapse. In some cases their very existence was threatened, and they were forced to fill enrollment lists with women (145).

On the heels of the Civil War came the suffrage movement, often led and organized by women who had taken advantage of the window of educational opportunity afforded by the Civil War.

Denial of education is a proven method of subjugating societal groups. Those who seek to restrict the education of the unempowered have often forced such groups to compete with each other for educational opportunities, creating struggles within struggles. In *Escape from the Doll's House*, Saul D. Feldman makes this point by referring to the circumstances which surrounded the admission of a white woman, Harriet Hunt, and African Americans to Harvard's medical school:

Miss Hunt applied originally in 1847, but her application was refused. She was accepted in 1850 but was asked to withdraw her application. Harvard had admitted Blacks that year and the combination of Black students and a female student was more than the Harvard Medical School felt it could handle (35).

African Americans have tended to see higher education as keys to self-determination. Feldman comments, Since the beginning of higher education in America there has never been equality between men and women. Today, we find that although women constitute slightly over half of the college age population, they are not equally represented in undergraduate education, let alone on the graduate or faculty level. Women who do enroll in graduate school are less likely to attain graduate degrees than men. They are most likely to be enrolled in fields that are low in power, privilege and prestige (137).

Black women quickly recognized the value of formal education and sought every opportunity to attain it. Feldman notes that "One of the most striking features of the reconstruction period was the tremendous hunger of the ex-slaves for education" (321).

African American women emerging from Civil War emancipation quickly recognized that freedom had to mean more than the freedom to starve. They realized they would be forced to work because it would be rare for a Black man to have the earning power to sustain a family on his labor alone. Most Black Americans, men and women, advocated

the education of Black women for two very practical reasons: better training and skills were rewarded with better wages, and educated Black women could escape working in domestic service. The homes of whites were places where African American women were too often economically exploited and sexually assaulted. Thus, the ex-slave community is one of the few where the education of females was often placed ahead of education of males. Black men often sacrificed their formal training and undertook extra unskilled work so that a wife, sister, or daughter could go to school. According to Frazier and Sadker,

It appears that norms that affect the adolescent Black woman are quite different. . . . For them, acquisition of an education was perceived as the key to upward mobility. . . . In short, the Black girl shoulders responsibility along with her initial independence. This is what she perceives femininity and womanhood to be. She will need every ounce of independence and responsibility she can muster; for she is caught in a double bind in which the discrimination that she must confront will be increased immeasurably (129).

Today, I am privileged to serve as the president of Spelman College, the oldest of two historically Black colleges for women. Spelman was founded in 1881 by two white women, Sophia B. Packard and Harriet E. Giles, who were both educated at the Oread Collegiate Institute. The Institute, founded in 1849, was one of the first to provide a college education for women. In those days, Oberlin was the only other college that accepted women. To their honor and credit, Packard and Giles did not shield their lights. These pioneering, college-trained women brought their education to Atlanta and applied their education to the founding of Spelman. In *The Story of Spelman College*, Florence Matilda Read records that the purpose of the college, as stated in the charter filed in the State of Georgia on January 9, 1888, was

the establishment and maintenance of an institution of learning for young colored women in which special attention is given to the formation of industrious habits and of Christian character . . . (103-104).

Today, over a hundred years since Spelman College was founded and more than two hundred years after West African women were sold in America, I am able to walk across campus and see the great great grandchildren of slaves studying to become biologists, astronauts, poets, and teachers. I am humbled by my responsibility to these young Black women and to those numberless and nameless women upon whose shoulders we stand. And yet, we must recognize that for the women of Spelman College, no less than for African American women and men throughout our country, racism and sexism persist. On the issue of racism, the authors of *Racial Attitudes in America* conclude that "America is not much more color-blind today than it ever was."

The struggle continues in our country for racial and

gender equality. I choose to wage my share of this struggle as an educator because I believe that education is at the core of the battle for equality waged by people of color as well as by women. It is education which must be at the base of a correct analysis of the very nature of racism and sexism, and it is education which must be the site where people of color and women gain the tools and the confidence to change their conditions. When the past two hundred years are evaluated, the record will show that African American women waged an honorable struggle in pursuit of life, liberty, and happiness. Any honest account of the evolution of our nation will show that African American women have sought and shared education in every available arena. Though once excluded, we have, with love, labor, and laments, seized our citizenship and relieved the Constitution of much of its original contradiction.

That West African woman of two centuries ago could not have dreamed of the status enjoyed today by millions of her descendants. But we today must never forget the price that she paid. Now, as in 1787, cynics insist that the Constitution is a malevolent plot designed to divert, deflect, and defuse resistance. We optimists see the Constitution as a brilliant but imperfect document with the potential for delivering freedom and justice to all citizens. I am grateful for this opportunity to add my voice to this discussion and conclude with lines from a poem by a former Spelman student and Pulitzer Prize-winning author, Alice Walker:

Each one, pull one back into the sun
We who have stood over
so many graves
know that no matter what they do
all of us must live
or none.

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Gender Difference and Disadvantage in Family Law: Families As They Are or As They Should Be?

By Jan C. Costello

Family law is a paradigm of law based upon assumptions about differences between men and women. "Husband" and "wife" are sex-specific terms; in every jurisdiction in the United States, a "marriage" is defined, by statute or case law, as a relationship between a man and a woman. (Clark, 1988, p.77). Traditional family law in setting out rights and obligations of the parties to a marriage did so by specific reference to sex, for example, by describing a husband's duty to support his wife, or the wife's obligation to live in the domicile selected by her husband. Although current family law statutes tend to use gender-neutral terms, such as the mutual support duty of each "spouse," the expectations of family members and the decisions of family courts are still deeply rooted in assumptions about gender difference.

Family law codifies and reinforces societal assumptions about what a family is and how it functions, including the roles of husband and wife. Feminist writer Fran Olsen has described the "apologetic" and "utopian" aspects of family law. The "apologetic" aspect legitimizes the oppression of women in marriage by characterizing oppressive family structures as "legal" and making such structures seem "natural." In its "utopian" aspect family law helps to shape the culture and "contributes to the development of shared meaning and aspirations regarding family life" (Olsen, 1984, p. 2). Thus, family law at once reflects families as they are and holds up an ideal of families as they should be—at least in the view of the dominant societal group.

Family law in the United States has come under fire from both feminists and women of the Right as sacrificing women to a gender-neutral ideal that does not reflect reality. Countless articles in the popular media have warned women that recent changes in family law designed to make it gender neutral have hurt rather than helped them. Two of those changes have been the chief targets of criticism: spousal support rather than alimony as a gender-neutral concept linked to no-fault divorce, and the discard of the maternal tender-years custody preference in favor of a best-interests-of-the child standard. Both of these changes have been criticized by women on the Right as well as feminist commentators as depriving women of their traditional sources of bargaining power in divorce: (1) a right to seek alimony so long as they were not the spouse at fault and (2) a presumption in favor of mothers' obtaining custody of children of tender years. Critics from the Right view this loss of bargaining power as the result of feminist error. Feminist-identified writers such as Lenore Weitzman (1985) and Phyllis Chesler (1987)

point out that gender-neutral family laws can be and are being used by judges to punish women who deviate from traditional roles.

Both Right and feminist critics agree that the gender-neutral laws, as applied, do not reflect the reality of most or many women's lives, and place women at a disadvantage in the divorce court. Critics from the Right presumably favor a return to the fault standard and maternal custody preference; feminists have proposed remedies which, while they use gender-neutral language, are designed to restore to women the bargaining power believed to have been lost: classifying the primary wage-earner's earning ability as a property asset to which the dependent spouse is entitled to a share, and adopting a custody preference in favor of the primary child-care provider. Have the changes in family law designed to make it gender-neutral really put women at a disadvantage? If so, is the answer the return to traditional gender-specific family law—whether openly or in the guise of gender-neutral language—or to develop different family law principles?

The problem has been well-documented. Spousal support is not awarded at all in the great majority of divorce cases. Such awards as are made are inadequate to support the dependent spouse (usually the wife) at the level enjoyed during the marriage, or even, in many cases, at a level above the poverty line. A 1981 Census Bureau Study shows that in 1978, 86% of divorces in the United States were granted without spousal support. Of women awarded support, only 41% actually collected the full amount; 27% collected partial payments, and 31% collected nothing. The mean amount for women receiving payments in 1978 was \$2,850 per year. Weitzman and others have documented the severe economic effects of divorce on women and children in their custody: in the first year after divorce, the ex-husband enjoys a 75% increase in income, while the ex-wife and children suffer a 45% decrease (Weitzman, 1985, p. 339). The inadequacy of child support payments is a separate issue, but clearly the ex-wife who has custody of children typically is not able to support herself on child support payments, either (Hunter, 1983, pp. 204-209; Krause, 1986, pp. 217-219; Chambers, 1979, p. 48). There is no question that this is a problem. But is it the result of no-fault or the feminist reform of family law? And can it be solved by a return to previous standards? No-fault divorce was not initiated by feminists or developed primarily as part of a theory of sex equality. It was meant to clean up the hypocrisy of divorce practice in fault jurisdictions (Kay, 1987a, p. 298). Feminists supported no-fault, as did other groups, on a theory that it would reduce the acrimony of fault divorce and put an end to the forum-shopping and fabrication of evidence that accompanied it. No fault was also deserving of feminist support because it permitted women (as well as men) unhappily married to a technically blameless spouse to dissolve their marriages. Moreover, no-fault removed fault as a barrier to eligibility for spousal support; a woman who was economically needy would no longer be barred

from seeking alimony by her marital "fault" (Kay, 1987a, pp. 299-301). Thus, no-fault divorce made it possible for women to escape unhappy marriages, and to seek spousal support even if their conduct contributed to the divorce. Unquestionably, the no-fault divorce provided a gain for women. What, if anything, did women actually lose by no-fault divorce? Critics of Weitzman's interpretation of her findings suggest: not much. (Jacob, 1986, pp. 777-779; McIsaac, 1986). No-fault divorce cannot be said to have injured women's economic status unless women who do not receive spousal support under no-fault divorce would have received it under a fault divorce statute, which is not usually the case. Contemporary studies show that spousal support is granted in under 20% of all cases. These data compared with the 1880s, 1920s, and 1950s show comparable percentages of alimony awards: 15-19%, depending upon the jurisdiction (Weitzman, 1981, p. 1221). Then, as now, spousal support was most likely to be awarded to a woman married to a wealthy man. Weitzman's data from Los Angeles County shows that the key factor in determining whether or not a woman received spousal support was not custody of young children or duration of the marriage; it was whether the husband earned more than \$20,000 per year (Weitzman, 1981, p. 1225). One Family Law casebook euphemistically refers to "cases involving serious legal work," i.e. divorce cases involving large property settlements and spousal support payments (Krause, 1983, p. 485).

The fault statutes in 1880 may have communicated to women that if they were legally faultless wives, they were entitled to economic support in the event of a divorce. No-fault divorce statutes, with their emphasis on need as the criterion for spousal support, may reassure the economically dependent wife in the 1980s. Yet under both divorce statutes, the reality—as opposed to the ideal—that family law communicates is that a woman should marry a rich man and her lawyer will see to it that she is provided for; that should she marry a poor man, she will be dependent upon herself. For the majority of women, "The promise of alimony has always been a myth" (Weitzman, 1981, p. 1221, n. 142).

Weitzman's proposed solution to the problem is to expand the definition of property which could be divided at divorce to include the husband's "career assets" such as pensions, goodwill, medical and dental insurance, and a professional degree or license, assets that enhance the earning capacity they represent (Weitzman, 1985, p. 47-49). An alternative proposal is to calculate an amount representing the foregone career opportunity owed the dependent spouse (Kay, 1987a, pp. 315-316). A third proposal, using a model of the "family as firm," would compensate the wife for her investment in the husband's "human capital" (Krauskopf, 1980, pp. 381-382). As a matter of constitutional law, the right to seek spousal support must be available to both husband and wife (*Orr v. Orr*, 440 U.S. 268 283 (1979)). Thus, each of these proposals must use sex-neutral language (*primary wage*

earner and dependent spouse) and be available to men as well as to women, although the proposals assume and are designed to address the economically disadvantaged position of the wife. Under all these proposals, the dependent spouse's share of these assets would be paid in a lump sum at the time of divorce or in multiple payments out of future earnings. If a husband is not wealthy enough to make lump sum or balloon payments, the schedule of multiple payments of this property division will closely resemble spousal support and will present the same problems of enforcement.

The economic hardships experienced by women post-divorce are very real. The suffering of an upper-middle-class woman who suddenly experiences a major drop in her standard of living should not be minimized. However, historically poor and working-class women have benefitted neither from fault divorce nor from sex-specific alimony laws. Today, the average family has relatively few assets to divide, and the husband/primary wage-earner does not have the earning potential to support adequately himself, his ex-wife, the new family he is statistically more likely than she to start, and the children of the marriage(s). Thus, a solution which focuses on reinstating fault divorce, or allocating a greater share of the family assets to the wife, will not adequately protect the great majority of women.

Proponents of the traditional, sex-specific, family law assume that fault divorce and maternal custody preference give women a divorce bargaining power that offsets the otherwise poor bargaining position. The blameless wife could seek alimony, which offset the fact that the marital property was likely to be in the husband's name; the full-time mother could assume that, absent a finding of unfitness, she would receive custody of very young children. Although the tender-years presumption was never an absolute right, commentators have argued that while it was in effect fathers could not effectively threaten mothers with the loss of custody. By contrast, the best-interests-of-the-child standard of custody, coupled in some states with the preference for joint custody, has given fathers more bargaining power (Olsen, 1984, p. 16; Polikoff, 1982, p. 236; Mnookin and Kornhauser, 1979, pp. 969-972, 977-980). The change from the tender-years presumption to best-interests-of-the-child as the sole standard for custody set out an ideal of custody determination. The battle should no longer be one of competing rights—mother versus father—in which the parents' wrongs to one another are the basis of decision.

Mothers still get custody of children in more than 90% of divorce cases nationally. However, studies show that a father's chance of successfully contesting custody is improving. Most significantly, fathers apparently do not need to prove the mother unfit or to demonstrate their own capability as a parent to succeed in a custody battle. Phyllis Chesler and Nancy Polikoff cite cases in which abusive fathers who were minimally involved in child-care before the divorce obtained custody from a "good enough"

(i.e. not unfit) but nontraditional mother (for example, a Lesbian, a mother working outside the home, a resister of physical abuse by the husband). In Chesler's study of sixty custody cases, fathers were given custody in 70% of contested cases, even though 87% had not been involved in child-care and 67% had not paid any child support (Chesler, 1986, p. 434). Weitzman's figures for California show fathers' success in up to 90% of contested cases (Weitzman 1985, p. 222). The best-interests-of-the-child standard obviously leaves a great deal to the discretion of the judge. Thus, the judge's own views on what a child most needs are critical to a determination of custody. Some commentators have found that family law judges are giving less weight to the kind of mothering care which women provide and favoring the less-involved, more challenging parental behavior deemed characteristic of fathers. A mother who works outside the home may find herself in a less favored custody position than a father who also works outside the home but who shows unusual (for a father) and thus praiseworthy interest in child custody.

The authors of a study on the uses of custody determinations (Fineman and Opie, 1987) conclude that the effect of sex-neutral custody has not been, as feminists hoped, to look at nurturing or caretaking by both fathers and mothers, but to de-emphasize the child's needs for such caring and to put a new, high value on independence and assertiveness, particularly for male children. Nancy Polikoff describes the same phenomenon: "Instead of replacing an assumption that the mother was caring for the children with a gender-neutral inquiry, we've seen instead the work of the child-raiser gradually devalued or ignored. . . . Courts look at financial status, the nicer home, even the new spouse the man is statistically more likely to have" (Polikoff, pp. 237-41). As women and men become more aware of the greater likelihood that fathers will succeed in a custody battle, the bargaining position for women is adversely affected. According to Chesler, although only one in ten fathers actually seeks custody in court, more than one-third threaten to seek it. Richard Neely, Chief Judge of the West Virginia Supreme Court, comments: "The better a mother is as a parent, the less likely she is to allow a destructive fight over the children"; thus, the "better" mother will settle property and spousal support claims unfavorably in return for the father's promise not to seek child custody (Neely 1985, pp. 177-79).

Proposals for solutions are varied. A return to the maternal custody preference would raise constitutional problems. Both parents have a constitutional right to liberty and privacy, which includes the right to procreate and participate in family life (*Loving v. Virginia*, 388 U.S. 1 (1967); *Boddie v. Connecticut*, 401 U.S. 371 383 (1976); *Zablocki v. Redhail*, 434 U.S. 374 384 (1978). Thus, a statute which, solely by virtue of sex, put men at a disadvantage in seeking custody would not pass constitutional muster. States with ERAs promptly removed their maternal custody preference, as did states that used simply a rational basis analysis (Clark, 1988, pp. 799-800).

A proposed gender-neutral solution for this problem is the primary caretaker rule. West Virginia by statute has a presumption that the best interests of a child under six are served by placement (in contested cases) with the primary caretaker. The statute states a preference for placement with the primary caretaker as one factor for the court to weigh for a child six to fourteen; after age fourteen, the child's expressed preference is determinative. According to Judge Neely, the primary caretaker is defined as "the parent who (1) prepares the meals; (2) changes the diapers and dresses and bathes the child; (3) chauffeurs the child to school, church, friends' homes, and the like; (4) provides medical attention, monitors the child's health and is responsible for taking the child to the doctor; and (5) interacts with the child's friends, school authorities, and other parents engaged in activities that involve the child" (Neely, 1924, p. 180). Does this statute reflect reality? Mothers mostly perform these functions; thus, mothers would usually get the benefit of the primary caretaker rule. The West Virginia statute obviously would give greater custody bargaining power to the mother of a child under six; however, the helpfulness of a mere stated preference for placement of a child six to fourteen is difficult to assess. Two other states, Pennsylvania and Oregon, have listed primary caretaker as a factor to be weighed in determining best interest of the child (*Commonwealth ex rel. Jordan v. Jordan*, 44 A.2d 1113, 1115 (Pa.Super.Ct. 1982); *Dervy and Dervy*, 571 P.2d 562, 564 (or Ct. App. 1977)). How much difference would adopting some variation of the primary caretaker presumption really make in most states? To answer this question, consideration should first be given to the ideal and the reality of maternal custody preference.

The mother's right to custody was not so firmly established as those who mourn its loss suggest. The common law rule in force until the end of the nineteenth century gave the husband and father custody right, thus preventing women from leaving abusive or otherwise intolerable marriages because they feared the loss not only of custody but of any contact with the child. The development of the tender-years presumption—that mothers should be the preferred custodian of a child under age five—was a "tie-breaker" which gave mothers an edge in contested cases involving very young children (Olsen, 1984, p. 13). Arguably a practical weapon for women, the presumption meant that a father, to obtain custody of a very young child, had to prove the mother was unfit (Fineman and Opie, 1987, p. 112).

The tender-years presumption has also been described as an "ideological defeat" (Olsen, 1984, p. 15) because it reinforced and rewarded the role of woman as caretaker of young children. A mother who deviated from that role, for example, by working outside the home, could be regarded as unfit and lose custody. Again, the family law, by establishing a standard of ideal maternal behavior, punished women who failed to conform to the ideal. An additional problem with the tender-years presumption is

that any bargaining power it gave the mother weakened as the child became older, reinforcing the idea that a woman was a fit caretaker for a helpless infant but not for a school-age child or adolescent. The obverse side of the tender-years presumption was the folk wisdom that older children, especially boys, need the guiding hand of their fathers. The reality of the tender-years presumption was "to implement, as a legal norm, the placement of infants and older female children with their mothers, while fathers claimed the benefits of older male children whose labor could contribute to the fathers' economic well-being" (Fineman and Opie, 1987, p. 112.)

Adopting the primary caretaker rule, at least in its present form in West Virginia, might give women a false sense of security while reinforcing the idea that mothers should care for infants but that fathers are equally entitled to custody of older (more enjoyable? more socially prestigious? more economically valuable?) children. The rule might also create an assumption that, to benefit from the rule, a mother would have to be a full-time parent. Studies show that even in households where fathers are significantly involved in child-rearing mothers spend much more time with the children and, crucially, are responsible for overseeing child care generally (Fineman and Opie, 1987, p. 113 n. 20.) Yet, if a father can prove that he often performs three out of Judge Neely's five tasks, is he the primary caretaker? Is then the presumption invalid that there is a primary caretaker?

While focusing upon problems of divorce for women, the problems of support and custody remain crucial to the welfare of children as well. A question is whether or not society should advocate a primary caretaker presumption simply because it will increase some women's chances of gaining custody. Can we safely assume that placing a child in the custody of one parent is the best or the only alternative after divorce? (Wallerstein and Kelly, 1980, pp. 254-257; Bartlett, 1984, p. 882; Charlow, 1987, p. 275). Will adopting a primary caretaker presumption serve the interests of children as well as of their mothers? Possibly, some combination should be adopted of the primary caretaker presumption and the interests of the older child. For example, the primary caretaker presumption could apply to children of all ages, not just to infants. In the case of older children (ten and older), the court could give some weight to the child's expression of desire for joint custody or for visitation rights. For children fourteen and older the court could give greater weight to the child's request for a custody change. However, the court should not, without more study, find that the presumption in favor of primary caretaker has been rebutted.

In addition to these difficult issues an even more important question is whether or not changing family law will actually make any difference. If the ideal and reality of family law have been and continue to be widely disparate, will a change in the law actually offer women any greater protection? Will change make any difference in the way women (and men) behave during marriage?

During marriage men and women function differently in ways that have important economic consequences when the marriage breaks up. For example, most wives earn less than their husbands during marriage; at divorce most women have less earning potential than their ex-husbands; most women have primary child-care responsibilities during marriage; and most women seek custody of children at divorce. These differences between the situations of women and men during marriage arguably put women at a disadvantage not only at divorce but during the marriage. Even in a marriage where the husband and wife agree that the wife should not work outside the home and should devote herself to child-rearing, the disparity in earnings translates to a disparity in decision-making power (Blumstein and Schwartz, 1983, p. 139). A wife who has had little to bargain with during the marriage will thus be in a predictably poor bargaining position at divorce. By contrast, families where both spouses make approximately equal economic contributions to the marriage tend to develop an egalitarian decision-making style, regardless of the husbands' and wives' expressed views of sexual equality or the proper roles of spouses (Hertz, 1986, pp. 197-198). Should family law encourage women not to work outside the home or to take part-time or lower-paying jobs because these are seen as more compatible with child-care responsibilities, even when these choices are, economically speaking, not wise ones? Assuming for the sake of argument that most women do want to be married, do want children, and probably do want to be primary caretakers but not primary wage-earners within the family, should family law encourage or discourage such choices? If being a primary caretaker and lesser wage-earner gives women less power in marriage and at divorce, should family law discourage or reward these decisions? The question is difficult for feminists, who have been criticized as insufficiently sensitive to the wishes of the majority of women. Yet, the question continues about how to give most married women legal and economic protection in light of the realities of child-care and housework responsibilities, even within two-income families, and the limited earning potential of most men. For most women, who do not marry rich men, the reality is that economic security at divorce cannot be attained by requiring a transfer of assets from their husbands to them.

The issue remains of whether or not child custody laws can or should affect how mothers and fathers behave during marriage. Perhaps fathers become more actively involved in child care during the marriage if they know that they can only succeed in a child-custody challenge if they can rebut the presumption that there is a primary caretaker. Whether or not such behavior will be better or worse for children is unknown. It has been suggested that in the days of maternal custody preference, men with an emotional investment in their children had an incentive to make the marriage work. If fathers are more involved with children during marriage, perhaps the result will be

fewer divorces—or the same number of divorces but a norm of joint custody. The effects of the new emphasis on children's assertiveness and independence may affect parenting behavior in on-going marriages. Therefore, qualities both fathers and mothers seek to exhibit as parents may change if courts continue to devalue the traditional child-caring provided by women in favor of the kind of financial support fathers can give.

Finally, the overall question is whether or not society can picture a family life within which a wife and mother who does not work outside the home or who is not the primary wage-earner is not at a power disadvantage. If such a picture of family life is desirable, then how can it be attained. Feminist writers have pointed out that family law reform, to be meaningful, must address the larger societal context which puts married women and mothers at an economic disadvantage. Comparable worth/maternity leave/child care/job discrimination issues must be faced (Fineman, 1986, pp. 785-790; Kay, 1987b, pp. 85-89). Women will be best served by a family law which, rather than looking back wistfully to former times, acknowledges the past and present realities of sexism and economic oppression. As a mirror of families as they presently exist, the law should mitigate economic disadvantages for women who have made traditional choices in marriage. As an ideal for the future, the law should promote those choices and family structures which empower women, foster equality between spouses, and preserve the welfare of children.

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Strategies for the Future: A Public Sector Perspective

by Cheryl Brown Henderson

In a country with so many goods and services available, how could anyone be without—without food, shelter, or literacy—those basics so necessary for self esteem and success?

Recently, during a trip to Portland, Oregon, I came across an article in *Vogue* magazine (and, yes, that publication does include articles of substance) entitled "Superglut," written by Leslie Jane Nonkin. In the article, Nonkin points out the various areas of substantial increase in products, etc., available in America. She writes that

in 1950 there were 7,000 types of magazines, and in 1986 there were over 11,000;

in 1950 the number of new book titles was 8,634, and in 1986 more than 39,000 new book titles;

in 1957 there were 2,000 shopping centers, and today there are more than 28,000.

She writes that Americans experience one million and one sensory jolts per hour from telephones ringing, car horns blowing, etc. She concludes by saying that the pressure is on us because people are no longer identified by the families they belong to but by the work they do and the possessions they have. It has been said that if Benjamin Franklin were alive today his advice of "Early to bed and early to rise makes a man healthy, wealthy, and wise" would be on a video cassette called "The Ben Franklin Workout."

Let's take a good, hard look at the issues I am here to examine:

- The status of women in the educational process.
- The importance of literacy.
- The future of women in the educational process.

First, in examining the status of women in the educational process we have to remember that education as we know it historically was a method of leadership training: leadership training for the sons of white landowners to, first, be able to present themselves and, second, to take over the family business. I would not be surprised if some of that training included how to handle women and servants. Education was not designed for women in the first place. Education for the masses had to be conceived, and the idea is really an infant in the history of this country. In spite of the historical intent, women such as Alice Paul and Mary McLeod Bethune insisted that women be educated and went on to establish the fact that their education was in the best interest of the country. The result for the black community was that girls were encouraged, providing the means were within their reach, to educate themselves, to seek higher education in order to become teachers, nurses, etc., as a means of keeping

themselves out of someone else's kitchen.

Dr. Shirley McCune of the Mid-Continent Regional Educational Laboratory has developed an interesting look at education in what she calls the pyramid of chronological change in education beginning with 1954. The base of the pyramid is *Brown v. Topeka Board of Education* (1954) concerned with physical desegregation, i. e. equal access. In 1957, *Sputnik* had educators up in arms to recruit students into math and science. In 1964, the Civil Rights Act was concerned with equal treatment, and in 1972 Title IX dealt with discrimination on the basis of sex. In 1981, educational research began examining whether or not outcomes were equal. In 1984, national reports were commissioned to offer recommendations for improving the quality of education.

The research of 1981 on equal outcomes tells us that girls are not expected to perform as well as boys, and that the most overlooked population in education is black females. It is almost as if educators see black and Hispanic females with signs on their backs that read, "Teen Pregnancy in Progress" or "Future AFDC Recipient." The status of women right now in education is bleak. According to a report on dropouts by the National Association of State Boards of Education, girls quit school as often as boys and suffer more serious consequences when they do. Pregnancy and marriage are the reasons 40% of the girls drop out of school, but the majority quit because they are less assertive, ignored by teachers, and, often, have low self-esteem. Teen pregnancy is increasingly viewed as an indication of low self-esteem, low basic skills, and a general lack of life options. The report concludes that girls need special attention, and I add that they need attention before they become statistics—one of the 12 million who depend on AFDC as a primary source of income.

In examining the issue of the importance of literacy, there are several types of literacy that are musts in order to meet the future head on:

- 1) basic skills literacy;
—skills to do the job
—skills to be a good employee
—skills to move up the ladder
- 2) work-place literacy
—skills to do the job
—skills to be a good employee
—skills to move up the ladder
- 3) life skills literacy
—decision-making skills to answer the questions
Do I become pregnant or don't I?
Do I need more education or don't I?
Do I complain about my landlord or don't I?
- 4) political literacy
—decision-making skills to answer the questions
Do I vote or don't I?
Do I run for office or don't I?
Do I belong to the PTA or don't I?

Public school education is not solely responsible for seeing that women develop these areas of literacy. Others who share the responsibility are business and industry, community-based organizations, churches, and homes; all must share in the responsibility.

In examining the issue of women in the future of the educational process, I believe the future will surprise us. Whether we like it or not, women need to continue to become classroom teachers. More to the point, more and more black women need to become teachers; we need more black teachers because in America black teachers are becoming extinct. According to NEA in a 1987 report, blacks and other minorities make up 33% of public school children but only 10.3% of the teachers. The American Association of Colleges for Teacher Education predicts that by the year 2,000, minority teachers will comprise less than 5% of teaching staffs. A recent report by the *Carnegie Forum on Education and the Economy* states that we should be deeply concerned about this issue because "the public schools educate and socialize the nation's children. Schools form children's opinions about the larger society and their own futures. The race, sex and background of their teachers tell something about authority and power in contemporary America." We need to make sure black, Hispanic, and white students see a view of the world that includes them. Much can be said for role models.

One of the reasons for the decline of the number of blacks in education is that expanding job opportunities in other fields are more attractive. Stepped-up efforts to recruit blacks and other minorities back into education will create the perfect opportunity for women to move more rapidly into educational administration and teacher education. Of course, the push will continue for training and employment in all higher wage-earning occupations, both technical and professional.

I believe the following strategies should be considered by educators to help change the future picture for girls and women:

1. Education has to go where the young women are:
 - a. housing projects
 - b. community centers
 - c. churches
 - d. laundromats.

We cannot merely offer programs on the campus of a university, a community college, or a vocational school.

2. Educational programs have to include child care.
3. Role models and mentors are musts.
4. Financial assistance, not always from the government, must be provided.
5. Assessment and basic skills programs must be ongoing.

Terrel H. Bell, in his article "Parting Words of the 13th Man," (*Phi Delta Kappa*, February 1988), stated that our new president must rally support for reshaping education so that the dropout rate falls below 5%, illiteracy is wiped out, and every graduate—regardless of race, ethnic background, or level of parental income—is competent, employable, and adaptable when she or he leaves school. The goal of this administration and of all Americans should be to develop the most productive, efficient, and cost-effective system of education in the world.

Pornography: The Civil Rights Issue for the Remainder of the Century?

by Joan Hoff

Attorney Alan E. Seans, who served as Executive Director of Attorney General Edwin Meese's 1986 Commission on pornography, has lectured around the country, saying that pornography is the civil rights issue of the 1980s. For some of the same as well as different reasons, I believe that pornography will become the civil rights issue for the remainder of the century, not simply for the last two years of this decade, a surprising conclusion perhaps because pornography currently lacks a legal definition and is not generally considered a civil rights issue. Moreover, we do not yet even understand pornography as a historical phenomenon, let alone a civil right (Hoff, 1989). Yet, in 1984 and 1985, two widely respected law journals—*Harvard Law Review* and *New England Law Review*—carried detailed and well reasoned arguments outlining the reasons for and against considering pornography as a form of discrimination and, therefore, a violation of women's civil rights. Written as "Note" comments, the arguments reached the same conclusion that, indeed, pornography harms women and should not be prosecuted under criminal obscenity laws but under civil rights procedures. The language of these articles, while different, was similar. For example, the "Note" in *Harvard Law Review* supports the drafting of civil rights legislation because pornography degrades women, thereby contributing to discrimination against them, and concludes that an "arguable correlation" exists between violent pornography and harm to women. Similarly, the *New England Law Review* "Note" concludes that pornography is not a criminal offense against the state but a civil crime against women because a "plausible nexus" exists between violent pornography and harm to women. "Arguable correlation" and "plausible nexus": These are not the words of rabid, radical feminists but of two reasonable individuals writing for establishment law journals ("Anti-Pornography Laws," 1984, pp. 460-481; Klausner, 1984-85, pp. 721-757). Both demonstrate that the cultural and legal aspects of pornography qualify the issue as a violation of women's civil right.

Pornography has passed from obscurity in antiquity to a present-day mass phenomenon without acquiring either a history or a legal definition. What is to be made of the fact that this most controversial subject has yet to be legally defined or historically analyzed? "Truly enlightened," describe its supporters in the mid-1980s; "truly deplorable," reply its critics. The 1986 Attorney General's Commission on Pornography (AGCP) with video cassettes was forced to conclude that "the history of pornography still remains to be written." This same report states that "to understand the phenomenon of pornography, it is necessary to look at the history of the phenom-

enon itself. . . [but] commissioning independent historical research was far beyond our mandate, our budget, and our time constraints" (AGCP I, 233). The 1970 President's Commission on Obscenity and Pornography, which had a budget sixteen times larger than the AGCP (after taking into account the impact of inflation on the difference between \$500,000 and \$2 million) also did not authorize such a historical study. Reasons for not providing such a study abound, ranging from the implicit notion that pornography is too trivial (or too dangerous) a subject, to the explicit assertion that existing histories of sexual practices and of attempts to regulate such practices and writings about them are sufficient. Several basic reasons belie these standard ahistorical rationalizations. One has to do with the state of legal and historical research. Pornography challenges traditional liberal legal and historical assumptions. As a result, historians and lawyers have tended to bring their respective talents to bear primarily in critically appraising the variety of attempts to censor pornography, not to understand it as social phenomenon.

Despite state and religious proscriptions, the authority of both institutions tolerated a wide range of sexually explicit representations up to the nineteenth century. In colonial America, some statutes criminalized immorality, blasphemy, and heretical actions associated with such actions but did not focus primarily on materials dealing with sex. The status remained unchanged during the first decades of the new republic after the Constitution of 1787 officially separated church and state because "pure sexual explicitness, while often condemned, was not . . . taken to be a matter of governmental concern" (AGCP I, p. 242). Beginning in the nineteenth century, private organizations and individuals supporting social concepts about decency and obscenity have dominated the attempts to regulate sexually explicit material. Before then, protection of state authority and religious values formed the basis for such erratic regulation of immoral, but not usually sex-oriented material, as existed. However, in the course of the last century, certain individuals such as Anthony Comstock decided to ban all sexually explicit materials on grounds unrelated to state security or religious integrity: that they were lewd, indecent, and obscene.

Gradually, during this century, the legal system and government entered the picture more forcefully, not at the instigation of secular or religious zealots but as a response to U.S. intellectuals of the 1920s and 1930s who made highly subjective distinctions between erotica and pornography that had no historical or etymological rationale. They automatically assigned a reputable (and primarily heterosexual) past to erotica but not pornography. Although this attempt to distinguish between the two is, at most, an arbitrary and artificial product of three generations of writers, literary and theater critics, and journalists, it has so captured the imagination of the liberal establishment that its recent, and self-interested origins, have been obscured. These private literary

definitions, having little to do with moral purity or sex education, were soon thrust into the public area of the courts as all literature became more professionalized and academicized within the confines of universities and colleges (Kendrick, 1987). Two common themes linked opinions of the literary giants of these decades and academic experts of these nineteenth-century reform movements and legislation: the objectification and hence subordination of women in most sexually explicit material (Capland, 1987; Kappeler, 1986) and the continuing focus of the courts on obscenity, not pornography per se. Although no one generic or legal definition yet exists in western culture, all describe intimate physical contact based on subject-object relations, meaning that most definitions of pornographic representations of heterosexual (and homosexual) relations share one (unusually unstated) commonality: namely, female sexual subordination, or the subordination of the person playing the "feminine" role in sexual relations (Dworkin, 1981 & 1987; Kappeler, 1986; MacKinnon, 1984 & 1987).

Until the late 1970s, authors of books about sex practices and literary examples of erotica seemed content with the plethora of meanings and their implicit acceptance of male domination in sexual relations. Most lawyers by the late 1970s also accepted the unenforceable tripartite definition of what constitutes obscene material stemming from the 1957 and subsequent 1973 Supreme Court decision in *Roth v. United States* and *Miller v. California*. Moreover, neither group seriously attempted a historically comprehensive or accurate definition of pornography because, among other things, they were not concerned about gender as a category of analysis (Bruendorff & Henningsen, 1983; Gillette, 1965; Hughes, 1970; Michelson, 1971; Thompson, 1979). Without gender analysis, no definition of pornography will expose its basic sexism, or its function as an ideological representation of patriarchy and as an exercise in the "practice of power and powerlessness" (MacKinnon, 1985, p. 21). Therefore, pornography no longer can be arrogantly neglected by liberals nor inadequately regulated by conservatives prosecuting under statutes and legal interpretations about proof, discovery, and immunity meant to apply in criminal obscenity cases.

Obscenity and pornography are two quite different concepts despite the fact that they, along with erotica, are often used interchangeably by scholars and laymen alike (Dworkin, 1985; Grossman, 1985; Hoff, 1989). Obscenity laws are meant to cover sexually explicit material when it promotes "excessive" arousal or excitement (traditionally in males) through candid portrayals of nudity, prurient appeal, and illegal or unnatural acts. Not only does pornography have a very different etymological origin from obscenity, but also it does not focus simply on graphic depictions of sexual organs or sexual acts that stimulate men. Rather, contemporary feminists are concerned with the variety of pornographic representations of women that in sexually subordinating and

objectifying them imply that women enjoy such treatment. In fact, "many sexually explicit materials that current law would classify as obscene would not be prohibited by anti-pornography laws," according to the *Harvard Law Review* "Notes" mentioned above, "because such materials do not present a false and damaging image of women." Even the much-maligned Meese Commission's report states that most nonviolent and nondegrading obscene material is probably not very harmful to women or society but notes that this category of sexually explicit material "is in fact quite small" compared to what is currently available ("Anti-Pornography Laws," 1984; Klausner, 1984-85; AGCP, I, p. 335).

The word obscenity (and obscenity laws) continues to suggest that sex is dirty and that sexual materials are behind-the-counter items. Moreover, the current legal definition of obscenity not only reflects similarly outmoded male views but also makes the determination of what is obscene rest on subjective literary and/or community judgments that can neither be effectively applied nor have any relevance for contemporary pornography. In this sense, with all of their defects, the anti-pornography ordinances are more objective and clearer than the moral and literary definitions of obscenity that have been handed down in the *Roth*, *Miller*, and *Pope* decisions. Additionally, legally defined obscenities always carried with them the connotation that they somehow offend or are outside the moral boundaries or propriety of society ("Anti-Pornography Laws," 1984; Klausner, 1984-85). The same cannot be said of mass-distributed forms of pornography. They are in the middle of the most respected communities—in supermarkets, book stores, movie theaters, malls, and video rental outlets. There is little "outsideness" about the bulk of material now flooding the country that is produced by an \$8 billion pornography industry. So both in quantity and quality there is a difference in kind rather than simply in degree between obscene contemporary and pornographic materials that the courts and legal profession have yet to fathom for apparently one basic reason: the First Amendment.

The most controversial of all the differences between obscenity and pornography at the present time is whether the definition of pornography in anti-pornography ordinances can be or should be given First Amendment protection or made an exception to it. Pro-ordinance feminists argue that the very nature of especially violent pornography is not a form of protected speech because it is not speech. It is not an expression of opinion or mere advocacy of the subordination of women. Instead, it is the act of subordinating women that offers no opportunity for discussion in the open marketplace of ideas because the false and degrading images of women projected through pornographic representations perpetuate gender inequality by their very existence. In harming women, pornography is a civil rights violation, not a form of free speech. That is why violent pornography, in particular, does not simply advocate the degradation of women; it has become "sex forced on real women so that it can be sold at a profit to

be forced on other real women; women's bodies trussed and maimed and raped and made into things to be hurt and obtained and accessed and this presented as the nature of women in a way that is acted on and acted out over and over again" (MacKinnon, 1985, pp. 21-22).

On the other side, civil libertarians claim that this is simply "feminist ideology," not legal discourse. They flatly deny that the First Amendment, which is such a "proud symbol of liberal democracy," has become "the cornerstone of constitutional mysogyny [sic]" (Grossman, 1985, p. 1). Instead, they believe that pornography is advocacy, not action, and, therefore, protected speech. In part, this absence of or callousness toward gender analysis when interpreting the First Amendment has contributed to the obsession among liberals for creating a largely unenforceable definition of obscenity, while assiduously avoiding a legal meaning for pornography.

Using gender analysis, some members of the Second Women's Movement began to question not only the sexist assumptions of existing legal definitions, but also the implicitly and explicitly harmful societal effects on women of mass-distributed pornography. Pro-ordinance feminists contend that this most personal of amendments was never intended to protect pornography and pornographers at the expense of women's civil rights. As the defendants in *American Booksellers v. Hudnut* argued, pornography is not a form of protected speech because the ideas it "conveys are offensive, but because the practice of pornography creates harms irrespective of the idea being conveyed. . . . Put another way, it is not the idea of subordinating women which is prohibited but the actual subordination of women" that should be the concern of those interpreting the First Amendment in relation to pornography—not vague male notions about immorality, prurient interest, and patent offensiveness (Defendants' Brief, *American Booksellers*, p. 18; Grossman, 1985, p. 1). This disagreement between feminists and civil libertarians with respect to whether pornography is speech or conduct is both the most dramatic and the least solvable from a judicial point of view than the other issues dividing them over the difference between pornography and obscenity.

The final rift between the two groups is over the much heralded legal fiction that civil liberties are indivisible. Although U.S. legal history is replete with contrary examples, contemporary liberals maintain that civil liberties must protect (and apply to) everyone or they will protect (and apply to) no one. Obviously, when two civil liberties clash only one can prevail, thus violating the indivisibility postulate. As of the mid-1980s, the free speech rights of pornographers under the First Amendment prevailed over women's civil rights on the grounds that pornography cannot be prosecuted unless it falls under the criminal law's definition of obscenity (Gillers, 1987, p. A27).

In the 1980s, civil suits increasingly succeeded against drug dealers, terrorist organizations, anti-Semitic or white supremacist groups, corrupt politicians, white collar

criminals, and antiabortion demonstrations at the same time that legal decisions deny that pornography is a violation of the civil rights of women. In all these other areas where the possibility of criminal prosecution exists, as it does for pornography under obscenity laws, the government and individuals have found successful cause for actions under the law to prosecute using civil law. Thus, the 1970 Federal Racketeering Influenced and Corrupt Organizations Act (RICO) has been increasingly broadly interpreted by U.S. courts in the 1980s much to the consternation of civil libertarians—except in pornography cases. For example, the Supreme Court ruled unanimously in February 1989 that the First Amendment bars law enforcement officials from seizing the entire inventory of adult bookstores (and, presumably, video outlets) before the materials involved have been proved to be obscene. In *Wayne Books Inc. v. Indiana* and *Sappenfield v. Indiana*, 109 S.Ct. 916 (1989) the Justices had no trouble distinguishing the seizure of a defendant accused of racketeering before trial from seizure of the "assets" of a book dealer. Arguing that this was a form of "prior constraint," the Supreme Court, thus, for the first time, limited the application of RICO. RICO has proven effective when criminal procedures have not, because of significant differences between civil and criminal suits in the areas of burden of proof, the power to grant immunity, "discover" procedures, and availability of remedies (to say nothing of allowing successful plaintiffs to collect triple damages). As of 1989, however, civil suits against pornographers have failed because pornography has become one of the many legal texts of modern patriarchy. Thus, contemporary American Civil Liberties Union (ACLU) attorneys routinely maintain that the right of pornographers to freedom of expression under the First Amendment takes precedent over any harmful impact that this form of protected speech may have on women even though it is difficult to understand how such material can be considered legitimate political expressions since no exchange of ideas takes place in most pornographic representations of women.

As if being an orphan of history and literature were not enough, pornography has been assigned bastard status as well by lawyers who have, since the 1960s, claimed that the term cannot be legally defined. The hegemonic hypocrisy of this elitist civil libertarian stance with respect to pornography is revealed by the fact that the male intelligentsia in the United States has not hesitated to define illicit or illegitimate sexual behavior for themselves (and their readers) in the name of erotica, proving once again Karl Mannheim's axiom: "Intellectuals exist to provide an interpretation of the world for that society." In fact, academic and liberal intellectuals have consciously chosen both to invent the word erotica and to accord it privileged status, while claiming no similar responsibility for pornography (cited in Bakhtin, 1965, p. xiii; also see Hoff, 1989). Some feminists now maintain that "true" erotica consists of "sexually explicit materials premised on

equality" (Klausner, 1984-85, p. 734).

Regardless of which side one favors in this debate, the fact remains that sexually explicit pornographic material has, from invention of sexuality in the nineteenth century down to the present, served the interests of the patriarchal state. Like other legal texts, according to Robin West, pornographic texts are seldom recognized for what they are: vehicles for preserving, not protesting, the status quo (1989). Historically, anti-pornography rhetoric and campaigns always coincide with greater distribution and promotion of pornographic material and activities. Such campaigns have actually strengthened rather than weakened the sexualization of U.S. society because in the past they have encouraged the pseudoscientific principles upon which nineteenth-century sexuality was based and have attempted to solve a public or societal problem through behavior modification or education of individuals, not through structural or collective attitudinal change. Moreover, these early reform crusades—both for and against obscene materials—also competed with the simultaneous development of "acceptable" forms of pornography under the guise of nineteenth-century versions of the grotesque as more typical pornographic representations permeated private levels of society (Fiedler, 1978).

For more than a century—from the broad Queen's Bench meaning of obscenity in *Reginia v. Hicklin*, LR 3 QB 360 (1868), to *Pope v. Illinois*, 107 S. Ct. 1918 (1987), the legal definition of obscenity gradually narrowed in both English and American common law (Copp & Wendell, 1983; Kendrick, 1987). The *Hicklin* test (like the Comstock Law) had been intended to apply not only to sexually explicit materials but also to any "immoral influence" that would corrupt the vulnerable minds of youth, particularly those of young men (AGCP, I, p. 247; Klausner, 1984-85, p. 727). Thus, legal obscenity under *Hicklin* focused on acts or writings that violated prevailing standards of propriety. But this proved too broad and imprecise after the invention of sexuality and the resurrection of the word pornography. In the course of the next hundred years, attempts to diminish the scope of similar decisions and legislation prevailed in the United States until, by the 1960s, "the range of permissible regulation [of obscene materials] could properly be described as 'minimal'" (AGCP, I, pp. 253-54).

The success in narrowing the definition of obscenity was the result in no small measure of the influence of lawyers who, relying on the private literary definitions, made sexually explicit pictures, words, and films subject to protection under the First Amendment. A few famous cases involving major literary works and films were won in the 1930s and 1940s, but the major U.S. case law precedents (until *Pope*) occurred in the 1950s and 1970s. In *Roth v. United States*, 354 U.S. 476 (1957), and other subsequent decisions, the Supreme Court declared that only obscene material "utterly without redeeming social importance falls outside the jurisdiction of the First

Amendment, meaning that most ideas, however hateful and controversial, were protected if they demonstrated "even the slightest redeeming social importance" (AGCP, I, pp. 253-54; "Anti-Pornography Laws," 1984; Grossman, 1985; Klausner, 1984-85, p. 21; MacKinnon, 1985, p. 21). Anything deemed legally obscene is not, therefore, considered to be "speech" under the First Amendment. The catch in this legalese is how to define what constitutes obscene material.

In 1973 the Justices came as close as they ever have to a comprehensive definition. *Miller v. California*, 413 U.S. 15 (1973) set three conditions for determining whether visual or printed material is obscene. This tripartite definition held that obscenity exists when 1) an average person using "contemporary community standards" concludes that a work in its entirety appeals to "prurient interest" in sex; 2) the work is "patently offensive" as defined by state or federal laws; and 3) when the entire work "lacks serious literary, artistic, political, or scientific value." The third point constituted the so-called "LAPS test." While Supreme Court decisions between 1973 and 1987 paid lip service to "community standards," actual prosecutions of obscenity declined. In any case, as Catharine MacKinnon notes, this definition turns obscenity into a "moral idea" based on the application of good and bad literary standards while pornography remains a "political practice" (1985, p. 26).

Then, in *Pope v. Illinois*, the Supreme court further narrowed the definition of obscenity by negating entirely the idea that the value of any particular work could "vary from community to community based on the degree of local acceptance it has won." Throwing out the "average person" reference in *Miller*, the Justices ruled that the "LAPS test" could only be determined by a "reasonable person," not an "ordinary person" (107 S. Ct. 1921 [1987]). This decision appears to have eliminated community standards for determining legal obscenity, thus rendering the remaining portions of the *Miller* definition even less applicable to the undefinable: pornography. Ironically, as the depiction of sexual violence has proliferated beyond all reason, a "reasonable" gender-neutral person is now sought to determine the overall value of material alleged to be obscene. Finally, in June 1989, the Supreme Court handed down a decision in *Sable Communication Commission of California v. FCC* and *FCC v. Sable*. Since these dial-a-porn cases did not involve RICO the opinion of the court was straightforward in striking down the "total ban Congress had placed on both obscene and indecent telephone communications," saying: "Because the statute's denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages, we hold that the ban does not survive constitutional scrutiny" (57 U.S. Law Week 4920 at 4924).

Long before the 1987 *Pope* and *Sable* decisions, however, leading members of the Second Women's Movement had divided over how to respond to the increased violence

and availability of contemporary pornography. Battle lines had already been clearly drawn by the beginning of the 1980s. This stalemate placed radical feminists ostensibly on the side of fundamentalists in advocating the banning of such material through anti-pornography ordinances. At the same time, many reformist and socialist feminists appeared to have allied themselves with the purveyors of pornography arguing that such material is protected by the First Amendment and that, in addition, consenting adults have the sexual right to engage in all intimate acts short of murder.

In actuality, the debate is both more complex and significant than it sometimes appears on the surface. The two groupings are misaligned for a variety of reasons, the most important being that of the four groups, only one is attempting to "desexualize" society by banning or severely regulating the production and distribution of pornography: namely, the radical feminists. The other groups—members of the radical right, the producers and distributors of pornography, and the reformist feminists—are all advocating a "re-sexualizing" of society through the promotion of pornography behind the banner of the First Amendment and sexual rights based on subjective and increasingly obsolete legal definitions of obscenity. They are, in a word, trying to reinforce, albeit with some minor modifications, the idea that male-dominated views about sexuality should continue to determine private identity. This is particularly true of heterosexual and homosexual sadomasochists for whom the personal amendment provides protection for harming physically or being harmed by a "consenting adult" (Califia, 1981). Since re-sexualizing represents nothing more nor less than an extension of the nineteenth-century construct of sexuality, it cannot liberate women or men. Only de-sexualization can do that as Michele Foucault pointed out almost twenty years ago (cited in Martin, 1982).

For all of these reasons, I can no longer accept the standard liberal defense of pornography in the name of freedom of expression, which does not consider its potential harm to women, nor the assertions of the Feminists Against Censorship Taskforce (FACT) that women will be sexually liberated by more pornography. In terms of the difference between re-sexualizing or de-sexualizing society, the exact opposite is true. FACT's pornographic publication *Caught Looking* is no better or worse than the male standards of individuality and sexuality that it imitates so well. As such, it represents a brand of fake feminism. It is typical of the dangerously shallow and uncritical liberal response to the increase in actual violence against women and children in contemporary society, and to the increasing associations between violence and sex in the mass media (Hollyday, 1984; *Humanities in Society*, 1984; Russo, 1987, p. xx; Soley, 1984).

Approximately one hundred years after the original invention of sexuality with all of its hypocritical and repressive sexist elements, the most conservative and most liberal factions in U.S. society are unwittingly in a sexual

alliance despite their different intentions and goals. The radical right wants to ban pornography in order to re-sexualize society along the lines suggested so frighteningly in Margaret Atwood's *The Handmaid's Tale*. The pornography industry simply wants to re-sexualize society to keep the profits flowing. And FACT, along with the ACLU, wants to re-sexualize society in the name of the First Amendment, ensuring that the least emancipated areas in America will remain the millions of bedrooms across the country, regardless of sexual preference. Therefore, it is a mistake to view the current debate as a question of heterosexual versus homosexual preferences; it also is not a question of sexual liberation versus sexual inhibition. It is a question of de-sexualizing society (and thereby endorsing non-violent sex which does not subordinate and objectify women as unequal partners) or re-sexualizing society (with all of its violent, degrading, and harmful elements) at the end of the twentieth century. It is an example of promoting false equality arguments (i. e. sexual liberation of women through pornography) at the very moment when pornographic materials in overwhelming amounts are designed to keep women in their "proper places" through violent object lessons.

This confusing and misunderstood set of misalliances reached an inconsequential legal climax on June 11, 1984, when the city of Indianapolis adopted a statute that defined pornography as a form of sex discrimination and, thus, a violation of women's civil rights. Although several other cities—Los Angeles, Minneapolis, and Cambridge, for example—have considered similar anti-pornography legislation, Indianapolis remains the only community in the United States to adopt such a statute.

The various decisions in *American Booksellers Association v. Hudnut* (771 F.2d 323 (7th Cir. 1985, aff'd 475 U.S. 1001 (1986)), did not by any means settle the issue of pornography for the various participants. While accepting the premises of the Indianapolis ordinance, namely, that "depictions of subordination tend to perpetuate subordination," the court held that no legal definition of pornography had been put forth that did not violate free speech under the Constitution. Since this decision, the Attorney General's Commission on Pornography issued in July 1986 a report that has only exacerbated the debate among scholars and feminists alike by declaring categorically that pornography plays a leading role in causing "sexual violence, sexual aggression or unwanted sexual coercion," despite the ambiguity of social science research on this causal relationship (*American Booksellers v. Hudnut*; New York Times, 1986, p. 1,26).

While historians and lawyers continue to disagree over the meaning and legal status of pornography, some social science and literary studies have suggested that it is rapidly becoming the new opiate of the masses. Thus, the "raptures and bliss of the ..." are replacing both religion and science as ways to attain heaven on earth in our sex-and-violence obsessed era (Rushdoony, 1974, p. 33). Other studies maintain that pornography has always been

a frontier literature, presaging or predicting future sexual relationships. Indeed, early sexually explicit representations are now largely accepted as normal behavior among consenting adults. While this frontier function of pornography appears to be a valid generalization about the past, it may not be for the present. It is possible that violent pornography has a demographic profile. By the end of the twentieth century, it may not be as much in demand and as prevalent as the population significantly ages. The current AIDS epidemic constitutes another deterrent. Demography and disease may ultimately be the determining factors in the battle over whether to re-sexualize or de-sexualize society on the eve of the twenty-first century.

In any case, until pornography receives adequate historical and legal gender analysis by liberals, so that we can draw lessons and paradigms for the future that are not based on the past, I can only agree with David Holbrook who has said that "Our failure to discriminate against pornography . . . marks a deep failure in our intellectual life" (1973, p. 2). Even more important, as long as pornography continues not to have a history, the longer its negative importance will be denied and the variety of its acceptably sexist and its violently grotesque disguises will increase. Without histories, people, events, and issues are taken less seriously than otherwise would be the case. Until the history of pornography is written, those who would re-sexualize U.S. society can use its ahistorical status and outmoded legal interpretations about obscenity under the very personal First Amendment to serve their own disparate private interests with impunity.

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Women's Fight for Fundamental Freedoms: The Mixed Legacy of Margaret Sanger

by Esther Katz

As most of you know, last week the Reagan Administration published new regulations for federally-funded family planning clinics that would end Federal funding for any clinic that offers women information or counseling on abortion. By limiting the ability of clinics to offer women complete information on abortion, these new rules challenge not only women's reproductive freedom but their First Amendment rights as well. It is not a new tactic. In fact, it was by challenging governmental censorship of contraceptive information that Margaret Sanger launched the birth control movement over seventy-five years ago.

In the beginning, Margaret Sanger (1931) recalled, she had "visualized the birth control movement as part of the fight for free speech" (p. 143). Convinced that birth control was the route to women's autonomy, Sanger believed that women had a fundamental right to obtain the necessary information about contraceptive methods and alternatives. However, in advocating open and public access to birth control information and materials, Sanger was not just challenging the social and moral values of her day; she was also breaking the law.

Under the nation's Comstock Laws (both the 1873 federal law and the many "little Comstock" state laws) the distribution of any materials defined as "obscene, lewd, or lascivious" was prohibited. Specifically included in this prohibition were any materials relating to contraception and abortion. A dedicated enthusiast of direct action tactics, Margaret Sanger deliberately defied these laws which, she asserted (1919), "prevent the enlightenment of women and the freeing them from the burden of too frequent child bearing" (p. 4). In doing so, Margaret Sanger successfully forced birth control into the center of public debate and, in the process, set the parameters for that debate. It is a significant legacy, but one with whose consequences we continue to grapple.

Margaret Sanger emerged on the public scene in 1912 active in the radical politics of the pre-World War I years and imbued with beliefs in sexual freedom and the importance of sex education. While working as a home nurse among New York City's working-classes, Sanger recognized that what the women she treated desperately needed was detailed information about birth control. In March of 1914 Margaret Sanger published the first issue of *The Woman Rebel*, a monthly newspaper devoted to radical/socialist issues. Her goal was to educate and raise the consciousness of working-class women by urging them to "look the whole world in the face with a go-to-hell look

in the eyes; to have an ideal; to speak and act in defiance of convention." Sanger claimed that the purpose of *The Woman Rebel* "was a scathing denunciation of all conventionalities"; she wrote, "It went as far as necessary to arouse the Comstockians to bite." (1931, p. 80). Bite they did. Five of the seven issues published were declared unmailable and confiscated by postal authorities. Sanger responded in the May 1914 issue, declaring that the paper was "not going to be suppressed . . . until it has accomplished the work which it has undertaken" (p. 3). In August the paper included an article entitled "A Defense of Assassination." Sanger was immediately indicted on nine counts of violating federal postal laws.

The issue that had initially aroused the postal authorities was birth control. Sanger had made her intent clear in that first issue. "It will . . . be the aim of *The Woman Rebel*," she wrote, "to advocate the prevention of conception and to impart such knowledge in the columns of this paper" (p. 1). Although Sanger openly advocated birth control in *The Woman Rebel*, she did not actually include any specific contraceptive information in its pages. Reluctant to stand trial on charges that did not all focus on the dissemination of birth control, Sanger fled the indictment.

Sanger left behind a far more blatant violation of the federal ban on birth control information in the form of a pamphlet called *Family Limitation*. This little pamphlet contained the extremely frank and graphic descriptions, with illustrations, of various birth control methods that she had threatened to print in *The Woman Rebel*. Because Sanger was hiding out in England when the pamphlet was released, Anthony Comstock went after her husband, William Sanger, tricking him into giving a copy to an undercover agent. Arrested and indicted, William Sanger's trial and conviction became a cause celebre for free speech advocates and civil libertarians. When Margaret Sanger returned to the United States in 1915, she found that birth control had made the front pages and she was being hailed by many as a heroine in the fight for First Amendment rights (Sanger, 1931). She soon generated so much additional sympathetic publicity that the government, reluctant to give more attention to this diminutive but charismatic figure or to her cause, refused to prosecute her on *The Woman Rebel* charges (*United States v. Margaret Sanger*, 1915).

Sanger, however, was not satisfied. "The law had not been tested," she wrote. "I knew and felt instinctively the dangers of having a privilege under a law rather than a right" (Sanger, 1938, p. 190). Determined not to let the laws silence her, Sanger undertook a series of lecture tours to promote birth control. Locked out of halls, refused the right to speak, arrested, and even jailed, she succeeded in generating even more controversy and publicity. "I have been gagged, I have been suppressed, I have been arrested, I have been hauled off to jail . . .," she wrote in 1929, "As a fighting pioneer, you see, I believe in Free Speech. As a propagandist, I see immense advantages in being gagged. It silences me, but it makes millions of others talk about

me, and the cause in which I live. (Ford Hall Forum Speech, April 16, 1929, Library of Congress-Margaret Sanger Papers).

Margaret Sanger's continued insistence on speaking out in support of women's right to have birth control information and services firmly linked birth control with First Amendment issues (Gordon, 1977, p. 228). Yet her goal was not just to win acceptance for birth control among civil libertarians. "The secret of our success . . .," Sanger wrote in 1924, "is to be found in the fact that we have never wasted our time and energy *whining* about our constitutional rights to free speech. We have simply spoken out" (p. 248). What Sanger wanted was to provide women with access to the most medically sound, up to date, and effective methods of birth control as quickly as possible—her solution was a system of neighborhood clinics.

During a 1915 tour of Dutch birth control clinics, Sanger had become impressed with the newly developed spring-form diaphragms being used there. Although she had been promoting self-help, Sanger now decided that for women to properly use such birth control devices, they needed medically skilled and individualized instruction from nurses, midwives, or physicians, as well as education and counselling. She believed this could only be done through a system of birth control clinics similar to those in the Netherlands. However, New York State's "Little Comstock" law prohibited the distribution of contraceptive information by anyone for any reason. The only exception applied to physicians who could prescribe contraceptives for the prevention or cure of disease. Sanger, who correctly perceived that this provision was designed to curb venereal disease by enabling physicians to distribute condoms, thought this exception could be extended to include the prescription of contraceptives to women. Once again she decided to challenge the law. In 1916 she opened the first American birth control clinic in Brownsville, Brooklyn. She was, of course, immediately arrested and indicted for violating Section 1142 of the New York State penal code.

Sanger was determined to stand trial and demonstrate the unconstitutionality of the law on the grounds that "no state was permitted to interfere with a citizen's right to life or liberty, and such denial was certainly interference" (Sanger, 1938, p. 224). Unwilling to promise the court that she would not violate this law again, Sanger was convicted and jailed for thirty days (Dienes, 1972, p. 83; Sanger, 1931, pp. 171-172). She appealed, insisting that the law compelled women "to unnecessarily expose themselves to the hazardry of death" (qtd in Dienes, 1972, p. 83). The arguments did not impress the court, which upheld Sanger's conviction. However, in its decision the court did interpret the exemption of physicians broadly enough to include the distribution of birth control information and services (*People v. Sanger*, 1918). Sanger had found the loophole through which she could begin to legally establish doctor-staffed birth control clinics, a loophole that required both money and widespread public support.

In her landmark history of the birth control movement, Linda Gordon (1977) has noted, "Sanger's approach to birth control was distinguished by her willingness to make it her full-time, single cause" (p. 257). In Sanger's view, challenging the Comstock Laws was not enough; birth control would have to be made respectable before it could be made fully legal. Willing to do whatever she deemed necessary to bring the movement closer to its goal, she decided to concentrate on creating a more favorable social climate for the birth control movement by broadening its base of support. By 1919, Sanger had begun to distance herself from her radical/socialist roots and to seek the support of more moderate, middle-class women's groups, academics, and professionals, particularly doctors. It was in this spirit that Sanger also embraced some of the beliefs of leading twentieth-century eugenicists. It is important to make clear, however, Pat Robertson (*USA Today*, 3 Feb. 1988, 1A) notwithstanding, that while Sanger did advocate the importance of limiting reproduction among those with hereditary mental and physical disabilities, she did not promote birth control as a way of limiting any particular ethnic, racial, class, or religious group. Sanger was pursuing what Rosalind Petchesky (1984) defined as a strategy designed "to give birth control an aura of scientific and medical respectability by assimilating it within the framework of social engineering . . . and public policy" (p. 92).

Sanger's attempts to legitimize the birth control movement muted her earlier identification of birth control with the feminist goals of reproductive and sexual autonomy. Thus, although Sanger had initially wanted birth control to be controlled by the women, she now not only repudiated efforts to keep male doctors out of the movement but actively sought their participation. Beginning in 1919 she began supporting a series of bills that would limit the distribution of birth control information to physicians, midwives, and nurses (*Birth Control Review*, July 1919, p. 9). Within a few years, she was advocating "doctors-only" bills explaining that only "licensed physicians, hospitals, and clinics are proper sources of information. . . ." (*Hearings on S. 1842*, p. 149).

In part, Sanger decided to push for "doctors-only" legislation because she was genuinely convinced that medically-controlled birth control services would prevent the exploitation of women's contraceptive needs by self-serving commercial interests and assorted quacks. "I am primarily interested in the health and welfare of the women whom this law is designed to protect . . .," she explained, "while guarding them from the charlatans who would ceaselessly prey upon them under an open bill" (Sanger to Mary Ware Dennett [Feb. 1930], Park Papers). Certainly, given the number of dubious products being advertised for "women's special needs," her fears were not wholly unfounded. Yet Sanger's advocacy of "doctors-only" bills was also clearly a reflection of her pragmatic attempt to appeal to the professionalizing aspirations of physicians by offering them control over the distribution of contraceptive information and services. "We believe that this

question of receiving contraceptive information should be the woman's right," Sanger explained, "that it should be the mother who should have the right to receive information, but we believe in limiting who should give it. That is the difference" (*Hearings on H.R. 5978*, 1934, p.6).

In deciding to support "doctors-only" legislation, Sanger deliberately broke with civil libertarians such as Mary Ware Dennett who wanted a "clean repeal" bill to overturn all legal prohibitions on birth control. In Dennett's view, a "doctors-only" bill accepted the assumption that sexuality without reproduction was indecent and would "keep the subject of contraception still classed with obscenity" (Dennett, 1926, p. 201). Such a bill, moreover, would remove contraceptive methods from women's control giving physicians a virtual monopoly on the distribution of birth control information and services (Dennett, 1926, p. 203).

Sanger, however, refused to support a clean repeal bill. Unlike Dennett, she would not publicly oppose the whole concept of legal obscenity. "Please do not misunderstand us as to our position on the present obscenity law;" she told the House Judiciary Committee, "we want those provisions as to obscenity to remain, and we only have an interest in the present law to the extent that it deals with the prevention of conception" (*Hearings on H.R. 5978*, p. 6). As Sanger explained to Dennett, "I think if I were keen about repealing the obscenity law, I should have the desire to remove abortion . . . together with the prevention of conception" (Park Papers [Feb. 1930]). Sanger, however, believed that with the strength of the Catholic lobby opposing her, the complete removal of contraception and particularly abortion from the category of prohibited materials would be almost impossible to achieve.

This partial accommodation to non-feminist, conservative forces resulted in only partial victories. While Sanger did get the support she wanted from the medical establishment and from other moderate liberal professional groups, she did not get the legislation she sought. Sanger may have over-estimated her ability to counter the opposition of the Catholic lobby and under-estimated the personal conservatism of most legislators; at the very least, she misjudged the social and moral environment (Dienes, 1972, p. 93). As a result, despite repeated efforts, the federal bills she advocated never got out of committee. "The legislative approach seemed to me a slow and torturous method of making clinics legal," Sanger (1938) wrote, "we stood a better and quicker chance by securing a favorable judicial interpretation through challenging the law directly" (p. 211).

Aware that customs officials were enforcing the Comstock Laws' ban on obscene materials far more often than postal officials, Sanger and her associates decided to challenge the law once again. Their goal was a judicial ruling that either exempted physicians from the importation prohibition or that declared the federal law unconstitutional (Dienes, 1972, p. 109). In 1936, the case, which centered on the confiscation of a package of diaphragms

imported from Japan by Dr. Hannah Stone of Sanger's Birth Control Clinical Research Bureau, went to the U.S. Court of Appeals. Justice Augustus Hand ruled that though the language of the Comstock law clearly prohibited the importation or dissemination of contraceptives, the ban was not really designed to include physicians (*U.S. v. One Package*, 1936).

This 1936 decision effectively legalized the distribution of birth control—but only as a medical tool whose use was to be defined by physicians. While this certainly improved women's access to contraceptive services, it did not grant women the right of control over reproduction. It would take until 1965 for the Supreme Court to affirm the Constitutional right of married couples to use birth control (*Griswold v. Conn.*, 1965) and another seven years for the Court to extend these rights to unmarried couples (*Eisenstadt v. Baird*, 1972). While these decisions freed women from the punishment of unwanted pregnancy for engaging in sexual activity, they did not specifically affirm that reproductive choice was among women's fundamental liberties. Even in 1973, when the Court lifted the ban on abortion, the abortion choice was deemed too significant to be left in the hands of a woman alone and would have to be made in consultation with her physician (*Roe v. Wade*, 1973) and finally mediated by the interests of the state.

Margaret Sanger's belief in the importance of sexual and reproductive autonomy for women was unwavering. In her view, the accommodationist strategy she adopted was not an abandonment of her feminist principles. And, indeed, her accommodation only went so far. She was never willing to give the medical establishment complete authority over the birth control movement and was steadfast in her refusal to accept a rationale for birth control based solely on medical indications. Rather, she remained firmly insistent on the importance of acknowledging economic and social considerations in all contraceptive decisions.

Sanger did try to accommodate the goals of the movement to the demands of middle class, male professionals, but not at the expense of women's right to make their own reproductive choices. "I claim it as a woman's duty and right," Margaret Sanger said in 1921, "to have for herself the right to say when she shall and shall not have children" (Sanger & Russell, p. 18). Nevertheless, her deliberate choice of limited access separated the movement from a gender-based assertion of Constitutional protection (see Gordon, 1977). This has left us at some distance from full reproductive freedom. That we can come together today to talk about birth control is due in large part to Margaret Sanger; that we still have so much to talk about is also part of her legacy. What remains clear is that the struggle to guarantee women's reproductive rights and liberties is far from over.

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Sandra Day O'Connor: Myra Bradwell's Revenge

by Orma Linford

The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . [and] incompetent fully to perform the duties and trusts that belong to the office of attorney and counsellor. . . . [The] paramount destiny and mission of woman are to fill the noble and benign offices of wife and mother. This is the law of the Creator.

Myra Bradwell v. State of Illinois (1873)
(Concurring Opinion)

With this statement, in the first sex discrimination case heard by the U.S. Supreme Court [*Bradwell v. Illinois*, 83 U.S. 130 (1873)], Justice Joseph P. Bradley dismissed Myra Bradwell's claim that the U.S. Constitution protected her right to practice law and prohibited the State of Illinois from denying her admission to the bar. On September 25, 1981, Sandra Day O'Connor took the oath of office as the first woman Supreme Court Justice.

In one sense, the appointment of Sandra Day O'Connor to the Court was ironic: the most inherently conservative of the three branches of government, the judiciary seemed the most unlikely to be the first to surrender its highest office to a woman. After all, in 1981, only 5% of the nation's judges were women; women accounted for only 2% of the partners in the largest law firms; in the law schools, only 5% of full professors were women; no state bar association had elected a woman as president; and no woman had ever served on the board of governors of the American Bar Association. As recently as 1970, only 8.5% of the students in law school were women, and women constituted fewer than 3% of the practicing attorneys. The numbers had improved by the time O'Connor was nominated, but the increase had no impact on the pool of candidates available to President Reagan when he looked for a replacement for the retiring Justice Potter Stewart (Library of Congress personal interview; *Time* 17).

Furthermore, Ronald Reagan seemed an unlikely champion of women. While he routinely expressed his support for women's movement toward equality, his actions did not match his words. He was the first presidential candidate in recent memory to run on a platform which excluded the Equal Rights Amendment, and he appointed as solicitor general a Brigham Young University Mormon law school professor who had authored a book urging defeat of the ERA. Candidate Reagan was an uncompromising enemy of women's right to choose abortions, and his 1984 platform would include a plank proposing that federal judicial appointees be screened for commitment to "the sanctity of human life," a provision

universally interpreted as a promise to appoint judges only if they opposed abortion. Just 10% of his appointments to the highest positions in the executive branch had been women. Perhaps most significantly, while his predecessor, Jimmy Carter, had selected women for 19.6% of his appointments to the courts of appeals, and 14.1% of his appointees to the district courts were women, Reagan's first round of judicial appointments included no women to the courts of appeals, and women were only 4.3% of his appointees to the district courts (*Time* 8; *Congressional Quarterly* 2560).

Sandra Day, born March 26, 1930, was the eldest child of Harry and Ada May Day. In a sense, she grew up in two different worlds. O'Connor was born in a hospital in El Paso, Texas, because the remote area in which her parents lived had no medical facilities and, for a time, no running water or electricity. She spent her early childhood years and summer vacations on the cattle ranch called the "Lazy B" operated by her parents on 260 acres astride the New Mexico-Arizona border. Like most farm children—male and female—she did manual labor and learned to drive a truck well before she was old enough to get a driver's license. The other part of the time, she lived with her grandmother in El Paso, where she attended a private elementary school and later a public high school. Thus, she received the quality schooling available in an urban area, while at the same time she learned the skills of self-sufficiency required by ranch life in the desert country of the American Southwest.

O'Connor entered Stanford University in 1947, graduated in 1950, and went on to Stanford Law School, where she received her law degree in 1952. She completed the usual seven years of work in a short five years. That same year, she married a law school classmate, John Jay O'Connor III. She served as deputy county attorney in San Mateo County, California, from 1952 to 1953. When her husband entered military service, she accompanied him to Germany and worked as a civilian attorney for the army in Frankfurt from 1954 to 1957. After his discharge, they moved to Arizona, and O'Connor opened up a neighborhood law office with a partner and was engaged in private practice in Maryvale, Arizona, from 1958 to 1960. She took five years off to raise three sons. O'Connor served as an assistant attorney general of Arizona from 1965 to 1969. Appointed to fill a vacancy in the state senate in 1969, she was reelected twice to two-year terms, serving as majority leader in her last term. In 1975, she was elected to the Maricopa County Superior Court, which served Phoenix, and, in 1979, Governor Bruce Babbitt appointed her to the Arizona Court of Appeals.

Neither the Constitution nor federal statutes prescribe qualifications for Supreme Court Justices, or for lower federal court judges, for that matter. Only custom requires a federal judge to have a law degree. However, that is not the only requirement that custom and practice dictate. As Henry Abraham points out, a prospective Justice must be "politically 'available' and acceptable to the executive,

legislative, and private forces that . . . constitute the powers-that-be which underlie the paths of selection, nomination, and appointment" (Abraham 53). On the whole, the 101 Justices who preceded O'Connor had amazingly little prior judicial experience; of the twenty-eight men appointed in the fifty years before her appointment, half had no prior judicial experience and half of those who did had five years or fewer on the bench. The Court being the singular and unique institution that it is, other qualities are more important. In the words of members of the Court themselves, a Justice must be a "philosopher, historian, and prophet," and possess "imagination, inordinate patience, poetic sensibilities," and "antennae registering feeling and judgment beyond logical, let alone quantitative proof" (Abraham 55). A Justice must be a thinker, more than a technician.

The first woman on the federal bench was Genevieve R. Cline, appointed by President Calvin Coolidge in 1928, to the U.S. Customs Court. Florence Allen, the first woman to serve on a federal appellate court, was appointed to the Court of Appeals for the Sixth Circuit in 1934 by President Franklin Delano Roosevelt (Abraham 62). When Sandra Day O'Connor was appointed, there were just forty-four women on the courts of appeals and district courts (Library of Congress Interview). When Ronald Reagan searched for Justice Potter Stewart's replacement, what was he looking for? Henry Abraham has identified four kinds of influences on a president's choice: (1) objective merit, (2) personal friendship, (3) political and ideological compatibility, and (4) balance of representation on the Court (64).

With regard to merit, O'Connor's background recommended her. She had served in all three branches of government on the state level; she had been a county attorney in California and assistant attorney-general in Arizona; she had spent over six years in the Arizona legislature, the last three as majority leader of the senate; and she had been a county judge before her appointment to the Arizona court of appeals. She had even spent some time with the military as a civilian lawyer. Her public activities on her official biographical data sheet reveal work with a constellation of civic, professional, and community organizations and causes, ranging from the Board of Trustees of Stanford University to the Soroptomist Club of Phoenix, from the Arizona Criminal Code Commission to the Maricopa County Juvenile Detention Home Visiting Board, and from the National Conference of Christians and Jews to the Board of Junior Achievement (Public biographical data sheet; Personal Interview with O'Connor).

A *magna cum laude* graduate of Stanford, she was third in her class at Stanford Law School. She had written for scholarly journals. O'Connor's "temperament" could be assessed by reports of capacity for hard work, solid and methodical performance under pressure, mental toughness, and almost legendary serenity. She had impressed state senate colleagues with her conscientious and

systematic preparation and equanimity. Lawyers who had practiced before her reported that as a judge she tolerated nothing less than their best effort in terms of competence, professionalism, and good manners.

On a personal level, she had a solid marriage with a man who shared her commitment to public life. She had reared three children. She was an athlete, with a respectable game of tennis and an acquaintance with ski hills on both sides of the Continental Divide. Friends said she was a good dancer, a good cook, and gave a good party (*Newsweek* 16-19; *Time* 8-19).

O'Connor was not a close personal friend of the President but had close friends who were. She had maintained her California connections. Arizona Senator Barry Goldwater used his personal as well as political influence. Associate Justice William Rehnquist, a law review classmate at Stanford and long-time friend, is reported to have given her strong endorsement. Her case had been made well before she went to the White House for the formal interview, which she describes as "not very long" (Personal interview with O'Connor hereinafter not cited).

As far as O'Connor's judicial philosophy was concerned, she was almost perfect. She was a very active member of the President's own Republican party. If views about the role of the federal judiciary can be divided into two schools of thought—"activists" and "passivists"—O'Connor was clearly the latter. She was a judge who would act in accordance with judicial self-restraint, and that was the kind of judge the President wanted. Judicial self-restraint can be described best in negative terms. To list its axioms is to make a catalogue of shall nots. According to judicial self-restraint, even where federal courts have jurisdiction meaning the power to hear and decide cases, judges should not do certain things. They should take care not to intrude upon the prerogatives of the legislative and executive branches; courts should not make policy. They should not interfere with the states' exercise of their reserved powers; federal courts should respect the efforts of the states to solve public problems. They should not substitute their judgment for the judgments of state courts in cases where actions of states can come under scrutiny of the federal courts. Other rules require refusing to hear cases where the parties lack standing to sue, that is, lack a concrete, immediate, and personal interest in the outcome of the case; the parties have not exhausted administrative or state remedies; issues are not ripe for adjudication; or the parties are asking the Court to decide hypothetical questions or give advisory opinions. O'Connor's appellate court opinions, legislative voting record, and public statements and writings indicated that she could be trusted.

Among those who mattered, only the extremists on the far right did not give her a clean bill of ideological health. They scoured her voting record in the Arizona legislature and found suggestions that she had supported the right to abortion and the ERA. As it turned out, the record was ambiguous (*Congressional Quarterly* 1235, 1731-32, 1831,

2145). As far as the general public was concerned, her nomination was popular. An August 1981 Gallup poll revealed that 69% of Americans considered her qualified for the job; only 4% thought that she was not qualified (*The Gallup Report* 3-5).

In achieving the final objective—balance of representation on the Court—Ronald Reagan, of course, would make history. Regional, religious, and racial considerations have motivated Court appointments in the past. Although Justice William Rehnquist's roots are in Arizona, he did not reside there when he was appointed, so O'Connor would formally correct the under-representation of the western part of the country. While Justice William Brennan occupies the "Catholic seat" on the Court, no one has occupied the "Jewish seat" since Abe Fortas resigned, so it could be argued that religion in recent times has not been an important factor. When Lyndon Johnson appointed Justice Thurgood Marshall in 1967, a "black seat" was created. While women were making steady progress toward equality in all fields, the absence of a female Justice had become increasingly unacceptable since the 1970s. Presidential candidates from the 1972 election on routinely promised the appointment of a woman to the Court, and when President Gerald Ford had to find a successor to Justice William O. Douglas, several women's names actually circulated.

Despite what looked like impressive credentials, O'Connor hardly had national name recognition. She was, indeed, an obscure state judge, not even on the highest court of the state. On the other hand, men with more modest credentials have been nominated in the past. O'Connor herself is unequivocal; when asked recently whether—more important than her judicial philosophy or objective merit—she thought it was the fact that she is a woman that got her the nomination, she said without hesitation and with certainty: "Why, I do. I'm sure that was the main thing." After the clear indication that Reagan gave during his campaign that he wanted to appoint a woman to the Court, O'Connor thinks that the pool of candidates he immediately turned to were Republican women judges, and "there aren't many women judges in the country to begin with, and there are even fewer Republican women judges." She refuses to speculate about the suggestion that since the President was committed to appointing a woman, the standards for selection were lower than they would have been if he had been considering men as well: "I'm not going to rate myself. . . . I hope not [that he didn't lower the standards]. That's for others to say, not me." Also, as O'Connor says, "I would imagine that my age had something to do with it. If you're going to make an appointment to the Court, I'm not sure that you want to put someone on who is so old that they can only serve a brief time. Nor do you want to appoint someone who is so young that they lack experience. That pretty much confines you to someone in the middle years, and I doubt that there were very many women Republican judges in their middle years from which he could make a

selection." With gender, party, judicial experience, and age central factors, O'Connor's name moved quickly to the fore. With a variety of issues affecting women likely to come before the Court, feminists were enthusiastic about the fact that a woman had been appointed but concerned that she was a judicial and political conservative.

Justice O'Connor feels that she personally was the victim of sex discrimination at only one point in her life. Looking for her first jobs, initially in California and later in Arizona, no major law firm would hire her because she is a woman, although she was offered positions as a legal secretary. During her grade-school and high-school years, she lived with her grandmother, a strong, independent woman. O'Connor says that she was given "enormous freedom," and that her grandmother "thought anything I wanted to do was fine, and there wasn't anything I couldn't do as far as she was concerned."

She felt no discrimination in law school: "I always competed [with male students] and I did not feel hassled. I thought I was accepted. I got good assignments on the law review and my professors treated me very nicely." Her professors provided her with no assistance in finding a job after graduation, but she says that they gave no help to anyone else. As a trial attorney, she says, judges and colleagues treated her no differently than the way they treated male lawyers, despite the fact that the women lawyers in Phoenix were so few that when they had lunch together, they "could all sit at a fairly small table." Once she discovered that the private sector was closed to her, she found a series of positions in the public sector, where she maintains her gender was never a handicap: "Once I could get my foot in the door, I was always able to develop a job or a position that I thought was pleasing and one in which I was happily accepted by my peers and colleagues."

In addition to her grandmother, she had a strong role model in Lorna Lockwood, who would become the first woman to serve as the chief justice of a state supreme court:

She was a woman whose life in many ways preceded mine. She grew up in a rural area, was an assistant attorney general, a state legislator, a trial court judge, and later an appellate court judge. She was always interested in all of the women lawyers, gave generously of her time and attention. Her experience in Arizona certainly made it easier for me.

The fact that O'Connor served as a state legislator and state judge—both trial and appellate—helped shape her views about the kind of role that the Supreme Court should play in the American political system. She and her colleagues worked very hard on significant matters of public policy, and she acquired respect for the products of the legislative process. As a result, she thinks that the Supreme Court should pay deference to legislative bodies. As a state judge, she saw colleagues arrive at sound decisions, ensure that justice was dispensed, and make good law. Consequently, she does not accept the notion that federal judges are somehow better than state judges and thinks that the Supreme Court should be reluctant to

substitute its judgment for that of state courts. These are two important axioms of the judicial self-restraint mentioned above that could determine her position in cases where legislatures or state courts have made decisions involving women's issues.

While O'Connor was in the state senate, the Arizona legislature debated ratification of the Equal Rights Amendment, and she describes the lobbying by its proponents and opponents as something close to a siege: "We would get floods of mail on both sides of the issue. There was great pressure on every single member of the legislature, by both sides." She attributes the defeat of the ERA to the depth and intensity of the divisions it caused in the country, rather than to the size of the opposition or the merits of their arguments:

It is clear that women throughout the country were themselves divided, and that division went right down to the grass-roots level. When that kind of heated confrontation emerges over any issue, it makes the likelihood of affirmative legislative action greatly reduced.

Her position on the Equal Rights Amendment itself is ambiguous. Given the absence of the ERA, women—and men as well—have been forced to depend, for constitutional protection against sex discrimination, on Supreme Court interpretation of the provisions that forbid state and federal governments to deny any person "the equal protection of the laws." The Fourteenth Amendment applies this prohibition to the states; the Court has ruled that the Fifth Amendment due process clause contains an equal protection component that applies to the federal government. The standards of equal protection analysis vary, and the one that the Court selects virtually determines the outcome of a case. The Court has applied a very demanding standard in cases involving race discrimination, finding distinctions based upon race to be inherently "suspect classifications," which require proof of a "compelling governmental interest" to sustain them, and subjects governmental justifications to "strict judicial scrutiny" [e. g. *Univ. of California Regents v. Bakke*, 438 U.S. 265 (1978)]. Given the rigor of the standard, it can be argued that no racial classification could survive judicial examination under the equal protection clause.

The Court, however, has refused to declare classifications based upon sex to be suspect, and, consequently, applies a less rigorous test: the governmental interest only has to be "important," and the Court will give just plain "scrutiny" to such governmental action, and its inquiry simply requires that the action bear a "close and substantial relationship" to the governmental interest [e. g. *Craig v. Boren*, 429 U.S. 190 (1976)]. As a result of the relaxed standard, there have been several instances where the Court has upheld governmental action which treats men and women differently—for example, the male-only draft [e. g. *Rostker v. Goldberg*, 453 U.S. 57 (1981)].

It should be noted that there is a third standard of review, according to which the Court requires only that

the governmental action have a "reasonable (or 'rational') basis"; this test determines the constitutionality of garden-variety classifications, like tax laws or zoning ordinances, and is not a demanding standard [e. g. *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980)].

O'Connor refuses to say whether she thinks the Court adopted the correct standard for sex discrimination cases. However, independent of *stare decisis*, it is significant that she explains the different judicial treatment of race and sex in historical terms:

[T]he 13th, 14th, and 15th amendments were adopted in direct response to the Civil War and to the plight of race-based discrimination. The application of those amendments, and thus the equal protection clause, to gender-based discrimination came later, much later, and the Court simply employed a different test.

Interestingly, O'Connor's subscription to the historical approach to interpreting the equal protection clause sits side-by-side with her belief, stated in very strong terms, that the Court has a special responsibility to protect persons who cannot prevail in the political process. Such a historical explanation, however, overlooks the facts that sex, like race, is an immutable characteristic and that women and blacks share similar legacies of stereotyping, discrimination, and political powerlessness. Since O'Connor has now served more than six years on the Court, her apprenticeship may be considered over and her record sufficient for at least tentative conclusions. Her record may be analyzed in three ways: general observations on what her voting record indicates about her general approach to the role of the Court in the American political system; how she has voted on cases involving civil rights and liberties in general, and finally, a review of her record in cases which affect, either directly, or by analogy, women's issues.

To begin with, O'Connor usually voted on the same side as Chief Justice Burger and Justice Rehnquist, usually identified as the conservative wing of the Court, but they usually deserted her when she voted in favor of women's rights. When the issue is not which way the court will decide a case or a question but whether it should hear it in the first place, and the Justices disagree, she is much more likely than not to vote against reaching the merits, by dismissing it, for example, for want of jurisdiction or lack of standing to sue [e. g. *Allen v. Wright*, 468 U.S. 737 (1984)]. In a case which requires a judgment on whether an administrative agency has acted unconstitutionally or illegally, the odds are very good that she will uphold the agency action [e. g. *Commissioner of Internal Revenue v. Tufts*, 461 U.S. 300 (1983)]. If the Court is asked to invalidate an action of a state legislature or the state executive branch, she is more likely than not to vote in the state's favor [e. g. *Rice v. Rehner*, 463 U.S. 714 (1983)]. In a case in which the Court is asked to review the findings and conclusions of the highest court in the state, she usually votes to accept them [e. g. her dissent in

Southland Corporation v. Keating, 465 U.S. 37 (1984)]. In the area of constitutionally protected rights and liberties, her position, to a great extent, depends on what right or liberty is at issue. In procedural due process cases, a criminal defendant can expect little comfort from Justice O'Connor; she has voted about five times more often to uphold a conviction than reverse it. In cases involving the substantive liberties of conscience, expression, and association, the reviews are mixed; while she has voted to sustain government action challenged on these grounds more often than not [e. g. *Board of Education v. Pico*, 457 U.S. 853 (1982)] she has contributed to significant First Amendment victories [e. g. *Kolender v. Lawson*, 461 U.S. 352 (1983)]. Where property interests under the due process clauses of the Constitution have been involved, she usually votes against the government action and to sustain the property rights [e. g. *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984)].

In cases involving race, she agrees with the discrimination claim in roughly half of the cases. In sex discrimination cases, she has much more often voted in favor of the claimant with very important exceptions. Her posture in two kinds of civil rights cases involving race is of interest, because they involve matters of general equal protection principle. In the Memphis firefighters case [*Firefighters v. Stotts*, 468 U.S. 561 (1982)], she joined four other Justices in ruling that a federal district court could not order the city to maintain a certain percentage of black employees when it meant layoffs of white employees with more seniority. She also added a separate concurring opinion in which she emphasized that she thought that the federal statute which prohibits employers from discriminating on the basis of race protects the rights of white male employees. The Memphis case was widely interpreted as the beginning of the end for affirmative action. Another case [*Guardians Association v. Civil Service Commission of New York* 463 U.S. 582 (1983)] was a suit brought by black and Hispanic police officers in New York City, where O'Connor wrote a concurring opinion insisting that proof of intent to discriminate was essential to a valid claim under a federal civil rights statute; proof of discriminatory effect is not enough.

During her first term on the Court, she participated in six pertinent sex-discrimination cases. First, she joined the Court in removing a jurisdictional barrier to a suit brought by female flight attendants against Trans World Airlines, challenging its policy of grounding all female flight attendants who became mothers, while permitting male counterparts who became fathers to continue to fly [*Zepes v. Trans World Airlines*, 455 U.S. 385 (1982)]. She also voted to uphold administrative regulations prohibiting federally funded education programs from discriminating on the basis of sex in employment [*North Haven Board of Education v. Bell*, 456 U.S. 512 (1982)]. Next, joining an opinion written by Justice Marshall, she helped clear the way for a woman employee to sue a Florida state university for race and sex discrimination, but not without a re-

minder of judicial self-restraint in her separate concurring opinion [*Patsy v. Board of Regents*, 457 U.S. 496 (1982)].

In two other cases, her sympathies were not with the female complainants. She joined the Court's ruling against the employees of American Tobacco Company, who claimed race and sex discrimination under federal civil rights law [*American Tobacco Company*, 456 U.S. 63 (1982)], and she wrote for the Court to cancel a lower federal court's award of back pay to female employees of Ford Motor Company [*Ford Motor Company v. Equal Employment Opportunity Commission* 458 U.S. 219 (1982)].

In the final case, writing for the Court, O'Connor held invalid the policy of a state-supported university excluding males from its school of nursing. *Mississippi University for Women v. Hogan* [458 U.S. 718 (1982)] is important because she explained the equal protection standard that she will apply in sex discrimination cases. It is also significant because she disagreed sharply with her most consistent judicial soul mates, Burger and Rehnquist, who both wrote dissenting opinions. There was no surprise in *Hogan*: she followed precedent and applied the intermediate standard of review. It was, however, a strong restatement, and the kind of examination that she gave to the state's announced interests did not fall much short of "strict scrutiny." And, in a careful footnote, she firmly rejected the suggestion made by Justice Powell, in his separate concurring opinion, that a less rigorous standard of review could be applied. Even though the case involved unfair treatment of males, she made it clear that the equal protection test cuts both ways: "it must be applied free of fixed notions concerning the roles and abilities of males and females" (458 U.S. at 724-25). She gave the footnote to Myra Bradwell.

Three sex-discrimination cases were decided during the 1982-83 Term. She voted with the majority in holding that an employer's health plan which gave less pregnancy coverage to the spouses of male employees than it gave to female employees violated the Pregnancy Discrimination Act [*Newport News Shipbuilding and Dry Dock Company*, 462 U.S. 699 (1983)]. But the following week, she agreed with the Court when it held that the father of an illegitimate child was not entitled to be notified of its adoption, although the state gave that right to the mother [*Lehr v. Robertson*, 463 U.S. 248 (1983)]. Finally, she agreed that a federal civil rights law was violated by an Arizona retirement plan which provided lower monthly annuity payments for state employees who were women, but then she wrote a concurring opinion in support of granting only prospective relief [*Arizona Government Committee v. Norris*, 463 U.S. 1073 (1983)].

Midway through the 1983-84 Term, O'Connor helped deliver a serious blow to women's equality in education. *Grove City College v. Bell* [465 U.S. 555 (1984)] ruled that the federal statute which prohibits sex discrimination in any education program requires termination of federal funding for only the specific part of the program in which discrimination was found, not for the entire institution. In

another case [*Equal Employment Opportunity Commission v. Shell Oil Company*, 466 U.S. 54 (1983)], she wrote a partially concurring opinion in support of the enforcement of an Employment Opportunity Commission subpoena, but she complained about what she considered lack of notice to the defendant, Shell Oil Company. Next, she joined a unanimous Court in upholding a federal statute providing a five-year extension of a gender-based classification for determining Social Security benefits which the Court had previously held unconstitutional. Since wage earners had depended upon the statute in making their retirement plans, Congress could protect them from the damaging effects of that previous decision—an “important governmental interest” [*Heckler v. Matthews*, 465 U.S. 728 (1984)].

Later that Term, O'Connor joined a plurality opinion which held that a woman employee had forfeited the right to sue her former employer because she had not filed her complaint in accordance with the statute of limitations [*Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984)]. In a fourth case, *Palmore v. Dicoi* 466 U.S. 429 (1984)], she was a member of a unanimous Court which ruled that Florida could not take custody of a child from a mother and give it to the father when the mother, a Caucasian, married a black man.

In *Hirshon v. King and Spaulding* [467 U.S. 69 (1984)], a unanimous Court declared that a law firm violated federal civil rights law when it fired a woman lawyer who had been told, when she was hired as an associate, that she could expect to become a partner although only male associates had been made partners. Finally, the Court told the United States Jaycees that their freedoms of expression and association were not violated when Minnesota interpreted its human rights statute to prohibit the organization from excluding women; O'Connor joined in the judgment and wrote a separate concurring opinion [*Roberts v. United States Jaycees*, 468 U.S. 609 (1984)].

The 1984-85 Term provided only one significant sex discrimination case, *Anderson v. Bessemer City* [470 U.S. 564 (1985)], and O'Connor agreed with the Court's finding for a woman whose application for city recreation director was rejected in favor of a less experienced, less well-qualified man.

The 1985-1986 term produced the Court's first opinion involving sexual harassment as a violation of federal civil rights legislation [*Savings Bank v. Vinson*, 477 U.S. 57 (1986)]. All nine justices agreed that a female bank employee was the victim of sex discrimination because her supervisor created an environment of intimidation in the workplace with his unwelcome sexual advances, regardless of the facts that she had not been forced against her will to submit to his attentions and that there was no economic *quid pro quo*. However, six justices agreed that employers are not always liable for sexual harassment of employees by their supervisors, and O'Connor was one of the six. O'Connor was among the majority when the Court held that Social Security legislation granting survivor's benefits to a wage earner's widowed but remarried spouse, but not

to a remarried surviving spouse who had divorced him, was not a violation of equal protection [*Bowen v. Owens*, 476 U.S. 340 (1986)]. She was also in the majority in a 5-4 decision refusing to review a lower federal court ruling that the application of a state statute prohibiting sex discrimination to a private school violated the constitutional protection of freedom of religion [*Ohio Civil Rights Commission v. Dayton Schools*, 477 U.S. 619 (1986)].

In three decisions announced toward the end of the term, the Court withstood the Reagan administration's assault on affirmative action, and, although these decisions involved race rather than sex, the principles involved have general application [*Sheet Metal Workers v. Equal Employment Opportunity Commission*, 478 U.S. 421 (1986); *Firefighters v. Cleveland*, 478 U.S. 405 (1986); *Wygant v. Jackson Board of Education*, 476 U.S. 267, (1986)]. O'Connor joined five other justices in two cases approving court orders requiring preferential treatment of nonwhites who are not actual victims of discrimination and directing a union to meet membership goals and establish a fund to be used to remedy discrimination. She did balk a bit, however; in both cases, she added concurring opinions expressing objections and separating herself from certain parts of the majority opinions. She joined a different, smaller majority to invalidate a third affirmative action program, but again added a concurring opinion that made it clear that she was not deserting race-conscious remedies for discrimination; in fact, significantly for women, she recognized as a permissible governmental interest the provision of “role models.”

The Court's 1986-87 term produced several cases dealing with constitutional or statutory rights which affected women. Once again, the positions taken by O'Connor are difficult to define narrowly. In January 1987, she voted to uphold a California statute requiring employers to provide leave and qualified reinstatement to pregnant employees, rejecting the claim that the state law was pre-empted by the federal Pregnancy Discrimination amendment to Title VII, which provides that pregnant employees shall not be treated differently than other disabled employees [*California Federal Savings and Loan Assn. v. Guerra*, 479 U.S. 613 (1987)]. The employer argued that because the California law required reinstatement in the case of pregnancy, but not for other disabilities, it constituted sex discrimination under Title VII. The majority of the Court disagreed, ruling that Congress intended “to construct a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.” Dissenting were Justices White, Rehnquist, and Powell, with whom O'Connor frequently agreed on other issues.

O'Connor wrote for a unanimous Court in *Wimberly v. Labor and Industrial Relations Commission* [479 U.S. 511 (1987)] in a non-preemptive ruling which did not work in favor of a pregnant employee. The Court ruled that the Federal Unemployment Tax Act, which prohibits states to deny unemployment benefits solely on the basis of

pregnancy, did not bar the denial of benefits to a woman who left her job when she became pregnant, because the Missouri law in question disqualifies all claimants who leave their jobs for reasons not connected to their work.

In the most-publicized affirmative action case of the term, *Johnson v. Transportation Agency* [480 U.S. 616 (1987)], the majority upheld, against Title VII objections, an affirmative action plan under which a woman was promoted to the position of road dispatcher over two white male applicants. All three were rated "qualified," but the two men scored 75 points on evaluations based upon tests, experience, expertise, etc., while the woman's score was 73. O'Connor did not join the opinion of the Court, but wrote a concurring opinion in which she expressed her agreement with the judgment only, and wrote separately because she thought while the judgment was supported by precedent, "The Court has chosen to follow an expansive and ill-defined approach to voluntary affirmative action despite the limitations imposed by the Constitution and Title VII and because the dissent rejects the Court's precedent and addresses the question . . . as if the Court were writing on a clean slate." It should be noted, however, that she dissented from a majority opinion which upheld a court-ordered affirmative action interim requirement that Alabama promote one black state trooper for every white trooper promoted if qualified black applicants are available. Writing for Rehnquist and Scalia, she objected to the use of a quota system [*U.S. v. Paradise*, 480 U.S. 149 (1987)].

With regard to the issue of abortion, O'Connor had told the Senate during her confirmation hearings that she was personally opposed to abortion, but that it would be improper for her to speculate about constitutional and legal issues that might come before her as a member of the Court in the future. The fact that some senators were left unsatisfied about her answers presented no threat to her confirmation (*Congressional Quarterly* 1235). As the only member of the Court to have personal experience with child-bearing, how she would vote on cases involving abortion was of great interest. Not until her second year did the Court accept more abortion cases for full argument. Three in all, the most important involved an Akron, Ohio, ordinance best characterized as an expression of "massive resistance" to the line of cases beginning with *Roe v. Wade* in 1973, upholding the constitutional right of a woman to decide whether or not to terminate her pregnancy.

The Akron ordinance contained seventeen different provisions regulating abortion, each designed to discourage it or make it more difficult to obtain. The substantive provisions were introduced by several findings, one of which found that human life begins with the union of sperm and egg. When the case reached the Court, five sections were at issue: requirements of hospitalization, informed consent, parental consent, a waiting period, and the humane disposal of fetal remains. In *City of Akron v. Akron Center for Reproductive Health* [462 U.S. 416

(1983)] the Court struck down all five. O'Connor, writing for White and Rehnquist, authored the dissent. She began by rejecting the approach that has consistently governed the Court's analysis of legislation regulating abortion since 1973. She argued that technological advances have made, and will continue to make, the Court's three-part formula (three trimesters and legislative power in each) obsolete. The safety of second trimester abortions has increased dramatically, she said, so that if a state's power is measured by its interest in the mother's health, regulation may be prohibited until well after the third month; likewise, medical advances have made, and will continue to make, the possibility of the fetus living outside the mother's body much earlier than six months. O'Connor noted,

Just as improvements in medical technology inevitably will move forward the point at which the State may regulate for reasons of maternal health, different technological improvements will move backward the point of viability at which the State may proscribe abortions except when necessary to preserve the life and health of the mother (462 U.S. 456).

Instead of "due process by trimester," she would apply a single standard to determine the constitutionality of legislation, regardless of what stage of pregnancy was being regulated. The Court should ask, she insisted, whether the regulation was "unduly burdensome," and, applying that yardstick, none of the Akron provisions imposed an "undue burden" on the woman's right of choice. The "undue burden" test was used in the abortion funding cases which raise an entirely different set of legal issues.

O'Connor's opinion does not state flatly that she thinks that legislative bodies do have the power that *Roe* declared unconstitutional, but she gave flat statement to her belief that "the state's interest in protecting potential human life exists throughout the pregnancy" (462 U.S., at 456), and argued for a substantial relaxation of the demanding "strict scrutiny" rule that the Court has said it must apply in these cases. Also, her opinion was liberally sprinkled with approving references to "reasonable" and "rational" as descriptions of the appropriate measure of state interest required, as contrasted with the Court's overall consistent demand for proof of a "compelling" interest. Clearly, she would give legislatures wide power in the regulation of abortions.

In the second case, *Planned Parenthood v. Ashcroft* [462 U.S. 476 (1983)], where the Court struck down a Missouri statute requiring second trimester abortions to be performed in hospitals, she again wrote in dissent. In the third case [*Simopoulos v. Virginia*, 462 U.S. 506 (1983)], she wrote an opinion approving a Virginia requirement that second trimester abortions be performed in licensed clinics. She repeated her view of the proper constitutional recipe: neither statute constituted an "undue burden" on the constitutional right of women.

The 1985-1986 term provided one abortion case, *Thornburgh v. American College of Obstetricians and Gynecologists* [476 U.S. 747 (1986)], in which O'Connor again

made pro-choice advocates nervous by dissenting from a decision declaring unconstitutional four provisions of a Pennsylvania abortion control act. Although her dissenting opinion would have given a victory to those who deny any constitutional right to abortion, it serves, in a perverse way, as a sort of control: first, she does not join the dissenting opinions of Burger, White, or Rehnquist, who ask for a reexamination of *Roe v. Wade*, and second, she attacks the Court on matters of form, rather than substance.

President Dwight D. Eisenhower once said that his appointment of Earl Warren as Chief Justice in 1953 was "the worst damn fool mistake I ever made" (qtd. in Ulmer 252), and President Richard M. Nixon was given reason to worry about Justice Harry Blackmun. Sandra Day O'Connor, on the other hand, has been almost exactly what Ronald Reagan sought in a Justice.

True, she deserted her conservative legal soul mates in important cases involving discrimination, voting to uphold women's rights and affirmative action programs, and it was even suggested by some that during her fourth, fifth, and sixth terms, she became generally more independent in other areas as well. However, to suggest that she should no longer be classified as a conservative but as a moderate is clearly premature. Her record on women's issues is mixed. Her views on affirmative action, the Equal Rights Amendment, and abortion, for example, are unclear. Furthermore, it is not likely that she will change her mind about questions of judicial self-restraint, deference to the political branches of government, and states' rights; her attitudes on these matters would have a Supreme Court much less active in the protection of individual rights.

In addition, the Court is very different from the Court before Ronald Reagan took office. Former Associate Justice William Rehnquist, the member of the Court who has most consistently voted against women's rights, is firmly in place in the seat of the Chief Justice vacated by Warren Burger. Rehnquist's replacement is Antonin Scalia, and retiring Associate Justice Lewis Powell, one of the moderates of the Court, will be replaced by Anthony Kennedy. Both Scalia and Kennedy were U.S. Courts of Appeals judges whose records indicate that they fit the Reagan recipe for judicial appointments perfectly. The increase in the number of fellow conservatives may very well galvanize O'Connor's predilections, which means that the Court will be dominated by four solid legal and judicial conservatives, all relatively young. The Reagan legacy will endure a long time. The distinct possibility that the 1988 presidential election will produce a president with the same views about judicial appointments and have four to eight years to implement them bodes ill for the rights of women. Liberal Justices Harry Blackmun, William Brennan, and Thurgood Marshall are more than eighty years old. Advocates of the rights of women—and others—will have a lot to worry about for a long time.

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State Constitutions and Women: Leading or Lagging Agents of Change?

By Susan A. MacManus with the assistance of
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State constitutions are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of Federal law. The legal resolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.

William J. Brennan, Jr. (1977)
Associate Justice
United States Supreme Court

No aspect of state government has been more severely criticized than state constitutions. Condemned as antiquated, too long and detailed, poorly organized, difficult to amend, and more concerned with restricting state action than facilitating problem solution, constitutions have been under attack in all states for most of this century.

Mavis Mann Reeves (1982)
Professor; Co-Author of
Pragmatic Federalism

Throughout American history, state constitutions have been lauded as either the "leading" agents of change in the battle for more comprehensive civil rights and liberties (Sturm and Wright, 1975; Brennan, 1977; Welsh and Collins, 1981) or as "the drag anchors of state progress . . . permanent cloaks for the protection of special interests and points of view" (Terry Sanford, qtd. in Leach, 1976: ix; Leach, 1969). In this paper, we examine this debate in the context of women's rights, focusing primarily on changes in state constitutions over the past decade.

Since 1776, the fifty states have operated under no fewer than 146 constitutions. Through 1979, 7,563 proposed amendments had been made to operative state constitutions; 4,704 (62%) were adopted (Sturm, 1982: 74). These changes ranged from alterations in a single section to major rewrites of the entire document. Major changes have often come in flurries, stimulated by federal court rulings (e.g. reapportionment rulings of the 1960s) or social and economic revolutions (the minority rights movements of the 1960s and 1970s; the morality movement of the 1980s). In some cases state constitutional change lags behind federal constitutional law; in others, it leads (state ERAs).

In the 1970s alone, twelve constitutional conventions

were held in ten different states (Browne, 1973; Goodman, et al. 1973; Leach, 1973; 1976; 1977; Clark and Clark, 1975; Cornwell et al. 1975; Dunn, 1976; Hoar, 1976; Yarger, 1976; Canning, 1977; May, 1977; Sturm, 1979a; 1982; English and Carroll, 1982; Press, 1982). "Practically all new or revised state constitutions provided added protection for individuals against discrimination, although the protection was more extensively racial than gender, or sexual discrimination" (Sturm, 1979a: 27). However, during the early 1970s, some form of an Equal Rights Amendment was inserted into fifteen state constitutions: Colorado, Hawaii, Maryland, Pennsylvania, New Mexico, Washington, Alaska, Montana, Illinois, Connecticut, Texas, New Hampshire, Massachusetts, Virginia, and Louisiana. Utah and Wyoming adopted constitutional provisions regarding sex equality near the end of the nineteenth century (United States Commission on Civil Rights, 1981: 1; Schafley, 1979).

By the beginning of the 1980s, the pace of state constitutional change had slowed somewhat. Comprehensive revisions emanating from constitutional conventions and commissions were far less common than in the 1970s. Nonetheless, one state adopted a new constitution, its tenth (Georgia, 1982). The District of Columbia's constitutional convention drafted a new constitution in preparation for hoped-for statehood (Sturm and May, 1986).

Between 1980 and 1985, there were a significant number of constitutional changes proposed in forty-five states even if there were not many comprehensive rewrites. A total of 708 constitutional changes with statewide applicability were submitted to voters of which 463 were adopted (65%). (See Sturm, 1982; Sturm and May, 1986.) Thus, even in a "slow" period, changes in state constitutions are common.¹

With each state "free to adopt its own republican constitution under the federal right of constitutional choices," and with the relatively liberal procedures available for changes, it means that each constitution reflects "the geographic, ethnic, religious, socioeconomic, cultural, and historic" uniqueness of that entity (Elazar, 1982: 14). Thus, we would expect the constitutions to vary in their coverage of issues and principles affecting women. The premier difficulty lies in defining what is a "women's issue."

We define "women's issues" as those with the potential to impact disproportionately on women due to demographic, socioeconomic, biological, and/or attitudinal and policy preference patterns. We regard this as a more appropriate way to define women's issues because it permits inclusion of a broader range of policy arenas (e.g. economic and taxation, health, personal safety) than the traditional civil rights and civil liberties and suffrage areas. In a somewhat similar vein, U.S. Rep. Pat Schroeder has proposed broadening the definition of women's issues: "Everything we used to call women's issues are really family issues. If you're shortchanging women, you're shortchanging everybody" (qtd. in Hannon, 1988: 2).

Columnist Ellen Goodman (1988: 7G) concurs: "Democratic issues just aren't segregated by sex anymore. No longer 'special,' these interests have been recast as family concerns, as economic issues . . . [or issues reaching out] broadly to women in terms of education, health care, child care, jobs."

We turn now to a review of the success rates of constitutional proposals that might be regarded as "women's issues" which were submitted to the voters of various states in the 1977-1985 time period.²

The source of the data for our content analysis of constitutional changes made in the fifty states, 1977-1985, is the annual January or February issue of the *National Civic Review*. In it, Albert Sturm provides a detailed list of each constitutional change formally submitted for approval, the method by which it was proposed, and its disposition.³ (The series was discontinued in the 1987 issue which limits our analysis to the 1977-85 period.)

We expect to find some unique provisions that are absent from the U.S. Constitution. Judicial scholars Welsh and Collins tell us "it is worthy of note that in one or another respect all the texts of individual state constitutions offer some measure of constitutional protection not contained in the text of the U.S. Constitution" (1981: 12). Included among this list are protections of the rights of the handicapped against discriminatory practices (three states), labor organizations and/or the right to work (nine states), minors and prisoners, environmentalists, and rights governing personal communication, privacy (ten states), euthanasia, the amount of recoverable damages in death or personal injury cases, use of nuclear power, firearms or ammunition, hunting and fishing, revolution, and punishment and rehabilitation. Their view of state constitutions as "leading" agents of change in the area of individual rights is shared by many others, as noted above. Justice Brennan says it well: "the notion that state constitutional provisions were adopted to mirror the federal Bill of Rights [has been put to rest]. The lesson of history is otherwise; indeed, the drafters of the federal Bill of Rights drew upon corresponding provisions in the various state constitutions. Prior to the adoption of the federal constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions" (Brennan, 1977: 501). Today, state constitutions are also unique in their detailing of the rights of individuals and groups to benefits in various substantive policy arenas.

The substantive areas that have received the most attention from scholars studying women's rights are those labeled "Bill of Rights" and "Suffrage and Elections." We, however, extend our analysis to include economic and taxation issues, personal safety, health, housing, and transportation issues especially as they affect the poor and elderly (disproportionately women). We focus on substantive changes rather than procedural ones (amendment processes).

Our substantive categories are: Economic and Taxa-

tion; Personal Safety (protection against violent crimes, criminals and repeat offenders; right of self-defense); Housing; Health; Civil Rights/Liberties (including ERAs); Education; Suffrage; and Language (gender-and-race-neutral). Our results show that of the 126 women's issue constitutional changes submitted between 1977 and 1985, the breakdown by category was: Economic and Taxation (28%); Personal Safety (22%); Civil Rights/Liberties (18%); Language — Gender and Race Neutral (9%); Health (3%); Housing (8%); Education (4%) and Suffrage (3%).⁴ Of these 126 issues, twenty-eight (22%) failed. (See Table 1.) Of these failures, only four bore gender-related language in them (Florida ERA, 1978; Iowa ERA, 1980; New Hampshire-gender neutral language 1980; Maine ERA, 1982).

TABLE 1
SUMMARY OF STATE CONSTITUTIONAL
CHANGES AFFECTING WOMEN'S ISSUES,
1977-1985
BY ISSUE AREA, METHOD OF PROPOSAL,
AND SUCCESS RATE

Issue	% of Proposals (n=126)	Method of Proposal				% Success (n=101)
		Legis. (n=103)	Init. (n=12)	Const. Conv. (n=10)	Rev. Conv. (n=1)	
Economic & Taxation	28%	29%	33%	-	-	85%
Personal Safety	22	23	33	-	-	89
Civil Rights/ Civil Liberties	24	17	17	30	1	75
Language (Gender & Race Neutral)	9	8	-	20 10 Rev.	-	91
Health	8	7	-	30	-	80
Housing	8	8	8	-	-	56
Education	4	4	8	-	-	20
Suffrage	3	3	-	10	100	100
	100%	99%*	99%*	100%	100%	101%*

Note: * Figures may not add to 100% due to rounding.

Source: Abstracted from annual articles by Albert Sturm (and various co-authors) in the January or February issue of the *National Civic Review*. The authors of this article identified changes that were related to women's issues and classified them by type of issue.

Only sixteen of the 126 issues specifically mentioned sex or gender (Florida - 1978, "no person will be deprived of any right because of sex; Hawaii - 1978, prohibition of discrimination in public educational institutions on the basis of sex; remove language applicable to persons of one sex; 1978 - Mississippi, deletion of requirement that state librarian be a woman; 1978 - Nevada, elimination of restrictions on female elector eligibility for office; delete requirement for registration of the separate property of married women; 1978 - Wyoming, repeal of prohibition of females from working in the mines; permission for legislature to locate a penitentiary for women somewhere in the state; 1980 - Iowa, ERA; 1980 - New Hampshire, elimination of masculine language; 1980 - Utah, removal of prohibitions against women working in underground mines; 1981 - Georgia, gender-neutral language; 1982 - Idaho, eliminate language restricting offices women can hold and elections in which women can vote; 1982 - Wisconsin, removal of gender-specific terminology; 1984 - Colorado, limit on public funding of abortion but not on preventing death of a pregnant woman or her unborn child in life-threatening situation; 1982 - Maine, prohibition against denial or abridgement of equality under the law because of sex). In summary, most of the amendments specifically mentioning gender fall under the Civil Rights/Civil Liberties or Language classifications. The success rate was higher for Language (91%) than Civil Rights/Civil Liberties (75%) amendments.

Of course, some of the issues that passed may not be regarded as pro-women by feminists (e.g. Colorado's 1984 limit on public funding of abortion). But we really do not know how women in Colorado voted on the issue. Without exit polls in each state it is difficult to make definitive statements about the cohesiveness of the women's vote, especially on many other issues that are not traditionally viewed as women's issues.

More frequent than mention of gender is the targeting of constitutional protections, rights, and benefits to the elderly. A review of the 126 changes submitted show that twenty-one specifically singled out the elderly. Most of these provided tax benefits in the form of higher homestead exemptions (Cf. 1970 - Texas; 1980 - Arizona; 1980 - Georgia; 1980 - New Jersey; 1980 - West Virginia; 1982 - West Virginia). Several dealt with pension and retirement benefit transfers to survivors (Cf. Nebraska - 1978; Pennsylvania, 1984). Others delineated state responsibility for health, transportation, security, housing, and/or voting accessibility for the elderly (1978 - Hawaii; 1978 - Oregon; 1980 - Oregon; 1981 - New Jersey; 1982 - Oregon; 1982 - Texas; 1984 - New Hampshire). Since women are a much larger proportion of the elderly population, the success of such legislation should be viewed positively by women's rights advocates.

The rising incidence of violent and sexual crimes (often related), along with increasingly higher recidivism rates among criminals, has meant that the right of self-defense (including the right to bear arms), the right to

deny bail to repeat offenders, and the right to impose tougher incarceration restrictions are getting more support among women than in the past. We labeled these issues as "Personal Safety" issues. There were a number of these placed before voters for approval in the 1977-85 time period, the bulk of which passed. Voters in many states approved limiting bail, especially for those accused of violent crimes (1977 - Texas; 1978 - Michigan; 1978 - Nebraska (provided that certain sexual crimes shall be nonbailable); Nevada - 1980; New Mexico - 1980; Wisconsin - 1981; Arizona - 1982; Colorado - 1982; Illinois - 1982; Vermont - 1982; Rhode Island - 1984). Maximum sentencing was approved in Idaho - 1978 and Oklahoma - 1978. Compensation of victims of crimes was endorsed by voters in Georgia (1978), and California (1982). And the right to bear arms was given additional constitutional emphasis in Idaho - 1978; Nevada - 1982; New Hampshire - 1982; and North Dakota - 1984.

Another group of issues targeted constitutional protection and provisions for the poor in a variety of areas, primarily housing and welfare. Here the success rate was not as uniform. For example, government support for low-income housing was twice endorsed in Oregon (1978); Oregon (1980), but failed in Ohio (1977); California (1980); and Ohio (1980). Exemption of food and drugs from state sales taxes also met with mixed results (1978, Arkansas - failed; Nevada, 1980 - passed; Nevada, 1982 - failed; Nevada, 1984 - passed). There was only one instance of a welfare-to-the-needy provision (Texas, 1982 - passed).

In general, then, constitutional protections and provisions specifically targeting the poor are not as likely to be approved as those aimed at wider recipient groups. From the perspective of women's rights advocates, this finding is not cause for joy — or for views of state constitutions as leading agents of change, since the overwhelming majority of the poor are women and children.

Strictly family or child-oriented constitutional changes were not common (although as U.S. Rep. Schroeder notes, every women's issue is really a family issue). Ironically, most of these changes had to do with making dissolution of the family easier (e.g. 1978 - Nevada's provision to delineate more clearly the property rights of married women - passed; 1978 - South Carolina's reduction of period of continuous separation from three years to one as an allowed ground for divorce - passed; 1980 - Texas authorization for spouses to agree that income or property arising from separate property is to be separate (rather than community) property - passed. Only one dealt specifically with child-support (Texas - 1982 - authorized legislature to provide for the garnishment of wages to enforce court-ordered child support payments - passed). Another eliminated the prohibition against interracial marriages (Tennessee, 1978).

Support for government-financing or regulation of health services and facilities (of which the elderly and youth are disproportionately heavy users) was mixed. Such proposals were supported in Georgia - 1978; Hawaii - 1978;

New Jersey - 1981; Texas - 1982; and Texas - 1985, but defeated in Idaho - 1978; Idaho - 1980; Arizona - 1982. Most often defeat occurred when a proposal called for public support for, or regulation of, religious or private firms. This same debate prevailed in the education area where proposals for state funding/support for private schools was consistently defeated (Michigan - 1978; California - 1982; Massachusetts - 1982; North Carolina - 1982).

A few of the other educational-related provisions eliminated racially discriminatory language (e.g. Oklahoma - 1978; Tennessee - 1978; both passed). One dealt with school prayer (West Virginia - 1984). It also passed.

The success rate of constitutional changes varied by the type of method used to propose it. The data show that changes submitted by state legislatures have the highest success rate (83%), followed closely by convention-initiated changes (80%). Citizen-drafted changes (initiatives and Florida's revision commission) fared less well (50% and 0% success rates respectively). These findings are consistent with those of other scholars (e.g. Sturm and May, 1986; Press, 1982). Press (1982: 111) suggests that the reason citizen-initiated proposals are less successful is that they tend to yield radical constitutional changes ("radical in that [they have] a marked influence in reshaping current policy and operations"). "More common," he notes, "are constitutional changes that ratify battles already won, or changes that aid in bringing to a successful conclusion political battles almost won" (1982: 110). This suggests that more often than not, state constitutional changes may lag behind societal changes but not always. Our analysis of state constitutional changes between 1977 and 1985 suggests that insofar as the treatment of women's issues goes, the lag may be greater in the civil rights and civil liberties arenas than in substantive policy areas, such as economic, health, welfare, and housing.⁵ Specifically, insertion of amendments expressly prohibiting discrimination on the basis of race, gender, religious belief, mental or physical condition and amendments assuring individual right to privacy have lagged behind federal, state, and local statutes and/or practices.

Our analysis of the constitutional changes related to women's issues (those that disproportionately impact on women as a consequence of demographic, socioeconomic, biological, and/or attitudinal patterns) between 1977 and 1985 shows that state constitutions are both leading and lagging agents of change in comparison with the U.S. Constitution and with each other. We should be encouraged by their economic, health, and personal safety protections and provisions but less so by their mixed results with regard to extension of equal civil rights and liberties and to direct provisions for care of the poor. Our analyses confirm what Justice Louis Brandeis observed over a half century ago: "A single courageous state may, if its citizens choose, serve as a laboratory and try moral, social and economic experiments" (qtd. in Welsh and Collins, 1981: 7). But it also shows some states have longer histories of boldness than others, reflecting cultural, socioeconomic, and

political differences in their constituencies.

While women's rights advocates may be somewhat inclined to view some state constitutions as "drag anchors" insofar as proposed changes that specifically mention gender-equality, they should take heart and view most constitutions as positive agents of change for the most part in bettering the economic and social policy conditions enjoyed by women. While constitutional change is but the first step down the long road toward equality, it is nonetheless, a giant one, and one that often begins (and ends) at the state rather than the federal level.

Notes

1. Throughout the fifty states there are four commonly used methods of initiating change (Dye, 1988: 36):
 - 1) Legislative proposal: Amendments are passed by the state legislature, and then submitted to the voters for approval in a referendum. (Used by all states, although in Delaware voter approval is not required).
 - 2) Popular initiative: A specific number of voters petition to get a constitutional amendment on the ballot for approval by the voters in a referendum (Arizona, Alaska, California, Colorado, Florida, Illinois, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota).
 - 3) Constitutional Convention: Legislatures submit to the voters a proposal for calling a constitutional convention, and if voters approve, a convention convenes, draws up constitutional revisions, and submits them again for approval by the voters in a referendum. (41 states - see Sturm, 1987). Fourteen states require periodic submission to the voters of the question of calling a constitutional convention: 8 states every 20 years - Connecticut, Illinois, Maryland, Missouri, Montana, New York, Ohio, Oklahoma, 4 states every 10 years - Arkansas, Iowa, New Hampshire, Rhode Island; 1 every 16 years - Michigan; and 1 every 9 years - Hawaii.
 - 4) Constitutional Commission: Commissions are created by the legislature to study the constitution and recommend changes to the state legislature. In the case of Florida, the recommendations of the commission are submitted directly to the voters in a referendum.
2. We recognize, of course, that women often differ considerably in their public policy preferences due to variances in age, race or ethnicity, income, education, regional location, ideology, and political party affiliation. (Frankovic, 1982; Sapiro, 1983; Poole and Zeigler, 1985; Zeigler and Poole, 1985; Witt, 1985; Boneparth and Stoper, 1988; Hannon,

- 1988; Schafley, 1977; Boles, 1979; Sackett, 1985; Bunzel, 1986; Hoff-Wilson, 1987).
3. While the Sturm data may legitimately be criticized for its lack of detail in delineating each amendment's potential impact on women, it is still the most comprehensive longitudinal data set on state constitutional amendment proposals and adoptions.
 4. A detailed state-by-state listing of these proposed amendments is available from the authors upon request.
 5. It is important to note that constitutional guarantees are but one step toward the achievement of equality. Implementation is an equally important, often difficult, next step in the policy process. (See MacManus and Van Hightower, "The Limits of State Constitutional Guarantees: Lessons From Efforts to Implement Domestic Violence and Sexual Assault Policies" (Forthcoming).

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The 1986-87 Affirmative Action Cases: Implications for Public Managers

By Palma F. Marron

In a period of less than one year, the Supreme Court carefully reaffirmed and strengthened the underlying principles of affirmative action and the mandates of equal employment legislation. The five major affirmative action cases decided in 1986 and in early 1987 bolstered the cause of equal opportunity against a de-emphasis on affirmative action programs. Public managers must now comply with the guidelines as set down in these decisions and while only one of the decisions specifically involved a question of gender, all of the cases are significant for women because of the precedents established concerning the implementation of affirmative action plans. These precedents and the nature of their impact on women and public managers as well as the future need for affirmative action programs, strategies for women, and the roles of public managers form the basis of this study.

Equal Employment Legislation

Federal regulation of equal employment stems from a variety of laws extending equal opportunity and protection from discrimination in employment to different groups. Basic protections, however, are derived from the Constitution. The Fifth Amendment ensures that "No person shall . . . be deprived of life, liberty, or property without due process of law . . .," and The Fourteenth Amendment, famous for its Equal Protection Clause, guarantees that these same rights will not be abridged by any State. These two amendments are the roots from which equal employment legislation has grown.

Sprouting from these roots, Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, affords the most comprehensive protection against unlawful employment practices. It outlaws discrimination due to a person's "race, color, religion, sex, or national origin" (42 U.S.C. sec. 2000e) by employers, unions, employment agencies, and joint apprenticeship or training committees. Title VII also prescribes a policy of nondiscrimination in Federal employment and extends coverage to state and local governments. To enforce the mandates of Title VII, the Equal Employment Opportunity Commission (EEOC) was established. The significance of the intent of this legislation will become apparent after examining the recent affirmative action cases which were filed under Title VII appeals.

In addition to congressionally sanctioned protections, Executive Orders have also served to promulgate guidelines for equal employment policies. For instance, Executive Order 11246, as amended by Executive Orders 11375 and 12086, prohibits discrimination in employment by Federal contractors and subcontractors. The orders serve

to reinforce the concept of equal employment and require, in some instances, the development of affirmative action plans and the submission of equal employment reports to the Office of Federal Contract Compliance Programs (OFCCP), the agency established to administer these requirements.

Other pertinent Federal laws include the Age Discrimination in Employment Act of 1967, the Equal Pay Act of 1963, the Vocational Rehabilitation Act of 1973, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and the Immigration Reform and Control Act of 1986. Legislation regulating equal employment policy is also developed on the state and local levels but must comply with Federal legislation. These laws are supplemented by the guidelines and regulations issued by the EEOC and the OFCCP and by the case law established by the Federal courts when deciding individual appeals or class-action suits (Levin-Epstein, 1987).

Precedents

Wygant v. Jackson Board of Education

The Jackson Board of Education and the Jackson Education Association agreed to include a layoff provision in their Collective Bargaining Agreement in response to community racial upheaval in 1972. The agreement stipulated that if layoffs were required, seniority would be the determining factor; however, the minority percentage had to be maintained even if non-minority teachers with more seniority had to be dismissed. In 1974, the Jackson Board was forced to lay off teachers but it did not adhere to the agreed-to policy and dismissed untenured minority teachers. A lawsuit was filed in Federal District Court on the grounds that the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964 was violated. Because there was no evidence to support a claim of prior discrimination and because charges had not been filed with the EEOC, the case was dismissed. A lawsuit was then initiated in the State court which upheld the agreement, although it discriminated against non-minorities. In compliance, the Board of Education, when faced with making cuts in 1976-1977 and in 1981-1982, dismissed senior non-minority teachers. The teachers challenged their dismissal in Federal District Court as a violation of the Equal Protection Clause. The Court upheld the Board's actions. The decision was affirmed by the Court of Appeals. The Supreme Court reversed the decision and concluded that utilizing a policy of preferential treatment in layoffs in order to lessen societal discrimination is unsound and in violation of the Equal Protection Clause of the Fourteenth Amendment. The use of affirmative action plans in the public sector must be justified by a clearly established pattern of prior discrimination (*Wygant*, 40 FEP Cases 1321, 1986).

Local 28, Sheet Metal Workers v. EEOC

In this case, the Supreme Court dealt with a situation of documented egregious discrimination. The Joint Apprenticeship Committee of Local 28 of the Sheet

Metal Workers International Association in New York City provided an apprenticeship program which offered on-the-job as well as classroom training. Graduation from the apprenticeship program led to a journeyman's level of proficiency and opened the door to union membership. In 1964, the New York State Commission for Human Rights determined that non-whites had been denied access to the program and that selection had mainly been based on nepotism. The union was told to terminate these procedures and the New York State Supreme Court issued directions to implement objective selection standards. The union never complied and as a result, in 1975, the District Court found the union to be in violation of Title VII and New York State law. An Order and Judgment prohibiting the union from continued discriminatory practice was issued; however, due to bad faith attempts at affirmative action, the District Court decided that establishment of a remedial goal was necessary. A 29% non-white membership goal based on the relevant labor pool was set to be achieved by 1981. This determination was affirmed by the Court of Appeals for the Second Circuit as a temporary remedy. A Revised Affirmative Action Program and Order (RAAPO) was developed which set interim goals in order to measure progress that granted the union an additional year to achieve the 29% goal. In 1982, the union was held in civil contempt for non-compliance with the RAAPO. A fine of \$150,000, earmarked for a fund to augment non-white participation in the apprenticeship program and non-white union membership, was imposed on the union. A second contempt citation was placed on the union in 1983. The Local 28 was instructed to hire outside consultants to operate a computerized system of record keeping. At this proceeding, the District Court amended the RAAPO and set a new goal of 29.23% non-white membership by 1987. The case was brought to the Court of Appeals which affirmed the orders of the District Court. The union claimed that the membership goal and fund were in violation of the Due Process Clause of the Fifth Amendment and that Title VII does not provide race-conscious relief to individuals not specifically identified as victims of discrimination.

In addressing these claims, the Supreme Court ruled that Section 706(g) of the Civil Rights Act of 1964 gives lower courts broad discretion in correcting past discrimination and allows, in appropriate circumstances such as in cases of egregious or pervasive discrimination, affirmative race-conscious remedies that may benefit non-victims of discrimination through preferential treatment. The Court also upheld the order establishing the membership goal and the fund to increase participation as not violating the Fifth Amendment because it was narrowly tailored to accomplish the remedial objectives of the Government (*Sheet Metal Workers*, 41 FEP Cases 107, 1986).

Local 93, Firefighters v. City of Cleveland

Firefighters v. Cleveland, like *Sheet Metal Workers v. EEOC*, questioned the intent of Section 706(g) of Title

VII of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e-5(g)). The *Vanguards of Cleveland*, composed of black and Hispanic firefighters employed by the City of Cleveland, filed a class-action suit on behalf of blacks and Hispanics currently employed by the City and on behalf of future black and Hispanic applicants or employees of the City's Fire Department. Although the suit claimed that the city had discriminated on the basis of race and national origin in hiring, promotion, and assignment, emphasis was placed on promotion. Based on recent experience with other discrimination complaints, the City decided to enter into negotiations with the *Vanguards* rather than face certain long-term litigation. In the spring of 1981, Local 93 of the International Association of Firefighters, which represented a majority of Cleveland's firefighters, moved to intervene in the suit and submitted a document of intervention which called for promotions to be made based on competency as measured by objective examination instead of using a racial quota system. The City and the *Vanguards*, without the participation of Local 93, came to an agreement that would establish a short-term remedy for past discrimination in promotions. At a hearing, the District Court ordered the City and the *Vanguards* to confer with Local 93. The Local refused to change its position and, at a second hearing, the parties were remanded to the U.S. Magistrate to work out a revised consent decree that would open up non-minority promotions while still providing affirmative relief for past discrimination. The members of Local 93 voted against the revision which forced the City and the *Vanguards* to submit another revision to the District Court in 1983. Local 93 filed a formal objection asking the Court to disallow the decree and emphasizing its abhorrence of the use of racial quotas. Finding a documented pattern of racial discrimination, the District Court approved the Consent decree as a temporary remedy. Local 93 appealed and the Court of Appeals affirmed the consent decree as equitable.

The Supreme Court was asked to resolve the question as to whether a consent decree which benefits an individual who was not a victim of discrimination is in violation of Section 706(g) of the Civil Rights Act of 1964. The Court ruled that a consent decree is a voluntary agreement among parties as opposed to a judicial order and is, therefore, not bound by the requirements of Section 706(g). The Court continued in this vein by affirming that voluntary affirmative action may result in benefits to individuals who are not victims of discrimination and that the public sector may, in certain circumstances, voluntarily agree to race-conscious plans which seek to remedy previous discrimination (*Firefighters*, 41 FEP Cases 139, 1986).

United States v. Paradise

In *U.S. v. Paradise*, The Supreme Court wrestled with the problem of whether race-conscious relief in the form of a temporary quota system is violative of the Equal Protection Clause of the Fourteenth Amendment. The history of this case begins in 1972 when the National

Association for the Advancement of Colored People (NAACP) charged the Alabama Department of Public Safety with discrimination in the employment of blacks. The District Court, finding that the Department had systematically excluded blacks from employment, ordered a hiring quota of one black trooper for one white trooper until blacks composed 25% of the force. The Department was also instructed to refrain from utilizing any employment practices that would result in discriminating in all aspects of employment against any employee or applicant on the basis of race or color. An appeal of the ruling was upheld and in 1974, after the NAACP sought additional redress from the District Court, it was determined that the Department, by limiting the size of the force, was delaying compliance with the 1972 order which was then reaffirmed. In 1977, additional relief, focused on promotion procedures, was sought. Litigation continued, with both parties entering into consent decrees in 1979 and 1981. Six years later, in December 1983, the District Court was forced to develop a quota system, citing the fact that after eleven years, the Alabama Department of Public Safety had not remedied the effects of prior discrimination. The court's order required the promotion of one black for each white promoted to the upper ranks only if qualified black prospects are available, if the rank currently has less than 25% black participation, and if the Department has not implemented an acceptable nondiscriminatory promotion plan for the particular rank. On appeal, the order was affirmed by the Court of Appeals for the Eleventh Circuit. The case was brought to the Supreme Court by the U.S. Department of Justice on a Constitutional challenge. The Government contended that the quota promotional plan breached the Equal Protection Clause of the Fourteenth Amendment. In deciding this case, the Supreme Court reiterated that the public sector may establish race-conscious preferential plans to remedy the effects of past discrimination and, in this case, it was established that the Department of Public Safety had followed a long-term course of discriminatory practice. The Supreme Court ruled that the District Court's order did not contravene the Fourteenth Amendment because it was temporary and narrowly tailored to be a suitable and justifiable remedy. The order served the purpose of the District Court by rectifying a clear violation of the Fourteenth Amendment due to an egregious pattern of discrimination (*Paradise*, 43 FEP Cases 1, 1987).

Johnson v. Transportation Agency

After hearing four cases dealing with affirmative action plans providing race-conscious or national origin relief, the Supreme Court, in the spring of 1987, examined whether the Transportation Agency of Santa Clara, California, in promoting a female over a male, inappropriately used sex as a determining factor in violation of Title VII of the Civil Rights Act of 1964. An Affirmative Action Plan was implemented in 1978 with an objective of achieving a fair distribution of women, minorities, and handicapped persons. The plan empowered the agency to

correct the under-representation of women in traditionally segregated job classifications by using sex as a factor of consideration in giving promotions to qualified candidates. In addition, the plan targeted a gradual improvement in the hiring, training, and promotion of women and minorities. The position in question, road dispatcher, was classified as a Skilled Craft Worker. Of 238 positions in this classification, none was held by a woman. When the road dispatcher position was announced, twelve employees submitted applications. After review of the applicants' work history, nine were considered qualified and were subsequently interviewed by a two-member panel. Scoring of the interviewees narrowed the field to seven eligible applicants. A second interview by three Agency supervisors recommended Paul Johnson for the position. Diane Joyce, having concerns about not receiving an impartial consideration due to prior disagreements with two of the interviewers, sought guidance from the County's Affirmative Action Office which notified the Agency's Affirmative Action Coordinator. Under the Agency plan, the Coordinator was responsible for recommending opportunities for improving the representation of women and minorities. The Coordinator recommended Diane Joyce for the position. The Director of the Agency selected Joyce after reviewing all of the factors of selection including qualifications, test scores, and affirmative action concerns. Paul Johnson asserted, in District Court, that he did not receive the promotion on the basis of sex which is in violation of Title VII of the Civil Rights Act of 1964. The District Court held that the Agency plan was invalid because it was not temporary and, therefore, did not meet the criteria established in *Steelworkers v. Weber*, (443 U.S. 193, 20 FEP Cases 1, 1979). This ruling was reversed by the Court of Appeals for the Ninth Circuit which focused on the plan's goal of attainment rather than maintenance and that it did not identify percentages to be achieved. The plan addressed a noticeable imbalance in the workforce and did not unnecessarily infringe on male employees' rights nor bar their promotion. In deciding this case, the Supreme Court applied the principles established in *Weber* and affirmed the ruling of the Court of Appeals. The Agency, in promoting Diane Joyce over Paul Johnson, was justified in using sex as a determining factor because it relied on an affirmative action plan that was designed to achieve moderate gains in employing qualified minorities or women. Title VII was not violated nor does it prohibit, as interpreted in *Weber*, voluntary affirmative action programs which are consistent with the Title's intent of rectifying the effects of prior discrimination in employment (*Johnson*, 43 FEP Cases 411, 1987).

Case Significance

The briefing of these affirmative action cases suggests a departure from the previously strict interpretations of Title VII. While it is true that the *Wygant* case does not fit into this pattern, its importance may be evaluated in terms of establishing a future precedent on Constitutional grounds for the utilization of voluntary affirmative action.

Justice O'Connor, in her concurring opinion in *Johnson*, (43 FEP Cases 425-429, 1987) argues that, in measuring the legality of affirmative action plans, there is no difference between Constitutional and Title VII requirements. Using this reasoning, Justice O'Connor found the decision of the Court, which only focused on the Title VII violation, in compliance with the requirements of *Steelworkers v. Weber* (1979) and more importantly, with *Wygant* (1986). Affirmative Action policies were strengthened by the other cases in the following ways. Courts may now impose race-conscious remedial plans in cases of egregious discrimination whether or not individuals who have not been actual victims of discrimination benefit, and they may order temporary preferential treatment plans that are narrowly tailored to be suitable remedies for discrimination. In addition, the public employer may voluntarily enter into agreements, such as consent decrees, which extend race conscious relief to victims of discrimination as well as to non-victims.

For women, the most significant judgment was the decision in *Johnson*. Sex was upheld as a factor of consideration among qualified candidates. The case has been called the "broadest endorsement to date of voluntary affirmative action" (Bureau of National Affairs, Vol. 23, No. 7, 1987, p. 39). Public employers will not have to prove prior discrimination in order to implement an affirmative action policy as long as an imbalance in the workforce is noticeable. The case has already been used as a precedent in a reverse discrimination suit in which a white firefighter challenged the promotion of a black firefighter. The California Court of Appeals in *Higgins v. City of Vallejo* (CA 9, 1987, 44 FEP Cases 676) justified the promotion by evaluating the affirmative action plan using the criteria established in *Johnson*. Incidentally, the plan was found to be a narrowly tailored remedy which did not violate the Equal Protection Clause of the Fourteenth Amendment (Bureau of National Affairs, Vol. 23, No. 17, 1987, p. 99).

In spite of the fact that four of these cases involved situations of racial discrimination, women will still be able to benefit from the expanded interpretation of Title VII. The decisions build flexibility into the legislation and reinforce its mandate that discrimination in employment, in any form, will not be tolerated. Since courts may now order preferential treatment plans and public employers may voluntarily develop plans to rectify the effects of either prior discrimination or current imbalances in the workforce, affirmative action programs, in the coming years, should operate from a position of strength substantiated by the law. If this holds true, women will benefit along with other protected groups.

Implications for the Public Manager

In the wake of the Supreme Court's decisions, public managers must necessarily adjust the way they form and implement affirmative action programs. In public sector agencies that have been plagued by a history of past discrimination, voluntary plans providing race, minority,

or sex conscious relief open the door to alleviating criticism from the public and to avoiding the stigma and the expense of a court imposed settlement. Without having to bear the burden of proving past bias, the public sector employer can focus on developing a comprehensive affirmative action agenda that will benefit minorities, women, and ultimately the organization. Freedom to develop a plan that suits their organization will spur public managers to evaluate their current plans, revise them if necessary, and educate management to implement them with knowledge. A renewed interest in affirmative action is likely to be fostered by the broadening of Title VII's interpretation. The expanded interpretation, however, does not relieve public managers from their duty to ensure that their affirmative action plans do not abrogate the rights of others without need, nor does it allow the selection and promotion of unqualified candidates. The public sector, as always, must seek to recruit and promote applicants on merit. The sex, race, color, or national origin of qualified candidates are additional factors to be considered in the selection process when affirmative action plans apply to the relevant position.

Public managers, particularly in this era of cutback management and budget imposed staffing, will have to reckon with the judgment in *Wygant*. Layoff priority plans, even in justifiable circumstances, are in violation of the Fourteenth Amendment. In cases where the effects of discrimination need to be remedied, it is better to utilize an affirmative hiring program rather than potentially disturb the lives of innocent individuals by the adoption of a layoff plan (*Wygant*, 40 FEP Cases 1327-1328, 1986).

Based on the decision in *Firefighters v. Cleveland*, the general counsel of the Equal Employment Opportunity Commission, Charles A. Shanor, recently circulated a policy memorandum to regional attorneys concerning the incorporation of goals and timetables into consent decrees. Shanor points out that goals and timetables, while they are permitted in consent decrees with EEOC permission in cases of documented prior discrimination, are emergency measures and should only be used when relief cannot be provided by other measures (Bureau of National Affairs, Vol. 23, No. 22, October 29, 1987, p. 131). Public managers who become involved in situations where pervasive discrimination exists should keep in mind that goals and timetables are now acceptable remedies and that it is probably a better path to follow voluntarily rather than having to comply with court imposed goals.

Regardless of the ways public managers adjust to the expanded interpretation of Title VII, affirmative action policies have to continue to be based on proven personnel practices that work to improve employment opportunities for women and minorities. Thorough job analysis to establish valid selection criteria, career planning to determine the proper training for the qualified employee and education of line supervisors in the organization's overall equal employment objectives and in their responsibilities as managers combined with an involved commitment from

the top level of management has been a successful approach to equal employment and should continue to be implemented as such (Shaeffer & Lynton, 1979).

Predictions

As indicated above, the 1986-87 affirmative action cases will influence the future decisions of public employers in directing the course of women and minorities in employment. In order to develop a strategy for the 1990s, the women's movement will have to take into consideration the precedents established in these cases. Women must also begin to assess the future by focusing on events effecting changes in the nation's social, economic, and political environment.

Recent events, on the social level, have brought attention to a rise in racism or the manifestation of underlying racial tensions. In reaction to an increase in racial attacks, black activists have once again taken to marching for civil rights, to practicing civil disobedience, and to disrupting the delivery of services. Racial tensions are reaching the boiling point. Blacks are pleading with New York's Governor Cuomo to appoint a permanent special prosecutor to try cases of racial violence (Morgan, 1988) and the Reverend Jesse Jackson, a 1988 presidential candidate, has spoken out in favor of conciliation in an attempt to assuage mounting anger (Lynn, 1988). While the highlighted events have occurred in New York, the state could be used as a barometer for the rest of the nation and, if the reading holds steady, the civil rights movement will be gearing up for another round of violence, strife, and activism.

Adding to the racial upheaval are forecasts of an uncertain economic future. Although a recession is not authoritatively being predicted, a slowdown in the economy is anticipated (Bennett, 1988; Hershey, 1988; "Home Sales Off," 1988). And what happens when the economy is sluggish? Consumers stop spending, money becomes tight, jobs are cut, and the competition for top-paying jobs becomes intensified with women and minorities being the big losers in employment. If the recession of the 1970's gives any indication as to how women will fare in a constricted job market, then women must begin now to prepare for the next decade (Dex & Shaw, 1986; Ratner, 1979).

Politics will also affect the future of women in America. Two significant events of 1988 will influence the course of the nation. A new Supreme Court justice will be sworn in and a new president will be elected. A Democratic victory in the election should cause a readjustment in the objectives of the country's political leadership. A return to emphasizing the needs of the downtrodden of the country, including women, minorities, and workers, is a possibility. On the other hand, the election of a Republican would probably have minimal impact upon affirmative action policies.

If changes in the composition of the Supreme Court are taken into consideration, the political environment

will become increasingly unstable for minorities and women. The Senate confirmation of Judge Anthony M. Kennedy could result in challenges to the recent expansive affirmative action precedents. Judge Kennedy has been noted for his fairness; however, his opinions on civil rights and affirmative action have concerned members of the Senate (Greenhouse, January 28, 1988; February 4, 1988). For women, these changes will increase the uncertainty of the future.

Remembering that equal employment legislation was initially directed toward the pervasive discrimination that existed in the United States in the early 1960's, Malveaux (cited in Sokoloff, 1985) argued that the thrust of affirmative action in the late 1960's was mainly on race. The emphasis changed to affirmative action programs for women after 1972, and women remained in the limelight for the rest of the decade. If the 1960's focused on race and the 1970's on sex, the 1980's have been characterized by a weakened Federal support for affirmative action plans in general (Low, 1987; Preston, 1986). Considering the political, social, and economic climate, the 1990's could turn out to be a decade of renewed interest in the civil rights of blacks. As racial strife increases and the economy winds down, a resurgence in black activism can be expected and as the emphasis turns to the plight of the black or minority worker in a tight economy, women will bear the brunt of economic setbacks and decreases in employment.

For these reasons, women must organize and plan for the coming decades. The pulse of the nation will have to be measured. Objectives will have to be set and, yes, precedents will have to be used in order to lay a foundation for the rocky future to come. Even as these words are written, civil rights legislation is evolving. On January 28, 1988, the Senate passed the Civil Rights Restoration Act, which, if passed by the House of Representatives and signed by the president, will overturn a Supreme Court decision that banned sex discrimination in college and university programs that are recipients of federal funding. The reversal will apply the ban to the entire institution instead of just the funded program. In addition, an amendment was tacked on to the bill that could affect the rights of women. Colleges and universities, by refusing to provide abortions or abortion-related services, would not necessarily lose funding even when sex discrimination is practiced (Molotsky, 1988).

The protection of civil rights is an ongoing process and women, like black and minority activists, will have to bring pressure on the decision-makers if they expect to eliminate the vestiges of sex discrimination in employment. The public manager must also take notice of the events affecting the nation. Government does not operate in a vacuum nor is affirmative action a cure for society's mistakes. Women and minorities are still under-utilized and are economically less stable than white males. Affirmative action plans have helped lessen the imbalances in employment and will continue to contribute in the future (U.S. House of Representatives, 1986). The

affirmative action precedents may or may not help women in the future. The success of affirmative action depends largely on the commitment of public managers to develop quality plans that utilize the freedom provided by the broader interpretation of Title VII and combine them with already successful strategies.

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“With All Deliberate Speed”

by Leola Brown Montgomery

Women have played a key role in the history of America, both behind the scenes and in taking the lead. We can look around and see how far we've come. For example, the participation of minorities in this conference would not have been possible forty years ago. At the same time, from Georgia to New York, from Michigan to California, racially-motivated incidences are reported that make us aware that we have a long way to go.

Many misconceptions exist about the Supreme Court decision of 1954, *Brown v. Topeka Board of Education*. One misconception is that this was the first attempt to use the legal system to desegregate schools. In 1946, Herman Sweatt was denied admission to the University of Texas Law School and took his case all the way to the Supreme Court. In *Sweatt v. Painter*, Sweatt became the first black student to attend law school at the University of Texas at Austin. There were other similar cases.

A second misconception for some concerns where the case took place because Topeka is in Kansas, and Kansas was not and is not known as a state with a large minority population. Yet, those blacks who migrated to Kansas full of the promise of freedom and equal opportunities faced separatism: in restaurants, in public accommodations, in recreation, in theatres, and, ultimately, in education. In 1949, the population of Topeka was 78,791. Of this number, about 6,500 were black citizens. The black citizens of Topeka faced the same challenges as blacks any place else in the United States and were most incensed by the system their children encountered in their efforts to get an education. There were only four elementary schools in Topeka for black children; many of the black children lived nowhere near the schools they were assigned to attend and had to be bussed several miles to school. There were many more elementary schools for white children, all within walking distances of their homes.

I consider *Plessy v. Ferguson* to be the forerunner of *Brown v. the Topeka Board of Education* because that doctrine was the justification used by school boards across the country to educate children in separate and unequal facilities.

In 1949, the Topeka chapter of the NAACP and the chapter's attorneys met with black parents to plan for each family to try to enroll their children in the white schools nearest their homes. My husband, the late Rev. Oliver Brown, and I were willing participants, because there were many evenings when my husband would come home and find me almost in tears because our daughter, Linda, would get only half way to the school bus stop before she got so cold she would have to return home. For a six-year-old child, waiting on a school bus that was sometimes thirty minutes late in the kind of weather we have in Kansas was too much to bear and too much for parents to tolerate. Bus transportation was not even provided for our kindergartners, so an elaborate system of car pooling was

established within the black community. Sometimes Linda would return home with tears frozen on her face. Even in warm weather, walking to the school bus stop was hazardous because the children had to walk through the busy and dangerous switching yards of the Rock Island Railroad and cross a busy avenue.

In September 1950, twelve black families agreed to attempt to enroll their children in the white schools of Topeka. After trying to enroll their children and being refused, they filed a suit in federal court in February 1951. The case was argued in federal district court and was decided in favor of the Board of Education and its segregated elementary schools. The funny thing about Topeka was that the secondary schools were always integrated. That is to say, classes were integrated, but all activities and social events were segregated. There were black football and basketball teams, and there were white football and basketball teams. Class parties were separate and in different rooms. In Topeka, the issue was not so much integrating the elementary schools to improve the quality of instruction but to integrate them due to the inaccessibility of the neighborhood schools. We lived only four blocks from an elementary school for white children. My children played with white and Hispanic children all summer, yet they had to be separated to attend school.

During the local court battle, there was a very definite division within the black community. There were those who felt this action was long overdue and those who expressed concern about upsetting the balance of things, which they feared could lead to job loss and threats of violence. The local school board, which some believed to be above reproach, mailed threatening letters to black teachers. The best-known letter stated, and I quote:

Dear Miss Buchanan:

Due to the present uncertainty about enrollment next year in schools for negro children, it is not possible at this time to offer you employment for next year. If the Court should rule that segregation in the elementary grades is unconstitutional, our Board will proceed on the assumption that the majority of people in Topeka will not want to employ negro teachers next year for white children. It is necessary for me to notify you now that your services will not be needed for next year. This is in compliance with the continuing contract law.

If it turns out that segregation is not terminated, there will be nothing to prevent us from negotiating a contract with you at some later date this spring. You will understand that I am sending letters of this kind to only those teachers of the negro schools who have been employed during the last year or two. It is presumed that, even though segregation should be declared unconstitutional, we would have need for some schools for negro children, and we would retain our negro teachers to teach them.

I think I understand that all of you must be under considerable strain, and I sympathize with uncertain-

ties and inconveniences which you must experience during this period of adjustment. I believe that whatever happens, will ultimately turn out to be best for everybody concerned.

Sincerely yours,

Wendell Godwin
Superintendent of Schools

After the unsuccessful attempts in federal court, an appeal was made to the United States Supreme Court under the guidance of the NAACP's legal staff, more specifically, the now-Honorable Supreme Court Justice, Thurgood Marshall. The case was consolidated with similar cases from Clarendon County, South Carolina; Prince Edward County, Virginia; and New Castle County, Delaware, and argued in terms of the psychological damage brought about by segregation in public education. Experts from the psychiatric community examined whether or not segregation served to break a youngster's morale and block the development of a strong, positive self-concept so essential to educational progress.

During the period of litigation, my husband was called into the ministry and received his first assignment to St. Marks A.M.E. Church in Topeka. One year later, I was at home in the church parsonage, doing the family ironing and listening to the radio, when at 12:00 noon the radio program was interrupted for an important announcement. The Supreme Court's decision on ending segregation was unanimous. I was overwhelmed and could hardly wait for the children and my husband to get home so that I could relay the good news. That evening when I told them, there was rejoicing, tears, embraces, and prayers. That night our family attended an NAACP-sponsored rally.

Linda did not immediately benefit from the Supreme Court's decision, for in fall 1954 she had entered the already-integrated junior high school. However, her two younger sisters, Terry and Cheryl, were able to attend integrated elementary schools. Integration that fall in Topeka went very smoothly. It seemed as though black and white children had been going to school together for years. My family never suffered any abuse and racial strife or received any threatening phone calls, unlike that which was suffered in many cities in other parts of the country.

After the decision was handed down, the Constitution of the United States became a living document to me, because without the Fourteenth Amendment it might not have been possible to seek legal recourse to overturn a legal ruling such as *Plessy v. Ferguson*, paving the way for black people and other minorities to seek due process of law.

Many of you are well aware that during fall 1986 we were back in Court in Topeka, for what is being called "Brown III." As unfortunate as this return to court may seem, the message it sends is that we can never become complacent. We must keep examining our options, taking steps to insure that the barriers of continued racism do not erode the progress we have made. It is in America's best

interest not to enter into a fourth decade since "Brown" struggling with the definition of "With all deliberate speed." Many places in the United States do not understand this mandate or else simply choose to ignore it. We still have a long way to go. We must press on to make it known and enforced in this century.

Gender Difference and Gender Disadvantage

by Deborah L. Rhode

For most of this nation's history, the law's approach to gender difference has alternated between exaggeration and neglect. Neglect has been the preferred strategy. The recent cluster of bicentennial conferences on women and the constitution are an ironic reminder of that fact. When the nation's founding fathers spoke of "We the People," they were not using the term generically. Although subject to the Constitution's mandates, women were unacknowledged in its text, uninvited in its formulation, unsolicited in its ratification, and, before the last quarter-century, largely uninvolved in its interpretation. Yet, as these recent conferences also testify, such patterns of silence have been broken. Women have found a voice. How we should use it is a question worth greater exploration.

The following analysis considers a specific set of questions about voice.¹ How we describe the relation between the sexes involves a politics of paradigms that legal decision makers rarely acknowledge or address. For the most part, traditional legal frameworks have analyzed gender issues in terms of gender difference. Under this approach, sex-based distinctions have been overvalued and overlooked. In some contexts, such as occupational restrictions, courts transformed biological differences into cultural imperatives. In other cases, such as those involving pregnancy, those differences have remained unrecognized. Significant progress will require an alternative framework, one focused not on gender difference but gender disadvantage.

I.

Traditional equal protection doctrine has developed within an Aristotelian tradition that defines equality as similar treatment for those similarly situated. Under this approach, discrimination presents no difficulties if the groups concerned are dissimilar in some sense that is related to valid regulatory objectives. This analytic paradigm has proven inadequate in both theory and practice. As a theoretical matter, it tends toward tautology. It permits different treatment for those who are different with respect to legitimate purposes but provides no criteria for determining what differences matter and what counts as legitimate. As a practical matter, this approach has generated results that are indeterminate, inconsistent, and often indefensible.

The alternative proposed here would shift emphasis from gender difference to gender disadvantage. This approach builds on the work of other feminist legal scholars including Katherine Bartlett, Mary Becker, Clare Dalton, Lucina Finley, Mary Jo Frug, Ann Freedman, Kenneth Karst, Herma Hill Kay, Sylvia Law, Christine Littleton, Carrie Menkel-Meadow, Martha Minow, Frances Olsen, Ann Scales, Elizabeth Schneider, Nadine

Taub, Robin West, and Wendy Williams (Bartlett, 1988; Becker, 1987; Freedman, 1983; Frug, 1979; Law, 1984; Karst, 1984; Littleton, 1987; Menkel-Meadow, 1985; Olsen, 1983; Schneider, 1986; West, 1980). By focusing on ways to redress gender disadvantage, such an approach responds to the two most prevalent strands of feminist jurisprudence, those that stress women's fundamental equality with men, and those that seek accommodation of women's differences.

Under this alternative paradigm, a determination that the sexes are not "similarly situated" only begins discussion. Analysis would then turn on whether legal recognition of sex-based differences is more likely to reduce or to reinforce sex-based disparities in political power, social status, and economic security. Such an approach would entail a more searching review than has generally been apparent in cases involving gender. Its focus would extend beyond the rationality of means and legitimacy of ends. Rather, this alternative would require that governmental objectives include a substantive commitment to gender equality—to a society in which women as a group are not disadvantaged in controlling their own destiny.

This paradigm presupposes a better understanding of the harms of sex-based classifications, the diversity of women's interests, and the complexity of strategies designed to address them. Subsequent discussion of issues such as military service exemptions, protective labor legislation, and maternity/parental leaves provide representative illustrations of these complexities. Preferential policies that offer concrete advantages to some women in the short term may carry a less obvious price in the long term. Sex-based classifications often reinforce sex-based stereotypes and thus help perpetuate sex-based inequalities.

In these cases, any adequate legal analysis will require close attention to context. Shifting focus from gender difference to gender disadvantage will not always supply definitive answers, but it can at least suggest the right questions. Which women benefit, by how much, and at what cost? Reframing the issue in these terms can also point up the limitations of traditional strategies, which have too often promised equality in form but not in fact. If we are to make significant progress, our goal must include not simply access to but alteration of existing social institutions (Taub and Williams, 1986; Littleton, 1987; Rhode, 1986).

II.

Until the last two decades, American lawmakers have generally leapt from the fact of sex-based differences to the appropriateness of differential treatment, often without the benefit of any intermediate premises. In contexts ranging from tax exemptions to criminal penalties, judges have found it "too plain for discussion" that "real differences" between men and women justified their different legal status (*Quong Wing v. Kirkendall*; *Platt v. Commonwealth*). It has, however, been less plain which way those differences cut. So, for example, women's "special" attributes have pointed to different results on identical is-

sues, to both longer and shorter prison terms, and to both favored and disfavored treatment in child custody determinations (Compare *Ex Parte Gosselin*; *Territory v. Armstrong*; *Commonwealth v. Daniels*; *Wark v. State*; Olsen, 1984). In some contexts, decision makers have attributed sex-based differences to nature and in other contexts to nurture but, most often, they have confused the two. The most celebrated examples have involved occupational contexts in which exclusively male decision-makers have contemplated the boundaries of their own exclusivity. Throughout the late nineteenth and early twentieth centuries, many judges identified a "Law of Nature" or of "the Creator" that decreed domesticity as woman's only destiny (*Bradwell v. State*). Her "proper delicacy," "tender sensibilities," and maternal responsibilities served as disqualifications for a diverse range of occupations ranging from law to shoeshining (*Bradwell v. State*; *In the Matter of Goodell*; Baer, 1978; Baker, 1978). Although the Lord's will was ultimately reversed in most of these contexts, the legacy of the difference framework lingers on. The most recent illustrations have involved women's exclusion from occupational settings thought to present special demands or risks, such as military combat, maximum security prisons, or toxic worksites.

A difference-oriented framework copes poorly with circumstances in which the sexes are not similarly situated. The Court's 1981 decision upholding a male-only draft registration system is a case in point. There, a majority of Justices reverted to the time-honored technique of avoiding difficulties by avoiding the issue. The Court simply assumed that differences between the sexes justified differences in combat eligibility, and that these differences further justified exemptions from registration requirements (*Rostker v. Goldberg*). Evidence concerning women's effective performance in a wide range of non-combat and combat-related contexts here and abroad was diplomatically ignored. Nor did the Court consider the availability of gender-neutral standards to screen for positions requiring special physical strength (*Rostker v. Goldberg*; Kornblum, 1984). What was perhaps most telling was the absence of any concern about the stereotypes underpinning combat exemptions: for example, legislators' assumptions that women couldn't and men wouldn't fight well in mixed units; that sexual proximity would breed sexual promiscuity; that the nation would be reluctant to mobilize if its daughters were at risk; and that the trauma of gender-integrated field latrines would hamstring the infantry (Estrich and Kerr, 1984; Ruddick, 1984; Rhode, 1983).

How actively to demand the benefits and burdens of military service has been a matter of considerable controversy within the women's movement. Among some constituencies, the goal is to end conscription for both sexes, not to allocate its burdens equally. For these feminists, women's traditional ethics of nurturance are fundamentally at odds with the ethics of aggression that have traditionally shaped American defense policy. Yet

other feminists, while agreeing with the need for changes in military structures and service requirements, view women's equal participation as a means to that end. As they note, restrictions of women in combat have long served to limit women's access to desirable jobs, training, and benefits, and to reinforce traditional notions of masculine aggression and female passivity (Williams, 1982; Kornblum, 1984). However one assesses the practical effects of full female participation in the military, there remain profound symbolic reasons to seek that objective. It is difficult for women to attain equal treatment and equal respect as citizens while remaining exempt from one of citizenship's central responsibilities.

Similar points are applicable in other occupational contexts. A recurring issue has involved interpretations of Title VII of the Civil Rights Act, which prohibits discrimination on the basis of sex except where it is a "bona fide occupational qualification" (BFOQ). On the whole, courts have interpreted this exception narrowly, but the circumstances where it has survived point up limitations in difference-oriented paradigms.

The first BFOQ case to reach the Supreme Court involved an employment policy that barred job applications from women but not men with preschool children. In a brief 1970 opinion, the Supreme Court effectively avoided decision by remanding the case to lower courts for two determinations: first, whether conflicting family obligations were demonstrably more relevant to job performance for a woman than a man; and, if so, whether that would constitute a BFOQ defense to the employer's policy (*Phillips v. Martin Marietta*). Yet, by asking only if the sexes were different in a sense relevant to this differential treatment, the Court ignored more fundamental issues about the legitimacy of that treatment and the gender stereotypes underlying it. In effect, the Court ignored the social costs of penalizing individuals for their parental status and of visiting those penalties disproportionately on mothers.

Nor was the Supreme Court's next pronouncement on BFOQs a substantial improvement. At issue were Alabama prison regulations preventing women from serving as guards in positions requiring close physical contact with inmates. In upholding such restrictions, the majority relied on "substantial" trial testimony indicating that women would pose a "substantial" security problem because of their special vulnerability to sexual assault (*Dothard v. Rawlinson*). The factual basis for that testimony was somewhat less substantial. Never did the state explain why sexual assaults, as opposed to assaults in general, posed a particular threat to prison safety. Nor did the Court explain its refusal to credit equally substantial evidence indicating that properly trained female guards had not presented risks in other state maximum security prisons. By adopting what Catharine MacKinnon has characterized as the "reasonable rapist" perspective on employment opportunities, the majority decision perpetuated stereotypes of women's inability to protect themselves

(MacKinnon, 1987; Williams, 1982). The Court's reasoning also penalized female job applicants for the "barbaric" prison conditions that allegedly placed them at risk.

If this difference-oriented approach to occupational qualifications remains unchallenged, it could have serious consequences for both men and women in potentially toxic workplaces. In the interests of maternal and fetal health, courts have sanctioned layoffs of pregnant employees or bans on employing fertile women. Since an estimated twenty million jobs may pose some reproductive risks, many of which affect men as well as women, it is crucial for decision makers to focus less on gender differences and more on gender disadvantages (EEOC, 1980; Becker, 1980; Williams, 1981). The strategy must be to reduce employment hazards, not to restrict female employment opportunities.

III.

One final context in which the advantages of shifting paradigms is most apparent involves special treatment in protective labor and maternity policies. The issue arose around the turn of this century as increasing numbers of state legislatures began passing regulations governing maximum hours, minimum wages, and working conditions. Controversies increased after a pair of Supreme Court decisions struck down such regulations for male workers as a violation of their freedom to contract, but upheld restrictions for female employees in light of their special vulnerabilities and reproductive responsibilities (*Lochner v. New York*; *Muller v. Oregon*). Even after the Supreme Court reversed its holding as to male workers, the disputes over gender-specific protections persisted. In part, the debate centered on concerns about the fate of such protections under a proposed Constitutional Equal Rights Amendment. Underlying that issue were deeper questions about mandates guaranteeing formal equality in circumstances of social inequality. Those same questions have resurfaced in the last decade, as the women's movement divided over the merits of special protection for maternity leave.

Then, as now, feminists who supported gender-specific policies began from the premise that women have special needs that justify special regulatory intervention. Earlier in the century, the focus was on female employees' unequal labor force status and unequal domestic burdens. Most women workers were crowded into low-paying jobs with few advancement opportunities and little likelihood of improving their situation through unionization. Female employees were also far more likely than their male counterparts to assume major family responsibilities, and the combination of those duties with prevailing twelve-to-fourteen-hour work shifts imposed enormous hardships. For most of these women, statutory regulation of hours and wages meant a substantial improvement in their quality of life (Women's Bureau, 1928; Baer, 1978; Baker, 1979; Cott, 1986).

Yet as feminists who opposed gender-specific statutes

also noted, such protections, by making women more expensive, often protected them out of any jobs desirable to male competitors. In some contexts, sex-based regulation also increased female unemployment and reinforced stereotypes about men's breadwinning and women's nurturing roles (Baer, 1978; Kessler-Harris, 1980; Landes, 1980).

Although those on both sides of the protective labor debate claimed to speak for women, women's interests were more divided than partisans acknowledged. For the majority of workers, clustered in female-dominated jobs, gender-specific regulation resulted in significant improvements. Yet the price was to limit other employment opportunities and thus to reinforce the social inequalities that protective statutes could not adequately address. Moreover, the ideology of protectionism and women's maternal mission spilled over to other contexts in which protection was less advantageous (Johnston and Knapp, 1971; Williams, 1985; Olsen, 1986).

The contemporary debate about maternity policies involves similar claims and presents similar complexities. The issue has its origins in the Supreme Court's initial confusion over how to treat pregnancy. What makes the pregnancy cases particularly instructive as sex discrimination opinions was the Supreme Court's unwillingness to treat them as such. During the mid-1970s, a majority of Justices upheld policies providing employee benefits for virtually all medical treatment except that related to childbirth. Yet, in the first of these cases, the Court relegated the entire discussion of discrimination to a footnote. Then the majority announced its somewhat novel conclusion that pregnancy policies did not even involve "gender as such" (*Geduldig v. Aiello*). Rather, employers were simply drawing a distinction between—in the Court's memorable phrase—"pregnant women" and "non-pregnant persons." Preoccupied with issues of difference rather than disadvantage, the majority perceived no issue of discrimination. Since pregnancy was a "unique" and "additional" disability for women, employers were entitled to exclude it from insurance coverage (*Geduldig v. Aiello*; *General Electric v. Gilbert*; *Bartlett*, 1974). Never did the Court explain why only pregnancy was "unique," while men's disabilities, such as prostatectomies, were fully covered. Rather the Court's characterization assumed what should have been at issue and made the assumption from a male reference point. Men's physiology set the standard against which women's claims appeared only "additional."

In the aftermath of these cases, concerted lobbying efforts prompted passage of the federal Pregnancy Discrimination Act, which provided that pregnancy should be treated "the same as" other medical risks for employment-related purposes (92 Stat. 2076). This remains, however, one of the many contexts in which equality in form has not resulted in equality in fact. The Act demands only that employers treat pregnancy like other disabilities. It does not affirmatively require adequate disability policies. In the absence of statutory

mandates, such policies have been slow to develop. Data from the late 1980s indicated that about three-fifths of female workers were not entitled to wage replacement, and a third could not count on returning to their same job after a normal period of leave. The United States has remained alone among major industrialized nations in failing to provide such benefits (Kamerman and Kahn, 1987; Congressional Caucus for Women's Issues, 1986). A difference-oriented approach that is focused on formal, not substantive, equality does nothing to challenge or change the situation.

These inadequacies in national policy have prompted some state initiatives, including legislation that requires employers to require job-protected leaves for pregnancy but not for other disabilities or for parental and caretaking responsibilities. During the early 1980s, litigation challenging such preferential policies once again found feminists on both sides of the issue. In *California Federal Savings and Loan v. Guerra*, the Supreme Court held that the Pregnancy Discrimination Act's requirement that pregnancy be treated "the same" as other medical disabilities did not bar states from mandating special maternity leaves. Any alternative decision would, in the majority's view, violate the Act's central purpose: to secure workplace equality for women.

Feminists who have argued in favor of such a holding generally begin from the premise that women are unequally situated with respect to reproduction. While no-leave policies pose hardships for both sexes concerning the disabilities they share, those policies present an additional burden for women. As a matter of principle, pregnancy should not have to seem just like other disabilities to obtain protection. As a practical matter, until legislatures are prepared to mandate adequate benefits for all workers, partial coverage seems like an appropriate goal (Finley, 1986; Kay, 1985; Littleton, 1987).

The danger, however, as other feminists have noted, is that settling for the proverbial half a loaf could erode efforts for more comprehensive approaches. To require maternity but not paternity or parental leaves is to reinforce a division of childrearing responsibilities that has been more separate than equal. Women's unequal family responsibilities translate into unequal career options and perpetuate the socialization patterns on which such inequalities rest. Legislation that makes women more expensive also creates incentives for covert discrimination. Many feminists are unwilling to see women once again "protected out" of jobs desirable to men (Williams, 1985; Brief for NOW, 1987).

Similar concerns arise with proposals for special slower career paths for working mothers (Schwartz, 1989). "Mommy tracks" can too easily become "mommy traps"; they restrict individual opportunity and reinforce sex-based stereotypes. The implication that infants are mothers' responsibility deters men from seeking and employers from accommodating full parental commitment. Such attitudes limit both male and female experi-

ence. They impair fathers' formation of nurturing relationships (Chodorow, 1978) and force mothers to choose between caretaking commitments and occupational advancement (Rhode, 1988).

The advantages of disadvantage as a legal framework are well illustrated by this debate over maternity policies. For these issues, a sameness/difference approach is utterly unilluminating. Women are both the same and different. They are different in their needs at childbirth but the same in their needs for broader medical, childrearing, and caretaking policies. To know which side of the sameness/difference dichotomy to emphasize in legal contexts requires some further analytic tool.

A disadvantage-oriented approach focuses on an alternative question: In the current context, what strategy is most likely to serve most women's long-term interests? From this perspective, the preferable strategy for resolving issues such as employee leave policy should be to press for the broadest possible coverage for all workers. While the historical, ideological, and economic consequences of pregnancy should not be overlooked, neither should they be over-emphasized. More employers provide job-protected childbirth leaves than other forms of assistance that are equally critical to workers and their dependents. Pregnancy-related policies affect most women workers for relatively brief intervals. The absence of broader disability, health, childrearing, and caretaking policies remains a chronic problem for the vast majority of employees, male and female, throughout their working lives (Taub, 1985; Williams, 1985; Taub and Williams, 1986).

Even if that problem is assessed solely in economic terms, our current approach appears misguided. As recent estimates have suggested, the social costs resulting from the lack of a national disability policy in terms of lost earnings, additional public assistance, and reduced productivity substantially exceed the projected cost of requiring short-term leaves (Spalter-Roth, 1988). In this context, both men and women stand to gain if we press for more by refusing to settle for less.

IV.

A framework less concerned with sex-based differences than sex-based disadvantages could expand both our legal and political agendas. The most pressing problems now facing women—poverty, sexual violence, reproductive freedom, family responsibility—do not generally find them "similarly situated" to men. Focusing not on difference but on the difference it makes recasts both the problem and the prescription. In employment settings, the issue becomes not whether gender is relevant to the job as currently structured, but how the workplace can be restructured to make gender less relevant. For example, what changes in training programs, working conditions, and cultural attitudes would enable women to exercise authority in military or prison settings? What sorts of public and private sector initiatives are necessary to avoid penalizing parenthood? What changes in working sched-

ules, hiring and promotion criteria, leave policies, and child care options would enable both men and women to accommodate home and family responsibilities? (Kamerman and Kahn, 1987; Sidel, 1986; Taub, 1985).

The discourse of difference will sometimes have a place, but it should begin, not end, analysis. As deconstructionists remind us, women are always already the same and different: the same in their humanity, different in their anatomy. Whichever category we privilege in our legal frameworks, the other will always be waiting to disrupt it (Derrida, 1977; Silverman, 1983). By constantly presenting gender issues in difference-oriented frameworks, conventional legal discourse implicitly biases analysis. To pronounce women either the same or different from men allows men to remain the standard (MacKinnon, 1987).

Significant progress toward gender equality will require moving beyond the sameness/difference dilemma. We must insist not just on equal treatment but on women's treatment as equals. Such a strategy will require substantial changes in our legal paradigms and social priorities. The stakes are not just equality between the sexes but the quality of life for both of them.

Note

¹More extended discussions of these issues appear in Rhode, 1989, and Rhode (Ed.), 1990: in press.

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The Constitutional Rights of Women in Post-Marcos Philippines

by Linda K. Richter

The *Women and the Constitution* Conference comes at a critical juncture for women and indeed all citizens in the United States and the Philippines. For Americans the re-examination of women's rights comes during the bi-centennial celebration of our Constitution. At a time when we justifiably praise its endurance, it is appropriate we also assess its omissions and its failure to be interpreted as providing equal rights to both men and women. In the Philippines, America's only colony and a nation that has a closely shared history with the United States in the twentieth century, it is not a time to remember venerable institutions but to celebrate new ones in which the decisions for equity are embodied. In the new Constitution, ratified in 1987, not only is a new political order created from the ruins of the Marcos dictatorship but also the ground rules for a new era of sexual equality have been established.

Women in both countries have long sought basic civil rights. Their struggles in the twentieth century have on occasion been linked, as during the colonial period and more recently in the modern era of the international women's movement. Filipinos watched the American suffrage battle, the fight of American working women, and the struggle for the ERA; they shared our ambivalence about abortion. They understood perhaps more clearly because these issues were linked in the Philippines to colonial rule and severe class inequality as well as gender inequities. Even after independence in 1946, the two countries have been politically and economically linked to a degree some Philippine nationalists contend is neo-colonial and which American policy makers and pundits alike have labeled "special."

Over one million Filipinos live in the United States, and nearly thirty thousand Americans reside at least temporarily in the Philippines. In the Philippines, once known as America's "showcase of democracy" in Asia (Day, 1984), a herculean effort is directed at recapturing democratic values that were to have been America's legacy of colonial rule, and refashioning them in institutions both democratic and nationalist, stable and innovative, equitable and merit-based.

This article traces the legal evolution of women's rights in the Philippines with a primary focus on the contemporary struggle for equality of the sexes that culminated in the new Philippine Constitution. At major junctures, the similarities and differences between the Philippine women's struggle and the American movement are noted, putting each country's key women's issues in context and comparative perspective.

When Philippine women struggle for equality their earliest frames of historical reference are quite different from those of Western feminists. The latter picture

securing rights as an evolving struggle against both religious dogma (be it Christian, Jewish, or Islamic) that asserts their innate inferiority and legal codes and systems of law that consider women little more than property. In the Philippines the task is not seen in terms of securing more and more legitimacy in the political system as the generations unfold. Instead, it is viewed as recovering a basic equality of the sexes that was lost when the country was colonized—primarily by the Spanish in the 1500s and later by the Americans in 1898. Even the Philippine myth of creation has man and woman springing from the same cylinder of bamboo. The man is referred to as Malaka (strong) and the woman as Maganda (beautiful) but the assumption is that they are different but equal (Rojas-Aleta, et al, 1976, p. 13).

While there is probably a bias toward romanticizing the pre-Spanish period when the islands were free of domination by outsiders, anthropologists agree that the pre-Catholic and pre-Islamic period among most racially Malay people (now of Malaysia, the Philippines, and Indonesia) did have generally greater equality of the sexes than has been known since. There was no preference for males; there was freedom for both sexes in choosing mates. A bi-lateral kinship system was in place that put no greater importance on the male's family than on the female's. A woman retained her name, inheritance, and property rights after marriage. Women could make contracts, could have babies without stigma outside of marriage, and were free to divorce if necessary (Rojas-Aleta, et al, 1976, p. 14).

Women were leaders in religious ceremonies, and some were thought to have healing powers. Records are numerous of Malay chiefs consulting women on issues before the group, and women could succeed men as leaders (but only if there was no male heir). History has many examples of pre-Spanish female leaders, including generals, who fought valiantly against colonization. Women also led revolutionaries against later Spanish rule and were important organizers for peaceful resistance to and reform of Spanish colonial rule (Rojas-Aleta, et al, 1976, p. 14).

The lengthy period of Spanish conquest introduced a wholly different set of myths and culture to the islands. Only Mindanao and a few other islands in the South stayed out of the de facto grip of Spain. In those areas, the spread of Islam from Indonesia strengthened the resistance to Catholic Spain. However, Islam proved no more conducive to rights than the Catholic influence in the North. The datus or Muslim chiefs in the South permitted no political influence for women; the women were kept subordinate to men in all spheres of life. Later, access to education was effectively denied women; even in the 1980s the literacy, longevity, and other development indicators are much lower for Muslim women than others in the Philippines. The only advantage Muslim women had over their Catholic counterparts was that divorce was an option, although it could be initiated only by a man.

The spread of Islam in Southeast Asia would seem to cast some doubts on the accuracy of those who claim a "Golden Age" of equality that vanished with conversion. It is hard to believe women equally and freely converted to Islam and its controls on women. However, throughout most of the Philippines the Spanish Code of Laws held sway. Under the Code women had no more rights than did children or the insane (which is to say few). Where property and family rights were involved, Catholicism legitimated the dominance of the husband, while cultural myths tempered that role with the notions of gallantry and chivalry. Women were instructed to be pious and docile. Some disregarded such self-serving advice, most notably Gabriela Sinang (1723-1763), the Philippines' first female general and a resister of Spanish rule (Rojas-Aleta, et al, 1976, p. 15). The church itself was a source of some concern as the friars and the Spanish proceeded to take control of most land. Class divisions developed, sharpened, and exacerbated the plight of the poor (Richter, 1982). Thus, by the time of the Spanish-American War in 1898 strong counter pressures organized against the Spanish and for independence had been building for a generation (Schirmer and Shalom, 1987, p. 6). The defeat of Spain led many Filipinos to assume that the United States would acquiesce in their liberation—a tragic miscalculation.

Most American schoolchildren are taught that the United States acquired the Philippines after defeating Spain in the Spanish-American War. That is about as accurate as those accounts that say American women were given the vote in 1919. It was not that tidy. The Filipinos had inflicted major losses on the Spanish before the United States arrived and had established an independent government for themselves. Because the Philippine troops had forced Spanish colonists into Manila, the Spanish surrendered in Manila to the Americans in the summer of 1898. The surrender caused no immediate concern to the young Philippine Republic until the Americans began to conquer other areas and in February formally "annexed" the Philippines. As Schirmer and Shalom comment, "Thus it turned out that the essential starting point for U.S.-Philippines relations . . . was a war of conquest. . . . This lasted officially three years, unofficially twice that long. The war destroyed a fledgling Philippine Republic and turned that country into a U.S. colony bereft of the independence it had newly won from Spain" (1987, p. 7).

The Philippine "Insurrection," as it was called in the United States, was a particularly savage war with racist overtones. Some Philippine women fought in the war and were among its estimated one million casualties (Schirmer and Shalom, 1987, p. 19). Despite the harsh conquest of the Philippines, the American colonial period in the Philippine War was viewed by most Filipinos as rather benign after Spanish rule. Leaving aside chronic land tenure problems and the question of the morality of colonialism by any nation, the access to education and the tutoring in democratic values (however self-serving or

Westernized the context) contributed mightily to the generally positive attitudes toward American governance.

Because women had been disproportionately disadvantaged under Spanish Code Law, Filipinas benefited most from the huge efforts toward mass education for both sexes. Space here does not permit a discussion of the variations in treatment throughout the colonial period, but in general while access to opportunities outside the home flourished relative to the Spanish period, many gender inequalities persisted even as they did in the United States. In the Southern Philippines the Muslims continued to have much autonomy despite the efforts of the American government.

The 1935 Constitution, drafted to serve as a progressive transition document for an eventually independent Philippines, seems rather sexist and quaint today. For example, though American women could vote by 1920, Filipino women could not until 1937. Even then, the 1935 Constitution did not provide for their suffrage but only for the opportunity to seize it. Article V of the 1935 Constitution provided that the National Assembly could extend the right of suffrage to women if, in a plebiscite held for that purpose within two years of the adoption of the Constitution, at least 300,000 eligible women voted in favor of suffrage (*Encyclopedia*, 1953:169). This they did in 1937. In the first Philippine elections 325 women were elected to local and national office (Rojas-Aleta, et al, 1987, pp. 170-171).

Constitutional language was sexist, referring to "he" and "him" rather than to "citizens" or "persons." More importantly, Article IV governing citizenship provided that children of Filipino fathers and foreign mothers were automatically citizens, while children of Filipino mothers and foreign fathers only became citizens when as adults they chose Philippine citizenship (*Encyclopedia*, 1953:168). The Constitution also authorized, in Article XIII Section 6, legislation for the special protection of working women and children, at a time when such legislation was also in vogue in the United States. The 1935 Constitution, like the U.S. Constitution and most pre-World War II constitutions, had little or nothing to say about family life, women, gender, or minority relations. The Presidential democracy it provided was very similar to that of the mother country. Only in establishing a unitary system rather than a federal government did it substantially diverge from the U.S. structure.

Many of the issues most salient to women's lives were controlled as they are to this day by the Catholic Church. Divorce and abortion were forbidden. Beyond that, property and family relations were governed by a Civil Code that treated women as little more than children. Thus, while U.S. and Philippine women shared many common objectives in the struggle for suffrage and civil liberties, in the Philippines the interplay of culture, especially religion, political conquest, and the persistence of class rigidity, resulted in specific national agendas as well. The 1935 Constitution was the effective law of the

land until the Japanese took over during World War II. It then became the *de jure* Constitution after the War, through Philippine independence until 1972. At that time, major provisions were suspended by President Marcos' declaration of martial law. A new Constitution was drafted in 1973 and "ratified" by voice vote in 1975 (Proclamation No. 1102, 1975).

The rights of women under the 1975 Constitution are of interest primarily in terms of their illustrating the increasing salience of women in the country's public life. Perhaps because of the women's movement, a better awareness existed that women were an important constituency that demanded greater recognition of their heavy domestic and public work. By the 1970s, women were represented in all of the professions, including law. Though not immune to sex role socialization (chemistry and pharmacy were female dominated as were teaching and nursing), women had a broader range of careers, including public sector appointive and elective offices, than their American sisters. Moreover, a critical mass of women was in most careers rather than a few token women. Agriculture and engineering were the two chief areas in which women remained relative rarities. Formal access to education had led many women, particularly middle and upper class urban women, to grasp opportunities across a broad spectrum of roles. Access was less a problem than was equal pay (Crawford and Sidener, 1984).

The 1975 Constitution, however, had very little to do with opportunities for women and everything to do with the tenure of President Marcos. The president was limited to two terms of office under the 1935 Constitution, terms expiring in 1973. When Marcos failed to prevail in pushing for a parliamentary system in 1971-72, he declared martial law in September 1972, ostensibly to deal with insurgency and political violence. His action was a legal option under the 1935 Constitution. He then proceeded to close all democratic institutions, and a more carefully constituted constitutional convention drafted a new Constitution with a parliamentary system (and no limits on tenure) more to the president's liking (Richter, 1984). The Constitution was then ratified by a voice vote taken during martial law. The Constitution did not go into substantial effect beyond the mere terminology of a parliamentary system ("ministry" instead of "departments," the selection of a "Prime Minister," etc.) until martial law was lifted in 1981 (Richter, 1982, epilogue).

The provisions of the new Constitution that are of specific interest to women primarily modified sexist conditions in the 1935 Constitution. For example, a Filipino mother who marries an alien was enabled to transfer her citizenship to children born after 1973. Such children born before 1973 would not be considered natural-born Filipino citizens. The distinction becomes important because eligibility for many public offices hinges on being natural born citizens. Apparently, President Marcos feared no competition from babies born after 1973! The president was notorious for changing the

rules of the game to benefit himself and relatives and to disenfranchise enemies. In 1981, he made fifty the age of eligibility for the presidency. His chief opponent, Benigno Aquino, was forty-eight. In the same election, Marcos lowered the age of eligibility for governors from twenty-five to twenty so that his son could also hold the governorship of Illocos Norte while attending college in the United States! Filipino women who marry aliens no longer lost their citizenship unless they voluntarily renounced it (Constitution, p. 12).

While the 1973 Constitution tended to make men and single women relatively equal under the law, married women remained severely disadvantaged by discriminatory provisions of the Civil Code (Rojas-Aleta, et al, 1977, p. 188). A married woman who earns a salary is taxed more heavily than a man because her earnings are considered only supplementary (Villariba, 1984). Also, in cases of marriage between individuals of different religions, the laws, rituals, and customs of the male are to be followed. The man establishes the domicile, a provision held in many U.S. states, the only exception being if he goes abroad while not in the service of the Philippines (Rojas-Aleta, et al, 1977, p. 189). The husband is the head of the household and while both are charged with the responsibility for raising the children, in cases where the parents disagree the husband's decision is binding. Similarly, the husband is legal executor of the children's property and the couple's joint property. The courts did adhere to the "tender years doctrine" in most child custody cases, stipulating that mothers have custody of children under age five. However, unless abandoned for more than a year, women rarely won contested custody disputes (Rojas-Aleta, 1977, p. 184). A potentially more common problem under the Civil Code was that a husband could prohibit a wife from working if he could establish that he could provide for her (Montrel and Hollnsteiner, 1976, p. 20).

A pernicious double standard existed in other areas as well. In court cases involving the wife, the husband's involvement was typically mandatory; but in reverse circumstances she generally could not participate (Montrel and Hollnsteiner, 1976, p. 20). In the absence of divorce the rules for legal separation become critical. A man could separate from a wife upon charging her with a single incidence of adultery. A woman could only separate from a husband if she could establish that her husband had brought his mistress into their home or that he has sexually misbehaved with someone else under scandalous circumstances (Montrel and Hollnsteiner, 1976, p. 26). The Civil Code added insult to injury at every turn. Because the 1935 and 1973 Constitutions had so little to say about women and families, the Civil Code took on the task with a vengeance largely unchallenged by the pre-1972 politicians or the Church.

President Marcos did issue several Presidential Decrees and Letters of Instruction that indicated an intent to move toward sexual equality. Since there is no legislative history and neither an independent judiciary nor a clean

election was ever involved, the decrees and LOIs must be taken at face value. In Presidential Decree #148, companies with three hundred or more workers were mandated to have free family planning units (Rojas-Aleta, et al, 1977, p. 186). While no information is available on compliance and implementation, the Philippine government and private sector have a substantial stake in a lower birthrate. Not only are the general economy and maternal and infant mortality factors; also at issue is the fact that the Philippines, like more than one hundred of the world's nations but unlike the United States, provides for paid maternity leave.

While the Civil Code was supposed to mandate equal pay for equal work, salaries for men averaged one and one-half times those for women (Rojas-Aleta, et al, 1977, p. 151). Presidential Decree #442 in 1974 substantially increased the horizon of equality by calling for equal pay for work "of equal value" (a demand for comparable worth well before it became a fashionable issue in the United States). Marcos also decreed that women could not be fired on the basis of becoming married or pregnant (Rojas-Aleta, et al, 1977, p. 186).

Another progressive step taken during the Marcos years that reveals the dictator's admirable concern with legal symbolism was the ratification in 1980 of the U. N. Convention on the Elimination of All Forms of Discrimination Against Women (National Commission, *Filipino Women*, 1985, p. 32). Though by 1989 nearly one hundred nations have signed this document, the United States and most of the Muslim nations remain holdouts (Richter, 1985b). Like so many Marcos steps, the signing furnished more rhetoric than action. The dictator was long on flourishes for world opinion but apathetic or opposed to actions designed to give women basic protection against sexual harassment and political torture. Nor would he assure minimum wages and health and safety conditions in the foreign processing zone which had an 80% female work force. As an example, women workers were harassed and prevented from striking for better conditions in so-called "essential" industries such as Mattel's Barbie Doll factory.

There were other inconsistencies. Female relatives enjoyed high positions of responsibility in the Marcos government. Imelda Marcos, for example, as Metro Manila Governor, had authority over the 7 1/2 million people who lived in the capital city environs. She also was Minister of Human Settlements, a country-wide responsibility with the largest budget of any ministry.

Yet, President Marcos presented a macho image as well. He survived scandalous affairs and even maintained a mistress and her family. Marcos claimed to be embarrassed to be competing against a woman in a presidential election, contending "women belong in the bedroom" (*Women's International News Network*, 1987a, p. 473). Thus, it is high irony that he found his twenty-year rule undone by a woman without a political party, catapulted to fame by the martyrdom of the man whose popularity

Marcos most feared. (Benigno Aquino was assassinated in the custody of military officials upon his return to the Philippines in 1983.)

The incredible struggle of February 1986 of millions of people fighting for democracy in the Philippines, ousting a dictator and installing Corazon Aquino, was a moving drama for Americans and Filipinos alike. The United States had long prided itself on bringing democracy to the Philippines, but for nearly twenty years it had acquiesced at least and supported at worst a Philippine leader who was anti-democratic but adept at manipulating the trappings of democracy and corrupt beyond all contemporary comparisons. The United States was grateful when the end came to whisk Marcos and his entourage without bloodshed out of the Philippines.

With hindsight it is clear that the dramatic events watched by Americans and Filipinos alike represented a massive uprising of a disaffected citizenry not, at least at this juncture, a bona fide revolution. Still, for most Filipinos the events of February 1986 represented no ordinary coup d'etat. Filipinos were inordinately proud of the fact that what had occurred had been done by Filipinos not at the behest of the United States, not by the United States, and even despite the fact that the U.S. President had been President Marcos' long-time ally.

Filipino women had always been involved in political resistance and the best educated had typically been organizationally active in establishment politics, but this time one of their own had been installed as president after a personally dangerous and arduous campaign against a ruthless leader whose political legerdemain was the stuff of myths. The sense of political efficacy these events instilled in both Filipino men and women is hard to exaggerate. Except for the most extreme groups, the New People's Army and the militant Muslim groups, women's groups (particularly in Manila) were perhaps the most prepared to take advantage of the new situation. For the previous ten years the United Nations Decade for Women had been a focus for established and incipient women's groups throughout the world. Even in the Philippines where civil liberties were in scarce supply, women's groups were allowed relatively free sway because of the high visibility of the U.N. Decade for Women and Marcos' careful and consistent efforts to coopt and contain groups with international links.

The Government had appointed reliable women loyalists to head key political positions (such as relatives in governorships) and had appointed technocrats or other apparently dependable women to head commissions, the U.N. delegation, etc. In 1978 the President had set up with government funds the National Commission on the Role of Filipino women with Imelda Marcos as Chairperson. While not a very active force in the Marcos years, it was in place. Other women's organizations were also mobilized and quite active during this period. One of the most ambitious was GABRIELA, an umbrella organization for more than ninety-seven women's organizations whose

political views ranged from conservative to radical.

It was against this backdrop that Corazon Aquino became the first woman president of the Philippines. Her political challenges were without parallel. She inherited a de-developing nation where 70% of the population was below the poverty line, a bankrupt nation from which an estimated \$20 billion had been stolen by the previous incumbent and his cronies. She faced two serious guerrilla insurrections, the Muslim struggle in the South, and the Communist-led New People's Army that had grown from 700 to 28,000 during Marcos' rule and now operated in virtually all of the Philippine provinces. All national political institutions had been destroyed or compromised under Marcos rule. Aquino also had no transition time before assuming office and faced an unrepentant and still trouble-making Marcos in exile. She was further compelled by election to share power with an arch rival, Salvador Laurel, as vice president, and by the circumstances of Marcos' downfall with military defectors, one of whom was potentially linked to her husband's assassination (Richter, 1986). Since then she has survived a half dozen coup attempts, turned around the economy, negotiated three cease-fires of which two were short-lived, re-negotiated the nation's external debt, reversed the capital flight, recovered some of the money stolen by the Marcos family, gone abroad to garner major sources of aid, freed political prisoners, insured freedom of the press, set up a totally new Constitutional order, and held Congressional and local elections. Not too bad a record for a demure woman's twenty-two months in office, a woman whom critics insist is weak and friends fear is reluctant to use power (Richter, 1987a).

The new Constitution most concerns us. Shaped as it was in reaction to the flaws of the two earlier Constitutions and the extraordinary circumstances that led to Marcos' downfall and Aquino's ascendancy, the Constitution ratified February 2, 1987, is important to study with care. The very composition of the Constitutional Commission is worth noting. The delegates were not elected but appointed by the president from many occupational and ethnic backgrounds. No representatives, however, are included of the most leftist legal groups, Bayan or the National Democratic Front. Pro-Marcos individuals were represented, however. What was most encouraging and striking was that the President of the Constitutional Convention was a woman, Cecilia Munoz Palma, and six of the forty-six delegates were women (*The Constitutional Commission* of 1986, p. 60); thus, this Philippine Constitution had both its foremothers and forefathers. The document also appears to reflect the new political environment in gender and family components.

The most important provision in terms of gender equality is within Section 14 of the Constitution, the Declaration of Principles and State Policies: "The State recognizes the role of women in nation-building and shall insure the fundamental equality before the law of men and women" (p. 60). Thus, the Philippines, former colony,

granted equal rights to men and women before the so-called tutor in democracy, the United States.

The achievement did not come without enduring efforts by women's groups over the last ten years, marshaling public support and, more importantly, quantifying it. As early as 1976 the University of the Philippine Law Center proposed a series of steps needed to insure women's rights and particularly to insure that women's rights were not abridged upon marriage. These proposals followed an exhaustive analysis of the laws affecting women. Women in nine major cities were polled, and overwhelming support for equal rights was found. Public forums were conducted in eleven cities where unanimous approval of the proposed reforms existed except for opposition to the unqualified right of divorce (Rojas-Aleta, 1977, et al, p. 287). In the interim, other groups were actively documenting the plight of women and politicizing men and women alike to the issues of gender inequality.

Women's groups coordinated their strategy after the Constitutional Convention was formulated. According to the *Women's International Network News*, "Formulated by women's groups, the gender equality provision along with other proposals, was endorsed to the Constitutional Commission by Ms. Felicitas Aquino, one of the six women commissioners of the 48-member body. Although the provisions were 'watered down', their passage is . . . a clear victory for women" (1987b, p. 58). The gender equality provision was not only important for providing the essential legitimacy for future legislation concerning gender, but also it led to a new Civil Code.

The preparation and popularity of the gender equality clause did not assure its inclusion, however. The gender equality clause is reminiscent of the ironic way in which the United States passed its strongest legislation to date on gender equality. When the 1964 Civil Rights Act was being originally debated it referred only to prohibiting discrimination based on race, religion, creed, and national origin. A Southern senator, in an effort to defeat the bill, facetiously added "sex" to the criteria. It passed anyway and became the bulwark of the last generation's legal basis for gender equality.

The Philippines women's groups did not win all that they sought however. Originally, they had campaigned for a provision that would call for equality not only before the law but also "for equal rights of women and men in all spheres of economic, political, civil, social and cultural life, including family life" (*Women's International Network News*, 1987b, p. 58). The Constitution calls for the state to "ensure equal work opportunities and equality of employment and compensation." The proposal would have added: "In order to achieve the goal of equality in employment, women shall be provided full and equal access to formal and non-formal education and training that are sex-differentiated" (*Women's International Network News*, 1987b, p. 58). There were other defeats as well. One futile proposal introduced to the Commission sought to recognize the value of housework. This had also

been an important issue at the final UN Decade for Women Conference in Nairobi. The global unpaid housework women do was estimated to be worth four trillion dollars in 1985; yet, it is performed almost exclusively by women without stipend, other benefits, or even recognition that it is work. Equally doomed was a proposal that men and women assume equal responsibilities for housework and other aspects of family life. Though fanciful sounding in a society imbued with machismo, a similar provision is in the Cuban Civil code with family courts set up to implement it (Cuban Family Code, 1984, pp. 321-328). Role-sharing is rare in most societies, especially Third World ones where extended families and the availability of servants for the middle class means that one woman's liberation from housework is at the expense of her female relatives or female servants (Richter, 1985a). The Philippines, especially in the last twenty years, however, has faced deteriorating economic conditions which have made the two-job family the norm, especially in cities (Richter, 1986). Thus, the proposal to call for equality in family responsibilities was particularly heartfelt.

Another provision defeated was aimed at the infamous Civil Code's restrictions on women's property and freedom to choose a career. It would have established "the right of women to freely choose and practice a career or calling and to control their own property and income, regardless of civil status." Why it was defeated is unclear, though it would appear that it is redundant if the essential equality of the sexes called for in Section 14 is reasonably interpreted (*Women's International News Network*, 1987b, p. 58).

However, two other provisions of the Constitution seem to give special consideration to women, which suggests that the Philippine Constitution demand for sexual equality may be less absolute than that sought in the U.S. Equal Rights Amendment. For example, the Constitution in Section 14 of the Social Justice and Human Rights Article calls for the protection of working women and consideration of their maternal functions through the provision of "safe and healthful working conditions . . . and such facilities and opportunities that will enhance their welfare and enable them to realize their full potential in the service of the nation" (The Constitutional Commission of 1986, p. 46). Having qualified a right to provide benefits for women, it may be difficult to protect the principle on issues discriminatory toward them.

The dilemma comes as it did in the United States when the protective legislation operates as a barrier to the employment of women. Genuine protective legislation is desirable for both sexes. Leaving it to the courts or Civil Code to interpret working women's needs and consideration of their maternal functions sounds very risky indeed. Could not such a clause be used against single or childless women? Couldn't it be used to compel pregnant women to take unpaid leave? Ambiguity also surrounds the issue of whether or not equality of the sexes obligates women to military service. The general conclusion is that it does

not, though the subject has not been really discussed. The Constitution of 1986 appears to have assumed that all the progressive features of the old Civil Code would be left intact while only the reactionary ones would be repealed or ratified as a result of clauses in the Constitution. The progressive features in the laws allowing paid maternity leave may be deemed compatible or amended, it seems, on the basis of the Constitution's general language.

The theoretical problems of interpretation associated with the new Constitution have not emerged yet. Indeed, the new Family Code as signed into law by Aquino July 6, 1987, significantly enlarges women's rights. Women no longer need their husband's consent to work, and both are given equal responsibility for supporting the family and managing the home. There is also now "absolute community of property" (*Asiaweek*, 1987, p. 14).

Two issues not on the Philippine women's agenda, divorce and abortion, are still prohibited under the new Constitution ("State Policies," Sec. 123, Constitution, p. 3). In fact, it was left a bit unclear whether even Muslims would be allowed divorce or specific concessions to their religion under the Constitution. Muslim leaders have been quite critical of the Constitution's failure to address the political situation in the Southern Philippines or the cultural rights of their people (Wilmot, 1986, pp. 27-28).

The new Civil Code is, however, more explicit in protecting the right of divorce for the nation's 3.5 million Muslims and expands for all Filipinos rights to annulment beyond fraud at the time of marriage to concealment of transmissible disease, homosexuality, alcoholism or drug addiction. Grounds for legal separation have also been expanded (*Asiaweek*, 1987, pp. 14-15).

The 1986 Constitution was drafted by a group of men and women of far more representative backgrounds than any other constitution the Philippines has known, including that of the United States. It was written not by a group of "demigods" but by political activists and was designed perhaps less for the ages than for an era of crisis. Because it is not a federal society, the most vexing power questions in American Constitutional formulation—of relative power between the states and the national government—were absent. It was not without controversy, however.

Although this study is of issues distinctly impinging on women, it should be noted that this constitution endured far less testing and debate than the U.S. document. It was ratified by popular vote, not state or regional conventions, and its success was linked far less to its substance (which was relatively unknown to the voters) than to its sponsor, the immensely popular President Corazon Aquino. Like the U.S. Constitution, which won some votes by the assumption that the incorruptible George Washington would be its first president, the Philippine Constitution was ratified by over 76% of the vote largely because of the charisma of Aquino. That saintly charisma has been largely eroded in the political battles since, and it is still too soon to conclude what substantive impact the Constitution's

bold provisions may have; however, at least in this fundamental document, the Philippines has declared itself for the equality of all its citizens. In that regard, the tutored democracy has instructed the mother country.

Comparing the Filipino women and American women in terms of their constitutional rights illustrates that even where two countries have been linked for the entire century, formally and informally, their feminist agendas remain distinct. Child care, reproductive freedom, comparable worth, and the ERA are American issues. Some, such as the ERA, are correctable by Constitutional amendment. Others require a different milieu that treats children as national resources rather than the private property and sole responsibility of their parents, that sees women as worthy to make reproductive decisions and capable of valuable work. These issues are not yet on the Philippine feminist agenda, because equal rights have been won in principle in the new Constitution, and family planning is available in the form currently acceptable to the overwhelmingly Catholic population and in accord with Islamic values as well. Depending on the legal status of President Marcos' more progressive decrees, comparable worth is a value that simply needs implementation or is an issue for another day. In any event, Philippine careers are not nearly as sex-segregated as U.S. occupations are.

Child care is still available for most women within the family and affordable to middle and upper class. This is in striking contrast to the United States. In fact, on a flight to Manila in 1987, I met three Filipino-American women bringing their babies to be raised by their parents in the Philippines. On the way back I met a mother who had gone to Manila to do the same, but she had tearfully decided she could not give her baby up though she had no idea how she and her husband could manage without her salary or while paying for child care. In many areas, however, American and Philippine feminists have struggled together to confront common problems of world peace, domestic violence, harassment, and a lack of political power commensurate with voting participation that exceeds that of men. (American women have been voting in higher percentages than men since the 1980 presidential election, and Filipino women also have a current history of voting in higher proportions than Filipino men.)

As Americans have learned with their own Constitution, some of the critical development problems for the entire society are often not even addressed in the Constitution. Race relations, women's rights, mass immigration, the cities, housing, and most of the media are just a few of the topics nearly ignored in our original constitution. Similarly, some feminists, particularly Marxist feminists, in both countries argue that fundamental liberties and rights rest with equitable class and property rights, with genuine national independence and the eradication of capitalism rather than with Constitutional provisions designed by representatives of the "haves" in society (E. San Juan, pp. 151-175; D. Aguilar-San Juan, 1982, pp. 253-261).

Whether one agrees with this analysis or not, class does explain a great deal about political attitudes of women. As is the case with their American counterparts, those women, ironically, most likely to cling to the status quo even with its inherent inequalities are those most vulnerable: the older, the housewives, and the lower class. Though they have the most to gain from equality they feel threatened by change. In the Philippines this is most apparent in terms of the issue of divorce. Many women fear divorce rights would lead to abandonment, to no child support. Much greater support exists among professional women for the right to divorce, equal property rights, and free access to careers. To many if not most Philippine women, the most salient conditions are not gender-related but class-related.

While sexism and male dominance of society exacerbates class problems, those on the left of the political spectrum are skeptical if the Constitution can do anything about either class or gender inequalities, since even the 1986 constitution was written by individuals disproportionately advantaged by the status quo. They argue that the widespread prostitution in tourist areas of major cities and around the U. S. military bases demonstrates that exploitation is a by-product of inequalities in the system accelerated by the U.S. military presence and the economic power of many multinational companies and affluent Western tourists. The Philippines political dependency itself, they claim, is a women's issue because 80% of those laboring in unsafe working conditions in multinational firms or in foreign processing zones are women (Ehrenreich and Fuentes, 1981, pp. 52-71). The foreign owners were lured to the Philippines by ex-President Marcos with all kinds of tax benefits and the promise of a docile work force. The new constitution, they argue, does little, and that timidly, to assert a nationalist, independent rhetoric. Other women's groups with more credibility and clout within the establishment do not question the deplorable conditions under which women exist, but contend that in many cases the multinationals have better working conditions than some domestic industries and that the Philippines hasn't the luxury nor does it want to go it alone like Burma or some other socialist systems.

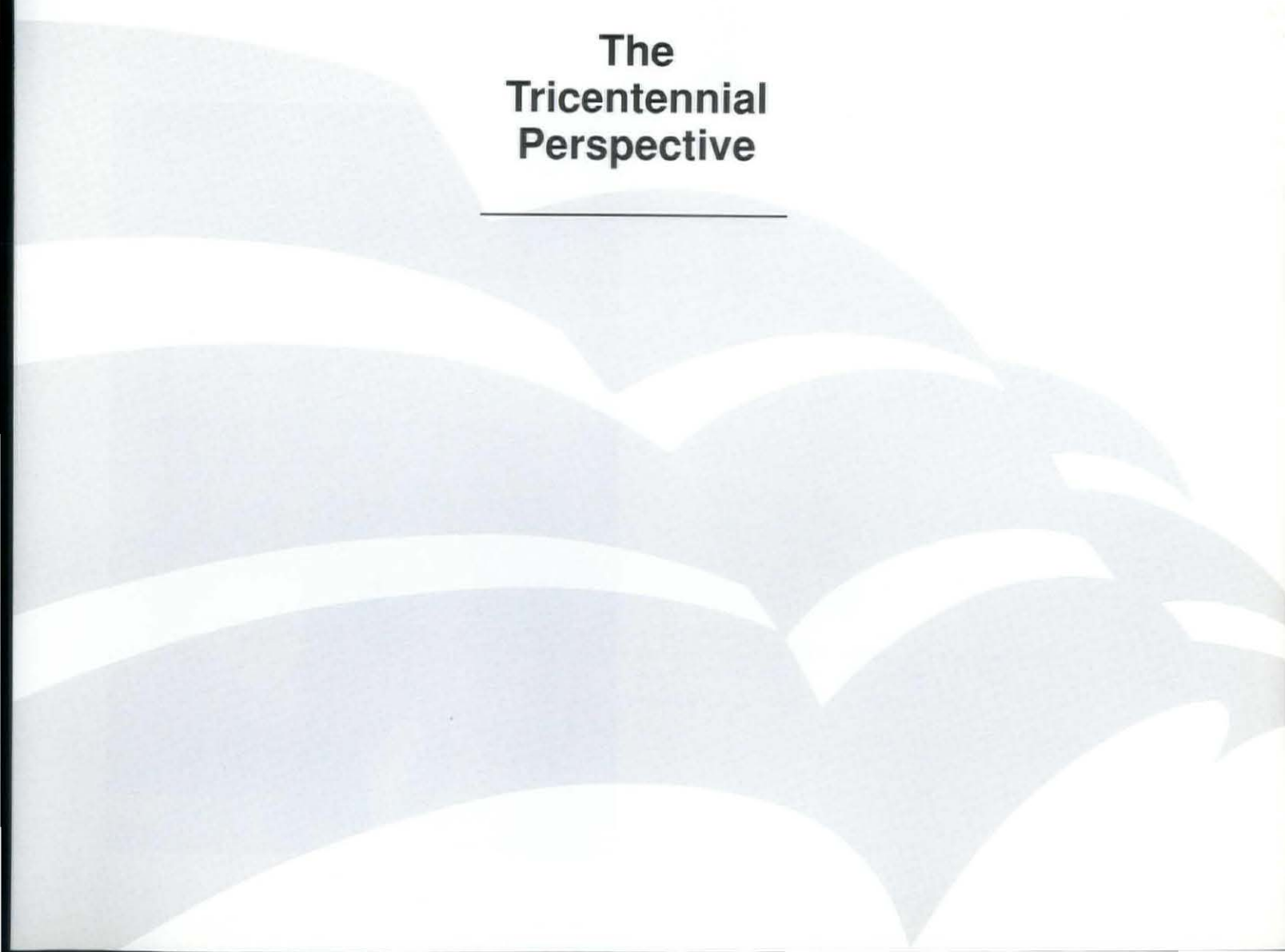
This study provides no definitive assessment of what impact the Philippine's new constitution will have or what are the likely future feminist agendas. What is indicated is that women in the Philippines and the United States are no longer a silent or invisible majority. They are capable of seizing political opportunities and enduring long struggles for some measure of control over their own destiny. Research illustrates also the difference made when women actually are in power, serve in legislatures, and work in shaping constitutional provisions. Yet, in neither society will a document, no matter how explicit or progressive, automatically usher in a better era for women. Women will continually have to empower themselves to shape society to their needs.

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**The
Tricentennial
Perspective**





Coretta Scott King
Women and the Constitution: A Bicentennial Perspective
February 10-13, 1988, Atlanta, Georgia
Courtesy of The Carter Center of Emory University



Geraldine Ferraro
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Bella Abzug
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Barbara Jordan
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These women leaders and 150 others addressed the audience of *Women and the Constitution:
A Bicentennial Perspective.*
February 10-13, 1988, Atlanta, Georgia



Eleanor Smeal



Erma Bombeck



Rosa Parks



Mary King



Liz Carpenter



Christine King Farris and Delores Tucker



Atlanta area Girl Scouts participated in the Opening Ceremony. *Women and the Constitution: A Bicentennial Perspective*, February 10-13, 1988, Atlanta, Georgia

Courtesy of The Carter Center of Emory University



Naomi Lynn, Lady Bird Johnson, Barbara Jordan, Donald Schewe, and Marjorie Fine Knowles. Members of the Executive Committee with featured speakers. *Women and the Constitution: A Bicentennial Perspective*, February 10-13, 1988, Atlanta, Georgia

Courtesy of The Carter Center of Emory University



Kimberly Chaddock, a winner in the National Essay Contest for *Women and the Constitution: A Bicentennial Perspective*, February 10-13, 1988, Atlanta, Georgia

Courtesy of The Carter Center of Emory University



George Ann Hoffman, Joan Grayson, Ronnie Van Gelder, and Donald Schewe address an audience of volunteers for *Woman and the Constitution: A Bicentennial Perspective*. 1987, Atlanta, Georgia

Courtesy of The Carter Center of Emory University



Volunteers who donated over 3,000 hours of service surround Rosalynn Carter (center, second row). *Women and the Constitution: A Bicentennial Perspective*, February 10-13, 1988, Atlanta, Georgia

Courtesy of The Carter Center of Emory University

Women's Role in the Future

by Brenda K. Baker

With the realization of being lost, I began searching for familiar faces. I was not quite sure how I had arrived in this large, unfamiliar town or what the purpose of my visit was, but I was determined to find out. For some time I walked silently through the city. Glancing down as I passed a newsstand, I caught sight of a newspaper dated November 18, 2087.

Even though I was astounded and frightened by my presence in this strange place, I was also curious. As I began reading the paper, I was amazed to learn that the president of the United States was a woman. A female vice-president was also in office. I remembered that in the elections of 1986 nearly twenty women had been running for governorships and only two were elected. I also remembered that the first woman to run for the office of vice-president was defeated. It was almost unbelievable that women held the offices of both president and vice-president.

This new information made me wonder what other areas women had influenced in the past one hundred years. The public library provided some of the answers to my questions. Women had become leaders of many large corporations; they had proven to the male population that they were as dependable and trustworthy as any man. Although the path to equality was long and difficult, women had finally obtained their goal.

In an article I found written by the president, she explained, "I believe that women have succeeded due to the fact that they have not neglected their families. Faith in God and strong family units are what keeps America strong. With all the new advancements," she said, "women have succeeded in all areas and still been able to raise honest, respectable children, children who will be leaders of tomorrow."

My mind still on family life, I ran across an article about Acquired Immune Deficiency Syndrome (AIDS). A cure had been found in 2068 by a female scientist. I thought back to 1987 when many attempted to find a cure for this deadly disease, and all attempts had failed. Now I could read about the cure myself!

Before I finished reading the article, I heard someone ask, "In what year did women receive the right to vote?" Awaking, I realized that I was sitting in history class, and the students were discussing the rights and freedoms of women. I was glad to be in familiar territory again, but I was also excited about the roles that women would have in the future. Women had made many advances in the past one hundred years, and now, because of my dream, I was sure women would continue striving to be the best, that women would never be satisfied with anything but the best.

The Woman of the Future

by Kimberly Chaddock

I see in the future a society that will recognize the labels of man and woman as barriers, walls that hinder the progress of many great minds. Equal emphasis will be placed on education, allowing all the chance to gain the knowledge and experience they need. The woman of the future will be strong, able to cast off the myths and misconceptions of a male-dominated society, and she will stride forward, uninhibited, to grasp life and love and experience the pure joy of being a woman.

The future woman will be able to recognize and love herself as a human being, not only as wife or mother, employer or employee. She will see and create a balance of all the characteristics and traits that combine to make a fully developed person. She will recognize her needs, evaluate them, and fill them adequately. She can be a wife and mother and find a career, yet still find peace with herself. She will find less pressure to perform but much more pressure to experience. She will know that society is worried about what accomplishes the tasks rather than who accomplishes the tasks. I see a common ground for women among all people of the earth.

Today, many people speak of having a woman president. I am confident that by the year 2087 a woman president of the United States will be a fact several times over. I am sure a woman of the year 2087 will accomplish much more in this role than a woman of today because the next one-hundred-year time span will be a growth period, a time to live and experience much that in 1987 is forbidden. The twenty-first century woman can set a goal and reach it, give love and receive it, but, most of all, she can respect and be respected. She will know her assets and liabilities and will use both to advantage. She will not be forced to or need to struggle to maintain a calm existence, but she will be recognized as a person, someone who matters. She can express her opinions clearly and freely, secure in knowing they are noted.

The woman of the year 2087 will carry with her a sense of pride and accomplishment. She will have pride in knowing how her ancestors worked to give her the success she enjoys and accomplishment in knowing that she, a woman, is carving a destiny for her daughters, the women of the future. The joy of being a woman will be hers.

True Equality

by Christine Mezzacappa

When the forefathers of America gathered in Philadelphia two hundred years ago to create the single most important document in United States history, they were burdened with many questions to be resolved. Called demigods by Thomas Jefferson, these fifty-five men combined to compromise on their seemingly irreconcilable differences and develop what may be referred to as a miracle.

Our ancestors constructed ideals that we hope will be used in years to come. These great men may have disagreed among themselves, but they respected others' opinions and integrated them to produce the Constitution. They did not consider segregating men and women when they constructed the laws of America; they wished to create just laws for all Americans. Race and sex were not taken into account, just the unification of society to make a better place for society as a whole.

Today, perhaps some of yesterday's integrity has been lost. Men and women compete, sometimes mercilessly. Women demand equal rights, men refuse to change their beliefs, and women become more determined to change the ways and thoughts of men. The cycle becomes vicious, with no end in sight. However, this is not to say that women have accomplished nothing or should give up the fight for equality. Women have progressed far in the last century. For example, women have voted since 1920. In 1984, a woman was a vice-presidential candidate. The United States has a woman serving as a Supreme Court Justice. Women have contributed greatly to America's

greatness. However, the facts remain. Women, on the average, earn only sixty cents for every dollar a man is paid. If opinions are valid information, then it cannot be denied that women are generally considered the weaker sex.

Yet, hope and dreams remain, for the nation was built upon hope and dreams. With an advanced society, expectations are that women will someday be seen as equals to men. Perhaps even further progress will see men and women who will stand together as a single being, not as two separate yet equal sexes but as one single entity motivated to support each other and create a better world. Women will be valued for what they accomplish as human beings, not for what they accomplish as women. Their accomplishments will be worth noting, not their gender.

Women have always had the intelligence and determination to execute peace and well-being, but by the year 2087 women will combine with men to form a unified human race that betters the conditions for all. This goal is what our forefathers advocated—human rights for all citizens. Women may change society by encouraging men and women to fight together for causes rather than to fight each other. In one hundred years, women may change society by using their motivation and endurance to help everyone combine to make the world a truly better place. Only as one unified entity under God may men and women discover peace and understand what the Constitution advocates—liberty and justice for all.

A Giant Leap

by Lisa Patterson

"Women who strive to be equal to men have no ambition," a phrase that appears on bumper stickers, is intended to insult men; actually, it could challenge women, for attaining equality with other persons is not nearly so great an accomplishment as realizing one's individual potential for greatness. In recent years, women have reached great successes by setting and achieving individual goals to serve and strengthen society. By continuing their natural roles as preservers of life and teachers of society, women can, over the next century, aid in developing a more humanized world.

It is in a woman's nature to act as a preserver of life, for just as a mother brings new life into the world and does her best to protect it, a woman by instinct will also desire protection and preservation for her society as a whole. Because of these instincts, many women today are in medical professions and research. They have also become more involved politically, supporting and influencing local, state, and federal governments. As women continue

their efforts over the next century, they will further emphasize the value of life. Medically, advances in knowledge and techniques, resulting from the help of many dedicated women, will save and strengthen lives of people all over the world. Politically, because women usually prefer peace to war, women will help bring about a peaceful world.

Not only are women natural preservers of life, but they also fulfill the roles of teachers and nurturers. When women use these inborn skills to teach society's members lessons of dedication, self-discipline, and perseverance, all of humanity will be changed for the better. Several women, while serving as First Ladies, have greatly influenced society by using their teaching skills. For example, Lady Bird Johnson taught the value of early education and the importance of national pride as she emphasized the Head Start Program and initiated a campaign to clean up and beautify America. Pat Nixon has shown Americans how to battle and overcome tremendous obstacles as she

remained constant and faithful through the political hardships of the Nixon administration and, later, conquered the physical trauma of a stroke. Betty Ford taught Americans a lesson of awareness and self-discipline not only by admitting her dependency on alcohol and drugs but also by establishing the Betty Ford Center to help others. Finally, Rosalynn Carter taught independence by breaking tradition and attending Cabinet meetings, becoming one of her husband's most influential advisors.

These four women have demonstrated values that today's and tomorrow's women should continually re-teach to develop strength, success, and humanity for future generations.

By using their natural instincts to preserve life, to nurture, and to teach, women one hundred years from now will reach a major goal. Through a series of small steps, they can accomplish, as Neal Armstrong described America's reaching the moon, "one giant leap for mankind."

Profiles of Progress and Prospects for the Future

by Jon Peterson

From the gradual early development of the United States as a strong, independent nation to the continued advance to unity and democracy, the American woman has proudly striven to aid her country, her fellow citizens, and her democratic government. Women such as the former First Ladies and the current First Lady, the former United Nations Ambassador Jean Kirkpatrick, Rosa Lee Parks of the Civil Rights Movement, the women astronauts of the space program past and present such as Sally Ride, Judith Resnik, and astronaut/teacher Christa McAuliff, have shown through action, service, and duty how American women have contributed to and changed American society. Now, we must focus upon how we hope American women can change American society in the future.

By the year 2087, I hope even more women will become active leaders in politics and the government of America. Through leadership positions, they can change situations that are damaging and troubling. They can help reduce the enormous national deficit, they can help the poor, the homeless, and the unemployed by establishing programs to help them regain independence, and they can help America come to peaceful terms with the Soviet Union and other countries through effective and peaceful

dialogue. Through these and other efforts, I hope American women will put an end to the fear of hunger, war, and the arms race, creating the hope of peace and friendship.

It is my hope and America's hope that women will change the field of science and technology in terms of finding cures for devastating diseases such as AIDS and cancer in order to create a healthy country and world. Through continued involvement in space exploration, women will help develop new and modern technology. By the year 2087, I hope American women will help change and improve education to prepare young Americans for the technological future that awaits them and requires their ability to learn, think, and dream.

President John F. Kennedy said, "Ask not what your country can do for you; ask what you can do for your country." American women have done much for their country; they have the capability to do even more. From the extreme north to the deep south, from east to west, from "sea to shining sea," "We the People," men and women, rich and poor, all races and creeds, will and must control the future of America, its development and strength as an independent, united nation.

One Hundred Years of Progress: Women by the Year 2087

by Steve Thalheimer

The history of the United States presents an impressive chronicle of women's involvement from the patriotic spirit of Betsy Ross and Dolly Madison in early America to the determination of Rosa Parks to exercise her right to a bus seat, from the conquering bravery of Sally Ride and Sharon Christa McAuliff to the political innovations of Sandra Day O'Connor and Geraldine Ferraro. Women's involvement has made and is making America into the country that we know today. If women, often considered subordinate to men, have done so much in the past two centuries, how much more will they influence society by the year 2087 with the rights they have gained? In the next one hundred years, women will be able to obtain even more active stature in society by affecting two factors, technical advances and changes in attitudes.

Although women are increasingly becoming an integral part of the work force, numbers of women are still virtually trapped in the home. They are prisoners of domestic tasks that have been labeled women's work. Within the next century, however, homemaking should become easier, enabling women to contribute their talents outside of the home and still be homemakers. With the progress of technology, totally automated records of household finance may not be far away. Perhaps a computerized grocery network will be initiated, and robots that do household chores will be perfected. However, life will not be all push buttons as it is for Jane Jetson in the Hanna-Barbera cartoons. Some advances,

though, will allow more women to come out from behind their "great men" and influence social and economic elements of society.

Once women have less to worry about at home and can enter the work place, thereby shaping American society, they will still face male chauvinistic or traditional views. To begin a change, men must realize the need for women in administrative, medical, and religious professions. If a woman is more capable than a man or if, as in the priesthood, a shortage of men occurs, why not fill the vacancies with capable women. Some tend to forget the way American women competently filled the void left by men in industry during World War II. Through deliberation and legislation, women by 2087 will find a way to overcome discrimination and obtain positions of leadership.

In the next twenty-five elections before 2087, it is likely, also, that another woman, following the example of Geraldine Ferraro, will be a candidate for the vice-presidency or the presidency of the United States. From those posts, or any post in government, women will better the situation for men as well as for other women.

With diligent effort, women by the year 2087 will gain the status they deserve. Putting technology to work and forcing sentiment to change are excellent ways to begin. Living in a world led by the patriotism, determination, bravery, and innovation of a group growing stronger everyday—American women—will be both invigorating and inspirational.

Women's Roles: One Hundred Years From Now

by Wendy Watson

In the year 2087, women will change the attitude of society. Women must seek out educational opportunities and, probably, work twice as hard to prove they can do jobs and meet challenges. Women must get men to understand that they do not wish to take over but to offer their services if qualified. In the next one hundred years, women's roles must be intellectually equal to men's.

Seeing the world through a softer light than men, women are often stereotyped for their gentleness. Women can and already have built a foundation of courage, showing they can be as tough as they need to be while still keeping their femininity. Attitudes, learned most often in the home, will change as children are brought up observing equal women's and men's roles. Bearing children, the

role that women have that men do not, presents them a special opportunity. Every other role is and should be left up to the individual's intellect and education, moral and physical strength, environment and opportunity, and personal dreams and ambitions.

Children, the future of America and the world, should not be sacrificed or be second best to a career, and, by the year 2087, perhaps women will change attitudes of men about the importance of sharing duties of raising children. Thus, in a subtle but major way, women would bring the family closer and have a part in reducing child delinquency. If any children have been in a violent home or have been lonely and neglected latchkey children, women can speak out against such child abuse and be sure

someone is at home with all young children. Maybe by 2087, women can change society by being seeing that children's futures are more optimistic and positive.

Traditional women's roles will not be the same in one hundred years. Nursing, home-making, teaching, and secretarial, traditional jobs for women, now attract more and more men. As well, medical, construction, and technological careers are being sought by women. The next one hundred years will bring new scientific, artistic, educational, and political careers, and women will enter them equally with men.

More and more women will be leaders in cities and

towns in the United States of America, and a woman may serve as president in or before 2087. Women, rather than making laws and rules in favor only of women, will further human relations for all; their leadership will be for the good of all Americans: men, women, and children.

America, the nation, stands today because of the equality decreed by its Constitution; therefore, gender cannot be an issue. Ability and courage to meet challenges, love and generosity toward society, and optimistic, positive attitudes toward the future should become the core of womankind's influence for the next one hundred years and beyond.

A More Perfect Union — Between Genders

by Kimberly Webb

American women, from the past up through the present, have a vast accumulation of accomplishments, but these are only the tip of the iceberg. Today, basically a few women make a lot of noise about feminine equality. The majority of women in America remain unsatisfied with the progress the women's movement has made, yet they make no attempt to change the situation because of the illusion that one voice cannot possibly make a difference. The women's fight for equality can be compared and contrasted to the struggle of blacks for freedom. Women and blacks represent people who are not content with their present situations, women with psychological restraints and blacks with brutality. Women, gradually becoming aware that they are equal to men, often fail to see, because of the absence of graphic violence, they are being discriminated against; thus, the battle for women's equality will be much longer than the battle for blacks' equality with whites.

Many men and, remarkably, some women refer to woman as the lesser gender because women are not considered to be as courageous or because they are not as physically strong as men. Although women may not possess the physical strength of men, in many instances in history women have overcome great physical odds simply because of their overwhelming desire to succeed. Moreover, women

have proven their tremendous courage. Perhaps Christa McAuliff is the most recent example of high courage among women. She dreamed of traveling into outer space not only to further her own knowledge but also to teach to her students what she learned. She knew the risks of space travel; she was more than willing to take them. Her supreme courage, and the courage of the other astronauts, aboard the Challenger space shuttle will remain an example for women through 2087. Christa McAuliff shared the duties, learning, exuberance, and death of men aboard the Challenger. What could be more courageous.

It seems meaningless to cite a specific prediction such as "a woman will be president" by 2087 because such a possibility exists right now. Women need to concentrate on the bigger picture of feminine progress that will alter the whole society. If mothers and daughters of the coming century strive together for 100% participation in the women's movement, by the year 2087 women will be accepted as equals in all aspects of life. The many qualities that women possess—compassion, dedication, fortitude, humility, resourcefulness, intelligence, and courage—will spread to everyone and everything, making the United States, as the Preamble to the United States Constitution describes it, "a more perfect Union."

We've Got a Long Way to Go

by Jenny Weber

Often in the past women's roles have been behind the scenes rather than in the spotlight. First Ladies encouraged their husbands, nurses cared for soldiers in wartime, mothers nurtured children, and women educated America's boys and girls. By 1920, women had received the right to vote. By World War II, women had entered the work force. However, women are still stereotyped as the "happy homemaker."

The 1960s and 1970s brought the National Organization of Women, the Women's Liberation Movement, and the issue of the Equal Rights Amendment. Women learned they could have educations and careers as well as families. A few even became successful and famous: Sandra Day O'Connor, the first woman Supreme Court Justice; Geraldine Ferraro, first woman vice-presidential nominee; Kay Orr, first woman governor of my state, Nebraska; Sally Ride, first woman astronaut; and Gloria Steinem, journalist, magazine editor, and feminist leader. Their prominence came from education, career counseling, strong determination, and hard work.

How will these women affect society in the next one hundred years? America faces the massive problems of alcohol and drug abuse, skyrocketing divorce rates, Acquired Immune Deficiency Syndrome (AIDS), illiteracy, and the national debt. Everyone in society must be involved in solutions to these problems, and because women are more than half of the population, logically they must lead the way. Former First Lady Betty Ford and current First Lady Nancy Reagan have existing programs to cure alcohol and drug abuse, but more is needed. Parents must become

involved as did the mother of Len Bias, a famous basketball player who died of drugs, who traveled the country to speak against drug use. Women can change society's attitudes by having the courage to speak out about society's problems.

Women today have and will continue to have more opportunities for higher education and career choices. Observing divorce and understanding themselves as individuals before marrying have shown that women can balance careers with family roles. This trend will continue to the year 2087 and will help in re-establishing the extended family and the strong values on which America was founded.

Women are now entering and will continue to enter professions traditionally reserved for men; they are becoming doctors, scientists, politicians, and economists. Women can research AIDS, a disease projected to kill 270,000 people by 1991; they can counsel dying patients and anguished families. The economy, the major predictor of society's future, can be improved with women working in that field. In elected positions in Congress women can help decrease nuclear arms spending and channel spending to people's needs—to education, day care, social security, and health care. With illiteracy rates rising, women educators can continue to teach, tutor, and counsel.

If America wants to continue on the basis the Founding Fathers foresaw, women and men must supply a balanced support of the Constitution's principles. In order for America to survive to and through 2087, women must be involved. As the saying goes, "You've come a long way baby," but WE'VE got a long way to go.

About the Editor

Joyce M. Pair received her Ph.D. in English from Georgia State University in 1983 and is Associate Professor of English at DeKalb College. Dr. Pair designed and produced the printed program for *Women and the Constitution: A Bicentennial Perspective*. She has written and researched on the works of Sylvia Wilkinson, Toni Morrison, F. Scott Fitzgerald, and James Dickey. She is the founding editor of the *James Dickey Newsletter*.

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WOMEN AND THE CONSTITUTION:
A BICENTENNIAL PERSPECTIVE

GALLERY TOUR

WHAT: Art Gallery and Museum
Exhibits featuring women artists
and women's issues.

WHEN: Saturday, February 13, 1988
from 10 am to 4 pm.

WHERE: Shuttle around the Atlanta
area all day Saturday (for a small
fee) departing from the Hilton
Hotel.

Some gallery participants will be:
Agnes Scott College, Atlanta
College of Art, Emory University,
Georgia State University, High
Museum of Art, Jimmy Carter
Library, Nexus Gallery and Spelman
College.

ENTRANCE FEE SCHEDULE: High Museum
of Art - \$3.00, other exhibits are
free.

LUNCH: Can be purchased at the
High Museum of Art and the Jimmy
Carter Library.

HOW: Register on arrival.

Announcing

Women and the Constitution

A Historic
Curriculum Program
from
The Carter Center
of Emory University

1777

"I desire you would remember the ladies....(We) will not hold ourselves bound by any laws in which we have no voice or representation." Abigail Adams

1988

"Life is too large to hang out a sign: 'For Men Only.'"

Barbara Jordan, former U.S. representative

1872

"The natural timidity and delicacy (of) the female sex evidently unfits it for many of the occupations of civil life." Justice Bradley, Bradwell vs. Illinois

1988

"Despite the relative gains women have made over the last 30 years...there are still significant gaps."

Supreme Court Justice Sandra Day O'Connor

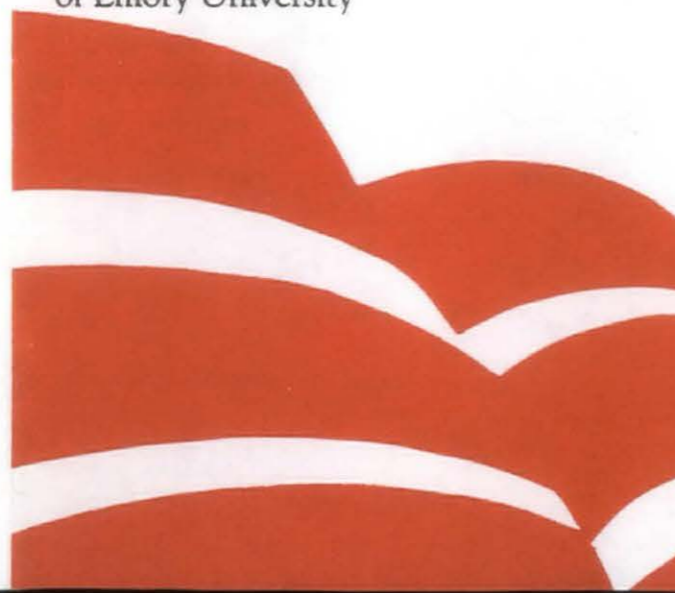
1905

"Sensible and reasonable women do not want to vote." President Grover Cleveland

1988

"If you don't run, you can't win."

Geraldine Ferraro, former Democratic Vice Presidential Nominee





Women and the Constitution

In February, 1988, more than 1,500 participants gathered in Atlanta, Georgia for a historic symposium convened by Rosalynn Carter, Betty Ford, Pat Nixon, and Lady Bird Johnson, four former First Ladies of the United States. The two-day event brought together leading female scholars and political figures from all 50 states and 10 foreign countries to examine women's role in U.S. history, politics, and policies. "One of our goals," stated Rosalynn Carter, "was to leave a legacy for our children and grandchildren." Now that legacy is here.

"Ain't I a woman?", asked Sojourner Truth. This pre-Civil War evangelist, abolitionist and feminist electrified audiences with her speeches. The curriculum offers a historical perspective on women from the pre-Colonial era to the present.



Photo courtesy Sophia Smith Collection, Smith College.

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Women and the Constitution is a comprehensive program that explores the contribution of women to the Constitution and offers a perspective on the future of women's rights. The four-part curriculum package includes:

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**Women
and the Constitution**
A Bicentennial Perspective.

The United States of America is observing two hundred years of government under our Constitution. It is important that women's role in the constitutional process and the Constitution's impact on women be considered as part of the observances. "Women and the Constitution: A Bicentennial Perspective" will bring together a broad cross section of Americans for reflection, evaluation and projection of women's past, present, and future under the Constitution.

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Associate Justice
United States Supreme Court



The Honorable Barbara Jordan
Former Congresswoman, Texas
Professor, University of Texas



The Honorable Geraldine A. Ferraro
Former Congresswoman, New York
Vice Presidential Candidate
Author/Lecturer



Coretta Scott King
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Martin Luther King, Jr., Center for
Nonviolent Social Change.

PROGRAM:

Wednesday, February 10, 1988

6:00PM- 8:00PM Reception, Atlanta College of Art
High Museum of Art
1280 Peachtree Street, N.E.

Thursday, February 11, 1988, Hilton Hotel

7:00AM- 5:00PM Registration
9:00AM- 9:30AM Press Conference
10:00AM-11:00AM *Opening Session*
11:00AM-12:00PM "Women and the Constitution:
The Challenge"
The Honorable Barbara Jordan
12:15PM- 1:45PM *Lunch* Keynote Address
The Honorable Sandra Day
O'Connor
2:00PM- 3:00PM Panels and Workshops
(Concurrent Sessions)
3:00PM- 4:00PM Panels and Workshops
(Concurrent Sessions)
4:00PM- 6:00PM Tour of The Jimmy Carter
Library and Museum
7:00PM *Dinner and Entertainment*
In Honor of Special Guests

Friday, February 12, 1988, Hilton Hotel

7:00AM- 3:00PM Registration
7:30AM- 8:45AM *Breakfast*
"Women in Public Office:
The Opportunities"
The Honorable Geraldine Ferraro
9:00AM-10:00AM Mini-Plenaries
(Concurrent Sessions)
10:15AM-11:45AM Panels and Workshops
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12:00PM- 1:30PM *Lunch* "The Civil Rights
Movement's Impact on
Women's Rights"
Coretta Scott King
1:45PM- 2:45PM Mini-Plenaries
(Concurrent Sessions)
3:00PM- 4:00PM *Closing Sessions*
"The Third Century: Where to
from Here?"
4:00PM Adjournment

MINI-PLENARY TOPICS INCLUDE:

- Heroines of Constitutional Change
- ERA: Was it Worth it?
- Women Political Leaders Reflect on the Constitution
- Plaintiffs, Lawyers and the Courts
- The Contemporary Supreme Court and Women
- Women's Constitutional Issues:
Perspectives for the Future

PANEL TOPICS INCLUDE:

- The Invisible Founder:
Mercy Otis Warren's Contribution
- Historical Perspectives on the Suffrage Movement
- Women's Involvement in Amending the Constitution
- Women's Rights Under State Constitutions
- Bureaucracy and Constitutional Interpretation
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- Minority Women and the Constitution
- The Politics of Exclusion
- Constitutions: An International Perspective
- Legal and Political Status of Women, 1776-1865



**Women
and the Constitution**
A Bicentennial Perspective.

February 10-12, 1988
Atlanta, Georgia

This Symposium is made possible in part
through the support of Avon Products, Inc.

REGISTRATION

c/o Women and the Constitution:
A Bicentennial Perspective
The Carter Center of Emory University
One Copenhill
Atlanta, Georgia 30307

REGISTRATION:

YES, I want to come to *Women and the Constitution* February 10-12 in Atlanta. Enclosed is my registration fee of:

\$125 (until November 1)
 \$150 (November 1-December 31)
 \$175 (January 1-January 10)

YES, I am interested in coming for:

February 11
 February 12

Enclosed is my registration fee of:

\$80 (until November 1)
 \$100 (November 1-December 31)

YES, I want to come to the following (accepted on a space-available basis):

Lunch February 11 (\$20)
 Dinner February 11 (\$35)
 Breakfast February 12 (\$20)
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Sorry, I can't come, but I want to help. Please accept my tax deductible donation.

Name / Position

Address

City / State

Zip / Phone

Make Checks Payable To:
 The Carter Center of Emory University

REGISTRATION INFORMATION:

Registration fees for all proceedings and meals:

Early Registration (Until November 1, 1987) \$125
 Regular Registration (November 1-December 31) \$150
 Late Registration (January 1-January 10, 1988) \$175

For Single Day Registration and meals:

Early Registration (Until November 1, 1987) \$80
 Regular Registration \$100

After December 31, 1987, registration for single days will be accepted only on a space available basis.

For Single Event Registration:

Dinner \$35
 Breakfast or Lunch \$20

(Accepted on a space available basis only)

SCHOLARSHIP INFORMATION:

A limited number of scholarships are available. For consideration, please send a request for scholarship information to Dayle E. Powell, Conference Director. No phone calls please.

HOTEL ACCOMMODATIONS:

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NATIONAL ADVISORY COMMITTEE:

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 U.S. Commission on Civil Rights

Katherine Cade
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 Family Focus

Sey Chassler
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Janice Mendenhall Regenstein
 General Services Administration

Bernice Sandler
 Project for the Status and Education of Women

Donald W. Schewe
 Director, The Jimmy Carter Library

Sarah Ragle Weddington
 Attorney, Austin, Texas

CONFERENCE DIRECTOR:

Dayle E. Powell
 Associate Director, Fellow
 The Carter Center of Emory University



**Women
 and the Constitution**

A Bicentennial Perspective.

Feb. 10-12, 1988
 Atlanta, Georgia

Convened By:

Rosalynn Carter
 Betty Ford
 Lady Bird Johnson
 Pat Nixon

Sponsored By:

The Carter Center of
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 in conjunction with
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WOMEN AND THE CONSTITUTION:
A BICENTENNIAL PERSPECTIVE

GALLERY TOUR

WHAT: Art Gallery and Museum
Exhibits featuring women artists
and women's issues.

WHEN: Saturday, February 13, 1988
from 10 am to 4 pm.

WHERE: Shuttle around the Atlanta
area all day Saturday (for a small
fee) departing from the Hilton
Hotel.

Some gallery participants will be:
Agnes Scott College, Atlanta
College of Art, Emory University,
Georgia State University, High
Museum of Art, Jimmy Carter
Library, Nexus Gallery and Spelman
College.

ENTRANCE FEE SCHEDULE: High Museum
of Art - \$3.00, other exhibits are
free.

LUNCH: Can be purchased at the
High Museum of Art and the Jimmy
Carter Library.

HOW: Register on arrival.



**Women
and the Constitution**
A Bicentennial Perspective.

The United States of America is observing two hundred years of government under our Constitution. It is important that women's role in the constitutional process and the Constitution's impact on women be considered as part of the observances. "Women and the Constitution: A Bicentennial Perspective" will bring together a broad cross section of Americans for reflection, evaluation and projection of women's past, present, and future under the Constitution.

FEATURING:



The Honorable Sandra Day O'Connor
Associate Justice
United States Supreme Court



The Honorable Barbara Jordan
Former Congresswoman, Texas
Professor, University of Texas



The Honorable Geraldine A. Ferraro
Former Congresswoman, New York
Vice Presidential Candidate
Author/Lecturer



Coretta Scott King
Executive Director
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Shirley M. Hufstедler
 Attorney, Los Angeles, California

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 United States Senate, Kansas

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Juanita M. Kreps
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Naomi B. Lynn
 Dean, Georgia State University

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Jewel Limar Prestage
 Professor, Southern University

Janice Mendenhall Regenstien
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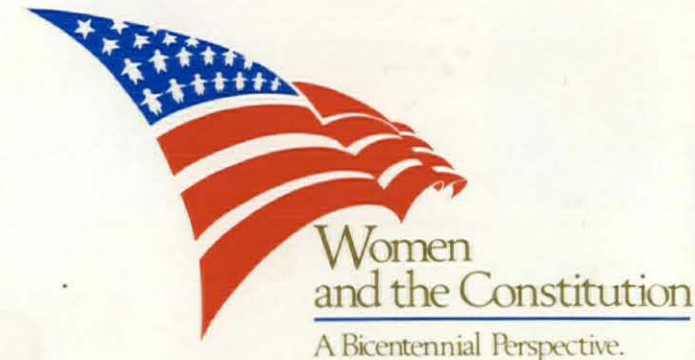
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