

# “One United People”: Second-Class Female Citizenship and the American Quest for Community

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## I. INTRODUCTION

The United States has always proclaimed itself the land of liberty, and scholars still usually identify its prevailing political ideas as “liberal” or at least “liberal republican.” These characterizations undoubtedly make much sense. Americans would not have replaced English subjectship with the particular political status they created, citizenship in a commercial republic guaranteeing various personal, economic, and intellectual freedoms, if they had not been at least partly guided by the often-intertwined ideologies historians term “liberalism” and “republicanism.” Yet while those political outlooks have certainly shaped the laws that have historically constituted American citizenship, their precepts have never been wholly obeyed. America’s civic laws have often been starkly illiberal, riddled with racial, sexual, ideological, ethnic, and xenophobic discriminations. Today the worst oppressions have been modified, but all the divisive tensions they expressed remain potent forces in American politics. Most disturbingly, it is still far from clear, even in theory, how a morally defensible body of citizenship laws, “liberal” or otherwise, ought to respond to these forces.

In this and other writings on citizenship, I have tried to assist consideration of how American civic membership should be defined in the nation’s public laws by offering analyses of how it has actually been legally defined and defended historically.<sup>1</sup> For while Americans have refused to adhere completely to what “liberal republican” principles imply for their civic laws, they have usually felt compelled to justify their apparent departures from those principles. Their justifications provide some indication of the respects in which Americans have found traditional liberalism, especially, lacking as a national public philosophy.

Here I wish to continue these analyses by focusing on the types of political ideas, values, and arguments America’s governors used to defend gender discriminations in their citizenship laws, and to suggest why those

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1. See, e.g., R.M. Smith, *The “American Creed” and American Identity: The Limits of Liberal Citizenship in the United States*, 41 W. Pol. Q. 225 (1988).

defenses were so effective in a titularly liberal polity. My central argument is that such discriminations seemed legitimate because the tradition of liberal discourse, stemming from the opposition movements of the Enlightenment, paid little attention to personal and communal needs for a sense of meaningful collective identity. Thus classical liberalism said little about what its abstract commitments to universal human rights implied for the ways liberal societies should meet those needs.<sup>2</sup>

The failing was crucial, and not only because, as often noted, the individualism, competitiveness, privatism, and inequalities of liberal societies work against strong feelings of community. Even liberalism's attractive insistence on at least a minimum of respect for all persons, inside and outside one's political community, is in tension with a vivid belief in the importance of one's particular civic membership, one's citizenship. Repeatedly, periods of substantial economic, demographic, cultural, or other social changes fostered powerful longings for such beliefs in many Americans. They were clearly anxious about the survival of the communal identities, including gender roles, from which they drew much of their own senses of personhood and worth. I contend that when they found liberal discourse largely silent about their concerns, Americans turned to discursive traditions that did treat their community identity as significant—even though these traditions often sanctified inegalitarian notions of civic roles and social relations that permitted suppression of women (as well as racial minorities). The language in which the nation's governors officially justified their explicit legal gender discriminations, to each other and to the public at large, is strong evidence that they took such non-liberal notions seriously in the efforts at collective self-definition that laws of citizenship express.

Specifically, I will contend that from the founding until at least 1932, America's citizenship laws were debated largely in terms of three intertwined but analytically distinguishable bodies of ideas or traditions of discourse: classical liberalism, classical republicanism, and Americanism, the last comprised by a set of ethnocultural definitions of civic identity which have nativism as their ultimate extreme.<sup>3</sup> Historically, these civic traditions have usually appeared in combination; none has been able to prevail on its own. Although one could well ask why this has been so for each tradition, my concern here is to show how liberalism's failings have often

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2. This is, of course, an accusation long levelled against Enlightenment liberalism by theorists on both the right and the left, going back at least to Burke and Rousseau. The analysis here is an attempt to show concretely one way this liberal failing has been manifested in American law, and how it has fostered specific invidious consequences.

3. It is noteworthy that this framework, although arrived at independently, parallels that of Hans Kohn's classic essay *American Nationalism* (1957). Kohn analyzes American nationality in terms of "three foundations": the tradition of liberty; federal republicanism; and the interaction of the predominant Anglo-American cultural tradition with those of other national origins. *Id.* at 135, 165, 252 n. 45.

helped inegalitarian views, usually expressed in terms of the two other traditions, to win legal enactment.<sup>4</sup> Exponents of republican and Americanist ideas have frequently joined forces to pass laws that buttressed the social composition and hierarchies preferred by more established citizens—denials of citizenship, or conferral of second-class citizenship, on women and minorities in ways that liberalism should logically have opposed. America's republican-inspired federal system, which assigns the states powers of self-definition that they can use to enact deviations from nationally recognized liberal rights, has also significantly aided these discriminatory efforts.

As I will note in conclusion, despite real progress, recent legal developments adverse to equal rights for women suggest that modern liberalism has still not succeeded in overcoming the long-standing appeal of these non-liberal outlooks. New variations of traditional arguments for gender inequalities gained great power in the 1980s, limiting or reversing liberal egalitarian initiatives of the late 1960s and early 1970s, including the proposed ERA, stricter judicial scrutiny of gender classifications, and abortion rights. As feminist writers, among others, have forcefully maintained, contemporary liberal thought still provides inadequate resources for constructing arguments against oppressive statuses that are sensitive both to the social realities produced by ongoing discrimination, and to the fears over loss of social identity that reforms produce. I will suggest that, in confronting these disputes, liberalism's traditional commitments to equal human rights should be preserved; but that both classical and contemporary versions of liberal theory must be revised if more sustaining conceptions of American civic identity, for women and men, are to be achieved.<sup>5</sup>

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4. See R.M. Smith, *supra* note 1, at 225-40, on which my discussion here draws. The three structures of ideas on citizenship I identify are built not only from some overlapping traditions of political argument, but also from both the English common law and the influential continental treatises on international law by writers including Grotius, Pufendorf, Vattel and Burlamaqui. In American law, the legal doctrines on citizenship derived from those juridical sources maintained some intrinsic content that was relatively independent of the three political traditions, including doctrines of territorial sovereignty and birthright citizenship. These legal doctrines were, however, usually used to justify policies spawned by one or more of those basic political perspectives.

5. These are broad claims. I will defend them here only on the basis of the justifications given in the federal courts for legal discriminations against women, supplemented by sketches of the decisions' broader historical context based on secondary sources. Obviously, this frame of reference is too narrow to prove decisively any generalizations about American political and legal thought as a whole. But precisely because, as I will discuss, the case of women seems to fit less readily into this general framework for analyzing citizenship laws, it is a particularly revealing one. And it seems worth offering the broader generalizations this case suggests in order to assist reflection on topics of basic importance—the questions of what America's laws of citizenship, and the American community, should look like today. (My forthcoming book, *Civic Ideals: Conceptions of Citizenship in American Public Law*, pursues this among other arguments in a number of areas of law.)

## II. CITIZENSHIP IN THREE TRADITIONS OF AMERICAN POLITICAL DISCOURSE

First, some definitions.<sup>6</sup> By the classical liberal tradition I mean the moderate Whig ideology preeminently exemplified by the writings of John Locke, taken as a whole.<sup>7</sup> Liberalism is properly identified with the Enlightenment's concerns to replace allegedly natural social and political hierarchies with recognition of natural freedom and universal human rights, hegemonic church establishments with religious toleration, near-subsistence agricultural economies with expansive commercial ones, scholastic orthodoxies with new rationalistic and empiricist sciences, and an aristocratic martial ethos with bourgeois civil peace. But I take classical liberalism's distinguishing feature to be its insistence that the state must allow for private as well as public pursuits of individual happiness, and must therefore be limited to enforcing personal rights and promoting external goods thought to benefit all.

By classical republicanism, I mean the Renaissance tradition of "civic humanism" variously expressed in Machiavelli, James Harrington, and Rousseau, which also focuses on liberty, but understands it not essentially as freedom from state interference but as active participation in and dedication to civic self-governance.<sup>8</sup> Because of their concern for a vigorous

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6. By explicating America's laws of citizenship in terms of liberal, republican, and Americanist conceptions, I do not mean to imply that single, coherent, and wholly distinct versions of each of these positions persisted throughout the first three-quarters of United States history. The traditions contain many variations, especially since most actual American political positions have blended the different strands together in variegated and intellectually untidy ways. I separate these three ways of conceiving American citizenship and political identity only in order to identify analytically the main ingredients Americans have mixed in justifying their political measures and to chart the characteristic tendencies of each. By using an "ideal type," a simplified sketch of a relatively enduring structure of ideas and arguments, to characterize each of these traditions, we can better appreciate the alternative possibilities Americans perceived and why they sometimes chose to reject liberal precepts.

This focus on enduring structures of ideas or discourses is influenced by J.G.A. Pocock's example and methodological writings, despite my contrasting characterizations of American thought. See J.G.A. Pocock, *Politics, Language, and Time* (1971); cf. I. Kramnick, *The "Great National Discussion": The Discourse of Politics in 1787*, 45 *Wm. & Mary Q.* 3 (1988). The use of cases to determine how alternative structures of ideas have influenced governmental decision-making follows my own methodological argument in R.M. Smith, *Political Jurisprudence, the "New Institutionalism," and the Future of Public Law*, 82 *Am. Pol. Sci. Rev.* 89 (1988). Admittedly the analysis here can only suggest, not confirm, that the failings of ideas, as opposed to other forces, have greatly influenced the developments it depicts.

7. For useful descriptions, see H. May, *The Enlightenment in America* 3-101 (1976); R. Ashcraft, *Revolutionary Politics and Locke's Two Treatises of Government* (1986) [hereinafter R. Ashcraft 1986]; R. Ashcraft, *Locke's Two Treatises of Government* (1987) [hereinafter R. Ashcraft 1987] (arguing that, in the context of his time, Locke should be seen as a radical Whig). While recent scholarship properly challenges Louis Hartz' view that Locke dominates American political thought, most writers still see his works, especially the *Letter Concerning Toleration* and the *Essay*, as profoundly influential. See, e.g., I. Kramnick, *supra* note 6; H. May, *supra*, at 38; B. Bailyn, *The Ideological Origins of the American Revolution* 30-46 (1967); J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* 424 (1975); G. Wills, *Inventing America 170-76* (1978); J.P. Diggins, *The Lost Soul of American Politics: Virtue, Self-Interest, and the Foundations of Liberalism* 3-47 (1984); T.L. Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke* (1988).

8. J.G.A. Pocock, *supra* note 7, at 4, 49-80.

civic life, republicans often are suspicious of the liberals' commerce, cosmopolitanism, and absorption in private or non-civic pursuits.

By "Americanism" I mean the identification of American nationality with a particular set of ethnocultural traits and conceptions. In this view Americans have a distinctive character, born of their freedom-loving Anglo-Saxon ancestors, Protestant culture, and favorable natural conditions in the new world, all rendering them a special breed uniquely fit to govern themselves in the land of liberty. Today such "Americanism" may not seem a genuine intellectual tradition rivalling liberalism and republicanism, but its lesser status is due more to now-prevailing egalitarian norms than to authentic intellectual history. From the Jacksonian era on, the scientific racialism of the "American school of ethnography," the cultural nationalism of European romantic thinkers, then the racist anthropology, history, and Social Darwinist sociology and political science of the late nineteenth and early twentieth centuries, all supported a "political ideology" of "American racial Anglo-Saxonism" that was endorsed by professors and politicians alike. "Americanist" thinkers often praised the nation's liberal and republican institutions, but only because these were elements of the nation's Anglo-Saxon culture, their real concern. A Klansman, for example, might profess esteem for the "American republic," but in fact he typically cared little about "republicanism." His deepest commitment was to the preservation of a white supremacist racial ordering; his "republican" rhetoric was merely instrumental to that goal.<sup>9</sup> I turn now to some implications of these traditions for American citizenship laws.

#### A. *The Classical Liberal Tradition*

Scholars often debate the characteristics of Enlightenment liberalism, but the aspect most salient here is not very controversial. Most agree that, at least rhetorically, classical liberalism was dedicated to the securing of natural or human rights, held to be equally possessed by every person. To recall the familiar phrases, "Locke proclaims men naturally "free, equal and independent" and says they create governments only "for the mutual preservation of their Lives, Liberties and Estates."<sup>10</sup> The Declaration of Independence holds that all men are created equal and that governments are created to secure inalienable rights to life, liberty, and the pursuit of happiness. This liberal rhetoric has a very great value: it can be used to

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9. Since the seminal work of John Higham, and particularly in recent years, acknowledgment of racial and ethnocultural doctrines of superiority as important American intellectual traditions has been increasing. See J. Higham, *Strangers in the Land: Patterns of American Nativism, 1860-1925* (1966); E.L. Tuveson, *Redeemer Nation: The Idea of America's Millennial Role* 101-53 (1968); G.M. Fredrickson, *The Black Image in the White Mind* 61-102, 125-27 (1971); D.W. Howe, *The Political Culture of the American Whigs* 38-42, 86-87, 201-02 (1979); R. Horsman, *Race and Manifest Destiny* 3-24, 138-86, 298-303 (1981); R.M. Smith, *supra* note 1, at 233-34.

10. J. Locke, *Two Treatises of Government* 374, 395 (1965).

claim basic rights for every human being, black or white, female or male, alien or citizen.

But this emphasis on protecting the natural rights of each individual, against other persons, against governments, and against non-voluntary group memberships, also has disadvantages. The rhetoric of classical liberalism must be adapted if it is not simply to dismiss claims made by ethnic and cultural groups, economic and gender classes, and the smaller political communities that make up a liberal nation, as well as by the nation itself. The thrust of classical liberalism's oppositional language of personal rights is to cast the claims of all types of associations, including political membership, as threats to personal liberty. The constructive implications of liberal principles for issues about proper civic and social roles, relations and obligations, if any, are simply not clear.

Locke, for example, said little about such issues. He simply presumed that people would join politically in groups or communities characterized by a common language and by common familial and national origins, and that fairly traditional gender and class relationships would largely endure.<sup>11</sup> He also expected his commonwealth to summon its members to certain duties, perhaps because he expected patriotism to "grow out of men's private attachments."<sup>12</sup> But Locke left uncharted how the social characteristics and affiliations he anticipated comported with the realization of his liberal ideals.<sup>13</sup>

Consequently, students of Locke debate the implications of his liberalism for the social relations that have often figured in legal definitions of citizenship. Some, such as John Dunn, Gordon Schochet, and Richard Ashcraft, note that Locke's stress on the duty to prepare all for rational self-direction, and on the moral equality of all who are so prepared, has some "startlingly egalitarian" implications. They suggest, for example, a natural equality of the races, prohibitions on most forms of slavery, more equal education for women and for laborers, less harsh working conditions for all, and more equal property rights for women. The propagation of such egalitarianism could not fail in practice to assist challenges to unequal citizenship statuses.<sup>14</sup>

Most writers, however, see Locke himself as unwilling to pursue all the

11. M. Seliger, *Locke, Liberalism, and Nationalism*, in John Locke: Problems and Perspectives 20-27 (J. Yolton ed. 1969); N. Wood, *The Politics of Locke's Philosophy* 5-7, 81-96, 137-40 (1983).

12. N. Tarcov, *A "Non-Lockean" Locke and the Character of Liberalism*, in *Liberalism Reconsidered* 137 (D. MacLean and C. Mills ed. 1983).

13. See J. Locke, *supra* note 10, at 285-86; J. Dunn, *The Political Thought of John Locke* 146, 240 (1969); M. Seliger, *supra* note 11, at 20-21, 27.

14. J. Locke, *supra* note 10, at 345; J. Dunn, *supra* note 13, at 175, 240, 255; M. Seliger, *supra* note 11, at 29; N. Wood, *supra* note 11, at 32-33, 81-82, 121-33; R. Ashcraft 1987, *supra* note 7, at 111, 169-95; J. Axtell, *The Educational Writings of John Locke* 81, 345 (1968); G. Schochet, *Patriarchalism in Political Thought* 268-71 (1975); Butler, *Early Roots of Liberal Feminism: John Locke and the Attack on Patriarchy*, 72 *Am. Pol. Sci. Rev.* 135-50 (1978); Farr, *So Vile and Miserable an Estate: The Problem of Slavery in Locke's Political Thought*, 14 *Pol. Theory* 263 (1986).

egalitarian implications of his frequent claims for universal human rights. Two basic explanations are offered. Critics of liberalism have argued that Locke's principles tacitly but inherently embrace at least some of the economic, sexual, racial, and imperialist inequalities of his day.<sup>15</sup> Others have taken the view that Locke's failure to address these issues represents no hidden intrinsic requirement of his apparently more egalitarian liberal principles, simply a personal failure to extend his vision much beyond the political issues that immediately concerned him (issues on which his views did place him amongst the egalitarian "left" of his day).<sup>16</sup> On this interpretation, any presuppositions of unequal political rights he may have unreflectively maintained contradicted his liberalism's core principles.

Scholars on both sides of this debate agree, however, that some of Locke's positions supported greater equality for women than then existed, and that it was not difficult to build from his premises stronger egalitarian gender claims than Locke ever overtly advanced. He presented marriage, like political society, as a voluntary compact between equals; he assigned mothers equal authority over their children and claimed for wives more independent property rights than English law granted; and he also suggested that young girls, at least, be educated similarly to young boys. To be sure, he briefly "granted" that the customary dominance of husband over wife had "some foundation in nature" because men were the "stronger and abler" gender. And overall the bachelor philosopher said little about women directly, once remarking with apparent condescension that he had "more admired than considered" the female sex. Nonetheless, there can be no real dispute of the claim that Locke's liberal premises had the potential to challenge gender statuses and many other hierarchical social relationships that he did not examine at length.<sup>17</sup>

Even so, I do not mean to deny that beyond its silences, Lockean liberalism contained other elements that could serve as defenses for the unequal status quo.<sup>18</sup> And it minimized even hard-to-justify civic inequalities

15. N. Wood, *supra* note 11, at 35, 115-18, 194 n. 51; C.B. Macpherson, *The Political Theory of Possessive Individualism, Hobbes to Locke* 221-38 (1962); S.M. Okin, *Women in Western Political Thought* 199 (1979); Z. Eisenstein, *The Radical Future of Liberal Feminism* 3-5, 34-49 (1981).

16. J. Dunn, *supra* note 13, at 236, 240, 250; G. Schochet, *supra* note 14, at 248-50; Butler, *supra* note 14, at 142-48; Farr, *supra* note 14; R. Ashcraft 1987, *supra* note 7, at 246-50, 265. Thomas Pangle suggests, moreover, that Locke was well aware of the radical implications of his principles for gender roles and the traditional patriarchal family, but that Locke found it politic not to make them too explicit. T.L. Pangle, *supra* note 7, at 172-76, 230-43.

17. With regard to familial, economic, and political relationships, these issues have been widely debated, so this conclusion seems firm. *See, e.g.*, J. Locke, *supra* note 10, at 209-10, 364; R. Ashcraft 1986, *supra* note 7, at 257-85, 572-84; T.L. Pangle, *supra* note 7, at 230-43; J. Axtell, *supra* note 14, at 8, 364; G. Schochet, *supra* note 14, at 248-50; Butler, *supra* note 14, at 147-48; S.M. Okin, *supra* note 15, at 199; Z. Eisenstein, *supra* note 15, at 42-43; B. Harris, *Beyond Her Sphere: Women and the Professions* 78 (1978); J.B. Elshtain, *Public Man, Private Woman* 122-27 (1981); N. Tarcov, *Locke's Education for Liberty* 70-76 (1984).

18. Among the most central: first, the liberal emphasis on protecting personal liberties and property rights conducive to commercial growth could buttress arguments for governmental tolerance of, or even support for, great inequalities that were allegedly products of free conduct in "private" spheres.

by presenting citizenship as an instrumental status, one that liberal polities could bestow wherever it seemed most likely to produce a government that would protect the rights of all and promote liberal goals. Hence if sexual roles, poverty, or racial characteristics appeared to render some unfit for full citizenship, liberals could still hold this inferior legal status consistent with guaranteeing equal "natural" or "human" rights for all.<sup>19</sup> Classical liberalism, then, had genuine potential to prompt gender and other social reforms, but it was often cloaked by its other features.

### B. *The Classical Republican Tradition*

"Republicanism," even "classical republicanism," includes a large, unruly family of views, some egalitarian, some hierarchical, some isolationist, some imperialistic, some fairly liberal, some virtually totalitarian. Hence it is always wise to indicate which republicanism is under discussion. For most, "republicanism" in America came to mean "popular" government, as opposed to aristocratic, monarchical, or mixed forms; and some indeed stressed the non-liberal element that Pocock's work highlights, the ideal of fulfillment via politically active, participatory citizenship.<sup>20</sup> If classical liberal theorists left social forms largely to private choices, moreover, republican writers were always concerned with the types of political and social institutions that could make a vigorously participatory civic life possible. Though he did not advocate classical republicanism, Montesquieu's account of ancient republican institutions, and his analysis of how far they could be joined with the commercial and privatistic predilections of the newer liberal vision in emerging bourgeois societies, were greatly influential on these topics.<sup>21</sup>

Montesquieu identified "virtue," a passion for the good of the polity, as the "spring" of the classical republics, and he argued that such passion

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Second, Locke's view that governments should act according to the majority will of their citizens, limited only by fairly minimal natural rights, meant that liberal states could defend harsh treatment of minorities and outsiders as exercises of popular sovereignty. Liberal writers on public law, particularly Vattel, argued further that in the relatively anarchic international realm, the necessity for each sovereign people to decide for themselves what their self-preservation required meant that the rights of individuals against them were often "imperfect," morally valid but legally unenforceable. Third, the Enlightenment fascination with cultural and anthropological differences could support "scientific" theories of racial and gender inferiority, although as these were elaborated in the nineteenth century, their authors often explicitly distinguished themselves from "naively" egalitarian Enlightenment thinkers. Locke's insistence on the necessity for rational labor to create property rights was also often employed to buttress such racist endeavors. It permitted disregard for the land claims of "savage," "unproductive" Native Americans, so long as the fiction that they were purely nomadic was sustained.

19. R. Horsman, *supra* note 9, at 46-48, 190-91; J. Locke, *supra* note 10, at 399-400; J. Dunn, *supra* note 13, at 175, 225, 240; E. de Vattel, *The Law of Nations* 175-76, 265, 279 (1787); W.E. Washburn, *Red Man's Land/White Man's Law* 38-41 (1971).

20. J.G.A. Pocock, *supra* note 7, at 75, 436, 507, 550-52 (1975).

21. *Id.* at 491-93, 527; 1 Montesquieu, *The Spirit of the Laws* 42 (T. Nugent trans. 1949). Hume's related concerns about the feasibility and institutions of a large commercial republic also had great influence, especially on the authors of the *Federalist Papers*, as Douglass Adair stressed and Garry Wills has reemphasized. See D. Adair, *Fame and the Founding Fathers* (1974); G. Wills, *Explaining America* (1981).



flourished only with relative civic equality. Republics therefore had to strive to limit the economic inequalities and luxury that commercial economies involved.<sup>22</sup> Many republicans preferred an agrarian economy of small, independent free-holders, who could not easily be manipulated and who would be proud to serve and defend the land they tilled. Yet many American republicans, like Montesquieu and Hume, were unwilling to sacrifice the material and intellectual advances that the growth of commerce and urbanization seemed to promise. Thus they hoped that commercial republics might develop a frugal and self-disciplined private virtue that could compensate to some degree for the lack of public-spiritedness commercialism engendered.<sup>23</sup>

But if that political economy represented an accommodation to liberalism, there were other elements in republican thought that could not be easily reconciled with liberal egalitarian precepts. Against liberalism's stress on inclusion and equal rights for all, most classical republican writers insisted that not all persons could be citizens, for two reasons. First, an enduring republic required a homogeneous citizenry. Second, genuine republics had to be small, bound to other peoples either by loose federation or through imperial domination. The call for homogeneity could support virtually any kind of discrimination in citizenship laws, including gender, race, religion, and national origin. The second requirement produced America's federalism, so often relied on historically to justify national acquiescence in the inequities imposed by state and local governments.<sup>24</sup>

The demand for homogeneity is visible in Montesquieu's argument that to inculcate republican virtue, citizens must be raised "like a single family"—with a pervasive civic education in patriotism reinforced by frequent public rites and ceremonies, censorship of dissenting ideas, legal limits on divisive and privatizing economic pursuits, and strict restraints on the admissions of aliens to the citizenry. He also maintained that in modern times, Protestantism was the religion most suited for republics, and that republics, like other regimes, should try to avoid the addition of new religions (though Montesquieu urged tolerance if they should nonetheless arise). Only if citizens' similarities led them to identify with their fellows along almost every cultural dimension was a virtuous willingness to labor for the common good likely to exist throughout the community.

Most pertinent here is Montesquieu's treatment of gender. He thought women normally had more legal freedoms in republics than in Eastern despotisms, but he expected the greater "family" of the republican community to preserve customary gender roles, with women in subordinate positions. This belief is evident in his praise for the "admirable institu-

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22. 1 Montesquieu, *supra* note 21, at lxxi, 20-21, 46-52, 96, 120.

23. J.G.A. Pocock, *supra* note 7, at 534-42; T. Jefferson, *The Portable Thomas Jefferson* 216-17, 384 (M. Peterson ed. 1975).

24. I. Kramnick, *supra* note 6, at 9.

tion” of the republican Samnites, who allowed the young men most distinguished by virtue and service to the community to choose among the eligible women for their wives.<sup>25</sup> The custom dramatizes the republican esteem for civic virtue, but since only men could choose, the inferior place of women is clearly implied.<sup>26</sup>

The classical republican esteem for relative economic independence for all citizens also had a harsh side that worked against full female citizenship. A healthy republic’s civic body had to be small, because meaningful participation in self-governance became more difficult as membership and territory grew more extensive. But this did not mean republics could not govern many people: indeed, classical republicanism’s emphasis on the importance of shared political membership meant that it could justify unequal treatment of non-citizens far more naturally than the liberal discourse of universal human rights. As the ancient republics and the American South show, many republicans believed that the citizenry’s economic independence, military security, and shared life of civic virtue would be impossible unless a body of subjects performed many of the most arduous, dangerous, or menial tasks. Since these subjects—conquered peoples, poor laborers, servants, slaves, and women—lacked the leisure, education, and economic freedom they made possible for others, they were unfit for the franchise or other aspects of full citizenship. They were properly subject to near-absolute rule, so that citizens could live in freedom.<sup>27</sup>

Some republican thinkers in fact advocated policies of imperial conquest and rule, accepting the risk of corruption by foreigners.<sup>28</sup> Less bellicose writers like Montesquieu and Vattel suggested instead that modern republics might establish defensive confederations with other republican regimes, meeting their military needs without establishing potentially degenerative empires. Many Americans took these latter works as textbooks for their experiments in confederation and, later, constitutional federalism

25. Montesquieu’s praise much more clearly expresses his sense of the suitability of such institutions for the ancient republics than his own unqualified esteem. Like the Federalist authors, he was well aware of the brutalities that inculcation and expression of republican virtue could involve.

26. 1 Montesquieu, *supra* note 21, at 37, 69, 96, 107-08, 138; 2 *id.* at 30-31, 52. Similarly, Jean-Jacques Rousseau, who devoted perhaps more attention to the political significance of women than any other republican writer, describes the true “female citizen” as one who thanks the gods for a military victory in which all her sons have been slain. Rousseau later makes it clear that, because of their different natures, only men can genuinely be citizens. Women contribute by serving their husband and raising sons who will be good citizens. He admits there are exceptions, but holds this to be the general rule that should govern policy. J.-J. Rousseau, *Emile* 40, 358-63 (1979).

27. J.G.A. Pocock, *supra* note 7, at 510, 530; E.S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* 236-38, 380-83 (1975).

28. Initially Jefferson simply opposed admitting aliens, especially from non-republican backgrounds, fearing a transformation of the “homogeneous” and “peaceable” American populace into a “heterogeneous, incoherent, distracted mass.” T. Jefferson, *supra* note 23, at 125. His equally exclusionist views on women in politics followed the republican notions of Rousseau, influentially expressed in America by Lord Kames. M. Gruber, *Women in American Politics* 4 (1968); L. Kerber, *Women of the Republic* 26-27, 243 (1980).

(though some happily contemplated an empire of their own).<sup>29</sup> These American republicans nonetheless insisted that their federalism must not lead to a consolidated nation, and that constituent states must retain the power to define their own citizenry to preserve their special characters. Such rights in state governments were, in Jefferson's words, "the surest bulwarks against anti-republican tendencies" in a distant, potentially despotic central government.<sup>30</sup> These republican beliefs made the slogan of states' rights a frequent, effective shield for state and local oppressions against women and other unempowered groups.

### C. *Americanism*

While both classical republicanism and liberalism claimed to define principles applicable to a wide range of peoples, "Americanism" has obviously been more particularistic. Yet its range has still been broad, for its advocates have criticized not only political but also cultural and social behavior as "un-American," and its roots run deep. Almost from their first revolutionary stirrings, Americans began forging contentions that they possessed superior characteristics out of materials provided by their British heritage, religious traditions, colonial experiences, and then-current biological and cultural analyses. Such materials were ample, since the British like virtually all other peoples had long advanced claims for their distinctive excellence.<sup>31</sup> As both Bernard Bailyn and Edmund Morgan have pointed out, many colonists believed that "they, as Britishers, shared in a unique inheritance of liberty." Like other Englishmen, they saw themselves as proud descendants of Anglo-Saxon peoples who had special historical traditions, capacities and vocations that were culturally, if not biologically, central to their race. They looked back to "a golden age of Anglo-Saxon purity and freedom" before the Norman Conquest, which had deprived the English of these ancient liberties until the Glorious Revolution of 1688 restored them. But England had since become corrupt; revolutionary leaders assured their followers that *they* were now providentially destined to provide such a restoration in their new land.<sup>32</sup>

Later, in *Federalist* No. 2, John Jay argued for the viability of the new national Constitution by proclaiming that "Providence had been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same languages, professing

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29. E. de Vattel, *supra* note 19, at 18; B. de Montesquieu, *supra* note 21, at 126-28; The *Federalist Papers* 73-76 (C. Rossiter ed. 1961); G. Wood, *The Creation of the American Republic* 255 (1969); L. Banning, *The Jeffersonian Persuasion* 30-31, 107 (1978).

30. T. Jefferson, *supra* note 23, at 293.

31. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. Rev. 307 (1986). Karst's fine essay links these claims with nativist anxieties, and with quests for community within ethnic subgroups in response to America's sometimes frightening "openness." *Id.* at 311, 327.

32. R. Horsman, *supra* note 9, at 18, notes such appeals in, e.g., summons to resistance by Josiah Quincy, Jr., Sam Adams, Benjamin Franklin, Charles Carroll, and Richard Bland.

the same religion, attached to the same principles of government, very similar in their manners and customs." Hence he presented Americans as specially equipped to undertake the great challenges of free national self-governance.<sup>33</sup> His portrait was calculated to counter the charges of the more republican anti-Federalists that a single large republic was impossible, and it deliberately ignored the great regional, religious, and ethnic diversity America already displayed. It thereby shows that from the start, many who were chiefly devoted to the liberal dream of a prospering commercial nation were willing to concede to the republicans that free popular institutions required homogeneity to survive. Jay's remarks also indicate that (despite Madison's call for multiplying factions in *Federalist* No. 10) many liberal and republican Americans were willing to equate American nationality with the country's predominant but far from universal Anglo-Saxon Protestant heritage.<sup>34</sup>

Jay's reference to the shared "manners and customs" of his "one united people" also indicates how "Americanism" could support a broad variety of civic discriminations, including hierarchical gender statuses. Those "manners and customs" included Anglo-Saxon practices, especially those embodied in common law, and many inherited Protestant beliefs. Thus Americanist outlooks always justified patriarchy by endorsing the subordinate status of women prescribed in the English common law of coverture and British custom, and by accepting with the dominant varieties of Protestantism that while women might be capable of reading the Bible and directing the home, only harm could come from granting them political equality.<sup>35</sup>

My linkage of America's patriarchal social structure with these ethnocultural conceptions of civic identity that include racism and incipient American nativism may, however, seem suspect. Obviously patriarchy predates the United States, and it has not been limited to any particular ethnocultural identity. I contend nonetheless that patriarchy has been defended in United States history primarily via "Americanist" discourse, that is, by joint appeals to traditions, customs, the common law, the "natural order of things," and the divine ordinance, that all define a special "American way of life." And I suggest that this source of discursive defenses is not accidental. It arises because patriarchy's appeal is in large measure the same as the appeal of racial and ethnic forms of civic inequality: all these hierarchies preserve a community order and identity that

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33. J. Higham, *supra* note 9; E.L. Tuveson, *supra* note 9; *The Federalist Papers*, *supra* note 29, at 38.

34. J. Higham, *Send These To Me* 31 (1975); G.B. Nash, *Red, White and Black: The Peoples of Early America* (1974); R. Kelley, *The Cultural Pattern in American Politics* 31-80 (1979); H. Storing, *What the Anti-Federalists Were For* 15-23 (1981); T.J. Archdeacon, *Becoming American: An Ethnic History* 1-26 (1983).

35. B. Harris, *supra* note 17, at 15-19; E. Flexner, *Century of Struggle* 7-9 (1975); C. Degler, *At Odds: Woman and the Family in America from the Revolution to the Present* 15-16, 73 (1980).

the dominant white male citizens find more comfortable, particularly in times of change and stress, than liberalism's egalitarianism.

These commonalities between patriarchal defenses and other ethnocultural interpretations of American identity have frequently been noted. The nineteenth century women's rights activist Elizabeth Cady Stanton argued in 1860 that racial and gender prejudices are "produced by the same cause, and manifested very much in the same way. The Negro's skin and the woman's sex are both *prima facie* evidence that they were intended to be in subjection to the white Saxon man." Aileen Kraditor maintained in regard to the late nineteenth century that when "antisuffragists defended the home from woman suffrage, they were defending the ideal of the white, Anglo-Saxon, Protestant, sober, middle-class home in which the mother was queen of a realm she never left except to perform good works for the less fortunate." The manner in which Americanist appeals have taken up patriarchy as a traditional set of customs Americans should preserve, even though it predates "Americanism," thus seems clear enough. At the least, as Virginia Sapiro observes, American policies regarding political membership "show once again that racism, sexism, and xenophobia do not merely exist in parallel but rather are systematically interrelated within the political community."<sup>36</sup> As ethnocultural conceptions of American nationality received more elaborate intellectual articulations over time, American courts in the nineteenth and early twentieth centuries often affirmed limitations on female citizenship by relying explicitly on such notions, often in alliances with republican conceptions that the nation's governors found more compelling than liberal claims for equal human rights. To that story I now turn.

### III. WOMEN AND CITIZENSHIP IN AMERICAN LAW TO 1937

#### A. *The Colonial Era*

In colonial America, the legal status of women was governed largely by the English common law of coverture. Despite regional variations, moreover, most of the colonists would always have concurred with Blackstone's 1766 interpretation of that doctrine, at least as an ideal to be approached. In Blackstone's view, coverture absolutely subsumed the legal identity of the married woman, the *feme covert*, to that of her husband. Married women were thus subjects not only of the crown but of their spouses, leaving them without any meaningful civic rights of their own. From early on in the colonial era, American courts with equity powers did rule, con-

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36. Stanton quoted in C.A. MacKinnon, *Sexual Harassment of Working Women* 129-30 (1979); A.S. Kraditor, *The Ideas of the Woman Suffrage Movement 1890-1920*, at 123-24 (1965); V. Sapiro, *Women, Citizenship and Nationality: Immigration and Naturalization Policies in the United States*, 13 *Pol. & Soc.* 1, 2-4 (1984); cf. W.D. Jordan, *On the Bracketing of Blacks and Women in the Same Agenda*, in *The American Revolution: Its Character and Limits* 287-90 (J.P. Greene ed. 1987).

trary to Blackstone, that American wives could hold separate estates; but only a tiny percentage of married women actually did so. In addition, the unmarried adult woman, the *feme sole*, did have an independent legal personality, and in the colonial era sometimes could even vote. But again, this appearance of relative equality is misleading. While the number of single women grew during the colonial era, it probably reached only ten to fifteen percent of the female population, and few single women ever exercised their rights of franchise. The political subordination of women to men was thus accepted as part of the customary British, and British-American, way of life.<sup>37</sup>

Even so, inherited views of women did undergo some modifications in the colonial era. While the dominant strains of Protestantism still regarded women as unfit for political or religious office, they rejected notions in some medieval thought depicting women as innately inclined to be wanton temptresses. American Protestants instead portrayed mothers as natural custodians of Christian morality and governesses of the household and children. In practice colonial women often assumed more equal responsibilities for both home and work due to the demanding conditions of frontier life. In the relatively few urban, commercial areas, single women could be declared "*feme sole* traders," entitled to sue, conduct businesses, enter into contracts, sell real property, and be attorneys-in-fact, though not in law.

Yet the greater equality sometimes reflected in slightly broader rights for women in colonial customs than in English law only reflected the economic realities of life in the thinly populated colonies. It did not fundamentally alter the inferior status held to be appropriate to a female British subject, in the colonies as in the home countries. As the colonies became more settled, most if not all the early departures from that inferior status were undone. While the colonies' population increases were accompanied by growing numbers of single women, with theoretically greater legal rights than married women, most of these *feme soles* found it very hard to provide for themselves in the colonial men's world. Few had property or training enabling them to compete economically, and few men would assist them in gaining such competency. These impoverished unmarried

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37. L. Kerber, *supra* note 28, at 15-16, 28; C. Degler, *supra* note 35, at 8; J.H. Wilson, *The Illusion of Change: Women and the American Revolution*, in *The American Revolution: Explorations in the History of American Radicalism* 393 (A.F. Young ed. 1976); A. Sachs & J.H. Wilson, *Sexism and the Law* 74 (1978); E.C. Dubois, *Feminism and Suffrage* 74 (1978); N. Taub & E. Schneider, *Perspective on Women's Subordination and the Role of Law*, in *The Politics of Law* 118 (D. Kairys ed. 1982); S. Lebsack, *The Free Women of Petersburg: Status and Culture in a Southern Town 1784-1860*, at 54-57 (1984); M. Salmon, *Women and the Law of Property in Early America* xv-xvi, 14-30 (1986); E.F. Crane, *Dependence in the Era of Independence: The Role of Women in a Republican Society*, in *The American Revolution: Its Character and Limits* 262-66 (J.P. Greene ed. 1987).

women and widows were hardly well situated to lead crusades for women's rights.<sup>38</sup>

### B. *The Revolutionary Era*

Then came the American Revolution. Whatever their other differences, colonial adherents of classical liberalism, republicanism, and the more ethnocultural notions of political identity that would supply the raw materials for Americanism were initially able to work in concert. Revolutionaries of all ideological stripes could agree that tyrannical (illiberal), monarchical (unrepublican), English (un-American) rule must go. As John Higham has detailed, while Americans claimed that the Anglo-Saxon culture or race (the two concepts were not sharply distinguished) was particularly suited for personal liberty and republican self-government, in the revolutionary years that contention was not an argument against inclusiveness. Most American leaders were confident that all Europeans, at least, could be assimilated into these virtuous Anglo-Saxon traits.<sup>39</sup>

Despite their liberating consequences for white men, however, the Revolution and the formation of the new confederated state republics after 1776 on balance moved women further away from full, equal civic status. As Joan Hoff Wilson has stressed, the new governments continued the "civilizing" process of adhering more fully to Blackstone's view of married women's subordinate status, as both natural law and time-honored custom allegedly demanded. The increased enforcement of the common law's coverture was evident, for example, in the way the revolutionary governments treated married women. A colonial woman who actively worked against the revolutionary cause could be prosecuted as a traitor in the way that British loyalist men were, but a woman who simply followed her husband in returning to Britain was held to have exercised no choice of her own. She had simply done her marital duty. He had chosen for her, and hence she had not committed treason or forfeited all property rights by that act alone. Massachusetts did pass statutes requiring women whose husbands had left to fight with Britain to profess their own allegiance to the revolutionary cause in order to retain their property rights, and others indicating that a choice to follow him would be viewed as treason. But this attention to the woman's own decisions was unusual. The common assumption was that she had no political views of her own unless her overt acts proved

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38. For analyses of the status of colonial women, with some differing assessments of the degree and significance of their independence, see J.H. Wilson, *supra* note 37, at 396, 414-15; A. Sachs & J.H. Wilson, *supra* note 37, at 69-75; N. Taub & E. Schneider, *supra* note 37, at 136; M. Salmon, *supra* note 37, at 44-53; E.F. Crane, *supra* note 37, at 258-62; B. Harris, *supra* note 17, at 3, 16; J.B. Elshtain, *supra* note 17, at 56-61, 72-74; E. Flexner, *supra* note 35, at 9; C. Degler, *supra* note 35, at 5, 193-94; B.L. Epstein, *The Politics of Domesticity* 41 (1981).

39. J. Higham, *supra* note 9, at 9-11, 20-33, 137; J. Higham, *supra* note 34, at 31-33.

otherwise. The statutes on treason—themselves a reflection of ethnocultural views of persons as having an inborn, “natural” political identity—thus extended that outlook to include an endorsement of the natural subordination of American women to their men.<sup>40</sup>

Even more strikingly, the new state constitutions also generally restricted the franchise to men, beginning with New York’s express provision to this effect in 1777. The voting rights that some property-holding single women had exercised in the colonial era were thus lost everywhere but in New Jersey, and in 1807 that state revoked the anomalous grant of female suffrage in its initial constitution.<sup>41</sup> While Lockean liberal thought contained some elements that could have been used to challenge the unequal status of women, they were muted in his work, as noted above. And such liberalism was thoroughly intermixed in early American thought with the views of republican writers who (with a few exceptions such as Condorcet) usually positively endorsed the exclusion of women from full citizenship. After all, American republicans identified citizenship with material self-reliance, participation in public life, and martial virtue. The very words “public” and “virtue” derived from Latin terms signifying manhood. Since women were generally economically dependent on their husbands, and limited in their military capacities, women could not be full participants in the republic. Linda Kerber has shown that the leaders of the founding generation instead defined for women the role of “republican mothers,” a role that drew on Protestant beliefs and evolved quite easily into the more general “domestic sphere” ideology that prevailed in the nineteenth century. Women could sew, cook, or raise money for the revolutionary cause; they played major roles in colonial boycotts; and sometimes they even issued broadsides on behalf of republican political principles. But their main contributions came in their care of the home and children. They were not to vote or fight. Even the relatively egalitarian Jefferson claimed that women must always be excluded from public deliberations and offices, for “depravation of morals” would result if they should “mix promiscuously in gatherings of men.”<sup>42</sup>

Women often endorsed these views themselves. Their political consciousness may have exceeded the negligible amount men attributed to

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40. L. Kerber, *supra* note 28, at 9, 123-36; J.H. Wilson, *supra* note 37, at 387, 414; A. Sachs & J.H. Wilson, *supra* note 37, at 69; E.F. Crane, *supra* note 37, at 254-62; DePauw, *Woman and the Law: The Colonial Period*, 6 Hum. Rts. 107 (1977); J. Kettner, *The Development of American Citizenship 1608-1870*, at 198 (1978); Gundersen, *Independence, Citizenship, and the American Revolution*, 13 Signs 59, 68-71 (1987).

41. J.H. Wilson, *supra* note 37, at 418; A. Sachs & J.H. Wilson, *supra* note 37, at 74; Gundersen, *supra* note 40, at 65-66.

42. M. Gruber, *supra* note 28, at 4; L. Kerber, *supra* note 28, at 7-33, 102-06, 283-88; C. Degler, *supra* note 35, at 26, 336; E.C. Dubois, *supra* note 37, at 45; E.F. Crane, *supra* note 37, at 26-69, 255; F. McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 70 (1985); Bloch, *The Gendered Meanings of Virtue in Revolutionary America*, 13 Signs 37, 38-44 (1987).



them, as Mary Beth Norton has argued. Yet it was rarely overtly high, so that even expressions of support for republicanism were relatively infrequent among American wives. More typically, women became involved in public life during the revolution only when they deferentially petitioned the new governments to be allowed to join husbands in exile, or to win the release of imprisoned male relatives. Those governments simply ignored the few more directly political petitions women presented. To be sure, some revolutionaries, female and male, glimpsed the case for civic equality that liberal republican principles could provide, and perhaps more women would have done so if the times had been more propitious. But in the end, the thought and practice of the new regimes only consigned women even more explicitly to the domestic role they were held to be fitted for by nature and tradition.<sup>43</sup>

### C. *The Constitution and the Federalist Years*

While classical liberalism's egalitarian precepts posed no challenge to the subordination of women in the revolutionary and Confederation eras, tensions did surface between other classical liberal and republican commitments. Many historians now portray the process by which the Constitution was adopted as a struggle between more liberal Federalists, who were dissatisfied with the insecurity of property rights under the democratic state constitutions and with the lack of power to promote commerce nationally, and more republican Anti-Federalists, who were wary of a remote new central government ruling a vast territory with the aid of extensive financial and military power. The general view is that on the whole the liberals initially prevailed: Americans created a new national government with open borders that emphasized private rights and commercial growth more than political participation or agrarian civic virtue.<sup>44</sup> Nonetheless, the states retained considerable powers to define the memberships of their smaller republics themselves, and they continued to do so in restrictive "Americanist" ways. The Constitution did nothing to oppose their denials of political and property rights to women, or their racial restrictions affecting African and Native Americans. Indeed, it did not even clearly preclude the states from adopting their own naturalization policies. The early Congresses, moreover, imposed overt federal racial and ideological requirements for the acquisition of citizenship via naturaliza-

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43. L. Kerber, *supra* note 28, at 31-35, 73-95, 285-87; E.F. Crane, *supra* note 37, at 256-58; J.H. Wilson, *supra* note 37, at 419-21, 426-27; Gundersen, *supra* note 40, at 73-74; M. B. Norton, *Liberty's Daughters: The Revolutionary Experience of American Women 1750-1860*, at 170-94 (1980); Norton, *The Evolution of White Women's Experience in Early America*, 89 *Am. Hist. Rev.* 593, 615-17 (1984).

44. G. Wood, *supra* note 29; Wood, *The Foundations of American Freedom*, in *Freedom in America* (N. Graebner ed. 1971); I. Kramnick, *supra* note 6, at 5; H. Storing, *supra* note 34; Schambra, *The Roots of the American Public Philosophy*, 67 *Pub. Interest* 36, 37-42 (1982).

tion, though they did not address female naturalization.<sup>45</sup> That silence only confirmed how little attention lawmakers gave to the implications of their officially egalitarian doctrines of human rights for the status of women.

A rare example of a revolutionary intellectual actually trying to reconcile his liberal and republican precepts with women's traditional politically powerless status came in James Wilson's 1790-91 *Lectures on Law*. The lectures elaborated the comprehensive legal and political philosophy of the founding generation's leading legal scholar. Wilson was heavily influenced by the republicanism of the Scottish Enlightenment, but he was also a fervent Protestant, and a liberal who ultimately emphasized private pursuits over public ones. He also revered the common law as a means of injecting a restraining concern for tradition into popular governments. As an apparent aside, in one lecture Wilson explained to the ladies in his audience why they lacked full political status. To do so, he combined all three ideological strains to defend the propriety of a separate "domestic sphere" for "republican mothers."<sup>46</sup>

Wilson's tone was casual and condescending, but his arguments revealed the great difficulties of his task, especially given his proudly egalitarian liberal republicanism. His liberalism spoke when Wilson unequivocally assured women that, contrary to traditional views of female inferiority, they were "neither less honest, nor less virtuous, nor less wise" than men. Why, then, should they not participate in politics? Wilson first appealed to a strongly privatistic version of liberalism, arguing that "publick government and publick law" were made not for themselves but "for something better," for "domestick society." And he argued that women formed the "better part" of such society—that is, if they did not acquire "masculine" characteristics through public pursuits. Here Wilson moved to ethnocultural, naturalistic Americanism and republicanism: women should develop their unique qualities, bestowed by nature and its Creator, so that they might "embellish" and "exalt" the nation's social life by their "beauty," "virtue," and "affection." Their proper political role, again, was simply to form their daughters for similar service, and to refine the

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45. From 1790 to 1870, only whites could be naturalized. (Blacks were then added; in 1924, Native Americans were naturalized, while most persons of Asian origins were still ineligible until the 1940s.) Jeffersonian Republicans, fearful of aristocracy, added to the 1795 naturalization act a provision requiring the abandonment of any hereditary titles. H. Kohn, *supra* note 3, at 13, 138; J. Higham, *supra* note 9, at 112; R. Horsman, *supra* note 9, at 18-24; J. Kettner, *supra* note 40, at 224-43, 264-65, 340-41; W.D. Jordan, *White Over Black: American Attitudes Toward the Negro 1550-1812*, at 336-39 (1968).

46. J. Wilson, *The Works of James Wilson* 86, 102, 143, 217, 403-07, 579 (R. G. McCloskey ed. 1967). Wilson's early advancement of the doctrine of two spheres as America's true legal philosophy is not mentioned by Taub and Schneider, who find little evidence that legal thought "played an overt role in the initial articulation of separate-sphere ideology." N. Taub & E. Schneider, *supra* note 37, at 126. I am indebted to an early draft of S.A. Conrad's excellent *Polite Foundation: Citizenship and Common Sense in James Wilson's Republican Theory*, 1984 Sup. Ct. Rev. 359.

virtues of their sons, adding to male spiritedness the civility and concern for others that republican citizenship also required.<sup>47</sup>

Subsequently, Wilson endorsed more liberal Lockean and Protestant views upholding education for women and treating marriage as a civil contract.<sup>48</sup> But he defended the coverture status imposed by the common law, albeit by a further appeal to liberalism's regard for private life. Wilson said the law ought, like a "benevolent neighbor," to assume "all to be well" with husband and wife, so that they have a total identity of interest. It therefore should not intrude on their matrimonial privacy unless this presumption should prove so flagrantly untrue that the "peace and safety of society" are endangered.<sup>49</sup>

Rhetorically, then, Wilson upheld a liberal recognition of female equality, and a contributing role for women in republican government. Women were said to be of at least equal worth but distinctive abilities, so that they contributed most by shaping future citizens from within their proper domestic sphere. In much classical liberal and Protestant, if not republican discourse, that sphere was actually higher than that of government. But Wilson's synthesis was far from seamless. The contribution of "republican mothers" was too indirect for women truly to be equal republican citizens. And while liberalism might lead the state to defer to the private arrangements of husband and wife, such deference did not logically imply that the *male* should be the sole public representative of their united identity. That step rested on embracing the inegalitarian naturalistic assumptions of the "destiny" of women embodied in common law and religious traditions. But since Wilson's view of women's place did on the surface appear to satisfy simultaneously liberal egalitarianism, "Americanist" outlooks, and the republican insistence on social roles consistent with a virtuous, homogeneous citizenry, it is not surprising that this basic position became increasingly dominant in the new American liberal republic.

Counter-currents existed in post-revolutionary society, but they were very weak. A few voices spoke for broadening the education of women: Benjamin Rush thought more history, biography, and geography appropriate if they were to be effective "republican mothers." In the 1790s, Judith Sargent Murray of Massachusetts published essays suggesting women might appear less inferior with more adequate education, and she was gratified to see some slight growth in female academies, though they were more finishing schools than training grounds for equal citizens. These efforts strained to find grounds for greater gender equality primarily in the Revolution's republicanism, but the most influential argument

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47. J. Wilson, *supra* note 46, at 85-88.

48. *Id.* at 599-600.

49. *Id.* at 602-03. One trusts Wilson would have judged this requirement to be met by cases such as wife-beating, and that he would not have insisted on the sort of threat to third parties presented by, for example, stray shots from a couple exchanging gunfire.

in that cause built instead on classical liberalism's commitments to human reason and human rights.

In 1792 a freethinking English writer, Mary Wollstonecraft, influenced by the Scottish Enlightenment philosopher Richard Price, by Tom Paine, Catherine Macauley, and her general immersion in radical Enlightenment rationalism, criticized Rousseau and called for equal female education and independence in her *Vindication of the Rights of Women*. Often described as the founding work of the modern women's movement, the book was soon reprinted in a Republican periodical in America. It quickly won criticism from Federalist traditionalists, but its assaults on excessive absorption in fashion, sentimentality, and useless feminine refinements accorded with anti-aristocratic American sensibilities. Wollstonecraft's views came to be linked, however, to the excesses of the French Revolution and to radical calls for free love. As a result, they did not generate any significant reform efforts in the United States during these years.<sup>50</sup>

#### D. *The Jeffersonian Era*

The Constitution's deference to state regulation of civic statuses meant that little litigation concerning women's rights reached the Supreme Court in the first half of the nineteenth century. The cases that did arise in the Jeffersonian and Jacksonian eras, moreover, largely endorsed the confined legal status assigned to women by the common law and the states from the revolutionary era through the early Federalist administrations. In *Kempe's Lessee v. Kennedy*,<sup>51</sup> for example, the lessee of Grace Kempe, a woman who had married a British loyalist and gone to England during the revolution, challenged a New Jersey law confiscating the land of inhabitants of other states who were guilty of aiding America's enemies. He contended this law should not apply to Kempe's lands, to which he now held title, because she was a *feme covert*. As such, her departure represented not aid to the enemy, but simply allegiance to her husband, an obligation (among "the most important duties of social and domestic life") that he did not think the law had been meant to override. Furthermore, as a *feme covert* Kempe was not in his view even an "inhabitant of a state." Her husband was the inhabitant—so again the law could not be applied to her. While the U.S. Supreme Court decided against Kempe's lessee on jurisdictional grounds, Chief Justice John Marshall indicated some sympathy to the lessee's views on the merits. That sympathy is revealing. Clearly if a married woman's status was so subordinate to her husband's that she could not even be truly deemed an inhabitant of a political com-

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50. L. Kerber, *supra* note 28, at 224-25, 279; M.B. Norton, *Liberty's Daughters*, *supra* note 43, at 267-72; E. Flexner, *Mary Wollstonecraft: A Biography* 162-66 (1972); E. Flexner, *supra* note 35, at 15-17; E.W. Sunstein, *A Different Face: The Life of Mary Wollstonecraft* 214-15 (1975); M. Wollstonecraft, *A Vindication of the Rights of Women* 51, 157-78 (C. H. Poston ed. 1975).

51. 9 U.S. (5 Cranch) 173 (1809).

munity in her own right, she possessed in the law's eyes no meaningfully independent citizenship.<sup>52</sup>

Other developments in the Jeffersonian era did lead to civil law and social reforms that in some ways gave women more legal rights and an enhanced social position. As the nation pursued Jefferson's dream of a western "empire of liberty," family separations became common. Both sentiment and interest then demanded that states clarify the law of family property and make land more easily alienable. When husbands left wives and daughters at home, it was inconvenient for the women to be unable to sell property themselves; and protective men often wished to secure their female dependents' financial positions by giving them these rights. Eventually, state courts and legislatures began to respond by granting women more extensive powers to inherit and transfer property and retain control over their own incomes. A few states also began to liberalize divorce laws mildly and to increase the parental rights of married women.

Americans began educating their daughters more extensively in this era as well, accounting for much of the increased school enrollment of the period. The education of girls, however, still focused on the domestic duties of "republican motherhood." American female writers such as the "American Lady" who published *A Second Vindication of the Rights of Women* in 1801 and Hannah Crocker, who published *Observations on the Real Rights of Women* in 1818, were inspired by Wollstonecraft's demands for women's education, which bespoke the liberal legacy of radical Enlightenment thought. But while Crocker agreed that women could benefit from a more broad-ranging curriculum, she still believed it "morally wrong, and physically imprudent" for women to pursue abstract studies like metaphysics or public careers like law.

Some went further: Emma Hart Willard fought to teach the natural sciences as well as domestic sciences in several northeastern female academies. And another exponent of the most radical currents of the Scottish Enlightenment, the renowned Frances Wright, travelled several times from Scotland to America in the 1820s, eventually becoming one of the leaders of the American freethought movement. With Robert Dale Owen, she edited the *New Harmony Gazette*, the journal of his socialist utopia in Indiana, and later the *Free Enquirer* in New York. But she was best known as the first prominent female lecturer in the United States. Her *Course of Popular Lectures*, published in 1829, called for common schools with equal education for women. She also spoke for the gradual

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52. *Id.* at 177-78, 182-87. For a widely followed state decision that confined the membership claims of married women so greatly as to render them virtual "political aliens," see *Martin v. Commonwealth*, 1 Mass. 347 (1805), and the discussion in L. Kerber, *supra* note 28, at 132-36. When even unmarried women with property were not enfranchised by that state's new constitutional charter in 1820, some complained; but defenders of the ban replied that unmarried women had "disobeyed God's injunction to multiply and subdue the earth." C. Williamson, *American Suffrage from Property to Democracy 1760-1860*, at 194 (1960).

abolition of all slavery. But like Wollstonecraft, she was mocked as an atheistic free love advocate. Her ideas began to bear fruit only in the Jacksonian years.<sup>53</sup>

Although the legal changes during this period provided some progress toward greater equality of condition for women, the widespread scorn for women such as Fanny Wright, and the dominant understanding of the purposes of female education, limited the significance of those changes. State courts usually interpreted the expansions of women's legal rights as steps reflecting female needs for special protection, not as expressing any recognition of genuinely equal status. The support these reforms provided for women's rights was thus fragile and was easily transformed into endorsements of their separate and subordinate position.<sup>54</sup>

### E. *The Jacksonian Era*

After Andrew Jackson drove the more nationalistic wing of the once-Jeffersonian Republican Party from power, to be replaced by his Democrats, political and intellectual developments worked for greater civic equality among white men, but more harshly unequal civic statuses for virtually everyone else. Just as white Americans had from the start reacted to the presence of African-Americans by limiting naturalization to whites, so from the 1830s on they responded to the rise of abolitionism, the pressures for western expansion at the expense of Native Americans and Mexicans, and increases in European immigration by abandoning their faith in assimilation and arguing for policies premised on Anglo-Saxon superiority. Jacksonian Democrats tended to appeal to the "scientific" evidence of racial inequalities offered by the American school of ethnography. Its doctrines burgeoned rapidly after Philadelphia physician Samuel George Morton drew on the world's largest collection of skulls to assert a physical basis for racial differences in his 1839 work, *Crania Americana*. His work was applauded and extended by a popular phrenologist, Dr. Charles Caldwell, who maintained the superiority of Anglo-Saxon heads, and by the prolific Dr. Josiah Nott of Mobile, who wrote in 1844 that the "Mongol, the Malay, the Indian, and the Negro" had now been proven to be "in all ages and places inferior to the Caucasian."

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53. J.G.A. Pocock, *supra* note 7, at 529-42; E. Flexner, *supra* note 35, at 24-29; C. Degler, *supra* note 35, at 307-10, 332-33; E.C. Dubois, *supra* note 37, at 41-42, 46; M.B. Norton, *supra* note 43, at 295; J. Blau, *Social Theories of Jacksonian Democracy* xiii-xvii, 242-48, 376 (J. Blau ed. 1954); L.M. Friedman, *A History of American Law* 205-11 (2d ed. 1985); Kerber, *From the Declaration of Independence to the Declaration of Sentiments: The Legal Status of Women in the Early Republic, 1776-1848*, 6 *Hum. Rts.* 115 (1977); L. Cremin, *American Education: The National Experience 1783-1876* (1980); C.F. Kaestle, *Pillars of the Republic: Common Schools and American Society 1780-1860*, at 27-29 (1983).

54. E.C. Dubois, *supra* note 37, at 46; N. Taub & E. Schneider, *supra* note 37, at 119; M. Salmon, *supra* note 37, at 81-140, 189-93; W. Leach, *True Love and Perfect Union* 178 (1980); Speth, *The Married Women's Property Acts, 1834-1865: Reform, Reaction, or Revolution?* in *2 Women and the Law* 69 (D.K. Weisberg ed. 1982).

Northern writers such as the physician John H. Van Evrie and lawyer William Van Amringe, both New Yorkers, added popular works supporting these racial views, and in 1850 Louis Agassiz of Harvard endorsed Morton's argument for polygenesis. The widely read Jacksonian organ, the *Democratic Review*, treated these works as establishing what George Fredrickson has termed the Democratic "public ideology" of "Herrenvolk egalitarianism," justifying democracy for whites and their dominance over non-whites. Subsequently, this ideology was refined by western expansionists like Sam Houston and Polk's Secretary of State, Robert J. Walker, to focus on northern Europeans, often lumped together as Anglo-Saxons, in order to assert the "manifest destiny" of Americans to rule over Mexico's territories in the west.<sup>55</sup>

Whigs drew not on scientific racialism but on the historiography and literature of European romanticism, as well as their own Puritan traditions, to defend the cultural, if not providential superiority of Anglo-American peoples, variously defined as the "Anglo-Saxon," "Anglo-Norman," "Teutonic," "Scandinavian," or simply "Nordic" race or races. Many Whigs justified their hostility toward immigrants in these ethnocultural terms, though less conservative ones clung to the faith that all culturally inferior peoples could eventually acquire Anglo-Saxon qualities. Whig histories recounted the rise of "Anglo-American Protestantism" from the Pilgrim founding and identified the United States above all as a "redeemer nation," taking the romantic conceptions of unique historically rooted nationalities in the writings of the German-American scholar Francis Lieber and English authors like Thomas Carlyle and Sir Walter Scott as intellectual supports for their outlook. The willingness of many German and English romantic writers to connect the mythical old Anglo-Saxon constitution of liberty with Tacitus' classical portrait of freedom-loving ancient Germanic tribes made them perfectly suitable for American ethnocultural claims. From such materials Daniel Webster and other Whig orators constructed their mystical portraits of America's national meaning and providential destiny, should it avoid corruption. For many Whigs that heritage required the avoidance of contact with "un-American" populations, not their enslavement or extermination. These Whigs opposed Jacksonian expansionism, though rarely on the grounds of strong egalitarianism.<sup>56</sup>

Despite those differences, male Jacksonians and Whigs generally agreed that female equality was out of the question. It was of course in

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55. G.M. Fredrickson, *supra* note 9, at 61-77, 92-102; D.W. Howe, *supra* note 9, at 140; R. Horsman, *supra* note 9, at 108-10, 130-49, 208-35; P.S. Foner, *History of Black Americans: From the Emergence of the Cotton Kingdom to the Eve of the Compromise of 1850*, at 374-75 (1983).

56. G.M. Fredrickson, *supra* note 9, at 2, 97-101; D.W. Howe, *supra* note 9, *passim*; R. Horsman, *supra* note 9, *passim*; E.L. Tuveson, *supra* note 9, at 165-75; M. Curti, *Probing Our Past* 126-27 (1955); P.C. Nagel, *This Sacred Trust: American Nationality 1798-1898*, at 88-97 (1971); R.H. Wiebe, *The Opening of American Society* 321-47 (1984).

Jackson's 1830s that Alexis de Tocqueville formed and advanced his profound commentaries on American beliefs and institutions, including the circumstances of the sexes. His *Democracy in America* provided one of the most influential formulations of the nation's increasingly stressed "separate sphere" ideology, relying on appeals to nature and religion and also "political economy" to suggest the appropriateness of purely domestic roles for women in "industrial nations." Americans, Tocqueville wrote, had "carefully separated the functions of man and of woman," since forcing equality on the sexes would make "a jumble of nature's works." The "natural head of the conjugal association is the husband." Yet while women were properly left to "the domestic sphere," that very fact enabled them to achieve their proper kind of "equal worth." They received sufficient education to play their politically crucial role in shaping the "mores" and "opinions" of the nation's future citizens. Tocqueville found the Americans' firm insistence on this role for women, in law and custom, "the chief cause" of their growing prosperity and power. Few in the American mainstream would have disputed either his reasoning or his conclusions.<sup>57</sup>

Even so, in the latter years of the antebellum period, some further liberalizing legal reforms did occur, and a genuinely egalitarian women's movement began to develop. By and large, however, that movement was not responsible for the legal changes, which were more liberal in result than in purpose. From 1839 on, many states passed Married Women's Property Acts of various sorts that incrementally expanded the powers of women to inherit, own, and transfer property independently of their husbands. By 1850, some seventeen states had passed such statutes. Conservative judges sometimes tried to invalidate the reforms as intrusions on protected economic rights, but those arguments were effectively countered by Jacksonian claims to expansive state police powers. These laws gave women some measure of the economic rights that most liberals held to be fundamental, and they were supported in part by egalitarian female activists; but most scholars describe them as remarkably uncontroversial adjustments to the fast-changing economic conditions of the day. Westward expansion and economic growth created family separations and a marked increase in market transactions, circumstances that demanded greater clarity in titles to family property and greater facility in exchanging property when men were absent. These conditions were also conducive to the mild continuing moves toward more liberal divorce laws.<sup>58</sup>

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57. A. de Tocqueville, *Democracy in America* 291, 590-93, 597-98, 600-03 (J.P. Mayer ed. 1969); Baker, *The Domestication of Politics: Women and American Political Society, 1780-1920*, 89 *Am. Hist. Rev.* 629 (1984).

58. Examples of state judicial resistance to Married Women's Property Acts include *White v. White*, 5 Barb. 474 (N.Y. Sup. Ct. 1849); *Rice v. Foster*, 4 Del. (4 Harr.) 479 (1847). For discussion of Married Women's Property Acts and their litigation, see, e.g., S. Lebsack, *supra* note 37, at 84-86; H.M. Hyman & W.M. Wiecek, *Equal Justice Under Law: Constitutional Development 1835-1875*,



Some scholars contend further that insofar as these reforms had noneconomic motives, they were not so expressive of egalitarian sentiments as much as paternalistic efforts to provide women with resources sheltered against debts incurred by their husbands or fathers (and to insure that those resources were available to be inherited by their sons). The original 1839 Married Women's Act, passed in Mississippi, mostly secured women's rights over slaves, thereby enforcing racial inequality more than gender equality. Although the later laws covered more typical property holdings, none established full female parity in economic matters. Most of the litigation involving such provisions, moreover, did not present women's claims to independence from their husbands, but rather defenses by couples against external creditors.<sup>59</sup> Hence while these acts, too, had liberalizing effects, they were not expressions of any major ideological shift toward liberal views of women. Even so, they were subsequently cited by feminist leaders such as Elizabeth Cady Stanton and Susan B. Anthony as factors which helped prompt their broader political activism.<sup>60</sup>

In certain contexts, the courts of this period recognized women as having civic statuses different from their husbands, tempering the eclipse of female political identity that coverture involved. But again, when they did so, the courts were usually moved by non-liberal concerns. In *Shanks v. DuPont*,<sup>61</sup> for example, Justice Story held for the Supreme Court that a native-born American woman did not automatically change her nationality by marrying an alien; but he relied on the common law's doctrines of birthright allegiance and limited expatriation rights, according to which "no persons can by any act of their own, without consent of the government, put off this allegiance, and become aliens." Correspondingly, Story noted, *feme covert*s did not become naturalized by marrying American citizens. In Story's view, this acceptance of their independent nationality on naturalistic common law premises in no way jeopardized recognition of all the other "incapacities of *feme covert*s, provided by the common law."<sup>62</sup>

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at 23, 52-53 (1982); Chused, *Married Women's Property Law: 1800-1850*, 71 *Geo. L.J.* 1359 (1983); Basch, *The Emerging Legal History of Women in the United States: Property, Divorce, and the Constitution*, 12 *Signs* 97 (1986).

59. See, e.g., *Bein v. Heath*, 47 U.S. (6 How.) 228, 247 (1848), a rare U.S. Supreme Court incursion into marital property law. The case did not involve a Married Women's Property Act, but it did consider a provision codified by Louisiana in 1825 which made a wife independent of the debts of her husband (even when she had professed to underwrite them). The Beins unsuccessfully tried to use this provision to void Mary Bein's obligations to Mary Heath for a loan Mrs. Bein had secured to assist her impecunious husband, Richard.

60. L. Kerber, *supra* note 28, at 154-61; Kerber, *supra* note 53, at 120; E. Flexner, *supra* note 35, at 62-65; C. Degler, *supra* note 35, at 4-9; A. Sachs & J.H. Wilson, *supra* note 37, at 78; N. Taub & E. Schneider, *supra* note 37, at 119; E.C. Dubois, *supra* note 37, at 41-46; L.M. Friedman, *supra* note 53, at 205-11, 251; Speth, *supra* note 54, at 66-91; W. Leach, *supra* note 54, at 174-78; N. Basch, *supra* note 58, at 103-4.

61. 28 U.S. (3 Pet.) 242 (1830).

62. *Id.* at 245-48. Story similarly regarded a divorced couple as having diverse nationalities in *Ex parte Barry*, 43 U.S. (2 How.) 65 (1844). A New York court held that Congress had the power to naturalize married women, "even against the consent" of their husbands, in *Priest v. Cummings*, 16

Related ambiguities surrounded one of the few other U.S. Supreme Court cases of this era that touched on the question of female citizenship. In *Barber v. Barber*,<sup>63</sup> the Court permitted a mistreated wife who had been granted a divorce *a mensa et thoro* (a status in which the couple lived separately while remaining legally "man and wife") to sue her husband for alimony in federal courts, since they resided in separate states. That permission implied that she held a distinct state citizenship, at least for jurisdictional purposes. Yet in regard to state citizenship, courts ordinarily assigned married women the civic status of their husbands. The Court dealt with this problem by stressing that women would be placed "upon a very unequal footing," without relief in cases of interstate desertion, were they to be denied access to federal courts in this way.<sup>64</sup> The decision can thus be seen as expressing either a novel liberal esteem for female equality or a paternalistic concern for women's welfare, though its tone bespeaks more the latter.

Nonetheless, Justice Peter Daniel of Virginia, joined by Chief Justice Roger Taney and Justice John Campbell of Alabama, still found the decision both too egalitarian and too nationalistic. His dissent cited Blackstone and Kent on behalf of the common law view that marriage made man and woman into "one person," essentially the husband, so that the wife was "not a citizen at all, or a person *sui juris*." Further, Daniel insisted that only "the particular communities of which . . . families form parts," not the federal government, should be permitted to regulate "the domestic relations of society."<sup>65</sup> Daniel's failure to carry a majority means that, even with its considerable ambiguity, this relatively minor case remains the closest the Supreme Court came to enunciating a liberal egalitarian view of the status of women during the antebellum years.

As many scholars have noted, the antebellum period instead saw the further entrenchment of beliefs that women were especially suited for the domestic sphere, concerned primarily with child-rearing, housekeeping, and hygiene, and religiously-based personal morality. Those views were partly challenged, though also partly extended, by the incipient women's rights movement, which used "feminine" social concerns (temperance, for example) as a basis of social activism, but also argued for equal human rights as discussed below. As far as American lawmakers were concerned, however, confining views of women's domestic role prevailed. Hence it is not surprising that in 1855, Congress passed a new Naturalization Act that did automatically naturalize all women who married United States citizens, if the women "might lawfully be naturalized under the existing laws." Congress added that qualification "to prevent the citizenship of

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Wend. 617, 627 (N.Y. 1837).

63. 62 U.S. (21 How.) 582 (1858).

64. *Id.* at 594.

65. *Id.* at 601-03.

negro, Indian, or Chinese women." The law did not specify whether American women who had married aliens lost their citizenship (and the issue would not receive a definitive legal answer until 1907). The lack of specificity probably reflects the fact that the act mainly addressed another goal.<sup>66</sup> It provided that all children born overseas to fathers who were U.S. citizens would be deemed citizens, if the fathers had ever resided in the United States. Faithful to the paternalism that pervaded the law, Congress rejected a version which would also have granted citizenship to children of mothers who were citizens.

While this automatic naturalization of formerly alien *feme covert*s, imposed whether they wished it or not, was not the chief aim of the act, it did receive a brief yet revealing defense. A supporter in the House indicated that the provision involved little real cost to anyone, because "women possess no political rights," and so lost nothing by a change of citizenship. Furthermore, the measure might lead a wife to do a better job for her husband in the "instilling of proper principles in his children." Wives would, in other words, be better "republican mothers," lacking any power to participate politically themselves, but charged with conveying political morality to children in the domestic sphere. This "reform," undoing some of the legal recognition of women's independent political status granted in the earlier court decisions, thus indicates that although various liberalizations in the legal status of women did occur in these years, traditional republican and ethnocultural views of women's place remained powerful and also found some new legal expressions.<sup>67</sup>

The antebellum era did, however, witness the rise of a staunchly egalitarian and liberal women's movement, triggered by the abolitionist crusade and its revitalization of the ideals of the Declaration of Independence. With the sponsorship of William Lloyd Garrison and other antislavery leaders, women began to form female antislavery societies in the 1830s. By the end of the decade, there were some 112 of these groups, present in every northern state. An initial national conference, the Antislavery Convention of American Women, met in New York in 1837. The American Anti-Slavery Association also hired two female lecturers, Sarah and Angelina Grimke, the first American women since Frances Wright to become prominent public speakers on political issues. When the Massachusetts Congregationalist clergy attacked the Grimke sisters for their public involvements, they began writing and speaking in defense of women's rights, invoking the "natural rights egalitarianism" of the En-

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66. It imitated an 1844 English statute, which superseded the parallel common law requirement there, and which rested on similar "domestic sphere" notions. V. Sapiro, *supra* note 36, at 8-9. In *Kelley v. Owen*, 74 U.S. (7 Wall.) 496 (1868), Justice Stephen Field (plausibly) interpreted the 1855 naturalization act as intending to insure that the wife's citizenship always followed her husband's, at least when they were becoming Americans. He saw this patriarchal intent as wholly unproblematic.

67. V. Sapiro, *supra* note 36, at 8-9; C. Degler, *supra* note 35, at 26-27, 73, 150; F.G. Franklin, *A Legislative History of Naturalization* (1906, reprint 1969).

lightenment, as extended by Mary Wollstonecraft to women. Similarly, Stanton, Anthony, Lucy Stone, Lucretia Mott, and other leaders of the women's rights cause from 1848 on had previously been active in the American Anti-Slavery Association and other antislavery groups. Garrison, in turn, defended women's rights; but other antislavery activists objected to combining the two causes, a controversy that contributed to Stanton and Mott's decision to organize the 1848 Convention that signalled the beginning of their own movement.<sup>68</sup>

These women's rights activists continued to give some voice to themes of "Republican Motherhood," to the view that their reform politics merely extended their roles in the "women's sphere." But to defend their role against male abolitionists, and to link their cause more explicitly with blacks, they relied most heavily on the liberal language of human moral equality in regard to natural rights, as the Seneca Falls Declaration showed. In the end they combined both outlooks fruitfully. Once they had advanced a liberal egalitarian foundation for women's rights, they could use republican notions of citizenship to derive the conclusion that the franchise for women was essential, something only the more radical antislavery activists were willing to suggest for blacks.<sup>69</sup> Religious sentiments also remained pervasive in the rhetoric of female activists; but more than abolitionists, women had to break with powerful but confining elements in traditional religious outlooks to support their cause. Thus it is perhaps not surprising that of all the reformers articulating liberal ideals in these years, it was the women's rights activists, especially Elizabeth Cady Stanton, who carried the logic of these principles further than virtually any earlier American liberals, male or female, had been willing to do. Stanton called not only for the vote for women and for reformed property laws, but also for basic changes in marriage and divorce laws, family roles, and Christian beliefs to give women more meaningful equality. Despite its failure to gain much hearing among the nation's lawmakers at the time, such activism set in motion arguments that eventually became prominent features of American legal and constitutional debates. Arguably, a trace of impact is visible in some postbellum cases where the Supreme Court construed the domicile of married women as separate from their husbands when such a construction aided the woman's legitimate interests.<sup>70</sup> But the rationale for interpretations granting women independent status was not sharply articulated, and the rationales judges did offer bespoke more the continuing needs of women for protection than the abolitionist women's

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68. C. Degler, *supra* note 35, at 303-06; E. Flexner, *supra* note 35, at 72-74; E.C. Dubois, *supra* note 37, at 22-23; P.S. Foner, *History of Black Americans: From the Compromise of 1850 to the End of the Civil War* (1983).

69. It is because Ellen Dubois's otherwise excellent study neglects republicanism that she can call the "widespread belief in the importance of the ballot" a "somewhat elusive aspect of the American political tradition." E.C. Dubois, *supra* note 37, at 42.

70. See, e.g., *Cheever v. Wilson*, 76 U.S. (9 Wall.) 108 (1869).

commitment to equal human rights. And the opposing view, that the law should limit women's rights outside their sphere, and that at any rate their status was a matter for state decision, regained even more force after the reform passions of the Civil War had abated.<sup>71</sup>

#### F. *The Civil War and the Postwar Amendments*

As Eric Foner has richly detailed, the War culminated in the constitutional enshrinement of the Republican Party's ideology in the three great post-war amendments, the Thirteenth, Fourteenth, and Fifteenth. That ideology drew on American Protestant and Whig traditions, but it was undeniably liberal in its Lockean insistence on the central importance of free labor as the source of all productive value, as well as the best proof of good moral character. Republicans had therefore insisted that although the races might not be fully equal in all respects, every human being had a natural right to pursue his trade and reap the fruits of his labor. Hence slavery was the height of injustice. The Thirteenth Amendment banned all forms of involuntary servitude; the Fourteenth went on to constitutionalize beyond dispute the 1866 Civil Rights Act by extending citizenship to all persons born within the jurisdiction of the United States and prohibiting the states from infringing the privileges and immunities of such citizens, or denying any person legal due process or equal protection; and the Fifteenth prohibited racial restrictions on the franchise. Those liberal amendments provided ample textual bases for assaulting various ethnocentric inequalities embodied in American citizenship laws.<sup>72</sup>

Yet those victories for liberal egalitarian principles were accompanied by two great and destructive splits among reform movements, splits that contributed to the postbellum waning of their influence. First abolitionism and women's rights diverged because many women refused to subordinate their claims to those of the freedmen, a subordination evident in the failure of the postwar amendments to address female concerns explicitly. Eventually, the debate thus initiated split the ranks of the women's rights activists themselves. It contributed to the establishment of two separate Woman Suffrage Associations, the National and the American, in 1869.<sup>73</sup>

The American organization, led by Lucy Stone and Julia Ward Howe,

71. Z. Eisenstein, *supra* note 15, at 162-63; B. Harris, *supra* note 17, at 78-85; E. Flexner, *supra* note 35, at 89, 159, 226; A. Sachs & J.H. Wilson, *supra* note 37, at 81-82; E.C. Dubois, *supra* note 37, at 31-42, 184; W. Leach, *supra* note 54, at 8, 23, 146.

72. E. Foner, *Free Soil, Free Labor, Free Men* 9-23, 290-300 (1970); E. Foner, *Reconstruction: America's Unfinished Revolution 1863-1877*, at xxvi, 228-80 (1988). In *Reconstruction*, Foner sometimes refers to the "free labor" ideology as a "republican" one, in partial contrast to what he sees as a postwar "classical liberal" ideology. *Id.* at 416, 488-99, 530. But he does not deny that the "free labor" position is thoroughly Lockean, a fact that previous commentators, including Foner himself, have explicitly noted. See E. Foner, *Politics and Ideology in the Age of the Civil War 192-93* (1980); Farber & Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 Const. Commentary 235, 241-42 (1984).

73. E. Flexner, *supra* note 35, at 145-48; E.C. Dubois, *supra* note 37, at 58-78.

reluctantly accepted the temporary primacy of black suffrage, while placing the vote above all other concerns of women and working for change largely at the state level. These emphases represented a greater stress on the justification of female suffrage in terms of "republican motherhood," as a means for women to fulfill their special functions by shaping local policies pertinent to child-rearing, education, health and sanitation, and public morality. In contrast, the NWSA refused to take a back seat to the "Negro's hour," worked for change at the national level, and challenged traditional familial, economic, and religious conceptions of women's role as well as franchise restrictions. These positions reflected a more liberal emphasis on full human equality; but in the postwar years they led the NWSA to be viewed as too radical for many of their former allies, male and female. (Indeed, even many NWSA activists refused to recognize how much their aims threatened the structure of the traditional family.) Stanton and Anthony thus labored in vain to alter the Fourteenth and Fifteenth Amendments so as to aid women as well as blacks.<sup>74</sup>

While the most expansive of the postwar amendments, the Fourteenth, spoke of due process and equal protection for all persons, it outraged women's rights leaders by referring three times to the suffrage granted to "male" citizens—thereby providing some basis for assuming the amendment did not affect women's domestic role.<sup>75</sup> Moreover, in the landmark *Slaughter-House Cases*,<sup>76</sup> the Supreme Court read the Thirteenth and Fourteenth Amendments very narrowly, overruling interpretations grounded in the free labor ideology of the governing Republican Party, out of an explicit concern to prevent the amendments from interfering extensively with traditional state prerogatives. The case arose when New Orleans butchers challenged a monopolistic slaughterhouse charter, granted by the state's North-dominated Reconstruction legislature, which forced them to work at the Crescent City Slaughter-House Company's

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74. E. Flexner, *supra* note 35, at 155-56, 223; E.C. Dubois, *supra* note 37, at 135-202; Dubois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878*, in *The Constitution and American Life 184-88* (D. Thelen ed. 1988); C. Degler, *supra* note 35, at 315-20, 342-50; W. O'Neill, *Everyone Was Brave* 18-21 (1969).

75. The first two sections of the Fourteenth Amendment read in full:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, 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.

76. 83 U.S. (16 Wall.) 36, 52-53, 56 (1873).

facilities or give up their trade. The butchers claimed this measure violated the most fundamental right in liberal "free labor" ideology, the right to labor productively, to pursue their vocation and reap the fruits of their efforts. In so doing, they alleged it imposed an involuntary servitude on them, in violation of the Thirteenth Amendment, and restricted a privilege of U.S. citizenship in ways that denied them due process and equal protection, in violation of the Fourteenth Amendment. Former Supreme Court Justice John Campbell's argument for the butchers contended that the amendments had decisively repudiated the states' rights, republican views of citizenship prevalent in the antebellum South, rendering national citizenship unquestionably primary. This national citizenship, moreover, was based on the liberal commitment to securing fundamental rights against all threats, including any from the states. High among those rights, as "property of a sacred kind," was the "right to labor . . . and to the product of one's faculties."

By only a 5-4 vote, the Court rejected all the butchers' claims, via reasoning that ultimately appealed to the longstanding fears in American republican thought that a centralized despotism would be inevitable if the federal government could override the states' definitions of basic rights. Campbell's arguments would mean, Justice Samuel Miller wrote for the Court, that federal agencies could "fetter and degrade the State governments," which was arguably the precise goal of the amendments, at least in regard to the rebellious southern states.<sup>77</sup> But that possibility violated the old Jacksonian orthodoxy of "dual federalism" more than Miller and his colleagues could accept. He interpreted the Fourteenth Amendment, which Campbell had stressed, as almost exclusively concerned with protecting the newly freed blacks against further racial discrimination.<sup>78</sup>

Of the dissenters, Justices Stephen Field and Joseph Bradley most clearly expressed how a "free labor" reading of the amendments did indeed support the butchers' claims. Each stressed that the Fourteenth Amendment, especially its due process clause, had protected basic liberties, including the "sacred" right to pursue "unmolested a lawful employment in a lawful manner," against arbitrary restrictions of the sort they thought the monopoly to impose. Field termed this "the distinguishing privilege" of United States citizenship as well as a natural right (citing Adam Smith), and he insisted a government could not be truly republican, or free "in the American sense of the term," without that basic economic liberty.<sup>79</sup>

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77. *Id.* at 78.

78. H.M. Hyman & W.M. Wiecek, *supra* note 58, at 476-78. This reading enabled the Court later to indicate in passing that while the amendment should be read liberally to strike down laws limiting jury service to whites, similar discriminations against women were perfectly constitutional. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880).

79. *Id.* at 95, 96, 105, 110-12, 119.

The same clash between a liberal free labor interpretation of the amendments and states' rights republican views reappeared in the next case the Court decided, and here the justices explicitly wed republicanism to ethnocultural views limiting the vocational opportunities of women. *Bradwell v. State*<sup>80</sup> upheld the refusal of the Illinois Supreme Court to license the highly qualified Myra Bradwell to practice law. Bradwell's attorney, the Republican Senator from Wisconsin, Matthew Hale Carpenter (who had represented the Northern-based monopoly in the *Slaughter-House Cases*) here followed Campbell's lead and centered his argument on a liberal interpretation of U.S. citizenship. He invoked the rights of the Declaration of Independence as "privileges and immunities" protected by the Fourteenth Amendment, along with due process rights, and he contended that fundamental among them was the right to labor in one's chosen vocation without invidious restrictions or discriminations.

Quoting *Cummings v. Missouri*,<sup>81</sup> Carpenter argued that the "theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness, and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law." He next contended that the legal profession was such an avocation, that women were both persons and citizens within the meaning of the amendment, and that it "opens to every citizen of the United States, male or female, black or white, married or single, the honorable professions as well as the servile employments of life."<sup>82</sup> By resting his case on the liberal right to labor and drawing an analogy between the discrimination against women and the racial oppressions the amendment was universally acknowledged to oppose, Carpenter made a very strong argument. He also faced no opposing counsel.

Yet Bradwell and Carpenter lost. Justice Miller, again writing for the Court, provided another straightforward statement of states' rights republicanism: the right to practice law was a privilege of state citizenship, not United States citizenship, and therefore the state had the power to bestow it as it chose.<sup>83</sup> The case was harder for Justice Bradley, who had found the liberal claim of vocational rights compelling against just such republican states' rights arguments in the preceding decision. Hence he added a concurrence that relied not on republicanism, but on arguments plainly in the ethnocultural Americanist, patriarchal mode. Bradley invoked "nature," God's "divine ordinance," and Anglo-American common law traditions to prove that man was inherently destined to be "woman's protector and defender." She was instead destined for the "domestic sphere."

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80. 83 U.S. (16 Wall.) 130 (1872).

81. 71 U.S. (4 Wall.) 277, 321 (1866).

82. 83 U.S. (16 Wall.) at 137.

83. *Id.* at 139.



Neither "recent modifications" in her status, such as new property rights laws, nor the fact that a few women did not marry could alter this "general constitution of things," which Bradley took to be embodied in the United States Constitution.<sup>84</sup>

Bradley's opinion is thus a perfect example of how ethnocultural Americanist reasoning, appealing to allegedly natural, traditional, and divinely ordered social roles and identities, served to justify the gender hierarchies embodied in the ideology of the "domestic sphere." But while that ideology's great historical importance has led many scholars to focus on Bradley's argument, it was only a concurrence. It prevailed only by working in alliance with republican concerns for states' rights, so that it also exemplifies the alliance of ethnocultural and republican arguments on behalf of civic restrictions that has so frequently recurred in the evolution of American citizenship laws. The republican argument may have been preferable to those justices who had not already rejected it on behalf of the New Orleans butchers because it permitted them simply to defer to the states, instead of explicitly endorsing hierarchical views like Bradley's. Thus they could evade, rather than directly oppose, the liberal claims of basic human rights that the "free labor" ideology of the amendments clearly advanced.

In subsequent cases where women claimed the right to vote under the Fourteenth Amendment, this alliance of restrictive arguments became even more apparent. Whereas formerly the states were clearly free to deny that women were full citizens in their own right, the Fourteenth Amendment's declaration that all persons born or naturalized in the United States and subject to its jurisdiction were citizens of both the nation and their states appeared to render all native-born women both U.S. and state citizens, regardless of state law. Whatever might be true of practicing law, moreover, in a republican government the franchise seemed a crucial privilege of full citizenship. Thus, apparently, no state could deny it to women, certainly not in a manner consistent with the new constitutional requirement of equal protection.

Feminists therefore claimed the vote under the Fourteenth Amendment. In 1873, Susan B. Anthony actually did vote in defiance of a law making it a crime for those who knew they were ineligible to do so. She was convicted in a peremptory fashion by a Judge Ward Hunt, who cited *Slaughter-House*, found voting to be a privilege of state citizenship only, which the state could distribute at its unbridled discretion, and then directed the jury to enter a verdict of guilty. Hunt also did not enforce the fine he imposed on Anthony, making an appeal impossible.<sup>85</sup>

But Anthony's general line of argument was presented more elaborately

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84. *Id.* at 141.

85. *United States v. Anthony*, 24 F. Cas. 829, 830, 833 (C.C.S.D.N.Y. 1873) (No. 14,459); A. Sachs & J.H. Wilson, *supra* note 37, at 85-94; *see* E.C. Dubois, *supra* note 37, at 199-200.

in a case that did reach the Supreme Court two years later, *Minor v. Happersett*.<sup>86</sup> Chief Justice Morrison Waite's opinion for the Court ultimately reached the same result, but he labored long to demonstrate that women were indeed equally citizens of a republican government despite their inability to participate in it.

Waite first held that women not only were, but always had been, citizens. He observed that the term had become common when Americans threw off English subjectship because "citizenship" was thought "better suited to the description of one living under a republican government." But despite this identification of citizenship with republicanism, he asserted that the status was not much different from subjectship, involving "membership of a nation and nothing more."<sup>87</sup> Waite went on to argue that the suffrage, in particular, had never been considered a privilege of citizenship. He maintained, in liberal fashion, that it could be granted to whoever would exercise it beneficially, citizen or not, and he cited state practices expressing this view, such as grants of the vote to aliens.<sup>88</sup> But the longstanding belief that republicanism meant political self-governance by equal citizens seemed to haunt him. Returning to the subject at the end of his opinion, Waite added that republicanism must be defined not by theory but by the practices of the founding states. He contended that republican citizenship was not then held to require universal suffrage.<sup>89</sup>

Waite was, of course, right about the practices of the early states. Those practices, however, rested in part on a liberal policy toward aliens and in part on patriarchal common law as well as republican beliefs that women, among others, were not full republican citizens, but essentially subjects. Waite clearly felt compelled to concede to the Fourteenth Amendment, and the liberal tradition it embodied, that women were equally persons and therefore citizens. He consequently had to reject the claims of republican theorists that political participation lay at the heart of citizenship. Instead, he employed the classical liberal claim that political participation is inessential to citizenship, and he deferred to the state's republican powers of self-governance, in order to appear to confer equal citizenship nationally while acquiescing in the creation of second-class citizens by the states. The belief that participation is extraneous to American citizenship thereby came to be unequivocally established constitutionally, reinforcing the privatistic orientation of American political thought.<sup>90</sup> And Waite was

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86. 88 U.S. (21 Wall.) 162 (1875).

87. *Id.* at 165-66.

88. *Id.* at 171.

89. *Id.* at 175.

90. This view of American citizenship also proved useful for many other discriminations. For example, in *Downes v. Bidwell*, 182 U.S. 244 (1901), the Court cited *Minor* to support its suggestion that the law distinguished between "certain natural rights" that were "indispensable to a free government," such as most of the Bill of Rights, and others which were merely "artificial" and often "unnecessary," such as the right to suffrage (and the right to citizenship itself). *Id.* at 282-83. This distinction was used in support of keeping Puerto Ricans in a subject colonial status.

left with defining citizenship simply as "membership in the nation," structured, apparently, in conformity with all the social hierarchies the national life involved. Thus in his hands the status quo was confirmed rather than challenged by the discriminatory aspects of Americanism. Considering the manner in which he employed only certain aspects of liberalism and republicanism so as to avoid the obvious implications of recognizing full female personhood and citizenship, that may well have been the point all along.

### G. *The Late Nineteenth Century*

This suspicion is confirmed by Waite's stance in the other cases involving women's issues decided later in the nineteenth century. But in reaffirming the distinctive and largely subordinate "natural" position of women, as well as of the nation's various non-white inhabitants, the Court was quite consonant with prevailing intellectual and political opinions. In postwar America, dominated by the Industrial Revolution, not only advocates of black rights but also many labor leaders rejected women's claims, taking what Alice Kessler-Harris terms a more "hard-line" insistence on "two spheres" ideology. Women had been structured by God and nature for management of the household, not the workplace. That argument served what male workers took to be their economic interests in an increasingly competitive work force. Many in the nation's middle and upper classes also found such a view congenial, for they were reacting to new immigrants from southern Europe and China and to the labor unrest for which immigrants were blamed by trying to protect and strengthen traditional "Americanism," including traditional roles for women. Adherents of the era's resurgent nativist Protestantism, exemplified by Rev. Josiah Strong's immensely popular 1885 tract, *Our Country*, were reformers as well as reactionaries, striving to combat corruption and social distress and to find new ways to maintain what they took to be the nation's essential virtues; but they were not egalitarian in regard to race, ethnicity, or gender.

Their inegalitarianism gained further credibility from the rise of social Darwinist scientific doctrines that seemed to confirm the biological determinism that appeals to woman's "nature," as well as racial differences, required. To be sure, the growing prestige of the sciences that produced new industrial technologies and of evolutionary theory also challenged much in traditional Protestantism, liberalism, and republicanism, as less conservative reformers pointed out. But Darwinian sociologists like Herbert Spencer and William Graham Sumner showed how evolutionary, historical, "scientific" views of human society could be made to affirm longstanding American values, the family, and the capitalist industrial system as proven champions in the human race's struggle for progress. In

so doing, they offered elaborate "liberal" theories of social institutions for the first time, but in ways that subordinated many of liberalism's egalitarian elements to claims on behalf of inequalities regarded as both natural and efficient.<sup>91</sup>

Even many activists for women's rights felt compelled to defend their cause in terms of arguments reflecting this political and intellectual milieu: the differences between women and men were indeed more important than their similarities, but their natural differences were precisely what would help women fight the saloon, the unsanitary civic conditions, the corrupt urban machines, and the "un-American" customs that threatened traditional families. "Reform Darwinist" sociologists like Lester Ward therefore challenged Sumnerian views head on, endorsing female involvement in social reconstruction on "scientific" grounds of women's unique capabilities. Under Frances Willard's leadership, the Women's Christian Temperance Union worked for an exceptionally broad-ranging reform agenda held to be expressive of such special female perspectives, which historians now term "domestic" or "social feminism."

Egalitarian views did not completely disappear from the woman's movement, but they became less prominent. The formerly radical NWSA, for example, also increasingly adopted this line, making possible its eventual reunion with the AWSA into the National American Woman Suffrage Association (NAWSA) in 1890. The "domestic" or "social feminist" women's rights outlook did represent a revision in "separate sphere" views, with its contention that women were quasi-scientific experts who could best address "housekeeping" social problems. And it was capable of gaining support in "respectable" circles because it posed much less of a threat to the traditional order. Correspondingly, however, it was also less capable of forging alliances with working women and the new wave of immigrants as well as blacks.<sup>92</sup> Indeed, this perspective proved able to adapt the compatibility of republicanism and nativism for its own purposes. More conservative native-born women argued that Anglo-Saxon males should grant their ladies the vote, so that they could help defend

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91. J. Higham, *supra* note 9, at 19, 133-34; C. Degler, *supra* note 35, at 334-45; E. Flexner, *supra* note 35 at 208-09; A.S. Kraditor, *supra* note 36, at 14-42; Baker, *supra* note 57, at 632-35; A. Kessler-Harris, *Out to Work: A History of Wage-Earning Women in the United States* 84, 153-59 (1982); L. A. Cremin, *American Education: The Metropolitan Experience 1876-1980*, at 17-18, 387-93 (1988).

92. E. Flexner, *supra* note 35, at 224-25; Baker, *supra* note 57, at 637-640; A. Kessler-Harris, *supra* note 91, at 93-97; B. Harris, *supra* note 17, at 57, 100-130; B.L. Epstein, *supra* note 38, at 116-25; W. Leach, *supra* note 54, at 182; W. O'Neill, *supra* note 74, at 147. Nancy Hewitt has argued forcefully that it is therefore misleading to focus on two gender "spheres" in American life, because those "spheres" usually were divided along racial and, especially, class lines that generally were, in her view, the more politically decisive alliances. Her argument is surely correct to assert that these other sources of political interest and identity played vital roles; but as she sometimes recognizes, it would be equally misleading to treat "separate spheres" simply as a convenient division of labor adopted harmoniously by the male and female members of the dominant classes. Hewitt, *Beyond the Search for Sisterhood: American Women's History in the 1980s*, 10 Soc. Hist. 310, 315 (1985).

native America against contamination by freed blacks, the Chinese, and southern European immigrants. And they favored obtaining the franchise on the state level, so as not to set a dangerous precedent for federal intervention in state definitions of their political communities.<sup>93</sup> Elizabeth Stanton herself stopped speaking of the ballot as a universal human right and called for the franchise only for the "educated" of both sexes, in order to block the uncivilizing and un-republican influence of "the foreign vote."<sup>94</sup> While such positions may have won over some who feared ethnic diversity more than partial female liberation, they obviously did not serve to challenge fundamentally traditional ideas of woman's role. Hence their potential value to women was severely limited.

With American thought generally and women's perspectives specifically taking these turns, one would not expect the usually conservative courts to speak much in terms of gender equality. Indeed such rhetoric is almost totally absent from the decisions of this era. There was a basic division among the justices, but it did not reflect radical liberal egalitarianism versus notions of "republican motherhood." Rather, it was a division between more Americanist justices who wished to keep the traditional family absolutely inviolate, and nineteenth century Spencerian economic liberals, who were more concerned both to promote economic growth and to protect vested property rights. The second group was somewhat more willing to view women as separate from their husbands, with distinct property rights, and to permit marriages to be made and broken more easily whenever such rulings served their economic concerns. As in the Married Women's Property Acts, this kind of liberalization often helped clarify titles and to promote development by making land more easily alienable. These justices were also much less concerned than the first group about extensive legislative power over women and the family, and they favored pro-development economic legislation; but they did draw a sharp line at legislative invasion of vested property rights, which they viewed as fundamental.

Adopting the more family-oriented Americanist stance most consistently were Waite and Bradley (the author of the *Bradwell* concurrence); championing growth and property rights were Justice Field, the famous archi-

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93. Baker, *supra* note 57, at 642; A. Kessler-Harris, *supra* note 91, at 137-40; E. Flexner, *supra* note 35, at 182-89; W. Leach, *supra* note 54, at 342-44; A.S. Kraditor, *supra* note 36, at 123-39, 165-69; B.L. Epstein, *supra* note 38, at 116-18; D. Morgan, *Suffragists and Democrats* 22, 76-94 (1972).

94. A.S. Kraditor, *supra* note 36, at 133; C. Degler, *supra* note 35, at 133. This strain in Stanton's thought first arose in the postwar split with the Republicans, who insisted on putting black rights first. Ellen Dubois suggests that the increasing willingness to view women's suffrage in exclusively white terms was an effort to use racism as a means to "a kind of sex pride," an explanation consistent with the thesis here, that virulent ethnocentrism is a response to status and identity anxieties. Obviously, even women's rights proponents committed to human equality had ample grounds for such anxieties in a tumultuous society that had discriminated against women. E.C. Dubois, *supra* note 37, at 93-96, 176-179; Dubois, *supra* note 74, at 189-92.

tect of late nineteenth century pro-industrial constitutionalism, and Justice Nathan Clifford. I should stress that while, as just noted, the focus of these latter justices on economic rights can correctly be labelled "liberal," they were no more solicitous of female equality than the traditionalists. Again, American adherents of Spencerian laissez-faire economics generally viewed the sexual division of labor as natural and efficient, and so both groups on the bench treated women as properly subordinate to men in most respects. They also both employed the republican rhetoric of state sovereignty and Americanist sentiments about the sanctity of the family whenever they found them useful, regardless of any ill consequences for women. The second group's economic preoccupations simply made such arguments useful less often. And over time, with the swelling of the intellectual and political forces just sketched, the Court as a whole moved to encompass more traditional views of female status more fully. Later justices, such as Rufus Peckham, managed to fuse the two positions quite effectively simply by insisting anew that for many legal purposes women *were* the property of men.

In the 1870s, however, it was at first the Field group that carried the day. The Court upheld common law marriages in a case where this settled an inheritance issue, although it justified the result by stressing the "policy of the state to encourage" marriage, even such unconventional marriages.<sup>95</sup> And with Justices Bradley, Waite, and John Harlan in dissent, Field wrote for the Court in holding that a man could not be ejected from his land by means of a paper served on his wife. Unlike the dissenters, Field did not believe their "theoretical unity" at law should extend so far.<sup>96</sup> Then, in *Bank of America v. Banks*,<sup>97</sup> Justice Clifford's opinion for the Court held that a loan provided for a husband's plantation could not be collected from the wife's estate, since this appeared contrary to the state's intent in governing married women's property. Although the same result could be reached by construing the law as concerned above all to protect women, the ruling nonetheless displays a willingness to view the property of husband and wife separately.

Almost a decade later, Field scored a similar victory in *Maynard v. Hill*,<sup>98</sup> where he wrote for the Court upholding a legislative divorce

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95. *Meister v. Moore*, 96 U.S. 76 (1877). The Court subsequently continued this support of common law marriages. *See, e.g., Maryland v. Baldwin*, 112 U.S. 490 (1884) (Field, J.); *Travelers v. Reinhardt*, 205 U.S. 423 (1907) (Harlan, J.).

96. I should observe that the dissenting justices were not equally Americanist in all areas. Harlan was the Court's only real champion of black rights in this era and a strong economic liberal himself, though he did support legislation hostile to Chinese immigrants. Bradley was more liberal in regard to the Chinese, but not in regard to women or blacks. The Californian Field, moreover, was the Court's leading exponent of republican and nativist arguments to justify excluding the Chinese from the country, though there were some legislated oppressions in his home state that were too extreme even for him. C.B. Swisher, Stephen J. Field: Craftsman of the Law 205-39 (1969).

97. 101 U.S. 240, 246-47 (1879).

98. 125 U.S. 190, 206, 210-11 (1877).

granted in Oregon to a man who had left his wife in Vermont without support. Field admitted the husband's conduct was "shameless"; but with majestic disregard for that detail, he upheld the legislative action. Field expounded at length on how marriage was more than a "mere contract"—it was "an institution," a "social relation," that formed the "foundation" of "society," "civilization," and "progress." It was therefore something in which the public was "deeply interested" and a fit subject for state regulation (as most contracts, in Field's view, were decidedly not). Since this regulation in fact *dissolved* the glorious institution, one cannot help but feel that the justice was really concerned with the way it enabled the state to assign lands for development with clear titles. Field in fact observed that if the case had invoked "rights of property invested in either party," he would not have sanctioned state abrogation of their original agreement. It thus seems clear that he was more concerned to protect the sorts of economic relations he thought desirable here than to assist either the family or, obviously, the woman.

Along with these cases, however, more traditional views of the husband and wife's unalterable unity prevailed on occasion. In the same term as *Bank of America*, Chief Justice Waite wrote for the Court in a case involving a congressional statute that permitted settlers to claim Oregon lands, with equal shares for the husband and wife. Waite held that the wife "could not be the settler," only the husband, so that the grant to her was through him, even though she would hold the land independently. Thus his "acts affecting the claim are her acts."<sup>99</sup> Five years later, Justice Horace Gray varied the pattern set in *Barber and Cheever* by refusing to view a woman who had been unwilling to follow her husband to Colorado as having a separate domicile. The earlier cases had indicated that women could obtain independent domicile only when they had legitimate grounds for their separation. Gray viewed the woman's aversion to living in frontier Colorado as "unjustifiable" (although he still found for her on the ground that the notice she had been given of the divorce proceeding was insufficient under state law).<sup>100</sup> Similarly, Chief Justice Melville Fuller routinely asserted the identity of the woman's domicile with her husband's, regardless of her actual residence, in *Anderson v. Wyatt*.<sup>101</sup> And by 1893, in deciding *In re Lockwood*,<sup>102</sup> the Court was again prepared to admit that the states could deny the very personhood of women for legal purposes. Belva Lockwood was admitted to the bar of the Supreme Court itself, the District of Columbia, and several states. Yet Virginia denied her admission to its bar on the basis of a law that referred to appropriately qualified "persons." Fuller, writing for the Court, invoked *Bradwell* and

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99. *Vance v. Burbank*, 101 U.S. 514, 521 (1879).

100. *Cheeley v. Clayton*, 110 U.S. 701, 705, 708-09 (1884).

101. 138 U.S. 694 (1890).

102. 154 U.S. 116 (1893).

the requirements of deference to state authority to hold that the Virginia courts could permissibly construe "persons" as excluding women.

My contention that justices of Field's persuasion were more willing to treat women as persons for some purposes, but only to advance these justices' economic concerns, gains support from the Court's treatment during these years of the polygamy practices of the Mormons (who were almost as much the targets of Americanist crusaders like Josiah Strong as Catholics were).<sup>103</sup> The Court was unanimous in excoriating polygamy and the Mormons. In fact, the justices vied to write the most stirring tributes to the importance of the traditional family for America's republican institutions and its "Christian civilization." In the first such case, *Reynolds v. United States*,<sup>104</sup> upholding a federal statute banning polygamy in the territories, Chief Justice Waite appealed in Americanist fashion to customs inherited from the "northern and western nations of Europe." He also cited the republican argument, going back to Montesquieu, that polygamy breeds despotism while monogamy is compatible with free government. Thus his opinion displays plainly once again the recurring alliance of republican and Americanist rationales for enforcing the traditional social order.

That alliance was equally visible in *Murphy v. Ramsey*<sup>105</sup> and *Davis v. Beason*,<sup>106</sup> where the Court upheld laws voiding the franchise of those who practiced or advocated polygamy, respectively. Justice Stanley Matthews defended denying citizens this basic political right by arguing in *Murphy* that the monogamous family was a "holy estate," the best source of "morality" and "progress." Hence the legislation was "necessary" for a "free, self-governing commonwealth" to survive.<sup>107</sup> Similarly, in *Davis* Field took his turn denouncing polygamy as "degrading" both to women and men and contrary to the laws of "all civilized and Christian countries," so that its mere advocacy could be made criminal.<sup>108</sup> But in *Mormon Church v. United States*,<sup>109</sup> while Justice Bradley for the majority upheld a federal law banning the Mormon Church due to its practice of polygamy and confiscating its property, Field joined Chief Justice Fuller's dissent. They approved the ban but protested the violation of property rights. While all the justices agreed that the traditional family was "holy" and necessary to the republic, for some property rights were more sacred yet.<sup>110</sup>

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103. The pertinence of these cases was brought to my attention by Diane Polan's unpublished essay, *Patriarchal Ideology in the Supreme Court* (1980) (Yale Law School).

104. 98 U.S. 145, 164-66 (1878).

105. 114 U.S. 15 (1885).

106. 133 U.S. 333 (1890).

107. 114 U.S. at 45.

108. 133 U.S. at 341-42.

109. 136 U.S. 1 (1890).

110. Similarly, early in his tenure on the Court, Field had readily upheld the patriarchal 1855 naturalization act in *Kelley v. Owen*, 74 U.S. (7 Wall.) 496 (1868).



## H. *The Progressive Era*

In many circumstances, however, concerns for property and concerns for traditional family roles coincided; and after the turn of the century, especially, the federal courts often took advantage of such coincidences to buttress property rights while opposing female emancipation. For example, a district court held in 1901 that, until a daughter reached 21, her father had "a property right" in her services.<sup>111</sup> And writing for the Supreme Court three years later in *Tinker v. Colwell*,<sup>112</sup> Justice Peckham, a disciple of Fieldian economic views, ruled that to commit adultery with a man's wife, even with her consent ("as is almost universally the case as proved"), was an injury to his "personal rights and property rights."

Justice Peckham was soon to write the Court's opinion in the landmark *Lochner v. New York*<sup>113</sup> decision striking down a state law that limited baker's hours in the name of a substantive "liberty of contract" found in the Fourteenth Amendment's due process clause. In holding that the limitation violated what many took to be an essentially procedural constitutional requirement, Peckham claimed to ask only whether the law had some *minimally* rational basis. He contended that it was instead so totally arbitrary that no process under it could be deemed fair or "due." Because of this dismissal of all justifications for economic regulation, the *Lochner* case has of course come to symbolize the Court's frequent hostility to social welfare and regulatory legislation from the late nineteenth century through the early New Deal. Hence Peckham's willingness to view wives as in part their husband's property was both of a piece with the Court's still-growing stress on expansive property rights and, as time was to show, a potential obstacle to legislative assistance to women.<sup>114</sup>

This atmosphere still left open another route to justification for legislation benefiting women, however: the patriarchal Americanist claim, going back to the legislative initiatives of the antebellum era, of women's special needs for protection. That claim fit quite comfortably with the family of

111. *In re Freche*, 109 F. 620 (D.N.J. 1901).

112. 193 U.S. 473, 481 (1904).

113. 198 U.S. 45 (1905).

114. In fairness to Peckham and Fuller, it should be noted that they did join (sometimes with David Brewer) in occasionally assisting women in a set of cases turning on the issue of whether one state is constitutionally required to give "full faith and credit" to another's marriage and divorce proceedings. The Court's fluctuations on this issue are too involved to review, but their votes often seemed to reflect a judgment on the merits of the competing claims of husband and wife rather than the issues of federalism and state powers that dominated the debate in these cases. Thus they voted to uphold later state proceedings that treated the woman's claims more fully and fairly—and they also voted to uphold state refusals to honor divorces granted on more permissive and less protective grounds than prevailed locally. But while these decisions did not treat women simply as property, their concerns throughout reflected an Americanist adherence to the traditional family and woman's dependent social role. *See, e.g.*, *Atherton v. Atherton*, 181 U.S. 155 (1901); *Andrews v. Andrews*, 188 U.S. 14 (1903); *Haddock v. Haddock*, 201 U.S. 562 (1906). The New Deal Court finally settled these issues by overturning *Haddock* and insisting that states must always recognize the prior marital proceedings of other states. *Williams v. North Carolina*, 269 U.S. 287 (1942).

perspectives that historians describe as "progressivism," including not only participants in state and national political parties bearing the Progressive label but also a range of other reform movements. Philosophically as well as politically, many progressives rebelled against what they took to be classical liberalism's portrait of human beings as atomistic bearers of natural economic rights that dictated laissez-faire governmental policies. Instead, progressives called for recognition of people and their economic relations as socially constituted in diverse ways that public policies had to recognize, but could often alter. Elaborating the "reform Darwinist" perspectives of the late nineteenth century, most progressives remained attached to middle-class, Protestant values, but optimistic that new sciences and new professions could devise private and public programs to advance those values in ways that would benefit all. Their agenda was often shaped by women's associations' focus on poverty, unsafe and unsanitary living conditions, poor education, and drunkenness, as well as political morality; and they emphasized how women's special experiences of these problems gave them both distinctive vulnerabilities and distinctive insights. Hence it is not surprising that many progressive leaders, such as Jane Addams, continued to advocate female suffrage in terms of the special maternal qualities women would bring to political life. Indeed, many opponents of the suffrage accepted the need for some female social activism, while shrinking from something so divisive of the family as the female vote.<sup>115</sup>

The progressive reformers who worked with the urban poor became much more conscious of the problems of female workers and immigrants, and more aware of the need for an institutional reform movement that would work for their economic as well as political interests. In consequence, progressives argued that in the new American industrial economy, both consumers and workers required regulatory protection. But the Supreme Court that decided *Lochner* became increasingly hostile to legislation that interfered with the juridical equality of employers and employees; so arguments about the special need to protect women, which might be more acceptable than claims for workers generally, seemed a promising way to stem the anti-regulation tide. From the standpoints of protection for all and of a consistent, egalitarian liberal feminism, this approach proved to be inadequate, but there can be no doubt that conditions of working women did urgently demand improvement. Conscious of this need, and hoping in some cases to develop precedents that could be used to support broader protective legislation, progressives pushed particularly for

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115. An influential overview of progressivism is D.T. Rodgers' *In Search of Progressivism*, 10 *Revs. in Am. Hist.* 113 (1982). See also L. Kerber, *supra* note 28, at 284; C. Degler, *supra* note 35, at 320-23, 350-54; A.S. Kraditor, *supra* note 36, at 68-70; Baker, *supra* note 57, at 641-42; A. Kessler-Harris, *supra* note 91, at 114-15; N.F. Cott, *The Grounding of Modern Feminism* 20-31, 119 (1987).

minimum wage and maximum hour laws for women in certain trades, and then for their ratification by the U.S. Supreme Court.<sup>116</sup>

In both efforts they were able to employ the fruits of the economic and sociological disciplines that were gaining increasing prominence in American intellectual life. By presenting massive amounts of statistical evidence to demonstrate that women could reasonably be thought to need legislative assistance, the female leadership of the National Consumers' League and their attorney, Louis Brandeis, were able to win the first major constitutional victory for progressive legislation in *Muller v. Oregon*.<sup>117</sup> The case sustained an Oregon law limiting the hours of women working in certain occupations.

The arguments in the case, however, indicate that it was on balance a victory only for a slightly more expansive version of "two spheres" ideology, not for female equality. Only the brief for the plaintiff, opposing the law, asserted in liberal fashion that women were "equally with men" endowed with "inalienable rights of liberty and property."<sup>118</sup> This was a recapitulation of Field's extreme laissez-faire liberalism, so that women's possession of formally equal rights only meant that they were entitled to no assistance in the transactions of the marketplace: they were legally empowered to bargain for themselves on an equal basis, and if they failed to achieve satisfying results, that was the price of ineffectiveness in a system of economic freedom.

Brandeis' famous brief in the case (compiled largely by League women) argued instead that despite any formally equal rights, women needed protective legislation, because their "special physical organization" made long hours more hazardous to them. This argument did not in itself preclude the possibility that male workers might also require legislative protection, and many progressives viewed female protective legislation as the opening wedge toward enactment of such laws for all. Nonetheless, the brief did give a reassuring "scientific" endorsement to traditional notions of female dependence.<sup>119</sup> And in the hands of Justice Brewer, writing for the Court, the mention of women's physical capabilities was transformed into a wholehearted embrace of the view that, though women might have to work at times, they were destined by nature for "maternal functions," child-rearing, and "maintenance of the home." It was in fact not so much the physical harms the women suffered from long hours that concerned Brewer, as the threat these harms posed to their reproductive role, to "vigorous offspring" and "the future well-being of the race."<sup>120</sup> And he made

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116. C. Degler, *supra* note 35, at 358-59, 401-02; A.S. Kraditor, *supra* note 36, at 146; E. Flexner, *supra* note 35, at 215-16; A. Sachs & J.H. Wilson, *supra* note 37, at 111-12; N. Taub and E. Schneider, *supra* note 37, at 128; J. Baer, *The Chains of Protection* 10-101, 130 (1978).

117. 208 U.S. 412 (1908).

118. *Id.* at 414.

119. *Id.* at 419.

120. *Id.* at 421-22.

it clear that in his eyes, the problem was not only that female physical weaknesses put women at a comparative disadvantage if they worked the same hours as men. Instead, women's greatest difficulty was that by "disposition and habit of life" they lacked the "self-reliance" needed for success in the tough competitive marketplace. Protective legislation would therefore always be necessary, even if they obtained full statutory equality of economic rights.<sup>121</sup>

By moving from the physical dangers to a woman, which were buttressed by statistical evidence however flimsy, to her psychic disabilities in bargaining and the threats posed to her reproductive functions, Brewer moved from more "scientific" to more explicitly Americanist arguments. He also made it much more difficult to use his decision as a precedent for universal labor legislation, as he himself emphasized. After the case, many states rapidly passed protective laws for women, but they adopted universal labor laws much less often, and the courts usually struck such acts down. Judith Baer has pointed out that *Muller* thus proved to be much more an (inegalitarian) precedent in the area of gender relations than in the area of economic regulation. Overall, the case's arguments left liberal notions of gender equality hostage to the bleak economic vision of the *Lochner* adherents, while the progressives achieved success only by endorsing a separate spheres ideology that foreclosed most further gains for women and men.<sup>122</sup>

Of course, for many progressives, female and male, and for many labor leaders, the *Muller* view that women needed special protection in itself seemed quite sound, even if they also favored regulatory legislation on behalf of male workers. Some trade unionists, moreover, valued protective laws for women as a means to reduce their competitive attractiveness vis-à-vis male workers. Only the left wing of progressivism, or of the woman's movement, would have contested Justice Oliver Wendell Holmes' subsequent affirmation of a Montana law that exempted small female laundries from a required fee on the ground that the Fourteenth Amendment did not require imposing "a fictitious equality where there is a real difference."<sup>123</sup> In subsequent cases, the Court sustained hours legislation for women by routinely citing *Muller*.<sup>124</sup> But when the case looked more

121. *Id.* at 422. Like Rousseau and Justice Bradley, Brewer admitted that "there are individual exceptions," and that women had many advantages over men; "but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality". *Id.* See also A. Sachs & J.H. Wilson, *supra* note 37, at 113; A. Kessler-Harris, *supra* note 91, at 185; J. Baer, *supra* note 116, at 59-62.

122. *Muller* even inspired restrictive "protective" legislation in states which had previously been anti-protectionist. See A. Sachs & J.H. Wilson, *supra* note 37, at 114-16; A. Kessler-Harris, *supra* note 91, at 186-87; J. Baer, *supra* note 116, at 66; N. Taub & E. Schneider, *supra* note 37, at 129-30.

123. *Quong Wing v. Kirkendall*, 223 U.S. 59 (1912); A. Kessler-Harris, *supra* note 91, at 187-89, 202-05; N.F. Cott, *supra* note 115, at 23-25.

124. See, e.g., *Riley v. Massachusetts*, 232 U.S. 671 (1914); *Hawley v. Walker*, 232 U.S. 718

difficult, as in California, where women employed in harvesting and other agricultural activities were excluded from protection, supporters of protective laws were quick to emphasize their concern for women's child-producing role, as well as Americanist nativism. In *Miller v. Wilson*, 1915, the state's brief justified its legislation on the ground that the law might help "check the rapid decline in reproduction of the older American stocks"—a racial claim which served as an oblique defense for *denying* protection to female harvesters, then as now often Hispanic immigrants. And it emphasized that "in any event" the legislation would leave the woman "free for the development of mind and body for wifeness and motherhood," thereby insuring the "increased intelligence and strengthening of the race." Justice Charles Evans Hughes' opinion for the Court, to his credit, did not explicitly endorse these nativist rationales; but he did hold that it was reasonable for the legislature to proceed "step by step" on women's working conditions, a ruling that says much about what the Court was prepared to find reasonable.<sup>125</sup>

The limited scope of the prevailing justifications for aiding women was further dramatized in another 1915 case, *Mackenzie v. Hare*.<sup>126</sup> California's progressive solicitude for women had extended to granting them the vote. But in 1907, Congress had clarified the ambiguity in the 1855 naturalization act by requiring American women who married aliens to take the nationality of their husbands. A California woman who married a British subject protested the consequent loss of her citizenship and franchise. But Justice Joseph McKenna, writing for the Court, upheld the law, indicating that the "identity of husband and wife," with dominance to the husband, was "an ancient principle of our jurisprudence" that often worked "for her protection." He argued, moreover, that since her marriage was voluntary, the loss of citizenship had been the woman's own decision. And while McKenna expressed "sympathy" for the Hobson's choice thus forced upon her, he indicated rather vaguely that the law might assist the nation in conducting foreign affairs. Clearly, to the Court the subordination of the woman's citizenship to her husband's still required no weighty justification.

During the second decade of the twentieth century a more radical feminism, partly inspired by the British suffragettes, finally began again to stress full female equality and to push for the vote more militantly. Its organizational voices were first the Congressional Union and then the Woman's Party, led by Alice Paul. Simultaneously, under the influence of

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(1914).

125. *Miller v. Wilson*, 236 U.S. 373, 377-78, 384 (1915). The Court also found it permissible for California to exempt graduate nurses from the law in *Bosley v. McLaughlin*, 236 U.S. 385 (1915). Judith Baer argues persuasively that the law in *Bosley* may have been more restrictive than protective in the case of at least one plaintiff, a female pharmacist who feared that California's hours legislation would result in the loss of her job. J. Baer, *supra* note 116, at 71.

126. 239 U.S. 229 (1915).

the progressives, and the realization that they could win immigrant votes, the NAWSA took a somewhat less nativist and anti-labor line. Even more conservative women came to recognize that a state-by-state approach to suffrage was unworkable, and that many male defenders of "states' rights" were quite willing to use the federal government against the states on behalf of other causes, such as prohibition. Their male "allies" were thus shown to be committed to a traditional Americanist social order of "home, Bible, and Anglo-Saxon civilization" more than genuinely republican self-government. Many were southerners who still feared the female vote would threaten rather than reinforce the suppression of blacks. But while women consequently began working for the suffrage at the national level with renewed vigor and unity, the "domestic" or "social feminist" orientation of the mainstream movement was not affected by these changes, becoming if anything more pronounced.<sup>127</sup>

### I. *The Twenties*

It was therefore the perspective of women's special domestic and maternal qualities and needs that at last succeeded in winning the vote via the Nineteenth Amendment in 1920. It was also this perspective that would long continue to govern how the courts interpreted not only that Amendment but woman's general place in the American constitutional order. Indeed, the chief case upholding the constitutionality of the Amendment, *Leser v. Garnett*<sup>128</sup> in 1921, produced a ringing endorsement not of female equality but of nationalism against the increasingly archaic republican claim of states' rights. Those attacking the measure claimed that, for those states who did not ratify it, the amendment violated the sovereign right of "self-preservation" of their distinctive "political communities," and that some state legislatures had ratified it in violation of specific bans on such actions in their state constitutions. Brandeis, now a justice, wrote for the Court holding that, at least since the passage of the Fifteenth Amendment, it had been clear that the nation as a whole could by amendment bind even a dissenting part, and that ratification was a federal function, in which legislatures could not be constrained in advance by the people of their states.<sup>129</sup> This dismissal of state autonomy (and state electorates) could support federal invalidation of discriminatory state legislation; but it could do so only if that legislation were considered improper, and as yet no justices took this view of legislation that denied female equality. Indeed, while intensive activity continued, women's politics became fragmented once again after the passage of the Nineteenth Amend-

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127. E. Flexner, *supra* note 35, at 274-323; A.S. Kraditor, *supra* note 36, at 208-09, 231-48; D. Morgan, *supra* note 93, at 96-101, 150-03; N.F. Cott, *supra* note 115, at 25-27, 53-81; W. O'Neill, *supra* note 74, at 127-29, 201-03.

128. 258 U.S. 130 (1921).

129. *Id.* at 135; see C. Degler, *supra* note 35, at 359.

ment. The NAWSA spawned the non-partisan National League of Women Voters, but its membership was only about five percent of its predecessor's. Many women turned instead to partisan women's groups, or to other, more apolitical civic associations. Moreover, both the conservative and the progressive elements that had long supported protective legislation for women repudiated the National Woman's Party's advocacy of the Equal Rights Amendment, which promised to render such protection unconstitutional. The NWP's membership was thus reduced to less than 200, from a height of 50,000. More mainstream women's organizations, however, lacked any single alternative agenda. And while many women in the 1920s continued to participate in voluntarist social reform groups, many others turned to personal sexual liberation and self-fulfillment, without challenging views of women's special feminine qualities and (ultimately) domestic role. Again, new scientific "advances," including "sciences" of homemaking and motherhood, medical research into women's biology, and psychological portraits of the "passive" feminine psyche, all provided additional reinforcement for these adaptations of traditional notions. As Nancy Cott has observed, whatever their other limitations, these various perspectives promised to preserve gender roles integral to many women's identities; while the "equal rights promised by the NWP—especially as negatively presented by trade unionists and other defenders of sex-based legislation—appeared to subvert those roles without providing secure alternatives."<sup>130</sup>

Conservative and progressive fears of full equality were, moreover, reinforced by the Supreme Court's employment of egalitarianism as part of its renewed efforts in the less reformist 1920s to combat economic regulatory legislation. The Court's new attitude was announced in *Adkins v. Children's Hospital*,<sup>131</sup> which considered the constitutionality of a minimum wage law for women. Justice George Sutherland's opinion for the Court overturned the law while attempting to distinguish it from the hours legislation upheld since *Muller*. The changes in women's legal, political, and civil status culminating in the Nineteenth Amendment, Sutherland contended, had brought the non-physical differences between men and women almost "to the vanishing point." As a result, special legislation could be justified only where physical differences were relevant.

Since women's physical vulnerability meant they would suffer hardship even if they successfully bargained for the same hours as men, the *Muller* law was constitutional; but in Sutherland's view, no special frailties justi-

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130. B. Harris, *supra* note 17, at 117-18, 133-35; C. Degler, *supra* note 35, at 360-61, 402-03, 437; A. Sachs & J.H. Wilson, *supra* note 37, at 117-18; A. Kessler-Harris, *supra* note 91, at 206-12, 226-30; N.F. Cott, *supra* note 115, at 41-88, 123-29, 141, 152-74; W. O'Neill, *supra* note 74, at 258-337; B. Ehrenreich & D. English, *For Her Own Good: 150 Years of Experts' Advice to Women* 91-203 (1979).

131. 261 U.S. 525 (1923).

fied state assistance to obtain wages better than those women could attain via their own negotiations. He thus tacitly rejected Brewer's belief, expressed in *Muller*, that women were by "disposition" incapable of bargaining effectively. Sutherland also observed that the law prevented women from negotiating lower wages even with female employers, and that in a companion case, *Adkins v. Lyons*,<sup>132</sup> the law was being attacked by a woman who claimed it worked to deny her employment.<sup>133</sup> Chief Justice William Howard Taft, in dissent, refused to read the Nineteenth Amendment as resting on so rigidly egalitarian a philosophy. He thought it was aimed only at insuring that legislation "for their protection will be in accord with their interests as they see them."<sup>134</sup> And Justice Holmes sniffed that it would take "more than the Nineteenth Amendment to convince me that there are no differences between men and women," although he did not specify what the relevant differences were.<sup>135</sup>

*Adkins* is thus a case full of ironies. Later cases were to show that, like its forerunner Justice Field, the *Adkins* majority was not really any more prepared than the dissenters to challenge woman's traditional domestic place. Yet while Taft was probably right about the philosophy of the Nineteenth Amendment's ratifiers, Sutherland was genuinely more liberal and egalitarian in his claim that protective legislation could be demeaning and restrictive. Alice Paul's National Woman's Party accordingly hailed the decision. Sutherland's Sumnerian liberalism, however, remained steadfastly blind to the fact that, despite their formal legal equality, working men and women negotiated under economic conditions that often rendered them incapable of pressing for minimally decent treatment, and that women did face special obstacles in entering many forms of employment and in claiming equal pay. Thus his effort to distinguish hours legislation from wage legislation on the ground that women would suffer even if they won equal hours not only ignored the fact that any alleged physical frailties would exacerbate the hardship of surviving on the low wages involved. It also paid no attention to the fact that the sort of social and institutional traditions the dissenters endorsed would make it difficult for women of equal bargaining skill to win the same employment opportunities and benefits as men.<sup>136</sup>

Whereas the "progressive" Holmes' insistence that women were ineradicably different perpetuated separate-spheres ideology, Sutherland's refusal to recognize the entrenched consequences of that ideology, in the form of women's quite different social circumstances, perpetuated the sep-

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132. 261 U.S. 542 (1923)

133. *Id.* at 553.

134. *Id.* at 567.

135. *Id.* at 569-70.

136. C. Degler, *supra* note 35, at 403, 424-38; A. Kessler-Harris, *supra* note 91, at 197-98; N.F. Cott, *supra* note 115, at 136; J. Baer, *supra* note 116, at 94-95; L. Goldstein, *The Constitutional Rights of Women* 25 (2d ed. 1988).



arate spheres reality. Admittedly, in Sutherland's case this refusal arose not so much from lack of reflection on liberalism's significance for women's rights, as from his insistence on a narrow economic definition of those rights and a relentlessly social Darwinist perspective on social issues. And, as noted, it is also true that the feasibility of some progressive legislation was quite debatable. However, the liberal tradition's longstanding failure to explore the social implications of its basic principles, to define "secure alternatives" to traditional gender roles, also played a part. Without this failing, it is less likely that social Darwinist views could still have been advanced dogmatically enough to dismiss competing views as lacking even minimal rationality, as Sutherland (like Peckham in *Lochner*) did.

In the next few years, the Court routinely confirmed the unconstitutionality of wage legislation for women. And in one other respect, egalitarian sentiments won some legal expression in the early 1920s. The Women's Joint Congressional Committee, a lobbying group formed by most of the leading women's organizations, persuaded Congress to pass the Cable Act of 1922, which partly undercut the patriarchal principle that a woman's citizenship automatically followed that of her husband. Like *Adkins*, however, this egalitarian victory was far from untainted. The WJCC's success came largely because a nativistic Congress wished to prevent alien women from gaining citizenship simply by marrying American men. The act therefore required their separate naturalization. It also voided automatic loss of citizenship for native-born American women who married alien men. Women who had done so after the 1907 act made such loss of citizenship explicit were eligible for renaturalization, provided they had not resided for two years in their husband's native country or for five years outside the United States. Most harshly, American women who married aliens who were "ineligible by race for naturalization" still did forfeit their citizenship. Congress repealed that racist provision in the 1930-31 legislative session, but its existence confirms how limited the nation's commitments to human equality remained in this era.<sup>137</sup>

Unsurprisingly, then, the same judges who opposed wage legislation still upheld protective laws governing women's working hours on traditional paternalist grounds. In *Radice v. New York*<sup>138</sup> in 1923, Sutherland again wrote for the Court to sustain a law prohibiting employment of women in restaurants between 10 p.m. and 6 a.m. He held that in view of woman's "more delicate organism," the state restriction was reasonable. The evidence suggested, however, that many women found night work convenient, and that this law was much more restrictive than protective.

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137. For wage legislation cases, see *Murphy v. Sarrell*, 269 U.S. 530 (1925); *Donham v. West-Nelson Manufacturing Co.*, 273 U.S. 657 (1926). On the Cable Act, see V. Sapiro, *supra* note 36; N.F. Cott, *supra* note 115, at 97-99.

138. 264 U.S. 292 (1923).

Overall, this expression of traditional paternalism was more characteristic of the judiciary's treatment of women's rights in the 1920s than Sutherland's egalitarian views of their bargaining powers. Most courts, for example, continued to interpret the now-longstanding Married Women's Property Acts very narrowly, altering as little as possible the inherited common law views of husband's prerogatives over their wives' labor and income.<sup>139</sup>

### J. *The New Deal*

With the arrival of the Depression and the New Deal, however, both the states and the nation began to pass new labor and social welfare legislation, despite this history of judicial opposition. The adjudication of these measures eventually produced fundamental changes in many constitutional doctrines, most famously the Court's new openness to all economic regulatory legislation. However, it did not alter the Court's commitment to separate spheres ideology. The opportunity was present, because while progressive forces again brought protective legislation for women before the Court, their arguments for it went somewhat beyond the standard invocations of female frailty. In the 1936 case of *Morehead v. New York ex rel. Tipaldo*,<sup>140</sup> defenders of a state law setting a minimum wage for women (and minors) argued that in "modern society," changes "affecting the economic status of the family" had made it necessary for many wives to work. But women were unequal in bargaining ability, as well as especially vulnerable physically. Those bargaining inequalities, they contended, stemmed from several sources: the types of jobs available to women, such as hotel and restaurant work, suffered "sharp seasonal movements," but due to "family ties" women were "less mobile"; they lacked trade unions; and due to "tradition" they were poorly informed about the labor market and ill-equipped to deal with "unconscionable employers."

In these arguments there was more explicit recognition of the familial, economic, and social barriers to equal opportunities for women, and somewhat less suggestion of inherent dependence, even if the narrow range of employments available to women seemed to be taken as a matter of course. The opponents of the law said, predictably, that it rested on a

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139. *Id.*; cf. A. Kessler-Harris, *supra* note 91, at 189-90; N.F. Cott, *supra* note 115, at 185-87; J. Baer, *supra* note 116, at 86-87. Anti-protectionist attitudes did surface in a later pair of cases, *United States v. Schwimmer*, 279 U.S. 644 (1929), and *United States v. Bland*, 283 U.S. 636 (1931); but there the Court was really driven by an Americanist opposition to political radicalism. In each case the Court upheld a denial of naturalization to women who indicated conscientious scruples about forcible national defense, even though they would be ineligible for military service. *Schwimmer*, the woman in the first case, was an active and effective agitator for pacifism, among other causes, and in keeping with the era's restrictive approach to speech, the Court held that this advocacy tended to harm national interests in ways that merited the denial of citizenship. 279 U.S. at 652.

140. 298 U.S. 587 (1936).

“social philosophy in conflict with the fundamental principles of the American Constitution,” specified by appeal to Adam Smith and the inalienable property rights “endowed by the Creator.”<sup>141</sup> Their brief insisted, like Sutherland, that the difference in bargaining power, unlike physical differences, was “illusory” and that women *could* “organize the same as men.” The National Woman’s Party also filed a brief in opposition to the law.

Justice Pierce Butler wrote for the Court, and overturned the law on rather extraordinary, narrow grounds. He did not affirm the wisdom of the *Adkins* precedent for striking down such laws. Instead, he noted that the challengers to the New York law had not asked that *Adkins* be overruled. They had only claimed it was distinguishable from the case at hand. Butler instead thought *Adkins* indistinguishable; and since he contended the Court had not been asked to reconsider it, he claimed to be bound to follow its result and strike down New York’s measure as well.<sup>142</sup>

Justice Harlan F. Stone issued a dissent, joined by Brandeis and Benjamin Cardozo, rejecting the idea that the Court should not reconsider *Adkins* simply because it had not been explicitly asked to do so. More importantly, Stone’s opinion placed liberal egalitarianism on the side of progressive legislation for the first time in these cases. He argued not only that *Adkins* should be overruled, but that *all* such protective economic regulation should be upheld. Stone did not rely on any “special status” of women. Instead, he thought the state’s police powers included authority to enact measures for the benefit of workers generally.<sup>143</sup> Chief Justice Hughes, however, also wrote a dissent, joined by Stone, Brandeis and Cardozo, that remained squarely in the “domestic feminist” tradition. Hughes argued that the “distinctive nature and function of women—their particular relation to the social welfare—has put them in a separate class,” and that neither the due process nor the equal protection clause of the Fourteenth Amendment had taken away the “protective power” over them that states consequently possessed.<sup>144</sup> Hence, while the brief in the case suggested arguments for protection that were less wedded to the ideology of inherently separate spheres, and while one dissent moved towards a more egalitarian welfare-oriented liberalism, the broadest support for the measure still was won by a “domestic feminist” protectionist ideology.

When at last the Supreme Court laid to rest the practice of striking down laws as violations of “liberty of contract” and other forms of economic substantive due process in its famed 1937 turnaround, it was Hughes who wrote for the Court. In *West Coast Hotel v. Parrish*,<sup>145</sup> he

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141. *Id.* at 597.

142. *Id.* at 604.

143. *Id.* at 631-45.

144. *Id.* at 629.

145. 300 U.S. 379, 391-95, 411-12 (1937).

sustained a Washington state law establishing a minimum wage for women, citing *Muller* and *Quong Wing* in support of the propriety of recognizing women's special needs. He did recall the arguments from the *Morehead* brief concerning the "relatively weak" bargaining power of women, especially when dealing with "unconscionable employers." Moreover, the case quickly came to stand for the permissibility of protective legislation for both sexes. But Hughes' account of women's weak position said little about the socially institutionalized obstacles to their efforts to achieve equality. Instead, it bespoke more the sort of view of women's natural inability to deal with unscrupulous men suggested by his *Morehead* dissent. Sutherland, now in dissent himself, repeated his view that women had gained "legal and political equality with men," so that there was no "substance" to any "suggestion that the bargaining ability of the average woman is not equal to that of the average man. . . . The ability to make a fair bargain, as everyone knows, does not depend upon sex." By failing to argue clearly that the need for protective legislation stemmed not from female ineptitude but from her social and economic position, Hughes continued to place his liberalism on welfare issues on the side of perspectives that denied the intrinsic equality Sutherland professed.

The upshot of Hughes' position was that, despite its sanctioning of the more egalitarian modern liberal welfare state, American constitutional law continued to permit legislation premised on the general confinement of women to the domestic sphere. A startlingly emphatic example came later the same year in *Breedlove v. Suttles*.<sup>146</sup> Georgia required all inhabitants between the ages of 21 and 60 to pay a poll tax, except for the blind and women who did not register to vote. The law obviously rewarded women for not voting and gave husbands an incentive to discourage their wives' political interests. But Justice Butler, writing for a *unanimous* Court, sustained the law through appeal to Americanist, separate-sphere, and republican arguments. Women, he said, could be exempted from the tax "on the basis of special considerations to which they are naturally entitled. In view of burdens necessarily borne by them for the preservation of the race, the State reasonably" could decide the tax was too much of an additional burden. Butler left unclear just how the tax made racial preservation more difficult. He may well have had in mind the "burdens" of political causes that women might have pursued more readily in the absence of the law. At any rate, Butler's willingness to uphold denials of any public role to women was readily apparent in his further observation that the "laws of Georgia declare the husband to be the head of the family and the wife to be subject to him," so that a tax on women would improperly "add to his burden." Similarly, the income from the tax was to be used for educational purposes, and in Georgia (contrary to even the most mini-

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146. 302 U.S. 277 (1937).

mally liberal separate-spheres ideology) it was "the father's duty to provide for education of the children." As one might expect, Butler buttressed his deference to these near-feudal state practices by invoking the extensive state power over the suffrage that remained despite the Fifteenth and Nineteenth Amendments. In a truly remarkable denial of the law's real effect, he also exculpated it from any charge that it discriminated against the right of *men* to vote on account of their sex!

While this opinion was no doubt more traditionalist than were the New Deal justices as a whole, their support for its result indicates that they had little trouble with legislation designed to "protect" women for their domestic functions, even if this "protection" meant inhibiting their access to public affairs. Indeed, while the New Dealers did establish national economic regulations that benefited all workers, including women, they made no serious efforts to alter the special restrictions and lower pay working women suffered, conditions male-dominated labor unions continued to support. So long as such protectionism was considered permissible, it could easily be merged with the most patriarchal Americanist views of women's place, as Butler's opinion dramatically demonstrated. The remnant of the republican states' rights tradition also continued to justify deference to such restrictive state actions. Thus despite the passage of the Nineteenth Amendment and the triumph of New Deal liberalism over the nineteenth century laissez-faire views of Sutherland, a genuinely egalitarian liberalism in regard to gender was barely articulated as a constitutional philosophy in this period.<sup>147</sup>

This survey also indicates that the arguments that did prevail appealed again and again to the need to preserve the sorts of social roles consistent with maintaining republican institutions and a suitable republican citizenry, and to America's cultural traditions, customs, and sacred way of life, taken to define the proper place of women. Even when women were held able to make a special contribution as participating republican citizens, this role was still viewed only as an extension, not a relinquishing or sharing, of their natural functions in the domestic sphere. The success of these views strongly indicates that the members of America's titularly liberal society felt it important to define fairly specifically the nature of their political community and the social arrangements it involved. This record supports the suggestion that when Americans felt impelled to do so, early liberalism's failure to consider in any full way the social and civic forms that would best realize its principles meant that they turned to alternative notions in their political culture. The most extensive legal elaborations of liberal equality's social implications came late and drew on the Darwinist sociology of Spencer and Sumner to support the laissez-faire (and otherwise Americanist) jurisprudence of Field and Sutherland. This harsh and

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147. A. Kessler-Harris, *supra* note 91, at 262-70.

one-sided view of liberalism's commitment to equal rights was of little use either in supporting an inclusive yet reassuring sense of community, or in aiding those oppressed under existing social forms.

#### IV. EPILOGUE: THE CONTINUING DILEMMAS OF LIBERAL EGALITARIANISM

Matters have changed in recent decades, and so it is natural to question whether the problems revealed by this record are still pertinent. In an essay devoted to providing the historical perspective needed for such inquiries, I can only sketch the ways I believe they are. Despite the relatively unchanged status of women, the New Deal and World War II did deal severe blows to the republican and Americanist traditions while bringing to power a modern liberalism quite different from that of the *Lochner* Court or the nation's founding. First the Depression made it clear that the economy had become nationally interdependent and that prosperity could not be achieved through disparate regulation by many state governments, or through no regulation at all. Then World War II required a national mobilization for a world role that the United States has yet to relinquish. As just noted, the Supreme Court responded to these developments by sanctioning broad national economic and military powers that reduced the states to transparently subsidiary roles in most pressing governmental concerns. The nation's opposition to the racist totalitarian regimes of Europe also led to some discrediting of the more nativistic strains of Americanism in mainstream thought, as well as to intellectual repudiation of the sciences' sanctioning of racism—although the Cold War atmosphere fueled McCarthyism's political repressions aimed at "un-American" activities.

In place of the property-oriented natural rights liberalism of the turn of the century, federal lawmakers increasingly came to adopt the more experimental and utilitarian views of their progressive pragmatist opponents, which permitted the national government to take virtually any action the people thought necessary to promote the general welfare, whether or not this was consistent with some economic or social "natural order of things." On this view, everyone's interests were to be counted equally, with majority rule prevailing—a position that did not guarantee correction of established inequalities, but that did present them as matters of political choice. Thus, despite the failure of New Deal thought and legislation to move the Court away from protectionism toward egalitarian feminism, the new constitutional perspectives did provide grounds to reject the sanctification of traditional arrangements that had for so long served to deny female aspirations.<sup>148</sup>

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148. C. Degler, *supra* note 35, at 438-40; R.G. McCloskey, *The American Supreme Court* 174-92 (1960); W.E. Leuchtenberg, *Franklin D. Roosevelt and the New Deal* 336-48 (1963); R.M.

In the postwar era, moreover, the new sense of human equality aroused in part by the experience of military service against European tyrannies fed a revived civil rights movement for blacks. Those efforts, and women's own ongoing attempts to expand their economic opportunities, helped in turn to inspire a new and more egalitarian women's movement. Campaigns for the rights of other minorities and the poor followed. These movements added to the prevailing utilitarian social philosophy a stronger insistence on realizing equal concern and respect for all persons.

I have suggested elsewhere that this insistence reflected the increased acceptance, among policy-makers at least, of a further ideal of American identity, which may be termed "democratic cultural pluralism." This ideal carries on the cosmopolitanism, tolerance, and respect for human liberties of the classical liberal tradition, but it is built on the progressive pragmatists' rejection of individualism and natural law in favor of an emphasis on socially constituted identities and memberships, consensual truth standards and hence considerable cultural relativism. One of its chief theorists, philosopher Horace Kallen, argued that these precepts pointed to national policies that would respect and indeed promote cultural pluralism, out of deference to persons' constitutive attachments to distinctive ethnic, religious, and cultural groups. He therefore envisioned America as a "democracy of nationalities, cooperating voluntarily and autonomously through common institutions in the enterprise of self-realization through the perfection of men according to their kind." According to this pluralism, all groups and persons deserved equal opportunities to pursue their own destinies, so the nation's history of legal ethnic, racial and gender discriminations was unacceptable. In contrast, national economic actions to promote opportunities for all were perfectly permissible. But even in the cause of prosperity, there should be no effort to transform equality into uniformity, to insist that all fit into a standard "Americanized" mold.<sup>149</sup>

As those points suggest, democratic pluralist ideals had some potential to stress the distinctive qualities of women, as of other groups; but their focus on human equality in terms of basic rights was even more plain. In the 1950s, women's rights found some champions who paralleled the odd alliance of George Sutherland and Alice Paul. While organized labor, moderate women's associations, and the Women's Bureau in the Depart-

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Smith, *Liberalism and American Constitutional Law* 154-60 (1985); J.T. Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought* 361-415 (1986).

149. J.T. Kloppenberg, *supra* note 148, at 64-100, 145-95; R.M. Smith, *supra* note 1, at 245-47; R.M. Smith, *The Irony of Liberal Citizenship in America*, paper presented to the Claremont Institute's 4th Annual *Novus Ordo Seclorum* Bicentennial Conference (1987); J. Higham, *supra* note 35, at 59-60, 220; A. Kessler-Harris, *supra* note 91, at 304-15; H. Kallen, *Culture and Democracy in the United States* 124 (1924); M. Gordon, *Assimilation in American Life* 14, 57 (1964); Gleason, *American Identity and Americanization*, in *Concepts of Ethnicity* 119-211 (W. Peterson, M. Novak, & P. Gleason, 1980); Keely, *Immigration and the American Future*, in *Ethnic Relations in America* 29-31 (L. Liebman ed. 1982).

ment of Labor continued to view the ERA as a threat to necessary protective legislation, Eisenhower Republicans found it politically useful to give the amendment rhetorical support. As the civil rights movement gave the ideal of democratic pluralism political potency, Democrats began to follow suit in the 1960s.<sup>150</sup> Both racial- and gender-based egalitarian claims then finally found important modern expression in American national legislation via the 1964 Civil Rights Act, which explicitly covered women as well as blacks, however inadvertently: women were added on the motion of Virginia Senator Howard Smith, who was trying to *diminish* support for the act. Then Senator Margaret Chase Smith and Representative Martha Griffiths fought to keep them included. Democratic cultural pluralist ideas were also enacted in a wide range of other measures, including the liberalizing 1965 Immigration and Naturalization Act; the 1965 Voting Rights Act; the 1968 Bilingual Education Act and the spread of bilingual ballots and governmental publications; more pluralist educational curricula; and many other steps aimed at assisting traditional victims of civic discriminations. Partly in justification of these initiatives, cultural pluralism became the leading ideal of community membership and citizenship in the mainstream academic liberal theories of the 1970s. For a time, some observers believed the country's new embrace of a national government acting vigorously to realize not only economic prosperity but also equal citizenship for all would at last lead to the development of a genuinely unified American civic community—a community in which women, too, would be full members.<sup>151</sup>

In this climate two important constitutional innovations for women's rights gained prominence. First, Congress finally endorsed the ERA in 1972; the longstanding opposition of pro-labor House Judiciary Committee Chairman Emanuel Celler was overcome by pressures from the women's movement, Congresswoman Edith Green's hearings on gender discrimination, and Congresswoman Martha Griffiths' forceful political leadership.<sup>152</sup>

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150. In 1954, under Eisenhower, the Women's Bureau ceased to oppose the ERA but did not endorse it. A. Kessler-Harris, *supra* note 91, at 306. The activist Warren Court also remained egalitarian on gender. Ruling in *Hoyt v. Florida*, 368 U.S. 57 (1961) on a state law that prevented women from serving on juries unless they requested to do so in person at court, the Court said that despite her "entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life." States could adopt measures excluding a woman from public life unless "she herself" found such service to be "consistent with her own special responsibilities."

151. A. Kessler-Harris, *supra* note 91, at 312-15; Keely, *supra* note 149, at 30-31; Beer, *Liberalism and the National Idea*, 5 Pub. Interest 70, 71-82 (1966); Black, *The Unfinished Business of the Warren Court*, 46 Wash. L. Rev. 3, 8-12, 44 (1970); J. Rawls, *A Theory of Justice* 442-50, 523-29 (1971); B.A. Ackerman, *Social Justice in the Liberal State* 82-83, 194-96, 347, 375 (1980); M. Gordon, *Models of Pluralism*, 454 *Annals Am. Acad. Pol. & Soc. Sci.* 178 (1981); G.Y. Steiner, *Constitutional Inequality: The Political Fortunes of the Equal Rights Amendment* 10-13 (1985).

152. G.Y. Steiner, *supra* note 151, at 15-23; J.J. Mansbridge, *Why We Lost the ERA* 10-13 (1986).



Second, the Supreme Court began to strike down some laws injurious to women as violations of the equal protection and due process clauses, with some justices suggesting that, even absent the ERA, gender classifications were as constitutionally "suspect" as racial classifications. The Supreme Court came closest to treating women as full claimants to modern pluralistic liberal egalitarianism in the 1973 case of *Frontiero v. Richardson*.<sup>153</sup> There, Justice Brennan, writing for three other justices, indicated that gender distinctions were indeed "suspect," requiring compelling governmental justifications for their use. His opinion perceptively characterized and repudiated the "romantic paternalism" of the traditionalist American separate spheres ideology underlying so much "protective" legislation, which Brennan said often placed women "not on a pedestal but in a cage."<sup>154</sup> That same year, the Court also handed down the landmark decision in *Roe v. Wade*,<sup>155</sup> indicating that women were entitled to make fundamental life decisions for themselves, including the choice whether or not to bear a child, subject to certain sharply limited state regulatory powers. Collectively, these developments seemed to promise that the nation's historical denials to women of the personal liberty and equality classical liberalism asserted for all might at last be coming to a close.

Yet while the 1973 decisions set in motion lines of doctrinal innovation that in some important respects are likely to endure, in retrospect the early 1970s may have been the high water mark of this modern liberal egalitarian tide, at least for the foreseeable future. To be sure, the Court went on to extend the *Roe* ruling against many other state attempts to direct sexual activity and childbearing; but it permitted Congress to curb public funds for the medical costs of abortions. In addition, the support for *Roe* in recent cases has been only 5 to 4.<sup>156</sup> At this writing many scholars and journalists project its reversal. The Court as a whole, moreover, never endorsed strict scrutiny for gender classifications. Since *Craig v. Boren*<sup>157</sup> in 1976, the Court has instead adopted the slippery middle-ground approach of "intermediate scrutiny," requiring classifications that discriminate against either sex to be shown to be "substantially related" to an "important" governmental interest. Undeniably, this standard has proved sufficient to support the greatest egalitarian activism on gender issues in the Court's not-so-distinguished history in this area. Discriminatory marriage laws, pension schemes, and other restrictive or paternalistic measures have been struck down, while affirmative action systems have been

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153. 411 U.S. 677 (1973).

154. *Id.* at 682, 684, 688.

155. 410 U.S. 113 (1973).

156. *See, e.g.*, *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Maher v. Roe*, 432 U.S. 464 (1977); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Harris v. McRae*, 448 U.S. 297 (1980); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Thornburgh v. ACOG*, 476 U.S. 747 (1986).

157. 429 U.S. 190 (1976).

upheld.<sup>158</sup> It is legitimately debatable, moreover, whether the justices are entitled to go further, given the failure of principles of sexual equality to win any clear constitutional embodiment. Again, women were consciously denied mention in the postwar amendments, and the Nineteenth Amendment is traceable largely to the power of more conservative "domestic feminist" views. Nonetheless, recent cases have so thoroughly displaced the demanding standard of *Frontiero* that no justice is currently advocating a strict scrutiny approach.

Contemporary with these cases was, of course, the failure of the campaign to ratify the ERA, which would almost certainly have required strict scrutiny for gender classifications. After thirty states ratified the proposed amendment in 1972 and 1973, organized opposition arose, led in part by women. As Jane Mansbridge depicts the coalition that effectively countered the ratification effort, it is recognizable as much the same sort of alliance, driven by much the same sort of fears, that so often produced legal support for traditional ethnocultural conceptions of American identity in the historical record just reviewed. Mansbridge describes it as a "New Right" coalition of "the traditional Radical Right, religious activists, and that . . . segment of the noncosmopolitan working and middle classes that was deeply disturbed by the cultural changes—especially the changes in sexual mores—in the second half of the twentieth century." This coalition pitted "fundamentalists and heavy churchgoers against agnostics and Jews, people with many children against those with none, old people against young, country against city dwellers, and nationwide, southerners against people on the East and West Coasts." ERA critics like Phyllis Schlafly succeeded in portraying the amendment as anti-family, anti-child, anti-traditional morality, and pro-abortion, pro-gays, pro-unisex lifestyles, pro-combat for women. As so often in the past, the fears these images raised about the survival of social roles and identities many found reassuring proved too great to overcome. And, as Mansbridge also notes, the anxious, defensively self-assertive political forces that defeated the ERA played major parts in the politics of the seventies and eighties on many other issues as well.<sup>159</sup>

When support for the ERA flagged, the Supreme Court began to apply its "intermediate scrutiny" test in less demanding ways, and it remains unclear how far President Reagan's promotion of William Rehnquist to Chief Justice and addition of Justices Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy to the highest bench will change matters. Rehnquist dissented in *Craig v. Boren*, and he argued during the late

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158. *Id.* at 197; *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Wengler v. Druggists Mutual Ins.*, 446 U.S. 142 (1980); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981); *Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987).

159. C. Degler, *supra* note 35, at 436, 446-50; J.J. Mansbridge, *supra* note 152, at 15-16 & *passim*; cf. G.Y. Steiner, *supra* note 151, at 46-49.

1970s that men needed no special solicitude and that gender classifications affecting them adversely should receive only minimal scrutiny. He ignored the manner in which discriminations that apparently aided women materially often in fact operated to reinforce traditional gender roles (as in the case of death benefit laws that make it easier for men than women to support their survivors, thereby discouraging women from serving as chief wage-earners).<sup>160</sup>

Rehnquist subsequently accepted the propriety of the *Craig v. Boren* intermediate standard for all types of gender discrimination, but in applying it he remains insensitive to the repressive effects of many "protective" measures. Thus in 1981 he wrote for a plurality sustaining a California law that made men alone liable for sexual intercourse involving one or more minors. The gender discrimination seemed less concerned with the professed goal of discouraging teen pregnancies than with ratifying traditional views tracing adolescent sexual activity to male corruption of innocent females.<sup>161</sup> The same year in *Rostker v. Goldberg*,<sup>162</sup> Rehnquist wrote for the Court sustaining a male-only draft registration program even though the gender distinction appeared to hamper more than to assist the government's goal of assessing the human resources available for national emergencies.

Among the Reagan appointees, Sandra Day O'Connor, at least, is likely to remain sensitive to the invidious gender stereotyping that legislation defended on other grounds may really express. She wrote for a 5-4 Court (with her law school classmate Rehnquist in dissent) in *Mississippi University for Women v. Hogan*,<sup>163</sup> finding a women-only state nursing school to violate equal protection. Her opinion deemed the school unnecessary as an aid to women, who dominate the state's nursing profession, and likely to reinforce views of nursing as a "women's career." But that margin was as thin as the one now barely surviving in the abortion area; and while no subsequent cases have indicated any significant changes, it remains quite possible that the Supreme Court's approach to gender issues will become more expressive of Chief Justice Rehnquist's views than O'Connor's or Brennan's.

The defeat of the ERA, and the concomitant threats to the Court's more egalitarian modern stance in gender cases, form part of a more general reaction against the democratic pluralist initiatives that reshaped American citizenship laws from the mid-fifties through the early seventies. Desegregation via busing and affirmative action programs have produced mounting acrimony. The return to more open immigration since 1965 has

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160. *Craig v. Boren*, 429 U.S. 190, 217, 220-21 (1976); *Califano v. Goldfarb*, 430 U.S. 199, 224-42 (1977); *Califano v. Webster*, 430 U.S. 313, 321 (1977).

161. *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

162. 453 U.S. 57 (1981).

163. 458 U.S. 718, 727-30 (1982).

led to a new influx of Asian and, especially, Spanish-speaking immigrants, heavily concentrated in a few regions, provoking new disputes over bilingualism, immigration and refugee policies, welfare, health care, amnesty for illegal aliens and education for their children, and other related issues. It has produced ugly new displays of ethnic bigotry as well, from crowded inner cities to competitive elite colleges.

Modern egalitarian initiatives are now often criticized for failing to promote either genuine equality or community at either the national or local levels. The enterprise of national governance they shaped is routinely portrayed as a process of "interest group" or "corporate pluralist" liberalism, in which selfish special interests, ethnic, economic, regional, religious, all compete for shares of the nation's largesse, with no broader common purposes underlying their bickering and bargaining. Samuel Beer, a former Great Society enthusiast, found its consequences in 1978 to be "a fragmentation of the national community" into competing "consumer" and "cultural groups" that did not "form a public" and shared only "negativism." John Higham concluded that the greater problem had become not appreciating "diversity" but "rediscovering what values can bind together" our "kaleidoscopic culture." For many, the answer of the 1980s proved to be the traditional values of the "American way," prominently featured in three consecutive successful Republican presidential campaigns.<sup>164</sup>

It would be egregiously wrong, moreover, to think that the reservations about liberal egalitarianism, in either its classical or its modern, democratic pluralist forms, are confined to the "New Right," academic neoconservatives, and Reagan Republicans. Many feminists were always concerned that liberal egalitarianism might foster a stress on formal equality of rights and identical treatment that would fail to address the distinctive aspects of women's historical experiences, contemporary material situations, and future aspirations. Liberal "equal treatment" might then fail to combat, and so help to perpetuate, the burdens and constraints imposed by past discriminatory attitudes. As the need to unite in support of the ERA faded, a wide range of challenges surfaced to the "gender neutrality" liberalism was thought to require.

Harvard psychologist Carol Gilligan has provided a tremendously influential empirically based analysis of how women often view morality in terms of personal relationships and care for particular individuals, in contrast to more "liberal" and typically male moral perspectives stressing

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164. Keely, *supra* note 149, at 28-65; Beer, *In Search of a New Public Philosophy*, in *The New American Political System* 5, 37, 44 (A. King ed. 1978); M. Gordon, *Human Nature, Class and Ethnicity* 89, 93 (1978); T. Lowi, *The End of Liberalism: The Second Republic of the United States*, 58-63, 207-36, 271-92 (2d. ed., 1979); Walzer, *Pluralism: A Political Perspective*, in *The Harvard Encyclopedia of American Ethnic Groups* 781, 785-87 (S. Thernstrom ed. 1980); T.H. White, *America in Search of Itself: The Making of the President 1956-80*, at 103-06 (1983); Glazer, *Introduction to Clamor at the Gates: The New American Immigration* 3-13 (N. Glazer ed. 1985).

only respect for the abstract rights of faceless "others." Political theorist Jean Bethke Elshtain has criticized liberal feminism for focusing on crass, utilitarian self-seeking, justifying attenuated concerns for both family and civic community. And numerous feminist lawyers have questioned the emphasis on sameness they perceive in even activist equal protection theories. Catharine MacKinnon, among others, has contended that the law's focus on actual gender differences still relies upon actual but socially constructed meanings to perpetuate oppressive statuses. Instead, she argues, one must see that women are differently situated, in social forms that frequently disempower them and which therefore ought to be transformed.<sup>165</sup>

These developments indicate why the questions raised by the nation's historical civic discriminations remain vital. Many Americans today still find a body of civic laws aimed at realizing liberal egalitarian principles unacceptable—some because those principles seem too limited in their consequences, many more because they are perceived as threatening the social and cultural order, however hierarchical, which these citizens feel to be essential to their secure possession of meaningful social identities. And while established and, often quite privileged citizens usually assert traditional Americanist values and roles most steadfastly, the opposition of many women in all classes to the ERA indicates that even the alleged beneficiaries of change may find it disturbing.

Yet if neither classical liberalism nor contemporary democratic pluralism offers conceptions of civic identity that are at once egalitarian enough and reassuring enough to overcome attachments to repressive but familiar social forms, each nonetheless has certain great strengths. The historical record suggests strongly that it has been liberal egalitarian commitments, whether formulated in terms of natural rights or pragmatic pluralistic tolerance, that have served to inspire and defend the most significant civic reforms in United States history, from the abolition of slavery and the civil rights movement to the nineteenth and twentieth century women's movements to efforts to establish and maintain the rights of ethnically diverse immigrants and other minorities. Conversely, history suggests Americans should be extremely wary of proposals to set aside liberal egalitarian civic ideals in favor of (other) "traditional values" or doctrines stressing the unique and distinctive character of a gender, race, or ethnocultural group. Too often those values and doctrines, however benignly offered, have proven fertile soil in which new callous legal restrictions sprouted.<sup>166</sup>

As Catharine MacKinnon has argued in reference to Carol Gilligan's

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165. J.B. Elshtain, *supra* note 17, at 242-49; C.A. MacKinnon, *supra* note 36, at 101-41; C.A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 14-36, 118-37 (1987); C. Gilligan, *In a Different Voice* (1983). See also Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497 (1983); Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 Yale L.J. 913 (1983); West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1 (1988).

166. N.F. Cott, *supra* note 115, at 16-17, 278-79.

work, there is a danger that if women place great emphasis on their socially constituted differences from men, when those differences are partly produced by confining social institutions, when "difference means dominance," then policies that affirm and reinforce those differences may simply affirm "the qualities and characteristics of powerlessness." One should say "may," because there is clearly much of value in the moral perspective Gilligan emphasizes, and it need not have any ineradicable connection with restrictive laws. Even so, the caution remains that, as Barbara Harris has observed, in American experience every "ideology that has focused on the difference between the sexes, no matter how it is phrased, has been used historically to consign women to the home."<sup>167</sup>

I believe, then, that the contemporary task must be to reformulate the nation's dedication to human liberty into a public philosophy that can combat oppressive social structures while addressing more successfully widespread longings for a sustaining sense of civic identity and a meaningful social order. That task is a daunting one. I think it must begin by rejecting the view, even more pervasive in contemporary democratic pluralist theories than in classical liberalism, that the liberal state is essentially a neutral umpire for subjectively valued pursuits and diverse views of the good life. Instead, a liberal polity should be united, not by ethnicity, religion, language, or particular customs or social roles, but by a shared political and social purpose: to promote ways of life that advance liberty for all. This liberty is to be understood, however, not simply as the right to do whatever one wishes. On this view a free life is guided by esteem for, and the exercise of, humanity's remarkable capacities for reflective self-governance, personally and politically. To distinguish this conception of human freedom from simple willfulness, I have previously termed it "rational" or "reflective" liberty.<sup>168</sup>

To seek to promote capacities for liberty in this sense is not to set up a neutral ideal. It is to establish a substantive standard for judging social institutions, according to whether they impair or enhance the human capacities which this view sees as having intrinsic moral dignity and worth. It is to seek to empower all citizens; to find public institutions that can make available to them the cognitive qualities, the material resources, and the social opportunities they need to pursue the paths they reflectively choose to value most among their available memberships and obligations, so long as their choices are not destructive of future capacities for reflective choices by themselves or others.

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167. *Id.*; B. Harris, *supra* note 17, at 146; J. Baer, *supra* note 116, at 180; C.A. MacKinnon, *supra* note 165, at 38-39.

168. R.M. Smith, *supra* note 149, at 198-259. As William Galston has noted, a number of recent writers on liberalism have been moving in cognate directions. Galston's own work has greatly assisted my thinking. See Galston, *Defending Liberalism*, 76 *Am. Pol. Sci. Rev.* 621 (1982); Galston, *Liberal Virtues*, 82 *Am. Pol. Sci. Rev.* 1277 (1988).

This is a sense of political purpose that preserves classical liberalism's call for freedom for all, since virtually all human beings except the most severely mentally deficient either display or have the potential to develop meaningful capacities for understanding themselves and their social worlds, and to make deliberative choices. Hence all deserve to have those capacities publicly respected and assisted, regardless of race, gender, religion, or other aspects of their ethnocultural identities. At the same time, taking the promotion of such concrete, actual human abilities and opportunities as a shared political goal has the effect of turning liberalism away from the conceptions of atomistic individuals and abstract rights that Gilligan and others rightly decry. It also eliminates the tendency for liberal thought to identify equality with formally identical treatment, even for those differently situated, that MacKinnon and others rightly criticize.

The move to this more purposeful liberalism has these consequences because it calls for citizens to attend to how they and others can meaningfully exercise and enhance their potential for reflective choice in the social contexts in which they find themselves—a question that may lead them to challenge those contexts. Citizens must reflect on the place of their social memberships, familial, religious, professional, political, among their values and aspirations—reflect, that is, on the persons and things they most care about. Their lives of deliberative freedom must involve giving those cares appropriate weight in the choices they make. But citizens must also frequently ask how their various memberships are affecting their capacities for such informed deliberative self-guidance; for on this view, they should reform or abandon those pursuits which are destructive of their self-directive abilities. Particularly when they act as collective deliberative self-governors, through democratic political processes, such liberal citizens should ask whether basic economic, educational, and cultural arrangements are working adequately to empower all, or whether some are being systematically neglected or constrained. When such oppressive political and social institutions are found, a liberal polity must seek their reconstruction.

I believe this turn in a more purposeful direction thus has the promise to add to liberalism's allegedly "masculine" focus on capacities for rational calculation and respect for the rights of others a "feminine" emphasis on persons' needs, desires, and duties to care for others, especially those with whom they share memberships deeply constitutive of their moral identities—and to do so without justifying a divisive particularism that results in lack of concern for those outside one's constitutive groups, or strongly hierarchical views of what the structure of one's groups should be. On this view, all people deserve considerable room to work out which involvements really constitute lives of freedom for them; but all are also obliged to regard others, inside and outside such involvements, with es-

teem for their abilities to make morally significant judgments and commitments.

A liberal polity that shared this sense of purpose as a common endeavor would better support feelings of meaningful national membership than classical liberalism or contemporary democratic pluralism has proven able to do. There can be no better founded source of pride in one's country than the belief that it aims above all at furthering the capacities for responsible freedom that give persons moral dignity. If citizens come to feel more widely that this commitment is what their civic life is really all about, then many more may be inspired rather than angered or intimidated by political efforts to change social institutions that are stifling the opportunities of their fellow citizens.

After all, many Americans now affirm proudly their nation's revolutionary opposition to monarchical government and religious intolerance; its early extension of the franchise to workers and subsequent extension to women; its abolition of slavery; its modern reforms of racial segregation and bigoted immigration policies; its great success in generating material abundance, combined with continual (albeit controversial) efforts to find ways all can productively share in it. If public institutions expressed this shared purpose more clearly, desires to feel good about America might be at least as well satisfied in times of reform and improvement as in times of unchanging stability. Yet even while the promotion of liberty thus understood could provide a stronger sense of shared worthwhile communal membership, the content of that goal should militate against imposing undue uniformity, against policies that fail to respect the disparate but responsible choices of others. Women, then, would have the legal and moral right to choose to be different from men, and each other, or not, as they wished; but public policies would also try to establish institutions that gave them meaningful resources for making such choices, through, for example, treating child-rearing and jobs as options available to both sexes, and also seeking ways to enable both to combine them.

To be sure, no moral perspective is likely to reconcile entirely the conflicting claims of individuality and group memberships, personal liberty and shared values, pluralist diversity and harmonious social unity. The more purposeful liberalism here would explicitly be in tension with many traditional views, but its precise implications for proper legal treatment of the sexes are far from self-evident. Here, I have tried to provide not settled answers, but simply some lessons from past experience that indicate the problems Americans should focus on and, perhaps, particular directions that we can most promisingly explore. Those lessons make it more understandable why the liberal egalitarian reform movements which promised so much for women in the early 1970s have lost considerable force, for that pattern has occurred before, particularly in the Civil War and progressive eras. The pattern represents a failure for liberalism's ex-



plicit principles; and as the resurgent opposition to fully equal female citizenship of the 1980s indicates, this failure is not confined to America's now-superseded dark past. Perhaps the specific diagnosis of that failure offered here is incorrect, but in any case I believe it is a failure that should command considerable attention in the years ahead. For I take the chief lesson of America's history of discriminatory citizenship laws to be that longings for a sense of the importance of particular communities and social roles pose many dangers—but that efforts to ignore such longings guarantee that those dangers will sooner or later come to pass.

