

RACE AND GENDER DISCRIMINATION: A HISTORICAL CASE FOR EQUAL TREATMENT UNDER THE FOURTEENTH AMENDMENT

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It was we, the people, not we, the white male citizens, nor yet we, the male citizens, but we, the whole people, who formed this Union. And we formed it, not to give the blessings of liberty, but to secure them; not to the half of ourselves and the half of our posterity, but to the whole people—women as well as men.

—Susan B. Anthony¹

Under the common law of both England and the United States, a married woman enjoyed a legal status only slightly better than that of a slave. Until the mid-nineteenth century, in no state could a married American woman own property, make a will, inherit, sue or be sued, enter into a contract, or exercise any other of her most basic civil rights. Even single and widowed women, many of whom owned large amounts of property, were deprived of political rights: they could not vote, hold office, or sit on a jury. The gradual dissolution of women's inferior legal status began with the passage of married women's property laws, beginning before the Civil War and continuing throughout the twentieth century.

In an even more brutal fashion, the institution of slavery stripped Black Americans of all their human, civil, political, and social rights.² In *Dred Scott v. Sanford* the Supreme Court determined that, even if Blacks were "free," they were not "citizens" of the United States.³ This Supreme Court ruling was superseded by the passage of the Thirteenth and the Fourteenth Amendments in 1865 and 1868 respectively, in which Congress emancipated Blacks, expressly granted them citizenship status, and sought to protect their civil rights.

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1. ELIZABETH CADY STANTON, 2 HISTORY OF WOMEN'S SUFFRAGE: 1861-1876, at 632 (Arno Press ed., 1969) (1881).

2. In this Article, I have used the term "Black" when referring to persons of African heritage living in the United States, rather than "African-American". I realize that "African-American" more accurately describes such persons today, but given the historical context of this Article, the term did not seem appropriate. During much of the time period discussed in this Article, Blacks in the United States were enslaved. Even when they were technically "free", the Supreme Court refused to recognize their national citizenship. I therefore question whether Blacks in the United States would have considered themselves to be "African-Americans" during this time period.

3. 60 U.S. (19 How.) 393, 416 (1857).

Congress did not extend the political rights of citizenship to Black males until it adopted the Fifteenth Amendment in 1870. Until this development, advocates of women's rights in the nineteenth century considered Black males' legal status to be equal to their own—that of "second-class citizens"—citizens with some civil, but no political rights.⁴ The Woman's Movement, led by Susan B. Anthony and Elizabeth Cady Stanton, began as a counterpart to and an ally of the Abolition Movement. However, when Congress amended the Constitution to forbid discrimination in voting on the basis of race—but not on the basis of gender—the alliance abruptly ended.

This Article does not argue that women of all races and Black men have experienced identical levels of oppression in American society, nor that the relationship between husband and wife in the nineteenth century was perfectly analogous to that of master and slave. In theory, a husband's love for his wife should have prevented him from abusing the legal superiority that he enjoyed over her.⁵ Few would suggest that such a bond existed between the slave and his master.⁶

Yet historically, women and Blacks in America have shared a common experience, especially in the context of those rights protected by the Fourteenth Amendment. Sexism and racism in American society have prevented women of all races and Black men from enjoying the rights—civil, social, and political—to which they are entitled under the Constitution. Section One of the Fourteenth Amendment guarantees that all United States citizens are entitled to the "Privileges and Immunities" of that citizenship (civil rights), and that all persons are entitled to "Due Process" and "Equal Protection" of

4. Race and sex are clearly not mutually exclusive categories. It seems patently obvious that at least half of all Blacks are female. Yet although half of all slaves were women, the Fifteenth Amendment's protection against disenfranchisement on the grounds of "previous condition of servitude" only extended to those Blacks who were men.

The Woman's Movement has historically failed adequately to address the needs of Black women. Angela P. Harris comments on modern feminists' tendency to perpetuate this failure. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 581-616 (1990). These issues became particularly relevant recently in the context of Justice Clarence Thomas' Senate confirmation hearings and the role played in those hearings by Professor Anita Hill. See Christine Stansell, *White Feminists and Black Realities: The Politics of Authenticity*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 251-268 (Toni Morrison ed., 1992); Kimberle Crenshaw, *Whose Story Is It Anyway—Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, *supra* at 402, 403-406.

5. Nineteenth century women's rights advocates argued that it did not. They challenged the ideal vision of marriage and motherhood popularized in this era. With regard to the holy bond of matrimony, Elizabeth Cady Stanton wrote, "[i]t is folly to talk of the sacredness of marriage and maternity, while the wife is practically regarded as . . . a slave." ELIZABETH CADY STANTON, *The Arena*, in EIGHTY YEARS AND MORE: REMINISCENCES 1815-1897, at 230 (Schoken Books ed., 1971) (1898) [hereinafter REMINISCENCES].

6. Although the notion that a slave loved his master in the same way that a wife loved her husband is perverse and false, much of Southern literature and culture reflects that society's desire to indulge in this illusion and to romanticize slavery. Civil War scenes from *GONE WITH THE WIND* depicted loyal enslaved house servants fighting to protect their master, rather than joining forces with the "Damn Yankees." See MARGARET MITCHELL, *GONE WITH THE WIND* (1936). The silent film *BIRTH OF A NATION* (Hollywood Home Theater 1980) (1915), presented the Civil War in a similar fashion.

the laws.⁷ In interpreting these clauses of the Constitution, courts have acknowledged the effects of racism on Blacks and all other racial minorities.⁸ However, the deleterious effects of sexism on women have been discounted.

This Article argues that the judiciary should use strict scrutiny when reviewing discrimination based on sex as well as when reviewing discrimination based on race. Sexism and racism are pervasive prejudices that have been nurtured and encouraged by our laws. Each has been manifested and maintained by the law in the past, hence the need for the law to rectify the effects of this discrimination in the present.

I. THEORETICAL PARALLELS BETWEEN RACE AND SEX DISCRIMINATION

In his essay, *The Subjection of Women*, John Stuart Mill constructs many theoretical parallels between the status of women and Blacks in Western society.⁹ He notes that "[l]aws and systems of polity always begin by recognising the relations they find already existing between individuals. They convert what was a mere physical fact into a legal right . . ." ¹⁰ Mill argues in this manner that the underpinnings of slavery advanced from the simple rule of "might makes right" to the level of legal right and contract, whereby one race subjugated another.

By this same evolutionary process the common law of "Husband and Wife" codified man's rule over woman. An anonymous seventeenth-century English legal scholar made the following analogy:

When a small brooke or little river incorporateth with Rhodanus, Humber, or the Thames, the poor rivulet looseth her name. . . . See here the reason . . . that women have no voice in Parliament. They make no laws, they consent to none, they abrogate none. All of them are understood either married, or to be married, and their desires are to their husbands.¹¹

For centuries the subordinate status of both slaves and women in America was considered to be the natural state of society predestined by Divine will,¹² and recognized as such by the United States Supreme Court. With respect to slavery, Chief Justice Taney observed in *Dred Scott* that, when the Founding Fathers wrote the Declaration of Independence, the legitimacy of slavery "was . . . fixed and universal in the civilized portion of the white

7. U.S. CONST. amend. XIV, §1.

8. The Supreme Court extended strict scrutiny analysis to include minorities other than Blacks early in the history of its Equal Protection analysis. It provided little explanation for this expansion of Fourteenth Amendment protection. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (applying strict scrutiny analysis to racial discrimination against Asians).

9. John Stuart Mill, *The Subjection of Women*, in *ESSAYS ON SEX EQUALITY* 125 (Alice S. Rossi ed., 1970).

10. *Id.* at 130.

11. *The Lawes Resolutions of Women's Rights*, in *ESSAYS ON SEX EQUALITY*, *supra* note 9, at 53.

12. Elizabeth Cady Stanton rejected many traditional ideas about God's intended place for women in society, and in 1895 she published her theories in *The Woman's Bible*. See *REMINISCENCES*, *supra* note 5, at 452-57. For a general discussion of the interaction of religion and the woman suffrage movement, see AILEEN S. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920*, at 75-95 (1965).

race. It was regarded as an axiom in morals as well as in politics . . . "13 With respect to the status of women, in 1872, Justice Bradley, concurring in *Bradwell v. Illinois*, remarked that "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."¹⁴ As if in response, Mill asks: "[W]as there ever any domination which did not appear natural to those who possessed it?"¹⁵

A. MARRIED WOMEN AND SLAVES

By the dawn of the age of Enlightenment, a married woman's status had changed little under the common law,¹⁶ except insofar as most of her legal disabilities were now more directly tied to the contract of marriage, rather than to her status as female.¹⁷ At the same time, most of the nations of the Western hemisphere had abolished the institution of slavery, with one glaring exception: the United States. The emergence of the Woman's Movement was clearly linked—both temporally and ideologically—with the drive to end slavery.¹⁸

One of the first abolitionists explicitly to link the causes of racial and sexual equality was Sarah Grimke, a Quaker¹⁹ and former slaveowner's

13. 60 U.S. at 407.

14. 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

15. John Stuart Mill, *supra* note 9, at 137.

16. Sir William Blackstone wrote one of the leading treatises on the status of the common law in the eighteenth century, the *COMMENTARIES ON THE LAWS OF ENGLAND* (1765). In a section entitled "Husband and Wife," Blackstone states:

By marriage, the husband and wife are one person in law; that is, the very being, or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband under whose wing, protection and cover she performs everything.

Id. at 442.

17. Sir Henry Maine suggested that a shift in emphasis from Status (i.e., sex, race, class, or pedigree) to Contract (a relationship into which an individual willfully entered) was part of the natural evolution of a progressive legal system. SIR HENRY MAINE, *ANCIENT LAW* 100 (1861). See also HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW, CONSTITUTIONAL DEVELOPMENT, 1835-1875*, at 50-51 (1982). One result of this development was that, by the end of the nineteenth century, all common law property states had passed some form of statute protecting the property rights of married women. See Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 *GEO. L.J.* 1359, 1398 (1983).

18. For many women in the United States, involvement in the abolitionist movement led to a recognition of their own inferior status. At its 1863 national convention, the Women's National Loyal League passed a resolution in support of equal civil and political rights for "citizens of African descent" and white women. STANTON, *supra* note 1, at 57-66. Delegate Angeline G. Weld stated:

I rejoice exceedingly that that resolution should combine us with the negro. I feel that we have been with him; that the iron has entered into our souls. True, we have not felt the slave-holder's lash; true, we have not had our hands manacled, but our hearts have been crushed.

Id. at 60.

19. The egalitarian ideals propounded by the Hicksite Quaker community inspired many early activists for abolition and women's rights. See SARA M. EVANS, *BORN FOR LIBERTY: A HISTORY OF WOMEN IN AMERICA* 79-81 (1989); ELLEN CAROL DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848-1869*, at 36-38 (1978).

daughter from South Carolina. In a letter to the Boston Female Antislavery Society entitled the "Legal Disabilities of Women," Grimke systematically compares the status of women and slaves under the common law.²⁰ She writes that the "unjust and unequal laws" that wrested a woman's rights from her "approximate too nearly to the laws enacted by slaveholders for the government of their slaves, and must tend to debase and depress the mind of [woman]."²¹

Almost all of Grimke's analysis focuses on the "legal disabilities" attached to married women. Grimke notes that, upon taking the vows of marriage, "the very being of a [married] woman, like that of a slave, is absorbed in her master. All contracts made with her, like those made with slaves by their owners, are a mere nullity."²² In the eyes of the law, the married woman ceased to exist. The theoretical nonexistence of married women under the common law had many practical consequences. Married women could neither make contracts nor own property.²³ Anything that a woman possessed before she married or acquired during her marriage automatically became the property of her husband.²⁴ Grimke notes that the laws of Louisiana imposed a similar condition upon the slave: "All that a slave possesses belongs to his master; he possesses nothing of his own, except what his master chooses . . ."²⁵

The common law of torts also clearly reflected the legal nonexistence of married women and slaves. A wife had no right to sue her husband, just as a slave had no right to sue his master. If a wife were injured in a tort action, she could only sue the tortfeasor in her husband's name, and then only with his permission. Grimke notes that "if any damages are recovered for an injury committed on a wife, the husband pockets it; in the case of the slave, the master does the same."²⁶ This feature of the common law derived from the theory that the wife/slave was the property of the husband/master; hence, he was entitled to compensation for any damage done to such property. Likewise, the common law did not hold a woman liable for any torts committed in her husband's presence; the man was held accountable for his wife's actions. This evokes the common law rule that also held the master liable for the torts of his servant.

Other than Susan B. Anthony, all of the major leaders of the nineteenth-century Woman's Movement were married women. Elizabeth Cady Stanton, herself married with seven children, wrote much about the legal disabilities attached to the marital vow.²⁷ In her autobiography she observed that,

20. Letter from Sarah Grimke to the Boston Female Antislavery Society (Sept. 6, 1837), in *LETTERS ON THE EQUALITY OF THE SEXES AND OTHER ESSAYS*, at 71-77 (Elizabeth Ann Bartlett ed., 1988).

21. *Id.* at 77.

22. *Id.* at 72. See also John Stuart Mill, *supra* note 9, at 158.

23. 1 ANN OLDFATHER ET AL., VALUATION AND DISTRIBUTION OF MARITAL PROPERTY §3.02 (1984).

24. See generally, JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 324-25 (2nd. ed. 1988).

25. Grimke, *supra* note 20, at 75.

26. *Id.* at 73.

27. Stanton convinced the minister conducting her own marriage ceremony to omit the

while an unmarried woman could "make contracts, sue and be sued, enjoy the rights of property, to her inheritance—to her wages—to her person—to her children . . . in marriage, she is robbed by law of all and every natural and civil right."²⁸ Another outspoken crusader for women's rights, Lucy Stone, gained national attention by marrying the prominent abolitionist Henry Blackwell. Stone and Blackwell executed a contract disavowing the inferior legal status attached to the wife under the common law, and Stone refused to change her maiden name.²⁹

B. UNMARRIED WHITE WOMEN AND BLACK FREEDMEN

The Woman's Movement did not focus its efforts solely on eliminating the legal disabilities attached to the marital vow; the Movement recognized that even single women could not exercise many of the basic rights to which all white men were entitled. All women, married or single, were denied every political right traditionally associated with citizenship, including the right to vote, the right to serve on juries, and the right to hold public office.³⁰ Many widowed and single women owned large amounts of property and real estate, and the cry of "no taxation without representation" was often heard from the suffragists.³¹ Scattered signs of protest from other unmarried women can be found throughout American history,³² but in general

word "obey" from the vows: "I obstinately refused to obey one with whom I supposed I was entering into an equal relations." REMINISCENCES, *supra* note 5, at 72.

28. *Id.* at 222.

29. The marriage contract by Lucy Stone and Henry Blackwell reads as follows:

This act on our part implies no sanction of, nor promise of voluntary obedience to . . . the present laws of marriage, as [they] refuse to recognize the wife as an independent, rational being, while they confer upon the husband an injurious and unnatural superiority. . . . We protest . . . the whole system by which 'the legal existence of the wife is suspended during marriage,' so that in most States, she neither has a legal part in the choice of her residence, nor can she make a will, nor sue or be sued in her own name, nor inherit property.

Lucy Stone & Henry Blackwell, Marriage Contract, in Wendy McElroy, *The Roots of Individualist Feminism in 19th-Century America*, in FREEDOM, FEMINISM, AND THE STATE 119 (McElroy ed., 1982).

30. See HARRIET TAYLOR MILL, ENFRANCHISEMENT OF WOMEN 91, 104 (1869).

31. Elizabeth Cady Stanton addressed the New York State legislature at its 1867 constitutional convention and argued for amendment of the state constitution to grant suffrage rights to women. She made the following comment regarding taxation of property-holding women:

[U]nmarried women have always had the right to property and wages; to make contracts and do business in their own name. And even married women, by recent legislation in this State, have been secured in some civil rights. . . . Woman now holds a vast amount of property in the country, and pays her full proportion of taxes. . . . On what principle, then, do you deny her representation? If the 'white male' will do all the voting, let him pay all the taxes.

STANTON, *supra* note 1, at 274. See also JOHN STUART MILL, *supra* note 9, at 97.

32. For example, in 1647 the recently-widowed Margaret Brent asked the Maryland Assembly to grant her two votes, one in her own capacity as a freeholder, and one as the executor of her husband's estate. Her recently deceased husband had been the governor of the colony. The Assembly replied that, being a woman, she was entitled to no vote. See J.C. SPRUILL, WOMEN'S LIFE AND WORK IN THE SOUTHERN COLONIES 237-38 (1938).

the law made no distinction between married and single women in denying their political rights.

The legal status of unmarried white women and Black freedmen in the North was very similar during the antebellum period.³³ Like the unmarried white woman, the Black freedman was more likely to enjoy his basic "civil" rights, such as the right to contract or own property, than his "political" rights, such as the right to sit on a jury, vote, or hold office. In many free states, Blacks were guaranteed the right to contract and to own property.³⁴ By 1860, free Blacks were allowed to vote in Maine, New Hampshire, Vermont, Massachusetts, and Rhode Island—in these states free Blacks possessed almost all of the traditional rights of full citizenship.³⁵

Despite the fact that several states' laws granted the Black freedman a litany of rights, the Supreme Court held in *Dred Scott* that Blacks were not entitled to those rights because they were not citizens of the United States.³⁶ On the other hand, *Dred Scott* recognized that white women, both married and unmarried, were "citizens," although that status did not enhance the character of their legal rights.³⁷

C. THE LINKAGE BETWEEN CIVIL AND POLITICAL RIGHTS FOR WOMEN AND BLACKS

Prior to the Civil War and the enactment of the Fourteenth and Fifteenth Amendments, few Blacks³⁸ and no women³⁹ enjoyed any of the political rights of citizenship, such as voting or office-holding. Theoretically, it is easy to understand why these rights were denied to married women and slaves under the common law. However, it is more difficult to rationalize the deprivation of political rights for freedmen and unmarried white women.

33. Although free Blacks in the Southern States technically enjoyed some civil rights, they were treated more like slaves than free men. Although free Blacks in the South were allowed to own property, the law often dictated that they could do so only under the agency of a white guardian. See generally, Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415, 477 (1986). Of all the Southern States, only Louisiana allowed Blacks to testify against whites. *Id.* at 451.

34. *Id.* at 477.

35. *Id.* at 422, 424-25. New York imposed a property qualification upon Black voters, Ohio allowed mulattoes to vote, and Michigan only allowed Blacks to vote in school board elections. *Id.* at 477-78. Blacks were allowed to testify against whites in all non-slave states, except Indiana and Illinois. California adopted a law allowing Blacks to testify against whites in 1863; Oregon did so in 1862. *Id.* at 451. But see LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860* (1961) (offering a more pessimistic conception of free Blacks' status in the Antebellum North).

36. 60 U.S. at 405-406. See text accompanying note 98, *infra*.

37. The Court notes that "a person may be a citizen, and entitled to that character, although he does not possess all the rights which belong to other citizens. . . . Women and minors, who form a part of the political family, cannot vote [or hold public office] . . . yet they are citizens." 60 U.S. at 421-22.

38. See Finkelman, *supra* note 33, at 417.

39. Women first attained the right to vote in some of the territories, but not until after the Civil War. Woman suffrage was approved in the Wyoming territory in 1869 and in Utah in 1870. Women were allowed to vote in the Washington territory between 1883 and 1889. See MILDRED ADAMS, *THE RIGHT TO BE PEOPLE* 68-69 (1966); STANTON, *supra* note 1, at 508.

Although no state ever distinguished between married and unmarried women with respect to voting rights, the question was occasionally discussed.⁴⁰

Democratic theory assumes that the individual must attain a very basic level of independence before she can participate in civil society: self-ownership. The common law treated slaves like any other piece of property owned by their masters, thus they obviously did not meet this qualification. A white woman could not be bought or sold; yet when she married, law and custom granted her husband complete control over her person, her property, and her labor.⁴¹ Children were controlled by their fathers, who automatically retained custody of them in the event of a divorce. Therefore, slaves of either sex and any age, married white women, and children did not possess the requisite self-ownership to participate in the political community.⁴²

The eighteenth century Federalists' definition of political rights echoes this theme; they reasoned that only those owning a "stake in the community" (i.e., property) should have a voice in its governance.⁴³ John Adams argued, based on the works of Blackstone⁴⁴ and Montesquieu,⁴⁵ that property qualifications for voting were necessary to exclude people who were dependent on others to feed, clothe, and employ them, and thus whose vote could be controlled.⁴⁶ Although Adams went so far as to acknowledge that "generally speaking, women and children have as good judgements, and as independent minds, as those men who are wholly destitute of property,"⁴⁷ he failed to articulate any reason for distinguishing among adult property-holders on the basis of race and sex.

On the same subject, Justice Story wrote:

[I]t would be extremely difficult, upon any mere theoretical reasoning, to establish any satisfactory principle, upon which the one half of every society

40. For example, at the 1820 Massachusetts constitutional convention, some members of the delegation suggested that unmarried women who owned property be given the vote. Their motion did not prevail. STANTON, *supra* note 1, at 586.

41. Even if they were "freed", Black married women continued to suffer these same legal disabilities.

42. See DUBOIS, *supra* note 19, at 44-46. The legal status of children has also been compared to that of slaves. See Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359 (1992).

43. See Linda K. 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, 118 (1977).

44. Blackstone notes:

The true reason of requiring any qualification with regard to property in voters is to exclude such persons, as are in so mean a situation, that they are esteemed to have no will of their own. . . . [A]ll popular states have been obliged to establish certain qualifications, whereby some, who are suspected to have no will of their own, are excluded from voting, in order to set other individuals, whose will may be supposed independent, more thoroughly upon a level with each other.

BLACKSTONE, *supra* note 16, at 171-2.

45. See CHARLES DE SECONDAT, BARON DE MONTESQUIEU, 11 THE SPIRIT OF THE LAWS, 151-62 (Thomas Nugent trans., Hafner Publishing Co. 2nd ed. 1959).

46. ANNE F. SCOTT & ANDREW M. SCOTT, ONE HALF THE PEOPLE: THE FIGHT FOR WOMAN SUFFRAGE 4 (1975).

47. Letter from John Adams in reply to a constituent (May 26, 1776) in 9 WORKS OF JOHN ADAMS, at 375-77 (C.F. Adams ed., 1854) (reprinted in SCOTT & SCOTT, *supra* note 46).

has thus been systematically excluded by the other half from all right of participation in government. . . . If it be said, that all men have a natural, equal and unalienable right to vote . . . what [consideration] is not equally applicable to females, as free, intelligent, moral, responsible beings . . . having a vital stake in all the regulations and laws of society?⁴⁸

It is fair to say that, under the common law, married women were not considered free and responsible beings. However, this theoretical rationale for excluding the married woman from the political community does not apply to the single woman. Justice Bradley's concurrence in *Bradwell v. Illinois* addresses the issue:

[M]any women are unmarried and not affected by any of the duties . . . and incapacities arising out of the married state, . . . [yet] these are exceptions to the general rule. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.⁴⁹

This unsatisfactory explanation is essentially identical to that delivered in 1624, when all women were considered either "married or to be married" and thus treated with equal disregard by the common law.⁵⁰

Other language in Justice Bradley's *Bradwell* concurrence sheds a harsher light on the reasoning underlying his refusal to distinguish between married and unmarried women. He states generally that "[m]an is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . ." ⁵¹ Justice Bradley was not alone in his thinking. When debating woman suffrage, members of the House and Senate also voiced the opinion that a woman's place in society was strictly limited to the domestic sphere.⁵²

When *Dred Scott* addressed the question of a freedman's right to sue, the Supreme Court held that Blacks, both free and enslaved, were guaran-

48. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 79 (1991). Examining the theory of voting as a civil, as opposed to a natural, right, Justice Story notes that "it will require some astuteness to find upon what ground this exclusion [of women] can be vindicated. . . ." *Id.* at 80.

49. 83 U.S. at 141-42 (Bradley, J., concurring) (the majority held that the state of Illinois could legally refuse to admit Myra Bradwell to the state bar on the basis of her sex because, as a married woman, Bradwell would not be bound by her express or implied contracts, such as those between attorney and client).

50. See *supra* note 11 and accompanying text.

51. 83 U.S. at 141 (Bradley, J., concurring).

52. On May 28, 1874, Senator Sargent, a California Republican, proposed an amendment to extend the right of suffrage to women in the Pembina Territory (what is today North Dakota). Senator Bayard opposed the amendment on the following grounds:

Under the operation of the amendment, what will become of the family hearthstone . . . ? You will no longer have that healthful and necessary subordination of wife to husband. . . . I can see in this proposition for female suffrage the end of all that home life and education which are the best nursery for a nation's virtue. . . . [T]here never was a falser fact stated than that the women of America need any protection further than the love borne to them by their fellow-countrymen.

STANTON, *supra* note 1, at 577 (citing CONG. GLOBE, 43d Cong., 1st Sess. 4331-44 (1874)).

teed no rights—civil, social, or political—by the United States Constitution.⁵³ Justice Taney reasoned that Blacks were not citizens because at the time the Constitution was drafted, they were “considered as a subordinate and inferior class of beings . . . and had no rights or privileges but such as . . . the Government might choose to grant them.”⁵⁴

In other words, the legal disabilities imposed on women and Blacks by the common law stemmed from pervasive racist and sexist beliefs. In this context, racism and sexism can be broadly defined as the belief that these two classes of humanity—women and Blacks—were unfit or incapable of carrying out the civil and political functions of the society. These ideas trace their roots deep into the bedrock of tradition and custom. Applying Mill’s analysis, the seed of these beliefs lies in the simple rule that in nature, the strong will always rule those weaker than themselves.⁵⁵ Mill also points out that, under such a system, society becomes dependent on the coerced work of the oppressed. He compares the following statements:

It is necessary that cotton and sugar should be grown. White men cannot produce them. Negroes will not, for any wages which we choose to give. *Ergo* they must be compelled . . .

It is necessary to society that women should marry and produce children. They will not do so unless they are compelled. Therefore it is necessary to compel them.⁵⁶

Mill speculates that society has forced women to focus all their energies on marrying and bearing children by foreclosing their opportunities to do anything else. He suggests that instead, society should focus on improving woman’s status within marriage, rather than forcing her to live under a “law of despotism.”⁵⁷

Until the nineteenth century, racist and sexist assumptions about the status of Blacks and white women living in America went largely unchallenged. Although Blacks,⁵⁸ and to a lesser extent white women,⁵⁹ had previously emitted scattered signs of protest, an organized movement did not emerge until this time. The crusade for women’s rights evolved out of the fight for abolitionism and established itself as a separate movement when a

53. 60 U.S. at 404-405.

54. *Id.* at 405.

55. Although Mill does not identify the following as “sexism”, he essentially reaches the same conclusion: “I believe that [women’s] disabilities . . . are only clung to in order to maintain their subordination in domestic life; because the generality of the male sex cannot yet tolerate the idea of living with an equal.” John Stuart Mill, *supra* note 9, at 181.

56. *Id.* at 155.

57. *Id.* at 156.

58. See, e.g., HENRY IRVING TRAGLE, *THE SOUTHAMPTON SLAVE REVOLT OF 1831: A COMPILATION OF SOURCE MATERIAL* (1971) (documenting Nat Turner’s 1831 slave rebellion in Southampton, Virginia).

59. Abigail Adams expressed an early feminist sentiment when she wrote to her husband, “[i]f particular care and attention is not paid to the ladies, we are determined to foment a rebellion, and will not hold ourselves bound by any laws in which we have no voice or representation.” Letter from Abigail Adams to John Adams (Mar. 31, 1777), in *FAMILIAR LETTERS OF JOHN ADAMS AND HIS WIFE, ABIGAIL ADAMS DURING THE REVOLUTION 149-50* (C. Adams ed., 1876), reprinted in *THE FEMINIST PAPERS 7-15* (A.S. Rossi ed., 1973).

group of female abolitionists were made conscious of their own inferior legal status by the abolitionist movement itself.

II. HISTORIC LINKS BETWEEN THE RIGHTS CAMPAIGN FOR WOMEN AND BLACK MEN

Like all social phenomena, the Woman's Movement emerged gradually over a long period of time. However, the date which has historically signified the beginning of an organized campaign for women's rights is July 19, 1848—the date of the Seneca Falls Convention. Elizabeth Cady Stanton and Lucretia Mott resolved to orchestrate this gathering after being humiliated at the 1840 World Anti-Slavery Convention in England, when, following a bitter debate, the Convention refused to seat any female delegates.⁶⁰ According to Stanton, women were rejected because, "according to English prejudices at that time, [women] were excluded by Scriptural texts from sharing equal dignity and authority with men in all reform associations. . . ."⁶¹ To show their support for the disqualified women, William Lloyd Garrison and other prominent American abolitionists refused to participate in the conference.

For eight years following the Convention, the duties of marriage and motherhood precluded Mott and Stanton from proceeding with their plans to organize a meeting on the status of women. Finally, on July 14, 1848, they published a call to attend a "Women's Rights Convention" in the *Seneca County Courier*.⁶² The document that emerged from the Seneca Falls meeting—the Declaration of Sentiments—essentially became the manifesto of the Woman's Movement.⁶³ Copies of the Declaration and Resolutions endorsing

60. See REMINISCENCES, *supra* note 5, at 79-83; ADAMS, *supra* note 47, at 23-24. Other women also returned from the London convention newly resolved to campaign for women's rights; upon arriving home in Pennsylvania, Mary Grew began circulating petitions for a married woman's property act. Her abolitionist father vigorously opposed her efforts. DUBOIS, *supra* note 19, at 25.

61. REMINISCENCES, *supra* note 5, at 79. Stanton remarked that "[i]t was really pitiful to hear narrow-minded bigots, pretending to be teachers and leaders of men, so cruelly remanding their own mothers, with the rest of womankind, to absolute subjection to the ordinary masculine type of humanity." *Id.* at 81.

62. *Id.* at 148.

63. The Declaration was composed and delivered by Elizabeth Cady Stanton and signed by all in attendance. Stanton modeled the introduction after the Declaration of Independence, emphasizing women's natural rights:

We hold these truths to be self-evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted, deriving their just powers from the consent of the governed.

The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world.

He has never permitted her to exercise her inalienable right to the elective franchise.

He has compelled her to submit to laws, in the formation of which she had not voice. . . .

He has made her, if married, in the eye of the law, civilly dead.

He has taken from her all right in property, even to the wages she earns.

He has so framed the laws of divorce, as to . . . whom the guardianship of

its contents were circulated through the anti-slavery press, receiving favorable coverage in the *Liberator*, the *North Star*, and the *National Anti-Slavery Standard*. In contrast, the overall public reaction was overwhelmingly negative. Stanton sadly noted that "so pronounced was the popular voice against us, in the parlor, press, and pulpit, that most of the ladies who had attended the convention and signed the declaration . . . withdrew their names and influence and joined our persecutors."⁶⁴ However, the Woman's Movement did not die, but instead grew steadily. Women began to organize and petition the legislatures for greater civil and political rights.⁶⁵

During the antebellum period, the Woman's Movement focused almost exclusively on lobbying the state legislatures. Women demanded the right to contract, own property, control their own wages, exercise joint guardianship over their children, enjoy full inheritance rights, sit on a jury, and vote. The Movement's earliest successes involved gaining property rights for married women. Susan B. Anthony led the fight for the adoption of a Married Woman's Property Act in New York in 1856.⁶⁶ Nine states passed similar acts before the Civil War began, but they were generally interpreted narrowly by the courts.⁶⁷ For example, almost all courts refused to allow a married woman to control her earnings, even if she had a right to own separate property.⁶⁸ Yet by the end of the nineteenth century, all common law prop-

the children shall be given, as to be wholly regardless of the happiness of women—the law, in all cases, going upon a false supposition of the supremacy of man, and giving all power into his hands.

After depriving her of all rights as a married woman, if single, and the owner of property, he has taxed her to support a government which recognizes her only when her property can be made profitable to it.

He has monopolized . . . all the profitable employments. . . . As a teacher of theology, medicine, or law, she is not known.

Now, in view of this entire disfranchisement of one-half the people of this country, their social and religious degradation—in view of the unjust laws above mentioned . . . we insist that [women] have immediate admission to all the rights and privileges which belong to them as citizens of the United States.

ELIZABETH CADY STANTON, 1 HISTORY OF WOMAN SUFFRAGE, 1848-1861, at 70-71 (Arno Press ed., 1969) (1881).

64. REMINISCENCES, *supra* note 5, at 149.

65. Women's activity in America gained attention in Europe even at this early stage of the Movement. In England, Harriet Taylor Mill cited to women's petitions and protests in America as evidence that at least some women did not embrace their subordinate status in society:

In the United States, at least, there are women, seemingly numerous, and now organized for action on the public mind, who demand equality in the fullest acceptation of the word, and demand it by a straightforward appeal to men's sense of justice, not plead for it with a timid deprecation of their displeasure. . . .

HARRIET TAYLOR MILL, *supra* note 30, at 119-20 (first published in the *Westminster Review*, Oct. 1852).

66. The first state to pass a married woman's property act was Mississippi in 1839. Chused, *Married Women*, *supra* note 17, at 1398.

67. See Joan Hoff Wilson, *The Legal Status of Women in the Late Nineteenth and Early Twentieth Centuries*, 6 HUM. RTS. 125, 126-28 (1977); Richard H. Chused, *Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures*, 29 AM. J. LEG. HIST. 3 (1985); Chused, *Married Women*, *supra* note 17, at 1400 n.21.

68. Kerber, *supra* note 43, at 120. Statutes protecting married women's earnings from the

erty states had passed some form of law protecting married women's property rights.⁶⁹

III. IMPACT OF THE CIVIL WAR ON RIGHTS FOR WOMEN AND BLACK MEN

During the Civil War, the American Woman Suffrage Association suspended its work toward equal rights for women and concentrated solely on the Union war effort, operating under the new title of the Women's National Loyal League.⁷⁰ The Loyal League allied itself politically with the Radical Republicans and the abolitionists. Following the war, the League focused its efforts on securing passage of the Thirteenth Amendment.⁷¹

The Thirteenth Amendment emancipated Blacks in 1865, thus ending the institution of slavery in America, at least officially.⁷² At this point, women's rights advocates considered Black males' legal status to be equivalent to their own—citizens with civil, but not political, rights.⁷³ As discussed above, society's refusal to recognize the political rights of Blacks and women hinged upon these groups' inability to exercise civil rights and their subordination to the political community of white males. The end of slavery and the passage of the married women's property acts began to erode this justification for denying political rights to Blacks and women. However, the transition from arguing for civil rights to arguing for political rights was complicated by two factors: first, in reality, the passage of the Thirteenth Amendment and various married women's property laws did not guarantee civil rights to all citizens regardless of their race or gender; and second, due to the presence of racism and sexism in American society, unmarried white women and

institution of coverture generally did not appear until after the Civil War. Chused, *Married Women*, *supra* note 17, at 1398 n.361.

69. Chused, *Married Women*, *supra* note 17, at 1397-1412. Although laws granting property rights to married women greatly improved their legal status, most state legislatures did not adopt these laws to demonstrate support for women's equal rights—married women's creditors, who sought to attach their property, strongly advocated such laws. Kerber, *supra* note 43, at 120. Conversely, other laws protected women's property from attachment for their husband's debts. Chused, *Married Women*, *supra* note 17, at 1398-1400; Chused, *Nineteenth Century*, *supra* note 67, at 3. In New York, Stanton reported that the Dutch aristocracy had joined the campaign for a married woman's property bill to ensure that "their life-long accumulations [would] descend to their daughters and grandchildren rather than pass into the hands of dissipated, thriftless sons-in-law." REMINISCENCES, *supra* note 5, at 150. See also Kerber, *supra* note 43, at 119.

70. See STANTON, *supra* note 1, at 50.

71. The Loyal League presented petitions supporting the abolition of slavery and passage of the Thirteenth Amendment to Congress on February 9, 1864. The League eventually collected over 400,000 signatures. *Id.* at 78-79.

72. The Thirteenth Amendment reads:

Section One. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section Two. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

73. See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1279-80 (1991).

Black freedmen had always been denied political rights, even though they had previously enjoyed almost all the civil rights of citizenship. Therefore, the movement to attain political equality for Blacks and women first had to focus on securing civil rights, and second on overcoming the forces of racism and sexism in society.

A. WOMEN'S CIVIL RIGHTS AFTER THE CIVIL WAR

During the period immediately following the Civil War, the status of women's civil rights improved in some respects, but deteriorated in others. For the first time, laws were passed protecting married women's earnings from their husbands' debts.⁷⁴ However, other state laws advancing married women's civil rights were actually repealed or diluted after the Civil War.⁷⁵ For example, after the war, an 1860 New York law that had granted women the right to equal guardianship of their children was amended so that it merely prohibited the father from giving away the children without the mother's written permission.⁷⁶ The Woman's Declaration of Rights, presented by Susan B. Anthony at the nation's Centennial Celebration of 1876, denounced these setbacks in women's legal status:

Laws passed after years of untiring effort, guaranteeing married women certain rights of property, and mothers the custody of their children, have been repealed in States where we supposed all was safe. Thus have our most sacred rights been made the football of legislative caprice, proving that a power which grants as a privilege what by nature is a right, may withhold the same as a penalty when deeming it necessary for its own perpetuation.⁷⁷

The attempt to eradicate the legal disabilities associated with marriage was complicated by the fact that marriage, unlike slavery, never ceased to exist.

Prior to ratification of the Thirteenth Amendment, the legal process by which one person became the property of another was characterized as a contract, and as such was regulated by the state. The Thirteenth Amendment abolished these unconscionable contracts; thus men previously considered "property" instantly became free individuals, vested with natural rights. The contract of marriage, however, was never abolished, nor did anyone, except the most radical of women's rights advocates, suggest that it should be.⁷⁸ Throughout history, most societies have considered the institution of mar-

74. See Chused, *Married Women*, *supra* note 17, at 1424 n.361.

75. Susan Faludi hypothesizes that, throughout American history, the status of women's rights has ebbed and flowed, resulting in alternating periods of progress and backlash. Faludi identifies the late nineteenth century as a period of backlash against women. SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 48-50 (1991).

76. FREEDOM, FEMINISM, AND THE STATE, *supra* note 29, at 8.

77. This statement was presented as the sixth "Article of Impeachment" in the Declaration of Rights. ELIZABETH CADY STANTON, 3 *HISTORY OF WOMAN SUFFRAGE, 1876-1885*, at 32-33 (Arno Press ed., 1969) (1886).

78. The "free love" movement, associated primarily with activist Victoria Woodhull, had only a limited following. See Ellen Carol Dubois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution*, 74 *J. AM. HIST.* 836, 855 (1987).

riage and the family unit as vital to their own survival. Even the most vocal of the early feminists argued only to revise the terms of the marriage contract, not do away with it altogether.

Unlike the slave, the woman—at least in theory—had voluntarily entered into the contract by which she ceded her rights to another human being, her husband. Like any other contract, the marriage license was regulated completely by state law, and the Federal Government had no power to dictate its terms. However, the voluntary nature of this contractual relationship was somewhat illusory. Economic necessity pressured women to marry, regardless of whether they wanted a family.⁷⁹ Institutions of higher learning denied admission to women, and even if a woman did become competent in a profession, the state had the power to deny her a license to practice.⁸⁰ Most of the jobs available to women involved low-paying, menial labor.⁸¹ A single woman could only be economically secure if she came from a very wealthy family, or if she were a well provided-for widow. Women's struggles for political rights thus occurred in a context in which almost all women were bound to a marriage contract.

B. CIVIL RIGHTS LEGISLATION IN THE POST-WAR PERIOD

The backlash against the movement to guarantee civil rights for Blacks was more visible and violent than the effort to rescind civil rights gained by women, especially in the South. Yet initially, only conservative Republicans emphasized the need to ensure civil rights for Blacks, while the Radicals concentrated on demands for political rights—namely, enfranchisement. When state elections indicated that implementation of “universal manhood suffrage” would not be politically feasible in 1866, the Radicals amended their efforts to include the attainment of civil rights as well.⁸² As a result, in 1866, Congress enacted legislation intended to abolish the notorious Southern “Black codes”—laws which attempted to preserve slavery in form if not in fact⁸³—by statutorily guaranteeing “civil rights” to all citizens, regardless of race.⁸⁴ The nineteenth century conception of “civil rights” referred to those protections considered necessary to defend the fundamental “natural” or common law rights of “life, liberty, property, and the pursuit of happiness.”⁸⁵ The Civil Rights Act of 1866 listed the following as examples

79. At the end of the nineteenth century, fewer than twenty percent of women were in the laborforce. Approximately five percent of married women were employed outside the household. Chused, *Married Women*, *supra* note 17, at 1396 n.192.

80. See *supra* note 49 and accompanying text (discussing *Bradwell v. Illinois*).

81. In 1870, there were approximately 1.3 million female wage earners in the United States. Approximately seventy percent of these women were domestic servants; 24 percent worked in textile, clothing, and shoe factories. DUBOIS, *supra* note 19, at 128.

82. See JOSEPH B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 33 (1956); Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 AM. HIST. REV. 45, 49 (1987).

83. See Kaczorowski, *supra* note 82, at 51 (discussing the impact of Southern Black codes).

84. Freedmen's Bureau Act, 14 Stat. 173 (1866); Civil Rights Act, 14 Stat. 27 (1866).

85. See Mark Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause*, Dr. DuBois, and Charles Hamilton Houston, 74 J. AM. HIST. 884, 886 (1987).

of rights protected by the legislation: "the right to make and enforce contracts, to sue and be sued, and to give evidence, to inherit, purchase, sell, lease, hold, and convey real and personal property, and to full and equal benefit to all laws and proceedings for the security of person and property."⁸⁶ Section Seven of the Freedmen's Bureau Act restates this litany of rights.⁸⁷

Prior to the Reconstruction period, the civil rights field was dominated by state law, although Article IV of the Constitution prohibited states from discriminating against citizens of other states in the administration of these civil rights. The Comity Clause of Article IV provides that "the Citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States."⁸⁸ However, in 1866 Congress conferred more decision-making power regarding civil rights to the Federal Government with the passage of the Civil Rights Act.⁸⁹

Opponents of federal civil rights legislation claimed that in enacting these laws, Congress had exceeded the powers prescribed to it by the Constitution.⁹⁰ In response, Senator Trumbull and other Radical Republicans claimed that the Thirteenth Amendment's abolition of involuntary servitude granted Congress this power.⁹¹ They maintained that certain fundamental rights "belong[ed] to every man as a free man [and were protected] under the Constitution as it now exists. . . ."⁹² The argument was essentially that, if the Federal Government did not regulate and enforce civil rights in the South, freedmen would remain slaves in form if not in fact; once the former slave became a free man, he attained self-ownership and therefore was entitled to all the civil rights inherent in being a free individual.

86. CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866); see Tushnet, *supra* note 85, at 886.

87. Senator Trumbull presented the Freedmen's Bureau Bill to the Senate on January 5, 1866. CONG. GLOBE, 39th Cong., 1st Sess. 209-10 (1866).

88. U.S. CONST. art. IV, §2, cl. 1. The most oft-cited judicial definition of Article IV Privileges and Immunities appears in *Corfield v. Coryell*:

The right of a citizen of one State to pass through, or to reside in any other State . . . to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property . . . and an exemption from higher taxes . . . than are paid by other citizens of the State, may be mentioned as some of the particular *privileges and immunities* of citizens, which are clearly . . . fundamental; to which may be added the *elective franchise*, as regulated and established by the laws or constitution of the State in which it is to be exercised.

6 F. Cas. (C.C.E.D.Pa. 1823) (No. 3230) (emphasis added). Note that during the New Departure movement of the 1870s, woman suffragists challenged their second-class citizenship and demanded the franchise as a Privilege and Immunity of citizenship under Section One of the Fourteenth Amendment, but this argument was explicitly rejected by the Supreme Court. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874).

89. See Kaczorowski, *supra* note 82, at 54-55.

90. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1120 (1866) (comments by Rep. Rogers).

91. The House floor manager of the Civil Rights Act, James Wilson, stated that "[t]he possession of these rights by the citizen raises by necessary implication the power in Congress to protect them." CONG. GLOBE, 39th Cong., 1st Sess. 1118-1119 (1866). See HYMAN & WIECEK, *supra* note 17, at 386-404, 407; Kaczorowski, *supra* note 82, at 47-48, 60.

92. CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866).

Many members of Congress did not believe that the abolition of slavery had vested the power to regulate civil rights in the national government. President Andrew Johnson vetoed both civil rights bills for this reason.⁹³ In response to such concerns, the Radical Republicans took steps to protect Congress' power to regulate civil rights by amending the Constitution. John Bingham, a Republican from Ohio, was the primary drafter of Section One of the Fourteenth Amendment. While Bingham strongly advocated equal political and civil rights for Blacks, he believed that the Civil Rights Act of 1866 and Freedmen's Bureau Act could not be legally enforced without a constitutional amendment.⁹⁴ Republicans defined the Privileges and Immunities Clause of Section One as a reiteration of the rights set forth in the Reconstruction civil rights legislation.⁹⁵

C. CONSTITUTIONALIZING CIVIL RIGHTS—SECTION ONE OF THE FOURTEENTH AMENDMENT

As adopted, Section One of the Fourteenth Amendment reads as follows:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State 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.⁹⁶

The first sentence of Section One addressed the issue of national citizenship and overturned the Supreme Court's infamous *Dred Scott* decision.⁹⁷ In *Dred Scott*, the Court had ruled that even free Blacks were not citizens of the United States, posing the following question:

Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States . . .⁹⁸

93. President Johnson vetoed the Civil Rights Bill on March 27, 1866; the veto was overridden by the Senate on April 6, 1866, and by the House on April 9, 1866. CONG. GLOBE 39th Cong., 1st Sess. 1681, 1859, 1861 (1866). See JAMES, *supra* note 82, at 97-99, 189. President Johnson also vetoed the Freedmen's Bureau Bill. CONG. GLOBE, *supra*, at 915-17.

94. Bingham voted against the Civil Rights Bill for this reason. CONG. GLOBE, 39th Cong., 1st Sess. 1866, reprinted in THE RECONSTRUCTION AMENDMENT DEBATES 186 (Alfred Avins ed., 1967). See also JAMES, *supra* note 82, at 89, 189.

95. JAMES, *supra* note 82, at 161 (citing Author, *Article*, CINCINNATI COM., Aug. 3, 1866).

96. U.S. CONST. amend. XIV, §1.

97. 60 U.S. (19 How.) 393 (1857).

98. *Id.* at 403.

The Court's answer to this question was a resounding "no," holding that an individual state could not, by granting a slave his freedom, bestow upon him all the Privileges and Immunities of a citizen of the United States, thereby "cloth[ing] him with all the privileges of a citizen in every other State . . ." ⁹⁹ In other words, as long as a black man could be deprived of his self-ownership in any state in the Union, he could not be considered a citizen of the Union itself.

Section One of the Fourteenth Amendment addressed the issue by expressly granting state and national citizenship to "all persons born or naturalized in the United States."¹⁰⁰ The *Philadelphia American* underlined the importance of the citizenship issue in an editorial that urged ratification of the Amendment: "If there be one lesson written in bloody letters by the War, it is that the national citizenship must be paramount to that of the State."¹⁰¹ Since women had always been considered national citizens—even under the *Dred Scott* holding—it must be assumed that the drafters of Section One intended to include women within the broadly defined group entitled to national citizenship.

The second sentence of Section One delineates the basic civil rights to which national citizens are entitled.¹⁰² In addition, the Section creates a "floor" of basic rights to which all persons—citizens and aliens alike—are entitled, namely, fundamental Due Process and Equal Protection of the law.¹⁰³

Surprisingly, very little of the voluminous debate that accompanied the adoption of Section One even addressed the question of how the Amendment would affect women's civil rights.¹⁰⁴ However, in light of the contemporaneous advances in women's common law property rights through state legislation, it appears likely that, had Congress wanted to exclude women from coverage under Section One and thus deny women the civil rights of citizenship, it would have done so explicitly, as it did in crafting Section Two's denial to women of the right to vote.¹⁰⁵

99. *Id.* at 406.

100. U.S. CONST. amend. XIV, §1.

101. See Kaczorowski, *supra* note 82.

102. See *supra* note 96 and accompanying text.

103. Radical Republican Senator Jacob M. Howard described Section One protection of non-citizens:

The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying him the equal protection of the laws of the State.

CONG. GLOBE, 39th Cong, 1st Sess. 2765-66 (1866).

104. See Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1283 n.12 (1991).

105. See Nina Morais, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 YALE L.J. 1153 (1988).

IV. FIGHTING FOR THE POLITICAL RIGHTS OF WOMEN AND BLACK MEN IN THE POST-WAR ERA

At the end of the Civil War, the leaders of the Woman's Movement envisioned the creation of a "universal suffrage campaign" that would unite Blacks and women in a struggle to attain equal political rights—namely, the vote. The American Equal Rights Association (AERA) was formed to pursue that end.¹⁰⁶ However, the AERA was destined to have a short existence, and, as far as political rights were concerned, the alliance between the movements for sexual and racial equality was short-lived.

A. THE DISINTEGRATION OF A COALITION

Events in the State of Kansas illustrate how the theretofore harmonious union of former abolitionists and women's rights advocates abruptly ended. When amendments were offered at the 1867 Kansas constitutional convention to remove the words "white" and "male" from the state's suffrage qualifications, Republican Congressmen balked at the linkage of equal rights for women and Black men. Women, led by Susan B. Anthony and Elizabeth Cady Stanton, launched a campaign for woman suffrage in Kansas with no help from their former political allies; the state Republican party vigorously campaigned against them, while the national Republican organization offered no help or words of encouragement.¹⁰⁷ A similar scenario occurred during New York's 1867 constitutional convention.¹⁰⁸

Radical Republicans claimed that linking woman suffrage with the struggle to secure Black males' right to vote would reduce the likelihood of enfranchising former male slaves. Wendell Phillips, then head of the American Anti-Slavery Society, argued that the alliance "would lose for the Negro far more than we should gain for the woman."¹⁰⁹ He wrote: "As Abraham Lincoln said, one war at a time, so I say one question at a time. This hour belongs to the negro."¹¹⁰ In response to this contention, Elizabeth Cady Stanton inquired: "Do you believe the African race is composed entirely of males?"¹¹¹

106. The AERA was formed when the following resolution, presented by Susan B. Anthony, was unanimously adopted at the National Women's Rights Convention of 1866:

Whereas, By the act of Emancipation and the Civil Rights bill, the negro and woman now hold the same civil and political *status*, alike needing only the ballot; and whereas the same arguments apply equally to both classes, proving all partial legislation fatal to republican institutions, therefore, *Resolved*, That the time has come for an organization that shall demand Universal Suffrage, and that hereafter we shall be known as the "AMERICAN EQUAL RIGHTS ASSOCIATION."

STANTON, *supra* note 1, at 171-72.

107. See REMINISCENCES, *supra* note 5, at 245-58; DUBOIS, *supra* note 19, at 79-104; STANTON, *supra* note 1, at 229-68.

108. See DUBOIS, *supra* note 19, at 66-67, 87-90; STANTON, *supra* note 1, at 269-312.

109. JAMES, *supra* note 82, at 8 (citing Letter from Wendell Phillips to Elizabeth Cady Stanton (May 10, 1865)).

110. DUBOIS, *supra* note 19, at 59 (quoting Author, *American Anti-Slavery Anniversary*, STANDARDS, 2 (May 13, 1865). See generally, WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 136-39 (1988).

111. DUBOIS, *supra* note 19, at 60 (quoting Letter from Elizabeth Cady Stanton to Wendell

Despite Republican assertions to the contrary, it appears that Kansas voters were not necessarily more opposed to woman suffrage than they were to Black suffrage. With no support from the majority Republican party, approximately one-third of Kansas voters supported the enfranchisement of women in 1867, only a thousand fewer than those supporting suffrage for Blacks.¹¹² Anthony and Stanton claimed that the same group of voters supported both measures, despite the Democratic party's endorsement of woman's suffrage and its opposition to suffrage for Blacks.¹¹³ It seems unlikely that white males in the South would have preferred to enfranchise Black males rather than white women.¹¹⁴

Radical Republicans' sexism contributed to the party's ultimate abandonment of the Woman's Movement.¹¹⁵ They assumed that Black women's rights would be protected by newly-enfranchised Black men; the same reasoning justified denying rights to all women.¹¹⁶ Congressman Ben Wade asserted that women did not need the right to vote because they were in "high fellowship with those who do govern, who, to a great extent, act as their agents, their friends, promoting their interests in every vote they give, and therefore communities get along very well without conferring this right upon the female."¹¹⁷ Ironically, this same argument had been made during the antebellum period to justify the slaveowners' status as their slaves' legal guardians. Even so, Republicans acted upon the assumption that denying an individual's political rights on the basis of sex was less injurious than doing so on the basis of race.¹¹⁸

Phillips (May 25, 1865)).

112. Of 30,000 votes cast, 10,000 favored Black suffrage and 9,000 supported woman suffrage in the Kansas campaign. ADAMS, *supra* note 39, at 49.

113. During the Kansas campaign, Anthony and Stanton accepted funding from George Train, a prominent Democrat and vocal racist. The Radical Republicans denounced this alliance and called the suffragists themselves racists. See DUBOIS, *supra* note 19, at 93-100.

114. The opposite would seem to be the case. Later in the campaign, woman suffragists suggested that the votes of white women could serve as an "antidote" to dilute the effects of the Black man's vote (demonstrating that the tight alliance between abolitionists and women's rights advocates had disintegrated in more ways than one). However, following the passage of the Fifteenth Amendment, the South did not rush to enfranchise white women.

Sexism and racism were both powerful forces in the South. Speaking in opposition to the Nineteenth Amendment, a judge addressing the Alabama State Bar predicted that the ignorant Black woman voter "would unquestionably menace the domination of the White race." He did not discuss the potential countervailing effects of the white woman's vote. Hon. Emmet O'Neal, *The Susan B. Anthony Amendment*, 6 VA. L. REV. 338, 357 (1919).

115. Sexism here is broadly defined as the belief that the woman's place in society is limited to the sphere of domesticity, and that, as a class, women are unfit to participate in the civil and political realms of society.

116. At least one Black woman rejected this assumption. With regard to the issue, Sojourner Truth made the following statement:

I have a right to have just as much as a man. There is a great stir about colored men getting their rights, but not a word about the colored women; and if colored men get their rights, and not colored women theirs, you see the colored men will be masters over the women, and it will be just as bad as it was before.

STANTON, *supra* note 1, at 193.

117. CONG. GLOBE, 39th Cong., 2d Sess. 63 (1866); see NELSON, *supra* note 110, at 138.

118. NELSON, *supra* note 110, at 138-39 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1064

B. WOMEN'S OPPOSITION TO SECTION TWO OF THE FOURTEENTH AMENDMENT

Section Two of the Fourteenth Amendment punished states that disfranchised *male* voters by reducing the size of their Congressional delegation in Washington.¹¹⁹ It penalized no state for denying suffrage rights to *women*, and, for the first time, introduced the word "male" into the Constitution.¹²⁰ However, the Constitution was not a sex-neutral document before this time; at the time of the Constitution's adoption in 1789, women's exclusion from the realm of political and civil rights did not need to be formalized by the written word. The need to include the word "male" in the Fourteenth Amendment demonstrated that the Woman's Movement had begun to alter some of these assumptions.¹²¹

Elizabeth Cady Stanton and Susan B. Anthony believed that it was critical for women to claim their right to suffrage during Reconstruction—a radical period of Constitutional reform.¹²² Stanton and Anthony felt that if women could not seize this opportunity, their next chance for enfranchisement would lie many years in the future. Stanton emphasized this point in an 1866 letter to Radical Republican Gerrit Smith: "If that word 'male' be inserted, it will take us a century at least to get it out."¹²³

The suffragists' strong opposition to the inclusion of the word "male" in Section Two was directly at odds with their historic ties to the abolitionist movement and general (although certainly not monolithic) support for Blacks' equal rights. Until the ratification of the Fourteenth Amendment, women had considered Black men's legal status analogous to their own. However, when asked to postpone demands for their own equality and elevate Black men's political status above their own, white women leaders

(1866)). Feeling embittered and betrayed following the 1867 Kansas suffrage campaign, the leaders of the woman's movement wrote: "[W]e still wonder at the solid incapacity of all men to understand that woman feels the invidious distinctions of sex exactly as the black man does those of color . . . that she feels as keenly as man the injustice of disfranchisement." STANTON, *supra* note 1, at 265.

119. U.S. CONST. amend. XIV, §2.

120. *Id.*

121. In a letter to Elizabeth Cady Stanton, Senator Charles Sumner, a Radical Republican and former ally of the woman's movement, indicated that he "wrote over nineteen pages of foolscap to get rid of the word 'male' and yet keep 'negro suffrage' as a party measure intact; but it could not be done." STANTON, *supra* note 1, at 848. See DUBOIS, *supra* note 19, at 60.

122. See DuBois, *supra* note 78, at 844.

123. DUBOIS, *supra* note 19, at 61 (Letter from Elizabeth Cady Stanton to Gerrit Smith (Jan. 1, 1866)). Stanton's prediction that it would take years of effort to secure a woman's right to vote was accurate. Sixty years after the enactment of the Fourteenth Amendment, feminist Carrie Chapman Catt wrote:

To get that word, male, out of the Constitution, cost the women of this country 52 years of pauseless campaign; 56 state referendum campaigns; 480 legislative campaigns to get state amendments submitted; 47 state constitutional convention campaigns; 277 state party convention campaigns; nineteen campaigns to get suffrage planks in the party platforms; nineteen campaigns with nineteen successive Congresses to get the federal amendment submitted, and the final ratification campaign.

ADAMS, *supra* note 39, at 48.

like Anthony and Stanton refused. This tension split the Woman's Movement in half.

Lucy Stone and Henry Blackwell organized the more conservative branch of the Woman's Movement, the American Woman Suffrage Association (AWSA), which joined the Republican campaign to secure ratification of the Fourteenth Amendment as written. Although the group's ultimate objective remained woman suffrage, its members considered Black men's need for political equality more critical than women's during the Reconstruction era. They believed that, once Black men secured their rights, the Republican party would then pursue voting rights for women.¹²⁴ The Republicans never lived up to their promise.

A more radical organization, the National Woman's Suffrage Association (NWSA), under the leadership of Stanton and Anthony, continued to campaign actively for women's suffrage by launching a campaign in opposition to the Fourteenth Amendment. Stanton wrote:

I would call attention of the women of the nation to the fact that, under the Federal Constitution as it now exists, there is not one word that limits the right of Suffrage to any privileged class. The attempt to turn the wheels of civilization backward, on the part of Republicans claiming to be the liberal party, should rouse every woman in the nation to a prompt exercise of the only right she has in the Government, the right of petition.¹²⁵

Anthony and Stanton collected thousands of signatures on petitions demanding that ratifiers include woman suffrage in the Fourteenth Amendment, but their former allies in Congress offered little encouragement. Senator Charles Sumner, a leading Radical Republican, presented woman suffrage petitions to the Congress, but with a disclaimer: "[I]t was not judicious for [women] at this moment to bring forward their claims so as to compromise in any way the great question of equal rights for an enfranchised race now before Congress."¹²⁶ Democratic Congressmen often used the women's petitions and protests to embarrass the Republicans, but the Democrats did not make women's suffrage a plank in their party platform.¹²⁷ In the popular press of the day, the women's claims received little support. Typically, the *New York Tribune* suggested that "[t]he sure panacea for such ills as the Massachusetts petitioners complain of, is a wicker-work cradle and a dimple-cheeked baby."¹²⁸

124. See SARA M. EVANS, *BORN FOR LIBERTY* 124 (1989); DUBOIS, *supra* note 19, at 167.

125. REMINISCENCES, *supra* note 5, at 244 (citing Author letter in ANTI-SLAVERY STANDARD (Jan. 2, 1866)).

126. STANTON, *supra* note 1, at 100.

127. On January 23, 1866, Representative Brooks, a New York Democrat, presented petitions from Susan B. Anthony endorsing woman suffrage. During the debate for Black suffrage in the District of Columbia, Brooks presented an amendment to prohibit voting discrimination on the grounds of sex as well as color. When asked if he favored his own amendment, Brooks replied, "I am in favor of my own color in preference to any other color, and I prefer the white women of my country to the negro." *Id.* at 100.

128. *Id.* at 101.

C. STRATEGIC DECISIONS FOR A "NEW DEPARTURE": CIVIL VERSUS POLITICAL RIGHTS

Following the passage of the Fourteenth Amendment, the Woman's Movement shifted its focus from a state campaign for civil rights to a national campaign for political rights. The pointed exclusion of women from the political guarantees offered to Black men by Section Two of the Fourteenth Amendment, and later by the Fifteenth Amendment, solidified women's status as the only remaining class of adult United States citizens denied all political rights.

The new campaign linked the achievement of political rights to the ongoing demands for equal civil status. The theory was that no government, state or national, would fully guarantee a woman's natural or civil rights unless she had a political right to participate in that government—unless she had the right to vote.¹²⁹ A second rationale extended the logic of the married women's property acts to assert that since the legal disabilities associated with marriage had begun to disintegrate, married women theoretically were independent citizens—not the dependents of their husbands. As autonomous individuals then, no logical reason remained to prevent women from voting. At the seventh annual convention of the AWSA, the Reverend Charles G. Ames made the following statement:

At present, the position of woman in the State is false, contradictory and uncomfortable. She has ceased to be a nobody; but she is not yet conceded to be somebody. As she has gained many rights which were once denied, the old theory which made her a slave is overthrown; as she has not gained the absolute and chartered right of self-government, the new theory of her equality is not yet established. Of that equality suffrage is the symbol
¹³⁰

Based on these theories, the Movement determined to secure the right of suffrage for women.¹³¹ The Movement adopted Anthony's proposed

129. The same rationale had been advanced during the Fourteenth Amendment debates to secure suffrage for Black men. See CONG. GLOBE, 39th Cong., 1st Sess. 703-04 (1866) (statements by Sen. William Pitt Fessenden).

130. STANTON, *supra* note 1, at 845.

131. Addressing a group of suffragists at a Washington convention, Susan B. Anthony identified three directions in which the movement could proceed:

The first is for the legislatures of the various states to add women to those already voters. Before the war this was the only way thought of, and during all those years we petitioned the legislatures to submit an amendment striking the word "male" from the suffrage clauses of the State constitutions. The second method is for Congress to submit to the several legislatures a proposition for a Sixteenth Amendment. The third plan is for women to take their right under the Fourteenth Amendment of the National Constitution.

FREEDOM, FEMINISM, AND THE STATE, *supra* note 29, at 65-66. Anthony advocated the third approach, because, as she accurately predicted:

[I]f we once establish the false principle, that United States citizenship does not carry with it the right to vote . . . there is no end to the petty freaks and cunning devices that will be resorted to, to exclude one and another class of citizens from the right of suffrage.

Id. Civil rights cases upholding various "cunning devices" used to disenfranchise Blacks often

strategy, which became known as the "New Departure". Throughout the 1870s, women claimed suffrage as a Privilege and Immunity guaranteed under Section One of the Fourteenth Amendment.¹³² In 1871 and 1872, suffragists courted the attention of the judiciary by attempting to register and vote in state and federal elections.¹³³ The first test case involved a group of approximately seventy women who went to the polls in the District of Columbia and demanded to vote on April 20, 1871.¹³⁴ When denied the right to do so, they sued the Board of Inspectors, challenging the statute restricting suffrage to males as a violation of the Fourteenth Amendment. This suit failed, as did most of the New Departure cases.¹³⁵

The New Departure movement saw an inextricable link between civil rights, as set forth in Section One of the Fourteenth Amendment, and the political rights of citizenship—most importantly the vote—which were guaranteed to Black men but not to women by Section Two of the Fourteenth Amendment. This link, however, was not widely acknowledged by the male political and juridical leaders of the day.¹³⁶ The New Departure ended in 1873 when the Supreme Court, in *Minor v. Happersett*, held that the Privileges and Immunities guaranteed by Section One of the Fourteenth Amendment

cited precedents set by courts denying women's right to vote under the Fourteenth Amendment. See ADAMS, *supra* note 39, at 66.

132. Initially, suffragists petitioned Congress for legislation that explicitly guaranteed Fourteenth Amendment rights. Similar arguments for suffrage had been made on the behalf of Black men with respect to both the Thirteenth Amendment and Article I, § 4 of the Constitution. Ultimately, all three of these demands failed. See STANTON, *supra* note 1, at 443-448; JAMES, *supra* note 82, at 69. Following this effort, the suffragists shifted their attention from the legislature to the judiciary.

133. The most prominent of the New Departure litigants was Susan B. Anthony. Unlike the majority of the female parties to these lawsuits, Anthony appeared as a defendant. She persuaded an election official to allow her to register and vote in the November 1872 elections, and later she was arrested for the criminal charge of illegal voting. Anthony appealed to the jury during her trial: "We ask the juries to fail to return verdicts of 'guilty' against honest, law-abiding, tax-paying United States citizens, as it is their duty to do. . . ." STANTON, *supra* note 1, at 646. The trial judge refused to give Anthony's case to the jury and directed a guilty verdict as a matter of law. *Id.*

134. See STANTON, *supra* note 1, at 587-99.

135. According to the suffragists, at least two judges did recognize the right to vote under the Fourteenth Amendment—Howe, of the Wyoming territory, and Underwood of Virginia. STANTON, *supra* note 1, at 640.

136. In an effort to defeat the Civil Rights Bill, Democrats argued that the term "civil rights" would include the right to sit on a jury, to attend desegregated schools, to marry interracial, and the right to vote. See CONG. GLOBE, 39th Cong., 1st Sess. 606 (1866), *reprinted in THE RECONSTRUCTION DEBATES*, *supra* note 94, at 140. The Republicans countered that rights such as voting and attending public schools were social or political, and as such not covered by the bill. See CONG. GLOBE, 39th Cong., 1st Sess. 632 (1866), *reprinted in THE RECONSTRUCTION DEBATES*, *supra* note 94, at 141 (statements by Rep. Moulton); CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866), *reprinted in THE RECONSTRUCTION DEBATES*, *supra* note 94, at 163 (statements by Rep. Wilson). To clarify this issue, the Republicans eventually amended the Civil Rights Bill to verify that "nothing in this act shall be so construed as to affect the laws of any State concerning the right of suffrage." CONG. GLOBE, 39th Cong., 1st Sess. 1162 (1866), *reprinted in THE RECONSTRUCTION DEBATES*, *supra* note 94, at 171. A similar debate raged over the meaning of Privileges and Immunities under the Fourteenth Amendment. CONG. GLOBE, 39th Cong., 1st Sess. 2466-67; JAMES, *supra* note 82, at 163.

did not encompass voting rights. The New Departure's strategic decision to link the political right of suffrage to the civil rights of citizenship had ended in failure.¹³⁷

In December 1872, Virginia L. Minor challenged Missouri's constitutional restriction of voting rights to males as a violation of the Fourteenth Amendment. Although the Court recognized that women were United States citizens, it held that suffrage did not qualify as a Privilege or Immunity of that citizenship.¹³⁸ Chief Justice Waite found that the Fourteenth Amendment did not create any new Privileges and Immunities for the citizen; it merely "furnished an additional guaranty for the protection of such as he already had."¹³⁹ Because no state had allowed all citizens to vote at the time the Constitution was ratified, the Court reasoned that suffrage could not be a Privilege or Immunity of citizenship.¹⁴⁰

Minor severed the right to vote from the affirmative statement of national citizenship in the Fourteenth Amendment, and in doing so, effectively placed suffrage beyond the reach of the enforcement powers of the Federal Government, except as narrowly defined in the Fifteenth Amendment. The decision in *Minor*, in addition to denying suffrage to women, laid the groundwork for cases restricting the right of suffrage for Black men and women. Because the federal power to regulate suffrage was strictly limited by the words of the Fifteenth Amendment, courts upheld white primaries, poll taxes, literacy tests, and other devices used as surrogates for race.¹⁴¹

Women's rights advocates compared the Supreme Court's holding in *Minor* to that in *Dred Scott*.¹⁴² *Minor* constitutionalized women's status as

137. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874). The United States Supreme Court never addressed the question of whether Privileges and Immunities encompassed voting rights for Black males; the ratification of the Fifteenth Amendment in 1870 negated the need to do so. State courts did address this issue, with varying results. In *White v. Clements*, 39 Ga. 232 (1869), the Georgia Supreme Court held that the right to hold political office was guaranteed by the Privileges and Immunities and Equal Protection Clauses of the State Constitution. Dicta in Alabama and Indiana Supreme Court cases also suggested that Section One of the Fourteenth Amendment conferred political rights. See *Green v. State*, 58 Ala. 190, 196 (1877); *State v. Gibson*, 36 Ind. 389, 393 (1871). But see *Smith v. Moody*, 26 Ind. 299, 306 (1866) (citizenship confers civil, not political, rights).

138. *Minor* asserted that women had always been citizens, even before the enactment of the Fourteenth Amendment. 88 U.S. at 165-69.

139. 88 U.S. at 171.

140. *Id.* at 172-173.

141. See DuBois, *supra* note 78, at 860 (citing *United States v. Reese*, 92 U.S. 214 (1875) and *United States v. Cruikshank*, 92 U.S. 542 (1875)).

142. The Declaration of Rights for Women, delivered by Susan B. Anthony on behalf of the AWSA at the nation's Centennial celebration in 1876, criticizes the Supreme Court for its rulings in *Dred Scott* and *Minor*:

The judiciary above the nation has proved itself but the echo of the party in power, by upholding and enforcing laws that are opposed to the spirit and letter of the constitution. When the slave power was dominant, the Supreme Court decided that a black man was not a citizen, because he had not the right to vote; and when the constitution was so amended as to make all persons citizens, the same high tribunal decided that a woman, though a citizen, had not the right to vote. Such vacillating interpretations of constitutional law unsettle our faith in judicial authority, and undermine the liberties of the whole people.

second-class citizens, much like *Dred Scott* had constitutionalized Blacks' status as non-citizens approximately twenty years before. Just as with *Dred Scott*, the effects of *Minor* ultimately would only be reversed by constitutional amendment. The Nineteenth Amendment finally gave women the right to vote in 1920.¹⁴³

V. FOURTEENTH AMENDMENT GENDER JURISPRUDENCE

The Supreme Court observed in *Frontiero v. Richardson* that "throughout much of the nineteenth century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes."¹⁴⁴ Despite this history, with respect to the application of the Equal Protection Clause, the judiciary has applied a lower level of scrutiny to gender classifications than it has to classifications based upon race. The Supreme Court has held that race is a "suspect" basis for classification by the state.¹⁴⁵ Consequently, the courts evaluate the legitimacy of such classifications by applying a standard of "strict scrutiny" under the Equal Protection Clause of the Fourteenth Amendment.¹⁴⁶ In contrast, gender has been considered merely a "quasi-suspect" classification, and as such receives only "intermediate" scrutiny under the Equal Protection Clause.¹⁴⁷ As a result of this historical jurisprudential anomaly, women have been deprived of equal opportunity in jury service, education, employment, and a host of other arenas.

A. TRIAL BY JURY

In 1879, in *Strauder v. West Virginia*, the Supreme Court held that the exclusion of Black men from jury service violated the Equal Protection guarantee of the Fourteenth Amendment.¹⁴⁸ The Court's analysis in *Strauder* ar-

Susan B. Anthony & Elizabeth Cady Stanton, *Declaration of Rights for Women*, in SCOTT & SCOTT, *supra* note 46, at 90, 94.

143. U.S. CONST. amend. XIX.

144. 411 U.S. 677, 685 (1973).

145. *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944) (applying strict scrutiny to the racial classification excluding Japanese citizens during World War II); *Loving v. Virginia*, 388 U.S. 1 (1967) (applying strict scrutiny to laws forbidding miscegenation).

146. If the state chooses to regulate on the basis of a suspect class it must do so to further a compelling state interest, and it must utilize the least restrictive means to accomplish its goal. *See, e.g.*, *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 357 (1978).

147. *See Frontiero*, 411 U.S. 677; *Craig v. Boren*, 429 U.S. 190 (1976). Other quasi-suspect categories include alienage, *see Graham v. Richardson*, 403 U.S. 365 (1971) (holding that states cannot deny welfare benefits to aliens), and illegitimacy, *see Levy v. Louisiana*, 391 U.S. 68 (1968) (holding that law denying illegitimate children the right to recover benefits for mothers' wrongful death violates Equal Protection Clause). For an overview discussion of Equal Protection Clause analysis and varying levels of scrutiny, *see generally*, GERALD GUNTHER, *CONSTITUTIONAL LAW* 586-93, 621-87 (11th ed. 1985).

148. 100 U.S. 303, 310 (1879). Although most of the Fourteenth Amendment debate centered around the Privileges and Immunities Clause, *Strauder* focused on Equal Protection. Technically, the Equal Protection Clause applies to all persons, not just citizens; *Strauder* did not hold that non-citizens were entitled to serve on a jury. However, defining jury service as one of the Privileges and Immunities of citizenship also would have been problematic, since

bitrarily distinguishes between sex and race discrimination; yet acknowledges a link between jury service and the rights inherent in citizenship:

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority.¹⁴⁹

The Court does not explain why this logic does not apply to women, who were clearly also recognized as citizens. Furthermore, the Court completely ignores the implications of its decision for Black women.

The *Strauder* decision rested on a citizen-defendant's right to be tried by a jury of his peers, rather than a citizen's right to sit on a jury:

The right to a trial by jury is guaranteed to every citizen of West Virginia by the constitution of that State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is of . . . persons having the same legal status in society as that which he holds.¹⁵⁰

Again, the Court's reasoning would seem to apply equally well to a ban on women in the jury box. Instead, the *Strauder* Court effectively held that the Fourteenth Amendment only protected against discrimination on the basis of race or color.¹⁵¹ At the time *Strauder* was decided, women's rights advocates were vigorously demanding the right to be tried by a jury of their peers, as was evidenced by this clause of the Declaration of Rights for Women, delivered at the 1876 Centennial Celebration:

The Right of trial by a jury of one's peers was so jealously guarded that States refused to ratify the original Constitution until it was guaranteed by the Sixth Amendment. And yet the women of this nation have never been allowed a jury of their peers—being tried in all cases by men, native and foreign, educated and ignorant, virtuous and vicious. Young girls have been arraigned . . . for the crime of infanticide; tried, convicted, and hanged . . . while no woman's voice could be heard in their defense. . . .¹⁵²

jury service was generally considered to be a political, rather than a civil, right. See CONG. GLOBE, 39th Cong., 1st Sess. 632 (1866); CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866); CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866) (debate during discussion of the Civil Rights Act over whether jury is civil or political right). Cf. Tushnet, *supra* note 85, at 887 (arguing that the right to sit on a jury should be considered a civil right, because the right to offer testimony may be worthless if the testimony will only be heard by white jurors). Alternatively, Tushnet argues that "[t]he adoption of the Fifteenth Amendment essentially eliminated the need to distinguish between civil and political rights. Once equality with respect to the core political rights was guaranteed, it was pointless to allow discrimination with respect to rights that were ambiguously political." *Id.* at 887. The same argument can be made for extending other political rights to women after the passage of the Nineteenth Amendment. See Amar, *The Bill of Rights*, *supra* note 73, at 1202-03.

149. 100 U.S. at 308.

150. *Id.*

151. *Id.*

152. *Declaration of Rights for Women*, in SCOTT & SCOTT, *supra* note 46, at 91. Even during

In the mid-twentieth century, 21 states still barred women from jury service. Some progress had been made by 1961: only three states explicitly banned women from the jury box,¹⁵³ but eighteen states prevented their participation indirectly by allowing automatic exemptions for women.¹⁵⁴ The Supreme Court did not find the systematic exclusion of women from juries to be unconstitutional until 1975, in *Taylor v. Louisiana*.¹⁵⁵ Even this decision was based upon the rights of criminal defendants; it did not explicitly recognize a woman's right to sit on a jury. Not until 1994 did the Supreme Court hold that the use of peremptory challenges made on the basis of gender violates the Equal Protection Clause of the Fourteenth Amendment.¹⁵⁶ The use of peremptory challenges to exclude potential jurors on the basis of race was declared unconstitutional in 1986.¹⁵⁷

B. THE RIGHT TO BE A MEMBER OF A PROFESSION

In a second early interpretation of the Fourteenth Amendment, the Supreme Court rejected the idea that the right to practice law in a state court was a Privilege or Immunity of United States citizenship. *Bradwell v. Illinois* concerned the case of Myra Bradwell, the editor of the Chicago *Legal News*.¹⁵⁸ Bradwell passed the Illinois bar examination in September of 1869 and applied for admission to the state bar, but was rejected because she was a woman.¹⁵⁹ The Illinois Supreme Court had determined that Myra Bradwell could not become a member of the bar because she was married, and therefore would not be bound by any contracts, including those between

the pre-abolition stage of the Woman's Movement, Sarah Grimke had made similar demands:

In ecclesiastical, as well as civil courts, woman is tried and condemned, not by a jury of her peers, but by beings, who regard themselves as her superiors in the scale of creation. Her condition resembles, in some measure, that of the slave, who, while he is denied the advantages of his more enlightened master, is treated with even greater rigor of the law.

Grimke, *supra* note 20, at 77. See also HARRIET TAYLOR MILL, *supra* note 30, at 97.

153. See Carol Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN'S L.J. 59, 60 n.5 (1986).

154. See *Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (upholding unanimously a state jury selection process whereby women were automatically excluded from jury service unless they affirmatively waived the exemption).

155. 419 U.S. 522 (1975).

156. *J.E.B. v. Alabama ex rel T.B.*, 114 S.Ct. 1419 (1994). In *J.E.B.*, the Court notes that "with respect to jury service, African-Americans and women share a history of total exclusion, a history which came to an end for women many years after the embarrassing chapter in our history came to an end for African-Americans." *Id.* at 1425.

157. *Batson v. Kentucky*, 476 U.S. 79 (1986). See Note, *Beyond Batson: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920 (1992) (arguing that, because discrimination on the basis of race and gender shares a common history in the jury box, gender-based peremptory challenges violate the Equal Protection Clause).

158. 83 U.S. (16 Wall.) 130 (1872).

159. The Supreme Court decided *Bradwell* within fourteen months of the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 404 (1873). At least one historian has suggested that the narrow interpretation of Privileges and Immunities with respect to butchers' choice of occupation in *Slaughterhouse* may have been influenced by the Supreme Court's realization that a broad interpretation would necessarily change the status of women. See Wilson, *supra* note 67, at 128.

attorney and client. Bradwell argued that her right to pursue an occupation was a Privilege and Immunity of her citizenship guaranteed by the Fourteenth Amendment.¹⁶⁰ She maintained unsuccessfully that, while state legislatures could constitutionally regulate admission to the bar, they could not exclude an entire class of citizens from it.¹⁶¹

VI. CONCLUSION

Sexism and racism in American society share many common philosophical, historical, and legal roots. Both have resulted in the deprivation of the civil and political rights of United States citizens. Therefore, classifications on the basis of race and gender should both be subjected to strict scrutiny by the courts. If the current distinction between gender and race has any logical basis at all, it apparently stems from the subjective belief that sex discrimination is somehow less injurious to its victim than is discrimination on the basis of race. Women of all races would probably dispute this conclusion; in any event, it is insufficient to support Constitutional interpretation.

The abhorrent treatment of women under the common law and statutory law of the United States should compel the recognition of gender as a suspect class under the Equal Protection Clause of the Fourteenth Amendment; as such, the Supreme Court should evaluate gender classifications under a standard of strict scrutiny.

160. 83 U.S. at 133-134.

161. *Id.* at 135.

