

# The Winding Road Toward Equality for Women in the United States

**Diane P. Wood**

Circuit Judge, U.S. Court of Appeals for the 7<sup>th</sup> Circuit  
Senior Lecturer in Law, The University of Chicago Law School

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## **INSTITUTE OF DEVELOPMENT STUDIES KOLKATA**

**Calcutta University Alipore Campus (Block A, 5th Floor)  
1 Reformatory Street, Kolkata - 700 027**

**Phone : +91 (33) 2448-1364/8178, Fax : +91 (33) 2448-1364**

**e-mail : [idsk1@vsnl.net](mailto:idsk1@vsnl.net), Website : [www.idsk.org](http://www.idsk.org)**

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Today, the United States prides itself on having one of the world's most open societies: a society where not only the letter of the law, but also the reality on the ground, does not permit discrimination or disadvantage for any group on the basis of factors like race, national origin, religion, disability, and of course sex. As a description of the goal to which we aspire, this statement is reasonably accurate. Reality, of course, is somewhat more complex. If we focus particularly on the condition of women in the United States, history tells a story of both achievements and setbacks. To the extent that we have approached the ideal of true equality both of opportunity and result, this has come about through the tireless efforts of reformers from the earliest days of the country. Even now, at a time when formal legal entitlements have never been better, there is much more work to be done in order to transform the paper promises into day-to-day experience. This paper offers a brief overview of the history and development of the laws relating to women's rights in the United States and then discusses the most important particular areas in more detail.

## I. Historical Background: Colonial Period to Post-World War II

Putting to one side the centuries during which North America was home to hundreds of indigenous groups, the modern history of what became the United States began with the arrival of European settlers in the seventeenth century. Although they came from many different European countries, the dominant group, and the group who gave the new territory its laws, hailed from England. For the most part, they brought with them the common law of England, by which I mean the unwritten, judge-made law that had evolved in the royal courts roughly from the time of Henry II (who reigned from C.E. 1154 to 1189) forward. To a certain extent, they also imported English legislation, but it was the common law, and its complementary system of jurisprudence, equity, that had the greatest effect on the status of women.

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It would be well beyond the scope of this paper to try to detail all of the ways in which the common law distinguished between men and women, usually to the detriment of women. A few examples suffice to make the point. For a long time, women were entirely invisible to the law: a minor girl was under the guardianship of her father or nearest male relative; an unmarried woman continued to be under the guardianship of her father or nearest male relative; and a married woman's legal identity merged into that of her husband. Until very late in English legal history (well past the time of American independence), a married woman was labelled a *feme covert* (from the Law French that was used in English courts for centuries after the Norman Conquest of 1066). The term referred to the legal disabilities of a married woman, which included things like the lack of capacity to contract, to own property in her own name, to manage a business, to write a will, or to sue without her husband's permission.<sup>1</sup> As the 18<sup>th</sup> century Enlightenment and the 19<sup>th</sup> century Industrial Revolution proceeded, the status of single adult women improved somewhat. They were re-labelled with the term *feme sole*, and over time they were largely freed of the legal disabilities that were still imposed on their married sisters.

An important Supreme Court decision from 1872 reflects just how scrupulously the highest court in the United States followed these restrictions. The case is called *Bradwell v. Illinois*,<sup>2</sup> and it involved the efforts of a married woman named Myra Bradwell to be admitted to practice law before the Supreme Court of Illinois (the highest court of that state). Although no one questioned Bradwell's knowledge of the law (which she had learned with the help of her husband, who was an attorney), the Illinois Supreme Court denied her application solely because she was a married woman. As such, she could not enter into contracts, and, the Illinois court reasoned, this implied in turn that she could not practice law. How, for example, could she even enter into a binding contract of engagement with a client?

Bradwell, hoping to overturn this decision based either on the "Privileges and Immunities" or "Equal Protection" clauses of the then-new Fourteenth Amendment to the U.S. Constitution, took her case to the U.S. Supreme Court. She lost. Nothing in the new amendment, the Court ruled, affected the right of the State to decide on the qualifications of its lawyers. One member of the Court, Justice Joseph P. Bradley, wrote separately to express his agreement with the Illinois court. His opinion is a remarkable document from our perspective today. He asserted 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.”<sup>3</sup> Apparently the State of Illinois was not persuaded by these sentiments. After Bradwell failed in her effort to achieve change through constitutional litigation, efforts turned to the legislative arena. In 1873, the year after *Bradwell v. Illinois* was decided, the Illinois General Assembly passed a law that lifted the pertinent disabilities from married women and thereby enabled Alta May Hulett to become the first woman admitted to practice in the State.

The sorry condition of married women, at least in the eyes of the law, is reflected somewhat amusingly in the list of areas that fell within the jurisdiction of the equity courts. Charles E. Phelps, writing in 1894, summarized the heads of equity jurisdiction in a book called *Juridical Equity Abridged*.<sup>4</sup> Some of the topics covered in the book involved substantive law, such as accident, mistake, fraud, and trusts; some involved remedies, such as specific performance, accounting, interpleader (a procedural device for gathering together large numbers of interested parties in a single lawsuit), and bills of peace; and some involved the status of certain persons, including “infants, persons of unsound mind, and *married women*.”<sup>5</sup> Each of the latter groups were thought to need special protection under the law, and were regarded as incapable of acting independently.

By the time the twentieth century had dawned, most states in the United States had abandoned these formal restrictions on women’s activities, but there was nothing at the constitutional level that had required this to happen. To the contrary, a myriad of restrictions impeding women’s ability to participate in civil society still existed. Furthermore, the laws reflected profound ambivalence about the question of special treatment or consideration for women. This debate – to what extent is the “equality” model the correct one, and to what extent should and must society take into account women’s special needs – continues to this day.

Most people would date the beginning of the modern era in women’s rights in the United States with the 1848 Seneca Falls Women’s Rights Convention. The centerpiece of the Convention was a Declaration of Sentiments, which had been drafted by Elizabeth Cady Stanton, a giant of the women’s suffrage movement in the United States. At the Convention, a hundred men and women signed the Declaration, although in the wake of a torrent of ridicule after its results became public, a few people withdrew their signatures. No less a figure than Frederick Douglass, the well-known African-American abolitionist, had this to say: “A discussion of the rights of animals would be regarded with far

more complacency by many of what are called the wise and the good of our land, than would be a discussion of the rights of women.”<sup>6</sup> The Declaration is fascinating, however, for the light it throws on the problems its nineteenth-century drafters identified. Among the complaints it listed were the following: women had been denied the right to vote; married women were “civilly dead”; women had no rights to their own property, even wages; the laws of divorce and child custody gave “all power” to the man; many fields of employment were closed to women; “all colleges” and educational opportunities were closed to women; and women could hold only subordinate positions in the Church.<sup>7</sup>

In the years that followed Seneca Falls, women were active in the movement to abolish slavery. After the Civil War finally resolved that contentious issue, the Congress prepared a package of amendments to the U.S. Constitution that would ensure that slavery would be permanently banned and that the former slaves would be able to take their place in society. One part of that package was the proposed Fifteenth Amendment to the Constitution, which as enacted says that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” The women who had worked so hard for abolition of slavery campaigned hard – but eventually unsuccessfully – to have the word “sex” added to the text of this amendment. They did so because it was still up to each State to decide who would be enfranchised, and most states still restricted that right to males (sometimes even property-owning males). Thus, women in all but a handful of States still lacked the fundamental right to vote by the end of the nineteenth century, at the same time as the Supreme Court in cases like *Bradwell* was leaving the States free to enact legislation that differentiated among people on the basis of gender. Almost always, this left women in a disadvantaged position.

One other Supreme Court decision suffices to show where women’s rights stood in the United States prior to the post-World War II period. The case, known as *Goesaert v. Cleary*,<sup>8</sup> was about the right of women to serve as bartenders in establishments not owned by their husbands or their fathers. A Michigan law stated that no woman could obtain a bartender’s license unless she was the wife or daughter of the male owner of a licensed liquor establishment. When Ms. Goesaert challenged that law on the theory that it conflicted with the command of the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court brushed off her challenge as so trivial as hardly to be worth discussion. Justice Felix Frankfurter breezily wrote, “Beguiling as the subject is,

it need not detain us long. To ask whether or not the Equal Protection of the Laws Clause of the Fourteenth Amendment barred Michigan from making the classification the State has made between wives and daughters of owners of liquor places and wives and daughters of non-owners, is one of those rare instances where to state the question is in effect to answer it.”<sup>9</sup> The Court assumed that “Michigan could, beyond question, forbid all women from working behind a bar.”<sup>10</sup> It also found the line between women whose husbands or fathers ran the bar and all other women to be a perfectly rational one, if the legislature wanted to address “the moral and social problems” that (it thought) women would face in such a line of business.<sup>11</sup>

## **II. Federal Laws Protecting Women’s Rights**

By the early 1960s, much of this was about to change. The remainder of this paper considers the laws addressing women’s rights at both of the major levels of the U.S. system: first the federal laws, both at the constitutional and the statutory level; and second, the state laws. Although there is some overlap between the topics covered at the federal and the state levels, in general one can say that federal law dominates the right of any kind of legislative body – from Congress down to the town council – to draw lines on the basis of sex, whether for a discriminatory purpose or for a protective purpose. Federal law also takes primacy in such areas as employment rights, sexual harassment in the workplace or in an educational institution, some basic parental rights, reproductive rights, and rights to define one’s own family. State law, however, is the primary source of family law, inheritance law, educational systems, criminal law, and the laws affording protection against domestic violence. This section of the paper covers all areas of federal law, while Section III addresses the state law fields.

### *A. Constitutional Law*

#### *1. Equal Protection*

*Generally.* The U.S. Constitution contains two guarantees of equal protection to all persons, one explicit and the other implicit. The explicit guarantee appears in the Fourteenth Amendment to the Constitution (one of the three amendments passed immediately after the American Civil War). It says, in pertinent part:

... [N]or shall any State ... deny to any person within its jurisdiction the equal protection of the laws.<sup>12</sup>

A few things are notable about this brief passage. First, it is addressed to

*state* action, not to private acts that may disadvantage some one, or some group. Private action is, for the most part, addressed by state law rather than federal law in the United States. Second, the text speaks about protection of *persons* – not men, not citizens, not any other restricted group. Thus, despite the historical fact that the Amendment was passed with the plight of the former African slaves primarily in mind, it has always been understood as having a much broader application. Finally, the Amendment calls for the *equal* protection of the laws. In itself, it does not establish any minimum standard of treatment that the State must accord to persons subject to its jurisdiction. It must only treat everyone the same. The political theory behind this can be traced all the way back to the Federalist Papers and the writing of the U.S. Constitution: the assumption was that the majority would, through democratic processes, establish satisfactory minimum standards for society, and so all that was needed was to assure that this majority would be forced to extend those benefits to all others in society as well.

Nothing in the Fourteenth Amendment addresses obligations of the federal government, as opposed to the State governments at all levels. In 1954, however, in one of the companion cases to the famous *Brown v. Board of Education* decision,<sup>13</sup> which held that segregation of public school students on the basis of race violated the Constitution, the Court addressed the situation of the federal government. The case was called *Bolling v. Sharpe*,<sup>14</sup> and it concerned *de jure* segregation by race of public school students in the District of Columbia, which for historical reasons is not a State, but instead is a federal enclave. The Supreme Court acknowledged that the Fourteenth Amendment did not apply to the District of Columbia, but it found that the Due Process Clause of the Fifth Amendment to the Constitution (which has always applied to the Federal Government) contained within itself the same equal protection principle that the Fourteenth Amendment articulated. The end result is that no matter what the level of government, the U.S. Constitution forbids laws or any other public actions that deprive persons of equal protection.

One other background piece of U.S. constitutional law is necessary before one can appreciate the evolution of the way these standards apply to sex discrimination. Recall that in *Goesaert*, the Supreme Court found a “rational basis” for the law in question. This is the most lenient form of scrutiny the Court will give to state laws; essentially, if there is any conceivable legitimate rationale for the law (whether or not the legislative body was consciously aware of that rationale), the Court will uphold the law. In all but a very small number

of areas, this is the applicable test. The alternative, at the other end of the spectrum, is so-called "strict scrutiny." Under strict scrutiny, the Court asks whether there is a compelling need for the classification in question, and whether the State has adopted the measure that has the least restrictive effect on the individual's rights. Even though the Supreme Court has cautioned that it is wrong to assume that strict scrutiny is "fatal in fact" to the validity of a law, it remains true that it is often impossible to point to a sufficiently compelling justification. Laws drawing lines on the basis of race are the best example of the kind that will receive strict scrutiny. It is easy to see why, if the law is intended to disadvantage one racial group, as was the case prior to the civil rights revolution in the United States of the 1960s. During the so-called Jim Crow era, laws forbade African-American children from attending certain schools; from swimming in public pools; from using public parks; and from enjoying a wide range of public services.

Those laws, thankfully, are a thing of the past. Today the Court faces a more difficult set of questions that will be very familiar to an Indian audience: when, if ever, is it permissible to draw lines on racial ground with the intent of benefiting a disadvantaged group? In the United States, we call this "affirmative action." It is something that comes up when women are concerned just as it arises when racial or ethnic measures are at issue. Whether the motive is benign or invidious, the Supreme Court has held that racial classifications must be justified using strict scrutiny; thus, the government has the burden of proving that there is a compelling need for the law and that no less restrictive alternative will suffice.

Over the years, intermediate standards have also arisen, and we shall see that it is one of those standards that now applies to laws relating to women. This is of critical importance, because the standard of review that applies often dictates the outcome of the case. If it were enough to identify a casual assumption or stereotype about the differences between men and women in order to uphold a discriminatory law, then most laws with gender classifications would be upheld; if, instead, the proponent of the law must explain exactly why it is that women cannot be treated equally, the number of areas where different treatment can be justified shrinks considerably.

Time does not permit a full review of the Supreme Court's sex discrimination jurisprudence, but some examples will provide a good idea of its breadth at this point. The rule of law that the Court applies to these cases was best summarized in a 1996 decision striking down the State of Virginia's operation

of a single-sex college, the Virginia Military Institute.<sup>15</sup> As Justice Ruth Bader Ginsburg (herself a pioneer in the women's rights movement) wrote for the Court in that case,

We note, once again, the core instruction of this Court's pathmarking decisions in *J.E.B. v. Alabama ex rel. T. B.*, ... and *Mississippi Univ. for Women*, ... : Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action.

Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, "our Nation has had a long and unfortunate history of sex discrimination." ... Through a century plus three decades and more of that history, women did not count among voters composing "We the People"; not until 1920 did women gain a constitutional right to the franchise.... And for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any "basis in reason" could be conceived for the discrimination.<sup>16</sup>

Justice Ginsburg went on to say that "[s]ince [a key 1971 decision], the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature: equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."<sup>17</sup> With these ideas in mind, we are ready to turn to some key examples of the application of the constitutional rules forbidding the government to discriminate on the basis of sex.

*Employment.* Although most U.S. law concerning sex discrimination in employment is statutory, there are a few cases that have been decided at the constitutional level. One came out unfavorably to women, although it applied an established principle about the scope of the Equal Protection Clause. The case was *Personnel Administrator of Massachusetts v. Feeney*,<sup>18</sup> and it raised the question whether a Massachusetts law that gave an absolute hiring preference for military veterans in filling state civil service jobs violated the rights of women, because of the obvious fact that hardly any women were military veterans. The Court held that the state law was valid, notwithstanding its clear

discriminatory impact. Unequal impact, it explained, does not violate the Constitution; only a discriminatory purpose does. "Discriminatory purpose," it went on to explain, "implies more than intent as volition or intent as awareness of consequences. ... It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group."<sup>19</sup>

Sometimes, though rarely, the necessary discriminatory purpose is easy to detect. This was the case in *Davis v. Passman*,<sup>20</sup> a case decided in the same year as *Feeney*. The plaintiff, Shirley Davis, worked at the United States Congress for Representative Otto Passman. The Congressman fired her from her position as "understudy" (or assistant) to his Administrative Assistant, explaining in a letter to her that he had concluded that "it was essential that the understudy to my Administrative Assistant be a man."<sup>21</sup> Davis took this news badly and sued, claiming that the Congressman had violated the constitutional prohibition against sex discrimination. The Supreme Court agreed that she was entitled to pursue this claim.

Another case raised the question whether it is ever permissible to treat women in a way that might appear to be better than the treatment men receive. The answer seems to be yes, sometimes. Under a California statute, employers were required to provide leave and reinstatement to employees who were disabled by pregnancy.<sup>22</sup> Naturally, this statute applied only to women. An employer sued, arguing that the federal statutes forbidding sex discrimination in employment actually forbade this alleged preferential treatment for women. The Supreme Court rejected that argument. It pointed out that the purpose of both the federal statutes and the California law was to achieve equality of employment opportunity, and thus they were entirely consistent with one another.

*Education.* Two decisions based on the Equal Protection Clause touch on equal rights to education. As has often (and ironically) been the case with the U.S. law in this area, the plaintiff in the first of these cases was a man who was complaining that he had been deprived of a right that was being granted to women. The case is called *Mississippi University for Women v. Hogan*,<sup>23</sup> and it dealt with the question whether the State of Mississippi was entitled to have a state-supported school for professional nursing education whose enrollment was limited to women. The Supreme Court decided that the answer was no: nothing but stereotypes supported the notion that only women, and not men,

could be competent professional nurses, and the State could not justify closing the doors of its college to men who were otherwise qualified to attend.

The other decision was *United States v. Virginia*, which I have already mentioned. The question in the case was whether the State of Virginia could restrict enrollment in the rigorous, military college called the Virginia Military Institute (known as VMI) to men. When the litigation began, there was no comparable institution available to women. Had this continued to be the case, the State could not have argued that it was providing “separate but equal” facilities to its female population. (This doctrine has been thoroughly repudiated in the context of racial discrimination, but it continues to have some possible applicability to classifications based on sex.) The State quickly tried to establish a separate, women-only institution that would provide at least some of the opportunities that VMI offered. The Supreme Court, however, found no “exceedingly persuasive justification” for the State’s policy in excluding women from VMI, and held that the State had to begin admitting them.

*Family and Inheritance.* For the most part, these topics are covered by state law. The Supreme Court, however, has decided a number of cases that affect the range of possibilities for state law. The early 1971 decision to which Justice Ginsburg referred in the VMI case was a case called *Reed v. Reed*.<sup>24</sup> There, the Court considered the constitutionality of an Idaho statute that designated the persons who are entitled to administer the estate of a person who dies intestate – that is, without a will. The troublesome part of the statute provided that if several persons were equally entitled (by degree of relationship) to administer the estate, “males must be preferred to females.” Applying that law, the Idaho court had appointed the father of a child who had died without a will to administer the estate, not the mother. (The parents had separated some time before the child’s death.) The Supreme Court struck down the law, with the following observations:

To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.<sup>25</sup>

Applying the holding of *Reed* a couple of years later, the Court ruled in

*Stanton v. Stanton*<sup>26</sup> that a Utah statute specifying that females reached the age of majority at 18, and thus at that point were no longer entitled to support after a divorce, but that males reached the age of majority at 21 (and thus received support payments for three more years) was unconstitutional. Times had changed, the Court noted:

No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. ... Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government, and indeed, in all walks of life where education is a desirable if not always a necessary antecedent is apparent and a proper subject of judicial notice. If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, is it for the girl.<sup>27</sup>

A similar issue came up a few years later, once again in a case called *Orr v. Orr*,<sup>28</sup> which was brought (again) by a man to challenge an Alabama statute that required only husbands, not wives, to pay alimony after divorce to the ex-spouse. Applying principles that were by then becoming well established, the Court struck down the law as a violation of the Equal Protection Clause. In addition to repeating the points it had already made in *Reed* and *Stanton*, it added that there was no need to use sex as a proxy for need (based on assumption that wives tended not to have independent earning power), because the Alabama courts were already providing individualized hearings on need in every case.

Finally, there is an example of a case in which the Court permitted differential treatment of men and women. Under the U.S. immigration and citizenship laws, U.S. citizenship can be acquired either through birth in the United States or through the citizenship of one's parents. If the parents are both U.S. citizens and are married, then the child is also a U.S. citizen, no matter where she or he is born. Problems arise, however, when the parents are not married. If the mother is a U.S. citizen, then the child will also be a U.S. citizen. If it is the father who is the U.S. citizen and the mother is not, then the child may claim U.S. citizenship only in a limited number of ways. One is if the father acknowledges paternity under oath while the child is still a minor; another is if a court of competent jurisdiction makes a finding of paternity while the child is still a minor. In a suit called *Miller v. Albright*,<sup>29</sup> the Supreme Court decided

that this system, while somewhat more burdensome for children of U.S. citizen fathers than children of U.S. citizen mothers, was constitutional. (Technological advances in DNA testing for paternity may yet make this line obsolete, but the Court has not yet considered the fact that paternity is now almost as easy to establish as maternity, if the putative father is willing.)

*Social Security Benefits.* The Supreme Court has also struck down on constitutional grounds statutes that treat men and women differently for purposes of social security benefits (that is, government-provided payments for the elderly and the disabled). The case of *Califano v. Goldfarb* is typical.<sup>30</sup> The law at the time of this decision (in the mid-1970s) provided that survivors' benefits based on the earnings of a deceased husband were payable to his widow. If, instead, the wife was the worker, and she died first, her surviving husband was entitled to receive survivors' benefits only if she had been providing at least one-half of his support. The Supreme Court (once again at the instance of a male plaintiff) decided that this system created an unconstitutional distinction between male and female workers. An implicit part of the pay for a male worker was the assurance that the surviving wife would receive benefits, no matter how much (or how little) he was contributing to her support. A female worker, in contrast, was deprived of the same protection for her husband.

*Jury Service.* The jury, as is well known, plays a central part in both the criminal and civil sides of the U.S. legal system. In criminal cases, defendants are guaranteed the right to trial by an impartial jury, which is drawn from a representative cross-section of the community. Relying on the Sixth Amendment to the Constitution, the Supreme Court held that it was impermissible for prosecutors to remove from the jury, through a device called the peremptory challenge, possible jurors of any particular race. In the case of *J.E.B. v. Alabama ex rel. T.B.*,<sup>31</sup> the Court came to the same conclusion with respect to discrimination on the basis of sex. (Indeed, there was an earlier time when women were not even permitted to sit on juries, but the Supreme Court abolished that rule for the federal courts in 1946,<sup>32</sup> and for the state courts in 1975.<sup>33</sup>)

*Military Service.* The final area of note for equal protection analysis relates to military service. Here, the Supreme Court has been especially deferential to legislative decisions that draw lines based on gender - meaning that it has declined to intervene and declare such laws unconstitutional. In *Rostker v. Goldberg*,<sup>34</sup> the Court upheld provisions of the Military Selective Service Act over a challenge under the Due Process and Equal Protection clauses. The

statute required only men, not women, to register for military service. The Court found this to be a justifiable distinction, particularly in light of the fact (which it did not examine separately) that military regulations excluded women from combat service.

## 2. "Privacy": Reproductive Rights

One of the more contentious areas of constitutional law relating to women's rights has been that relating to reproductive rights, especially abortion. Once again, this paper cannot begin to describe everything that has happened since the landmark decision in *Roe v. Wade* in 1973, which held that for a period of time (roughly the first trimester of pregnancy), a woman had a constitutional right to choose whether to continue her pregnancy or obtain an abortion.<sup>35</sup> As the pregnancy progressed, *Roe* held, the State's interest in the developing fetus also increased, to the point that during the third trimester an abortion was permissible only if it was necessary to save the life or health of the mother.

After more than thirty years of legal development, the so-called right to choose has been modified considerably. The current Supreme Court decisions allow the States to impose numerous restrictions on that right, so long as the restrictions do not amount to an "undue burden" – a term that is difficult to define, but that defers to a great degree to legislative judgments.<sup>36</sup> Examples of restrictions the Court has upheld include: (1) a requirement that certain information be given to the woman seeking an abortion; (2) an informed consent certification; (3) a 24-hour waiting period between the time the woman requests the procedure and when it is performed; (4) for minors, a requirement of parental notification and consent, as long as the alternative of obtaining a family court's permission exists, for juveniles in abusive homes. At this time, the Court has so far refused to permit a requirement that the woman notify or obtain the consent of her husband or male partner; it wrote at some length about the problem of spousal abuse and violence against women in its *Casey* opinion, and expressed the concern that such a requirement would effectively ban abortions for this subset of women.

The other significant step the Court has taken, which has to some degree decreased the demand for abortions, is to uphold state and federal statutes that deny funding for indigent women who wish to have abortions. These women are otherwise eligible for state-supported medical services, but the Court has said that the government (state or federal) is entitled to refuse to fund procedures which it deems morally objectionable.

Abortion is not the only area in which the Court has found constitutional protection for personal decision-making. It has also decided a number of cases about the right to obtain contraceptives. State laws restricting access to contraceptives for married couples, for unmarried couples, and for minors have all been struck down on constitutional grounds.<sup>37</sup> Today, the battle has shifted to the right of providers, such as pharmacists, to refuse to dispense contraceptives that have been prescribed by a physician, if this offends the provider's personal morals. The Supreme Court has not yet spoken to that issue, although some States (including Illinois, where I live) have laws in place that require pharmacists to fill all legitimate prescriptions.

### 3. *The Family*

Sometimes, the very definition of the family is the central issue in a case before the Supreme Court. *Moore v. City of East Cleveland* is a good example of such a case.<sup>38</sup> There, the City had passed a land-use ordinance that stated that only one "family" could occupy a single-family dwelling, and then it defined the term "family" with Draconian strictness. A "family" could include a mother, a father, their children, and their parents. But that did not describe Denise Moore's situation. She had two sons, each of whom had one son, and all five were living in the same household. The fact that the two boys were cousins, however, rather than brothers, caused her group to fail the test of "family" set out in the ordinance. The City prosecuted her for committing a misdemeanor, and her case went all the way up to the Supreme Court. In a splintered opinion, the Court ruled that the City had no right to interfere with Mrs. Moore's personal life to that degree. As the grandmother of the two boys, she was entitled to include them in her family, along with her two sons, the boys' fathers. No law – not a City ordinance, not a State law, not a federal law – could impinge on that highly personal right.

### 4. *Rights of Children Born Out of Wedlock*

Although this topic may seem somewhat removed from women's rights, in reality it is often of great concern to women who are raising children born out of state-sanctioned wedlock. Often, the biological father is not assisting in the support of the child, and thus the woman must seek the state's help in compelling him to contribute financially. The state, of course, readily provides such help when a woman is divorced or separated from her husband, if she has custody of the children. The question therefore is whether, or to what extent, the state's help can be different if the children are illegitimate.

In *Clark v. Jeter*,<sup>39</sup> the Supreme Court emphasized that it had “invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because visiting this condemnation on the head of an infant is illogical and unjust.” Other decisions are to the same effect, even while they recognize, realistically, that paternity has traditionally been harder to prove than maternity. (As I noted earlier, this is changing with the advent of highly accurate DNA tests, but the law has been slow to take this into account.)

#### 5. Religion and Women’s Rights

Occasionally, the right to equal treatment in the workplace comes into conflict with other important constitutional rights, such as the right freely to exercise one’s religion. These two matters almost came to a head in the case of *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*,<sup>40</sup> but in the end the Court decided that case on procedural grounds that are not important here. The facts, however, provide an interesting illustration of the way in which this problem could arise again. The original plaintiff was a teacher in a school operated by a particular religious sect. All teachers were required to subscribe to the beliefs of this religion. When the teacher became pregnant, the school fired her, because one of its beliefs was that mothers of preschool children should not be in the workplace, but instead should be at home caring for their children. This would be a plainly illegal act, if it were not for the religious setting – the Pregnancy Discrimination Act and Title VII of the Civil Rights Act of 1964, taken together, forbid such an action. After the teacher was discharged, she filed a sex discrimination complaint with a state agency, the Ohio Civil Rights Commission. At that point, the school sued the state agency, claiming that it had no authority to interfere with the school’s implementation of its religious beliefs. The Supreme Court acknowledged that the discrimination issue was a serious one, but it decided that the state authorities should resolve it in the first instance.

In general, the Free Exercise Clause of the First Amendment requires courts in the United States to refrain from deciding questions relating to internal church governance. Thus, for example, a female member of the Catholic Church could not sue and claim that she had a right to become a priest, even though the Catholic Church has a well-known rule reserving the priesthood to men. Ordinary employers have the obligation to accommodate religious practices, unless the accommodation would be too burdensome.

## *B. Federal Statutory Law*

### *1. Civil Rights Act of 1964*

In the interest of time and space, the review of statutory law protecting women's rights will be brief. The most important of these laws is the Civil Rights Act of 1964. Title VII of that law assured equality in the workplace: it makes it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex*, or national origin." The impact of this law on the lives of working women would be hard to overstate. Although historians will tell you that the inclusion of "sex" as a protected characteristic was, at the outset, a cynical effort to defeat the bill that became the law, countless women have successfully vindicated their rights to equal treatment in the workplace under this statute.

Three basic situations are covered by Title VII. First are actions that are discriminatory, either in the way they treat particular employees, or in the discriminatory impact they may have on a group. This first category also includes discrimination on the basis of pregnancy, which is specifically defined in the Pregnancy Discrimination Act to be a form of sex discrimination. Second are actions taken in retaliation against an employee who is trying to assert her rights under the statute; this type of retaliation is forbidden, and the employer can be punished for it even if there was no merit in the underlying complaint of discrimination. Third is sexual harassment at the workplace, either from a supervisor or from a co-worker, a customer, or anyone else. At the broadest level, sexual harassment is considered as one of the ways in which the "terms and conditions of employment" might be altered negatively for a woman. (Theoretically, and occasionally, one sees "reverse" sexual harassment claims, where a man is the victim of a woman's harassment; it is also possible to have same-sex harassment, where one group of men harass another man *because he is male*. These cases are less common, and so we can put them to one side.)

A benign reason for discrimination is not an excuse under the statute. Thus, in *UAW v. Johnson Controls, Inc.*,<sup>41</sup> where the employer had a policy barring all women from working on jobs involving certain levels of lead exposure, unless they provided medical documentation of infertility, the Court found the policy to be facially discriminatory. Importantly, it also rejected the employer's argument that this policy was a "bona fide occupational qualification," known

by employment lawyers in the United States as a BFOQ. The women themselves, the Court ruled, had the right to decide how much lead they were willing to be exposed to. It was not up to the company to shut the door to employment, even if at some level it was well-motivated.

The law of sexual harassment has largely developed as an off-shoot of Title VII, although a claim of sexual harassment can also be brought in the education setting, as I note below. The Supreme Court has defined two general types of sexual harassment, *quid pro quo* and hostile environment. In *Burlington Industries, Inc. v. Ellerth*,<sup>42</sup> it explained what it meant:

We do not suggest the terms *quid pro quo* and hostile work environment are irrelevant to Title VII litigation. To the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII. When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive. Because Ellerth's claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct.<sup>43</sup>

The Court has also set forth additional requirements for this kind of claim, which it laid out in *Harris v. Forklift Systems, Inc.*:<sup>44</sup>

This standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. As we pointed out in [another case] "mere utterance of an ... epithet which engenders offensive feelings in a employee" does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment-an environment that a reasonable person would find hostile or abusive-is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive,

the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.<sup>45</sup>

The proper defendant in a Title VII lawsuit is the employer, not the particular supervisor or other person responsible for the discriminatory action, the retaliation, or the harassment. The statute permits a variety of remedies, including money damages, back pay, reinstatement to the job, or other injunctive relief. It provides a civil remedy only; there is no federal criminal law forbidding sexual harassment. (Many times the acts that constitute the harassment may also violate state laws such as those forbidding battery, those forbidding defamation, and even those forbidding rape or sexual assault. The victim of harassment is always entitled to make a complaint to the authorized prosecutors, who then have discretion to decide whether or not to pursue it.)

## *2. Title IX of the Education Amendments of 1972*

Title IX of the Education Amendments of 1972 provides that no person shall, on the basis of sex, be excluded from participation, denied the benefits of, or be subjected to discrimination in any educational programme or activity that receives federal financial assistance.<sup>46</sup> Although the primary remedy for a violation of this statute is for the federal government to withhold financial assistance to the offending recipient, the Supreme Court concluded in 1979 that private individuals who believed that they had been injured by a violation could sue privately for money damages.<sup>47</sup> Direct discrimination actions have accordingly been brought, relating to every kind of programme or activity imaginable. A great number have dealt with girls' and women's access to athletic programmes, which tend to be funded very generously for men's sports, and less so for women's. (The new generation of U.S. women competing in the Olympics are beneficiaries of this enhanced attention to women's sports.)

Harassment and retaliation theories are also available under Title IX, although the Court seems to have established a stricter standard for harassment actions in this area than it has in Title VII. In the leading case, the Court described the requirements as follows:

We conclude that a [private damages action may lie against the school board in cases of student-on-student harassment] ..., but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities. Moreover, we conclude that such an action will lie only for harassment that is so severe,

pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.<sup>48</sup>

The Court has also held that a person (for example, a basketball coach) who complains about sex discrimination in an education programme may sue if the authorities retaliate against him for his complaint.<sup>49</sup>

### *3. Other Federal Statutes*

Other federal statutes also exist that address women's rights. They include the Equal Pay Act of 1963, under which in principle women should receive pay equal to their male counterparts. The difficulty with that statute, however, is in deciding which jobs are comparable to other jobs. The theory of comparable worth, once somewhat more popular in the United States, has quietly been abandoned, because of the difficulty of placing a value on jobs other than the one that the market assigns them. Occasionally, however, a plaintiff will succeed in an Equal Pay Act claim, if she can show that her job really is the same as that of a male counterpart, and she is being paid less.

The military is an area where women still do not enjoy equal rights, although for better or for worse, the nature of modern combat is fast erasing the distinction between combat and non-combat positions. As far as anyone knows, the United States does not seem to be on the brink of re-instituting the military draft. For now, it remains the case that only young men must register with the Selective Service Commission when they reach their 18<sup>th</sup> birthday. Some years ago, Congress passed a federal Violence Against Women Act, designed to strengthen the efforts of the states to address this plague. The Supreme Court, however, decided that this statute went beyond the powers entrusted to the federal government, and so it struck down the law.<sup>50</sup> This does not mean, of course, that it is now legal to commit acts of violence against women. The decision was concerned only with the allocation of powers between the states and the federal government - a line that the Supreme Court for the last ten years has been particularly concerned to monitor. Certain kinds of interstate crime of particular concern to women, such as kidnapping<sup>51</sup> and transporting a person across state lines for purposes of prostitution or other unlawful sexual activity,<sup>52</sup> are already federal crimes.

### **III. State Laws**

State law is primarily responsible for matters of status, family law, inheritance law, education, criminal law, and protective services. Thus, laws regulating

marriage exist solely at the state level, with the exception of a relatively new congressional statute called the Defense of Marriage Act, which says that no state is required to recognize a marriage celebrated in another state if that marriage would offend the public policy of the second state. The statute was directed almost exclusively at the possibility - thought at the time to be immediate - that certain states would start allowing homosexual marriages. That issue remains controversial, as a political matter, even though more and more states and localities are beginning to recognize domestic partnerships that are, for all intents and purposes, the equivalent of marriages. If a state were to permit homosexual marriage, however, contrary to the usual rule in the United States requiring full faith and credit among the states, the Defense of Marriage Act would allow sister states to treat the couple as if they were not married.

Other subjects within the domain of family law also exist only at the state law. Federal law has little or nothing to say about divorce, child custody, or support obligations. Although education is funded by the federal government, and federal standards are creeping into education law, this too is a matter for the states. Inheritance law, including who is entitled to inherit, how does one create a valid will, and what rules govern the administration of the decedent's estate, are all handled at the state level, usually through specialized courts. Occasionally, as the earlier discussion of constitutional doctrine shows, federal questions will creep into these areas, and at that point, either Congress or the federal courts or both will become involved. A question that has been on the horizon for many years, but has yet to receive a definitive answer, is whether it is constitutional for the states to maintain single-sex elementary and secondary schools. Some educational theorists believe that girls learn better in an all-female environment, and boys learn better in an all-male environment, at least during the early years. At present, however, such schools are practically nonexistent in the public sphere (although it is not illegal for private schools to be single-sex). One reason for this, I would speculate, is that it is thought to be illegal; other reasons may simply be that it is more economical to teach all the students together, and it provides an early lesson in life skills.

Last, although certainly not least important, is the network of laws designed to protect women from abusive partners, and to protect their children from abusive adults. Indeed, these laws are written in a gender-neutral way, and so in the smaller number of cases where a man is being abused, he is fully entitled to invoke them also. Overtaxed city, county, and state agencies attempt to provide protection where it is needed. Their efforts are not always successful,

unfortunately. Domestic violence is a problem that crosses all lines of race, social class, and wealth. State and local legal services offices exist to provide assistance to women in need; privately run and publicly run shelters exist where they can go and be safe from their abusers. But there is still much more that needs to be done.

#### IV.

This has been a quick tour of the parts of the U.S. legal system that have the greatest impact on women's rights. My goal has been to furnish an historical sense of how the United States got to the point where it is today; to indicate where the laws have developed to a relatively satisfactory point; to highlight the places where problems still exist; and to note where we are just at the beginning. Perhaps the greatest difference between the legal regime in the United States and the one reflected in a number of international conventions, such as the Convention Against All Forms of Discrimination Against Women, is the fact that the United States continues to be wary of social entitlements, quotas or other forms of reservations, and a concept of equality based on outcomes rather than opportunities. For many poor or minority women, the "right" to attend the finest public universities in the country or to compete for top public jobs is just as illusory as it would be anywhere. So in the end the American story is a positive one, but hard work and imaginative solutions are still necessary, before all women will be able to achieve their full potential.

#### NOTES AND REFERENCES

1. See Black's Law Dictionary, 6th ed. , at 617 (1990). See, e.g., Barbara Babcock *et al.*, *Sex Discrimination and the Law: History, Practice, and Theory* 2d ed. at 61 n.115 (Little Brown 1996).
2. 83 U.S. (16 Wall.) 130 (1872).
3. 83 U.S. at 141.
4. This book is cited in Field, Kaplan & Clermont, *Civil Procedure* 8th ed. at 1031 (Foundation Press 2003).
5. *Id.* (emphasis added).
6. See "The Seneca Falls Convention , July 19-20, 1848, on the website of the National Portrait Gallery, <http://www.npg.si.edu/col/seneca/senfalls1.htm>.
7. For a full text of the Declaration of Sentiments, see [http://womenshistory.about.com/library/etext/bl\\_sececa\\_falls\\_declaration.htm](http://womenshistory.about.com/library/etext/bl_sececa_falls_declaration.htm).
8. 335 U.S. 464 (1948).
9. *Id.* at 465.
10. *Id.*
11. *Id.* at 466.
12. U.S. Const. amend. XIV, sec. 1.

13. 347 U.S. 483 (1954).
14. 347 U.S. 497 (1954).
15. See *United States v. Virginia*, 518 U.S. 515 (1996).
16. *Id.* at 531. (citations omitted).
17. *Id.* at 532 (citation omitted).
18. 442 U.S. 256 (1979).
19. *Id.* at 279.
20. 442 U.S. 228 (1979).
21. *Id.* at 230.
22. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).
23. 458 U.S. 718 (1982).
24. 404 U.S. 71 (1971).
25. *Id.* at 76.
26. 421 U.S. 7 (1975).
27. *Id.* at 14-15.
28. 440 U.S. 268 (1979).
29. 523 U.S. 420 (1998).
30. 430 U.S. 199 (1977).
31. 511 U.S. 127 (1994).
32. See *Ballard v. United States*, 323 U.S. 187 (1946).
33. See *Taylor v. Louisiana*, 419 U.S. 522 (1975) (stating “[w]e are also persuaded that the fair-cross-section requirement is violated by the systematic exclusion of women, who in the judicial district involved here amounted to 53% of the citizens eligible for jury service”).
34. 453 U.S. 57 (1981).
35. 410 U.S. 113 (1973).
36. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).
37. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (married couples); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (unmarried couples); *Carey v. Population Services*, 431 U.S. 678 (1977) (minors).
38. 431 U.S. 494 (1977).
39. 486 U.S. 456 (1988).
40. 477 U.S. 619 (1986).
41. 499 U.S. 187 (1991).
42. 542 U.S. 742 (1998).
43. *Id.* at 753-54.
44. 510 U.S. 17 (1993).
45. *Id.* at 21-22.
46. 20 U.S.C. § 1681 *et seq.*
47. See *Cannon v. University of Chicago*, 441 U.S. 677 (1979).
48. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999).
49. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).
50. *United States v. Morrison*, 529 U.S. 598 (2000).
51. 18 U.S.C. § 1201.
52. 18 U.S.C. § 2421.