DIVORCE AS A SUBSTANTIVE GENDER-EQUALITY RIGHT

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ABSTRACT

This Article—the first half of a diptych that continues with Divorce as a Formal Gender-Equality Right, *22 U. PA. J. CONST. L. (forthcoming April 2020)—draws on the insight that the position of women in society is nowhere better reflected and constituted than in a nation's personal status laws. Contemporary feminist and constitutional scholars have devoted much attention to how the laws of marriage affect women's status in society, but they have largely ignored the potential for divorce to vindicate gender equality norms—and many have overlooked recent political and legal developments that threaten to substantially restrict dissolution rights.*

This diptych seeks to fill in the academic void in feminist and constitutional scholarship by developing the constitutional argument for divorce as a gender equality right. Recognizing that there are competing conceptions of what constitutional gender equality means, the thesis is that every interpretation of equal protection must guarantee a right of unilateral, no-fault exit from matrimonial chains. This Article establishes the status of marital freedom as a gender-equality right under various substantive *visions of constitutional equality. The subsequent Article,* Divorce as a Formal Gender-Equality Right, *22 U. PA. J. CONST. L. (forthcoming April 2020), establishes the status of marital freedom as a gender-equality right under a* formal *understanding of constitutional equality.*

To expose the gender-equality implications of divorce law, this diptych unearths the lineage and function of divorce restrictions as gender-status regulation and outlines the gender-specific burdens they impose on women. It further unveils contemporary attempts to restrict divorce as reflecting impermissible status-based judgments about women's capacities, roles, and destinies. All in all, this diptych concludes that divorce restrictions coerce women to perform the work of wifehood without altering the conditions that continue to make such work a principal cause of their subordination. This makes unilateral no-fault divorce a fundamental right for women attempting to navigate the world as equals and an imperative for a constitutional system committed to disestablishing gender hierarchy.

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INTRODUCTION

The position of women in a society is nowhere better reflected than in a nation's personal status laws.[1] Regrettably, the laws of marriage have long served as among the chief vehicles for cultivating women's social and economic dependency on men, inculcating unequal gender roles, and inflicting status-harm on women as a class. The laws of divorce—especially the fault regime that has dominated marital dissolution laws for much of American history—have likewise functioned to maintain gender hierarchy and reify sex-role stereotypes. Even today, the egalitarian marriage is still more a myth than reality.[2] American women in the twenty-first century routinely struggle against structural inequities in their marriages. This inequity extends beyond the formal bounds of marriage. It permeates all gender relations and, in doing so, impedes women's progress towards full citizenship stature.

Because of the role marriage has played in fostering both private patriarchy—the control a husband exerts over his wife within a family system[3]—and public patriarchy by impairing women's position in society at large,[4] feminists have insisted that equality in education, politics, and the workplace cannot be fully realized without corresponding changes in the gender hierarchy of the marital family.[5] Accordingly, many liberal feminists

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1 *See, e.g.*, Essam Fawzy, *Muslim Personal Status Law in Egypt: The Current Situation and Possibilities of Reform Through Internal Initiatives*, *in* WOMEN'S RIGHTS & ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM 27 (Lynn Welchman ed., 2004) (arguing that the unattainability of divorce for women in Egypt "place[s] women in the position of accepting their inferior status"); Karin Carmit Yefet, *The Constitution and Female-Initiated Divorce in Pakistan: Western Liberalism in Islamic Garb*, 34 HARV. J.L. & GENDER 553 (2011).

2 *See, e.g.*, Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509 (1998) (concluding based on bargaining theory that the prospects for egalitarian marriage, however narrowly defined, are dim); LINDA C. MCCLAIN, THE PLACE OF FAMILIES 146 (2006) (noting that marriage has not yet transformed to reflect altered gender roles).

3 Carol Brown, *Mothers, Fathers and Children: From Private to Public Patriarchy*, *in* WOMEN AND REVOLUTION 239 (Lydia Sargent ed., 1981).

4 *See, e.g.*, SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 134, 149 (1989) (noting that the gendered marriage "radically limits" equality of opportunity for women, and that inequality within marriage has deep ramifications for the material, psychological, physical, and intellectual well-being of women).

5 Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239, 248–49 (2001) (arguing that feminists acknowledge that in order for women to act as full citizens in the public sphere, it is necessary to transform the marital family); OKIN, *supra* note 4, at 4 (noting that justice within marriage is a prerequisite to gaining equality in politics, at work, and in every other sphere).

have advocated egalitarian marriage, which would "encourage and facilitate the equal sharing by men and women of paid and unpaid work, of productive and reproductive labor,"[6] as a crucial step towards rectifying women's continued subordination and economic vulnerability.[7] More radical feminist theorists, led by Martha Fineman, have gone so far as to call for the abolition of marriage altogether.[8]

Neither solution, however, is adequate. The first, egalitarian marriage, is a practical impossibility for the foreseeable future; it would require abolition of gender hierarchy where it is most entrenched.[9] The second—abolition of marriage—is misguided: it would deprive individuals and society of the recognized benefits of marriage without guaranteeing women legal protection against subordination in intimate relationships.[10]

Instead, this diptych develops a modest, yet essential, innovative legal construct to counter marital inequality—a constitutional right to unilateral, no-fault divorce. The substance of this right is not purely negative. Its affirmative dimension is captured by the appellation "marital freedom." The right to marital freedom is imperative to combat marital subordination, one that is derived from multiple interpretations of America's constitutional

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6 OKIN, *supra* note 4, at 171.

7 Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1987 (2003) (noting that NOW's founding documents acknowledged that genuine social equality for women necessitates social reorganization of the family so that "women's participation in family relations would no longer constitute an impediment to their participation in public life.").

8 As Fineman maintains, insofar as society continues to assign responsibility for caretaking solely to the nuclear family, women will continue to carry the lion's share of domestic work and child care responsibilities and women's inequality therefore will persist both at home, within individual marriages, and in the workforce and society at large. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 230–36 (1995).

9 *See* OKIN, *supra* note 4, at 116 (conceding that this solution is "a radical break not only from prevailing patterns of behavior but also from widely, though not completely, shared understandings in our society about the social meanings, institutions, and implications of sexual difference."); Wax, *supra* note 2, at 513 (concluding that while "egalitarian marriage is possible in some cases, it will be the exception rather than the rule.").

10 Wax, *supra* note 2, at 637 ("[E]ven if legal marriage were abolished, people would continue to couple up . . . and to lose [relationship-specific] investments through sex-skewed opportunistic defections under conditions that favor the strong at the expense of the weak . . . ."); Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 93 (2004) ("[P]eople will continue to partner despite the lack of legal marriage, but will do so without the protections against subordination that the law can provide.").

commitment to gender equality. Just as women are allowed to enter into marriage and choose to conform to gendered marital arrangements that may disadvantage them,[11] this Article argues that women must enjoy a concomitant constitutional right to extricate themselves from rigid, even mandatory, societal and spousal expectations. To paraphrase Jack Balkin, liberal divorce rights guarantee "choice under conditions of sex inequality"[12] and therefore are integral to women's equality.

For all their focus on the laws of marriage, contemporary feminist and constitutional scholars have largely ignored the potential of divorce as a gender equality right—and many have overlooked recent political and legal developments that threaten to turn back the clock on dissolution rights. For most of American history, divorce law, shaped by rigid Christian doctrine, was expressly designed to make divorce difficult to achieve. It was fault-based, requiring one spouse to establish gross marital misconduct of the other utilizing a list of narrowly defined transgressions; most commonly adultery, desertion, and cruelty. Only in the 1970s did states overwhelmingly move to eliminate fault regimes or supplement them with liberal no-fault grounds, like "incompatibility," "breakdown of marriage," or "irreconcilable differences."[13] This so-called divorce revolution has been widely considered "the twentieth century's most significant contribution to family law."[14]

Ever since the start of the new millennium, however, legislation aimed at eliminating or at least weakening unilateral no-fault divorce laws has proliferated, with proposals for divorce-restrictive measures in over thirty states.[15] Now, American divorce law is on the brink of a troubling paradigm

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11 An increasing number of women are giving up the altar out of concern about gender equality, power within marriage, and domestic violence. *See, e.g.*, Kathryn Edin, *What Do Low-Income Single Mothers Say About Marriage?*, 47 SOC. PROBS. 112, 117–19, 130 (2000); Marcia Carlson, Sara McLanahan & Paula England, *Union Formation in Fragile Families*, 41 DEMOGRAPHY 237, 255–57 (2004); MCCLAIN, *supra* note 2, at 133, 141.

12 This is the term Jack Balkin employs to describe the abortion right, which this Article endeavors to show applies with equal force to the right to divorce. *See* Jack Balkin, *How New Genetic Technologies Will Transform* Roe v. Wade, 56 EMORY L.J. 843, 851 (2007).

13 JOHN DEWITT GREGORY ET AL., UNDERSTANDING FAMILY LAW § 8.01, at 238 (3d ed. 2005); Kenneth Rigby, *Report and Recommendation of the Louisiana State Law Institute to the House Civil Law and Procedure Committee of the Louisiana Legislature Relative to the Reinstatement of Fault as a Prerequisite to a Divorce*, 62 LA. L. REV. 561, 576–77 (2002).

14 Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2017, 2039 (2000).

15 THEODORA OOMS ET AL., BEYOND MARRIAGE LICENSES: EFFORTS IN STATES TO STRENGTHEN MARRIAGE AND TWO-PARENT FAMILIES: A STATE-BY-STATE SNAPSHOT 10

shift.[16] Various statutory reform efforts have embraced a range of procedural techniques to substantially stall or eliminate divorce: by mandating counseling, lengthy waiting periods, and spousal consent requirements; by exchanging no-fault for fault grounds; and even by restricting, or even abolishing,[17] the right of parents of minor children to marital exit.[18] In a prominent testament to the success of what is aptly called the "counter-revolution,"[19] three states to date have adopted "covenant marriage" legislation allowing couples to choose a form of marriage in which exit is severely restricted.[20]

These divorce restrictions are unconstitutional violations of gender equality because they have both the purpose and effect of turning back the clock, not only on divorce rights but also on women's roles and status in

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(2004) ("Since the mid-1990s, every state has made at least one policy change or undertaken at least one activity designed to promote marriage, strengthen two-parent families, or reduce divorce."); *see also* Nicholas H. Wolfinger, *The Mixed Blessings of No-Fault Divorce*, 4 WHITTIER J. CHILD & FAM. ADVOC. 407, 412 (2005) (describing states' efforts to curb divorce in the late 1990s and early 2000s).

16 *See* ASHTON APPLEWHITE, CUTTING LOOSE: WHY WOMEN WHO END THEIR MARRIAGES DO SO WELL 65 (1997) ("a backlash against no-fault divorce is now in full swing"); J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York*, 27 PACE L. REV. 559, 593 (2007) (describing somewhat recent criticism of no-fault divorce schemes).

17 Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 90–94 (1981) (introducing a proposal to restrict divorce for those with children); Scott Maier, *Breaking Up Is Harder to Do: Divorce Hits 21-Year Low*, PALM BEACH POST, Jan. 6, 1996, at 1D (citing sociologist Debra Friedman's proposal to "ban[] divorce when children are involved, except in extremely harmful situations . . . .").

18 As Steven Nock predicted, "[s]ome type of divorce reform will probably exist in almost every state in the next 10 to 15 years." Mary Otto, '*Save Marriage' Push: Classes, Tougher Laws*, SEATTLE TIMES, Mar. 3, 1999, at A9 (internal quotation marks omitted); *see* Katherine Shaw Spaht, *A Proposal: Legal Re-Regulation of the Content of Marriage*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243, 259 (2004) ("At the end of the twentieth century after suffering through the sexual revolution, the therapeutic revolution, the feminist revolution, and the divorce revolution, a nascent counter-revolution aimed at restoring traditional marriage has begun, both at the elite opinion level and at the grassroots level.").

19 Lynn D. Wardle, *Divorce Reform at the Turn of the Millennium: Certainties and Possibilities*, 33 FAM. L.Q. 783, 794 (1999) (quoting Joel A. Nichols, Comment, *Louisiana's Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law*, 47 EMORY L.J. 929, 930 (1998) (internal citation omitted)); APPLEWHITE, *supra* note 16, at 65.

20 *See* LA. REV. STAT. ANN. 9:272–75 (West 2000); ARIZ. REV. STAT. ANN. § 25-901 to -906 (West 1998) (laying out a portion of a statutory scheme for covenant marriages); ARK. REV. STAT. ANN. § 9-11-803 (West 2001); *see also* Joel A. Nichols, *Louisiana's Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law?*, 47 EMORY L.J. 929, 974 (1998) (describing several legislatures that considered covenant marriage laws). By the beginning of the twenty-first century, a total of twenty state legislatures had considered covenant marriage proposals, *see* Amy L. Stewart, *Covenant Marriage: Legislating Family Values*, 32 IND. L. REV. 509, 515 (1999).

society. This diptych seeks to fill in the scholarly void by developing the constitutional argument for marital freedom as both a substantive and formal gender-equality right. This Article, the first of two, develops the substantive gender-equality argument for the right to marital freedom, while its companion[21] develops the formal gender-equality argument.

This Article is structured as follows. Part I presents the constitutional edifice of gender equality. It begins with the Court's conceptualization of the Equal Protection Clause in formal terms, using the "antidiscrimination" principle, which prohibits state action that overtly classifies citizens on the basis of group membership or that is ostensibly neutral but in fact motivated by a discriminatory purpose. It then considers several competing, substantive visions of constitutional equality, all of which concern group status inequality, even when no facial classifications are drawn. Most prominent among these theories is the "anti-subordination" principle, which has been explicitly endorsed by the Supreme Court's dissenters and academic critics. But anti-subordination has recently been implicitly adopted by the Supreme Court in a variety of different guises. In particular, there is an emerging jurisprudence of gender equality/human dignity that straddles the divide between equal protection and substantive due process.

Part II applies the substantive theories of gender equality to the divorce context. It analyzes how laws that effectively compel wifehood by limiting exit injure women, showing that state action is implicated even when a husband's subordination of his wife appears to be "private." First, it opens with a historical account, examining how the common law of marital status fostered the unequal position of women in marriage, how divorce restrictions served to lock women in patriarchal relationships, and how leading feminists of the era recognized the right to divorce as a substantive gender equality imperative. Second, it documents the inequalities that plague modern marriages and continue to compromise women's full citizenship, considering sociological evidence on the division of household labor, women's lesser economic power and decision-making authority, and their heightened physical vulnerability. Third, it analyzes women's divorce accounts to establish that most women who seek marital freedom do so to escape inegalitarian relationships they find demeaning and to expose divorce as an

21 Karin Carmit Yefet, *Divorce as a Formal Gender-Equality Right*, 22 U. PA. J. CONST. L. (forthcoming April 2020).

experience that enhances women's independence and capacities for self-governance.

The law not only exacerbates gender inequality by locking women into relationships of social and economic dependency; Part III will show that it also plays an active role in maintaining gender inequality between husbands and wives once women have been "locked into" such relationships. It concludes that the right to marital freedom is an important anti-subordination remedy that substantially enhances women's control over their own lives, and over their status more generally as equal citizens.

This Article's companion, *Divorce as a Formal Gender-Equality Right*,[22] will construct a constitutional argument for marital freedom under the Supreme Court's formal antidiscrimination-oriented Equal Protection Clause jurisprudence. First, it will show that divorce-restrictive regulations were historically animated by discriminatory purposes and that fault grounds to this day are judicially applied in ways that raise equal-protection concerns. Second, it will show that the contemporary movement to restrict divorce repeats history: its impetus is to shore up the traditional family structure based on constitutionally proscribed views that subordinate women to the roles of wives and mothers.

The cultural, structural, and legal forces that contribute to women's inequality—and produce the need for a right to marital freedom—are broad and deep. Divorce rights, of course, are not sufficient in and of themselves to stem these forces and secure gender equality in marriage and society. Yet marital freedom is an indispensable step towards achieving gender equality and human dignity for women and families in twenty-first century America.

I. CONSTITUTIONAL VISIONS OF GENDER EQUALITY: FORMAL VERSUS SUBSTANTIVE UNDERSTANDINGS

As befits "the most complex of constitutional guarantees,"[23] gender equality has spurred a medley of analytical frameworks, both formal and substantive in nature. This Part sketches the gender-equality theories that will buttress discussion of the divorce right.

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22 Karin Carmit Yefet, *Divorce as a Formal Gender-Equality Right*, 22 U. PA. J. CONST. L. (forthcoming April 2020).

23 Robert A. Sedler, *The Settled Nature of American Constitutional Law*, 48 WAYNE L. REV. 173, 247 (2002).

A. Formal Gender Equality: The Antidiscrimination Principle

Grounded in the experiences with slavery and racial segregation, the Equal Protection Clause of the Fourteenth Amendment has been traditionally understood to guard against the false theory of racial difference and black inferiority.[24] Accordingly, the Supreme Court's jurisprudence has long stressed the principle of color-blindness or "antidiscrimination" as the mediating principle at the core of equal protection.[25] By virtue of this principle, also called the "anti-classification" or "anti-differentiation" principle, state classifications on "suspect" bases are invalid unless they satisfy the constitutional touchstones of strict scrutiny.[26] Where a law creates no express classifications but still has a disparate impact on a suspect group, the

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24 *See, e.g.*, Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 111–12 (1991) ("[T]he central meaning of the equal protection clause, and indeed of the Fourteenth Amendment in its entirety, is that the law must be colorblind.").

25 *See* Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7 (1976) ("The antidiscrimination principle fills a special need because . . . race-dependent decisions that are rational and purport to be based solely on legitimate considerations are likely in fact to rest on assumptions of the differential worth of racial groups or on the related phenomenon of racially selective sympathy and indifference."); Ruth Colker, *Anti-Subordination Above All: Sex, Race, And Equal Protection*, 61 N.Y.U. L. REV. 1003, 1004–06 (1986) (explaining that the "anti-differentiation" principle underlies heightened scrutiny models and demands "equal treatment"); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976) (emphasizing that the "antidiscrimination principle" is a "mediating principle" that bridges the facial ambiguity of the text of the Equal Protection Clause and the judicially-crafted meaning contained therein).

26 Classifications based on race, national origin, and alienage have all been considered "suspect" classes deserving of strict scrutiny, the strictest level of judicial review. *See* Foley v. Connelie, 435 U.S. 291, 295–96 (1978) (noting that prior cases that involved state discrimination against "aliens as a class" prompted "close scrutiny" but declining to adopt a bright-line rule); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (noting "traditional indicia of suspectness" that might warrant heightened scrutiny as a class "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a history of political powerlessness as to command extraordinary protection from the majoritarian political process"); Graham v. Richardson, 403 U.S. 365, 372 (1971) ("Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude is appropriate.") (quoting United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938)); Loving v. Virginia, 388 U.S. 1, 11 (1967) ("At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny' . . . .") (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)); Oyama v. California, 332 U.S. 633, 646 (1948) (explaining that "only the most exceptional circumstances can excuse discrimination" based on "racial descent").

Supreme Court finds discrimination only if the state acted with discriminatory intent in enacting the facially neutral law.[27]

Given the racial context of the Equal Protection Clause, how does it apply to laws that create *sex*-based classifications or that use *sex*-neutral terms but have a gendered impact? For the first hundred years of the Fourteenth Amendment's life, the Supreme Court routinely upheld legislation that relegated women to secondary status, in opinions replete with separate-spheres discourse affirming distinct roles for men and women in American society.[28] Only since the 1970s has the Court acknowledged that the Equal Protection Clause is relevant to questions of gender justice.[29] The Court developed its gender-equality doctrine in an ahistorical manner by analogy to its race-equality doctrine,[30] establishing a "de facto ERA"[31] that judges sex-based classifications using a new level of intermediate scrutiny.[32] To be upheld, sex-based classifications must be substantially related to an important government objective.[33]

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27 *See, e.g.*, Washington v. Davis, 426 U.S. 229, 241, 246 (1976) (requiring challengers of facially neutral state action demonstrate that the challenged practice was animated by a discriminatory purpose).

28 *See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961) (upholding the automatic exclusion of women from jury duty); Goesaert v. Cleary, 335 U.S. 464 (1948) (upholding a prohibition on female bartenders); Muller v. Oregon, 208 U.S. 412 (1908) (upholding limitations on the hours worked by women).

29 *See* Reed v. Reed, 404 U.S. 71, 75–77 (1971) (the first Supreme Court decision to invalidate a gender classification; using the rational basis test to invalidate a preference for males over females as executors of wills).

30 Justice Brennan was the first to make this argument. *See* Frontiero v. Richardson, 411 U.S. 677, 682–88 (1973) (concluding that sex-based discrimination is akin to race discrimination in that it is based on historical stereotypes and "immutable characteristics" wholly unrelated to one's ability to "contribute to society") (plurality opinion).

31 Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1324 (2006) (quoting Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 985 (2002)).

32 *See* United States v. Virginia (VMI), 518 U.S. 515, 531–58 (1996) (applying a form of intermediate scrutiny requiring "exceedingly persuasive justification" and ultimately holding as unconstitutional the Virginia Military Institute's all-male admissions policy); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724–31, 733 (1982) (applying a form of intermediate scrutiny that examined motivating biases and stereotypes; holding a state-sponsored all-female nursing school unconstitutional, in part because it was based on stereotypes about gender in nursing); Craig v. Boren, 429 U.S. 190, 197–204, 210 (1976) (applying intermediate scrutiny to invalidate a statute prohibiting the sale of beer to underage males only); Weinberger v. Weisenfeld, 420 U.S. 636, 643, 653 (1975) (applying a heightened standard of scrutiny to invalidate a provision of the Social Security Act giving survivor benefits to females only).

33 *Virginia*, 518 U.S. at 533 (quoting *Hogan*, 458 U.S. at 724). Some suggest that the *VMI* case introduced "skeptical scrutiny" to sex-based discrimination, which "differs from strict scrutiny only

Further, any justification for sex-based classifications must not be based on gender-role stereotypes.[34] In a long line of equal-protection cases, the Court invalidated gender classifications in family law because they reflected sexual stereotypes of the separate-spheres tradition that presume, on the one hand, breadwinning husbands, and on the other, domesticated wives focused on home and married life.[35] The Court indicated that the traditional and even settled beliefs about women's proper gender roles in the family and in society, far from vindicating discrimination, are now a barometer of constitutional invalidity.[36] The Court has thus understood "anti-stereotyping" to be a central aspect of gender equal protection.[37]

While the Court subjects overt sex-based classifications to heightened scrutiny, in the context of sex it has also adopted a stringent discriminatory intent requirement for laws that do not discriminate on their face. In *Feeney,* the Court held that facially neutral state action that has an adverse impact on women does not violate equal protection unless it was selected or

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in name." Anita K. Blair, *Constitutional Equal Protection, Strict Scrutiny, and the Politics of Marriage Law*, 47 CATH. U. L. REV. 1231, 1233–35 (1998); s*ee also* DAVID A. J. RICHARDS, THE CASE FOR GAY RIGHTS: FROM BOWERS TO LAWRENCE AND BEYOND 62 (2005) (positing that "the Supreme Court may be raising the level of scrutiny for gender much closer to that of race" after *VMI*).

34 *See* J.E.B. v. Alabama *ex rel.* T. B., 511 U.S. 127, 141–42, 146 (1994) (holding that gender-based peremptory challenges violate the Equal Protection Clause, particularly where the discrimination is informed by gender stereotypes).

35 *See Hogan*, 458 U.S. at 725–26, 726 n.14 (noting the "broad range of statutes already invalidated by [the] Court" that were based on "simplistic, outdated assumption[s]" about gender); s*ee, e.g.*, Orr v. Orr, 440 U.S. 268 (1979) (invalidating under the Fourteenth Amendment's Equal Protection Clause a state law provision based on gender stereotypes regarding financial need, that accorded ex-wives but not ex-husbands the right to receive alimony); Califano v. Goldfarb, 430 U.S. 199 (1977) (invalidating under the Fourteenth Amendment's Equal Protection Clause a statute, based on gender stereotypes regarding financial need, that required widowers—but not widows—prove dependency on their deceased spouses in order to receive OASDI benefits).

36 *See e.g.*, *Orr*, 440 U.S. at 283 ("Where . . . the State's . . . purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex."); *Craig*, 429 U.S. at 198–99 (holding impermissible the "increasingly outdated misconceptions concerning the role of females in the home rather than in 'the marketplace and world of ideas'") (quoting Stanton v. Stanton, 421 U.S. 7, 15 (1975)).

37 The Supreme Court has consistently held that state laws and practices reflecting stereotypical assumptions about women's proper roles are invalid under the Equal Protection Clause. *See* David H. Gans, *Stereotyping and Difference:* Planned Parenthood v. Casey *and the Future of Sex Discrimination Law*, 104 YALE L.J. 1875, 1881, 1897 (1995) (noting the centrality of stereotyping analysis to modern sex discrimination law under the Equal Protection Clause).

reaffirmed "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[38]

In sum, the Court's gender-equality jurisprudence, modeled after its race-equality paradigm, sounds in formalistic antidiscrimination norms by focusing on the purpose and structure of challenged legislation, not on its impact, to ensure that state actors are not motivated by stereotypical judgments about women.[39] This formalist understanding will be discussed in greater detail by *Divorce as a Formal Gender-Equality Right*.[40]

Recognizing that the Supreme Court equates discrimination with classification, regulatory bodies have wiped out traditional forms of gender-status legislation and generally avoided justifying facially neutral regulations using discredited status-based reasoning.[41] As a result, laws today are almost universally facially neutral and rationalized in non-discriminatory rhetoric, yet many still perpetuate, even aggravate, racial and gender stratification.[42] Thus, for example, absent evidence that state action was animated by a discriminatory purpose, many of the most oppressive marital status doctrines of the common law—which were originally couched or recently have been redefined in facially neutral terms—now survive equal-protection scrutiny.[43]

The Supreme Court, however, has failed to modernize its equal-protection doctrine to rout out bias in such ostensibly neutral state action.[44]

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38 Personnel Admin. of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

39 *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993) (rejecting the proposition that "class-based animus can be determined solely by effect."); *cf.* Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 61 n.66 (1990) (noting that a problem with anti-subordination approaches to Equal Protection Clause is that courts have rejected them).

40 Karin Carmit Yefet, *Divorce as a Formal Gender-Equality Right*, 22 U. PA. J. CONST. L. (forthcoming April 2020).

41 As Reva Siegel has explained, just as the conflicts culminating in the disestablishment of slavery and later segregation produced a shift in the justificatory rhetoric of racial status laws, the discriminatory purpose doctrine has caused a shift in the forms of state action that perpetuate the gender stratification of American society. Reva Siegel, *Why Equal Protection No Longer Protects*, 49 STAN. L. REV. 1111, 1119–29 (1997).

42 *Id.* at 1111, 1131 (demonstrating that the Court's current interpretation of equal protection "continues to authorize forms of state action that contribute to the racial and gender stratification of American society.").

43 Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1024–26 (2002).

44 Siegel, *supra* note 41, at 1141–42. For an egregious example, see *Unites States v. Clary*, 34 F.3d 709 (8th Cir. 1994) (upholding sentencing guidelines that treated the possession of a given amount of

Progressive constitutional commentators have thus fiercely attacked the discriminatory intent rule as outmoded in the wake of the disestablishment of overt forms of race and gender classification,[45] calling for a new paradigm that would allow equal protection to meaningfully target the contemporary forms of subordination of protected groups.[46]

B. A Substantive Understanding of Gender Equality

The legal literature abounds with proposals to either modify or abrogate the discriminatory purpose rule.[47] In what follows, this Section considers scholarly proposals to analyze facially neutral legislation in accordance with an anti-subordination principle[48] and to inform equal protection analysis based on its historical context.[49] Each of these approaches addresses the conceptual problems that plague the gender-discrimination paradigm in a way that is connected to constitutional text, history, or doctrine. It concludes by exploring the emergent doctrine of "due process equality," a development in the Supreme Court's jurisprudence that infuses due process analysis with substantive equality concerns.

1. The Anti-Subordination Principle

Prominent constitutional critics and dissenting justices have long called for making the substantive value of equality the mediating principle of equal-protection jurisprudence. The principle now widely known as "anti-

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crack cocaine equally to 100 times that amount of powder cocaine, even though over ninety percent of defendants possessing crack cocaine were blacks).

45 *See, e.g.*, David Kairys, *More or Less Equal*, 13 TEMP. POL. & C.R. L. REV. 675, 677 (2004); Carlos A. Singer, *The Stultification of the Fourteenth Amendment*, 13 TEMP. POL. & C.R. L. REV. 875, 882–83 (2004); Siegel, *supra* note 41, at 1135–46; Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1166 (1991).

46 Siegel, *supra* note 41, at 1144.

47 *See, e.g.*, David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 945 (1989) (arguing that the discriminatory purpose standard should be based on a showing of impartiality in governmental decision making); Randall L. Kennedy, McClesky v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1419–21, 1424–29 (1988); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1005–13 (1984).

48 *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1514–21 ¶¶ 16–21 (2d ed. 1988).

49 Siegel, *supra* note 41, at 1141–45. *See generally* Siegel, *supra* note 43.

subordination"[50] dominates the equality literature.[51] Anti-subordinationists argue that this approach is more faithful than the Supreme Court's antidiscrimination principle to the American constitutional tradition and the civil rights struggle, pointing out that equal protection developed to remedy a history of subordination, not just mere classification, against blacks.[52] Accordingly, the anti-subordination principle is less concerned about the hidden prejudices of state actors than about the inequalities in group status and the social stratification that state action inflicts on disadvantaged groups; the persistent reality of unconscious bias makes it essential to have equality standards that address policies that, while neutral on their face, are discriminatory in effect.[53]

To achieve its purpose of disestablishing entrenched forms of group-based subordination and securing substantive equality, the anti-subordination understanding of equal protection condemns laws and practices that have the effect of creating, perpetuating, or aggravating the second-class citizenship of historically oppressed groups.[54] For example,

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50 *See, e.g.*, Owen M. Fiss, *What Is Feminism?*, 26 ARIZ. ST. L.J. 413, 416–17 (1994) (discussing the centrality of the anti-subordination principle in modern feminist thought); Colker, *supra* note 25.

51 This principle is termed the "group-disadvantaging principle" by Owen Fiss—Fiss, *supra* note 25, at 157—the "antisubjugation principle" by Laurence Tribe—TRIBE, *supra* note 48, at 1515–16—and the "equal citizenship" or "anticaste" principle by Cass Sunstein, Kenneth Karst, and Charles Lawrence. *See* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9 n.2 (2003).

52 Anti-subordinationists persuasively demonstrate that the Equal Protection Clause was "drafted specifically"—TRIBE, *supra* note 48, at 1516—to remedy the very evil of subjugation by overturning the status of blacks as "a subordinate and inferior class of beings, who had been subjugated by the dominant race." Dred Scott v. Sandford, 60 U.S. 393, 404–405 (1856). *See also* JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 192–95 (Univ. Cal. Press & Cambridge Univ. Press, 1951) (noting that the Equal Protection Clause empowered Congress to "legislate upon all matters pertaining to the life, liberty, and property of all of the inhabitants of the several states."); West, *supra* note 24, at 112.

53 *See* Sylvia A. Law, *Where Do We Go from Here? The Fourteenth Amendment, Original Intent, and Present Realities*, 13 TEMP. POL. & C.R. L. REV. 691, 697–98 (2004) (arguing that since unconscious sexism is "pervasive and often invisible," constitutional concern about equality "should pay attention to effects."); Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 980–81 (1993) (arguing that the intent requirement ignores the existence of white race consciousness).

54 *See* Fiss, *supra* note 25, at 157 (noting that the Equal Protection Clause prohibits a law or official practice that "aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group."); Owen Fiss, *Another Equality*, *in* ISSUES IN LEGAL SCHOLARSHIP, THE ORIGINS AND FATE OF ANTISUBORDINATION THEORY 3–4 (Caranjit Singh ed., 2004) (explaining that under the anti-subordination principle, certain social practices should be condemned because they "perpetuate the subordination of the group of which the individual excluded or rejected is a member.").

unlike antidiscrimination, the anti-subordination principle does not require proof of individualized motivation and permits consideration of the group-based effects of an action. By disavowing all policies—whether facially differentiating or facially neutral—that disproportionately harm members of marginalized groups, unless justified by a weighty public purpose,[55] anti-subordination "can tell the difference between benign and invidious discrimination."[56]

There are several Supreme Court decisions that reflect the anti-subordination principle, drawing on concepts of social status or caste to interpret equal protection.[57] As shown by Jack Balkin and Reva Siegel, anti-subordination values often have guided the application of the antidiscrimination principle in practice.[58] In *Mississippi University for Women v. Hogan*, for example, the Court invalidated the state nursing school's women-only admission policy on the grounds that it "reflect[ed] archaic and stereotypic notions" of "proper" gender roles, thereby perpetuating the relegation of women to inferior status.[59] The antidiscrimination principle alone could not well account for the *Hogan* decision, as Laurence Tribe correctly observes, since the Court faulted the single-sex admission policy not only because it discriminated against men, but more so because it reinforced the subjugation of women.[60]

United States v. Virginia, to take a more recent illustration, similarly infuses the Court's antidiscrimination framework with anti-subordination

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55 For example, the goal of redressing subordination could justify a sex-specific affirmative action. For such anti-subordinationist scholars as Ruth Colker, the goal of anti-subordination is the *only* justification that is permitted to justify a race- or sex-specific policy or action. Colker, *supra* note 25, at 1015.

56 Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1288–89 (2011).

57 For example, in *Strauder v. West Virginia*, 100 U.S. 303 (1879), the first equal-protection case to reach the Court after the Civil War, a unanimous Court viewed equal protection as an "exemption from legal discriminations, implying inferiority," which are "steps towards reducing [blacks] to the condition of a subject race." *Id.* at 308.

58 *See generally* Balkin & Siegel, *supra* note 51 (arguing that many of the Court's equal-protection cases explicitly or implicitly vindicate anti-subordination norms within the discourse of anti-discrimination); *see also* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470, 1542–43 (2004) ("[C]oncerns of subordination shape the concept of classification itself.").

59 Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725, 726 (1981).

60 TRIBE, *supra* note 48, at 1518.

concerns.[61] Recognizing that equal-protection norms guarantee women the full stature of citizenship, not simply the right to individual consideration, the Court deemed the male-only admission policy to Virginia Military Institute a constitutional wrong for demeaning women and perpetuating their inferiority as a group.[62]

2. Historical Foundations for Substantive Gender-Equality Jurisprudence

The reviewed anti-subordination scholarship developed largely in response to the judicial focus on antidiscrimination as the central theme of constitutional equality. This Subsection explores several historically grounded theories of substantive gender equality that developed in response to the Supreme Court's ahistorical reliance on the racial-discrimination paradigm to guide its gender-equality jurisprudence. Informed directly by struggles with gender oppression, each approach canvassed below represents a particular vision of substantive equality that is narrowly focused on gender.

Lucinda Finely, for one, argues that in order to conceptualize gender equality in a way more faithful to the Equal Protection Clause's history and ideals, we should concentrate not on the racial classification cases originating in the civil rights movement, but on nineteenth century women's rights activists and their understanding of how the provisions of the Fourteenth Amendment could apply to practices that subordinate women.[63] For the nineteenth century movement for women's rights, equal protection was not based on formal equal treatment, but on a substantive model of equality.[64] As the nineteenth century "founding mothers" conceived of gender equality, "[if a] public act of state officials or a legal restriction or classification, or private actions such as violence, or public indifference to private oppressions, impairs women's ability to enjoy all their human rights both equally and fully, then the practice presents an equality problem."[65] These activists widely accepted as constitutive of equal protection affirmative state

61 United States v. Virginia (VMI), 518 U.S. 515 (1996).

62 *Id.* at 534 ("[Sex] classifications may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.").

63 Lucinda M. Finley, *Putting "Protection" Back in the Equal Protection Clause: Lessons from Nineteenth Century Women's Rights Activists' Understandings of Equality*, 13 TEMP. POL. & C.R. L. REV. 429 (2004).

64 *Id.* at 432–33.

65 *Id.* at 452.

obligations to protect citizens from private violence and to guarantee familial rights.[66]

Robin West, for another, has argued that the Equal Protection Clause must be understood in light of the abolitionist history surrounding its adoption. For her, an abolitionist understanding of gender equality is more faithful to both the text and history of the Fourteenth Amendment than either the formal antidiscrimination or the substantive anti-subordination views of equal protection.[67] She understands the Equal Protection Clause as a guarantee of "sole state sovereignty," a right not to be subjugated to the whims of a sovereign other than the state and a protection against potentially subordinating or enslaving conditions like private violence or economic dependence that leave citizens profoundly unequal.[68] Under West's abolitionist interpretation, the Equal Protection Clause is "a charter protecting our right to be self-governing, autonomous, free of other rulers, masters, or superiors, within the confines of the rule of law."[69]

Reva Siegel and Akhil Amar offer a synthetic reading of the Fourteenth and Nineteenth Amendments, grounding gender discrimination doctrine in the history and normative concerns that prompted the passage of the suffrage amendment.[70] In the debates over women's suffrage that began with the drafting of the Fourteenth Amendment and concluded with the ratification of the Nineteenth Amendment, the battle over women's right to vote centered on marriage.[71] Antisuffragists conceived of the female franchise as anathematic to the patriarchal family structure and the associated common-law notions of virtual representation and marital unity.[72] Suffragists,

66 *Id.* at 448–49.

67 West, *supra* note 24, at 113, 137.

68 *Id.* at 130, 138–39, 143–44 (noting that equal protection "targets states' refusal to protect citizens against profoundly private action which results in insubordination or enslavement . . . .").

69 *Id.* at 139, 149.

70 Siegel, *supra* note 43, at 959–60; *see also* Akhil Reed Amar, *Concurring and Dissenting*, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID 152, 162–63 (Jack M. Balkin ed., 2005) (advocating reading the Fourteenth Amendment in light of the Nineteenth Amendment, which produces a robust reading of women's equal protection and equal citizenship).

71 *See generally* Siegel, *supra* note 43, at 952, 981 (showing that suffragists and antisuffragists alike anticipated that enfranchising women would free women from laws and institutions that restricted their roles in marriage and the market).

72 Under this view of marriage, enfranchising women was perceived as both unnecessary and harmful. It was believed to be unnecessary in that men were understood as heads of household authorized to represent their wives and other dependents in public and private law. *Id.* at 981–87; *see, e.g.*, CONG. GLOBE, 40th Cong., 2d Sess. 1956 (1868) (noting that women and children should be

meanwhile, continuously challenged the common-law doctrines of marital status and viewed the demand for the vote as a challenge to the very order of coverture.[73] Ultimately, the suffragists had the better of the debate. Indeed, in the immediate aftermath of the Nineteenth Amendment's ratification, both the Supreme Court and Congress interpreted the amendment in light of the suffrage debates as a constitutional commitment to break from patriarchal understandings of the family and from common-law traditions of marital status.[74]

A synthetic construal of the Fourteenth and Nineteenth Amendments thus calls for a robust reading of women's equal protection and equal citizenship rights.[75] Whereas the Court's formalist equal-protection jurisprudence fails to give special attention to the way the state has regulated women's social position in and through the family, grounding gender-equality doctrine in the history of the women's struggle for citizenship rights teaches that at the core of gender equality is freedom from subordination in or through the family.[76] This sociohistorical understanding of gender-equality doctrine would thus accord heightened scrutiny not only to sex-based classifications, but also to ostensibly neutral state action regulating family life in a way that denies women "full citizenship stature" or that perpetuates the "legal, social, and economic inferiority of women."[77]

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represented by "someone who by reason of domestic or social relations . . . can be fairly said to represent [their] interests.").

73 Siegel, *supra* note 43, at 977–97.

74 For example, in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), the Court invalidated a sex-based minimum wage law based on the sex equality norm enshrined in the Nineteenth Amendment, discussing equality for women in the framework of the suffrage debates and understanding it as emancipation from reasoning about women's roles rooted in the common law of marital status. *Id.* at 553; *see also* Siegel, *supra* note 43, at 1012, 1015–19 (discussing the rulings of several federal and state courts that invoked the Nineteenth Amendment as a reason to repudiate or narrowly interpret coverture concepts). In recent years, however, courts have dissociated the suffrage amendment from the debates that surrounded its ratification, such that today the Nineteenth Amendment is commonly understood as limited to the context of voting. *Id.* at 1021–22.

75 Amar, *supra* note 70, at 162.

76 By adopting the Nineteenth Amendment, Americans repudiated patriarchal conceptions of the family that were rooted in coverture and the common-law traditions that subordinated women to men in marriage, understanding the Amendment to augur a shift in gender roles and family structure. *See* Siegel, *supra* note 43, at 953, 1007, 1034 ("constitutional guarantees of equal citizenship would protect women against regulation that perpetuates traditional understandings of the family that are inconsistent with equal citizenship in a democratic polity.").

77 *Id.* at 1044 (quoting United States v. Virginia (VMI), 518 U.S. 515, 533–534 (1996)).

3. "Due Process Equality": Substantive Protection for Equal Citizenship and Human Dignity

A gender-equality approach to marital freedom does not solely depend on the authority of the Equal Protection Clause. One of the most significant developments in fundamental rights jurisprudence in recent years is the grafting of liberty, equality, and dignity norms into substantive due process.[78] Several constitutional commentators have begun to call attention to "the ways in which equal citizenship's antisubordination values" have "profoundly influenced the doctrinal growth of substantive due process," commencing in *Griswold* and culminating in *Lawrence*[79] and *Obergefell*.[80] While many canonical fundamental rights decisions are inflected with equality concerns,[81] the reproductive freedom cases in particular highlight this trend of what this Article terms "due process equality."

Owen Fiss, along with an impressive line of thinkers,[82] has found that the seminal abortion case—*Roe v. Wade*—"makes constitutional sense only if we bring to the fore an understanding of the significance of the right to choose abortion for the social position of women: as a means of furthering their equality."[83] Indeed, the *Roe* majority's reasoning that "[m]aternity, or

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78 *See, e.g.*, Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) ("[D]ue process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix. It is a single, unfolding tale of equal liberty and increasingly universal dignity."). Kenji Yoshino refers to the links between equality and liberty as "dignity" claims. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748–49 (2011); *see also id.* at 776–83 (describing the judicial move toward "liberty-based dignity").

79 Lawrence v. Texas, 539 U.S. 558 (2003); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. Rev. 99, 102 (2007).

80 Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

81 *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), considered the "true progenitors" of substantive due process doctrine, have been understood to have equality dimensions, protecting national minorities and religious minorities, respectively. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (citing *Pierce* as relevant for religious minorities, and *Meyer* as relevant for national minorities).

82 *See, e.g.*, KENNETH L. KARST, LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION 53, 183 (1993) ("The *Griswold* and *Roe* decisions are most satisfactorily defended as effectuating the principle of equal citizenship.").

83 Fiss, *supra* note 50, at 416. For the rewriting of *Roe* as a sex equality decision, see generally WHAT *ROE V. WADE* SHOULD HAVE SAID, *supra* note 70. For a discussion of the evolution of equality-based arguments for the abortion right, see Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007) (noting that

additional offspring, may force upon the woman a distressful life and future"[84] led the dissent to observe that the majority was importing "legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under the Due Process Clause of the Fourteenth Amendment."[85] *Thornburgh v. American College of Obstetricians and Gynecologists* likewise invoked a gender-equality rationale for the right to reproductive freedom,[86] suggesting that abortion regulations "[implicate] constitutional values of equality as well as privacy."[87]

Planned Parenthood v. Casey expressly imported equality themes into its fundamental-rights jurisprudence, recognizing explicitly what had been implicit in *Roe*: "that a constitutional right of due process liberty can rest comfortably on grounds sounding in equality."[88] Though situating its equality analysis in a discussion of due process liberty rather than equal protection,[89] the joint opinion "manifestly and repeatedly declares its condemnation of women's status subordination,"[90] acknowledging the importance of the abortion decision in guaranteeing women full participation in society and denouncing abortion-restrictive regulations as premised on a narrow vision of women's customary family roles.[91] In

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a sex equality standpoint on reproductive rights can be, and is, expressed in a variety of constitutional frameworks).

84 Roe v. Wade, 410 U.S. 113, 153 (1973).

85 *Id*. at 173 (Rehnquist, J., dissenting).

86 *See* Planned Parenthood v. Casey, 505 U.S. 833, 925 (1992) (Blackmun, J., concurring in part and dissenting in part) ("The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power . . . ."); *see also* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986) (Stevens, J., concurring) ("Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of the government. . . . That promise extends to women as well as to men.").

87 Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 263 (1992).

88 Kenneth L. Karst, *Constitutional Equality as a Cultural Form: The Courts and the Meaning of Sex and Gender*, 38 WAKE FOREST L. REV. 513, 534 (2003).

89 Only Justice Blackmun located his argument within the Equal Protection Clause of the Fourteenth Amendment. *See Casey*, 505 U.S. at 928 (Blackmun, J., concurring in part and dissenting in part) (arguing that abortion restrictions resting on the assumption that motherhood is women's "natural" role in society implicates the Equal Protection Clause).

90 Karst, *supra* note 79, at 129.

91 *Casey*, 505 U.S. at 856 ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."); *id.* at 912 (Stevens, J., concurring in part and dissenting in part) ("*Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women."); *id.* at 928

addition, the opinion invoked dignitary concerns,[92] structuring a novel undue burden test to demand respect for the dignity of women that equals respect shown for the dignity of fetal life.[93] Many constitutional scholars accordingly read *Casey* to vindicate not only a right grounded in equality values alone, but also a right to dignity.[94]

More recently, in *Stenberg v. Carhart*, the Court further infused its substantive due process liberty analysis with equality and dignity concerns: "millions [of Americans] fear that a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of equal liberty and leading those with least resources to undergo illegal abortions with the attendant risks of death and suffering."[95] Finally, Justice Ginsburg's dissent in *Gonzales v. Carhart* brought equal-protection analysis to

(Blackmun J., concurring in part and dissenting in part) ("A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality."). As Justice Ginsburg put it, *Casey* "acknowledged the intimate connection between a woman's 'ability to control [her] reproductive life' and her 'ability . . . to participate equally in the economic and social life of the Nation.'" *See Nomination of Ruth Bader Ginsburg to be Assoc. Justice of the Supreme Court of the U.S.: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 103, 205–08 (1993); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 386 (1985); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199 (1992). *But see* Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1826 n.66 (2007) (arguing that sex equality "is not the justification that the Court has generally given for the abortion right").

92 *Casey*, 505 U.S. at 851.

93 *See id.* at 851, 876 (asserting that the best method of balancing the state's interest in fetal life and a woman's interest in personal autonomy would be to impose an undue burden test in evaluating the constitutionality of abortion regulations); *see also* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1696 (2008) (arguing that a commitment to both the dignity of human life and the dignity of women underlies the Court's undue burden formulation in its *Casey* and *Carhart* decisions).

94 *See* Siegel, *supra* note 83, at 833–34 (internal citations omitted) (reviewing commentary concerning liberty and equality values at stake in the Court's reasoning and situating *Casey* in the doctrinally evolving due process equality reasoning in support of the right to abort); *see also* Siegel, *supra* note 93, at 1696 ("*Carhart* appeals to human dignity as a reason to allow government to restrict abortion, while *Casey* appeals to human dignity as a reason to prohibit government from interfering with a woman's decision whether to become a parent."); Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1050–53 (2007) (analyzing the intertwining of liberty and equality values in *Casey*); Reva B. Siegel, *Abortion as a Sex Equality Right: Its Basis in Feminist Theory*, *in* MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD (Martha Albertson Fineman & Isabel Karpin eds., 1995); Reva B. Siegel, *"You've Come a Long Way, Baby": Rehnquist's New Approach to Pregnancy Discrimination in* Hibbs, 58 STAN. L. REV. 1871, 1895–96 (2006).

95 530 U.S. 914, 920 (2000).

the forefront of fundamental-rights jurisprudence.[96] Joined by three other justices, she concluded that the abortion right "center[s] on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."[97]

Even outside the abortion context, the Court has relied on equality and dignitary concerns to inform its due process analysis. When guaranteeing gay people the due process right to order their sexual lives, the *Lawrence* Court stressed the respect, dignity, and equal social standing that individuals in our society are owed.[98] In Justice Kennedy's terms, "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[99] Denying homosexuals the forms of autonomy accorded to heterosexuals was recognized as a simultaneous affront to liberty, dignity, and equality and to the protections against subordination that human dignity demands:

> If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* . . . demeans the lives of homosexual persons.[100]

Lawrence was therefore deeply concerned about social subordination, recognizing the essence of equal citizenship as the dignity of full membership in society.[101] Similarly, in the recent landmark *Obergefell* case, the Court

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96 Gonzales v. Carhart, 550 U.S. 124, 185 (2007) (Ginsburg, J., dissenting). Justice Ginsburg did not just draw upon sex equality *principles* to justify the abortion right, as in *Casey*, but she also directly invoked equal protection *cases* to extend the constitutional repudiation of laws reflecting or enforcing traditional sex-role stereotypes.

97 *Id.* at 172.

98 The Court repeatedly invokes the concept of individual dignity. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("[A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."); *id.* at 574 (discussing "personal dignity and autonomy" and quoting *Casey*, 505 U.S. 833, 851 (joint opinion of O'Connor, Kennedy, and Souter, JJ.)).

99 *Lawrence*, 539 U.S. at 562–75.

100 *Id*.

101 Siegel, *supra* note 93, at 1704 ("[The Court] speaks passionately of the dignity of autonomous decisionmaking, insisting that the Constitution guarantees an individual freedom to choose her own life course and not to live as the instrument of another's will. Justice Kennedy is eloquent also in describing the protections against subordination that human dignity requires, declaring the

further devoted considerable judicial energy to expounding the close ties between the liberty of the Due Process Clause and the equality of the Equal Protection Clause, stressing the interlocking nature of liberty and equality that crystalizes a right to "equal dignity" in same-sex marriages.[102]

The intersection of principles of liberty, dignity, and equality under the Due Process Clause is far less constraining than the Supreme Court's equal-protection jurisprudence, which sounds in antidiscrimination norms and focuses on the purpose and structure of challenged legislation rather than its impact.[103] "Due process equality," to the contrary, stresses anti-subordination norms, which respond to problems of social stratification, press substantive measures of equal citizenship, and impugn dignitary injuries of state action that enforce the subordinate status of relatively powerless groups.[104]

Part I has demonstrated that gender equality is a constitutional mandate protected under various jurisprudential and scholarly doctrinal frameworks. Parts II and III consider marital freedom as a *substantive* gender-equality right by applying the anti-subordination principle, historical interpretations of

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Constitution guarantees persons freedom from the denigration and humiliation of treatment as second-class citizens."); *see also* Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447, 1449 (2004) ("*Lawrence* is a case about liberty that has important implications for the jurisprudence of equality . . . ."); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 98 (2003) ("The perception that the Texas anti-sodomy statute imposes second-class citizenship on an identifiable class of persons . . . is at the core of *Lawrence*'s analysis.").

102 Obergefell v. Hodges, 135 S. Ct. 2584, 2602–04, 2608 (2015).

103 *See* Yoshino, *supra* note 78, at 781 (noting the function of due process equality as "an end run around bars on disparate impact"); *see also* Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1542 (2002) (arguing that the "fundamental rights strand of equal protection" analysis enables the Court to look beyond facial neutrality and look to the real-world impact of the laws it analyzes); Reva B. Siegel, Roe*'s Roots: The Women's Rights Claims That Engendered* Roe, 90 B.U. L. REV. 1875, 1903 (2010) (stating that the due process analysis in *Casey* tied the "constitutional protection for women's abortion decision to the understanding . . . that the government cannot use law to enforce traditional sex roles on women").

104 Indeed, like the Equal Protection Clause, the Due Process Clause was designed at least in part to "'abolish[] all class legislation in the States and do[] away with the injustice of subjecting one caste of persons to a code not applicable to another." Balkin, *supra* note 12, at 852 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2764–68 (1866) (statement of Sen. Howard)).

substantive equality, and the Supreme Court's emerging doctrine of "due process equality."[105]

II. MARITAL FREEDOM AS A SUBSTANTIVE GENDER-EQUALITY RIGHT

To establish the link between the right to marital freedom and substantive gender equality, this Part reveals the institution of marriage as a site of status inequality, as it has been historically regulated and as it is currently experienced by numerous women. This story, of subordination facilitated by marriage laws and reinforced through divorce laws, demands a right to marital freedom according to all visions of substantive equality identified.

The state has long enforced women's subordinate status in society through laws regulating the family.[106] Correspondingly, while feminist theories differ in many regards, "[a] continuous ideological thread of feminist theory through time and across continents is the common understanding that male power is linked to the subjugation and servitude of women in the home."[107] As this Part will show, the law has played a key role in enforcing and maintaining status inequalities between husband and wife, which persist to the present day in varying degrees. It is fueled by and in turn fuels gender discrimination in society at large, situating marriage at "the heart of politics"[108] for feminists of all stripes.[109] Precisely because of the contribution

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105 In addition to being a *substantive* equality right, marital freedom is also a *formal* equality right. *See* Karin Carmit Yefet, *Divorce as a Formal Gender-Equality Right*, 22 U. PA. J. CONST. L. (forthcoming April 2020).

106 G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty and Conceptions of State Accountability*, 37 RUTGERS L.J. 111, 152 (2005); Siegel, *supra* note 43, at 1036.

107 Kathleen Mahoney, *Theoretical Perspectives on Women's Human Rights and Strategies for Their Implementation*, 21 BROOKLYN J. INT'L L. 799, 800 (1996); *see also* Post & Siegel, *supra* note 7 ("[F]eminists often disagreed about the conditions of women's subordination, but there were certain matters about which they spoke with near unanimity. A core premise of the emergent feminist movement was that women's claim to equal rights with men entailed a challenge to the social organization of the family.").

108 Mahoney, *supra* note 107, at 801.

109 Indeed, all major social contract theorists understand the institution of marriage as central to female subordination. *See* Katherine O'Donovan, *Marriage: A Sacred Union or Profane Love Machine?*, 1 FEMINIST LEGAL STUD. 75, 88 (1993); Mahoney, *supra* note 107, at 801 (noting that based on their shared understanding of the home as a locus for women's oppression, feminist theories define the political very differently from theories developed from a male perspective, and that this idea is well-expressed in the slogans, "the personal is political"); *see also* Frances E. Olsen, *The Family and The Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1505 (1983); OKIN, *supra* note 4, at 125–26; Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239, 246 (2001)

of marriage to gender hierarchy in family and society, a strict divorce regime—even one that does not expressly differentiate between the sexes—adversely impacts women; the effect, if not the intent, is substantive gender inequality.

A. Marital Subordination in Historical Perspective

Marriage, as it was regulated from this nation's formation through the lesser part of the twentieth century, visited tremendous harms upon women. Upon the founding of the United States, men declared their independence from the English king, but clung to laws that made them "the kings of their own castle."[110] A legal regime of official discrimination and exploitation, the common law of marital status fostered relationships based on dependence and domination rather than equality and interdependence. The restrictive laws of divorce further constrained women's place both at home and in society; as feminists of the time saw it, divorce restrictions were among the most powerful sources of women's subordination and gender inequality.

Upon marriage, the law treated women as "civilly dead," deeming their legal existence "suspended," "incorporated," and "consolidated" into the legal existence of their husbands.[111] The compulsion to assume their husbands' names was an obvious marker of married women's loss of their separate identity.[112] As documented amply by historians of marriage, the coverture doctrine structured marriage to give husbands authority over their

(feminist family theorists have demonstrated that marriage is a public institution); CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 191 (1989); Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2098 (2001); KATE MILLETT, SEXUAL POLITICS 33, 36 (1969) (arguing that marriage is "the keystone of the stratification system, the social mechanism by which it is maintained.").

110 EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION 63 (2017).

111 Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude, and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 207, 208 n.9 (1991) (the metaphor of "women as slaves" referred to the status and condition of women upon marriage). Accounts of marital advice women received were even worse, speaking "even more forthrightly about the wife's status as a subordinate member of the relationship." Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2145 (1996).

112 McConnell, *supra* note 111, at 249 (showing that women were legally compelled to adopt their husbands' surnames). Even throughout the twentieth century, several states interpreted their laws to require that married women assume their husband's surnames for various purposes. *See, e.g.*, Forbush v. Wallace, 341 F. Supp. 217, 222–23 (M.D. Ala. 1971), *aff'd per curiam*, 405 U.S. 970 (1972) (finding that Alabama's law requiring a woman to assume her husband's surname upon marriage had a rational basis and furthered a legitimate state interest).

wives in almost all aspects of the relationship.[113] Wives owed their husbands strict obedience in all matters,[114] along with sexual and domestic services, and they could not sue their husbands for mistreatment.[115] The common-law doctrine of marital unity further worked to deprive wives of access to and ownership of income and property brought into or accumulated during the marriage—civil disabilities that greatly exacerbated women's already substantial economic and social dependence on their husbands. Anything that once belonged to a wife became her husband's property, and some commentators go so far as to suggest that a wife herself was viewed as her husband's property.[116]

While the common law of marital status limited wives' capacity for citizenship, it expanded husbands' citizenship stature, promoting the man's

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113 For an overview of common-law rules governing marital status in the antebellum period, see NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 47–55, 70–112 (1982); NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 9–23 (2000); LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES 8–15 (1998). For an overview of other historical periods, see, e.g., Linda McClain, *"God's Created Order," Gender Complementarity, and the Federal Marriage Amendment*, 20 BYU J. PUB. L. 313, 339 (2006); Hendrik Hartog, *Marital Exits and Marital Expectations in Nineteenth Century America*, 80 GEO. L.J. 95, 129 (1991) (to be married in the nineteenth century meant that "one assumed the character of a husband or a wife and that, in consequence, one was joined in a permanent relationship of power and submission"); Siegel, *supra* note 41, at 1114 ("the common law organized the 'domestic' relations of husband/wife and master/servant as relations of governance and dependence, with the law specifying the rights and obligations of superior and inferior parties"); Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2017, 2018 (2000); Jana B. Singer, *The Privatization of Family Law*, WIS. L. REV. 1443, 1462–65 (1992) (discussing the legal implications of the marital unity doctrine in the past and even at present).

114 Nancy F. Cott, *Divorce and the Changing Status of Women in Eighteenth-Century Massachusetts*, 33 WM. & MARY Q. 586, 611–12 (1976); Reva B. Siegel, *Valuing Housework: Nineteenth-Century Anxieties About the Commodification of Domestic Labor*, 41 AM. BEHAV. SCIENTIST 1437, 1440 (1998) (noting that the wife's duty in common law was to submit to and serve her husband).

115 *See generally* DAVID GALENSON, WHITE SERVITUDE IN COLONIAL AMERICA: AN ECONOMIC ANALYSIS (1981); STEPHEN INNES, WORK AND LABOR IN EARLY AMERICA (1988) (analyzing labor relationships and arrangements across groups in early America).

116 *See, e.g.*, HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 106 (1988) (finding that once married, a woman was deprived of control over all property she had owned beforehand); Blanche Crozier, *Marital Support*, 15 B.U. L. REV. 28 (1935) (noting that at the English common law, "the wife was, in economic relationship to the husband, his property"); Isabel Marcus, *Reflections on the Significance of the Sex/Gender System: Divorce Law Reform in New York*, 42 U. MIAMI L. REV. 55, 64–65 (1987) (describing how marriage served as a bar to formal access to all forms of property for women); Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 YALE L.J. 1073, 1082 (1994) (showing that marriage gave the husband the use of the wife's real property, personality, and services).

role as head of household, economic provider, and political representative.[117] At common law, a husband enjoyed the right to make all decisions for the family unit and to supervise his wife's actions, control her domestic labor,[118] dominate her body and sexuality,[119] determine whether she would bear children, and physically chastise her if she defied his authority.[120] This regime of gender hierarchy continued to be legally enforced and judicially exalted well into the twentieth century.[121]

Importantly, the structural inequalities built into the institution of marriage were mandatory and uniform. The state defined marriage as comprised of a husband-provider and wife-dependent, and individuals could not contract out of these sex-role prescriptions.[122] Over and over again, courts refused to give legal effect to private agreements to alter the gendered

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117 Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (Bradley, J., concurring) ("So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state . . . ."); 1 WILLIAM BLACKSTONE, COMMENTARIES *432–33 (describing how a husband was considered superior to his wife and could control her as he would his servants or children).

118 Naomi Cahn, *Faithless Wives and Lazy Husbands: Gender Norms in Nineteenth-Century Divorce Law*, 2002 U. ILL. L. REV. 651, 686 (2002). *See generally* Elizabeth B. Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America*, 8 L. & HIST. REV. 25 (1990) (describing how the position of women in nineteenth century marriages was comparable to that of an individual in bondage).

119 Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV 1373 (2000); Marybeth Herald, *A Bedroom of One's Own: Morality and Sexual Privacy After* Lawrence v. Texas, 16 YALE J.L. & FEMINISM 1, 13 (2004).

120 Husbands enjoyed the right to physically chastise wives, a right that knew no meaningful limits because courts refused to intervene "to prevent the deplorable spectacle of the exhibition of similar cases in our courts of justice." Bradley v. State, 1 Miss. (1 Walker) 156, 158 (Miss. 1824); *see also* Amy Eppler, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 YALE L.J. 788, 792 (1986) (finding that a husband had a right to physically chastise his wife as a corollary to his right to rule the home at common law).

121 *See, e.g.*, Chapman v. Mitchell, 44 A.2d, 392, 393 (1945) (asserting that male is the "master of his household", the "managing head, with control and power to preserve the family relation … and to guide their conduct."). As recently as the 1960s, the Supreme Court still insisted in a unanimous opinion that notwithstanding the recent "enlightened emancipation of women," they are "still regarded as the center of home and family life." Hoyt v. Florida, 368 U.S. 57, 61–62 (1961).

122 American courts have always refused to uphold marriage contracts that varied or particularized the traditional incidents of marriage, most notably the reciprocal marital duties of support and provision of domestic services, as well as husband's privileges to determine the residence and domicile of the couple and to give his name to family members. *See, e.g.*, *In re* Marriage of Higgason, 516 P.2d 289 (Cal. 1973) (failing to enforce a prenuptial agreement where husband and wife waived rights to support); Watkins v. Watkins, 143 Cal. App. 3d. 651, 654–55 (Cal. Ct. App. 1983) (examining the rule that a married woman could not contract with her husband regarding domestic services incidental to marital status).

terms of the traditional marriage contract.[123] This contractual disability in turn helped perpetuate gender hierarchy within marriage.[124]

The marriage contract was not only non-modifiable; it was also unenforceable. Married women were unable to enforce even the sparse protections that marriage afforded. Courts assiduously refused to intervene so long as a couple remained married, no matter how grossly the husband ignored his marital duties or abused his marital prerogatives.[125] The result in all too many cases was that married women were forced to endure a life of submission and accept their imposed domesticity.[126] It is little wonder that ever since the emergence of feminism in the United States, injustice within marriage has been a rallying cry. Antebellum feminists fiercely attacked the marital institution for giving husbands "unlimited power" while subsuming wives' wills and denying them full citizenship.[127] Many abolitionist and feminist activists described marriage as bondage or enslavement, a pointed reference to the legal trappings of the institution and the physical and emotional relations between husband and wife.[128] As they insisted, egalitarian marriage must be an inalienable human right.[129] Throughout, the laws of divorce played a complementary role.

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123 Courts feared that "giving legal sanction to marital bargaining would empower wives in ways that threatened the customary distribution of wealth and work in marriage." Siegel, *supra* note 114, at 1449.

124 Marjorie M. Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 207, 271 (1982).

125 Illustrative of the dependency of wives and the tyranny of their men under the traditional marriage contract, unenforceable in court, is the paradigmatic Nebraska case, *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953) (refusing to consider a wife's suit against her husband for inadequate support because the living standards of a family are for the household, and not the courts, to decide). *See* Shultz, *supra* note 124, at 234 (noting that the result in *McGuire* "is so common that commentators treat the unenforceability of support obligations during marriage as a given of marital law").

126 Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225, 246–47 (1997); *see also* RUTHANN ROBSON, LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW 124–27 (1992).

127 KERBER, *supra* note 113, at 12; MCCLAIN, *supra* note 2, at 58.

128 COTT, *supra* note 113, at 57–68; MCCLAIN, *supra* note 127, at 58; Clark, *supra* note 118, at 30–31.

129 Peggy Cooper Davis, *Neglected Stories and the Lawfulness of* Roe v. Wade, 28 HARV. C.R-C.L. L. REV. 299, 324 (1993) (noting that influential women's rights advocates in the nineteenth century deemed the right of egalitarian, non-patriarchal marriage inalienable).

1. The Complementary Functions of Divorce Restrictions in Enforcing Women's Subordinate Status

The patriarchal construction of marriage required a strict divorce regime.[130] Any right to renounce husbandly authority constituted a direct threat to the coverture doctrine, defying the notion that a married couple represents a single entity controlled by the husband.[131] As one scholar put it, "the old common law fiction that husband and wife were one and the husband was the one could no longer hold quite the same authority once divorce challenged the male-dominated corporatism of marriage."[132]

Beyond the goal of shoring up common-law marriage, divorce rights were strictly limited to preserve male honor. Marriage played a crucial role in conferring—and confirming—masculinity, such that a man's failure to establish himself as a dominating husband undermined his image as a sovereign capable of participating in the business of governance.[133] For a man, therefore, divorce was considered "a disaster, a source of overwhelming shame."[134] Viewed thus, it is easy to understand why divorce law managed to remain gender-neutral for much of American history. Women bore such a disproportionate share of the burdens of strict exit rules, while men had little need to escape marriage and much interest in maintaining it. Hence, laws that were sex-blind in theory, privileged men and manifestly disadvantaged women in practice.[135]

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130 GWYNN DAVIS & MERVYN MURCH, GROUNDS FOR DIVORCE 69 (1988) (the freedom to leave through divorce undermines male-dominated and male-oriented marriage); OKIN, *supra* note 4, at 129–30.

131 Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2017, 2032 (2000).

132 NORMA BASCH, FRAMING AMERICAN DIVORCE: FROM THE REVOLUTIONARY GENERATION TO THE VICTORIANS 42 (1999).

133 STEVEN NOCK, MARRIAGE IN MEN'S LIVES 58–59 (1998) (explaining the important role of marriage in conferring masculinity in all ages and the respect and social recognition that men receive from being married); *see also* MCCLAIN, *supra* note 2, at 135 (2006) (arguing that marriage is a "central site in which men define and display their masculinity," affording them social recognition and respect).

134 HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 101 (2000).

135 For example, Thomas Jefferson, a staunch advocate of divorce, envisioned marital freedom as a remedy for women: while a husband had "many ways of rendering his domestic affairs agreeable, by Command or desertion," a wife was "confined [and] subject"; the freedom of divorce would restore "to women their natural right to equality." Frank L. Dewey, *Thomas Jefferson's Notes on Divorce*, 39 WM. & MARY Q. 212, 219 (1982).

Ultimately, divorce restrictions were the manifestation of a society unable or unwilling to see women in any role other than that of wife and mother.[136] In a world in which wifehood was the defining characteristic of womanhood, not merely one of its incidents, a unilateral no-fault right to divorce was simply inconceivable.[137] Even as many jurisdictions began to enlarge the gamut exit options from marriage, the fault grounds they enacted actively reified sex-role expectations during marriage.[138] This Article's companion, focusing on divorce as a formal gender-equality right, will analyze how fault restrictions framed a deeply hierarchical vision of marital relations by rigidly policing gender-stereotypical behavior.[139]

It is little wonder, then, that liberal divorce has long been associated with women's most basic rights.[140] By the nineteenth century, feminists well understood marriage as a gender-subordination mechanism and divorce as an anti-subordination right that secures values of equal citizenship for women.

2. Toward a Feminist Understanding of the Equal Protection Clause: Rights of Exit in Early Feminist Theory

If we interpret the Equal Protection Clause based on the historical understandings and experiences of its feminist predecessors and contemporaries, as some constitutional scholars challenge us to do, then ostensibly sex-neutral limitations on divorce are a potent violation of gender

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136 Eppler, *supra* note 120, at 802; Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 458.

137 Nora J. Lauerman, *A Step Toward Enhancing Equality, Choice, and Opportunity to Develop in Marriage and at Divorce*, 56 CINCINNATI L. REV. 493, 510 n. 66 (1987) ("Traditionally, the law was premised on the stereotypic assumption that a married woman's only acceptable place was in the home, that her only truly legitimate role was that of homemaker/mother.").

138 OKIN, *supra* note 4, at 130; LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMICAL CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 2 (1987); Cahn, *supra* note 14, at 660.

139 Karin Carmit Yefet, *Divorce as a Formal Gender-Equality Right*, 22 U. PA. J. CONST. L. (forthcoming April 2020).

140 J. HERBIE DIFONZO, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA 14 (1997) (arguing that divorce has been perceived as a "woman's issue" in the United States); BARBARA DAFOE WHITEHEAD, THE DIVORCE CULTURE: RETHINKING OUR COMMITMENTS TO MARRIAGE AND FAMILY 16 (1998) (also noting the popular perception of divorce as a concern exclusive to women); Brown, *supra* note 3, at 248 (noting that a liberal right to divorce was a feminist issue since the early days of the country); Cahn, *supra* note 126, at 230 (divorce was historically associated with women's independence and liberation).

equality.[141] Indeed, nineteenth century feminists vociferously advocated liberalized divorce rules,[142] cautioning that strict limitations on exit resulted in the "subjugation of wives to domination by their husbands."[143] Their constant refrain analogizing marriage to slavery virtually compelled their audiences to contemplate divorce as a form of emancipation.[144]

Elizabeth Cady Stanton was a particularly vocal—and influential—champion of liberal divorce,[145] exclaiming with characteristic eloquence that "[t]here is no other human slavery that knows such depths of degradations as a wife chained to a man whom she neither loves nor respects, no other slavery so disastrous in its consequences on the race, or to individual respect, growth and development."[146] According to Stanton and other liberal feminists, one of the most important tenets of freedom and emancipation for women were "self-ownership within marriage and a right to divorce if the marriage became degrading."[147] Liberal divorce laws were for oppressed wives, Stanton often stated, "what Canada was for Southern slaves."[148]

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141 Finley, *supra* note 63, at 449 (2004).

142 NELSON MANFRED BLAKE, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES 87–88, 93–115 (1962); MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW 38–39 (1972) ("Reform of divorce laws became a tenet of the aggressive feminist movement of the mid-nineteenth century"); GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 73–77, 115–16 (1991).

143 RHEINSTEIN, *supra* note 142, at 43.

144 Clark, *supra* note 118, at 34. For example, Elizabeth Stanton used the paradigms of slavery and freedom to describe the condition of women within marriage. *Id.* at 26.

145 Stanton's writings on divorce are scattered in many sources. *See, e.g.*, ELIZABETH CADY STANTON, HISTORY OF WOMAN SUFFRAGE 716–22, 738–42, 860–61 (1881); Elizabeth Cady Stanton, Address Before the Judiciary Comm. of the N.Y. S. on the Divorce Bill (Feb. 8, 1861), *available at* https://www.loc.gov/item/mss412100063/ [hereinafter Stanton, Address on the Divorce Bill] (documenting Stanton's speech before the New York Senate on the importance of divorce for equality); Elizabeth Cady Stanton, On Marriage and Divorce, Address at the Decade Meeting (Oct. 20, 1870), *in* A HISTORY OF THE NATIONAL WOMAN'S RIGHTS MOVEMENT, FOR TWENTY YEARS 59 (Paulina W. Davis ed., Journeymen Printers' Co-Operative Ass'n 1871) (transcribing Stanton's speech on marriage and divorce).

146 THE ELIZABETH CADY STANTON-SUSAN B. ANTHONY READER 133 (Ellen Carol DuBois ed., rev. ed., 1992).

147 Clark, *supra* note 144, at 34; *see also id.* at 36–37 (documenting examples of Stanton's making these remarks in her speeches and writings).

148 *See, e.g.*, Elizabeth Cady Stanton, *Divorce Versus Domestic Warfare*, in DIVORCE: THE FIRST DEBATES 560–61 (David J. Rothman & Sheila M. Rothman eds., 1987) (arguing that because the abolition of slavery precluded the proposition that people are property, women should not be viewed as the property of their husbands and thus liberal divorce laws should be the norm); Elizabeth Cady Stanton, *The Need of Liberal Divorce Laws*, 139 N. AM. REV. 234, 243 (1884); Tracy A. Thomas,

The women who gathered for the first U.S. women's rights convention, held in Seneca Falls in 1848, identified "marital bondage" and restrictions on exit as major sources of gender subordination.[149] The Declaration of Sentiments they issued proclaimed that men have "so framed the laws of divorce, as to what shall be the proper causes of divorce . . . 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."[150] Accordingly, feminist leaders demanded "complete freedom of either party at any time to terminate the marriage relationship"[151] as critical to cultivating equality, dignity, and partnership for women within marriage.[152]

The activist work, legislative reform efforts, and public speeches on divorce that followed the Seneca Falls Convention advocated an end to divorce laws that disparately impacted women and to state tolerance of private oppression and violence in marriage.[153] At the Tenth National Women's Rights Convention in 1860, for example, Stanton advocated no-fault divorce to end "legalized prostitution of coerced marital intercourse and unwilling maternity."[154] In her 1861 appeal to the New York legislature to liberalize divorce law, Stanton argued that restricting divorce to specific grounds especially burdens women and often confines them to a life of degradation, bodily harm, and economic dependence.[155] As she saw it, divorce-restrictive regulations were a necessary step "in order to establish

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Elizabeth Cady Stanton on the Federal Marriage Amendment: A Letter to the President, 22 CONST. COMMENT. 137, 139–40 (2005).

149 JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 139 (1991) (citing THE REVOLUTION, Oct. 27, 1870, at 264). Women's activists complained that the laws of marriage and divorce were framed to benefit men and entrap women within the oppressive institution of marriage. Clark, *supra* note 144, at 25.

150 Declaration of Sentiments and Resolutions (Seneca Falls Convention, 1848), *reprinted in* UP FROM THE PEDESTAL: SELECTED WRITINGS IN THE HISTORY OF AMERICAN FEMINISM 185 (Aileen S. Kraditor ed., 1968); *see also* THE BIRTH OF AMERICAN FEMINISM: THE SENECA FALLS CONVENTION OF 1848, at 87 (Virginia Bernhard & Elizabeth Fox-Genovese eds., 1995).

151 MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW 40 (1972).

152 NELSON MANFRED BLAKE, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES 87–92 (1962); KATHLEEN BARRY, SUSAN B. ANTHONY: A BIOGRAPHY OF A SINGULAR FEMINIST 137 (1988); Clark, *supra* note 118, at 26–29.

153 Finley, *supra* note 63, at 443.

154 Ellen Carol DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution 1820–1878*, *in* A LESS THAN PERFECT UNION: ALTERNATIVE PERSPECTIVES ON THE U.S. CONSTITUTION 104, 111 (Jules Lobel ed., 1988).

155 *See* Stanton, Address on the Divorce Bill, *supra* note 145, at 9; Finley, *supra* note 63, at 444.

man's authority over woman."[156] Stanton and Susan B. Anthony devoted numerous editorials in their weekly newspaper to advocating free availability of marital freedom.[157]

In short, "'She' The People"—the women's rights movement that supported the vision of freedom and equality encapsulated in the Fourteenth Amendment—understood liberal divorce as a substantive equality right, critical for ameliorating the persisting subordination of women.

Concededly, not all feminists signed onto the divorce agenda,[158] but the "case made by radical feminists for a thorough-going overhaul of divorce and family law framed an agenda that eventually became well accepted by reformers in the post-Civil War era."[159] Indeed, the Stantonian agenda for greater gender equality in marriage and for a no-fault right of exit as prerequisites for substantive gender equality became "the dominant way"[160] of viewing marriage and divorce and contributed to the egalitarian legal changes that followed.

B. Legal Equality Versus Marital Reality: Gender Hierarchy in Contemporary Marriages

This Section focuses on the institution of contemporary marriages, contrasting legal equality with marital reality. As the analysis will document, despite legal developments in women's position in family and society, the

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156 Finley, *supra* note 63, at 444 (quoting Elizabeth Cady Stanton, *Home Life*, *in* THE ELIZABETH CADY STANTON-SUSAN B. ANTHONY READER, *supra* note 146, at 131–38).

157 BLAKE, *supra* note 142, at 99; WILLIAM L. O'NEIL, DIVORCE IN THE PROGRESSIVE ERA 206 (1967).

158 Women's advocates were not as unified on questions of marriage as they were on, say, the issue of suffrage. As Katharine Bartlett correctly notes, pro-marriage feminists disfavored divorce "in part because it would result in their being cast off beyond their primes when their prospects for remarriage were bleak." Katharine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475, 477 (1999); *see also* Kay, *supra* note 14, at 2027 (discussing the different views leaders of the nineteenth century women's movement had on divorce); *see also* Clark, *supra* note 118, at 25–26, 47 (explaining that divorce was a complex and divisive issue for feminists throughout the nineteenth century, and that many feminists spoke of divorce reluctantly out of fear of being branded as anti-marriage or anti-family or out of concern that Stanton's vision of liberal divorce would taint the quest for suffrage). For the concerns of both pro-divorce and pro-marriage nineteenth-century feminists, see BASCH, *supra* note 132, at 68–80; MIRIAM GURKO, THE LADIES OF SENECA FALLS: THE BIRTH OF THE WOMEN'S RIGHTS MOVEMENT 202–06 (1974).

159 Bartlett, *supra* note 158, at 477–78.

160 *Id.* at 484; *see* Clark, *supra* note 118, at 26, 43 (noting how many ideas central to Stanton's work have become dominant in modern society).

shadow of the patriarchal family still hovers over modern marriages, profoundly shaping husband-wife relationships and women's overall status. Against this backdrop, liberal divorce is revealed as a substantive equality right of constitutional significance, given the close ties between emancipation from marital subordination and the guarantees of equal citizenship.

1. Egalitarian Legal Rhetoric: The Modern Transformation of Marital Status Law

The early women's rights movement, which protested against the hierarchical strictures of marriage, was in large part responsible for the incremental reform of marital status law beginning in the second half of the nineteenth century.[161] As Reva Siegel has shown in her work on nineteenth century marriage law, women's demands for autonomy and equality in marriage slowly began to find resonance with state legislatures, which in turn modified many aspects of common-law coverture.[162] Thus, marriage law slowly resurrected women from their civil deaths,[163] and divorce law became more liberalized, at least in part thanks to feminist demands.[164]

Well into the second half of the twentieth century, however, the legal system still continued to allocate privileges and entitlements with respect to marriage and divorce in a manner that perpetuated overt gender

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161 Siegel, *supra* note 41, at 1116–17 (noting that by the 1850s, the woman's rights movement was meeting in national and regional conventions and circulating legislative petitions to protest the common law of marriage).

162 *See* Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127, 2149–68 (1994) (describing reform in nineteenth-century New York); Siegel, *supra* note 41, at 1117 (noting that towards the end of the century women were able to engage in third party transactions); Siegel, *supra* note 111, at 2119 (describing efforts the American feminist movement of the nineteenth and twentieth centuries took to secure wives' equality with their husbands). For reform in other jurisdictions see 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. LEGAL HIST. 3, 3–5 (1985); Joseph Warren, *Husband's Rights to Wife's Services (pts. 1–2),* 38 HARV. L. REV. 421, 622 (1925).

163 For a volume of essays describing various nineteenth-century reforms of marital property and contract law, see *Domestic Relations and Law*, *in* 3 HISTORY OF WOMEN IN THE UNITED STATES: HISTORICAL ARTICLES ON WOMEN'S LIVES AND ACTIVITIES (Nancy F. Cott ed., 1992).

164 Rigby, *supra* note 13, at 562 (noting that in the mid-1800s divorce laws were liberalized due to attempts to establish equal rights for women); DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 28 (1991) (as the century progressed, both legislative and judicial attitudes toward divorce became more liberal, partly in response to feminist demands); *see also* Bartlett, *supra* note 158, at 478.

hierarchy.[165] Only since the Supreme Court imported gender-equality concerns into its equal protection jurisprudence have the statute books largely purged explicit references to sex roles and stereotypes.[166] Gender equality became the new organizing principle of family law, as the legal system reconceived spouses and their family responsibilities in sex-neural terminology[167] and granted them a liberal right of marital exit free of fault or spousal consent considerations.[168]

While the attainment of gender equality initially was not a stated goal of the no-fault reform efforts in California—the first state to legalize no-fault divorce[169]—feminists in several other states became deeply involved in pushing for a more liberal divorce regime.[170] The elimination of fault

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165 For example, even after the Married Women's Property Acts eliminated aspects of a husband's legal control over his wife's property, they did not eliminate the other elements of the marital contract, such as the wife's duty to obey and provide domestic service. Wives also still lacked property rights in their household labor, which remained their husbands' by marital right; in all states, the common law still disabled a wife from making an enforceable contract with her husband for compensation for the labor she performed for their family. "Partial capacity" thus continued to be the defining reality of wives' lives in nineteenth-century family law. *See* MCCLAIN, *supra* note 2, at 59–60 (exploring shifts in the perception of marriage from the time of the Married Women's Property Acts to the 1970s); Siegel, *supra* note 116, at 1112–88 (describing the women's rights movement's efforts to justify demands for joint property rights in marriage).

166 *See, e.g.*, Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981) (invalidating Louisiana community property law treating husbands as "head and master" of property jointly owned with wife); Orr v. Orr, 440 U.S. 268, 270–71 (1979) (invalidating a law requiring only men to pay alimony to their ex-wives); *see also* Maxine Eichner, *Marriage and the Elephant: The Liberal Democratic State's Regulation of Intimate Relationships Between Adults*, HARV. J.L. & GENDER 25, 47 (2007) (recognizing that since the 1970s marriage has lost its gender-based duties); Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 97, 113 (2005) (the legal system eliminated different rules for women and men in areas of alimony, child custody, property management, and estate oversight).

167 Martha Albertson Fineman, *Progress and Progression in Family Law*, U. CHI. LEGAL F. 1, 7 (2004) ("The legal relationship between husband and wife has been completely rewritten in gender–neutral, equality aspiring terms"); MCCLAIN, *supra* note 2, at 61, 76.

168 JACOB, *supra* note 116, at 5; Singer, *supra* note 113, at 1462–65.

169 Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 293 (1987); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CINCINNATI L. REV. 1, 43–44 (1987); RHODE, *supra* note 164; JACOB, *supra* note 116, at 168 ("[T]he feminists who might otherwise have been attracted to divorce law reform were preoccupied with the Equal Rights Amendment, abortion, and other issues . . . .").

170 Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, WIS. L. REV. 789, 811 (1983) (noting that the major actor in divorce reform in Wisconsin was the feminist community); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. Rev. 1103, 1105 (1989) (highlighting that the no-fault revolution was supported by a number of women's rights advocates).

became a symbol of scrapping sex-based presumptions,[171] and a liberal right to divorce was perceived by many women as "a splendid enhancement of their status both in marriage and after,"[172] a social validation of the female right to self-actualization.[173]

The gradual repudiation of coverture and the legal disabilities attending marriage have, of course, substantially reduced the significance of marriage as a limitation on women's ability to participate as equal citizens in society. Yet, as the ensuing analysis will demonstrate, the dramatic legal transformation of marital status rules has not effected a commensurate transformation in the lived experience of marriage. While gender hierarchy is surely not as severe or overt as it was during the nineteenth-century marital regime, significant status inequalities still persist between twenty-first century husbands and wives.

2. Marital Reality Today: Documenting Private Patriarchy and its Public Consequences

Well into the twenty-first century, egalitarian marriage—however modestly defined[174]—still remains a "downright contradiction of terms."[175] The majority of contemporary couples, regardless of race or class, live according to either the traditional marriage model, characterized by gender specialization that confines women's talents to housekeeping and caretaking, or the modern dual-earner model, where marital life is often directed by what this Article calls "separate-spheres ideology in disguise."[176] Whatever the model of marriage, social scientists have consistently detected that "his"

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171 Thomas M. Mulroy, *Are Women Losing the Battle?—No-Fault Divorce*, 75 A.B.A.J. 76, 76 (1989); *see also* Kay, *supra* note 14, at 2060 (recounting that California was the first state to consider no-fault divorce).

172 J. Herbie DiFonzo, *No-Fault Marital Dissolution: The Bitter Triumph of Naked Divorce*, 31 S.D. L. REV. 519, 550 (1994); *see also* JACOB, *supra* note 116, at 3, 23 (detailing the effects that the feminist movement had on views of marriage).

173 Martha L. Fineman, *Neither Silent, Nor Revolutionary*, 23 L. & SOC'Y REV. 945, 947 (1989); DIFONZO, *supra* note 140, at 173; Nichols, *supra* note 20, at 939 (describing how women's advocates celebrated no-fault divorce for freeing women to realize their full potential by extricating themselves from constraining marriages).

174 Wax, *supra* note 2, at 531–35.

175 APPLEWHITE, *supra* note 16, at 270.

176 To be sure, this is not to suggest that spouses are expected to or even should be equal in all respects. In practice, however, marital inequality often translates into wifely subordination. *See* Frantz & Dagan, *supra* note 10, at 91 & n.61 (distinguishing marriage from other joint enterprises).

marriage—the husband's—is overwhelmingly better than "hers"—the wife's.[177]

In what follows, this Subsection endeavors to show that the typical marriage is a relationship not between equal partners but between dominating and subordinate figures, according to three indices of marital power: role specialization, decision-making authority, and the use of force. It then examines women's divorce accounts to demonstrate that women recognize the subordinating effects of marriage on their lives and the importance of divorce to achieving emancipation, independence, and dignity.

a. Gender-Role Differentiation at Home and in the Market

Approximately one in five American marriages today involves a breadwinner and a full-time homemaker.[178] A wealth of literature has eminently established that dividing economic and domestic responsibilities on the basis of gender inevitably marginalizes women, limits their access to universally valued resources, and devalues their contributions to their families. [179]

The role of breadwinner brings status, recognition, and economic reward in the larger world; the role of the homemaker brings none.[180] Breadwinning

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177 *See* JESSIE BERNARD, THE FUTURE OF MARRIAGE 14 (2d ed. 1982) ("There are two marriages… in every marital union, his and hers. And his . . . is better than hers."); *see also* EILEEN MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED, at ch. 2 (2003); CATHERINE KOHLER RIESSMAN, DIVORCE TALK: WOMEN AND MEN MAKE SENSE OF PERSONAL RELATIONSHIPS 15 (1990).

178 JANICE M. STEIL, MARITAL EQUALITY: ITS RELATIONSHIP TO THE WELL-BEING OF HUSBANDS AND WIVES 97 (1997); MARY FRANCES BERRY, THE POLITICS OF PARENTHOOD: CHILD CARE, WOMEN'S RIGHTS, AND THE MYTH OF THE GOOD MOTHER 8 (1993) (observing that one woman in five is a full-time homemaker); Catherine Albiston, *Institutional Inequality*, 2009 WIS. L. REV. 1093, 1124–25 (2009) (noting that 20% of families in 2006 fit the traditional model of a breadwinner and a stay-at-home parent); Gretchen Livingston, *Stay-at-Home Moms and Dads Account for About One-in-Five U.S. Parents*, PEW RES. CTR. (Sept. 24, 2018), https://www.pewresearch.org/fact-tank/2018/09/24/stay-at-home-moms-and-dads-account-for-about-one-in-five-u-s-parents/.

179 STEIL, *supra* note 178, at 45–54; *see also* Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307, 317 (2004) (arguing that the marital family has contributed to the marginalization of women).

180 RIESSMAN, *supra* note 177, at 56; Martha L. A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2188 (1995) ("[T]he uncompensated tasks of caretaking are placed with women while men pursue careers that provide economically for the family but also enhance their individual career or work prospects.").

husbands acquire knowledge, income, status, and prestige from their work, which enhances their independence, self-esteem, and social contacts.[181] Husbands' access to such resources significantly increases their bargaining power within the marriage.[182] Homemaking wives, by contrast, lack financial independence and alternative sources of achievement, self-esteem, and affirmation; enjoy limited opportunities to access resources and develop competence; and highly depend on their marriages, factors that reduce their influence and marital bargaining power.[183]

Entrenched societal values that place a high premium on paid employment while devaluing unpaid housework further bolster breadwinning husbands and marginalize the contributions of homemaking wives.[184] These adverse effects in turn converge in ways that make it "exceedingly difficult for [a wife] to interact with her spouse as an equal partner."[185] Indeed, social scientists of diverse orientations have found that, while marriage benefits men on each and every measure of well-being examined, for women it has often proven a source of personal unhappiness, psychological costs, and restricted opportunities for personal achievement and public participation.[186] As Betty Friedan cautioned in *The Feminine*

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181 Gregory S. Alexander, *The New Marriage Contract and the Limits of Private Ordering*, 73 IND. L.J. 503, 507 (1998) ("[M]en and women share unequally the benefits and burdens of marriage" and "[m]en tend to have greater bargaining power and use that power advantage to satisfy their preferences at the expense of their wives").

182 OKIN, *supra* note 4, at 157–59 (describing studies of power within families demonstrating that "the amount of money a person earns—in comparison with a partner's income—establishes relative power); M. Rivka Polatnick, *Why Men Don't Rear Children: A Power Analysis*, *in* MOTHERING: ESSAYS IN FEMINIST THEORY 21, 24–28 (Joyce Trebilcot ed., 1983); STEIL, *supra* note 178, at 47.

183 STEIL, *supra* note 178, at 47, 54. For the many benefits of participation in the labor force, see Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1177 (1991).

184 STEIL, *supra* note 178, at 47.

185 *Id.* (noting the validity of this conclusion even for couples who strive to minimize materialistic concerns).

186 Systematic analyses of marriage and the family found that men tended to be more satisfied in their relationships than women and that women, as a group, tended to be more seriously disappointed in their marriages. Researchers depict contemporary marriage as a "bad bargain" for a woman, affecting her life substantially more than a man's and often causing women to experience a loss of control over their own lives. *See* Robert L. Burgess, *Relationships in Marriage and the Family*, *in* 1 PERSONAL RELATIONSHIPS: STUDYING PERSONAL RELATIONSHIPS 179, 185 (Steve Duck & Robin Gilour eds., 1981); Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 178–79 (2003) (discussing the substantial gender gap in gains from marriage); STEIL, *supra* note 178, at 71, 103 (detailing the costs of marital inequality to women); *id.* at 87 (showing research consistently reports that wives are less satisfied in marriage than husbands and that their marriages

Mystique—a book credited with reawakening the women's movement and sparking Second-Wave Feminism in the United States[187]—women's specialization in the work of the home perpetuates men's dominance and women's social and economic dependence.[188]

A growing majority of marriages today concededly function in a dual-earner model,[189] but considerable sociological research suggests that the traditional gender roles of husband and wife "continue to provide a general blueprint for marriage, situating men's work primarily in the public sphere and women's in the private."[190] Even the most egalitarian, professional dual-career couples tend to "build life structures with one foot in the past, mimicking traditional marriages of their parents' generation, and one foot in the feminist influenced present . . . ."[191] Many twenty-first century marriages therefore continue to function as a limiting force on women's ability to participate as equal citizens.[192] Some feminists have gone so far as to suggest that married women in dual-earner marriages who work as providers in

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are less affirming, less validating, and less nurturing than their husbands'); HETHERINGTON & KELLY, *supra* note 177, at 23 (reporting the existence of "his" and "her" marriage and that his is superior to hers); FALUDI, *infra* note 196, at 16–17 (noting that "if there's one pattern that psychological studies have established, it's that the institution of marriage has an overwhelmingly salutary effect on men's mental health" and describing the extent to which marriage may be hazardous to women's health and that the two prime causes for female depression were low social status and marriage); *id.* at 37; APPLEWHITE, *supra* note 16, at 3, 242 (reviewing studies and concluding that married women are "the most depressed segment of the population"); Herma Hill Kay, *"Making Marriage and Divorce safe for Women" Revisited*, 32 HOFSTRA L. REV. 71, 75 (2004) (marriage is "a limitation on the woman who seeks to realize her own individuality rather than achieving identity through her husband.").

187 MAREN LOCKWOOD CARDEN, THE NEW FEMINIST MOVEMENT 154–55 (1974); Kay, *supra* note 14, at 2049.

188 BETTY FRIEDAN, THE FEMININE MYSTIQUE 336–37 (Dell Publ'g 1983) (1963).

189 *See, e.g.*, Crain, *supra* note 183, at 1177 (noting that almost two thirds of families have two wage earners).

190 RIESSMAN, *supra* note 177, at 51; *see also* MCCLAIN, *supra* note 2, at 75 (noting the problem that people accept the idea that sex equality is an appropriate public value yet may still believe that it does not extend to the "private" sphere of marriage); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2245 (1994) (explaining that women's disproportionate responsibility for household work influences the wage gap).

191 LISA R. SILBERSTEIN, DUAL-CAREER MARRIAGE: A SYSTEM IN TRANSITION 174 (1992).

192 *See* MCCLAIN, *supra* note 2, at 135 (observing that the institution of marriage continues to shape female identity and gender performance); J. Herbie DiFonzo & Ruth C. Stern, *The Winding Road from Form to Function: A Brief History of Contemporary Marriage*, 21 J. AM. ACAD. MATRIMONIAL LAW. 1, 28–29 (2008) (discussing how gendered norms still remain "pervasive" in the twenty-first century); Fiss, *supra* note 50, at 418–19 ("[T]he dominant contemporary social understanding continues to assign to women the primary responsibility for the care of children . . . .").

addition to homemakers exercise even greater levels of self-sacrifice than women in traditional marriages, obtain fewer marital benefits, and may even suffer from more inequality in marital bargaining.[193]

To begin with, husbands' involvement in domestic, relationship, and caretaking work is widely recognized as a barometer of wives' bargaining power.[194] As studies extensively document, women's chronic negotiating weakness pushes even "modern" marriages to slip into gendered patterns, characterized by grossly unequal divisions of labor in the family.[195] While married women have drastically increased their involvement in the paid labor force, they continue to bear a highly disproportionate responsibility for the work of the home, the children, and family relationships. As one writer quipped somewhat hyperbolically, "the only major change" is that husbands "*think* they do more around the house."[196]

A wealth of literature about the marital division of labor has reported on the overwhelming domestic duties imposed on married women, amounting to a "double day" or "second shift" at home.[197] Working wives perform approximately eighty percent of the housework, spending about fifteen hours more each week on housework than their husbands.[198] Working women also

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193 AUGUSTUS Y. NAPIER, THE FRAGILE BOND: IN SEARCH OF AN EQUAL, INTIMATE, AND ENDURING MARRIAGE 78 (1988); Wax, *supra* note 2, at 515.

194 STEIL, *supra* note 178, at 26, 66 (explaining that the sharing of domestic tasks is the most frequently cited barometer of relationship equality); Wax, *supra* note 2, at 603 ("[T]he wife's decisions about whether or how much to work are very much a function of her bargaining power within the marital relationship.").

195 FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART 29 (1991) (stating that traditional provider/caregiver roles continue to be a major organizing feature of household labor within contemporary marriages); MCCLAIN, *supra* note 2, at 106 (reinforcing that contemporary marriages use traditional provider/caregiver roles); Fineman, *supra* note 5, at 270 (noting that a very high proportion of marriages are still built upon a gender-based division of labor).

196 SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN xiv (1991).

197 ARLIE HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME 33–58 (1989); Alicia Brokars Kelly, *Money Matters in Marriage: Unmasking Interdependence in Ongoing Spousal Economic Relations*, 47 U. LOUISVILLE L. REV. 113, 125–26 (2008) (summarizing research that "consistently" reaffirms the deeply gendered division of labor in marriage); *see also* JANET STOCKS ET AL., MODERN COUPLES SHARING MONEY, SHARING LIFE 76 (2007) (compiling research studies from the 2000s).

198 HOCHSCHILD, *supra* note 197, at 216–22, 259–62; Williams, *supra* note 190, at 2245. Writing in the late 1990s, Janice Steil examined studies assessing the allocation of domestic work by both time and task measurement strategies, and concluded that employed women continue to do at least two thirds of the domestic work and that only between 2% and 12% of husbands in dual-earner families

perform some two-thirds of the child care, and the little that men do tend to be the pleasant kind of care.[199] Women also disproportionately perform the "emotion work" crucial to maintaining family relationships, work that requires considerable time, effort, and skill yet generally goes unacknowledged.[200]

To be sure, there is no evidence to support the common rejoinder that wives' disproportionate time spent on domestic labor is offset by husbands' disproportionate time spent on waged labor. Sociologists report that women typically perform much more family work even when employed the same number of hours as their partners; husbands do not increase their domestic responsibilities when their job demands decrease; and even when unemployed they "do much less housework than a wife who puts in a forty-hour week."[201] Notably, husbands whose wives outearn them are the *least* likely to share domestic responsibilities; their higher-earning wives may do even more housework to compensate husbands for challenging their masculinity and to protect their status as "primary" breadwinners.[202]

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share domestic responsibilities equally. *See* STEIL, *supra* note 178, at 21, 55; *see also* HETHERINGTON & KELLY, *supra* note 177, at 249; Karst, *supra* note 88, at 525–26.

199 For example, some studies found the typical American husband spends an average of twelve to twenty-four minutes in solo child care each day. *See* Hamilton, *supra* note 179, at 318 (noting that "shared" caretaking between parents "has remained illusory"). Husbands still feel entitled to avoid domestic responsibilities; what little they do, they do not out of a sense of duty, but as "volunteers" who "help" their working wives in managing the household. *See* RIESSMAN, *supra* note 177, at 51. Accordingly, many men feel proud, not guilty, with respect to the small amount of childcare they do. *See* Williams, *supra* note 190, at 2238 ("I'm spending a whole lot more time on family than my father did, and you're spending far less time than your mother did. Consequently, you feel incredibly guilty, while I naturally feel pretty proud of myself."). Indeed, numerous studies have repeatedly found that husbands still believe and act out as if their contributions are more valuable than their wives, "just because they come from men." Wax, *supra* note 2, at 582–83; *id.* at 589 (noting "[m]en's tendency to attach little importance to women's efforts"); *see also* HETHERINGTON & KELLY, *supra* note 177, at 249 (comparing minimal rise in man's contribution to household chores to over doubling of mothers who work in a similar period).

200 *See* STEIL, *supra* note 178, at 85–87.

201 *Id.* at 52; OKIN, *supra* note 4, at 141, 153; Jennifer R. Johnson, *Preferred by Law: The Disappearance of the Traditional Family and Law's Refusal to Let It Go*, 25 WOMEN'S RTS. L. REP. 125, 129 (2004) ("[S]tudies indicate that no matter how much money women make or how much value they place on their careers, they retain the majority of the caretaking responsibility."). For a comprehensive review of the literature on this point see Wax, *supra* note 2, at 519–24.

202 Monica Biernat & Camille B. Wortman, *Sharing of Home Responsibilities Between Professionally Employed Women and Their Husbands*, 60 J. Personality & Soc. Psychol. 844 (1991) (husbands of academic women who earned less than their wives were found to do *less* child care than husbands who earned more than their wives); HETHERINGTON & KELLY, *supra* note 177, at 250 (finding that husbands who earn less than wives tend to become even more reluctant to help in the work of the home);

Even among couples that aspire to egalitarian relationships, husbands are often at leisure while their wives are at work, either within or outside the home, a phenomenon sociologists term "the work-leisure gap."[203] Employed women work substantially longer hours than both housewives and husbands,[204] as men "have taken full advantage of their bargaining power to minimize the extent to which women's market efforts impinge on their freedom and leisure."[205] By these measures, "modern" working wives are paradoxically worse off than their "traditional" sisters.

It is worth noting that such gender inequality tends to grow stronger and bolder as a marriage progresses.[206] As Amy Wax has persuasively showed, using bargaining theory principles, the longer women are married, the more they experience a progressive erosion in their bargaining power, enabling husbands to steadily pressure women to take on even more responsibility for unpaid work.[207]

This modern form of separate spheres in disguise for husbands and wives produces marital inequality and erodes women's status in the family. Even to this day, a majority of Americans still endorse the male-as-breadwinner-and-female-as-caregiver model and ascribe different meanings to the waged

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Hochschild, *supra* note 197, at 216–22, 259–62 (husbands earning less than their wives were the least likely to participate in housework); STEIL, *supra* note 178, at 53–54, 110.

203 STEIL, *supra* note 178, at 52–53; Wax, *supra* note 2, at 523.

204 NAPIER, *supra* note 193, at 78 (arguing women in dual-earner marriages are worse off than their "traditional" counterparts, as they have to contend with even higher levels of self-denial and with less time for their personal needs); Wax, *supra* note 2, at 591–92; Tammy R. Pettinato, *Transforming Marriage: The Transformation of Intimacy and the Democratizing Potential of Love*, 9 J.L. FAM. STUD. 101, 112 (2007) ("When paid and unpaid labor are combined, women work much longer hours for much less pay than men.").

205 Wax, *supra* note 2, at 633*; see also* OKIN, *supra* note 4, at 153 ("husbands of wives with full-time jobs averaged about two minutes more housework per day than did husbands in housewife-maintaining families, hardly enough additional time to prepare a soft-boiled egg.").

206 OKIN, *supra* note 4, at 123 (noting that the gendered division of labor in modern marriages exacerbates the asymmetric power relation between husband and wife over time); *id.* at 156 (explaining that women as workers are disadvantaged by marriage itself, and more so the longer the duration of the marriage); Joan M. Krauskopf & Sharon Burgess Seiling, *A Pilot Study on Marital Power as an Influence in Division of Pension Benefits at Divorce of Long Term Marriages*, 2 J. DISP. RESOL. 169, 178 (1996) (noting that the differing marital roles increase a husband's power and reduce a wife's power over time).

207 Wax, *supra* note 2, at 626–35 (discussing the phenomenon of the "bargaining squeeze" and explaining the host of forces that push the division of labor in directions that favor men and that decrease bargaining power to effect more spousal sharing of unpaid domestic work).

labor of husbands and wives.[208] As Pepper Schwartz concluded, "[t]he linchpin of marital inequality is . . . the provider complex, a combination of roles that give the man the responsibility for financially supporting the family's life-style and the woman all the auxiliary duties that allow the man to devote himself to work."[209]

This provider complex produces different expectations for husbands and wives as to the rewards available from marriage. On the one hand, husbands feel entitled to appreciation for acting as "primary" providers, feel justified in putting their careers above their wives', expect their wives' undivided support and household services, and perceive the time they dedicate to their careers as an act of "family caring."[210] In this way, "even though, as a legal matter, marriage no longer entails a status relationship in which husbands have a duty to provide and may expect from wives services and obedience, the 'provider complex' continues to carry with it such expectations."[211] On the other hand, paid employment is still not considered an integral component of women's normative roles as wives, and so women workers are frequently considered secondary wage earners in their families.[212] Sociologists call this phenomenon an "ideological discount rate," whereby a woman's earnings, no matter how high its proportion to family income, is regarded as secondary.[213] Indeed, this phenomenon is rampant among

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208 Kelly, *supra* note 197, at 130–31, 135 (explaining that the male-as-breadwinner-and-female-as-caretaker model is still influential today and breadwinning is still part of the construct of masculinity); Nancy E. Shurtz, *Gender Equity and Tax Policy: The Theory of "Taxing Men"*, 6 S. CAL. REV. L. & WOMEN'S STUD. 485, 531 (1997) (noting that surveys show a widespread belief in the male "breadwinner" role); MCCLAIN, *supra* note 2, at 137–38 (pointing to contemporary research about gender roles within marriage).

209 PEPPER SCHWARTZ, PEER MARRIAGE: HOW LOVE BETWEEN EQUALS REALLY WORKS 111–13 (1994).

210 MCCLAIN, *supra* note 2, at 72, 137 (summarizing that the association of men with the breadwinning role often fosters inequality by yielding husbands more power and respect in marriage); OKIN, *supra* note 4, at 14, 95.

211 MCCLAIN, *supra* note 2, at 137.

212 *See generally* Allen M. Parkman, *Bargaining Over Housework: The Frustrating Situation of Secondary Wage Earners*, 63 AM. J. ECON. & SOC. 765 (2004) (observing that women tend to work less in the home as their earnings increase outside the home); *see also* Elizabeth Adjin-Tettey, *Contemporary Approaches to Compensating Female Tort Victims for Incapacity to Work*, 38 ALBERTA L. REV. 504, 509 (2000) (recognizing that the lost earnings method of evaluating plaintiffs' losses creates a gendered problem); Philomila Tsoukala, *Gary Becker, Legal Feminism, and the Costs of Moralizing Care*, 16 COLUM. J. GENDER & L. 357, 382 (2007) (citing sociological studies finding that most women are still considered secondary wage earners and also take on the bulk of the child-rearing duties).

213 Kelly, *supra* note 197, at 130–31.

working class families where wives often provide at least half of total income,[214] and even in families where wives earn more than husbands.[215] Viewed neither as primary providers, nor even as co-providers, working wives are consistently excluded from the benefits associated with this status.[216]

This leads to the devaluation of women's work both at home and in the labor market.[217] Moreover, women's "second-shift" or "double day" at home has serious public repercussions for gender equality and women's place in society. Numerous married women have little choice but to work in lower-status, low-waged, or part-time jobs, forgo advancement opportunities, and generally place a lower priority on their own careers for the sake of their husbands.[218] In fact, one third of married women with children are out of the labor force; among married women who are employed, a third work only

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214 *See, e.g.*, Martin H. Malin, *Unemployment Compensation in a Time of Increasing Work-Family Conflicts*, 29 U. MICH. J.L. REFORM 131, 133–34 (1996) (stating that fifty-five percent of employed women and forty-eight percent of married employed women provide at least half of their families' income); *see also* FAMILIES AND WORK INST., WOMEN: THE NEW PROVIDERS 33 (1995) (evidencing the same trend).

215 STEIL, *supra* note 178, at 66 (finding that of all the wives who out-earn husbands, the careers of none were considered primary).

216 *See* Adjin-Tettey, *supra* note 212, at 509 (stating that the perception of women's income as secondary leads to devaluation of women's work inside and outside of the home); *see also* Marion Crain & Ken Matheny, "*Labor's Divided Ranks": Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1587–88 (1999) (discussing the problems women encounter because they are perceived as "secondary" wage earners).

217 *See* STEIL, *supra* note 178, at 49 ("For women, separate gender roles preclude the view of a wife as either primary provider or co-provider."); Elizabeth Adjin-Tettey, *Replicating and Perpetuating Inequalities in Personal Injury Claims Through Female-Specific Contingencies*, 49 MCGILL L.J. 309, 328 (2004) (arguing that rigid gender roles lead to the assertion that there is "no need for women to engage in paid employment"). Rather, most two-earner couples today find *both* incomes necessary to sustain their standard of living. *See, e.g.*, Crain, *supra* note 183, at 1176 ("The idea that most women are secondary wage earners whose earnings are 'pin money' in the family economic situation is patently false.").

218 *See* JUDY GOLDBERG DEY & CATHERINE HILL, BEHIND THE PAY GAP 2 (2007) ("Mothers are more likely than fathers (or other women) to work part time, take leave, or take a break from the work force"); MILTON C. REGAN, FAMILY LAW AND THE PURSUIT OF INTIMACY 155 (1993) (stating that "women are more likely than men to make career sacrifices in order to meet family responsibilities, and therefore often are economically dependent on men"); Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177, 185–86 (2000) (stating that women are much more likely than men are to interrupt their work to care for children); Singer, *supra* note 170, at 1115 (same); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self Sufficiency*, 8 AM. U. J. GENDER, SOC. POL'Y & L. 13, 19–20 (2000) (highlighting the economic and career costs of acting as a caretaker).

part-time and many who work full-time are on the "mommy track."[219] Having been forced to make marriage-specific investments at the expense of labor market investments,[220] married women often become "wedlocked wives,"[221] limited in their professional capacities and deprived of opportunities to participate in politics, influence social choices, and become financially self-supporting.[222] The result is wives pushed deep into the private sphere and marginalized in the public sphere, a serious male-female wage differential, and the strengthening of sex segregation in the economy.[223]

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219 Williams, *supra* note 190, at 2237.

220 On this point, it is worth noting several important differences in the gender cultures of higher versus lower socioeconomic status couples, though both result in the perpetuation of traditional gender roles and the economic marginalization of women. In higher status families, driven by society's preference for male career success and an occupational culture where the "ideal worker" is assumed to have no significant familial responsibilities, women who are themselves trained for professional careers often have to marginalize their own labor market participation by performing domestic services to promote their husbands' occupational success. MCCLAIN, *supra* note 2, at 107; Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1892 (2000); Williams, *supra* note 190, at 2239–40. Alternatively, high-status wives shift the burden of gender inequality to other low-class women, to whom they assign the domestic responsibilities their husbands "delegate" to them, a solution that has turned "a gender problem into a class problem and has been a source of considerable hostility to feminism." Williams, supra note 190, at 2237 n.40; see also Fineman, supra note 180, at 2209. Meanwhile, in lower status families, where men often work in low prestige jobs that erode their dignity and threaten their masculinity, husbands tend to adhere especially strictly to traditional sex roles and to renounce domestic responsibilities at home. Williams, *supra* note 190, at 2242–43. This dynamic, in turn, pressures wives to select low-status, low-paid occupations to enhance their husbands' sense of self-worth. *See* OKIN, *supra* note 4, at 153; Williams, *supra* note 190, at 2244–45.

221 RHODE, *supra* note 164, at 133.

222 *See, e.g.*, OKIN, *supra* note 4, at 123 (stating that most wives are constrained in their opportunities in the labor force by what is required of them at home); Kelly, *supra* note 197, at 126 (detailing the various sacrifices women make in the labor force to support husbands' market participation, which significantly erode their power in both the market and home, while enhancing their husbands'); Wax, *supra* note 2, at 546 (stating that women's labor market value tends to be impaired by marriage); Williams, *supra* note 190, at 2245 (finding that while marriage enhances men's market potential, it erodes women's).

223 Williams, *supra* note 190, at 2245. *See generally* Jane Friesen, *Alternative Economic Perspectives on the Use of Labor Market Policies to Redress the Gender Gap in Compensation*, 82 GEO. L.J. 31, 39 (1993) ("When the gender wage gap is decomposed in the usual way, the differential effects of marital status account for about one-third of the unexplained portion of the mean differential between men's and women's earnings.").

b. Decisionmaking Power

While women's disproportionate investment in the work of the home is a "major indicator" of marital inequality,[224] it is not the sole measure. Decisionmaking power is another important factor, which usually correlates with earnings and job prestige. Consequently, status disparities between husbands and wives in society at large significantly influence negotiation dynamics within marriages. As a result, the diminished agency of women within the average marriage is pervasive among decision-making roles within the home.[225] Men almost universally enjoy greater bargaining power in the marriage, rendering women unequal, lower status partners.[226]

Studies indicate that employed husbands consistently enjoy the greatest say in all aspects of their marriages, homemakers have the least, and even employed wives seldom have as much say as their husbands.[227] When married women become mothers, they tend to suffer an additional decline in influence.[228]

Even where wives earn substantially more than their husbands, however, husbands still tend to enjoy greater say in financial matters.[229] As researchers

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224 STEIL, *supra* note 178, at 54, 66.

225 *Id.*

226 Sociological studies since the 1960s have documented that "power within the family generally tracks power outside it." *See* Joan Williams, *Toward a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. ILL. U. L. REV. 89, 154 (1998) (arguing that gender norms in parenting link caregiving roles with disempowerment in the family); *see also* Marsha Garrison, *Autonomy or Community? An Evaluation of Two Models of Parental Obligation*, 86 CALIF. L. REV. 41, 107 (1998) (stating that "the typical American husband continues to have more power within marriage than his wife"); Kelly, *supra* note 197, at 135 (stating that sex-differentiated roles that persist in marriage erode women's power in the market and at home, while allowing men greater earning power that can translate into more muscle in intra-family money matters); Wax, *supra* note 2, at 513 (recounting that husbands on average have more power and are in a position to "get their way" more often).

227 STEIL, *supra* note 178, at 29–30; June Carbone, *Has the Gender Divide Become Unbridgeable? The Implications for Social Equality*, 5 J. GENDER RACE & JUST. 31, 79–80 (2001) ("Studies show that the level of equality in marriage reflects the parties' relative earning capacity."); Janice M. Steil & Beth A. Turetsky, *Is Equal Better? The Relationship Between Marital Equality and Psychological Symptomatology*, 7 APPLIED SOC. PSYCHOL. ANN. 73 (1987); Williams, *supra* note 190, at 2288 (stating that feminist work establishes that men's greater power in the market results in greater power within the family).

228 STEIL, *supra* note 178, at 16, 18, 22, 28–29 (noting that family size is associated with marital power; mothers have the least equal relationships, whereas wives with no or few children have more influence).

229 Studies have indicated that husbands tended to have the final say in major decisions, that wives tended to characterize their husbands as "the real boss in the family," and that unemployed wives

have been forced to conclude, the persistence of the provider complex, which conceptualizes men as primary breadwinners, still works to maintain male domination within modern marriages,[230] and so women's economic gains in the workplace have not translated into commensurate gains at home, even though earning power normally increases bargaining power.[231]

c. Domestic Abuse

Another gauge of marital inequality is physical disempowerment: the use of force by a spouse to establish authority over the other. Domestic violence and sexual abuse are the ultimate acts of inequality in marriage, both a symptom and a cause of spousal subordination.[232] There is dramatic gender asymmetry in the incidence of violence between husbands and wives—the vast majority of victims are women.[233] Estimates suggest that over one third

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were more likely to report husbandly dominance in decision making than employed wives. *See id.* at 55–57 (summarizing numerous studies assessing marital power measured by decision-making say). *See also* DiFonzo & Stern, *supra* note 16, at 3 (reviewing the state of contemporary marriage and concluding that, while some aspects of marriage have dramatically changed, others—especially traditional gender norms—have stubbornly resisted alteration, and that "[m]ost importantly, men tend to retain their financial hegemony, both over women in general and over wives in particular.").

230 *See, e.g.*, OKIN, *supra* note 4, at 95, 141 (arguing that the economic dependence of women on men and the emphasis society places on economic success reinforces power imbalances in marital relationships); RIESSMAN, *supra* note 177, at 73 ("The provider role translates into diffuse power within the family and creates inequality between husbands and wives."); STEIL, *supra* note 178, at 84–85; Kelly, *supra* note 197, at 127 (noting that the reason women may enjoy less power at home is not necessarily the result of less market power, but "a reflection of gender ideologies embedded in society and manifested in marriage"); *id.* at 128 ("One obvious explanation for uneven distribution of work and power for some couples is the continued subordination of women.").

231 OKIN, *supra* note 4, at 159 (noting that the male-provider ideology sometimes overwhelms women's workplace successes in influencing the distribution of power in marriage); STEIL, *supra* note 178, at 49; Wax, *supra* note 2, at 593.

232 Wife-beating in the family setting builds on traditional assumptions about gender roles and in turn reflects and reinforces other patterns of gender inequality. *See* RIESSMAN, *supra* note 177, at 62 (arguing that domestic violence follows other forms of domination because primarily husbands are the perpetrators and wives are the victims); Eppler, *supra* note 120, at 790–91 n.14 ("Feminist scholars have persuasively argued that woman battering is . . . a graphic and explicit demonstration of men's domination over women."); Kenneth Karst, *Sources of Status-Harm and Group Disadvantage in Private Behavior*, 2 ISSUES LEGAL SCHOLARSHIP 13 (2002) (emphasis in original) ("Within the private zone of the intimate relationship, however, *power is being exercised* when a man beats his wife.").

233 *See* MCCLAIN, *supra* note 2, at 132 (stating that, according to a survey of Oklahomans, forty-four percent of women as opposed to eight percent of men identify domestic violence as a factor leading to their divorce); Ariella Hyman, Dean Schillinger & Bernard Lo, *Laws Mandating Reporting of Domestic Violence: Do They Promote Patient Well-being?*, 273 J. AM. MED. ASS'N 1781, 1781 (1995) (reporting findings that ninety to ninety-five percent of domestic violence victims are women). For a review of domestic violence acts, which indicate the grossly disproportionate risk of violence for

of married women have experienced some form of physical abuse[234] and "[a]s many as one in seven women have been raped by their husbands."[235] Of the women who eventually divorce, more than two-thirds leave behind violent husbands.[236]

The psychological and sociological literatures explain wife battering as a way of displaying power in a marriage, a tool to "effect total domination of a woman by a man,"[237] to accomplish goals, and to guarantee female submissiveness.[238] In fact, scholars have urged that the gender-neutral term "domestic violence" be replaced with "patriarchal violence" because the phenomenon is inherently connected to "sexism, to sexist thinking, and to male dominance."[239] The research on marital rape also confirms that it is used as a symbol of a husband's control over his wife[240] and is "only

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women, see Molly Dragiewicz & Yvonne Lindgren, *The Gendered Nature of Domestic Violence: Statistical Data for Lawyers Considering Equal Protection Analysis*, 17 AM. U. J. GENDER SOC. POL'Y & L. 229, 245–56 (2009) (asserting that women face a grossly disproportionate risk of violence from male partners).

234 *See* Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1288 n.16 (1992) ("The rate of physical abuse in marriage has been estimated by Lenore Walker and other experts at about 50%, though the lowest recent estimate is 12% and the highest is 60%."); *Statistics*, NAT'L COALITION AGAINST DOMESTIC VIOLENCE, https://ncadv.org/statistics (last visited Feb. 7, 2020).

235 *See* KATHA POLLITT, REASONABLE CREATURES: ESSAYS ON WOMEN AND FEMINISM 6 (1994). Battering often includes violent sexual assaults. *See* DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES 6–7 (1985); DIANA RUSSELL, RAPE IN MARRIAGE 87–101 (1990); McConnell, *supra* note 111, at 230 n.128 ("[O]ne out of ten wives has been sexually assaulted at least once by her husband."); *see also* RIESSMAN, *supra* note 177, at 82 (stating that sexual abuse of women in marriage is "[f]ar from a rare event" because wives are considered the "sexual property of husbands.").

236 DEMIE KURZ, FOR RICHER FOR POORER: MOTHERS CONFRONT DIVORCE 53, 56, 59 (1995); Nichols, *supra* note 20, at 943.

237 McConnell, *supra* note 111, at 233.

238 Eppler, *supra* note 120, at 791 n.14 (stating that domestic violence is a "violent manifestation of the patriarchal beliefs that men have the right to dominate, control, and rule over women . . . [as] the 'property' or 'possession' of men."); *see also* Mahoney, *supra* note 234, at 1304 ("Separation assault . . . shows that batterers do not stop seeking power and control merely because the woman has left the relationship."); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 53 (1991) ("Battering is about domination. . . .").

239 *See* Anat First & Michal Agmon-Gonnen, *Is a Man's Car More Important Than a Battered Woman's Body? Human Rights and Punishment for Violent Crimes Against Female Spouses*, 12 NEW CRIM. L. REV. 135, 138 (2009).

240 *See* ELIZABETH A. STANKO, INTIMATE INTRUSIONS: WOMEN'S EXPERIENCE OF MEN'S VIOLENCE 9 (1985); McConnell, *supra* note 111, at 231–32 (arguing that sexual assault in a relationship is symbolic of the man's domination of the woman); Angie Perone, *Unchain My Heart: Slavery as a Defense to the Dismantling of the Violence Against Women Act*, 17 HASTINGS WOMEN'S L.J. 115, 135–36 (2006) (marital rape is a common method of exerting domination over an abused wife);

peripherally about sex."[241] Moreover, some scholars view wife rape and battering as a bias crime motivated by a desire "to punish the victim in order to further subordinate the victim's group based on negative views of them."[242] The cumulative effect of the persistent threat of male violence is to subordinate not only an individual wife, but all women.[243]

Strikingly, study after study exposes wife battering as a means to enforce women's traditional roles and other patterns of gender inequality.[244] Indeed, the typical batterer has been revealed to be "a traditionalist, believing in male supremacy, the stereotyped masculine sex role in the family, and his entitlement to use violence to discipline his wife."[245] Husbands who batter rationalize their violence towards their wives by stressing women's traditional roles,[246] and tend to focus on their victims' "failure to fulfill obligations of a good wife"[247] with complaints that range from the deficient performance of

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Kathleen Waits, *Battered Women and Their Children: Lessons From One Woman's Story*, 35 HOUS. L. REV. 29, 40 (1998) (describing one domestic violence victim's experience of sexual assault as her husband's way of punishing her).

241 FINKELHOR & YLLO, *supra* note 235, at 18. *But see* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 86–87 (1987).

242 Kristin L. Taylor, *Treating Male Violence Against Women as a Bias Crime*, 76 B.U. L. REV. 575, 595 (1996).

243 *Id.* at 586, 596–97; Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75, 90, 95 (2009) (arguing that private violence enforces gender inequities); Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & C.R. L. REV. 557, 574 (2006) (noting that even though violence is targeted at an individual wife, "it also has the effect of enforcing gender roles . . . [and] gender hierarchy."); *see also* Dragiewicz & Lindgren, *supra* note 233, at 263–66 (reviewing how courts, the legislatures, and Congress have all identified domestic violence as gender discrimination).

244 Domestic and sexual violence is rooted in and reflects the legacy of sex discrimination. *See, e.g.*, ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 13–20 (2000) (analyzing historical perspectives of domestic and sexual violence); Linda L. Ammons, *What's God Got to Do With It? Church and State Collaboration in the Subordination of Women and Domestic Violence*, 51 RUTGERS L. REV. 1207, 1219 (1999) (noting the strong link between male supremacy and battered wives); Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1301 (1991) ("Women are sexually assaulted because they are women: not individually or at random, but on the basis of sex, because of their membership in a group defined by gender.").

245 Malinda L. Seymore, *Isn't it a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NW. U.L. REV. 1032, 1039–41 (1996) (profiling the batterer husband). *See also* Taylor, *supra* note 242, at 595 ("Many clinical studies suggest that men who use violence against their intimate partners idealize a rigid patriarchal family unit and have restricted and stereotypical views of their masculine role.").

246 Mahoney, *supra* note 234, at 1304; Mahoney, *supra* note 238, at 54–55.

247 James Ptacek, *Why Do Men Batter Their Wives*, *in* FEMINIST PERSPECTIVES ON WIFE ABUSE 133, 147 (Raquel Kennedy Bergen ed., 1998) (quoting MICHELE BOGRAD, DOMESTIC VIOLENCE: PERCEPTIONS OF BATTERED WOMEN, ABUSIVE MEN, AND NON-VIOLENT MEN AND WOMEN

domestic tasks to refusing sex.[248] In other words, non-compliance with gender roles offends batterers' sense of male entitlement so severely as to legitimize the abuse as a disciplinary measure to put women in their place[249] and signal that male prerogatives have been wrongfully revoked. [250]

Wife battering has indeed proven so effective in coercing domestic and sexual services through degradation and subjection that many scholars have proffered that violent marriages effect not simply gender subordination, but even involuntary servitude implicating the Thirteenth Amendment.[251]

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We have observed that contemporary marriages are still rife with gender injustice and inequalities that demean women and compromise their citizenship stature. Wives are saddled with the vast majority of unpaid, low-status domestic and caretaking work, tend to defer to their husbands when major decisions must be made, and all too often are subject to husbands who use violence to establish and enforce their dominance. As a result, women as a group are still systematically below men along important dimensions of social welfare, especially income, wealth, and political power;[252] these group-based disparities forcefully bear on the question of second-class citizenship. Put differently, the marital inequality that still plagues contemporary

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(1986)) (emphasis removed); ELIJAH ANDERSON, CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY 189 (1999) ("When men do get married and are unable to establish domestic control, physical abuse sometimes follows."); MCCLAIN, *supra* note 2, at 139; RHODE, *supra* note 164, at 238; Katharine K. Baker, *Dialectics and Domestic Abuse*, 110 YALE L.J. 1459, 1487 (2001) (reviewing ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING (2000)).

248 LEWIS OKUN, WOMAN ABUSE: FACTS REPLACING MYTHS 69–70 (1986); Rhonda Copelon, *Recognizing the Egregious in Everyday Life: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 335–36 (1994); PAUL KIVEL, MEN'S WORK: HOW TO STOP THE VIOLENCE THAT TEARS OUR LIVES APART 200 (1992); Lisa E. Martin, *Providing Equal Justice for the Domestic Violence Victim: Due Process and the Victim's Right to Counsel*, 34 GONZ. L. REV. 329, 332 (1999) (noting that in a typical case, a battered woman is beaten because her housekeeping skills did not meet her abuser's expectations).

249 ANDERSON, *supra* note 247, at 183, 189; MCCLAIN, *supra* note 2, at 139; RHODE, *supra* note 164, at 238; Baker, *supra* note 247, at 1487.

250 Seymore, *supra* note 245, at 1039.

251 After all, as Akhil Reed Amar put it, "[a]t its core, slavery is a system of domination, degradation and subordination, in which some people are allowed in effect to treat other persons—other human beings with God-given rights—as property rather than persons." Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENT. 403, 405 (1993); *see also id.* at 408 (analyzing domestic abuse through a Thirteenth Amendment lens); Perone, *supra* note 240, at 133, 136 (same); McConnell, *supra* note 111, at 233, 239–43 (same).

252 Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2448–49 (1994).

marriages implicates not only women's private family lives, but also their prospects for enjoying equal citizenship stature in society.

Our analysis thus far has derived from a close reading of marriage as it is and has been lived by women. The next Section looks at the lived experience of marital freedom by examining women's divorce accounts. As it will show, from the standpoint of women themselves, inequality in marriage is often so pervasive and so costly to well-being that it functions as a major motivating force behind their decision to divorce. Moreover, as they testify, divorce for many women has indeed constituted a valuable means for tackling experiences with marital subordination and "dual sovereignty."

C. Divorce: A "Self-Defense" Remedy to Marital Subordination

This Section aims to demonstrate how divorce can ameliorate gender stratification and the subordination of women. First, it identifies marital inequality as a primary cause of female-initiated divorce. Second, it analyzes evidence suggesting that divorce is a promising anti-subordinationist remedy against dual sovereignty and as a pathway towards dignity, self-esteem, independence, and ultimately full membership in society.

1. Female Divorce Accounts: Stories of Subordination, Degradation, and Devaluation

With apologies to Leo Tolstoy,[253] the divorce literature shows that Vladimir Nabokov had it right: "All happy families are more or less dissimilar; all unhappy ones are more or less alike."[254] Divorcing families in the contemporary United States resemble one another in their failure to constitute relationships among equal partners.[255] Women of all backgrounds and across lines of race and class define good marriage as a partnership of equals,[256] yet divorce memoirs reveal the abysmal failure to attain gender

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253 LEO TOLSTOY, ANNA KARENINA 1 (George Gibian ed., Maude trans., 1995) ("All happy families resemble one another, but each unhappy family is unhappy in its own way.").

254 VLADIMIR NABOKOV, ADA OR ARDOR: A FAMILY CHRONICLE 3 (1969).

255 Steven L. Nock, *Time and Gender in Marriage*, 86 VA. L. REV. 1971, 1979 (2000).

256 As Kathryn Edin testified before Congress, women seek self-government in marriage and an equal partnership, not subservience:

> [Men] think that piece of paper says they own you. You are their personal slave. Cook their meals, clear their house, do their laundry. . . . A man gets married to have somebody take care of them . . . .

equality in modern marriages. As this Subsection will show, it is women's sense of subordination and devaluation in marriage and their growing distaste for marital inequality that has been the primary impetus for a phenomenon this Article terms the "feminization of divorce." That is, women initiate two-thirds to three-quarters of divorces in the United States,[257] whether the divorce initiation is defined in terms of "who wanted to leave the marriage first" or "who actually filed for divorce."[258] This national trend is only increasing over time,[259] turning marital inequality into "the most potent and ominous threat" to the integrity of the institution of modern marriage.[260]

One of the first to study divorce from the perspective of divorce "veterans" themselves, Catharine Riessman has investigated the interpretive process through which divorcees make sense of their former marriages. She found that "[d]ivorcing women remember marriage as anything but

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> Most mothers don't want to be owned or slave for their husband. They want a partnership of equals.

Welfare and Marriage Issues: Hearing Before the House Subcomm. on Human Res. of the Comm. on Ways and Means, 107th Cong. 76–82 (2001) (testimony of Kathryn Edin, Assoc. Professor of Soc., Inst. of Pol'y Res., Nw. Univ.) (internal quotations omitted).

257 Researchers have consistently found that wives have almost always sought divorce in greater numbers than their husbands. Starting in the eighteenth century, women divorce seekers outnumbered men. *See* RILEY, *supra* note 142, at 16, 147. By the end of the nineteenth century, the percentage of divorces awarded to wives rose to two-thirds. *See* RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY 228 (1988); Margaret F. Brinig & Douglas W. Allen, *"These Boots are Made for Walking": Why Most Divorce Filers are Women*, 2 AM. L. & ECON. REV. 126, 126–28, 154 (2000).

258 ALISON CLARKE-STEWART & CORNELIA BRENTANO, DIVORCE: CAUSES AND CONSEQUENCES 53–54 (2006); Sanford L. Braver, Marnie Whitely & Christine Ng, *Who Divorced Whom? Methodological and Theoretical Issues*, 20 J. DIVORCE & REMARRIAGE 1 (1993).

259 Cahn, *supra* note 126, at 233; *see also* Michael J. Rosenfeld, *Who Wants the Breakup? Gender and Breakup in Heterosexual Couples*, *in* SOCIAL NETWORKS AND THE LIFE COURSE: INTEGRATING THE DEVELOPMENT OF HUMAN LIVES AND SOCIAL RELATIONAL NETWORKS 221 (Duane F. Alwin, Diane Helen Felmlee & Derek A. Kreager eds., 2017). Remarkably, the feminization of divorce has been a phenomenon shared virtually everywhere in the Western world. PHILLIPS, *supra* note 257, at 228; Andrew Adonis, *Britain in Focus: Wives Bring Most Divorce*s, FIN. TIMES, Feb. 28, 1996, at 10 ("Many more divorces are granted to the wife than to the husband, and this is particularly so where the couple have children."). This is, for example, the case in England and Australia. *See* DAVIS & MURCH, *supra* note 130, at 32–34. This is also the case in Israel. *See* Karin Carmit Yefet, *Unchaining the Agunot: Enlisting the Israeli Constitution in the Service of Women's Marital Freedom*, 20 Yale J.L. & Fem. 441, 451(2009); *see also* Patricia L. Sullivan, *Culture, Divorce, and Family Mediation in Hong Kong*, 43 FAM. CT. REV. 109, 116 (2005) (demonstrating that most divorces in China are initiated by women).

260 Wax, *supra* note 2, at 672.

equal"[261] and "vividly describe in their accounts how they are financially, psychologically, and physically dominated by their husbands."[262] While individual women, of course, experience substantial differences in the amount and forms of inequality in their marriages, most of the divorced women in Riessman's, and in later studies, explain their decision to divorce through these experiences, intimating that gender equality and marital dignity are a prerequisite for a viable marriage.[263]

Among the most common forms of subordination that divorced women cite as triggers of marital breakdown are instances in which they are devalued and discredited for their work in and outside the home as well as for their cognitive abilities.[264] Divorce accounts confirm that women's employment, in particular, is a major source of friction in many marriages.[265] While work is the strongest predictor of women's good health and the basis for their identity and mobility in the world at large,[266] far more than marriage or children,[267] it also causes many husbands psychological distress, lower self-esteem, and depression. Even men who espouse egalitarian beliefs about women's roles often perceive their wives' employment as "against their

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261 RIESSMAN, *supra* note 177, at 57 (summarizing divorced women's accounts of their marriages under the heading "Inequality: Women's Memories of Devaluation and Subordination.").

262 *Id.* at 73.

263 Starting in the 1970s, many books analyzing divorce have explained that without equality and mutual commitment, marriages are doomed to become a "divorce statistic." See the many sources cited by RILEY, *supra* note 142, at 177; Steven Ozment, *Marriage Was Having a Rough Time*, *in* MARRIAGE: JUST A PIECE OF PAPER? 229 (Katherine Anderson, Don Browning & Brian Boyer eds., 2002); ANDREW HACKER, MISMATCH: THE GROWING GULF BETWEEN WOMEN AND MEN 7 (2003).

264 RIESSMAN, *supra* note 177, at 59.

265 *Id.* at 51; NAPIER, *supra* note 193, at 132–33 (explaining that women's economic power often leads to conflict within marriage and many researchers explain the increase in divorce in recent decades as directly related to women's employment).

266 The role of paid worker has proven extremely beneficial to women's well-being across both race and class lines; it is a source of: psychological and social support; independent identity; increased self-esteem; purposefulness; enhanced social contacts and inherent interests; and a sense of well-being because of their financial contribution to the family welfare. *See, e.g.*, STEIL, *supra* note 178, at 17–20 (providing a review of the research literature); Rosalind C. Barnett & Grace K. Baruch, *Women's Involvement in Multiple Roles and Psychological Distress*, 49 J. PERSONALITY & SOC. PSYCHOL. 135, 136–37 (1985) (arguing that among employed women, overload and conflict "may be less strongly associated and conflict may be less strongly associated with psychological symptomatology than among nonemployed women").

267 APPLEWHITE, *supra* note 16, at 110; FALUDI, *supra* note 196, at 39 (recounting that as early as the 1950s, two-thirds of married women noted that what gave them a sense of purpose and self-worth was their jobs; by the 1980s, the number had risen to 87%).

interests" because it directs wives' focus away from their husbands, lessens men's control in marriage, and puts pressure on them to do more household work.[268] Accordingly, many women's divorce accounts recount husbands' attempts to usurp women's place in the public sphere by withholding support from their careers—or their plans to enter the labor market or return to school—or by demanding that they resign or cut back their hours.[269] Forced to choose between their job and their marriage, many women chose divorce.[270]

The unequal division of labor is another theme that figures prominently in women's accounts of marital dissatisfaction and dissolution.[271] Even many divorced men, reflecting upon their dissolved marriages, regret having taken their wives' labor for granted[272] and their own shirking of household responsibilities.[273] Divorced women also attested to more flagrant manifestations of marital inequality, recalling efforts at economic and psychological domination by their husbands.[274] Many complained about

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268 *See* RIESSMAN, *supra* note 177, at 54–55 (documenting the same in the 1980s); LILLIAN B. RUBIN, WORLDS OF PAIN: LIFE IN THE WORKING-CLASS FAMILY 171–84 (1976) (documenting this phenomenon in the 1970s); STEIL, *supra* note 178, at 20 (documenting the same in the 1990s).

269 Divorce researchers find that since women's participation in the workforce has increased, a new cause of divorce has been lack of husbandly support for women's careers. *See* CLARKE-STEWART & BRENTANO, *supra* note 258, at 44–45 ("Women also complained specifically about their husbands' lack of support for their careers—a new reason for divorce that has appeared since women became more involved in the workforce."); RIESSMAN, *supra* note 177, at 53–56 (analyzing husbands' lack of enthusiasm for wives' employment).

270 Many women, however, make a different choice. "Over and over, women from working-class marriages report that their husbands 'said no'" and some wives "went along with husbands' directives in order to keep peace at home." RIESSMAN, *supra* note 177, at 60. Indeed, research evidence suggests that despite women's conviction that they are entitled to marital equality in the home, they are also generally hesitant to press their desire for egalitarian marriage because they want to avoid conflict. MCCLAIN, *supra* note 2, at 145.

271 CLARKE-STEWART & BRENTANO, *supra* note 258, at 45; DONNA L. FRANKLIN, WHAT'S LOVE GOT TO DO WITH IT? UNDERSTANDING AND HEALING THE RIFT BETWEEN BLACK MEN AND WOMEN 210 (2000) (studying twenty-first century black families where both spouses work and reporting that "the issue of male dominance remains one of the primary sources of tension in black marriages"); HETHERINGTON & KELLY, *supra* note 177, at 249–50; RIESSMAN, *supra* note 177, at 97; Michelle L. Frisco & Kristi Williams, *Perceived Housework Equity, Marital Happiness, and Divorce in Dual-Earner Households*, 24 J. FAM. ISSUES 51, 69–71 (2003) (analyzing the relationship between perceived equity in relationships and marital happiness).

272 RIESSMAN, *supra* note 177, at 56.

273 *Id.* at 55.

274 *Id.* at 59–60 (noting that "living in tyranny" was an experience common to both low- and middle-class women, though its manifestations tended to be somewhat subtler for the latter); FALUDI, *supra* note 196, at xvi (noting that many wives complained of "male mistreatment, unequal relationship,

their economic subordination within marriage and dependency on husbands, which reduced their voice and limited their bargaining power in the home.[275] Ex-wives recalled their husbands' control over finances and attempts to exert power over the full array of domestic decisions.[276] As women perceived it, "husbands both demean[ed] their domesticity and tr[ied] to dominate it, often at the same time."[277] In making sense of their own divorces, some men corroborated female stories of control and admitted to having acted as "much of a demagogue," a "dictator," or "order[ing] her around like a little Hitler."[278]

Finally, physical and sexual violence continually reappear in women's divorce accounts as the most severe expression of their husbands' control.[279] During the marriage, abusive husbands would reiterate "their need to control or dominate the female, their belief that female independence meant loss of male control, and their attempt to persuade or coerce the female into adopting their definition of how the relationship should be structured and how it should function."[280] These husbands used violence to punish women

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and male efforts to… 'keep women down.'"); Fineman, *supra* note 5, at 248 ("There were real injustices within the hierarchical and patriarchal family, exemplified by the economic inequities that emerged with divorce reform and the prevalence of physical and psychological abuse of women.").

275 RIESSMAN, *supra* note 177, at 61 (observing that in making themselves economically beholden to their husbands, women become subordinate to them); OKIN, *supra* note 4, at 151–52 (analyzing the effects of wives' economic dependence on their husbands).

276 For example, husbands controlled decisions ranging "from the kind of food that would be served and which purchases would be made, to how wives used their time, to what religion they would practice." RIESSMAN, *supra* note 177, at 59; *see also* Finola O. Riagain, *Reasons for Martial Instability and Separation*, *in* DIVORCE? FACING THE ISSUES OF MARITAL BREAKDOWN 25, 32 (Mags O'Brien ed., 1995) (reporting "many cases in which the pattern of money management within marriage gives rise to serious inequalities and even hardship, especially for women").

277 RIESSMAN, *supra* note 177, at 59.

278 *Id*.

279 Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1043 n.6 (1991) (reporting that 95% of divorcing women alleged cruelty, usually in the form of ongoing physical abuse, under fault divorce (citing Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 297 (1987)); Mahoney, *supra* note 234, at 1288; Linda C. McClain, *The "Male Problematic" and the Problems of Family Law: A Response to Don Browning's "Critical Familism,"* 56 EMORY L.J. 1407, 1422 (2007) (identifying violence as a significant factor leading to divorce); Lynn Hecht Schafran, *Gender Bias in the Courts*, *in* WOMEN AS SINGLE PARENTS: CONFRONTING INSTITUTIONAL BARRIERS IN THE COURTS, THE WORKPLACE, AND THE HOUSING MARKET 39, 59 (Elizabeth A. Mulroy ed., 1988) (arguing that domestic violence is often what leads a woman into divorce); Singer, *supra* note 168, at 1547.

280 DONALD G. DUTTON, THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES 64 (1995).

for violating traditional gender roles,[281] or whenever they felt distress over status erosion within the family—evoked, for example, by wives' higher earnings or by becoming unemployed.[282]

In sum, many women's, and even men's, explanations of divorce expose modern marriages as rife with gender injustices that undermine women's dignity and equality in and outside the home. For divorcing women, staying married represented ongoing subservience, while getting divorced constituted their resistance to subordination, domestic violence, and the "stalled sex-role revolution at home."[283] To this we now turn.

2. "His" and "Her" Divorce: From Private Patriarchy to Gender Emancipation

Since wives and husbands experience marriage so differently, it should come as no surprise that just as there is a "his" and "her" marriage, there is also "his" and "her" divorce. And "her" divorce is much better than "his."[284] The divorce literature consistently finds that women, far from losing their identity without marriage, fare significantly better than when they were

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281 VICTOR R. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 74 (1988); Joanna Bunker Rohrbaugh, *Domestic Violence in Same-Gender Relationships*, 44 FAM. CT. REV. 287, 292 (2006) (arguing that wife battering "is related to rigid gender roles because men who beat their wives or girlfriends often 'engage in a coherent and disciplined rage to defend what they consider to be their rights,' which the men construe to be absolute authority over 'their' women"). *See generally* Matthew Jakupcak et al., *The Role of Masculine Ideology and Masculine Gender Role Stress in Men's Perpetuation of Relationship Violence*, 3 PSYCHOL. MEN & MASCULINITY 97 (2002).

282 For example, one study on the attitudes of low-income African-American young men found that they aspire to a marital ideal where they provide for and protect their family in exchange for being "the undisputed head of the household" who is in charge of making "the major decisions concerning the family," and that inability to be a "patriarch in the home" leads to troubling consequences: "[w]hen men marry and are unable to establish domestic control, physical abuse sometimes follows." ANDERSON, *supra* note 247, at 189; MCCLAIN, *supra* note 2, at 139. Indeed, other studies reported that physical violence was twice as high in families with an unemployed husband and working wife than in families in which both spouses or only the husband was employed. HETHERINGTON & KELLY, *supra* note 177, at 36; Deborah M. Weissman, *The Personal is Political—and Economic: Rethinking Domestic Violence*, 2007 BYU L. REV. 387, 419–30 (examining how loss of employment and subsequent failure to live up to prescribed gender roles relate to occurrence of domestic violence).

283 Edin, *supra* note 11, at 130; *see also* Joshua Cohen, *The Arc of the Moral Universe*, 26 PHIL. & PUB. AFF. 91, 93–94 (1997) (suggesting that human moral and emotional makeup is such that a group's chronic experience of relative powerlessness within a basic social institution must inevitably lead to a recognition of injustice and a rebellion against it).

284 RIESSMAN, *supra* note 177, at 15. This is also a foundational theme of HETHERINGTON & KELLY, *supra* note 177, at ch. 2 (titled "The His and Her Marriage; The His and Her Divorce").

married.[285] As one divorce scholar put it, whereas men tend to feel "whole in marriage and half a self without it," women tend to feel more whole after divorce.[286] Women's divorce accounts speak volumes about how the right to marital freedom remedies subordination, enhances women's capacities for personal self-government, and even contributes to co-sovereignty with husbands in subsequent remarriages.

In her research on divorced women, *Cutting Loose: Why Women Who End Their Marriages Do So Well,* Ashton Applewhite reports that the women in her study were unanimous in their happiness about getting divorced;[287] the more time passed the happier they became and the more conviction they felt that divorce was the right decision.[288] In fact, almost all the women in the study regretted that they had stayed married as long as they did.[289] These findings are remarkable given that many women in the study faced considerable financial hardship, yet even the neediest among them reported that their overall situation improved after divorce[290] and that the pleasures of being self-sufficient overwhelmed material loss.[291] Indeed, even Lenore Weitzman, who famously documented the feminization of poverty among divorced women, could not find women who regretted the decision to exit.[292]

The word "freedom" surfaces repeatedly in women's divorce accounts[293] to convey wives' sense of escape from subordination to husbands and to

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285 CLARKE-STEWART & BRENTANO, *supra* note 258, at 100; RIANE TENNENHAUS EISLER, DISSOLUTION: NO-FAULT DIVORCE, MARRIAGE, AND THE FUTURE OF WOMEN 136, 139 (1977).

286 RIESSMAN, *supra* note 177, at 197; *see also* NAPIER, *supra* note 193, at 126, 272.

287 APPLEWHITE, *supra* note 16, at xv, 27 (women take charge of their lives after divorce and emerge "stronger, clearer, and infinitely happier"); RIESSMAN, *supra* note 177, at ix.

288 *See* APPLEWHITE, *supra* note 16, at 165–67; FALUDI, *supra* note 196, at 26 (stating that the "nation's largest study on the long-term effects of divorce found that five years after divorce, two-thirds of the women were happier with their lives, and after ten years 80 percent of women thought divorce was the right decision.").

289 APPLEWHITE, *supra* note 16, at 24.

290 *Id.* at 28, 98–99 ("One [woman] after another described living on less but having it feel like more"); *see also id.* at 125.

291 *Id.* at 29, 122 (divorced women's "reduced circumstances translated into a better quality of life.").

292 WEITZMAN, *supra* note 138, at 346 ("Even the longer-married older housewives who suffer the greatest financial hardships after divorce (and who feel most economically deprived, most angry, and most 'cheated' by the divorce settlement) say they are 'personally' better off than they were during marriage. . . . They also report improved self-esteem, more pride in their appearance and greater competence in all aspects of their lives.").

293 RIESSMAN, *supra* note 177, at 165.

evoke their ongoing path to autonomy and self-realization.[294] Working- and middle-class women alike describe divorce as "liberation," "control," and "independence,"[295] and as an instrument allowing them "the freedom to be myself," to be "more like a free person," to "liv[e] again," and to feel "energized and liberated."[296] The language of freedom is particularly pronounced among women who escape domestic violence, but even escape from subtler forms of male authority is celebrated.[297]

Women's frequent invocation of the terminology of freedom complements their perception of their marriages as "filled with constraint, subservience, and vulnerability to the authority of husbands."[298] By using this vocabulary, divorced women were:

> making a connection between what their marriages were like and what their lives are like now. As they understand it, marriage brought subordination and divorce brings freedom. They revel in a new sense of ownership of themselves. Despite all the hardships—economic strain, role strain, and loneliness—women . . . experience more control than ever before over a variety of aspects of their lives and, concomitantly, a seeming zest and delight.[299]

Indeed, women described marital exit as an opportunity to "take back" their lives and realize their full potential,[300] as a "gateway to pathways associated with joy, satisfaction and attainments."[301] Most women indeed succeeded in carving out lives of "unparalleled productivity and richness, on their own terms."[302] In particular, divorced women tend to experience growth in three general areas: competence in the management of daily life, a fuller sense of identity, and development of social relationships.[303]

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294 *Id.* at 165–67, 205 (women view divorce as freedom from husbands' dominance); Elizabeth S. Scott, *Divorce, Children's Welfare, and the Culture Wars*, 9 VA. J. SOC. POL'Y & L. 95, 109 (2001).

295 RIESSMAN, *supra* note 177, at 165.

296 *Id.* at 165, 167.

297 *Id.* at 166–67 (noting women's deep appreciation of the pleasures of their new-found freedom).

298 *Id.* at 167; APPLEWHITE, *supra* note 16, at xv (women "came to realize that traditional marriage serves the husband, the wife serves the marriage – and that independence beat servitude.").

299 RIESSMAN, *supra* note 177, at 165.

300 APPLEWHITE, *supra* note 16, at 1–4 (divorce is an experience that proved liberating for women and brings opportunities for personal growth); RIESSMAN, *supra* note 177, at 165 (discussing the liberating effect of divorce on bringing out control and independence).

301 HETHERINGTON & KELLY, *supra* note 177, at 280.

302 APPLEWHITE, *supra* note 16, at xvi.

303 RIESSMAN, *supra* note 177, at 163; *see also id.* at 177–78 (divorce made women grow beyond the "childlike dependency" that marriage engenders and they "repeatedly use metaphors of maturation to describe themselves" in the post-divorce life); JUDITH S. WALLERSTEIN & JOAN B. KELLY,

With respect to competence in the management of daily life, divorced women experience more personal autonomy, self-sufficiency, and personal growth than married women.[304] Divorced women report moving past their dependency on husbands and gaining feelings of efficacy, confidence, and self-respect.[305] One recent study found that, a decade after divorce, three quarters of divorced women experience increases in personal power, develop independence, and even achieve financial security.[306] In fact, divorced women tend to earn more than both their married and never-married counterparts.[307] Even women who experience economic deprivation following divorce, however, generally feel better off with less money but more control over it.[308] Ex-wives reported that divorce, or freedom from their husbands' authority, expanded their vision of future possibilities and encouraged them to seize opportunities in the marketplace.[309]

In terms of women's sense of identity, divorce proved a pathway for women to fulfill themselves. Many women experienced divorce as transformative and regenerative, as a way of asserting their possession of an individual self, capable of acting in and on the world. For them, divorce "defines a sense of self and leads to greater maturity and self-knowledge . . . that is stimulating and energizing and growth-enhancing."[310] Indeed,

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SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 193 (2008) (confirming that divorce resulted in positive life changes for the majority of women).

304 Brinig & Allen, *supra* note 257, at 129 n.7; Nadin F. Marks, *Flying Solo at Midlife: Gender, Marital Status, and Psychological Well-Being*, 58 J. MARRIAGE & FAM. 917 (1996).

305 ABIGAIL TRAFFORD, CRAZY TIME: SURVIVING DIVORCE AND BUILDING A NEW LIFE 163 (1984) ("For females a sense of growth in self-esteem appears to result from the divorce. The effects of such changes appear long-lasting"); RIESSMAN, *supra* note 177, at 168–69.

306 Mary E. Duffy, Carolyn Thomas & Claudia Trayner, *Women's Reflections on Divorce—10 Years Later*, 23 HEALTH CARE FOR WOMEN INT'L 550 (2002).

307 Bernstein, *supra* note 186, at 178 ("[D]ivorced women earn more than both married and never-married women . . . .").

308 RIESSMAN, *supra* note 177, at 170; WHITEHEAD, *supra* note 140, at 53.

309 APPLEWHITE, *supra* note 16, at 129 ("Career women participating in the study tended to boost their output, win higher performance ratings, and feel more motivated and satisfied with their jobs" following divorce); CLARKE-STEWART & BRENTANO, *supra* note 258, at 71 (finding that more than 80% of divorced mothers are employed compared with fewer than 40% before the divorce, and women who were employed full time before divorce work even more hours after it). Many divorced women return to school, enter the labor force, or reinvest in their careers, moves that promote feelings of fulfillment, competence, self-esteem, and efficacy. *Id.* at 76–77 (discussing the positive consequences of divorce); RIESSMAN, *supra* note 177, at 171–72 (noting that women repeatedly make the point that paid work, unlike housework, led them to "a fuller identity as they develop[ed] competence, confidence, and status outside the home.").

310 WHITEHEAD, *supra* note 140, at 61.

researchers of divorce reported that such women presented selves that display "considerable innovation, competence, and mastery."[311] They invoked striking metaphors of dehumanization: that of being "in a cocoon" during marriage and of "coming out of a shell" and feeling like a "full person" following divorce.[312]

In terms of their social lives, women recall constraining marital experiences, "burying" their sociability in deference to their husbands and interacting primarily with friends that originated in their husbands' interests and work.[313] In their post-divorce lives, however, women tended to solidify ties with kin, construct social networks that provide emotional and material support, and generally diversify and intensify relationships with others.[314]

Notably, research indicates that individuals who have been divorced generally go on to pursue more egalitarian intimate relationships.[315] Upon remarriage, both spouses tend to view their marital roles differently. Remarried women tend to be psychologically and economically more independent and assertive, and are likely to enjoy greater gender equality and power within marriage.[316] Remarried men tend to become less traditional in their gender roles, more willing to support their wives' interests, and more likely to share family responsibilities.[317] Remarried husbands not

311 RIESSMAN, *supra* note 177, at 93, 176–77.

312 *Id.* at 173.

313 *Id.* at 172–74.

314 *Id.* at 172, 177, 207 (marriage imposes constraints on women's social network that divorce eases).

315 CLARKE-STEWART & BRENTANO, *supra* note 258, at 221–22; *see also id.* at 214 (most people learn from their first marriage and divorce and do not keep on making the same mistakes). They may be more willing to compromise and more determined to succeed in their second marriage. NIJOLE V. BENOKRAITIS, MARRIAGES AND FAMILIES: CHANGES, CHOICES, AND CONSTRAINTS (3d ed. 1993); RIESSMAN, *supra* note 177, at 201(highlighting research which shows that divorce transforms remarriage in positive ways, since divorce-veterans carry into remarriage the skills and understandings they learned from divorce); Rebecca M. Smith & Mary Anne Goslen, *Self-Other Orientation and Sex-Roles Orientation of Men and Women Who Remarry*, 14 J. DIVORCE & REMARRIAGE 3 (1991).

316 CLARKE-STEWART & BRENTANO, *supra* note 258, at 222; Karen D. Pyke, *Women's Employment as a Gift or Burden? Marital Power Across Marriage, Divorce, and Remarriage*, 8 GENDER & SOC'Y 73 (1994); Debora P. Schneller & Joyce A. Arditti, *After the Breakup: Interpreting Divorce and Rethinking Intimacy*, 42 J. DIVORCE & REMARRIAGE 1 (2004) (finding that a primary change divorcees seek in post-divorce relationships is greater equality within relationships).

317 CLARKE-STEWART & BRENTANO, *supra* note 258, at 222; RIESSMAN, *supra* note 177, at 215 (divorcees view their second marriages as more egalitarian then their first unions); Smith & Goslen, *supra* note 315 (remarried couples tend to be more egalitarian and more oriented to a balance

only contribute more to housework than first husbands,[318] but are also more likely to make concessions during conflicts than they were in their first marriage.[319] Research also suggests that the distress men experience during and after their divorce raises their awareness of their own and their wife's emotional needs,[320] and this in turn gives wives more leverage in remarriages than in first marriages.[321] Remarriages, characterized by a more equal division of labor and sharing of decision-making power, are thus significantly more empowering and dignifying for women than first marriages.[322]

In sum, given the historical and contemporary role that marriage and divorce have played in the lives of women, legislation that thwarts marital exit imposes special sex-specific burdens on women and cultivates gender hierarchy within the family. Moreover, divorce-restrictive regulations deprive women of an important mechanism to incentivize gender equality *during* marriage, as the implicit or explicit threat of exit allows women to renegotiate the balance of power in their marriage and put pressure on husbands to be responsive to their needs.[323] Indeed, the fear that divorce

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between self-interest and the other's interest, as women began to focus more on self-interest and the men began to focus on the other's interest more).

318 Pyke, *supra* note 316, at 86; Karen Pyke & Scott Coltrane, *Entitlement, Obligation, and Gratitude in Family Work*, 17 J. FAM. ISSUES 60, 65 (1996) (spouses in second marriages report that they share decision-making power and household work more equally); Smith & Goslen, *supra* note 315, at 14, 19, 29.

319 CLARKE-STEWART & BRENTANO, *supra* note 258, at 222.

320 *Id.* at 233 (husbands in second marriages tend to be more helpful in household labor and more sensitive to their wife's emotional needs than they were in first marriages).

321 Charles Hobart, *Conflict in Remarriages*, 15 J. DIVORCE & REMARRIAGE 69, 84 (1991).

322 FRANK F. FURSTENBERG & GRAHAM B. SPANIER, RECYCLING THE FAMILY: REMARRIAGE AFTER DIVORCE (1987) (arguing that the balance of power between spouses shifts toward greater gender equality in subsequent marriages, where husbands are more involved in domestic roles and women have more say in important decisions); HETHERINGTON & KELLY, *supra* note 177, at 179; MCCLAIN, *supra* note 2, at 152; Laura Hurd Clarke, *Remarriage in Later Life: Older Women's Negotiation of Power, Resources and Domestic Labor*, 17 J. WOMEN & AGING 21 (2005).

323 RIESSMAN, *supra* note 177, at 216 (noting divorce may exert various kinds of subtle pressures on partners to change traditional rules given the availability of conjugal change); OKIN, *supra* note 4, at 137 (discussing how the infeasibility of exit can impede the effectiveness of voice); Joanna Alexandra Norland, *When the Vow Breaks: Why the History of French Divorce Law Sounds a Warning About the Implications for Women of the Contemporary American Marriage Movement*, 17 WIS. WOMEN'S L.J. 321, 346 (2002) ("So long as women occupied a position of disadvantage within their marriages, divorce represented an opportunity for leverage and self-assertion."); Leslie Green, *Rights of Exit*, 4 LEGAL THEORY 165, 171 (1998); Carrie Yodanis, *Divorce Culture and Marital Gender Equality: A Cross-National Study*, 19 GENDER & SOC'Y 644, 646 (2005) (arguing that the threat of divorce serves as a "tool that women use to secure change and greater equality in marital relationships.").

would force marriage to change to a more egalitarian relationship was a key in restricting this remedy throughout history.[324]

The next Part takes the constitutional argument even further. It will show that the state takes not only a passive role in private patriarchy by limiting exit from unequal or indignifying relationships, but an active role as well, which makes a right to liberal divorce all the more pressing a constitutional imperative.

III. THE ROLE OF LAW IN SUPPORTING INEGALITARIAN MARRIAGE

While certainly there are many extralegal forces that fuel the systematic gender imbalances within modern marriages,[325] the law also contributes to these gender asymmetries and to the constraints wives continue to experience today. This Article earlier noted the law's historical role as a cornerstone of a larger social system supporting and legitimizing gender subordination. Through common law and statutes, the state—as the third party to a legal marriage—formalized gendered marital norms and expectations.[326] Domestic relations laws, of course, have dramatically changed and no longer explicitly institutionalize male supremacy. But the vestiges of patriarchal privilege continue to hover over modern relationships, in that individual expectations for marriage continue to be shaped by the gendered allocation of labor the law once mandated.[327] Moreover, a wide array of state laws

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324 Norma Basch, *Relief in the Premises: Divorce as a Woman's Remedy in New York and Indiana, 1815–1870*, 8 L. & HIST. REV. 1, 2 (1990); *see also* Norland, *supra* note 323, at 330.

325 *See also* Frantz & Dagan, *supra* note 10, at 92 (analyzing possible reasons for the persistence of patriarchal marriages in twenty-first century United States); STEIL, *supra* note 178, at 101–11. *See generally* Wax, *supra* note 2 (employing bargaining theory to analyze the many legal and extralegal forces that are arrayed against the egalitarian ideal of marriage and that make it almost impossible for women to obtain social equality with men).

326 *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 269–70 (1990); David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 556–57 & n.150 (2000) (noting that until two decades ago many state statutes assigned unilateral decision-making power over family matters to the husband); Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1139–44 (1985).

327 *See* Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 219 (2007) (arguing that marriage "has been irreparably shaped" by a discriminatory legal history); OKIN, *supra* note 4, at 140–41.

today still shape family life in ways that promote gender hierarchy and demonstrate a "strong preference" for the traditional family structure.[328]

For example, American tax legislation, unlike the law in most developed countries, penalized couples who challenged traditional gender roles,[329] at least until the Tax Cuts and Jobs Act of 2017.[330] Dual-earner couples were taxed at significantly higher rates than individuals who earned the same amount, such that tax benefits in marriages were greatest when one person was the primary wage earner.[331] By penalizing a second income, and not taxing the imputed income of stay-at-home spouses, the tax system pushed women to work less in the market and more at home, which in turn helped perpetuate social stereotypes about female work "preferences."[332] As Akhil Amar has pointed out, the tax code, rather than individual choices, accounted for much of "[t]he great differential in wages" between married men and married women, which easily "translate[d] into differential political power."[333]

Other legal rules that relegate women to inferior positions in the wage market encourage, and may even compel, women to undertake disproportionately larger domestic responsibilities than husbands; such decisions in turn reduce women's earnings outside of marriage and reduce their negotiating power within marriage.[334] As commentators have shown, the

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328 *See* MCCLAIN, *supra* note 2, at 78, 110 (noting the many laws and policies that encourage gendered division of labor); Johnson, *supra* note 199, at 127.

329 *See* Marjorie E. Kornhauser, *Wedded to the Joint Return: Culture and the Persistence of the Marital Unit in the American Income Tax*, 11 THEORETICAL INQUIRIES L. 631, 631–32 (2010) (noting the minority position of American tax law in favoring single-earner married couples over dual-earner ones).

330 Pub. L. No. 115-97, 131 Stat. 2054 (2017). This Article does not explore the change in tax landscape in the wake of this legislation.

331 *See* COTT, *supra* note 113, at 223–24; EISLER, *supra* note 285, at 140–41; Shultz, *supra* note 124, at 276 (noting the system of joint marital tax returns aids traditional one-earner marriages and penalizes dual-career couples by imposing higher taxes than if each spouse were single); Wax, *supra* note 2, at 617.

332 *See* Wax, *supra* note 2, at 617 (citing Edward J. McCaffery, *Equality of the Right Sort*, 6 UCLA WOMEN'S L.J. 289, 306–17 (1996)); Johnson, *supra* note 199, at 127 ("[B]y presenting women with the option of being the overtaxed second earner, or getting social security benefits and avoiding taxation, the code encourages women not to work outside the home.").

333 Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 465, 474 n.32 (1995).

334 *See* Mary Joe Frug, Commentary, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1059–65 (1992) (discussing legal rules that encourage women to assume disproportionate caretaking responsibilities)*; see also* RIESSMAN, *supra* note 177, at 215 (cautioning that even with the best efforts of couples, it will be difficult to sustain gender equality in marriage

gender gap in the labor market that makes it rational for women to conform to traditional gender roles continues to exist "partly because of gaps or omissions in the discrimination rules, partly because of the ways in which the rules have been interpreted, and partly because of the limited resources allocated to discrimination law enforcement."[335] For example, Title VII has proven an inadequate tool for challenging institutionalized work practices that exclude women, such as time norms, no matter how arbitrary or nonessential they may be.[336] The courts' interpretation of Title VII, one commentator concluded, "reinforces institutionalized work practices that push workers, both men and women, to adopt traditional gender roles at home."[337] Moreover, courts have validated work allocation schemes that channel far more men than women into lucrative jobs and unemployment compensation schemes that deny benefits to women who leave work because of childbirth.[338] These legal rules all devalue female work in the wage market, thereby providing financial incentives for women to defer to their partners in determining the work responsibilities.

Compounding the gendered division of labor is the law's exclusion of domestic labor, still performed primarily by women, from the benefits and protections accorded to other work.[339] By deeming housework a labor of love rather than a job deserving the dignity of economic return, the state devalues women's contributions to the family and undermines women's marital power.[340] More importantly, the doctrine of marital services, which

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without job parity); Johnson, *supra* note 199, at 134–35 (discussing the subservient, gendered role that women inhabit as caretakers).

335 Frug, *supra* note 334, at 1061.

336 Courts have interpreted Title VII not to require employers to provide part-time or flexible work schedules nor to require parental leave after a mother is no longer physically disabled. *See* Albiston, *supra* note 178, at 1134, 1136–44, 1152–54 (examining in detail the doctrinal constraints Title VII creates for unpacking the relationship between work and gender, and showing how this relationship informs courts' interpretation of Title VII).

337 *Id.* at 1155.

338 Frug, *supra* note 334, at 1061–62.

339 *See, e.g.*, JACOB, *supra* note 116, at 105; MCCLAIN, *supra* note 2, at 100; Herma Hill Kay, *"Making Marriage and Divorce safe for Women" Revisited*, 32 HOFSTRA L. REV. 71, 76 (2004) (noting that the homemaking wife's work in the home "is still not a paying job capable of both producing current income and generating the right to retirement with an old age pension"). *See generally* Fineman, *supra* note 180, at 2206 (noting that housewives receive neither compensation nor pension benefits for their labor); Katharine Silbaugh, *Turning Labor Into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996).

340 *See* OKIN, *supra* note 4, at 130, 141, 150–51, 181 (arguing that the fact that women are legally forced to perform housework for free adversely affects their power and influence within the family);

to this day still bars interspousal contracts for domestic labor, further fosters the economic dependence of wives by preventing them from bargaining with their husbands for compensation for housework and child care.[341] By constructing marriage as a regime of "altruistic" exchange, the state has systematically expropriated from women the value of a wife's work, leading to their economic disempowerment and decreased power in marriage.[342]

Relatedly, by refusing to enforce premarital contracts during the life of a marriage, the state puts women in the position of constantly having to renegotiate the marital bargain even though, as we have already observed, their bargaining position tends to decline over the course of the marriage.[343] The result is that women are exposed to opportunistic appropriation from husbands and often acquiesce in disadvantageous marital arrangements.[344] Without enforceable premarital contracts that cut off men's leverage for renegotiation, the law contributes to men's bargaining advantage and to women's inferior negotiating position. Legal recognition of interspousal contracts, as Vicky Shultz predicts, could "go far to equalize a wife's earning power with that of her husband," thereby promoting greater gender equality in the relationship.[345]

Legal doctrines governing marriage and its dissolution further devalue women's status and contributions and give husbands even more leverage to enforce their will. First, the laws of marital naming consistently thwart gender equality. In the past, a woman was encumbered with a legal duty to take her husband's surname upon marriage, signifying legal ownership by husbands and perpetuating male dominance.[346] Today, a woman is only

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Margaret Sokolov, Note, *Marriage Contracts for Support and Services: Constitutionality Begins at Home*, 49 N.Y.U. L. REV. 1161, 1224–25 (1974).

341 COTT, *supra* note 113, at 209–10; OKIN, *supra* note 4, at 122; Shultz, *supra* note 124, at 271. For an example, see *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16 (Ct. App. 1993). As Justice Poche in dissent correctly called it, the court's insistence that a husband has an entitlement to his wife's 'services' for which compensation is impossible "smack[s] of the common law doctrine of coverture." *Id.* at 21 (Poche, J., dissenting).

342 Siegel, *supra* note 162, at 2208–10; Wax, *supra* note 2, at 526.

343 Wax, *supra* note 2, at 626–35 ("[T]he logic of disparities in bargaining power dictates that small initial inequalities of responsibility for household work inexorably tend to snowball.").

344 *Id.* at 628, 648–50.

345 Shultz, *supra* note 124, at 271.

346 Deborah J. Anthony, *A Spouse By Any Other Name*, 17 WM. & MARY J. WOMEN & L. 187, 201 (2010). On the concept of surname as signifying ownership, see *id.* at 208, 210–11; Omi Morgenstern Leissner, *The Problem That Has No Name*, 4 CARDOZO WOMEN'S L.J. 321, 358 (1998).

socially expected to take her husband's name,[347] but a man is not allowed, in a majority of states, to change his name to his wife's simply by virtue of marriage.[348] In fact, only nine states explicitly allow a man to change his name through marriage with the same ease and procedures as a woman.[349] In structuring naming choices based on gender, the law continues to signal that family identity revolves around men and that female names and identities are secondary.[350] At the same time, the law discourages men from changing their name—a sign of ownership—as it is "virtually unthinkable in law and policy for a man to want to be 'owned' in that way by his wife."[351]

Second, the state still privatizes care, making the family "the private repository of inevitable dependency"[352] and assuming a gendered division of labor in which "women's roles typically are defined as subservient to the whole."[353] The burdens of family care doom women, as primary caretakers, to a life of dependency that is "socially defined and assigned, and that assignment is gendered."[354] Meanwhile, family and welfare reforms enshrine the image of a male head of household; the absence of a male provider is

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347 To this day the legal system still clings to continuing patriarchal tendencies, expecting, even if not mandating, women to adopt their husbands' name. For example, immigrant wives who retain their maiden name risk that the U.S. Citizenship and Immigration Service will question the validity of their marriage. Anthony, *supra* note 346, at 195; *see also* Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 780 (2007) (describing the state attorney general's opinion that a woman who wants to retain her maiden name is "odd" and "confused").

348 Anthony, *supra* note 346, at 190. A husband usually has to undergo a cumbersome procedure and a court process to convince a judge to change his name. At least one court told a man attempting to take his wife's name that getting married was not a valid reason for the change. *See id.* at 202–03.

349 *See* Anthony, *supra* note 346, at 204; Hannah Haksgaard, *Blending Surnames at Marriage*, 30 STAN. L. & POL'Y REV. 307, 315 (2019). The most recent state to do so is California, which amended its law in 2007, acknowledging that "the choice to adopt or not adopt a new name upon marriage . . . is a profoundly personal reflection of one's individuality, equality, family, community, and beliefs." Name Equality Act of 2007, Cal. Stat. ch. 567 (2007) (codified, as amended, at CAL. FAM. CODE § 306.5 (2020)). Only four states allow for surname blending: North Dakota, California, New York, and Kansas. Haksgaard, *supra*, at 309.

350 Anthony, *supra* note 346, at 190, 213, 222 (arguing "the law reinforces unequal cultural norms and archaic gender roles, represents and implicitly supports inequality, and violates the constitutional principle of equal protection of the laws," and that the marital names law "perpetuates traditional marital gender roles and archaic notions of women as property").

351 *Id.* at 211; Leissner, *supra* note 346, at 358.

352 Fineman, *supra* note 180, at 2209.

353 Johnson, *supra* note 199, at 134.

354 Fineman, *supra* note 180, at 2200.

constructed as a social problem and its presence as a vehicle for social policy.[355] As the *Shriver Report* points out, "[t]oo many of our government policies . . . are still rooted in the fundamental assumption that families typically rely on a single breadwinner . . . ."[356] In Martha Fineman's terms, "[b]oth divorce and welfare reforms attempt to reconstitute the natural family, by bringing the father into the picture through an economic and disciplinary connection reminiscent of the traditional male role in the hierarchical private family. Patriarchy is thus reasserted and modified to meet new social realities."[357]

Third, the legal rules that dictate a significant financial disparity in men's and women's exit options substantially weaken women's bargaining position within marriage. Feminist scholars have persuasively demonstrated that coverture has been updated rather than abolished in this context: marital property laws that formerly failed to acknowledge women's share in marital tangible assets now cut women off from property rights in what is typically the largest component of family wealth—their husband's future income stream—a component which women helped to produce through domestic labor.[358] By entitling a husband to exit with his income stream intact and leaving women economically vulnerable, marital property laws considerably enhance a husband's already superior leverage within marriage.[359] Perhaps even more problematic for women's marital bargaining power is the fact that the overwhelming majority of states adhere to the "he who earns it, owns it" rule during the life of the marriage. These states confer ownership and management authority based on formal title to property,[360] thus devaluing

355 *Id.* at 2206–07.

356 MARIA SHRIVER, THE SHRIVER REPORT: A WOMAN'S NATION CHANGES EVERYTHING 76 (2009).

357 Fineman, *supra* note 180, at 2207; *see also* Johnson, *supra* note 199, at 127.

358 *See, e.g.*, Williams, *supra* note 190, at 2251–53; Sunstein, *supra* note 252, at 2427; HERMA HILL KAY & MARTHA S. WEST, TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION 270–73 (5th ed. 2002).

359 Williams, *supra* note 190, at 2281; OKIN, *supra* note 4, at 167–68; Wax, *supra* note 2, at 549–51; Frantz & Dagan, *supra* note 10, at 92 n.67 ("The asymmetric cost of divorce likely contributes to male dominance during marriage.").

360 This regime is so extreme that, even when there is a joint bank account, legal ownership of money in the account is based largely on wage contributions. *See* Kelly, *supra* note 197, at 142–44, 157. The nine community property states are the exception, though all but one still refuse to adopt a joint-management regime. *See* HOMER H. CLARK, JR. & ANN L. ESTIN, DOMESTIC RELATIONS CASES AND PROBLEMS 614 (7th ed. 2005); Kelly, *supra* note 197, at 159.

unwaged family labor as insufficient to earn an automatic property right.[361] This property regime thus plays an "influential role in power distribution within ongoing marriage,"[362] cultivating wives' dependence on husbands by diminishing the economic resources available to them, and perpetuating gender hierarchy.[363]

Fourth, sex-neutral child custody laws that have proliferated in the last decades have increased sex-based disparities in bargaining power within intact marriages. As studies have shown, the prospect of having to battle over custody and losing children further undermines what little power wives have in marriage.[364]

Lastly, to this day, the state continues to enable marital violence, a group-disadvantaging practice that denies equal citizenship to innumerable women.[365] While the law no longer officially condones wife-beating,[366] it has yet to provide sufficiently effective means to rout out domestic violence.[367] The legal remedies that battered women have at their disposal, including resources for shelter-care[368] and sentencing rules for domestic abusers,[369] remain grossly inadequate to enable women to escape abusive marriages.[370] Moreover, whatever protections state laws purport to provide, enforcement authorities and the court system fail to deliver, letting abusers proceed

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361 Kelly, *supra* note 197, at 145, 164.

362 *Id.* at 157.

363 *Id.* at 116–17, 146, 151, 164; *see also id.* at 145.

364 Wax, *supra* note 2, at 640–42; *see also* Carbone, *supra* note 227, at 60.

365 *See* the discussion *supra* Part II.B.2.c; *see also* Lela Gray, *Municipal Accountability in Domestic Violence: A Promising New Case*, 4 ALB. GOV'T L. REV. 362, 363 (2011).

366 As nineteenth century women's rights activists grieved, "[i]n the covenant of marriage, she is compelled to promise obedience to her husband, he becoming to all intents and purposes, her master—the law giving him power to deprive her of her liberty, and to administer chastisement." *See* THE BIRTH OF AMERICAN FEMINISM, *supra* note 150, at 86–87.

367 Kay, *supra* note 339, at 87; COTT, *supra* note 113, at 211; Vi T. Vu, Town of Castle Rock v. Gonzales*: A Hindrance in Domestic Violence Policy Reform and Victory For the Institution of Male Dominance*, 9 SCHOLAR 87, 101, 111 (2006); Claire Wright, *Confronting Domestic Violence Head On: The Role of Power in Domestic Relationships*, 32 T. JEFFERSON L. REV. 21, 22 (2009) (noting that "the legal system's treatment of domestic violence remains grossly inadequate").

368 Miccio, *supra* note 106, at 138.

369 Washington State's recent increase in sentencing for chronic domestic violence offenders in 2010 is a notable exception. *See* Patricia Sully, *Taking It Seriously: Repairing Domestic Violence Sentencing in Washington State*, 34 SEATTLE U. L. REV. 963 (2011).

370 Finley, *supra* note 63, at 430–31; Balos, *supra* note 243, at 574–75.

uninterrupted with their abuse[371] and reinforcing gender subordination and hierarchy.[372] For example, police arrest avoidance, the "pervasive lack of enforcement"[373] of civil protective orders ("CPO"), prosecutors' tendency to undercharge or drop the cases altogether, the notorious phenomenon of discriminatory acquittals of battering husbands, and bias in the courts still persist unabated.[374] Many courts have further undercut the protective capacity of CPOs, interpreting mandatory arrest statutes to allow for police discretion to not arrest the abuser.[375] This judicial accommodation of police discretion has proven harmful to battered women and has "dramatically" weakened CPOs as a tool for remedying and reducing domestic violence.[376] Further, some judges still mistreat victims of domestic violence, trivializing the abuse or blaming women for courting it.[377] Finally, the lack of local government and law enforcement accountability—notoriously endorsed by

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371 For example, the police often place domestic violence calls at the bottom of their response hierarchy. *See* Miccio, *supra* note 106, at 130–31. For a recent case documenting how the plight of one battered woman sheds light on just how inefficient the legal system's treatment of battered women is, see Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415 (2d Cir. 2009). *See also* Gray, *supra* note 365, at 365 (reporting "an overall inadequate police response" to domestic violence).

372 Balos, *supra* note 243, at 574–75; Tetlow, *supra* note 243, at 90, 95; Bethany A. Corbin, *Goodbye Earl: Domestic Abusers and Guns in the Wake of* United States v. Castleman*—Can the Supreme Court Save Domestic Violence Victims*, 94 NEB. L. REV. 101, 104–96 (2015) (stating that despite the prevalence and brutality of abuse, abusers "are typically only charged with misdemeanors—if they are charged at all").

373 Vu, *supra* note 367, at 88.

374 Miccio, *supra* note 106, at 138; Vu, *supra* note 367, at 113 (noting that many male police officers fail to respond to protective order calls due to gender bias). *See generally* Tetlow, *supra* note 243, at 77; RHODE, *supra* note 164.

375 *See, e.g.*, Donaldson v. City of Seattle, 831 P.2d. 1098, 1104 (Wash. Ct. App. 1992) (holding that police do not need to seek out and arrest an abuser if he has fled the scene by the time the police arrived).

376 Jason Palmer, *Domestic Violence*, 11 GEO. J. GENDER & L. 97, 105 (2010); *see also* Jane K. Stoever, *Access to Safety and Justice: Service of Process in Domestic Violence Cases*, 94 WASH. L. REV. 333 (2019) (discussing current stringent procedural barriers that result in the dismissal of high percentages of cases of CPOs).

377 *Id.* at 158–60; Phyliss Craig-Taylor, *Lifting the Veil: The Intersectionality of Ethics, Culture, and Gender Bias in Domestic Violence Cases*, 32 RUTGERS L. REC. 31, 37–38 (2008) (noting that courts may blame women for the abuse).

the Supreme Court[378]—"operat[es] as state condonation of domestic violence."[379]

In response to state governments' failure to provide adequate remedies for gender-based violence,[380] and cognizant of the profound link between violence against women and women's equality,[381] Congress enacted the Violence Against Women Act. The Supreme Court, however, invalidated the legislation,[382] in a decision regarded by Catharine MacKinnon as a "substantive victory for the social institution of male dominance."[383]

Even more strikingly, twenty-six states have retained, in some form, the common-law notion of marital rape as a "definitional impossibility."[384] Many states either provide spousal exemptions or immunity for various non-consensual sexual offenses other than forcible rape, subject marital rape to less serious sanctions than non-marital rape, or impose diverse procedural hurdles for prosecution, among them the requirement that marital rape may be prosecuted only if a couple was legally separated or divorced at the time of the assault.[385] The state's refusal to interfere in marriages involving sexual

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378 *See, e.g.*, Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) (failing to recognize municipal liability claims even where domestic violence statutes require police officers to arrest violators of restraining orders).

379 Miccio, *supra* note 106, at 134; *see also id.* at 133–34 ("[accountability] failures contribute to continuation of the violence."). *See generally* Gray, *supra* note 365, at 364.

380 United States v. Morrison, 529 U.S. 598, 620 (2000) (acknowledging "that many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions . . . [that] often result in insufficient investigation and prosecution of gender motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence").

381 Bartlett, *supra* note 158, at 497.

382 *Morrison*, 529 U.S. at 598 (invalidating the Violence Against Women Act of 1994 as exceeding the power of Congress under the Fourteenth Amendment and the Commerce Clause).

383 Catharine A. MacKinnon, *Disputing Male Sovereignty: On* United States v. Morrison, 114 HARV. L. REV. 135, 136 (2000).

384 Brzonkala v. Va. Polytechnic Inst., 169 F.3d 820, 843 (4th Cir. 1999) (recognizing that seven states do not treat marital rape as a prosecutable offense, and twenty-six allow prosecutions only under restricted circumstances); Michelle Anderson, *Marital Immunity, Intimate Relationships, and Improper References: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1468 (2003); *see also* Hannah Schwarzchild, *Same-Sex Marriage and Constitutional Privacy: Moral Threat and Legal Anomaly*, 4 BERKELEY WOMEN'S L.J. 94, 108 & n.89 (1988); Hasday, *supra* note 119, at 1375.

385 Even in states where marital rape exemptions were abolished, the factual parameters of the offense are narrower than in other types of rape, the punishment is still significantly more lenient, and virtually all commentators note the dearth of prosecutions and convictions on marital rape charges. For a review of the literature on these points, see Shultz, *supra* note 124, at 277–78; Anderson, *supra*

violence—effectively treating the marriage license as a sexual license as well—facilitates the domestic abuse of wives by husbands and strengthens wifely subordination.[386]

Having helped in crucial ways to produce or reinforce sexual imbalances in marital power and to embed, perhaps indelibly, sexist assumptions about the respective roles of men and women in and outside the home, the state cannot disclaim any role in the gender hierarchy that continues to characterize most marriages.[387] Today's statutory rules and doctrines, at both the state and federal levels, along with the deeply gendered common law of centuries past, help cement the institution of marriage as it is currently structured and lived as a major obstacle to women's equality. To this day, marriages continue to feature a gender-based division of labor, grossly asymmetrical relations of power, economic vulnerability, domestic violence, and sexual exploitation. Certainly, women are not pressured to stay at home anymore, and most of them join their husbands in financially supporting the family. Yet, when they return home from the market, they are still expected—and typically have little bargaining strength to resist—to fulfill all of the wife's traditional domestic and caretaking tasks and to compromise their workforce participation whenever it conflicts with the needs of their family.

The work that wives do at home to enable men's occupational and financial successes remains uncounted, unrecognized, and undervalued, undermining women's opportunities to achieve economic independence. That gendered division of labor is duplicated in the marketplace, where women are treated as marginal workers and men as the "ideal workers"[388] who are expected to enjoy the domestic services of their spouses. The economic subordination of women in the workplace in turn increases their dependency on husbands, limits female bargaining power in marriage, and further aggravates private patriarchy in the home.

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note 384, at 1486–94, 1496–97; Morgan Lee Woolley, *Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues*, 18 HASTINGS WOMEN'S L.J. 269, 278, 281–84 (2007).

386 *See* Marc Spindelman, *Surviving* Lawrence v. Texas, 102 MICH. L. REV. 1615, 1650–51 (2004).

387 Meyer, *supra* note 326, at 557; Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1204 n.124 (1992).

388 The term "ideal worker" was famously coined by Joan C. Williams in her book, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (Oxford University Press, U.S.A. 2001).

By so doing, marital inequality produces a vicious cycle that reinforces the dominance of men over women, from home to work and back home again, and impedes women's progress toward full citizenship stature. That feedback mechanism may seriously disrupt women's lives and careers, frustrate their acquisition and development of human capital and labor skills, and generally make it less likely that they will be able to be equals in legislatures, judiciaries, and other positions of power. In this way, marriage not only differentiates women's and men's roles in society, but also contributes to the perpetuation of a caste-like system in which women as a group suffer from inferior social status, lesser political and economic power, and even physical vulnerability.[389]

CONCLUSION

This Article has argued that barriers on exit that lock women into marriages in which abuse may reign and sex roles are rigidly assigned are a form of state action that inflicts dignitary and status harms on women by limiting their prospects and channeling them into circumscribed lives. Divorce-restrictive regulations perpetuate women's social and economic inferiority, ensure that they live under the sovereignty of their husbands, and make it more difficult for women to participate as citizens on equal terms with men. Moreover, these regulations compel women to stay wives, while in no respect alleviating—and in some ways exacerbating—the conditions that make marriage a principal cause of female oppression. A unilateral right to a readily available marital exit is therefore indispensable if we are to alleviate gender stratification, release women from subordination and entrenched gender role expectations, prepare them to pursue roles that bring external valuation and recognition, and bolster their self-esteem, identity, and self-governance.

In the final analysis, then, probing what marriage has meant for women and their status in society exposes the gendered power in a facially neutral dissolution regime and provides solid constitutional anchors for the right to

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389 Wax, *supra* note 2, at 635; Karst, *supra* note 136, at 458–59; OKIN, *supra* note 4, at 25 ("underlying all [the substantial] inequalities that continue to exist between the sexes in American society is the unequal distribution of unpaid labor of the family"); OKIN, *supra* note 4, at 31 (many social goods, including time for paid work or for leisure, physical security, and access to financial resources are typically unevenly distributed within families); *see also* Sunstein, *supra* note 252, at 2411.

divorce under all substantive visions of gender equality. This is true whether one uses the anti-subordination principle, the historical interpretations of equal protection, or the Supreme Court's emerging doctrine of "due process equality." This Article's companion[390] will further establish marital freedom as a *formal* gender equality right by applying the antidiscrimination principle to the divorce context. All in all, marital freedom is thus not simply a legal remedy for broken marriages, but a critical component for a social order committed to securing equal citizenship and human dignity for all women.

390 Karin Carmit Yefet, *Divorce as a Formal Gender-Equality Right*, 22 U. PA. J. CONST. L. (forthcoming April 2020).