

Why Diamonds Really Are a Girl's Best Friend¹

LINDA K. KERBER

May Brodbeck Professor in the Liberal Arts
University of Iowa

IN THE USUAL TELLING, women enter the narrative of U.S. constitutional history when it touches on the right to vote: when the Seneca Falls 1848 “Declaration of Sentiments” claimed for women the right to vote; when the word *male* was placed in the Fourteenth Amendment in 1868, and when the word *sex* was omitted from the Fifteenth Amendment in 1870. Then follows the long struggle for a federal suffrage amendment, succeeding in the passage of the Nineteenth Amendment in 1920. After a gap, the story picks up with the efforts to pass an equal rights amendment in the 1970s and early 1980s. All this is appropriate and not wrong.

But there is a richer and far more complex story of women’s relationship to the Constitution. The constitutional history I would tell would start at the beginning, in the years of the Founding, and stretch right into our own time, right into Justice Ruth Bader Ginsburg’s remarkable dissent in *Carhart v. Gonzales* in 2007.² I would focus on two clauses of the Constitution, building an account of how they have been put into practice. Suffrage is not the only constitutional issue that matters to women.

Article IV, Section 2 promises that “the Citizens of each State shall be entitled to all the privileges and immunities of Citizens in the several states.” What are the privileges and immunities of citizens? How are we to know them? How are we to know when they are denied? The Constitution doesn’t specify. It awaits our interpretation.

Since the Declaration of Independence began with the assertion that all men are created equal, and we have generally assumed that in

¹Read 8 November 2007 as part of the symposium “Putting the Constitution into Practice.”

²*Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

that usage “men” meant everyone, it should not have taken until 1868 for the Constitution explicitly to promise all persons “equal protection of the laws.” Long after the Fourteenth Amendment, the principle of equality needed defending. Indeed, it is one of the most contested issues of our own time. On what terms can a person claim to have been denied equal protection of the laws? In 1875 the Supreme Court told Virginia Minor that voting was not a privilege of citizenship, and that denying her the right to vote was not denying her the equal protection of the laws.³ Not until 1971 would the U.S. Supreme Court begin to embrace the question of when discrimination on the grounds of sex could mean a denial of equal protection of the laws. Putting the Constitution into practice has meant turning words into choices; the choices mattered from the very beginning of the Republic.

The work of rebellion against England was framed as men’s work. “Like Columbus’s voyage to America and the College of Cardinals,” the historian Jack Hexter once quipped, “the Constitutional Congress was pretty much a stag affair.”⁴ The Founders understood themselves to be free white men, solving the conundrum that Rousseau had placed at the heart of the social contract: devising practices in which free people would be bound only by authority that they themselves had freely chosen. They twisted old monarchical rhetoric—I, George Rex, so order—into the plural, capacious *We, the people*.

In certain moods they really meant *people*. When they described holders of rights, the founders used the term *persons* more often than they did “men” or even “citizens,” establishing the great expansive tradition of American law and practice, one that has repeatedly been challenged in times of stress and fear, but has proved to be one of the most resilient aspects of American political tradition.

The founders did not spend much energy explicitly excluding women from political space. One of their progressive innovations was a new strategy of representation. Instead of basing representation in the lower house of Congress on free adult men or on “taxable polls” (that is, male household heads) or electors, as many states did, the federal Constitution established a ratio of one representative for every thirty thousand free *people*—or, as James Wilson of Pennsylvania described it, representation was “in proportion to the whole number of white & other free Citizens & inhabitants of every age sex & condition. . . .” The last three words dropped out of conversation, but only, as historian Jan Lewis has persuasively argued, because the drafters understood them

³ *Minor v. Happersett*, 88 U.S. 162 (1875).

⁴ J. H. Hexter, review of *Woman as Force in History*, by Mary Beard, *New York Times Book Review*, 17 March 1946.

as obvious. "You must remember . . . that you are one of my constituents," Senator Samuel Latham Mitchell wrote to his wife in 1804, "and that I am in some degree responsible to you for my public conduct. In the theory of our Constitution women are calculated as political beings. They are numbered in the census of inhabitants to make up the amount of population, and the Representatives are apportioned among the people according to their numbers, reckoning the females as well as the males. Though, therefore, women do not vote, they are nevertheless represented in the national government to their full amount."⁵ Senator Mitchell did not acknowledge the irony of this form of virtual representation in a nation that had justified a revolution in part out of scorn for its own virtual representation in Parliament. Yet however flawed at its origins, an equal ratio of representation for the free population was a door opening to the corridor that led—though it took nearly two centuries to come out the other end—to the rule of one person, one vote.

In the United States, rights-bearers were generally "persons"; citizens could be constructed however state legislatures wished to define them. When the state of New Jersey wrote its suffrage statutes in terms of property-owning persons, and when the outcome was that women actually voted, no one said the state of New Jersey couldn't do it. (When the women used their votes so effectively as to shift the outcome of an election, the men of the losing party got angry, and they persuaded the legislature to change the statute. But no one said they had not had the power to write it in the first place.) By writing in the language of equality, men of the founding generation presented women with an extraordinary opportunity. In these ways, as they did when they secured claims to freedom of religion, freedom of the press, freedom of assembly, freedom from arbitrary arrest, they made America into, as R. R. Palmer observed, "a kind of mirage or ideal vision for Europe, a land of open opportunity and of new beginnings, free from the load of history and of the past."⁶

Of course, freedom from history and the weight of the past is a mirage. The men of the founding generation prided themselves on their realism. They were afraid of mirages. And they were frightened of what might happen when the lessons of successful rebellion against established authority spread. What did it mean to be a woman citizen under this new regime?

⁵ Quoted in Jan Lewis, "'Of Every Age Sex & Condition': The Representation of Women in the Constitution," *Journal of the Early Republic* 15.3 (Autumn 1995): 359–87.

⁶ R. R. Palmer and Joel Colton, *A History of the Modern World*, 3rd ed. (New York: A. A. Knopf, 1965), 332.

The founders imagined the citizen in a male body. Here is Tom Paine on the political community as it emerges from a state of nature:

“Some convenient tree will afford them a statehouse, under the branches of which the whole colony may assemble to deliberate on public matters. . . . In this first parliament every man by natural right will have a seat.” And eligibility for seats is measured by men’s relations to good women: “. . . as a man, who is attached to a prostitute, is unfitted to choose or judge of a wife, so any prepossession in favour of a rotten constitution of government will disable us from discerning a good one.”⁷

In this vision, “us” is male. Women are wives or prostitutes—sexually accessible women, both good and bad, but equally outside the political community, equally barred from the shade of the “convenient tree” that is the statehouse. (A century later—and more than a decade before the general Chinese Exclusion Act of 1889—the first imagining of the exclusion of the Chinese took the shape of the Page Law of 1875, which explicitly placed the burden of establishing that they were not prostitutes on Chinese women seeking to enter the United States.) Legally women were always citizens in the American Republic—they could, for example, be naturalized—but simultaneously they were excluded from the “imagined community” that citizenship constructed. In a lawsuit that tested this principle, not long after the Revolution was over, an American jurist announced that a married woman “has no *political* relation to the *state* any more than an alien.”⁸

When Abigail Adams famously cautioned her husband to “remember the ladies,” he almost equally famously wrote back, “As to your extraordinary Code of Laws, I cannot but laugh. . . . Depend upon it, We know better than to repeal our Masculine systems.” He knew the code of laws was masculine. In the law that colonists inherited from England and did not change substantially in the early Republic, household and workplace, intimacy and authority, were so densely tangled that it was impossible to tell them apart. A single legal treatise covering what we would now call “domestic relations”—written by Tapping Reeve, published in 1816, and remaining in print and in circulation until the eve of the Civil War—bears the revealing title *The Law of Baron and Femme, of Parent and Child, Guardian and Ward, Master and Servant*. Everyone knew these were not the same relations—parent and child was different from master and slave—but everyone also knew that

⁷Thomas Paine, *Common Sense*.

⁸George Blake, arguing in the case of *Martin v. Commonwealth of Massachusetts*, 1 *Mass. Reports* 348 (1805). I have discussed this case extensively in *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1998), chap. 1.

these were, as historian Christopher Tomlins has put it, “relations of authorized power.”⁹ The opening phrase is not “husband and wife” but old “law French” for “lord and woman.”

Abigail Adams was explicit about what she wanted changed in the law codes of the new Republic. “Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could. . . . [P]ut it out of the power of the vicious and the Lawless to use us with cruelty and indignity with impunity.” Abigail Adams had domestic violence in mind, and well she might. Wherever one looked, the husband’s right to the body, property, and loyalty of his wife was embedded in the law; it even trumped her loyalty to the state.

The old law of domestic relations that Abigail Adams knew began from the principle that at marriage the husband controlled the physical body of the wife. (There would be no legal concept of marital rape until the 1970s.) There followed from this premise the elaborate system known as *coverture*. In the seventeenth and eighteenth centuries, as the English legal theorist William Blackstone put it, “husband and wife are one person in law, that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs every thing; and is therefore called . . . *a feme covert*.” This understanding was the foundation of the law of domestic relations. (Civil law systems in places where the French or Spanish had settled, such as Louisiana and what would become Texas and New Mexico, permitted a woman considerably more control over the property she had brought into the marriage, which she passed down to the next generation as a representative of her natal family, but the husband was still greatly empowered by his position as head of household.)

It was this set of rules that Abigail Adams had in mind when she wrote obsessively in the months of March, April, and May 1776 of husbands’ “arbitrary power” over wives. When an English woman married, her husband gained virtually absolute access to her body. It therefore seemed to follow that he became the absolute owner of all the personal property she possessed and of all the property or wages she might earn *during* their marriage. Since husbands controlled wives’ property and earnings, wives could not make contracts to buy or sell. Wives had no economic resources of their own to back up their word. Indeed, a woman’s ill-considered word could get her husband in trouble; if a merchant extended credit to a wife, for example, everyone understood

⁹Christopher L. Tomlins, “Subordination, Authority, Law. Subjects in Labor History,” *International Labor and Working Class History* 47 (Spring 1995): 56–90.

that it was the husband who had promised to pay. And the debtor husband could go to debtors' prison. In these relationships was rooted the tradition that the husband could "correct" his wife; like the unruly child, the unruly wife could undermine the husband's public reputation. The husband was entitled to silence his wife, and, as with the child, if persuasion failed, a "reasonable amount" of corporal punishment was not out of order. Folklore sustained the image that he could use a stick no wider than his thumb.¹⁰ Men monopolized training in violence and the right to use it. The state would not inquire into violence that occurred within the home that was a man's castle; not until the 1970s was domestic violence named. The principle of interspousal tort immunity meant that a wife could not sue her husband for damages in the aftermath of domestic violence. (In 1910, when Charles Thompson beat his pregnant wife so severely that she could not work as a seamstress, the U.S. Supreme Court recognized that a "cruel assault" had been committed and that, unable to use her hands, she could "suffer great pecuniary damages as the result of injuries inflicted by a brutal husband," but nevertheless ruled that to permit her to bring such a claim would undermine "domestic harmony.")¹¹ When a man killed his wife's lover in the heat of the moment, he could defend himself by saying he only did what a "real man would do."¹² The rules of self-defense were modeled on those governing what a reasonable man would do in the same circumstances; not until 1977, when Yvonne Wanrow, five feet four inches tall and using a crutch, claimed that she had acted reasonably in shooting an unarmed, six-foot, two-inch drunk known child molester who had threatened and startled her, was the doctrine gradually reshaped.¹³

Once he had fathered a child, a husband received the right to manage and collect the rents and profits on any real estate his wife had brought to the marriage. Husbands owned the money their wives earned. Even after married women's property acts loosened some of the husbands' control, giving to wives control over the wages they earned, courts narrowly interpreted this rule to mean only wages earned *outside* the home. Wives still owed husbands not only sexual service but their labor in the household. Deep into the twentieth century, if a wife was, say, dissatisfied with the terms of a will, she could not claim for

¹⁰On this point see Ruth Bloch's important "The American Revolution, Wife Beating, and the Emergent Value of Privacy," *Early American Studies* 5 (2007): 223–52.

¹¹*Thompson v. Thompson*, 218 U.S. 611 (1910). But see Justice John Marshall Harlan's vigorous dissent.

¹²Richard Maxwell Brown, *No Duty to Retreat: Violence and Values in American History and Society* (New York: Oxford University Press, 1991).

¹³*State v. Wanrow*, 88 Wash.2d 221, 559 P.2d 548 (1977).

her own the contribution to the estate that she had made from taking in boarders or doing their laundry (not even if they were the filthy overalls of coal miners). Even the “butter and egg money” so widely understood in farming families to be the wives’ to spend, turned out to be unprotected in law. Married women rarely left wills in the nineteenth century; they rarely had property to bequeath. As the feisty civil rights activist Dorothy Kenyon explained the hypocrisy in the mid-twentieth century, “At the very moment the bridegroom was saying ‘With all my worldly goods I thee endow,’ he was actually taking every cent his bride possessed.”

In return for turning over their bodies and property to their husbands, English law assured women that when they were widowed they would be able to count on an inheritance. If a man died without a will, the probate courts would ensure that his widow received her “thirds”; he could leave her more but he could not leave her less. But the inheritance—the widow’s dower right—was grudging; it was the right of a widow *to make use* of one-third of the real estate that her husband held at the time of his death. She was also usually entitled to claim outright one-third of the personal property he had owned, after the debts were paid, and to claim outright her personal “paraphernalia” *suitable to her station, as judged by probate officers*—her clothing, her cooking pots, and all the jewelry she had been *given*.

So finally we get to diamonds. Only the jewelry she had been *given*.

What do the privileges and immunities of citizenship mean under such a regime? What has been women’s experience of the equal protection of the laws?

It has been easiest to claim the privileges and immunities of citizenship when married; throughout American history there have been many pressures pushing people into marriage and under the cloak of coverture. Scorn for the old maid, the spinster, was one mode (there has been considerably less scorn for the bachelor). After the Civil War, freedmen and freedwomen faced enormous pressures to marry. Ex-slave couples, many of whom had been forced into fictive marriage by their masters and had little or no affection for each other, found that the Freedmen’s Bureau pressured them to marry legally. Freed people who traveled to search for partners or children who had been sold away from them now found themselves charged with vagrancy; freedpeople who claimed new partners could find themselves charged with bigamy; in both situations they were vulnerable to being forced into labor contracts, or leased out under convict labor laws.

Did the privileges and immunities of citizenship include the right to marry the person of your choice? Not if you’d be picked up for vagrancy while you searched for him or her. Not if miscegenation laws

forbade “whites” to marry people of a wide range of other ethnicities. These statutes were passed in many states in the nineteenth century; they were not declared unconstitutional by the Supreme Court until 1967. In the interim, they frustrated many loving couples. Many of these couples did, of course, “marry”—in practice or with only religious ceremonies. They were likely to find that at the death of the white partner, state law forced the family property to descend to the dead white partner’s relatives: nephews, cousins.¹⁴ Current litigation on same-sex marriage raises a similar question—do you have the right to marry the person of your choice?—in our own moment.

Carol Channing wanted diamonds to pay for her humble flat. She knew that she could not rely on a husband to provide it. Not only would a husband control her money, but she could have no domicile apart from him without his consent. As late as 1974, only four states allowed married women to have separate domiciles from their husbands; another fifteen permitted such separate addresses only for the purpose of voting; six permitted them for election to public office. An unmarried woman student who qualified for in-state tuition at her state university lost that entitlement if she married a man who was not a resident of the state; the point had to be bitterly litigated in many states in the 1960s and 1970s.¹⁵

Do the privileges and immunities of citizenship include the right to be tried by an impartial jury drawn from a full cross-section of the community? Jury service appears in Article III, Section 2 and the Sixth and Seventh Amendments of the federal Constitution. Judith Sargeant Murray recognized instantly how key jury service is to the practice of democracy; some of the founders thought it more important than voting.¹⁶ But even after the passage of the suffrage amendment in 1920, few states treated jury service as a logical accompaniment to it. In 1961, Florida’s assistant attorney general took the position that women’s duties to their husbands trumped their duties to the state. Why is it reasonable to put women’s names on prospective juror lists only if they had volunteered to serve, he was asked. “They have to cook the din-

¹⁴ See Peggy Pascoe, “Miscegenation Law, Court Cases, and Ideologies of ‘Race’ in Twentieth-Century America,” *Journal of American History* 83 (1996): 44–69.

¹⁵ See Kenneth M. Davidson, Ruth Bader Ginsburg, and Herma Hill Kay, *Text, Cases and Materials on Sex-Based Discrimination* (St. Paul, Minn.: West Publishing Co., 1974), 127–30.

¹⁶ Judith Sargeant Murray to [Esther Ellery], 22 April 1797, Letterbook 10, p. 101; JSM to Mrs. H____ of York, 25 Nov. 1800, Letterbook 10, p. 228, Reel 3, Judith Sargeant Murray Papers, University of Mississippi. I am grateful to Professor Sheila Skemp for these references. On the founders, see my observations in *No Constitutional Right to Be Ladies*, 128–31.

ners!” he blurted. That’s why Carol Channing needs her diamonds to help her at the automat. And that’s why Gwendolyn Hoyt, who had killed her abusive husband, had to be judged by a jury drawn from a pool of three thousand men’s names and ten women’s names. Note: she didn’t ask for women on the jury itself; just an authentically randomly selected “impartial jury” drawn from the full range of the community, as the contemporary understanding of the Sixth Amendment provides. Note also that her lawyers did not dare mention domestic violence at her 1957 trial; that would have been understood to have given her a motive, and raised the charges to first-degree murder, a capital crime in a death penalty state.¹⁷

Not until 1975 did the U.S. Supreme Court rule that men and women must be eligible for all jury service on the same terms. Only in 1992, after Ruth Bader Ginsburg joined it, did the U.S. Supreme Court rule that peremptory challenges based on gender are impermissible.¹⁸

Do the privileges and immunities of citizenship include the right to petition? It’s right there in the First Amendment: “Congress shall make no law . . . abridging the right of the people . . . to petition.” Congress did not make such a law. But in 1838, when former president John Quincy Adams, now serving as representative from his home district, brought to Congress petitions opposed to the annexation of Texas signed by thousands of women, including 238 of his own constituents, his colleagues laid them on the table and refused to accept them. One member of Congress said that what the women had done—taking a stand on a matter of political significance and attempting to influence congressional action—was a “departure from their proper sphere, in which there was abundant room for the practice of the most extensive benevolence and philanthropy,” and also “discreditable . . . to the national character.”¹⁹

Citizenship by birth has been central to Americans’ understanding of nationality at least since the Fourteenth Amendment was passed in 1868. Men have never put their citizenship at risk by marriage. But women did, in practice, at least since the 1850s. Even Ulysses Grant’s daughter, who had married a British man and gone to live with him in England, had to petition Congress to restore her citizenship after she was widowed in 1898.²⁰ The Expatriation Act of 1907 explicitly provided

¹⁷ *Hoyt v. Florida*, 368 U.S. 57 (1961).

¹⁸ *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994).

¹⁹ [John Quincy Adams]. *Speech of John Quincy Adams, of Massachusetts, Upon the Right of the People, Men and Women, to Petition; on the Freedom of Speech and Debate in the House of Representatives of the United States* . . . (Washington: Gales and Seaton, 1838), 15.

²⁰ John L. Cable, *Decisive Decisions of United States Citizenship* (Charlottesville, Va.: Michie Co., 1967), 41–42.

that American women who married aliens invariably lost their citizenship even if they continued to reside in the United States. The point was tested, and sustained a few years later when Ethel Mackenzie, who had worked hard in the successful California suffrage campaign, tried to register to vote. The Board of Election commissioners refused to register her on the grounds that when she had married Gordon Mackenzie, a British subject, she had "ceased to be a citizen of the United States." The U.S. Supreme Court sustained the point, invoking the "ancient principle of our jurisprudence: [the] identity of husband and wife."²¹ Women born in the United States continued to lose their citizenship when they married foreign men, thus denationalizing thousands of American women even in the midst of world war, requiring hundreds who were married to German men to register as "enemy aliens," and making some of them stateless. Bit by bit the law was changed, but not until the middle of the twentieth century was it largely a thing of the past. This formula also existed in many other nations and exists in some nations (including many in the Middle East) today. It is an issue with which the League of Nations and the U.N. have wrestled for nearly a century. Only a few years ago the U.S. Supreme Court sustained the practice of different access to birthright citizenship for non-marital children of male and female citizens born outside the United States.²²

Does equal protection of the laws mean that the old rule of the husband's unlimited sexual access to the wife's body has been permanently destabilized? In the mid-nineteenth century, a major campaign in which physicians were leaders criminalized abortion and criminalized birth control. Comstock laws characterized information about and devices to encourage birth control as obscene. Birth control was finally legalized when it could be understood not as women's freedom but as "family planning"; the state did not abandon its power to police women's bodies. When the U.S. Supreme Court made birth control devices legal in 1965, they were legal only if used *within* the privacy of marriage. Not until 1972 did the Supreme Court protect access to birth control devices for non-married people.

In the mid-twentieth century, another major campaign in which physicians were leaders decriminalized abortion. In *Roe v. Wade* (1971) Justice Harry Blackmun found a space for legal abortion when determined jointly by women and their physicians, not primarily on the grounds of a woman's own right to privacy and equality. Still, when *Thornburgh v. American College of Obstetricians and Gynecologists*

²¹ See Candice Lewis Bredbenner, *A Nationality of Her Own: Women, Marriage and the Law of Citizenship* (Berkeley: University of California Press, 1998), 65–70.

²² *Tuan Ahn Nguyen v. I.N.S.*, 533 U.S. 53 (2001).

(1986) established that a woman did not have to get her husband's permission, and when *Planned Parenthood v. Casey* (1992) established that she did not have to *inform* her husband, it looked like the old order of coverture was dead.

But not so fast. The failure to ground the decriminalization of abortion in equal protection and to specify the end of coverture has had major consequences. Less than two years ago (18 April 2007), when the U.S. Supreme Court denied the challenge of four physicians to the federal Partial-Birth Abortion Ban Act of 2003, the majority arrived at its conclusions by reasoning about medical practice and by deciding who counts as medical experts; even the absence of an exception to protect the health of the mother "did not render the Act facially unconstitutional." By supporting a national ban on a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists, Ruth Bader Ginsburg wrote in dissent, the Court "deprives women of the right to make an autonomous choice, even at the expense of their safety." The issue was not "some generalized notion of privacy," as much discussion of abortion had claimed; it was about equality, the heart of democratic practice. For equality implies that the state respects, as Ginsburg put it, "a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."²³ Every debate about abortion is a debate about the meanings of equality.

Antique assumptions about women's relation to the state, antique assumptions that the privileges and immunities of citizenship and the equal protection of the laws mean different things for men and women, and for men and women of different races and ethnicities still haunt our jurisprudence, still haunt our daily life. We are still putting the Constitution into practice.

²³ *Gonzales v. Carhart*, 127 S. Ct. 1610, at pp. 1649, 1641.