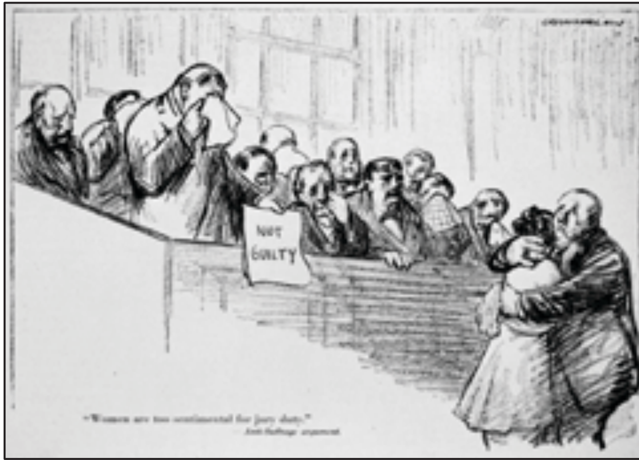
CHAPTER 7

"REMEMBERING THE LADIES"

America's Feminist Constitution



"WOMEN ARE TOO SENTIMENTAL FOR JURY DUTY" (1915).

In the heyday of American Progressivism, some reformers met the anti-suffrage argument that "women are too sentimental for jury duty" with a reminder that men, too, could act emotionally on juries. Note the premise underlying this prong of the suffrage debate: Woman suffrage would also entail woman jury service, even though neither the federal Woman Suffrage Amendment nor its typical state constitutional counterpart explicitly enumerated the jury-service right. At least some persons on both sides in the suffrage conversation thus understood the unenumerated links between voting and jury service. But did everyone in the 1910s understand these links? What other unenumerated entailments followed from the deep logic of woman suffrage?

America's written constitution describes itself as ordained by "the People" and proclaims itself "the supreme Law," superior to ordinary congressional statutes. At the Founding, these two patches of text were linked by an overarching theory of legitimacy based on popular sovereignty: The Constitution should trump an ordinary statute enacted later, because a mere statute passed by Congress is not democratically equivalent to a Constitution ratified more directly by the people themselves in a process that allowed an unusually wide slice of Americans to vote. Similarly, because a constitutional amendment needs to win the support of overwhelming supermajorities in Congress and in the states before becoming part of the Constitution, no mere congressional majority should be allowed to undo an amendment. Like the original Constitution, an amendment democratically outranks any statute, even a statute enacted more recently.[1]

But then something happened in America that the Founders did not anticipate—something with profound consequences that were neither comprehensively codified in the terse text nor immediately understood. Women got the vote via a series of reforms culminating in the Nineteenth Amendment. In 1908, almost no American woman could vote anywhere; by 1920, women voted everywhere. The Suffrage Revolution marked the largest numerical extension of the franchise in American history, complicating the standard democratic stories previously told about why the Constitution should trump a later statute.

To some extent, and perhaps unwittingly, the adoption of the Nineteenth Amendment logically undercut the democratic legitimacy of the constitutional regime that preceded the amendment. But to what extent, exactly? And what are the unwritten constitutional implications and entailments of this logical undercutting? In the aftermath of this unintentionally unsettling amendment, how should faithful constitutional interpreters make amends for the retrospectively problematic exclusions that defined the American constitutional order prior to 1920? In what other

respects did the Suffrage Revolution properly precipitate later unwritten constitutional changes not wholly foreseen or textualized in 1920? *

In this chapter we shall wrestle with these weighty questions and attempt to align contemporary constitutional gender law with the written Constitution.

"We the People"

SUPPOSE THAT CONGRESS TOMORROW were to enact a sweeping new law designed to protect women's rights. Our hypothetical civil-rights statute would protect women not only against discriminatory government action, state and federal, but also against various threats to women's liberty and equality posed by private misconduct—for example, workplace harassment and violence directed against women on account of their sex. Suppose further that this new civil-rights law was thought by some to go beyond the powers given to Congress by the Founding text, and even to go beyond the powers given to Congress by the Reconstruction Amendments.

It might be thought that no one but a crank could question the constitutionality of our hypothetical law on enumerated-powers grounds. After all, there is strong reason to believe that the Reconstruction Amendments gave Congress virtually plenary authority to identify and safeguard citizens' basic rights of liberty and equality. Recall that the Fourteenth Amendment's first sentence proclaimed that all persons born in America would be equal citizens at birth, and that its last sentence empowered Congress to enforce the ideals of the amendment. The first sentence guaranteed equal citizenship not just against governments but more generally, and guaranteed this birth equality not just for blacks vis-à-vis whites, but more universally. Under a straightforward interpretation, Congress has broad power to affirm equal birthright citizenship by protecting any class of citizens at serious

* Other constitutional amendments expanding rights of democratic participation—for example, the Thirteenth, Fourteenth, Fifteenth, Twenty-third, Twenty-fourth, and Twenty-sixth Amendments—raise broadly similar questions that lie beyond the scope of this chapter. Here, as in other chapters, I aim to offer exemplary, not exhaustive, illustrations of how faithful interpreters may properly go beyond the text while staying true to it.

risk of being systematically harmed or demeaned on the basis of their birth status—injured or excluded because, say, they happen to have been born black or female.[2]

But let's assume that some stingy interpreters of the written Constitution are not convinced by these textual and historical arguments. These interpreters admit that the Reconstruction text could plausibly be read to broadly empower Congress; however, they believe that the legislative history of the Fourteenth Amendment, with its central focus on the rights of blacks, in particular, and on the need to prevent state misconduct, limits the power of Congress to enact civil rights for nonracial groups, such as women, and to protect any group against nonstate actors, such as private employers or prejudiced thugs. In fact, after Congress passed a real-life law resembling our hypothetical statute, the Violence Against Women Act—"VAWA"—of 1994, the Supreme Court, in the 2000 case of *United States v. Morrison*, held that parts of the law exceeded Congress's constitutionally enumerated power.

When these sorts of stingy interpretations prevail—when the old Constitution is read to trump a modern women's-rights statute—it is hard to see how this trumping can be said to be democratically consistent with popular sovereignty. "We the People" who voted for the Founding text and who voted for the Reconstruction Amendments did not generally include women voters. The very legislative history of Reconstruction relied upon by stingy interpreters is a history dominated by male voters and male lawmakers.

By contrast, the members of Congress who passed our hypothetical modern civil-rights law (and who passed the real-life VAWA) *were* voted for by women. Indeed, women themselves—lots of them—serve in modern Congresses even though women were generally barred from serving in the constitutional ratifying conventions of the 1780s and the legislatures that approved the Reconstruction Amendments in the 1860s.

If we are to vindicate the written Constitution's legitimating principle—popular sovereignty—we should embrace the following as a basic precept of America's unwritten Constitution: When the written Constitution can fairly be read in different ways, congressional laws that are enacted after the Nineteenth Amendment and are designed to protect women's rights

merit a special measure of respect because of their special democratic pedigree. Thus, Congress should enjoy broad power to protect women's rights for the simple reason that the unwritten Constitution is a Constitution of American popular sovereignty, and popular sovereignty is perverted when more democratic, post-woman-suffrage enactments championing women's rights are trumped by less democratic, pre-woman-suffrage legal texts.

True, various pre-1920 constitutional enactments and amendments were enormously democratic for their time. Yet when these earlier enactments and amendments are viewed retrospectively through the lens of the Nineteenth Amendment, they suffer from a notable democracy deficit because they excluded women voters. The problem cannot be wished away by blithe assertions that earlier generations of men "virtually represented" women, because *the Nineteenth Amendment's underlying logic repudiated this particular version of virtual representation of women by men*. The very adoption of the Nineteenth Amendment undermined the glib assumption that before 1920, male voters and lawmakers always properly protected the legitimate interests of nonvoting females.

TO SEE THIS PROFOUND POINT about the retrospective democracy deficit more clearly, we should begin by noticing that the Nineteenth Amendment was designed to correct a past wrong. It was an amendment to make amends.

Not all amendments are of this sort. For example, nothing in the Eighteenth Amendment establishing National Prohibition in 1919 suggested that any rights violation or deep injustice had occurred when America was wet. Instead, the idea was simply that a dry America would be better. Unlike, say, murder and rape, drinking and selling alcohol were not intrinsically evil. In legalese, selling alcohol was widely understood as *malum prohibitum* (an action that was wrong only if and because the law prohibited it) and not *malum in se* (an action legally prohibited because it was wrong in itself, even before the law came along). Precisely because selling alcohol was merely *malum prohibitum*, the Eighteenth Amendment provided a special time-delay of one year after the amendment's ratification before any new federal criminal law implementing Prohibition would take effect. This year-long delay would give Americans time to adjust to a new—dry—code of conduct.

By contrast, the Allies at Nuremberg in the late 1940s applied their code of conduct to punish actions previously committed by the Nazis, and did so over the defendants' emphatic objection that this application was improperly ex post facto. Not so, said the Allies, correctly. Certain things were evil from time immemorial. Genocide and other war crimes had always been wrongful—*malum in se*. The Allies were not changing the basic human code of right and wrong; they were merely creating a new legal court to enforce the preexisting moral order, an order inscribed in the hearts of all right-thinking humans.[3]

On which side of the line did the Nineteenth Amendment fall? Did it merely create new rules that would apply purely prospectively, as with the Eighteenth Amendment? Or did it call for fully retrospective application, as with the Nuremberg prosecutions? Or was some intermediate approach called for? If so, what were its contours?

The text of the Nineteenth Amendment does not answer these questions. But here, as elsewhere, the text narrows the range of possible outcomes and various elements of America's unwritten Constitution—structural inferences, logical entailments, principles of interpretive coherence, and common sense—narrow the range even further.

On the one hand, we should immediately reject the outlandish idea that the Nineteenth Amendment somehow pulled the rug out from under its own feet and retroactively rendered illegitimate the entire constitutional project that preceded it. The amendment's text, after all, purports to modify, not exterminate, the preexisting Constitution. It was explicitly ratified as an "amendment" to an earlier document. In the language of Article V, it forms "Part of this Constitution." In this respect, the Nineteenth Amendment differs radically from the original Constitution itself, which was designed to kill and bury its predecessor document, the Articles of Confederation.[4]

Similarly, it would be nonsensical to think the Nineteenth Amendment requires interpreters to determine how the pre-1920 Constitution would have been worded differently had women been involved in its initial enactment or its pre-woman-suffrage amendments, and to follow the presumed constitutional text that would have emerged in this alternative universe. This would be a mind-bending thought experiment of such indeterminacy that all legal constraint would be lost—and the amendment was surely

about modifying a document designed to work as *law*. Likewise, no one can say whether past presidential elections would have turned out the same if women had voted, because the candidates would surely have played the game quite differently—but how, precisely? The whole world would have been different, almost unimaginably so. As the saying goes, if my aunt had wheels, she'd be a wagon.

On the other hand, it would lean too far in the other direction to limit the Nineteenth Amendment to purely prospective application, à la the Eighteenth. Such an approach would make sense if the ratification of the Nineteenth were exactly like the coming of age of an individual. When a person reaches age eighteen, she is allowed to vote, but we do not think that the fact that our new adult-voter was denied the vote last year is anything wrongful or deplorable. She couldn't vote then because she was not, in legal contemplation, old enough then. She is now older and presumably wiser. But woman suffrage was not like this. The idea was not that in 1920 women had matured and were thus fundamentally different from the women of 1919 or 1918 or 1901—or 1866 or 1787, for that matter. Rather, the very adoption of the Nineteenth Amendment was an official recognition that the previous exclusion of women from the franchise had indeed been wrong and deplorable by the more enlightened standards of the post-woman-suffrage Constitution itself. The question is how to factor this profound implication of woman suffrage into proper constitutional interpretation.

To repeat, the terse text does not prescribe a specific answer to this question. To some extent, the issue turns on basic principles of remedy law, and the text says very little about how to vindicate the venerable idea that for every legal wrong there should be some remedy.[5]

Very little, but not nothing. One clause in the Judicial Article reminds us that when judges hear cases arising under the Constitution, they are properly influenced by traditional principles of "equity." A second clause, in the Nineteenth Amendment itself, suggests that Congress should have broad authority to enforce the amendment's letter and spirit. Indeed, the very words used—"Congress shall have power to enforce this article by *appropriate* legislation"—harked back to the letter-and-spirit test laid down by Marshall in *McCulloch*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are *appropriate*, which are

plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional" (emphasis added). Marshall himself applied this test so as to accord Congress wide discretion to promote national security. Nothing in the written Constitution said anything specific about a national bank, and a national bank was not absolutely and indispensably necessary for national security. But if Congress plausibly thought that a national bank would promote national security, that was good enough for Marshall. Similarly, if Congress tomorrow plausibly thinks that a women's-rights law might promote women's full political equality, that, too, should be good enough under an amendment that gestures toward the generous *McCulloch* test via its use of the word "appropriate."

Though the text of the Nineteenth Amendment can easily be read in this fashion, it must be admitted that the text standing alone can also be read in a more stingy way. Recall that in 2000, the *Morrison* Court in fact adopted a stingy stance and rejected the claim that Congress has plenary power to pass any and all laws genuinely aimed at promoting women's full civil and political equality.

The decisive point, then, is a deeper one implicating unwritten constitutional first principles that, alas, were not presented to the *Morrison* Court, and that the Court therefore failed even to see, much less ponder. Whenever the Constitution is read to sharply limit the power of today's Congress to protect women's rights, an ambiguous and less democratic constitutional text (from whose original enactment and early amendment women were excluded—wrongly, in retrospect) ends up trumping a clear and more democratic statutory text (in whose making women rightly enjoy political equality). Such a result undermines the popular-sovereignty foundation of the Constitution—its basic claim to legitimacy. The written text depends on the unwritten principle of popular sovereignty and must be construed in light of that principle even though the text does not quite say so in any one explicit clause.

"the right to vote"

THE NINETEENTH AMENDMENT is not the only part of the written Constitution that means more than meets the eye. Before examining several other implications of this transformative amendment, let's recall some basic truths about earlier transformative constitutional clauses that also meant more than they initially seemed to say.

Although nothing in the original Constitution explicitly declared that American citizens would be more free than British subjects to criticize officialdom, this truth was a logical implication and entailment of American popular sovereignty—a principle that underlay the entire document, beginning with its opening three words (to say nothing of its actual enactment). Not everyone at the Founding initially understood the logical implications of the new American system. This widespread failure of understanding helps to explain why so many early Congressmen voted for the Sedition Act of 1798. People who live through a revolution do not always immediately appreciate just what they have wrought.

A similar dynamic of unintended entailments unfolded during America's second great revolution, more commonly known as Reconstruction. Some Reconstructionists at first believed that the Thirteenth Amendment would suffice to repair the constitutional damage caused by slavery and secession. But once blacks became free, republicanism obliged further reforms. How could any ex-gray state be a true republic if a great mass of the state's *free men* were excluded from the franchise? On further reflection, Americans came to see that freedom without the franchise was unstable—at least if the nation was to stand by the constitutional principle that each state be an honest-to-goodness republic. Excluding slaves from voting in antebellum America had been one thing; for purposes of republican self-government, slaves were no more part of the polity than were aliens. But excluding free men was something very different—and excluding large numbers of free men was, on second thought, the very definition of unrepublicanism. Thus, Reconstruction Republicans ended up going further than many had initially intended.

What was true of America's first two great democratic revolutions was equally true of its third, the doubling of suffrage accomplished in the early

twentieth century. Here, too, not all the implications and entailments were at first fully understood even by the revolutionaries themselves.[6]

FOR EXAMPLE, most suffragists probably gave little or no thought to how the Nineteenth Amendment's words should be squared with the apportionment rules laid down by section 2 of the Fourteenth Amendment, rules that had never been enforced by Congress or the courts prior to 1920. Yet simple logic dictated that the word "male" in section 2—the Constitution's first and only use of this word—would need to be modified after the Suffrage Revolution. Otherwise, section 2 itself would violate the central command of the Woman Suffrage Amendment, namely, that no law could henceforth treat males and females differently in the domain of voting rights.[7]

Exactly how far did this domain extend? For example, did voting rights entail the right to serve on juries? On this issue, too, the Suffrage Revolution implied reforms that not all suffragists may have fully understood during the revolution itself.

The Supreme Court did not recognize a right of women to serve on juries equally with men until 1975—and when the Court finally did recognize this right, in *Taylor v. Louisiana*, the Woman Suffrage Amendment went wholly unmentioned. Instead, the Court derived a right of women to serve equally on juries from the Fourteenth Amendment's equal-protection clause. As a matter of constitutional text and original understandings, this judicial reasoning left much to be desired. The equal-protection clause was written to be, and in the 1860s was universally understood to be, categorically inapplicable to voting rights. Nothing in this clause, which applied to all persons, including aliens, operated to enfranchise aliens—or blacks, or women for that matter. (In the 1875 case of *Minor v. Happersett*, a unanimous Supreme Court made mincemeat of the plaintiff's claim that the Fourteenth Amendment enfranchised women.) But if the Fourteenth Amendment gave women no right to vote outside the jury box, then how exactly did this amendment give women a right to vote inside the jury box? Conversely, if the Fourteenth Amendment equal-protection clause somehow had in fact enfranchised women, what exactly was all the fuss about in the 1910s over that Nineteenth Amendment thingy?[8]

Despite all this, *Taylor* clearly reached the right result. It simply used

the wrong clause, as did so many other Warren Court and post–Warren Court cases involving voting rights and/or the Fourteenth Amendment. Once the Warren Court in the early 1960s decided to press the equal-protection clause into service as a voting-rights provision in cases such as *Harper v. Virginia* and *Kramer v. Union Free School District*, the next logical step was to treat jury service as akin to voting. Those who voted for ordinary lawmakers should as a rule also be allowed to serve—or to vote, if you will—on ordinary juries. This logic made perfect sense; but the root right of women to vote (for lawmakers or on juries) came not from the Fourteenth Amendment but from the Nineteenth.

Put another way, women's equal right to vote on juries was a simple implication of their equal right to vote generally. Even if not all suffragists and not all their opponents understood this entailment in the 1910s, many surely did;* and any other way of thinking about the question risked making a hash of the Constitution as a whole. The Nineteenth Amendment's text tracked the Fifteenth Amendment's text virtually verbatim, simply substituting "sex" for "race, color, or previous condition of servitude." Ever since the 1870s, landmark congressional legislation had made clear that the antidiscrimination rules applicable to ordinary voting for legislators (and executives and state judges) also applied to jury service. If this was true of the Fifteenth Amendment, surely it also applied to the Nineteenth, whether or not every amendment supporter or opponent understood this implication.[9]

The right to vote was generally conceptualized not merely as a right to vote for legislators but also as a right to vote within a legislature. If blacks or women could not as such be disfranchised, neither could they be excluded from the legislature on account of their race or sex. Put differently, given that the Fifteenth Amendment and the Nineteenth Amendment clearly applied to initiatives, referendums, bond measures, and other occasions when ordinary voters engaged in direct lawmaking, surely these amendments likewise applied when lawmaking and voting occurred in representative assemblies.

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* See, e.g., the picture and caption with which this chapter begins. The linkage between woman suffrage and woman jury service was also a subtext of Susan Glaspell's brilliant 1917 short story "A Jury of Her Peers" and its accompanying one-act play, "Trifles."

But note what this means. The Nineteenth Amendment vested women with a right to run for president—for presidents are surely part of the legislative process—even though the original Constitution repeatedly used the words "he" and "his" to refer to the federal chief executive. Though the Suffrage Amendment did not expressly modify the basic rules of the Executive Article and the Twelfth Amendment, it implicitly did so. Before 1920, states could constitutionally keep women from: (1) voting for presidential electors, (2) serving as presidential electors, and (3) appearing on the ballot as presidential candidates. After 1920, states lost all three of these constitutional powers—and did so even though the Nineteenth Amendment's text might at first be thought to address only issue (1). Here, too, the amendment required a deeper restructuring of previous practices than might appear from a quick glance at the amendment's text.

THOUGH THE NINETEENTH AMENDMENT focused centrally on women's political rights and duties, it also had surprising ramifications for women's personal lives.

For example, if a married woman had an equal right to vote—if she was no longer merely represented politically by her husband—then a wife could choose to vote differently than her husband. Not only could she vote for a different candidate, but presumably she could also vote in a different jurisdiction. Politically, she was now her own man, so to speak. Thus, the Nineteenth Amendment effected an important change in traditional marriage law, which had insisted that husband and wife share a common domicile as part of the legal unity of marriage.[10]

Subtle changes within private domains such as marriage, wrought by an amendment facially concerned with public matters such as voting, have even played out within America's first families. Just as the Twelfth, Twenty-second, and Twenty-fifth Amendments reshaped the basic role of American vice presidents, so the Nineteenth Amendment worked changes in the role of the other traditional presidential running "mate"—the first lady.[11]

The notion that a president's spouse might have political ideas of her own and might function as a powerful political partner to her husband would not have shocked leading men in the Founding generation, familiar

as they were with the likes of Abigail Adams (the savvy wife and mother of Presidents John and John Quincy Adams, respectively) and Mercy Otis Warren (a respected political historian married to a prominent Massachusetts politician). But in a world where women could neither vote nor hold office, political spouses often felt obliged to hide their lights under bushels and to act as traditional wives in public. Just as George Washington defined the archetypical presidential role, and Thomas Jefferson redefined this role in a world of national parties, so Martha Washington and Dolley Madison (who acted as a hostess first for Jefferson, who was a widower, and then for her husband, James) solidified the role of the first lady.

Most first ladies followed in Martha and Dolley's footsteps, supporting their men at social events and perhaps exerting political influence in private, but not asserting their intellectual independence by holding forth on the great issues of the day in newspapers or other political forums. This mold was shattered by Eleanor Roosevelt—a high-profile and highly opinionated political force in her own right, resembling Alexander Hamilton more than Martha Washington. Hillary Clinton continued in this spirit and took the new model even further, becoming a U.S. senator, presidential candidate, and cabinet officer after her tenure as first lady.

Doubtless many causes have produced this evolution in the role of first lady, but one that should not be overlooked is the Nineteenth Amendment. Just as ordinary women were freed by the amendment to vote contrary to their husbands, so women within America's first families faced a new menu of options. Had Abigail Adams spoken out in public venues, she would have offended some male traditionalists and probably damaged her husband's political prospects. Seven score years later, Eleanor Roosevelt surely did offend some traditional men, but she also electrified many women, *and women could now vote*. According to a Gallup poll, roughly 57 percent of women supported Eleanor's husband for reelection in 1936—a lower percentage than the male support for FDR that year, but still a huge vote of confidence, especially compared to 1928, when women had overwhelmingly voted Republican.[12]

In effect, Franklin and Eleanor offered themselves up as a canny post–Nineteenth Amendment two-for-the-price-of-one political pair—a kind of balanced ticket in which Franklin wooed moderates while Eleanor

courted crusaders. In the very first presidential election ever held in which women could vote nationwide—in 1920—Franklin had been the Democrat's vice-presidential candidate. FDR was also the first president to have a female cabinet officer (Labor Secretary Frances Perkins) and the first to name a woman to the federal appellate bench (Florence Ellinwood Allen, who in 1922 had become the first woman ever elected to a state supreme court). In these Roosevelt appointments we see additional ripple effects of woman suffrage.

The Clintons took the Roosevelts' strategy to new heights, with implications for presidential baton-passing that are still emerging. Alexander Hamilton, Thomas Jefferson, and John Adams paid close attention to each other as potential rivals—but none of them worried about Martha Washington as a potential successor to her husband once he decided to exit the political stage. By contrast, Vice President Al Gore could not afford to overlook Hillary Clinton as President Clinton's other political "mate" and possible political successor. Thanks to the rise of women voters and women politicians—that is, thanks to the Nineteenth Amendment—dramatic new, albeit unwritten, political possibilities dwell in the old position of first lady.

"on account of sex"

THE TWO MOST FAMOUS REPRODUCTIVE RIGHTS CASES of the twentieth century—*Griswold v. Connecticut* and *Roe v Wade*, championing unwritten rights of contraception and abortion, respectively—can also be seen in a new way if examined through the prism of the Nineteenth Amendment and the Suffrage Revolution more generally.

Both the particular Connecticut anticontraceptive law under review in *Griswold* and the specific Texas antiabortion law challenged in *Roe* were initially adopted in the nineteenth century by all-male legislatures chosen by all-male electorates. (The Texas law was adopted in the 1850s, the Connecticut law in the 1870s.) Of course, the Nineteenth Amendment did not in 1920 wipe clean the entire legal slate by sweeping off the books all previous constitutional and statutory texts. But there was a unique problem, post-1920, whenever a government continued to enforce an old stat-

ute that: (1) was initially enacted without a single woman's vote, and (2) imposed special burdens on women qua women—burdens that (3) might make it more difficult for women, even after woman suffrage was won, to be fully equal political participants, and therefore (4) might be particularly difficult for women to undo even after they won the vote.

The laws in *Griswold* and *Roe* were precisely of this sort. Both laws were adopted when no woman voted. Both laws imposed special burdens of childbearing on women, and only women, as women. Both laws probably made it harder for women to achieve full equality as legislators, governors, jurors, judges, and so on, because these women were busy being at-home mothers when some of them would have preferred to avoid conception or childbearing, and would have done so if contraception or abortion had been legally available.

Thus, under an entirely plausible vision of America's unwritten feminist Constitution, judges soon after 1920 could have held that laws such as these were valid only if reenacted by a legislature elected by women voting equally alongside men. As for *these laws*, perhaps judges should have wiped the legal slate clean in 1920, by striking down the old laws and thereby obliging states to put the matter put to a fresh vote.

An antifeminist critic of this plausible approach might say that because women were able to vote in Connecticut and Texas after 1920, the burden was properly on them to repeal these old laws if they believed that such laws discriminated against them. But the Nineteenth Amendment should be read more broadly, even though its literal words do not compel this broader reading. To repeat, this amendment sought to make amends. It sought to end a past practice of exclusion that was viewed as unfair, wrongful, erroneous. To the extent that the Connecticut and Texas laws were sex-specific remnants of that wrongful era—badges of female inequality and disempowerment—and to the extent that these laws arguably created self-entrenching effects making it harder for women to repeal these laws, even after women had formally won the vote, these laws should not have been allowed to continue after 1920. Under a robust vision of the Nineteenth Amendment, judges could have set aside the old contraception law in Connecticut and the old abortion law in Texas, obliging both states to engage in a new conversation involving men and women on a truly equal legal footing.

An opposing, ultra-feminist critic might say that courts immediately after 1920 should have decided the full meaning of women's equality for themselves, rather than merely remanding the question to the political process in Connecticut and Texas. Such a critic might be aghast at the idea of putting constitutional rights up to a vote. But surely one apt way of respecting women's equality after the adoption of the Nineteenth Amendment would simply have been for judges to precipitate and then heed broad political conversations about women's roles in which women would participate as equals. Such conversations had not been possible before woman suffrage. They might not have been possible within the judiciary itself circa 1920. As a venue for a proper conversation with and about women, the political process post-1920 was arguably preferable to a purely judicial process dominated by lawyers, and therefore by men. The world of the 1920s, after all, was a world in which women still did not attend law schools in large numbers, and a proper post-suffrage conversation about women's rights needed to involve women themselves.

AT THIS POINT IN THE ANALYSIS, it is worth pondering the similarities and differences between race-equality law and sex-equality law. There are profound but oft-overlooked parallels between the twentieth century's two most famous reproductive-rights cases and its two most famous race cases, *Brown* and *Bolling*. Recall that the Connecticut contraception law and the Texas abortion law: (1) were initially enacted without a single woman's vote, and (2) imposed special gender-based burdens on women—burdens that (3) likely made it more difficult for women, even after woman suffrage was won, to be fully equal political participants, and therefore (4) were particularly difficult for women to undo even after they won the vote. Similarly, in *Brown* and *Bolling* the Court confronted Jim Crow laws that: (1) were initially enacted without the support of black voters (because blacks were widely disfranchised, often in unremedied violation of the Constitution), and (2) imposed serious race-based burdens on blacks (who were denied the chance to associate on equal terms with more privileged whites)—burdens that (3) likely made it more difficult for blacks to be fully equal political participants both in society at large and inside legislatures, and therefore (4) were particularly difficult for blacks to undo even if they later regained some measure of voting rights.

None of this is to say that racial-equality issues are identical to sex-equality issues. When it comes to race, a racial minority may not be able to protect itself fully in the legislature, even after courts have stepped in to strike down old laws from the pre-black-suffrage era. By contrast, in certain sex-discrimination situations, perhaps women, comprising half of the electorate, could have protected themselves well enough, thank you, had judges in the 1920s simply wiped the slate clean of pre-1920 laws entrenching men in power.

"equal"

OF COURSE, JUDGES DID NOT INVALIDATE such laws in the 1920s. Instead, the Supreme Court waited roughly half a century to take on sex discrimination in earnest. Only in the 1970s did the justices reinterpret the Fourteenth Amendment's equal-protection clause to approximate the then-pending Equal Rights Amendment (ERA), a proposed amendment that was never formally ratified by the requisite number of states. Having just seen how some thoughtful judges might have plausibly invoked the Nineteenth Amendment's spirit to strike down these old laws as early as the 1920s or 1930s, let's now see why the judiciary in fact waited until much later to act.

Recall that the key constitutional command of the Fourteenth Amendment is a command of birth equality: Americans should not be condemned to second-class citizenship because they were born black—or female, for that matter. Recall further that the Nineteenth Amendment envisioned women's equality across the entire range of political rights—voting, officeholding, jury service, and so on. Prior to the 1960s, some modest judges might understandably have hesitated to strike down various sex-discrimination laws (including laws regulating contraception and reproduction) because these laws were arguably not designed to treat women as inferiors or to keep them out of legislatures or off the judicial bench. Rather, many of these gender-based laws could have been viewed—and in fact were widely viewed for much of the twentieth century—as simply recognizing abiding differences between the sexes: Separate, but equal.

Though it might be tempting to scoff at this slogan, we must resist the temptation, for even today the concept remains a prominent feature of our

constitutional landscape. Most public buildings continue to have separate bathrooms for males and females; and most public schools continue to operate sex-segregated locker rooms and sports programs for boys and girls. These separations go virtually unchallenged in society and in law because they are not generally viewed as invidious. They are not widely perceived as privileging males over females—or females over males, for that matter—in their design and effect. They are simply recognitions of differences between the sexes. Separate, but equal. To put the point sociologically and politically, many women as well as many men today do not find separate bathrooms and gym classes to be badges of female inferiority. Indeed, most people today—most men and most women—may well prefer separate bathrooms and gym classes.[13]

Now consider pre-1960s America. The law treated men and women differently in myriad ways, but until the 1960s perhaps judges thought that most women did not themselves find these legal differences to be markers of subordination. Men generally went off to work in the economic marketplace (with all sorts of legal encouragements), and women generally stayed home and raised kids (again, with various legal nudges), but these law-induced differences were not clearly claimed by vast numbers of women themselves to be denials of equality.

Only in the 1960s and 1970s did very large numbers of women begin to take to the streets to challenge this separate-spheres regime, labeling it invidious and unequal. Only in this era did a veritable army of feminists demand a formal federal Equal Rights Amendment. Only in this era did a substantial number of states adopt state ERAs. (Before 1970, two low-population states, Utah and Wyoming, had constitutions with explicit ERA-style provisions. By 1977, sixteen state constitutions, accounting for roughly one-third of the national population, explicitly guaranteed sex equality.) Only in this era did Congress pass major civil-rights laws prohibiting sex discrimination. Only in this era did Congress propose an ERA, which was emphatically backed by both major-party presidential platforms in 1972. Only in this era did states comprising nearly two-thirds of the national population ratify this proposal. Once these things happened, it became impossible for judges to ignore the threat to women's equality posed by a wide range of previously acceptable laws.[14]

True, the ERA was not formally ratified in the 1970s. But precisely be-

cause the Constitution already featured an amendment (the Fourteenth) explicitly promising equality and committed to equal birth-status, the ERA itself was a largely declaratory proposal—a restatement and elaboration. Many of the ERA's supporters and detractors were fully aware that the Fourteenth Amendment's language already promised equality and was pointedly not limited to racial equality, as was the language of the Fifteenth Amendment. The failure of the ERA did not repeal or erase any part of the Fourteenth Amendment. The ERA debate did, however, highlight that a strong majority of Americans now supported a robust idea of sex equality. This broad popular support was entitled to interpretive weight as a popular gloss on the Fourteenth Amendment and the Ninth Amendment, in keeping with the principles of America's lived Constitution.

TO SAY THAT JUDGES properly took the insights of feminists into account in the 1960s and 1970s is not to say that popular social movements may, as a general matter, amend the Constitution by informal actions outside Article V. For example, no informal popular movement comparable to 1970s feminism could have made thirty-three-year-olds eligible to serve as president in the absence of a formal textual amendment. Where the written Constitution is clear and fixed—as with the presidential age requirement of thirty-five years—only written amendments can ordinarily suffice to change the written rules.

The idea here is not to draw a sharp line between, say, age rules on one side and equality rules on the other side. After all, the Constitution's age rules themselves were rooted in a vision of social equality. (In their eighteenth-century context, they were anti-dynasty provisions of sorts.) Rather, the idea here is that that some constitutional applications plainly pivot on broad understandings of social meaning, whereas other constitutional applications do not.[15]

Thus, on certain equality issues, the relevant constitutional rules and principles may be so clear that social meanings and social movements are largely beside the point. The Fifteenth Amendment was violated by massive race-based disfranchisement long before Dr. King, Thurgood Marshall, and other leaders mobilized large numbers of Americans to protest this legal wrong. As with the Black Codes that facially violated the central

meaning of the Fourteenth Amendment, race-based disfranchisements of blacks violated the core meaning of the Fifteenth Amendment regardless of how the disfranchised persons, or anyone else, may have understood the matter. These laws were unequal and thus unconstitutional regardless of their social meaning.

But other government practices have been properly viewed as unequal and thus unconstitutional *because* of their social meaning. In these situations, the social meaning was the basis for the legal verdict of unconstitutionality. Twentieth-century contraception and abortion laws were particularly difficult for judges to analyze under purely formal principles of equality precisely because such laws targeted features unique to women—namely, their sex-specific capacity to bear children. As to these laws, social meaning was thus particularly important—especially the social meaning of contraception and abortion laws in the eyes of women themselves.

TO GET A SENSE OF how the abortion issue looked prior to the rise of late-twentieth-century feminism, let's imagine a stylized dialogue circa 1950 between two earnest and knowledgeable constitutional scholars, Adam and Eve. Let's suppose that both Adam and Eve accept the idea that the Fourteenth Amendment was, at its core, an amendment designed to secure the birthright equality of all citizens—equality not just between blacks and whites, but also between women and men. But in 1950, Adam, who is cast as the traditionalist in this dialogue, does not have the benefit of the massive feminist consciousness-raising of the 1960s and 1970s. Let's imagine that Eve, by contrast, is familiar with avant-garde feminist theories that would soon gain wider currency. (Film buffs might profitably envision Spencer Tracy in the role of Adam, and Katharine Hepburn as Eve; recall the 1949 romantic comedy *Adam's Rib*.)[16]

ADAM: Eve, how exactly does a constitutional norm of sex-equality prohibit laws designed to protect the innocent human life of male and female babies alike? Many of these laws operate directly only upon physicians and operate equally on physicians of both sexes. This, indeed, is true of the Texas law that you find so troubling.

EVE: Adam, please get real. The primary weight of the Texas law falls not

upon the physician, whoever he or she may be. Rather, the law imposes its main burden upon pregnant women who are denied access to competent medical procedures. And what a burden it is to be obliged to carry an unwanted pregnancy to term! As a practical matter, it can require a woman to end her education or career, at least temporarily. It can impose serious financial costs and medical risks. It can put her in danger of physical attack from the biological father or a man who suspects that he is not the biological father. It can dramatically interfere with her freedom of movement, her daily routine, her diet, her relations with others around her, her mental state, and her body more generally. Especially in cases of rape and incest, the pregnancy itself can impose severe mental trauma on her. After she has given birth, psychological and social pressures may make it difficult for her to give the baby up for adoption. In that event, the serious burden of an unwanted pregnancy would be only the beginning of the obligations that she will bear and the possible sacrifices she may be obliged to make.

ADAM: Nothing in Texas's abortion law requires that women keep children after birth rather than giving them up for adoption. So if women decide to keep their babies, that is their free choice—and probably a good one for all concerned. As for the burdens of pregnancy itself, there exists an obvious and indeed compelling justification for imposing these burdens, even (though I admit this might seem callous to you) in cases of rape and incest. That compelling justification is to protect the life of the unborn and innocent human life inside the pregnant woman's womb. Her liberty is abridged so as to protect the unborn baby's life. Texas and other states may properly choose life over liberty. The Constitution itself—twice!—places life ahead of liberty in its phraseology. Surely states can do the same in their policies.

EVE: The problem is that states such as Texas have chosen to impose these life-sustaining burdens only on women.

ADAM: I think your quarrel there is with God and not the state. He's the one who made the rules you are complaining about.

EVE: What makes you so sure God is a "He"? In any event, my complaint is not with the Almighty but with Texas. There are, after all, other ways of promoting unborn human life that would be more evenhanded between men and women. For example, in the case of unmarried women,

the law could require the biological father to remunerate the woman for half of the total financial and physical costs that she must bear during the course of her pregnancy. This more gender-neutral approach would require him to compensate her for her childbearing expenses, work, and labor, and thus to bear his fair share of the burden. Yet Texas law does nothing of the sort.

Adam: Your alternative scheme sounds more heavy-handed than even-handed. In fact, it sounds downright socialistic. To repeat: Nature itself imposes the burden of childbearing on the biological mother rather than the father.

Eve: Nature also makes abortion possible. If the law intervenes to limit her "natural" freedoms, why not his? Indeed, in the act of procreation itself, men would seem to bear equal if not more responsibility.

Adam: Not always. We can imagine sexual intercourse in the absence of full male consent, as in the case of statutory rape involving an adult female and an underage male.

Eve: A cute point—but again, please get real. Sex in the absence of full consent by the woman—because of male coercion that rises to the level of legal rape, or some lower level of force or fraud—is far more common than sex in the absence of full consent by the man. Conscription of a father's income stream is actually *easier* to justify than conscription of a mother's womb. In almost every case, his commission of the sex act was voluntary; but in many cases, hers may not have been. And yet, to repeat, the Texas law saddles her with special burdens while exempting him. Texas obliges her to give up nine months of her life to sustain the unborn life, but does not oblige him to give up even nine dollars.

Adam: Well, your plan might require the state to do lots of complicated tests to establish prenatal paternity. Surely, you will admit that a woman's pregnancy and a man's financial obligations are logically different things, even though you are trying to conflate them. The Constitution requires only that men and women be treated equally, and when it comes to pregnancy, men and women are just different. Each has a different role. Such it has always been and will always be.

Eve: Look, a uterus is a body part, but why is it so different from other body parts—body parts that even males have?

Adam: Huh?

EVE: Once a child is in fact born, suppose that child needs a kidney or a blood transfusion, and that the only tissue that will work is the father's. Texas does not oblige him to give up even a drop of his replenishable blood or one of his kidneys, even though he has another one that suffices to meet his own biological needs. When it comes to body parts that men have, such as blood and kidneys, Texas law sides with the parent's bodily liberty even at the expense of the child's life. Only when it comes to uteri does Texas law privilege life over liberty, and Texas does so precisely because only women have uteri. In other words, Texas treats uniquely female body parts differently than all other body parts, and the state does so to women's detriment.

ADAM: All this sounds like science fiction. Formally, the law treats blood and kidneys the same for mothers as for fathers—perfect formal equality. And it treats these things the same whether the child in question who needs the blood or kidney is a boy or a girl. It's still hard for me to see the sex inequality here. True, pregnancy is treated differently than blood transfusions or kidney transplants—or nose jobs, for that matter—but that is simply because pregnancy is unique. Not all women are or ever become pregnant. The law simply treats pregnant persons differently than nonpregnant persons, and it does so for sensible reasons.

EVE: Adam, you can't really mean that last point. Surely government should not be free to subordinate women so long as it does so via laws that use women's unique biology to disadvantage them as a class! Imagine, for example, a law that said pregnant people may not vote, or serve on juries, or be elected to office. Wouldn't such a law plainly violate the Nineteenth Amendment? If so, isn't this a square admission that laws heaping disabilities on pregnant persons as such are indeed laws discriminating "on account of sex"?

ADAM: Hmm, I hadn't quite thought of the Nineteenth Amendment as relevant. But the point remains that even if abortion and other pregnancy laws are in some sense laws that treat people differently on account of sex, the different treatment is justified. *Vive la différence!* Just as boys and girls generally play on separate sports teams, so, too, men and women generally play different roles in society. These roles are not designed to subordinate women. True, abortion laws limit women's op-

tions, but other laws limit men's options. There is no grand male conspiracy here. Consider, for example, the military draft laws that have conscripted men and not women—impinging on men's liberties in order to protect the lives of all of us, in a manner that broadly counterbalances the burdens imposed on pregnant women's liberties to protect innocent unborn life.

Eve: Actually, the male-only draft tends to prove my point. When male soldiers have been drafted, our government has often furnished them with educational and other benefits after their term of service has ended. But when pregnant women are asked to disrupt their careers and education in order to protect unborn life, government has not showered comparable benefits upon them. There is no Mothers' Bill of Rights akin to the GI Bill of Rights. Indeed, in Texas and many other places, public schools and public employers have generally been allowed to expel or fire unmarried pregnant women, but have not expelled or fired the men involved. If Texas meant to minimize its imposition on the lives and liberty of women, I suspect the state could also do much more than it has done to facilitate and encourage adoption (perhaps even through publicly supported institutions that would help any woman who so desired to keep the pregnancy itself confidential as well as the later adoption). I further suspect that Texas could do far more to support public institutions providing medical assistance and other services to indigent women bearing unwanted pregnancies.

Adam: There you go again with your heavy-handed socialistic schemes! And while we're at it, I also cannot fathom how equality principles are violated by the Connecticut contraception law that so distresses you. That law, too, is wholly evenhanded. It outlaws certain forms of contraception by both males and females.

Eve: Only a man could think that! If contraception is barred, the risk of unwanted pregnancy will be borne by women and only women. Formally, what you say is true. Both men and women are prohibited from using certain devices. But the Connecticut law specifically exempts contraceptive devices designed to prevent venereal disease. Thus, a condom is okay (as it might protect the man from unwanted infection), but a diaphragm is not (as it would only protect the woman

from unwanted pregnancy). In short, Connecticut allows men to shield themselves from future disease, but women are not allowed equally to shield themselves from future "dis-ease." Pregnancy and childbirth are, after all, not exactly easy.

ADAM: Huh? Pregnancy and disease are very different things. Clever puns aside, there is a world of difference between having a baby and contracting syphilis.

EVE: Yes, there are differences, but please note how the Connecticut law entrenches traditional gender roles, implicitly treating women as baby machines and using their unique biology as a basis for legal disadvantage.

ADAM: Once you concede that pregnancy is unique, it becomes impossible for you to insist that Connecticut is improperly discriminating. Connecticut is simply recognizing the different—separate but equal—roles that men and women have always played in America.

THE LESSON OF THIS PLAYFUL VIGNETTE is that social meaning becomes especially important with regard to certain issues of gender equality because: (1) There are biological differences between the sexes that may make it hard for any purely formal and logical analysis to close the argumentative circle, and (2) the Constitution allows government to treat the two sexes differently, whereas the Constitution does not generally allow government to treat various races differently. Where pure logic runs out, social meaning often fills the gap to complete the circle of proper constitutional analysis.

Logically, it was difficult for Eve in 1950 to prove to Adam, in the way that a mathematician might undeniably prove a theorem, that the Texas and Connecticut statutes violated equality principles. And what was logically true in 1950 was of course logically true in 1975. Logic had not somehow changed in the intervening quarter century. But social norms and understandings did change in this era. *Sociologically*, Eve's task became much easier when she could point to lots of other Eves in America who now shared her once-avant-garde but increasingly mainstream views. When large numbers of women in the 1960s and 1970s began to sound increasingly like Eve, this swelling chorus of Eves prompted the Adams of the world to rethink their assumptions.

Social meaning outside the terse text thus interacts with the words of the written document in ways structured by the text itself. Even when the Constitution does not supply an unambiguous and concrete solution to a particular issue (as it does with presidential age), the document may still provide a relatively clear framework of constitutional conversation and contestation. In other words, the text at times gives later generations not the right answers but the right questions for us to ask and the right vocabulary for us as we begin thinking over and arguing about those questions.[17]

For example, we saw earlier how the word "unusual" invites interpreters to attend to national majoritarian trends in punishment. The word "unreasonable" in the Fourth Amendment also authorizes interpreters to take evolving social norms into account. What is widely viewed as reasonable in one era may not be so viewed in another period. The Ninth Amendment "rights of the people" are likewise influenced by what the people believe their rights to be at any given moment.

The word "equal" operates in a similar but not identical fashion. Like these other words, the word "equal" at times invites interpreters to go with the ebbs and flows of citizen understandings. But in looking outside the written Constitution to determine whether a borderline law should be viewed as a sex "discrimination," and, if so, whether this discrimination should be viewed as impermissibly "unequal," what matters is not merely what a majority of the entire population might think—an approach that might make more sense in parsing a word such as "unusual" or a phrase such as "the right of the people." Rather, in parsing the word "equal," faithful interpreters must pay particularly close attention to how *each side* of a given legal distinction views the law in question. If both sides think the law is sufficiently equal, that very fact might make it so. But if *either* side deems the law unacceptably unequal, then that fact may also be decisive. The mere facts that at certain moments many whites apparently convinced themselves that Jim Crow was equal, and that these whites perhaps constituted a majority, did not properly conclude the equality inquiry; the question of what blacks thought of this brand of apartheid remained. Similarly, it matters today not just whether men see various antiabortion laws as proper, but, crucially, whether women—the Eves of the twenty-first century—agree.

REGARDLESS OF IMPLEMENTATIONAL VARIATIONS and details in enforcing the written Constitution's rules regarding equal citizenship, unusual punishments, unreasonable searches and seizures, and so on, we should not lose sight of the larger methodological point: The document itself invites careful consideration of contemporary social meanings and popular understandings with regard to many issues of liberty and equality. Written words such as "equal," "unreasonable," and "unusual" direct sensitive interpreters to unwritten sources, including state practices, mass social movements, social meaning, lived experiences, and so on. Words like this, in short, are brilliantly designed to keep the American Constitution in touch with the American people even in the absence of formal Article V amendments. These words help America's written and unwritten Constitutions cohere.

THE CURRENT CHAPTER HAS TAKEN its title and its inspiration from a letter that Abigail Adams wrote to her husband in the spring of 1776: "I long to hear that you have declared an independency. And, by the way, in the new code of laws which I suppose it will be necessary for you to make, I desire you would remember the ladies and be more generous and favorable to them than your ancestors. Do not put such unlimited power into the hands of the husbands. Remember, all men would be tyrants if they could. If particular care and attention is not paid to the ladies, we are determined to foment a rebellion, and will not hold ourselves bound by any laws in which we have no voice or representation."[18]

John Adams and his fellow Founding fathers paid insufficient heed to Abigail's words, and eventually "the ladies" did "foment a rebellion"—three rebellions, in fact.

First, women played a large role in the abolition and equal-rights movements that led to the Reconstruction Revolution of the late 1860s. Happily for women, section 1 of the Fourteenth Amendment promised birth equality to all citizens in the domain of civil rights and did not limit itself to a mere promise of racial equality. Alas, section 2 constitutionalized sex-discrimination in the domain of voting rights and indeed inserted the word "male" in the Constitution for the first time.[19]

Revolted, women revolted—again. The crowning achievement of this

second feminist revolution was the Nineteenth Amendment's explicit textual guarantee of equal political as well as civil rights for women.

These two revolutions left their marks in the written Constitution, but America's Constitution today also reflects, quite properly, America's third—unwritten—feminist revolution, when women in the late twentieth century added a powerful feminist gloss to the previously adopted words "citizens," "equal," and "sex." These words have come to mean even more, perhaps, than they meant to those who initially added them to the document—and rightly so, given that the political institutions that added these words to the text did not at these moments of textual addition equally represent women.

Abigail Adams was on the right track: Why, indeed, should women "hold [themselves] bound by any laws in which [they] have no [or unequal] voice or representation"? The best answer is that women today do have equal voice and representation; and that all laws, and especially those laws enacted before women achieved full political equality, must now be construed with attention to women's equality and with particularly sensitive awareness of the political exclusion of women in earlier centuries. Whether or not the written Constitution compels this feminist rule of construction, this approach redeems the document's deepest principles. Faithful interpreters today must remember Adams—and Eves.

Lochner-era Court condemned legislative efforts to level "inequalities of fortune." For similar readings of the antiredistributive essence of the *Lochner* case and the *Lochner* era, see, e.g., Laurence H. Tribe, "The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law," *Harvard LR* 87 (1973): 1, 6–7, 12–13 & n. 69; Jed Rubenfeld, "The Anti-Antidiscrimination Agenda," *Yale LJ* 111(2002): 1141, 1146–1147. For a recent effort to end the demonization of *Lochner*, see David E. Bernstein, *Rehabilitating* Lochner*: Defending Individual Rights Against Progressive Reform* (2010). Bernstein succeeds in establishing that Justice Holmes and several other extreme contemporary Progressive critics of *Lochner* should not be viewed as heroic figures; their unduly dismissive vision of individual constitutional rights should not have prevailed in the *Lochner* era and should not prevail today. Alas, much of the rest of Bernstein's book fails to engage the best criticisms of *Lochner*, preferring instead to knock down an army of straw men. Bernstein fails to highlight the fact that the most admirable cases of the *Lochner* era, on which modern case law continues to build, were all joined in relevant part by Justice Louis Brandeis. Bernstein also oddly tries to claim Justice Harlan for his own team, even though Harlan famously dissented in *Lochner*. Ibid., 123–127. Despite the title of his book, Bernstein fails to rehabilitate *Lochner* even though he does defrock Holmes. Bernstein would have done better to write a book lauding *Lochner*'s most admirable and trenchant critics, including the first Justice Harlan, Justice Brandeis, and Justice Black. Although these three men disagreed about many things, each of these judicial icons contributed a great deal to what is best about modern constitutional law.

27 For the pairing of *Dred Scott* and *Plessy*, see, e.g., *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 781 (2006) (Thomas, J., concurring). Earlier opinions authored or joined by Justices Powell, Black, and Douglas and Chief Justice Warren also paired *Dred* and *Plessy*. See supra n. 22. For the pairing of *Dred Scott* and *Lochner*, see, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., dissenting, joined by Rehnquist, C.J., and White and Thomas, JJ.). For the pairing of *Plessy* and *Lochner*, see, e.g., ibid., 957. For a thoughtful discussion of related issues, see Richard Primus, "Canon, Anti-Canon, and Judicial Dissent," *Duke LJ* 48 (1998): 243.

CHAPTER 7: "REMEMBERING THE LADIES"

1 On the especially inclusive voting rules that governed the Constitution's ratification in the late 1780s, see Amar, *ACAB*, 5–7 and accompanying notes.
2 For more discussion and documentation, see ibid., 381–383.
3 See Akhil Reed Amar, "The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine," *Harvard LR* 114 (2000): 26, 96–102.
4 Joint Resolution of June 5, 1919, 41 Stat. 362.
5 The attentive reader will by now have noticed that several of the most interesting areas

of interplay between America's written and unwritten Constitution involve questions of remedy and related issues of severability. In a nutshell, what should happen when the Constitution's rules are not properly followed? For example, when states unlawfully try to exit the Union? (See Chapter 2, text accompanying nn. 41–50.) What about when improper searches and seizures in fact occur? (See Chapter 3, text accompanying nn. 23–26; Chapter 4, text accompanying nn. 38–52; and Chapter 5, text accompanying n. 12.) Or when the rights of blacks to enjoy equal citizenship and voting rights are massively violated by a pervasive regime of segregation, disfranchisement, and oppression? (See Chapter 5, text accompanying nn. 5–6, 10.) Or when the Court itself garbles the Constitution? (See Chapter 5, text accompanying nn. 19–25.) Or when certain sentences of the Constitution would violate later amendments unless some old words are in effect excised or some new words in effect interpolated? (See Chapter 10, text accompanying n. 14.)

6 Cf. Jack M. Balkin, *Living Originalism* (2011), 261–262 ("New amendments may alter the relationships between other parts of the Constitution, sometimes…in quite unexpected ways.…[S]tructural principles might emerge from the constitutional system that no single person or generation intended.").

7 For more, see Chapter 10, n. 14 and accompanying text.

8 It is, of course, logically possible to envision a declaratory amendment that merely restates more clearly a principle already implicit in the Constitution—and, indeed, we encountered a few examples in previous chapters. But almost no one in the 1910s believed that the proposed Woman Suffrage Amendment was merely declaratory of a voting right already implicit in the equal-protection clause. Note that in one of the first post-suffrage Supreme Court cases involving sex discrimination on juries, the Court did make passing reference to the Nineteenth Amendment. See *Fay v. New York*, 332 U.S. 261, 290 (1947).

9 In 1875, Congress evidently relied on the letter and spirit of the Black Suffrage Amendment to support enforcement legislation affirming the right of blacks to serve equally on juries. Compare U.S. Const. amend. XV ("The right of *citizens of the United States* to vote shall not be denied or abridged by *the United States or by any State on account of race, color, or previous condition of servitude*") (emphasis added) with the Act of March 1, 1875, ch. 114, sec. 4, 18 Stat. 335, 336 ("no *citizen*…shall be disqualified for service as grand or petit juror in any court *of the United States or of any State, on account of race, color, or previous condition of servitude*") (emphasis added). For much more elaboration and documentation, see Vikram David Amar, "Jury Service as Political Participation Akin to Voting," *Cornell LR* 80 (1995): 203. See also Amar, *Bill of Rights*, 272–274 & n *; Amar, *ACAB*, 400 & n *, 426–428 and accompanying notes; Akhil Reed Amar, "Intratextualism," *Harvard LR* 112 (1999): 747, 789.

10 See Reva B. Siegel, "She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family," *Harvard LR* 115 (2002): 947, 1016–1018.

11 For details on the changing shape of the vice presidency, see Chapter 10, text accompanying nn. 7, 11. See also Amar, ACAB, 342–343, 437–438, 449–451.

12 Jo Freeman, "Gender Gaps in Presidential Elections," *P.S.: Political Science and Politics* 32 (1999): 191.

13 If these separations one day come to be perceived by large numbers of men or women as invidious, then that change in public perception could provide a basis for declaring these now-permissible separations to be unequal and therefore unconstitutional.

14 On state constitutions, see Dawn C. Nunziato, "Gender Equality: States as Laboratories," *Virginia LR* 80 (1994): 945, 975–977; Beth Gammie, "Note, State ERAs: Problems and Possibilities," *U of Illinois LR* (1989): 1123, 1125–1126. Not counting various states that clearly or arguably rescinded their prior ratifications, the following thirty states said yes to the ERA before March 1979 (and thus within the initial seven-year ratification window proposed by Congress): Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. On the legality of state rescissions and congressional extensions of the ratification window, see Amar, *ACAB*, 455–445, and accompanying notes.

15 On the anti-dynastic logic of Founding-era age rules, see Amar, *ACAB*, 70–72, 159–164. Briefly, the idea was that in a world without age limits for public service, sons of famous fathers would have an unfair and unrepublican inside track to early election. Age limits would oblige political scions to develop political records of their own before they could win high posts and would give lower-born men of merit time to rise and shine.

16 Ever since Plato immortalized Socrates (and perhaps earlier), the dialogic form has been a familiar genre to explore questions of law and justice. Modern legal classics using hypothetical dialogue to present the analytic thrust and parry include Henry M. Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," *Harvard LR* 66 (1953): 1362; Bruce A. Ackerman, *Social Justice in the Liberal State* (1980); and Philip Bobbitt, *Constitutional Interpretation* (1991), 111–112. Note that in the movie, Hepburn played "Amanda" (not "Eve") opposite Tracy's "Adam."

17 See Balkin, *Living Originalism*, 31.

18 Charles Francis Adams, *Familiar Letters of John Adams and his Wife Abigail Adams, During the Revolution* (1876), 149–150 (letter of March 31, 1776).

19 See Amar, *Bill of Rights*, 216–218, 239–241, 245–246, 257 n *, 260–261 & n *, 293–294, 305; Amar, *ACAB*, 393–395, 401; Akhil Reed Amar, "Women and the Constitution," *Harvard Journal of Law and Public Policy* 18 (1995): 465.

CHAPTER 8: FOLLOWING WASHINGTON'S LEAD

1 Cf. *Federalist* No. 37 (Madison) ("All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications"). See, generally, Caleb Nelson, "Originalism and Interpretive Conventions," *U. of Chicago LR* 70 (2003): 519.