Gendered Law in American History

Richard Chused
Professor
New York Law School

Wendy Williams
Professor Emerita
Georgetown University Law Center

CAROLINA ACADEMIC PRESS
Durham, North Carolina
## Contents

<table>
<thead>
<tr>
<th>Table of Cases</th>
<th>xix</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>xxiii</td>
</tr>
</tbody>
</table>

### Chapter 1 · Women and Citizenship at the Turn of the Nineteenth Century

3

A. Introduction

3

B. The Gendered Politics of Citizenship and Suffrage in Early America

4

1. Enlightenment and the American Revolution

4

2. Suffrage, Dependency, and Gender: The Adams Correspondence

9

a. Letter from Abigail Adams to John Adams (March–April, 1776)

11

b. Commentary and Questions

13

c. Letter from John Adams to Abigail Adams (April 14, 1776)

15

d. Commentary and Questions

17

e. Letter from Abigail Adams to Mercy Otis Warren (April 27, 1776)

18

f. Commentary and Questions

20

<missing key>

31

2. Commentary and Questions

35

C. Property and Citizenship: The Status of Women During and After the Revolutionary War

30

1. Opinions of the Massachusetts Supreme Court in *Martin v. Commonwealth of Massachusetts*

31

2. Commentary and Questions

35

D. The Brief History of Woman Suffrage in New Jersey after the Revolutionary War

37

1. The Story

37

2. Commentary and Questions

43

### Chapter 2 · Property Reform and the First Women’s Movement

45

A. Setting the Stage: The Ohio Married Women’s Property Act of 1846

45

1. The Statute

45

2. Commentary and Questions

46

3. Marital Property Law’s Common Law and Equity Heritage

47

a. Introduction

47

b. *Blackstone’s Commentaries*

49

c. Commentary and Questions

57

4. Ohio Law before Adoption of the Married Women's Property Act of 1846 64
   a. Introduction 64
   b. The Courts and Married Women's Property 66
      (1) Early Cases: *Ramsdall v. Craighill* 66
      (2) Commentary and Questions 68
      (3) Early Cases: *Canby v. Porter* 71
      (4) Commentary and Questions 71

5. Adoption of Early Married Women's Property Acts in Other States 74
   a. Mississippi Married Women's Property Act of 1839 75
   b. Commentary and Questions 75

6. Gender in Early America 76

B. Property Reform and the Ohio Women's Movement after 1850 85

1. The Salem, Ohio, Convention of 1850 and Its Immediate Aftermath 85
   a. Introduction 85
   Nancy F. Cott, *The Bonds of Womanhood: "Woman's Sphere" in New England, 1780–1835* 86
   b. Seneca Falls as Model 89
   c. Commentary and Questions 92
   d. J. Elizabeth Jones' Salem Oration: "The Wrongs of Woman" 93
   e. Commentary and Questions 105

2. History of Ohio's 1857 Married Women's Property Act 106
   a. The 1854 Legislative Session 106
   b. Commentary and Questions 109
   c. The 1857 Legislative Session 110
   d. Married Women's Property Act of 1857 114
   e. Commentary and Questions 114

3. Reforms in the Late Nineteenth Century: 1861–1884 117
   a. The 1861 Married Woman's Property Act 117
   b. The Text of the 1861 Act 124
   c. Commentary and Questions 125
   Amy Dru Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation* 128
   e. Commentary and Questions 144
   f. The Final Nineteenth Century Reforms: The Married Woman's Separate Estate as Capital for Investment by Women 148
      (1) *Machir v. Burroughs* 148
      (2) Commentary and Questions 150
      (3) Married Women's Act of 1866 152
      (4) Married Women's Act of 1871 153
Chapter 3 • Divorce in the Nineteenth Century

A. Introduction

B. Setting the Stage
   1. The Indiana Divorce Act of 1818
   2. Commentary and Questions

C. Easing Access to Divorce: 1824 to 1852
   1. The Indiana Divorce Reform Statutes
   2. Divorce Reform Debates: Robert Dale Owen and the Growth of Divorce
      Elizabeth B. Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America*
   3. Commentary and Questions

D. Indiana as a Divorce Mill: Public Controversy and Conservative Reaction
   1. Indiana Legal Developments: From Divorce Mill to Termination of Migratory Divorce
      a. *McQuigg v. McQuigg*
      b. Commentary and Questions
      c. The Divorce Mill's End
   2. The Great National Divorce Debate of 1860: Greeley, Owen and Stanton
      a. Horace Greeley Essay
      b. Commentary and Questions
      c. Owen Response to Greeley
      d. Commentary and Questions
      e. Greeley Reply to Owen
      f. Commentary and Questions
      g. Another Owen Response
      h. Greeley's Next Rejoinder
      i. Commentary and Questions
      j. Owen Begins to Wind Down the Debate
      k. Commentary and Questions
      l. Stanton Enters the Fray
      m. Commentary and Questions
   3. The Schliemann and McFarland Divorces: Feminists Split and Divorce Mill Ends
      a. The Stories
      b. Commentary and Questions

E. Divorce and Writing History: Research Methodology, Legal Norms, and Judicial Reality in Nineteenth Century Divorce
Chapter 4 • Child Custody in the Nineteenth Century

A. Introduction

B. Setting the Stage: Parent and Child at the Turn of the Nineteenth Century
   1. Introduction: Early Child Custody Reform
   2. Barrere v. Barrere
   3. Commentary and Questions

C. Shifting Standards: Maternal Preference and the Best Interests of Children
   1. Introduction to the Mercein Litigation
   2. The Mercein Litigation
      a. Opinion of Chancellor Walworth
      b. Commentary and Questions

D. Mid-Century Debates about Child Custody
   1. The Contours of Early Protests against Paternal Authority over Children
      a. The Marriage Contract of Lucy Stone and Harry Blackwell
      b. The Seneca Falls Declaration of Sentiments
   2. Precursors to the New York Married Women's Act of 1860
      a. 1854 Women's Rights Convention in Albany, NY
         (1) Elizabeth Cady Stanton Convention Address
         (2) Woman's Rights Petition
      b. Commentary and Questions
         Report of the Select Committee
         Report of the Judiciary Committee
   3. The New York Act of 1860

E. Child Custody at the Turn of the Twentieth Century
   1. Introduction
   2. A Typical Custody Opinion
   3. Commentary and Questions

Chapter 5 • Reproduction in the Nineteenth Century: Infanticide, Birth Control and Abortion

A. Introduction

B. Demographic Data
   1. Infant Mortality
   2. Commentary and Questions
   3. Child and Maternal Mortality Rates
   4. Commentary and Questions
   5. Birth Rates
   6. Commentary and Questions

C. Infanticide
   1. Introduction
   2. Setting the Stage: Concealment of Pregnancy Statutes
   3. Commentary and Questions
# CONTENTS

Julie Miller, *Abandoned: Foundlings in Nineteenth-Century New York City* 295

4. An Infanticide Trial: The *Valpy-Hardy* Case 297
   a. Introduction 297
   b. The Trial 298
   c. Commentary and Questions 329

D. Abortion 333
   1. The Quickening Rule at the Turn of the Nineteenth Century 333
      a. The *Bangs* Case 333
      b. Commentary and Questions 334
      Medicus, *Facts and Observations on Quickening* 340
      Theodric Romeyn Beck, M.D., *Elements of Medical Jurisprudence* 343
   2. The Evolution of Abortion Law in Mid-Nineteenth Century Massachusetts 356
      a. *Commonwealth of Massachusetts v. Luceba Parker* 356
      b. Commentary and Questions 361
      c. Background Information About the Robert Wood Case 364
      d. The *Wood* Case 365
      e. Commentary and Questions 369
      f. Background Information about the David R. Brown Case 370
      g. The *Brown* Case 374
      h. Commentary and Questions 382
      i. Background to Second Case against Dr. David R. Brown 386
      j. Second *Brown* Case 386
      k. Commentary and Questions 393
      a. Introduction 394
      b. The *Police Gazette* Report of the Restell Trial 400
      c. Commentary and Questions 450
   4. Role of the Medical Profession in the Abortion Debate 461
   5. Abortion Data 472

E. Birth Control 474
   1. Introduction 474
   2. Comstockery 476
      a. The Comstock Act 476
      b. Anthony Comstock 479
      Anthony Comstock, *Traps for the Young* 480
      c. *United States v. Edward Bliss Foote* 484
      d. Commentary and Questions 486
   3. Decline of Comstockery 488
      a. Introduction 488
      Margaret Sanger, *Family Limitation* 490
b. Commentary and Questions 497
c. Prosecution of Margaret Sanger 502
d. *New York v. Sanger* 506
e. Commentary and Questions 507
f. The End of Comstockery 508
   (1) Mary Ware Dennett 508

Mary Ware Dennett, *The Sex Side of Life: An Explanation For Young People* 510
   (2) Prosecution of Mary Ware Dennett 512
   (3) Commentary and Questions 519
   (4) The *One Package* Case 520
   (5) Commentary and Questions 523

**Chapter 6 • Gender, Race and Violence: Nineteenth Century Visions of Wives, Slaves, and Freed Persons** 525

A. Introduction 525
B. The Wife/Slave Analogy Revisited 526
   1. Newspaper Commentary 526
      W.J.F., *Wives and Slaves: A Bone for the Abolitionists to Pick* 527
   2. Commentary and Questions 539
C. The Law of Violence in Nineteenth Century “Domestic Relations” 539
   1. Introduction 539
      Laura F. Edwards, *Law, Domestic Violence, and the Limits of Patriarchal Authority in the Antebellum South* 540
   2. The Criminal Law of Violence in Slavery 542
      a. Killing or Battering a Slave 543
         (1) The *Piver* Case 543
         (2) Commentary and Questions 543
         (3) The *Boon* Case 544
         (4) Commentary and Questions 551
         (5) Judge Thomas Ruffin 552
         (6) The *Mann* Case 553
         (7) Commentary and Questions 556
      b. A Slave’s Ability to Respond to Violence 569
         (1) The *Caesar* Case 569
         (2) Commentary and Questions 587
      c. Patrollers and State Violence 589
         (1) *Tate v. O’Neal* 589
         (2) Commentary and Questions 590
         (3) The *Hailey* Case 592
CONTENTS

(4) Commentary and Questions 594
d. Controlling Free Blacks 594
   (1) The *Jowers* Case 594
   (2) Commentary and Questions 596
   (3) Introduction to the *Howard* Case 596
   (4) The *Howard* Case 598
   (5) Commentary and Questions 601
3. The Law of Violence in Marriage 602
   a. Divorce and Battery Cases 602
      (1) The *Hussey* Case 602
      (2) Commentary and Questions 605
   Anne Firor Scott, *Women's Perspective on the Patriarchy in the 1850s* 606
      (3) The *Joyner* Case 613
      (4) Commentary and Questions 617
      (5) The *Black* Case 620
      (6) Commentary and Questions 621
      (7) The *Rhodes* Case 622
      (8) Commentary and Questions 626
      (9) The *Mabrey* Case 627
      (10) Commentary and Questions 628
      (11) The *Oliver* Case 629
      (12) Commentary and Questions 630
D. “Jane Crow” to “Jim Crow”: Gender and Race after the Civil War 631
   1. Introduction 631
   2. The “Ladies’ Car”: Class, Gender and Race 634
      a. The *Bass* Case 634
      b. Commentary and Questions 640
      c. Introduction to *Gray v. Cincinnati Southern Railway Company* 643
      d. The *Gray* Case 646
      e. Commentary and Questions 649
      f. Introduction to *The Sue* Case 653
      g. *The Sue* Case 664
      h. Commentary and Questions 668
   Theodore G. Bilbo, *Take Your Choice: Separation or Mongrelization* 669
   3. Separate but Equal in Operation 671
      a. Introduction to *Smith v. Chamberlain* 671
      b. The *Smith* Case 671
      c. Commentary and Questions 680
      d. Introduction to *Plessy v. Ferguson* 681
      e. The *Plessy* Case 683
      f. Commentary and Questions 697
Chapter 7 • The Temperance Movement: Women’s War on Whiskey and the Founding of the Women’s Christian Temperance Union 701
A. Setting the Stage: The Women’s Crusade of 1873–1874 701
   Ruth Bordin, “A Baptism of Power and Liberty”: The Women’s Crusade of 1873–1874 702
   1. Commentary and Questions 708
B. Reactions to the Crusades 714
   1. The Suffragists’ Reactions 714
      Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage, History of Woman Suffrage 714
      2. Commentary and Questions 716
      E. D. Stewart, Memories of the Crusade 717
   3. Liberal Commentary 722
      The Women and the Temperance Question 722
      4. Commentary and Questions 725
      5. The Temperance Prayer 726
         The Prayer 726
      6. Commentary and Questions 727
C. Reports on the Hillsboro Crusades 729
   1. The Palace Drug Store Controversy 729
   2. Commentary and Questions 737
   3. Constitutional Convention Meets Dio Lewis’ Speaking Tour 739
   4. Commentary and Questions 746
   5. The Hillsboro Injunction Case 747
   6. Commentary and Questions 765
D. The WCTU, Suffrage, and the “Do Everything” Movement 769
   1. Suffrage and “Home Protection” 769
      Frances E. Willard, Home Protection Manual 771
   2. Commentary and Questions 782
   3. The “Do Everything” Agenda of the WCTU 785
      Frances Willard, Address before the Second Biennial Convention of the World’s Christian Temperance Union, and the Twentieth Annual Convention of the National Woman’s Christian Temperance Union 787
      4. Commentary and Questions 791
         Jane E. Larson, “Even a Worm Will Turn at Last”: Rape Reform in Late Nineteenth-Century America 792

Chapter 8 • Women’s Suffrage after the Civil War — Defeat and Disarray 809
A. Setting the Stage: 1866 Congressional Debates on the District of Columbia Voting Rights Bill 809
   1. Introduction 809
      ADDRESS TO CONGRESS, Adopted by the Eleventh National Woman’s Rights Convention, held in New York City 812
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Commentary and Questions</td>
<td>813</td>
</tr>
<tr>
<td>3. District of Columbia Franchise Bill Debates</td>
<td>815</td>
</tr>
<tr>
<td>Elizabeth Cady Stanton, Susan B. Anthony, and Matilda Joslyn Gage</td>
<td></td>
</tr>
<tr>
<td>(eds.), <em>II History of Woman Suffrage: 1861–1876</em></td>
<td>816</td>
</tr>
<tr>
<td>4. Commentary and Questions</td>
<td>829</td>
</tr>
<tr>
<td>B. The Suffrage Movement Split of 1869</td>
<td>830</td>
</tr>
<tr>
<td>1. Introduction</td>
<td></td>
</tr>
<tr>
<td>2. Commentary and Questions</td>
<td>845</td>
</tr>
<tr>
<td>C. Post-Schism Suffrage Politics and the Minor Resolution</td>
<td>846</td>
</tr>
<tr>
<td>1. The Minor Resolution</td>
<td></td>
</tr>
<tr>
<td>Elizabeth Cady Stanton, Susan B. Anthony, and Matilda Joslyn Gage</td>
<td></td>
</tr>
<tr>
<td>(eds.), <em>II History of Woman Suffrage: 1861–1876</em></td>
<td>847</td>
</tr>
<tr>
<td>2. Commentary and Questions</td>
<td>850</td>
</tr>
<tr>
<td>D. Women's Suffrage in the Courts</td>
<td>852</td>
</tr>
<tr>
<td>1. The Spenser and Webster Voting Rights Cases</td>
<td></td>
</tr>
<tr>
<td>a. Introduction</td>
<td>852</td>
</tr>
<tr>
<td>b. The Spenser and Webster Dispute</td>
<td>853</td>
</tr>
<tr>
<td>c. Commentary and Questions</td>
<td>855</td>
</tr>
<tr>
<td>2. <em>Bradwell v. Illinois</em></td>
<td>857</td>
</tr>
<tr>
<td>a. Introduction</td>
<td>857</td>
</tr>
<tr>
<td>b. Commentary and Questions</td>
<td>860</td>
</tr>
<tr>
<td>c. Bradwell's Appeal to the Illinois Supreme Court</td>
<td>861</td>
</tr>
<tr>
<td>d. Commentary and Questions</td>
<td>862</td>
</tr>
<tr>
<td>e. Illinois Supreme Court Result</td>
<td>863</td>
</tr>
<tr>
<td>f. Commentary and Questions</td>
<td>864</td>
</tr>
<tr>
<td>g. Bradwell's Case in the United States Supreme Court</td>
<td>864</td>
</tr>
<tr>
<td>h. Supreme Court Opinions</td>
<td>867</td>
</tr>
<tr>
<td>i. Commentary and Questions</td>
<td>870</td>
</tr>
<tr>
<td>3. The Anthony Voting Rights Case</td>
<td>872</td>
</tr>
<tr>
<td>a. Introduction</td>
<td>872</td>
</tr>
<tr>
<td>b. Commentary and Questions</td>
<td>874</td>
</tr>
<tr>
<td>c. Anthony's Sentencing Hearing</td>
<td>876</td>
</tr>
<tr>
<td>d. Commentary and Questions</td>
<td>878</td>
</tr>
<tr>
<td>4. The United States Supreme Court and the Minor Resolution</td>
<td>878</td>
</tr>
<tr>
<td>a. <em>Minor v. Happersett</em></td>
<td>878</td>
</tr>
<tr>
<td>b. Commentary and Questions</td>
<td>884</td>
</tr>
<tr>
<td>E. Suffrage Reform in Ohio</td>
<td>887</td>
</tr>
<tr>
<td>1. Introduction</td>
<td>887</td>
</tr>
<tr>
<td>2. The School Voting Legislation of 1894</td>
<td>889</td>
</tr>
</tbody>
</table>
Chapter 9 • Protective Labor Legislation at the Turn of the Twentieth Century—Special or Equal Treatment under the Law

A. Introduction 899

B. Massachusetts Protective Labor Legislation 899

1. Regulating the Workday of Children and Women 899
   a. 1866 Legislation 903
      An Act in relation to the employment of children in manufacturing establishments 903
   b. Commentary and Questions 904
   c. Continuing Agitation for Hours Legislation 904
      Ira Steward, A Reduction of Hours Is an Increase in Wages 905
   d. 1874 Act and Later Legislation 908
      An Act to regulate the hours of labor in manufacturing establishments 908
   e. Commentary and Questions 911

2. Wage Legislation in Massachusetts 912
   An Act to establish the minimum wage commission and to provide for the determination of minimum wages for women and minors 914

C. The Early Twentieth Century Debate over Protective Labor Legislation 917

1. Introduction: The Dorr-Anderson Dialogue 917
   Rheta Childe Dorr, Should There Be Labor Laws for Women? No 919
   Mary Anderson, Should There Be Labor Laws for Women? Yes 925

2. Commentary and Questions 935

D. Protective Labor Legislation and the Supreme Court 936

   a. Structure of Freedom of Contract Litigation 936
   b. Commentary and Questions 939
   c. Background to Lochner v. New York 940
   d. Lochner: Supreme Court Opinions 941
   e. Commentary and Questions 955
      Gail Bederman, Manliness and Civilization: A Cultural History of Gender and Race in the United States, 1880–1917 956

2. Women Workers’ Hours Legislation: Muller and Bunting 960
   a. Briefs in the Muller Case 960
      (1) Muller’s Brief 961
      (2) The “Brandeis Brief” for the State of Oregon 963
      (3) Brief of Oregon Attorney General 969
   b. Commentary and Questions 971
      Edward H. Clarke, Sex in Education; A Fair Chance for Girls 973
Julia Ward Howe, Sex and Education, in Julia Ward Howe [ed.], Sex and Education. A Reply to Dr. E. H. Clarke’s “Sex in Education” 978

c. Supreme Court Opinions: Muller v. Oregon 980
d. Commentary and Questions 984
Felix Frankfurter, Hours of Labor and Realism in Constitutional Law 990
e. Supreme Court Opinions: Bunting v. Oregon 995
f. Commentary and Questions 1000

3. Wage Laws 1002
a. Introduction 1002
Joan G. Zimmerman, The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and Adkins v. Children's Hospital, 1905–1923 1003
b. Briefs in Adkins v. Children's Hospital 1007
   (1) Brief for Children's Hospital 1007
   (2) Brief for Adkins 1009
c. Supreme Court Opinions: Adkins v. Children's Hospital 1013
d. Commentary and Questions 1029
Note (Blanche Crozier), Constitutional Law—Regulation of Conditions of Employment of Women. A Critique of Muller v. Oregon 1030
e. Supreme Court Opinions: West Coast Hotel v. Parrish 1037
f. Commentary and Questions 1044

E. Protective Legislation after World War II 1045
1. Introduction 1045
2. Protecting Male Veterans 1047
a. Background to Goesaert v. Cleary 1047
b. Supreme Court Opinions: Goesaert v. Cleary 1052
c. Commentary and Questions 1054
3. Military Service and the Protection Rationale 1055
a. Background to Rostker v. Goldberg 1055
b. Supreme Court Opinions: Rostker v. Goldberg 1056
c. Commentary and Questions 1071
Kenneth L. Karst, The Pursuit of Manhood and the Desegregation of the Armed Forces 1071

Chapter 10 • The Legal Uses of History: The Sears Case 1081
A. Introduction 1081
1. Summaries of Testimony Offered by Historians 1083
   a. Rosalind Rosenberg on Behalf of Sears Roebuck and Company 1083
   b. Commentary and Questions 1092
   c. Alice Kessler-Harris on Behalf of the Equal Employment Opportunity Commission 1093
CONTENTS

d. Commentary and Questions 1105

2. The Trial Level Decision 1106
   a. Opinion of the United States District Court for the Northern
      District of Illinois: EEOC v. Sears, Roebuck & Co. 1106
   b. Commentary and Questions 1133

3. The Appellate Court Decision 1135
   a. Opinions of the United States Court of Appeals for the
      Seventh Circuit: EEOC v. Sears, Roebuck & Co. 1135
   b. Commentary and Questions 1144

C. Commentary about the Use of Historians in the Sears Litigation 1145
   1. Introduction 1145
   2. Commentary in the Media 1147
      a. Washington Post 1147
      b. Samuel G. Freedman 1148
      c. Commentary and Questions 1149
      d. Jon Wiener 1150
      e. Commentary and Questions 1154
   3. Commentary by Rosalind Rosenberg and Alice Kessler-Harris 1155
      a. Rosalind Rosenberg 1155
      b. Commentary and Questions 1157
      c. Alice Kessler-Harris 1157
      d. Commentary and Questions 1161
   4. Academic Commentary 1163
      a. Eileen Boris 1163
      b. Commentary and Questions 1165
      c. Jonathan D. Martin 1166
      d. Commentary and Questions 1172

D. Concluding Problem 1173
   Historians’ Amicus Curiae Brief in Webster v. Reproductive
   Health Services 1174

Index 1207