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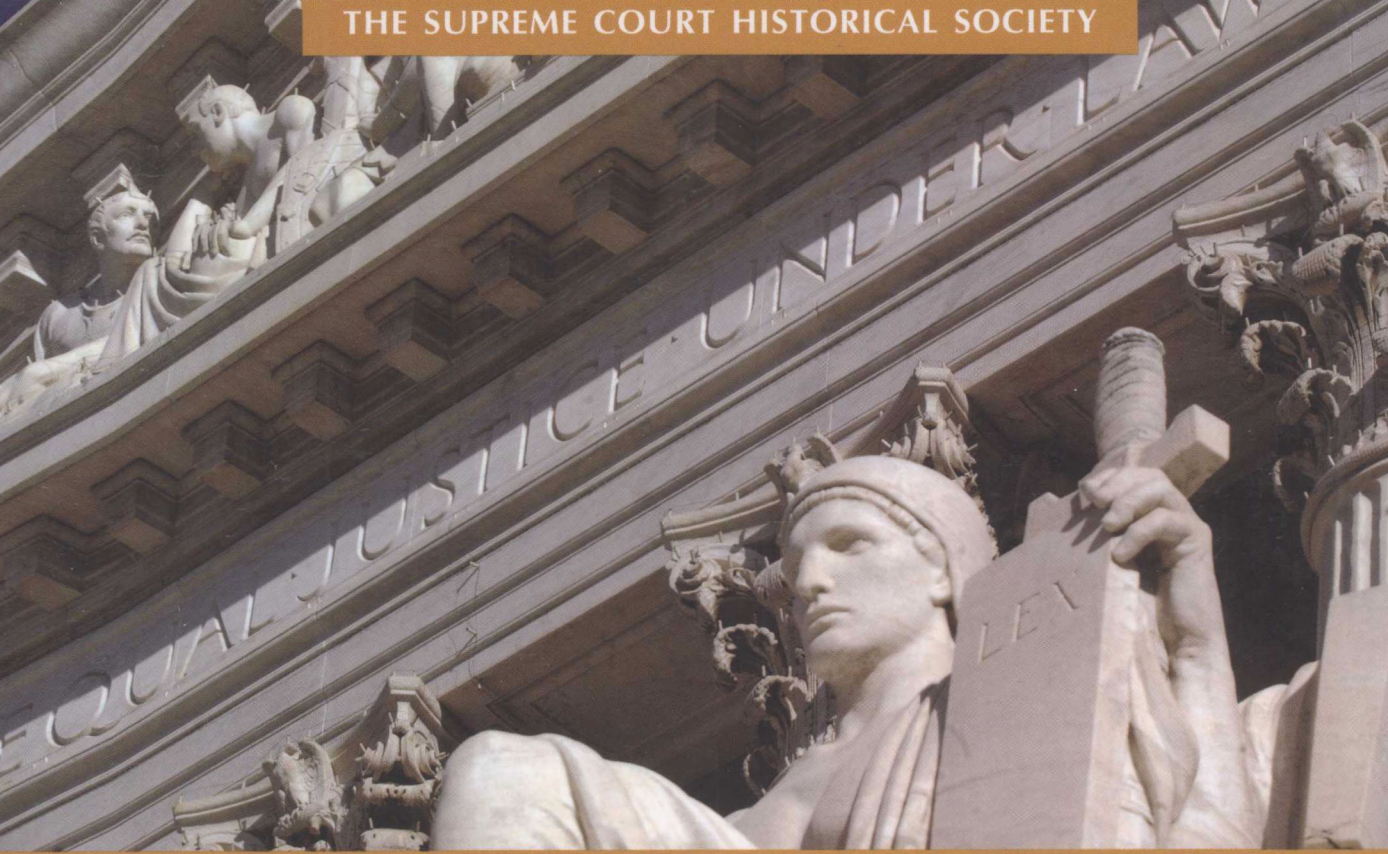
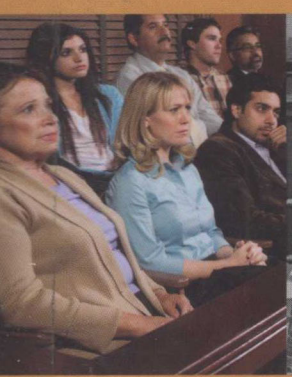
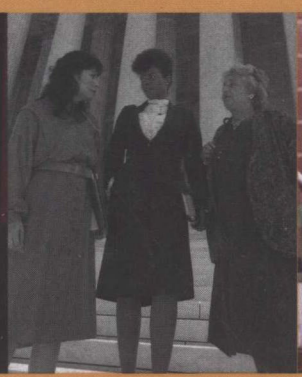


Supreme Court Decisions and Women's Rights

SECOND EDITION

MILESTONES TO EQUALITY





EDITED BY CLARE CUSHMAN

FOREWORD BY ASSOCIATE JUSTICE RUTH BADER GINSBURG

SUPREME COURT DECISIONS AND WOMEN'S RIGHTS

Milestones to Equality

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FOREWORD

Etched above the entrance to the majestic building that houses the Supreme Court of the United States are the words: "Equal Justice Under Law." Those four words express a fundamental, still evolving American ideal. In eleven enlightening chapters, this fine work of the Supreme Court Historical Society tells of the gradual realization of the equal justice ideal for the nation's once disenfranchised majority—its women.

Readers of the Constitution of the United States will search in vain for the word "equal" or "equality" in the seven articles composing our fundamental instrument of government as framed in 1787, or in the ten amendments, ratified in 1791, composing the Bill of Rights. Why should that be so in view of the 1776 Declaration of Independence, which declared in ringing tones the "self-evident" truth "that all men are created equal"?

The existence of slavery in all but five of the thirteen states of the United States when our nation was new is part of the answer, but the reason is more encompassing. John Adams, who became second president of the United States, wrote a revealing letter to a friend in 1776, the very year the Declaration of Independence was proclaimed. Adams explained to his friend why he thought voting qualifications should not be lowered in his home state of Massachusetts:

> [I]t is dangerous to open so fruitful a source of controversy and altercation as would be opened by attempting to alter the qualifications of voters; there will be no end of it. New claims will arise; women will demand a vote; lads from twelve to twenty-one will think their rights are not enough attended to; and every man who has not a farthing, will demand an equal voice with any other, in all acts of state. It tends to confound and destroy all distinctions, and prostrate all ranks to one common level.[1]

Concerning women, one must place in the context of the early nineteenth century, the words of Thomas Jefferson, principal author of the Declaration of Independence, later third president of the United States. Jefferson said in 1816:

> Were our State a pure democracy . . . there would yet be excluded from deliberations . . . women, who, to prevent depravation of morals and ambiguity of issues, should not mix promiscuously in the public meetings of men."[2]

Not until 1868, after the Civil War ended slavery, did the Constitution provide, as it has ever since, that no state "shall . . . deny to any person . . . the equal protection of the laws." And women did not become a part of the U.S. political community

until 1920 when, by constitutional amendment, they at last gained the right to vote.

Thurgood Marshall, leader of the struggle in the courts for an end to odious racial classifications, said prior to his 1991 retirement as a Supreme Court justice, that he did not celebrate what the Constitution was in the beginning. (As originally framed, the Constitution protected the slave trade until 1808 [art. I, sec. 9] and it required the return of persons who had escaped from human bondage, a provision in force until the Civil War [art. IV, sec. 2].) Instead, Thurgood Marshall celebrated how our fundamental instrument of government had evolved over the span of two centuries. The "true miracle," he said, is the Constitution's "life nurtured through two turbulent centuries."[3]

I share that view, but I appreciate, too, that the equal dignity of individuals is part of the constitutional legacy, shaped and bequeathed to us by the framers, in a most vital sense. The founding fathers rebelled against the patriarchal power of kings and the idea that political authority may legitimately rest on birth status. Their culture held them back from fully perceiving or acting upon ideals of human equality in rights, obligations, and opportunities, and of individual freedom to aspire and achieve. But they stated a commitment in the Declaration of Independence to equality and in the Declaration and Bill of Rights to individual liberty. Those commitments had growth potential. They received further expression in the nineteenth century, after the Civil War ended slavery, through the addition of the Equal Protection Clause to the Constitution, and again in the twentieth century, when women were made voting citizens. As historian Richard Morris wrote, a prime portion of the history of the U.S. Constitution, and a cause for celebration, is the story of the extension (through amendment, judicial interpretation, and practice) of constitutional rights and protections to once ignored or excluded people: to humans who were once held in bondage, to men without property, to the original inhabitants of the land that became the United States, and to women.[4]

With that background in mind, one can put in proper perspective the story told in this book of when, why, and how women came to count in constitutional adjudication and as participants, in full partnership with men, in diverse aspects of the nation's economic and social life. A great American, Susan B. Anthony, made a prediction a century ago, bold for her time, but now, as the following chapters show, within hailing distance. She forecast a time when "[t]he woman . . . will be the peer of man. In education, in art, in science, in literature; in the home, the church, the state; everywhere she will be acknowledged equal, though not identical with him."[5]

It is my hope and expectation that readers of this book will experience the realization of Susan B. Anthony's ultimate vision: "man and woman working together to make the world the better for their having lived."[6]

RUTH BADER GINSBURG
Associate Justice
Supreme Court of the United States

Notes

1. Letter from John Adams to James Sullivan (May 26, 1776), in 9 *The Works of John Adams* 378 (Charles F. Adams ed., 1854).

2. Letter from Thomas Jefferson to Samuel Kercheval (Sept. 5, 1816), in 10 *The Writings of Thomas Jefferson* 46 n. 1 (Paul L. Ford ed., 1899).

3. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution,* 101 *Harvard Law Review* 1, 5 (1987).

4. See Richard B. Morris, *The Forging of the Union, 1781–1789,* at 193 (1987).

5. Lynn Sherr, *Failure Is Impossible: Susan B. Anthony in Her Own Words* 305 (1995).

6. Ibid.

INTRODUCTION

In 1923 Justice George Sutherland wrote:

> In view of the great—not to say revolutionary—changes which have taken place since [1908], in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that the [differences between the sexes] have now come almost, if not quite, to the vanishing point.

When *Supreme Court Decisions and Women's Rights: Milestones to Equality* was first published in 2001, it seemed as though the momentum in constitutional law was heading toward Justice Sutherland's vanishing point. For the most part, the legal barriers to women's full equality had fallen. This was in no small measure due to the decisions by Justice Sutherland's successors on the Supreme Court, who, since the 1970s, had been striking down laws that treated men and women unequally. The justices had, of course, been prodded by a vigorous women's movement in the late 1960s that had led legislatures and the courts to reconsider such laws and find them discriminatory.

The VMI decision, *United States v. Virginia* (1996) gave hope to women's rights supporters that with the addition of one or two sympathetic justices, the Supreme Court might soon establish gender as a suspect classification subject to strict scrutiny. The VMI opinion elevated the equal protection standard for sex discrimination beyond the intermediate "heightened scrutiny" level established in *Craig v. Boren* (1976) but stopped short of putting it on the same level as racial and religious discrimination.

But this momentum has not continued. In the last decade the Court has ruled on only one case involving the application of an equal protection standard in sex discrimination. And that 2001 case, which involved the right of an unwed father to transmit his U.S. citizenship to a foreign-born child, can be seen as a small step backward because the Court held that unwed fathers do not benefit from the same rights as unwed mothers in this situation.

That is not to say that there has been a dearth of sex-discrimination cases before the Court. As the new cases featured in this book reveal, there has been plenty of fine-tuning in the area of gender law. Many of these recent decisions reflect the conservative shift of the Court. *Gonzales v. Carhart* (2007) upheld the federal ban on partial-birth abortions signed by President George W. Bush in 2003. This 5–4 decision marked the first time the

Court permitted abortion legislation that did not include a provision to protect the health of the mother. In *Ledbetter v. Goodyear Tire and Rubber Company* (2007) the plaintiff was a plant manager named Lilly Ledbetter who hoped to increase her pension by filing a claim seeking back wages for the years she had received (unbeknownst to her) lower pay than her male counterparts. The Supreme Court ruled 5–4 that too much time had lapsed for her to seek redress, as the law mandated a 180-day statute of limitations. The ruling prompted Congress to pass the Lilly Ledbetter Fair Pay Act in 2009, superseding the Court's decision. Under the act each paycheck that delivers discriminatory compensation is a wrong actionable under EEOC statutes, regardless of when the discrimination began. In *AT&T Corp. v. Hulteen* (2009) the justices held, 7–2, that companies that had discriminated against pregnant employees prior to passage of the Pregnancy Discrimination Act of 1978 could carry that discrimination over into calculating pension pay if the practice was part of a "bona fide seniority system" and legal at the time the original discrimination occurred.

The Supreme Court has issued several rulings since 2001 clarifying what constitutes sexual harassment in the workplace and in schools. The justices have also set new guidelines for complex forms of discrimination in the workplace, including "mixed-motive" firings.

In 2009 President Barack Obama appointed the first Latina woman to the Supreme Court, and in 2010 he appointed a fourth woman justice. This new edition of *Supreme Court Decisions and Women's Rights* features biographical profiles of Justices Sonia Sotomayor and Elena Kagan as well as updated biographies of Justice Sandra Day O'Connor, now retired, and of Justice Ruth Bader Ginsburg.

LEON SILVERMAN
Chairman
The Supreme Court Historical Society

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1

ROMANTIC PATERNALISM

Most nineteenth-century legal decisions involving women's issues were based on an attitude that historians now call "romantic paternalism." It was not a legal doctrine but a belief based on the "romantic" notion that women are the weaker or gentler sex and that the law should provide them increased protections. Women were expected to perform specific functions, such as domestic chores and raising children, and to be sheltered from the harshness of life outside the home. The downside to this protective attitude was that women were also considered unfit to participate in civic life, branded as inferior to men, denied economic rights, and subjected to their husbands' rule in the family.

Women therefore held many fewer rights in eighteenth- and nineteenth-century society than men. The law did not allow them to vote, hold office, or serve on juries. They were excluded from most educational institutions and professions. When they married, they became legally subordinate to their husbands under the principle of "coverture," a term defined in 1765 by British jurist William Blackstone.

> By Marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and cover, she performs every thing; . . . and her condition during her marriage is called her coverture.

Under coverture rules, a woman could not make contracts; write wills; sue or be sued in court; or own property such as money, clothing, and household goods—these belonged solely to the "head of the household," the husband. These rules meant that if the wife earned money working for someone else, her husband owned the wages she earned. If the wife came from a wealthy family, she could have restricted rights to own real property, such as land and a house that her father might give her, but because her husband had the sole right to manage or sell such property, and to keep the profits, her right was of little use unless her father made legal arrangements to give her management rights as well.

A married man also had the legal right to have sexual relations with his wife. This right could be exercised forcibly, if necessary, because the legal definition of rape specifically excluded husbands and wives. A husband also had control of their