

DIVORCE AS A FORMAL GENDER-EQUALITY RIGHT

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ABSTRACT

This Article—the second half of a diptych that begins with Divorce as a Substantive Gender-Equality Right, 22 U. PA. J. CONST. L. 455 (2020)—seeks to fill in the academic void in feminist and constitutional scholarship by developing the constitutional argument for marital freedom as a gender equality right. The previous Article showed that a constitutional regime committed to substantive gender equality must provide a readily available exit from marriage to disestablish sexist relations and alleviate gender stratification. This Article continues this project by constructing a constitutional argument for marital freedom under formal equality theory. It shows that divorce-restrictive regulations were historically animated by discriminatory purposes and that fault grounds continue to be applied in ways that raise equal protection concerns. It further shows that the contemporary movement to restrict divorce repeats history: its impetus is to shore up the hierarchical family structure based on constitutionally proscribed views that subordinate women to the constraining sex-roles of the separate-spheres tradition. The Article concludes that the dictates of constitutional gender equality, however narrowly defined, require the state to provide a liberal no-fault right of exit from the status-harm of subordinating marriages. Marital freedom is thus not simply a legal remedy for broken hearts, but the linchpin of a social order committed to securing genuine gender equality and human dignity for all women.

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TABLE OF CONTENTS

INTRODUCTION	795
I. THE ANTIDISCRIMINATION PRINCIPLE: A FORMAL GENDER EQUALITY PARADIGM.....	798
II. DIVORCE RESTRICTIONS AS GENDER-STATUS REGULATION.....	802
A. <i>Sex-Stereotypes in the Implementation of "Neutral" Divorce Legislation: A Look at Past and Recent History</i>	807
B. <i>From Past to Present: Faulting Fault Divorce in Contemporary Courtrooms</i>	817
III. TURNING BACK THE PATRIARCHAL CLOCK: THE NEW-OLD AGENDA TO RESTRICT DIVORCE	826
CONCLUSION	832

INTRODUCTION

The previous Article in this diptych, *Divorce as a Substantive Gender-Equality Right*,¹ argued that substantive mandates of equal protection—largely understood through the prism of an anti-subordination theory—require constitutional recognition of a right to marital freedom. This Article develops the same constitutional argument from an antidiscrimination vantage point, employing the formal doctrinal framework through which the Supreme Court analyzes questions of gender equality.

Strict divorce laws, the previous Article observed, do not overtly discriminate between the sexes, but they disproportionately harm women nevertheless.² The previous Article further maintained that divorce restrictions that lock women into marriages in which abuse may reign and sex roles are rigidly assigned channel women into circumscribed lives and impede their progress toward full citizenship status. In this way, divorce restrictions are covert gender-based legislation, perpetuating gender stratification in effect, even though they are sex-neutral in form.

In part, the disparate impact of such legislation is felt because men's and women's experiences with marriage are so different—divorce restrictions preserve relationships that are sites for subordination for many women and that exacerbate gender inequalities even outside of marriage.³ As a result, women have largely been the prime suitors of marital freedom; the feminization of divorce thus elicits the gendered operation of neutral impediments to exit.⁴ Divorce restrictions also have a disparate impact because the costs of delay are much higher for women than for men.

¹ 22 U. PA. J. CONST. L. 455 (2020).

² See generally Karin Carmit Yefet, *Divorce as a Substantive Gender-Equality Right*, 22 U. PA. J. CONST. L. 455 (2020).

³ *Id.* Perhaps the most thoughtful exposition of this argument was made by the early feminist Elizabeth Cady Stanton, as powerfully maintained in Professor Tracy A. Thomas's award-winning book, *ELIZABETH CADY STANTON & THE FEMINIST FOUNDATIONS OF FAMILY LAW* (N.Y.U. Press 2016). As the book shows, the call for a reform of the private sphere of the family as key to women's equality had nineteenth-century roots. For Stanton, divorce was not simply a gender equality right; it was, in some cases, a gender duty that enabled women to enforce their own vision of marriage and transform this relationship into a more egalitarian union. See THOMAS, *supra*, at ch. 3.

⁴ On the concept of the "feminization of divorce," see Karin Carmit Yefet, *Unchaining the Agunot: Enlisting the Israeli Constitution in the Service of Women's Marital Freedom*, 20 YALE J.L. & FEMINISM 441, 451 (2009).

Women's reproductive capacity and—arguably their marriageability—declines far more rapidly than men's as they age. Consequently, divorce regimes that make women wait impair their post-divorce prospects of remarrying and having children.⁵ Moreover, the feminization of poverty renders burdensome—and therefore prohibitively expensive—divorce procedures particularly detrimental for women⁶ and may force some to forgo divorce altogether.⁷ The onerous burdens of divorce restrictions on women are so pronounced that some commentators have envisaged a divorce model that reserves a unilateral right of exit to women only.⁸

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- 5 Voluminous research establishes that women's supposed value in the marriage market "depreciates" relative to men's as they get older, due to different mortality rates, the presence of children, and many men's lingering preference for younger women. See Lloyd Cohen, *Marriage, Divorce and Quasi Rents: Or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267, 278–87 (1987) (discussing the reasons why woman's perceived marriageability declines with age); Katharine T. Bartlett, *Saving the Family From the Reformers*, 31 U.C. DAVIS L. REV. 809, 840 (1998) (same); Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 547–50 (1998) (discussing the different currency of men and women in the marriage market).
- 6 See, e.g., Deborah H. Bell, *The Cost of Fault-Based Divorce*, 82 SUPRA 131 (2013); Molly Dragiewicz & Yvonne Lindgren, *The Gendered Nature of Domestic Violence: Statistical Data for Lawyers Considering Equal Protection Analysis*, 17 AM. U. J. GENDER SOC. POL'Y & L. 229, 244 (2009) (referencing studies discussing women's lower socioeconomic status and linking it to gender subordination in the private and public spheres); Lynn Hecht Schafran, *Gender Bias in the Courts*, in WOMEN AS SINGLE PARENTS: CONFRONTING INSTITUTIONAL BARRIERS IN THE COURTS, THE WORKPLACE, AND THE HOUSING MARKET 39, 44 (Elizabeth A. Mulroy ed., 1988) (noting the substantial costs of fault-based divorce litigation). No-fault divorce, in marked contrast, leads to a significantly less costly divorce, as it rarely involves court, attorneys, or other costs. See, e.g., DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 148 (1991); GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 165 (1991).
- 7 Indeed, research has found that the entire divorce process is shaped by the inability of many women to afford proper representation and handle fault proceedings. See Schafran, *supra* note 6; Jane Biondi, *Who Pays for Guilt? Recent Fault-Based Divorce Reform Proposals, Cultural Stereotypes and Economic Consequences*, 40 B.C. L. REV. 611, 624 (1999); Penelope E. Bryan, *Reasking the Woman Question at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1174–80 (1999); Karen Czapan斯基, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247, 250–51 n.11 (1993); Cynthia M. VanSickle, *A Return to the Anti-Feminist Past of Divorce Law: The Implications of the Covenant or Marriage Laws as Applied to Women*, 6 J.L. SOC'Y 154, 167–68 (2005). Judges exacerbate this problem by their frequent refusal to award attorney fees during and/or after the divorce proceeding. *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 803, 804–05 (1990); *Report of the Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485, 528, 550–51 (1993).
- 8 See, e.g., Linda J. Lacey, *Mandatory Marriage "for the Sake of the Children": A Feminist Reply to Elizabeth Scott*, 66 TUL. L. REV. 1435, 1450 n.77 (1992).

To these substantial gender disparities in neutral impediments to exit, however, the Supreme Court's formal equality jurisprudence is largely indifferent. The Court's gender-discrimination doctrine treats marriage as an institution devoid of special equal-protection concerns for women and thus ignores the gendered harm wrought by family regulations so long as they are facially neutral and have no discriminatory purpose. In so doing, the formal understanding of equality effectively effaces the gender-specific effects of divorce policies that enforce status relations between men and women. Limits on divorce thus expose the limits of sex-neutrality and formal equality principles as a vehicle for the advancement of substantive gender equality.

This Article contends that a unilateral right to no-fault divorce is constitutionally mandated—even under the Court's narrow anti-discrimination-oriented jurisprudence. The constitutional argument for marital freedom as a formal gender-equality right is developed in three Parts.

Part I delineates and dissects the formal paradigm of equal-protection doctrine. In essence, the Supreme Court pivots its equality jurisprudence on the antidiscrimination principle, which only prohibits state action that overtly classifies citizens on the basis of group membership or that is ostensibly neutral but in fact motivated by a discriminatory purpose.

Part II exposes the lineage and function of divorce restrictions as gender-status regulations and shows that limitations on divorce have been associated historically with either the patriarchal desire to control women or the paternalistic effort to protect them. The fault system in particular—traditionally based on the unholy trinity of adultery, cruelty, and desertion as all-American grounds for dissolution⁹—reflected the ideology of the separate-spheres tradition, which the government is prohibited from enforcing by the antidiscrimination interpretation of equality. Even today, as shown in Part II, the judicial implementation of fault divorce is susceptible to gender-based stereotyping that inculcates the repressive elements of the traditional family structure.

Finally, Part III argues that contemporary attempts to restrict divorce and reinstate fault thresholds repeat history and are animated, at least in part, by a discriminatory purpose: to shore up the hierarchical marital family

⁹ J. Herbie DiFonzo, *Alternatives to Marital Fault: Legislative and Judicial Experiments in Cultural Change*, 34 IDAHO L. REV. 1, 13 (1997). For an overview of traditional fault grounds and what they entail, see HOMER H. CLARK, JR. & ANN LAQUER ESTIN, *CASES AND PROBLEMS ON DOMESTIC RELATIONS* 656–59 (7th ed. 2005).

predicated on constitutionally proscribed views that subordinate women to the roles of wives and mothers. The conservative family values coalition, in particular, seeks to legally resuscitate the ideological origins of the fault system, based on impermissible status-based judgments about women's capacities, roles, and destinies.

The Article concludes that existing, purportedly neutral barriers to exit are unconstitutional violations of formal gender equality since they have both the purpose and effect of turning back the clock—not only on divorce rights, but also on women's status in the family and society.

I. THE ANTIDISCRIMINATION PRINCIPLE: A FORMAL GENDER-EQUALITY PARADIGM

Grounded in experience with slavery and racial segregation, the Fourteenth Amendment's Equal Protection Clause has traditionally been understood to guard against the false theory of racial difference and black inferiority.¹⁰ Accordingly, the Supreme Court's jurisprudence has long stressed the principle of color-blindness or "anti-discrimination" as the mediating principle at the core of equal protection.¹¹ By virtue of this principle, also called the "anti-classification" or "anti-differentiation" principle, state classifications on "suspect" bases are invalid unless they satisfy the constitutional touchstones of strict scrutiny.¹² Where a law creates no

¹⁰ See, e.g., Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 111–12 (1991) (“[T]he central meaning of the equal protection clause, and indeed of the Fourteenth Amendment in its entirety, is that the law must be colorblind.”).

¹¹ See Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7 (1976) (“The antidiscrimination principle fills a special need because . . . race-dependent decisions that are rational and purport to be based solely on legitimate considerations are likely in fact to rest on assumptions of the differential worth of racial groups or on the related phenomenon of racially selective sympathy and indifference.”); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1004–06 (1986) (explaining that the “anti-differentiation” principle underlies heightened scrutiny models and demands “equal treatment”); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976) (emphasizing that the “antidiscrimination principle” is a “mediating principle” that bridges the facial ambiguity of the text of the Equal Protection Clause and the judicially crafted meaning contained therein).

¹² Classifications based on race, national origin, and alienage have all been considered “suspect” classes deserving of strict scrutiny, the strictest level of judicial review. See *Foley v. Connelie*, 435 U.S. 291, 295–96 (1978) (noting that prior cases that involved state discrimination against “aliens as a class” prompted “close scrutiny” but declining to adopt a bright-line rule); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (noting “traditional indicia of suspectness” that might warrant heightened scrutiny as a class “saddled with such disabilities, or subjected to such a history

express classifications but still has a disparate impact on a suspect group, the Supreme Court finds discrimination only if the state acted with discriminatory intent in enacting the facially neutral law.¹³

Given the racial context of the Equal Protection Clause, how does it apply to laws that forge *sex*-based classifications or that utilize *sex*-neutral terms but exert a gendered impact? For the first hundred years of the Fourteenth Amendment's life, the Supreme Court routinely upheld legislation that relegated women to secondary status, in opinions replete with separate-spheres discourse affirming distinct roles for men and women in American society.¹⁴ Only since the 1970s has the Court acknowledged that the Equal Protection Clause is relevant to questions of gender justice.¹⁵ The Court developed its gender-equality doctrine in an ahistorical manner by analogy to its race-equality doctrine,¹⁶ establishing a "de facto ERA"¹⁷ that judges sex-based classifications using a new level of intermediate scrutiny.¹⁸ To be

of purposeful unequal treatment, or relegated to such a history of political powerlessness as to command extraordinary protection from the majoritarian political process"); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude is appropriate.") (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) ("At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny' . . .") (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)); *Oyama v. California*, 332 U.S. 633, 646 (1948) (explaining that "only the most exceptional circumstances can excuse discrimination" based on "racial descent").

¹³ See, e.g., *Washington v. Davis*, 426 U.S. 229, 241, 246 (1976) (requiring challengers of facially neutral state action to demonstrate that the challenged practice was animated by a discriminatory purpose).

¹⁴ See, e.g., *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding the automatic exclusion of women from jury duty); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding a prohibition on female bartenders); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding limitations on the hours worked by women).

¹⁵ See *Reed v. Reed*, 404 U.S. 71, 75–77 (1971) (invalidating, for the first time, a gender classification; using the rational basis test to invalidate a preference for males over females as executors of wills).

¹⁶ Justice Brennan was the first to make this argument. See *Frontiero v. Richardson*, 411 U.S. 677, 682–88 (1973) (concluding that sex-based discrimination is akin to race discrimination in that it is based on historical stereotypes and "immutable characteristics" wholly unrelated to one's ability to "contribute to society") (plurality opinion).

¹⁷ Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1324 (2006) (quoting Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 985 (2002)).

¹⁸ See *United States v. Virginia (VMI)*, 518 U.S. 515, 531–58 (1996) (applying a form of intermediate scrutiny requiring "exceedingly persuasive justification" and ultimately holding as unconstitutional the Virginia Military Institute's all-male admissions policy); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–31, 733 (1982) (applying a form of intermediate scrutiny that examined motivating biases and stereotypes; holding a state-sponsored all-female nursing school unconstitutional, in part

upheld, sex-based classifications must be substantially related to an important government objective.¹⁹

Further, any justification for sex-based classifications must not be based on gender-role stereotypes.²⁰ In a long line of equal-protection cases, the Court invalidated gender classifications in family law because they reflected sexual stereotypes of the separate-spheres tradition that presume, on the one hand, breadwinning husbands, and on the other, domesticated wives focused on home and married life.²¹ The Court indicated that the traditional and even settled beliefs about women's proper gender roles in the family and in society, far from vindicating discrimination, are now a barometer of constitutional invalidity.²² The Court has thus understood "anti-stereotyping" to be a central aspect of gender equal protection.²³

because it was based on stereotypes about gender in nursing); *Craig v. Boren*, 429 U.S. 190, 197–204, 210 (1976) (applying intermediate scrutiny to invalidate a statute prohibiting the sale of beer to underage males only); *Weinberger v. Weisenfeld*, 420 U.S. 636, 643, 653 (1975) (applying a heightened standard of scrutiny to invalidate a provision of the Social Security Act giving survivor benefits to females only).

¹⁹ *Virginia*, 518 U.S. at 533 (quoting *Hogan*, 458 U.S. at 724). Some suggest that the *VMI* case introduced "skeptical scrutiny" to sex-based discrimination, which "differs from strict scrutiny only in name." Anita K. Blair, *Constitutional Equal Protection, Strict Scrutiny, and the Politics of Marriage Law*, 47 CATH. U. L. REV. 1231, 1233–35 (1998); see also DAVID A. J. RICHARDS, *THE CASE FOR GAY RIGHTS: FROM BOWERS TO LAWRENCE AND BEYOND* 62 (2005) (positing that "the Supreme Court may be raising the level of scrutiny for gender much closer to that of race" after *VMI*).

²⁰ See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 141–42, 146 (1994) (holding that gender-based peremptory challenges violate the Equal Protection Clause, particularly where the discrimination is informed by gender stereotypes).

²¹ See *Hogan*, 458 U.S. at 725–26, 726 n.14 (noting the "broad range of statutes already invalidated by [the] Court" that were based on "simplistic, outdated assumption[s]" about gender); see, e.g., *Orr v. Orr*, 440 U.S. 268 (1979) (invalidating under the Fourteenth Amendment's Equal Protection Clause a state law provision based on gender stereotypes regarding financial need, that accorded ex-wives but not ex-husbands the right to receive alimony); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (invalidating under the Fourteenth Amendment's Equal Protection Clause a statute, based on gender stereotypes regarding financial need, that required widowers—but not widows—to prove dependency on their deceased spouses in order to receive OASDI benefits).

²² See e.g., *Orr*, 440 U.S. at 283 ("Where . . . the State's . . . purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex."); *Craig*, 429 U.S. at 198–99 (holding impermissible the "increasingly outdated misconceptions concerning the role of females in the home rather than in 'the marketplace and world of ideas'") (quoting *Stanton v. Stanton*, 421 U.S. 7, 15 (1975)).

²³ The Supreme Court has consistently held that state laws and practices reflecting stereotypical assumptions about women's proper roles are invalid under the Equal Protection Clause. See David H. Gans, *Stereotyping and Difference: Planned Parenthood v. Casey and the Future of Sex Discrimination*

While the Court subjects overt sex-based classifications to heightened scrutiny, in the context of sex it has also adopted a stringent discriminatory intent requirement for laws that do not discriminate on their face. In *Personnel Administrator of Massachusetts v. Feeney*, the Court held that facially neutral state action that has an adverse impact on women does not violate equal protection unless it was selected or reaffirmed “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”²⁴ In sum, the Court’s gender-equality jurisprudence, modeled after its race-equality paradigm, sounds in formalistic anti-discrimination norms by focusing on the purpose and structure of challenged legislation, not on its impact, to ensure that state actors are not motivated by stereotypical judgments about women.²⁵

Recognizing that the Supreme Court equates discrimination with classification, regulatory bodies have wiped out traditional forms of gender-status legislation and generally avoided justifying facially neutral regulations using discredited status-based reasoning.²⁶ As a result, laws today are almost universally facially neutral and rationalized in non-discriminatory rhetoric, yet many still perpetuate, even aggravate, racial and gender stratification.²⁷ Thus, for example, absent evidence that state action was animated by a discriminatory purpose, many of the most oppressive common-law marital-status doctrines—which were originally couched or recently have been redefined in facially neutral terms—now survive equal-protection scrutiny.²⁸

Law, 104 YALE L.J. 1875, 1881, 1897 (1995) (noting the centrality of stereotyping analysis to modern sex discrimination law under the Equal Protection Clause).

²⁴ *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

²⁵ See *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993) (rejecting the proposition that “class-based animus can be determined solely by effect.”); cf. Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 61 n.66 (1990) (noting that a problem with anti-subordination approaches to Equal Protection Clause is that courts have rejected them).

²⁶ As Reva Siegel has explained, just as the conflicts culminating in the disestablishment of slavery and later segregation produced a shift in the justificatory rhetoric of racial-status laws, the discriminatory-purpose doctrine has caused a shift in the forms of state action that perpetuate the gender stratification of American society. Reva Siegel, *Why Equal Protection No Longer Protects*, 49 STAN. L. REV. 1111, 1119–29 (1997).

²⁷ *Id.* at 1111, 1131 (demonstrating that the Court’s current interpretation of equal protection “continues to authorize forms of state action that contribute to the racial and gender stratification of American society.”).

²⁸ Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1024–26 (2002).

Progressive constitutional commentators have thus scathingly critiqued the discriminatory purpose rule as outmoded in the wake of the disestablishment of overt forms of race and gender classification.²⁹ They have further called for a new paradigm that would allow the Equal Protection Clause to meaningfully target the contemporary forms of protected groups' subordination.³⁰ The Supreme Court, however, has regrettably failed to modernize its equal-protection doctrine to rout out bias in ostensibly neutral state action.³¹

Parts II and III will assume the challenge of establishing the fundamental stature of marital freedom even under the formal dictates of constitutional gender equality, however narrowly defined.

II. DIVORCE RESTRICTIONS AS GENDER-STATUS REGULATION

The Supreme Court recognizes that a policy's historical background can influence its contemporary interpretation and aid in the deduction of present-day legislative intent.³² Analyzing divorce restrictions in historical perspective, this Part argues, illuminates their function as gender-caste legislation, a constitutionally significant feature otherwise obscured by their gender-neutral terminology.

²⁹ See, e.g., David Kairys, *More or Less Equal*, 13 TEMP. POL. & C.R. L. REV. 675, 677 (2004); Carlos A. Singer, *The Stultification of the Fourteenth Amendment*, 13 TEMP. POL. & C.R. L. REV. 875, 882–83 (2004); Siegel, *supra* note 26, at 1135–46; Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1166 (1991).

³⁰ See e.g., Siegel, *supra* note 26, at 1144.

³¹ *Id.* at 1141–42. For an egregious example, see *Unites States v. Clary*, 34 F.3d 709 (8th Cir. 1994) (upholding sentencing guidelines that treated the possession of a given amount of crack cocaine equally to 100 times that amount of powder cocaine, even though over ninety percent of defendants possessing crack cocaine were blacks).

³² In order to demonstrate discriminatory purpose, an inquiry is made into whatever circumstantial and direct evidence of intent is available, including the historical background of the decision, the specific sequence of events leading up to the decision, departures from normal procedural sequence, or the legislative or administrative history of the law. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977). See generally Reva B. Siegel, *Abortion as a Sex Equality Right: Its Basis in Feminist Theory*, in *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* 43 (Martha Albertson Fineman & Isabel Karpin eds., 1995) (discussing the importance of examining past regulatory practices as a way to detect otherwise tacit forms of bias in the motivation, justification, and structure of present regulatory practices); Catherine Wimberly, *Deadbeat Dads, Welfare Moms, and Uncle Sam: How the Child Support Recovery Act Punishes Single-Mother Families*, 53 STAN. L. REV. 729, 750 (2000) (discriminatory purpose may be “based on the statute’s legislative history as well as the general history of the problem the statute was supposed to solve”).

Using divorce restrictions to circumscribe women's status in society is a strategy that has been applied by Western legislatures over the course of centuries. Female-initiated divorce was perceived in many countries as a threat to the traditional social order, to husbandly authority and wifely domesticity.³³ Indeed, the fear that divorce would force marriage to transmute into a more egalitarian relationship was key in restricting this remedy throughout history.³⁴ Western legislatures thus often adopted stringent divorce policies with the express purpose of cementing hierarchical relations as the organizing principle of marriage and ensuring that women lived out their "destiny" as dutiful wives and mothers.³⁵ In France, during

33 See, e.g., Joanna Alexandra Norland, *When the Vow Breaks: Why the History of French Divorce Law Sounds a Warning About the Implications for Women of the Contemporary American Marriage Movement*, 17 WIS. WOMEN'S L.J. 321, 330–31 (2002); see also, e.g., SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 18 (1989).

34 Norma Basch, *Relief in the Premises: Divorce as a Woman's Remedy in New York and Indiana, 1815–1870*, 8 L. & HIST. REV. 1, 2 (1990); see also Norland, *supra* note 33, at 330. Indeed, divorce serves, as bargaining theory predicts, as a "tool that women use to secure change and greater equality in marital relationships." Carrie Yodanis, *Divorce Culture and Marital Gender Equality: A Cross-National Study*, 19 GENDER & SOC'Y 644, 646 (2005). As Albert Hirschman argued in a different context, an exit-threat point empowers a person to exercise a greater voice in influencing the course of events so as to spare the need for exit. See generally ALBERT HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970).

35 Rules governing divorce in the Western World were often flagrantly discriminatory, allowing easy path to marital freedom for men, but not for women. For example, in the Roman Empire, the law of Romulus, promulgated in 450 B.C., permitted divorce to husbands but refused it to their wives. Lawrence A. Moloney, *Our Divorce Laws*, 9 LOY. L. REV. 238, 240 (1923). Likewise, in Greece, the husband enjoyed the sole prerogative to divorce his wife at will, for any or no reason. The wife, however, was considered "incapable"; her only avenue to marital exit was to "submit a written claim for divorce before the archon, who was the traditional protector of all incapables." See Kenneth Rigby, *Report and Recommendation of the Louisiana State Law Institute to the House Civil Law and Procedure Committee of the Louisiana Legislature Relative to the Reinstatement of Fault as a Prerequisite to a Divorce*, 62 LA. L. REV. 561, 571 (2002). In Athens, a husband could shed his wife by merely sending her away from his house; a woman, on the other hand, required the assistance of a male citizen to bring a divorce suit. *Id.* at 572. In England as well, divorce law was characterized by a double standard that made divorce more difficult to obtain for women. See Karin Carmit Yefet, *Marrying Dissolution to the Constitution: Divorce as a Fundamental Right*, at ch. III, § II.A. (2012) (unpublished J.S.D. dissertation, Yale Law School) (on file with author).

While some legislatures preferred strict, unequal divorce laws so as to secure the contractual gendered exchange of protection for obedience, for others "the relationship between husband and wife involved no such reciprocal entitlements. It was simply required to replicate the dictatorial—and insoluble—relationship of sovereign and minister." See Norland, *supra* note 33, at 341. Yet, even when divorce law equally applied to both men and women, partisans of "neutral" divorce restrictions acknowledged that they would have an asymmetrical impact upon men and women and thus would contribute to patriarchal authority and to the establishment of a doctrine of male

the backlash to the French Revolution, for example, marital freedom represented both political and gender anarchy and a no-divorce regime was justified as a form of female control: “Just as political democracy, ‘allows the people, the weak part of political society, to rise against the established power,’ so divorce, ‘veritable domestic democracy,’ allows the wife, ‘the weak part,’ to rebel against marital authority.”³⁶ Allowing women equal access to marital freedom also resulted in acrimonious debates over matters of gender and divorce in mid-nineteenth-century England. In the legal imagination of many of these debates’ participants, liberal divorce law mounted a sustained challenge to marital hierarchy and undercut the foundations of masculine privilege and patriarchal authority in marriage.³⁷ The early history of divorce debates in modern Italy also provides a powerful evincement of how the doctrine of indissoluble marriage was perceived as a keystone of male power and a major instrument for the cultivation of traditional gender roles in Italian society.³⁸ Modern historians have shown how public deliberations and parliamentary records during Italy’s Liberal period conceptualized a no-divorce regime as protecting masculinity and its attendant privileges while arguing that the introduction of divorce law was doomed to make “skirts into trousers,” subvert the established gender order, and radically alter the hierarchical architecture of the marital relationship.³⁹

That legislatures intended, at least in part, to control women’s status through limitations on exit is also apparent from feminist reactions to stringent divorce laws throughout history. Understanding marital emancipation as a right articulating women’s social standing, an authority to govern their own lives as independent decisionmakers, and as a means of rebellion against intimate tyranny, feminists in many Western countries protested strict divorce laws as violative of their rights as equal citizens. In France, Ireland, and such Latin American countries as Argentina and Chile,

headship. See, e.g., *id.* at 336 (“the imperative of relegating wives to a subordinate position within marriage necessitated additional restrictions on their right to petition for divorce.”); *id.* at 345–46.

³⁶ LOUIS DE BONALD, *DU DIVORCE CONSIDERE AU XIX SIÈCLE* 182 (1818) (cited in JOAN WALLACH SCOTT, *GENDER AND THE POLITICS OF HISTORY* 47 (1988)).

³⁷ LAWRENCE STONE, *THE ROAD TO DIVORCE: ENGLAND 1530–1987*, at 375 (1990).

³⁸ For analysis of the history of divorce debates in Italy as reflecting a determination to protect traditional notions of masculinity and perpetuate the radical asymmetries of power underlying the Italian marriage contract, see Mark Seymour, *Keystone of the Patriarchal Family? Indissoluble Marriage, Masculinity and Divorce in Liberal Italy*, 10 *J. MOD. ITALIAN STUD.* 297 (2005).

³⁹ *Id.* at 302.

to take a few examples, feminists supported divorce law as “part of the process of achieving female equality before the law and as a solution to the age-old problems plaguing gender relations.”⁴⁰ This long-held feminist perspective is borne out by recent statistics: research examining the cross-national relationship between divorce culture on the national level and gender equality in intact marriages in twenty-two legal systems found that exit can exert a progressive transformative effect on patriarchal relationships. Strikingly, countries in which divorce is an accepted sociolegal act were clearly associated with greater marital equality, improved gender dynamics, and a more egalitarian sex-role division in the family.⁴¹

Another recurring rationale for limiting marital exit was women’s perceived moral weakness. Many legislatures sought rigid divorce laws because they perceived women as moral inferiors who would abandon their marriages if they only had the right to do so.⁴² Were women granted “the seemingly merciful concession of permitting one spouse to petition for divorce on the ground of adultery,” they posited, “women would stray brazenly so as to reclaim their freedom.”⁴³ At times, however, anti-divorce crusaders carefully cloaked their attempts to control women in the paternalistic discourse of protection, with some arguing that “women bring

⁴⁰ ASUNCION LAVRIN, WOMEN, FEMINISM, AND SOCIAL CHANGE IN ARGENTINA, CHILE, AND URUGUAY, 1890–1940, at 228–29 (1995); see also Mala Htun, SEX AND THE STATE: ABORTION, DIVORCE, AND THE FAMILY UNDER LATIN AMERICAN DICTATORSHIPS AND DEMOCRACIES 96, 104 (2003); Norland, *supra* note 33, at 327, 332, 338; Mags O’Brien, *The History of Divorce in Ireland, in DIVORCE? FACING THE ISSUES OF MARITAL BREAKDOWN* 9–12 (1995) (showing that women figured prominently in divorce-action groups calling for the removal of the constitutional ban throughout Ireland’s history). In the United States, however, there is a dissensus as to the role that feminists played in promoting divorce reform. Compare Herma Hill Kay, *An Appraisal of California’s No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 301–02 (1987); JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 147 (2014) (discerning that when gender equality figured on the reform agenda it “typically involved equality for men”); Deborah Dinner, *The Divorce Bargain: The Fathers’ Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 88 (2016) (arguing that men’s rights theorists called for a reform of fault divorce, which “they perceived as unjustly benefitting women and depriving men of their natural entitlements.”) with Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789, 846 (1983); Laura Oren, *No-Fault Divorce Reform in the 1950s: The Lost History of the Greatest Project of the National Association of Women Lawyers*, 36 L. & HIST. REV. 847 (2018) (recovering the lost history of the National Association of Women Lawyers’ struggle to achieve uniform no-fault divorce law reform in the 1950s).

⁴¹ Yodanis, *supra* note 34.

⁴² Norland, *supra* note 33, at 341.

⁴³ *Id.*

to marriage a ‘capital’ that is ‘consumed’ at its first use” such that “indissoluble marriage represented an indemnity against the rapid depreciation of women’s ‘value.’”⁴⁴ Yet others have justified limitations on divorce as a means to “protect” wives against the “indignities” of becoming single,⁴⁵ even as they were in fact “aiming to reinforce the dependence of women on men within a hierarchical family structure.”⁴⁶

In the United States, the first half of this diptych observed, liberal divorce was considered anathema to the doctrine of marital unity and an affront to husbandly authority.⁴⁷ Indeed, liberalization of divorce was sometimes openly opposed as jeopardizing male supremacy.⁴⁸ Throughout American history, until the 1970s, marital exit was almost exclusively limited to fault-based grounds, which envisioned divorce as a remedy for innocent spouses where the guilty party was considered “maritally impaired” and occasionally disqualified from remarrying.⁴⁹ This regime “compensated” women for their common-law disabilities by “safeguarding” their marriages so long as they knew their place and properly performed their gendered marital roles.⁵⁰ In

⁴⁴ Seymour, *supra* note 38, at 310.

⁴⁵ See, e.g., Norland, *supra* note 33, at 336 (explicating the sex-paternalist argument for divorce).

⁴⁶ *Id.* at 322, 346 (recounting that while opponents of divorce “contended that they aimed to protect women from abandonment, the focus of their concerns was the potential of the wife to disrupt the social order by abandoning the nest.”).

⁴⁷ See Yefet, *supra* note 2, at pt. II.A; see also THOMAS, *supra* note 3, at ch. 3.

⁴⁸ See Yefet, *supra* note 2; see also Norland, *supra* note 33, at 324 (“Although the prohibition on divorce applied to men as well as to women, the impact of this restriction was asymmetrical. It reinforced husbands’ authority by denying women an opportunity to exit, or even to exert leverage by threatening to do so.”).

⁴⁹ See, e.g., *Brown v. Brown*, 281 S.W.2d 492, 498 (Tenn. 1955) (“Divorce in this state is not a matter to be worked out for the mutual accommodation of the parties in whatever manner they may desire, or in whatever manner the Court may deem to be fair and just under the circumstances. It is conceived as a remedy for the innocent against the guilty.”); see also NANCY COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 49 (2000); ASHTON APPLEWHITE, *CUTTING LOOSE: WHY WOMEN WHO END THEIR MARRIAGES DO SO WELL* 62 (1997); Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 653 (1984); Karl N. Llewellyn, *Behind the Law of Divorce: II*, 32 COLUM. L. REV. 249, 288–89 (1933) (showing the prohibition of remarriage to the “guilty” party was a common theme in nineteenth-century U.S. legislation).

⁵⁰ See, e.g., Gary L. Nichols, *Covenant Marriage: Should Tennessee Join the Noble Experiment?*, 29 U. MEM. L. REV. 397, 426 (1998) (stating that until the no-fault divorce revolution, divorce law reinforced male dominance in society); Norland, *supra* note 33 at 337; Naomi Cahn, *Faithless Wives and Lazy Husbands: Gender Norms in Nineteenth-Century Divorce Law*, 2002 U. ILL. L. REV. 651, 654 (2002) (arguing that conformity with gendered norms benefited American women under the fault regime by legally protecting them from divorce as long as they were good homemakers and caretakers); *id.* at 667 (stating that divorce was also viewed as a form of “punishment” for spouses who transgressed

other words, the marital cage, stripping women of legal and economic independence, was celebrated as though it were a pedestal.⁵¹

In what follows, this Part shows how a limited right to fault divorce not only burdened women's exit but also concurrently enforced the gender status norms of the separate-spheres tradition. Given the lineage of this divorce regulation, this Part argues, it seems perverse that the mere use of gender-neutral language could immunize current fault policies from exacting constitutional review.

A. Sex Stereotypes in the Implementation of "Neutral" Divorce Legislation: A Look at Past and Recent History

The fault-based divorce regime was designed to fulfill two primary functions, both deeply at odds with the constitutional guarantee of equal protection. First, fault divorce was based on the overarching principle that wives were subordinate to their husbands and on sex stereotypes envisioning men as strong, disciplinarian, and independent, and women as passive, nurturing, and subservient.⁵² Divorce law in this capacity functioned as paternalistic legislation, with fault grounds that intended only to protect women from "the most harmful implications of their inferior status without attempting to change their status significantly."⁵³ Some fault-based grounds,

gendered marital roles); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1112 (1989); Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 823–24 (1989).

51 See *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (noting that, traditionally, sex discrimination had been "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage").

52 The fault system was originally based on Christian doctrines that urged the "necessity of female submission to male dominance." VanSickle, *supra* note 7, at 163; see also, e.g., *Ephesians* 5:22–24; Linda C. McClain, *The "Male Problematic" and the Problems of Family Law: A Response to Don Browning's "Critical Familism"*, 56 EMORY L.J. 1407, 1428 (2007); Rebecca L. Corrow, *Shaping the American Family by Inaction: The United States Constitution and "The Family," 1788–1920*, 14 J. CONTEMP. LEGAL ISSUES 7, 8 (2004).

53 See RODERICK PHILLIPS, *PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY* 172, 179 (1988) (arguing that fault divorce envisioned that women needed not equality, only paternalist protection from the worst physical and moral effects of their marital subordination); VanSickle, *supra* note 7, at 158 (stating that the fault system is an "archaic divorce form founded upon gender inequity—a form that subordinates women by casting them into the role of victim"); *id.* at 178 (arguing that fault thresholds "serve an infantilizing function, portraying women as little more than fragile and dependent children who need to be protected from the treachery and duplicity of men"); Lawrence Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1525 (2000) ("It was socially acceptable for a woman to be a victim; women

for example, were framed in avowedly gendered terms, offering women protection from the excesses of male authority. To illustrate, since “[m]an is, or should be, woman’s protector and defender,” as the Court’s infamous *Bradwell* decision paternalistically assumed,⁵⁴ Alabama law accorded a wife marital release when her husband defied this dictate and “his treatment to her [wa]s cruel, barbarous and inhuman,” while Tennessee’s law referenced a husband’s conduct “which would make her living with him unsafe and improper.”⁵⁵

Second, the fault regime was also based on sex-*role* stereotypes, normative assumptions that conceived of husbands as market participants and of wives as the mistresses of the home, a role that entailed economic dependency, self-sacrifice, and subservience.⁵⁶ We have already observed, in the first half of this diptych, how the laws of marriage constructed and maintained these status relations by, for example, denying spouses the freedom to contractually alter the gendered expectations of the traditional marital contract.⁵⁷ Even more effective, however, were the laws of divorce, which were structured to reward those who conformed to normative gender roles and to penalize those

were, after all, the weaker sex. It was difficult for a man to claim he was deceived, deserted, or beaten up by a woman.”).

⁵⁴ *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring).

⁵⁵ Jane Turner Censer, *Smiling Through Her Tears: Ante-Bellum Southern Women and Divorce*, 25 AM. J. LEGAL HIST. 24, 27 (1981) (quoting statutes); see also Margaret F. Brinig & Douglas W. Allen, “*These Boots are Made for Walking*”: *Why Most Divorce Filers are Women*, 2 AM. L. & ECON. REV. 126, 149 (2000) (finding that wives account for virtually all of the filing under the cruelty ground in the states examined); MARTIN INGRAM, CHURCH COURTS, SEX AND MARRIAGE IN ENGLAND, 1570–1640, at 180 (1987) (explaining that in England, where the fault system was inherited from, husbands rarely sued their wives for cruelty because they feared being ridiculed by a society which believed husbands should control their wives).

⁵⁶ See generally Cahn, *supra* note 50 (discussing the historical importance of conformity with gender roles in divorce proceedings); Nicole D. Lindsey, Note, *Marriage and Divorce: Degrees of “I Do,” an Analysis of the Ever-Changing Paradigm of Divorce*, 9 U. FLA. J.L. & PUB. POL’Y 265, 280 (1998) (describing how the fault system emphasized traditional gender roles and threatened the economic independence of women); VanSickle, *supra* note 7, at 171, 175 (noting that divorce judges have been influenced by gendered assumptions of women as “inherently different from and inferior to men” and of “female frailty and passivity”).

⁵⁷ Yefet, *supra* note 2, at pt. III; see also, e.g., *Watkins v. Watkins*, 192 Cal. Rptr. 54, 56 (Cal. Ct. App. 1983) (quoting *Brooks v. Brooks*, 119 P.2d 970, 972 (Cal. Dist. Ct. App. 1941)) (“[A] married woman cannot contract with her husband with respect to domestic services which are incidental to [the] marital status”); *Mays v. Wadel*, 236 N.E.2d 180, 183 (Ind. App. 1968); Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 866–70 (2004).

who transgressed them.⁵⁸ Indeed, since marriage laws were usually very brief in detailing spousal rights and responsibilities,⁵⁹ divorce law—through the fault grounds it provided for dissolving a marriage—articulated the law’s normative vision of marital life.⁶⁰ By enforcing the marital exchange of lifelong male support for lifelong female services, fault-based dissolution artfully reproduced the distinctions between male and female spheres of influence.⁶¹ Further, the double standard encapsulated in fault grounds—as some scholars of divorce have rightly concluded—manifested a “judicial blindness to the faults of men and indifference to the difficulties faced by women.”⁶²

Historically, this double standard has made itself especially apparent in the domain of sexual activity.⁶³ Adultery is the earliest and most widespread rationale of divorce in the United States. Concededly, only a few divorce codes explicitly differentiated the sexual activities of wives and provided for marital dissolution upon only a wife’s adultery.⁶⁴ In practice, however, the sexual double standard was virtually universal. In courtrooms, women were

58 Indeed, the failure to meet sex-role obligations was the most common basis for Victorian divorce. *See generally* ROBERT GRISWOLD, *FAMILY AND DIVORCE IN CALIFORNIA, 1850–1890: VICTORIAN ILLUSIONS AND EVERYDAY REALITIES* (1982); ELAINE TYLER MAY, *GREAT EXPECTATIONS: MARRIAGE AND DIVORCE IN POST-VICTORIAN AMERICA* (1980). *See also* Lindsey, *supra* note 56, at 280; Laura Bradford, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607, 634 (1997); Singer, *supra* note 50, at 1100–12.

59 Margaret Sokolov, Note, *Marriage Contracts for Support and Services: Constitutionality Begins at Home*, 49 N.Y.U. L. REV. 1161, 1168 (1974).

60 PHILLIPS, *supra* note 53, at 226–27 (claiming that the gender-specific obligations of the marriage contract were so central that failure to adhere to them provided a basis for divorce); Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 963 (2000).

61 F. H. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. ILL. L. REV. 561, 574 (2001) (“[B]arriers to divorce facilitate the traditional homemaker/wage earner marriage”); June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 988, 1008 (1991).

62 William E. Nelson, *Patriarchy or Equality: Family Values or Individuality*, 70 ST. JOHN’S L. REV. 435, 514 (1996).

63 Carl E. Schneider, *Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse*, 1994 UTAH L. REV. 503, 552 (1994) (criticizing the fault regime for being “too much based on now-obsolete ideas about gender”); Jeffrey G. Sherman, *Prenuptial Agreements: A New Reason To Revive An Old Rule*, 53 CLEV. ST. L. REV. 359, 379 (2006) (arguing that the fault regime stigmatized both men and women, portraying one as a “dishonorable villain” and the other as a “pathetic victim”); RHODE, *supra* note 6, at 27; Eric V. Wicks, *Fault-Based Divorce “Reforms,” Archaic Survivals, and Ancient Lessons*, 46 WAYNE L. REV. 1565, 1596 (2000) (claiming that fault divorce is based on archaic concepts of gender roles).

64 This was the case with Massachusetts’ divorce law, for example. *See* PHILLIPS, *supra* note 53, at 137–39, 147; RILEY, *supra* note 6, at 13.

subject to much stricter standards of purity than men, both before and during marriage.⁶⁵ While a woman usually had to prove multiple male adulteries to divorce her husband, a single act of female infidelity was generally enough to set a man free.⁶⁶ Stereotypes also abounded about men's voracious sexual appetites and about women's reluctance to have sex.⁶⁷ A wife who refused sexual relations might be deemed in breach of the marriage contract and could neither hold her husband to his duty of support nor liberate herself by divorce.⁶⁸ Indeed, ensuring husbands' unrestricted access to their wives' bodies was a keystone of the marital bargain that formed the blueprint for the fault system.⁶⁹ To give but one example of the extent and force of a woman's sexual duty, a late-nineteenth-century divorce case sketched a marital reality in which the husband had recurrently imposed himself on his wife, whose medical condition rendered sexual intercourse extremely painful. However, the court failed to find these conjugal circumstances sufficiently "grave and weighty" to warrant marital freedom.⁷⁰

The gendered treatment of sexual appetites also came into play in the judicial regulation of the condonation defense, commonly offered when spouses continued to cohabit following adultery.⁷¹ For divorce courts, wives

⁶⁵ For example, while courts found fault with a wife who had failed to disclose a previous pregnancy, they did not in the case of a husband whose wife could establish his undisclosed prior sexual activity, including impregnation a girl who bore him a child out of wedlock. See *Yucabezky v. Yucabezky*, 111 N.Y.S.2d 441, 445 (Sup. Ct. N.Y. Cty. 1952); *Pankiw v. Pankiw*, 45 Misc. 2d 206 (Sup. Ct. Monroe Cty. 1965); see also NORMA BASCH, *FRAMING AMERICAN DIVORCE: FROM THE REVOLUTIONARY GENERATION TO THE VICTORIANS 170-71* (1999); Barbara Bennett Woodhouse & Katharine T. Bartlett, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO L.J. 2525, 2526 (1994) (showing that fault divorce has a history of abuse as it had been used to reinforce stereotypes about women's sexuality and to keep women in their place; the traditional fault paradigm reflected an obsession with controlling women and their sexuality).

⁶⁶ Singer, *supra* note 50, at 1111.

⁶⁷ Friedman, *supra* note 53, at 1528.

⁶⁸ See, e.g., *Mirizio v. Mirizio*, 150 N.E. 605, 607 (N.Y. App. 1926).

⁶⁹ The most blatant manifestation of this regime is the marital-rape exemption which still persists in various forms in a majority of American jurisdictions. For a fascinating account of this regime, see Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000). See also COTT, *supra* note 49, at 66-67.

⁷⁰ *English v. English*, 27 N.J. Eq. 71 (N.J. Super. Ct. 1876).

⁷¹ A party was said to have condoned the misconduct if the innocent petitioner appeared to have forgiven the marital offense, as by moving back in with the spouse originally at fault. See John J. King et al., Note, *A Survey of the Law of Condonation, Connivance and Collusion in New England*, 35 B.U. L. REV. 99, 103 (1955). Even a single act of intercourse after the alleged misbehavior could be construed as an attempt at reconciliation and could consequently bar a divorce. See, e.g., *Hammer v. Hammer*, 309 N.E.2d 874, 874 (N.Y. 1974).

as subordinate spouses could be understood, and even applauded, for forgiving adultery and showing patient forbearance, while husbands who sought to repair marital ties with unfaithful wives were penalized by being denied divorce altogether.⁷²

In addition, judges interpreted ostensibly gender-neutral legal authority in ways that favored men over women and gave rise to intersectional gender and class discrimination.⁷³ For example, isolated incidents of violence by a woman's husband generally did not amount to legal cruelty,⁷⁴ especially when the violence was perceived as provoked by wifely scolding or rudeness,⁷⁵ and at times even "actual and repeated violence" was insufficient to warrant female marital emancipation.⁷⁶ As Reva Siegel aptly phrased it:

[J]udges developed a body of divorce law premised on the assumption that a wife was obliged to endure various kinds of violence as a normal—and sometimes deserved—part of married life. . . . [T]he evidence required to prove "extreme cruelty" varied by class, on the doctrinally explicit assumption that violence was a common part of life among the married poor.⁷⁷

⁷² Cahn, *supra* note 50, at 683 (noting the doctrine reaffirms the double sexual standard and women's subordination within marriage); *see also* Johnson v. Johnson, 1 Edw. Ch. 439 (N.Y. Ch. 1832) ("[T]he effect of cohabitation as a condonation is less binding on a wife than it is on the husband: because . . . she may entertain better hopes of the recovery and reform of her husband, her honor is less injured and is more easily healed; and so far from its being improper that she should for a time show a patient forbearance, it is commendable in her to exercise it, with a view to reclaim him; which would not be tolerated in the husband where the wife should happen to be the delinquent party. Besides, she may find a difficulty either in quitting his house or withdrawing from his bed.").

⁷³ The judicial hostility to female marital freedom is apparent, for example, when comparing the differential treatment accorded to domestic violence in the contexts of criminal law and divorce law, respectively. Whereas for purposes of criminal law, the prevalence of domestic violence among the "coarser" classes served to intensify the criminal prosecution of poor men, in the context of divorce, judges viewed the prevalence of violence as a reason to limit, rather than expand, women's entitlement to marital freedom. Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2134 (1996).

⁷⁴ *Id.* at 2133 (explaining that to demonstrate that she was entitled to a divorce, a battered wife typically had to prove that her husband acted with "extreme" and "repeated" cruelty).

⁷⁵ RHODE, *supra* note 6, at 28.

⁷⁶ *See, e.g.*, State v. Rhodes, 61 N.C. 453, 455, 459 (N.C. 1868); *see also* Davies v. Davies, 37 N.Y. 45 (N.Y. 1869) (using the defense of condonation to block a battered woman's divorce petition). Even though the husband had "choked [his wife]; committed severe personal violence upon her, and struck her a blow with his fist upon the left temple, severing the temporal artery, and endangering [her] life," the *Davies* court found that the wife's continued cohabitation "implied a forgiveness of such treatment" and held divorce unavailable "for such ill treatment, if in the interval, the defendant had treated his wife kindly and given her no further cause of complaint." *Id.* at 46, 48.

⁷⁷ Siegel, *supra* note 73, at 2134.

Divorce courts, therefore, often engaged in “close scrutiny” of female petitioners in order to establish whether they possessed “the tender delicacy of feeling that would be severely injured by verbal or mild physical abuse.”⁷⁸ In marked contrast, a single violent act of a wife against her husband was such a wrongdoing that she would be denied both separation and spousal support.⁷⁹

A review of nineteenth- and early-to-mid-twentieth-century divorce cases not only reveals these double standards, but also exposes gendered narratives about what it meant to be a “faulty” or “innocent” spouse, transforming trial courts into a legal theater for the reaffirmation of constraining sex roles.⁸⁰ Given the absence of a clear violation of gendered standards of performance that would suffice to establish a husband’s “guilt,” marital freedom was often out of reach for many women. Consider, for example, the 1926 case of Mrs. Sitterson’s husband who was convicted of murder and sent to prison. After failing to hear from him for a decade, Mrs. Sitterson eventually applied for divorce. The court refused to free her from her own marital prison, however, because her husband’s absence was involuntary; she would only be entitled to freedom if she could prove that he had committed murder for the sake of fleeing his conjugal duties.⁸¹

The same themes emerged repeatedly in divorce trials, as judges attempted, in the cogent words of Naomi Cahn, to “reinforce the authority of men and restrict the autonomy of women, to make them victims of conspiracies of men.”⁸² Indeed, judges insisted that a female petitioner seeking liberation not only had to prove her husband’s fault, but also had to

⁷⁸ Censer, *supra* note 55, at 35.

⁷⁹ *Axelrod v. Axelrod*, 150 N.Y.S.2d 633 (Sup. Ct. Kings Cty. 1956); J. Herbie DiFonzo & Ruth C. Stern, *The Winding Road from Form to Function: A Brief History of Contemporary Marriage*, 21 J. AM. ACAD. MATRIMONIAL LAW. 1, 11–12 (2008).

⁸⁰ Fault rhetoric reinforced patriarchy and hierarchy in the institution of marriage and highlighted the necessity of conforming with traditional gender roles. To win a divorce, husbands and wives alike had to profess their compliance with gender norms while their opponents alleged their noncompliance. As Naomi Cahn and others have concluded, the “cult of domesticity, together with the virgin/whore dichotomy, were thriving in divorce rhetoric.” Cahn, *supra* note 50, at 661, 669–70, 673 (“Fault served to signal the policing of gender norms; fault constricted behavior and punished women and men who transgressed.”); see also Hendrik Hartog, *Marital Exits and Marital Expectations in Nineteenth Century America*, 80 GEO. L.J. 95, 97–98 (1991); VanSickle, *supra* note 7, at 158; Basch, *supra* note 34, at 12; BASCH, *supra* note 65, at 155.

⁸¹ *Sitterson v. Sitterson*, 131 S.E. 641 (N.C. 1926). For a modern incarnation of this case, see *Scheu v. Vargas*, 778 N.Y.S.2d 663 (N.Y. 2004).

⁸² Cahn, *supra* note 50, at 673.

persuade the court of her own virtue and impeccable innocence; the appearance of chastity, respectability, morality, and female propriety thus played a prominent role in determining whether a wife would be entitled to marital release.⁸³ If both spouses were guilty of marital wrongdoing, however, they were believed to deserve each other, not a divorce.⁸⁴ Thus in order to achieve a fault-based escape route, wives were frequently portrayed as, and encouraged to play, innocent victims stripped of agency and with injured femininity.⁸⁵ So entrenched—and advantageous—was this role that wives played the victim even when they conceded the charges against them as defendants in divorce cases.⁸⁶

Divorce courts especially celebrated “dutiful and obedient”⁸⁷ wives, rewarding their good behavior with a coveted divorce decree.⁸⁸ Second only to the wifely virtues of submissiveness and docility was domesticity, cited by divorce courts as “sterling traits”⁸⁹ essential for an innocent wife who showed

⁸³ Censer, *supra* note 55, at 37–38; COTT, *supra* note 49, at 49.

⁸⁴ This is the defense of recrimination. For examples of cases in which the doctrine of recrimination was applied, see *Wheelahan v. Wheelahan*, 557 So. 2d 1046 (La. App. 4th Cir.), *writ denied*, 559 So. 2d 1379 (1990). *See also* *Schillaci v. Schillaci*, 310 So.2d 179 (La. App. 4th Cir. 1975); *Maranto v. Maranto*, 297 So.2d 704 (La. App. 1st Cir. 1974); *Canning v. Canning*, 443 S.W.2d 502 (Tenn. App. 1968); *Gundry v. Gundry*, 136 N.W.2d 728 (Mich. Ct. App. 1965). For a particularly absurd example, see *Kucera v. Kucera*, 117 N.W.2d 810 (N.D. 1962).

⁸⁵ As several commentators have argued, gender stereotypes mandate that women will almost always appear as the victim of physical violence or psychological cruelty, whereas husbands play the role of the abuser; women are chaste, loyal, and faithful, and husbands have large sexual appetites that make them go astray; women occupy responsibilities of nurturing and homemaking in the domestic sphere, while their husbands are in charge of bringing in the bacon and dominating the household. *See* Friedman, *supra* note 53, at 1528–31 (“[D]ivorce law almost forced women into a posture of submission and humility, into a mold of tender, injured femininity.”); VanSickle, *supra* note 7, at 170, 175; Kimberly Diane White, *Covenant Marriage: An Unnecessary Second Attempt at Fault-Based Divorce*, 61 ALA. L. REV. 869, 878 (2010).

⁸⁶ In one case, an adulteress claimed that God’s “strength has enabled me to confess the crime” to her husband and ensured her “affections are again entirely” for her husband. *Strong Divorce Case*, N.Y. TIMES, Dec. 1, 1865, at 8. In another case, the wife confessed to disclaimed responsibility for her adultery because her seducer had exploited her “very feminine weakness in the face of male sexual passion.” Cahn, *supra* note 50, at 679–80, 686.

⁸⁷ *Moyler v. Moyler*, 11 Ala. 620 (Ala. 1847).

⁸⁸ For example, in considering whether a wife was innocent enough to merit divorce, one court observed that, despite the wife’s own fault, more importantly she “submitted in meekness, smiling through her tears, to an almost continued flow of insult and unmerited contumely.” *Rose v. Rose*, 9 Ark. 507, 516 (Ark. 1849); *see also* Censer, *supra* note 55, at 38–39.

⁸⁹ Censer, *supra* note 55, at 40 (noting that courts applauded wives who exhibited feminine capabilities in domestic matters).

herself to be “industrious, managing and attentive to her domestic duties.”⁹⁰ So long as a wife abided by these conservative role expectations, both during *and after* marriage, the fault system rewarded her with custody, marital property, and lifetime alimony, thereby perpetuating marital gender roles long after a marriage ended.⁹¹

Conversely, judges penalized disobedient women who challenged their husbands’ authority by blocking marital freedom. Divorce courts construed the arcane defense of recrimination—which provided that “divorce on the ground of cruelty will not be granted if the ill treatment has been caused by the misconduct of the plaintiff”—to bar claims by women whose conduct was “incompatible with the duty of a wife” or who “justly provoke[d] the indignation of the husband.”⁹² Wives who were “wanting of conformity” to their husbands’ wishes were all met with judicial hostility.⁹³ No matter how egregious their husbands’ conduct, these “forward females” were punished for their assertive behavior and deficient domesticity with the denial of their pleas for freedom.⁹⁴

Interestingly enough, normative assumptions about women’s agency and roles figured especially prominently when husbands were the ones petitioning for divorce. Husbands who sought to rid themselves of “unruly” or “insubordinate” wives emphasized transgressions of womanly and wifely expectations to sympathetic courts.⁹⁵ In the famous case of *Beardsley v.*

⁹⁰ *Rose*, 9 Ark. at 507; *see also* *Robinson v. Robinson*, 26 Tenn. (7 Humph.) 440 (Tenn. 1846); Censer, *supra* note 55, at 38 (noting that judges favored well-bred and ladylike women, who were domesticated and possessed economical, prudent, and industrious habits).

⁹¹ An “unchaste” or otherwise immoral ex-wife could forfeit her right to support. *See, e.g.*, *Taake v. Taake*, 70 Wis. 2d 115, 129 (Wis. 1975); *Atkinson v. Atkinson*, 13 Md. App. 65, 71 (Md. 1971); *Daniels v. Daniels*, 82 Idaho 201, 207 (Idaho 1960); *Christiano v. Christiano*, 131 Conn. 589, 597 (Conn. 1945); Annotation, *Divorced Woman’s Subsequent Sexual Relations or Misconduct as Warranting, Alone or With Other Circumstances, Modification of Alimony Decree*, 98 A.L.R.3D 453 (1980 & Supp. 1986); Singer, *supra* note 50, at 1109–11.

⁹² JOSEPH W. MADDEN, *HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS* 274 (1931).

⁹³ *Gray v. Gray*, 15 Ala. 779 (Ala. 1849); *Trowbridge v. Carlin*, 12 La. Ann. 882 (La. 1857); *Naulet v. Dubois*, 6 La. Ann. 403 (La. 1851).

⁹⁴ *See, e.g.*, *Crow v. Crow*, 23 Ala. 583 (Ala. 1853); *Grey*, 15 Ala. at 779; *Trowbridge*, 12 La. Ann. at 882; *Naulet*, 6 La. Ann. at 403.

⁹⁵ Censer, *supra* note 55, at 39–40 (noting that courts punished “stubbornness and insubordination” in a wife, rebuking and denying her marital freedom); *see also id.* at 46 (explaining that judges looked unfavorably upon assertive or managing wives who were “neither long-suffering nor submissive”). Many cases vividly exhibit the gendered requirements of women to conform to their domestic roles as guardians of the home and caretakers of children and to be docile, chaste, and submissive, in

Beardsley, for example, the divorce-seeking husband ridiculed his wife's deficient domesticity, attacked her chastity by calling her "the most brazen strumpet that ever defied God and men," criticized her engagement in activities that contravened "wifely propriety," and noted her failure to greet her husband "with the caresses which were his due"⁹⁶ Tellingly, more than eighty percent of the divorce grounds invoked by men in the nineteenth century implied that wives had "refused to live up to the ideal of a submissive subordination."⁹⁷

Even in the twentieth century, many husbands convinced courts to permit them to discard wives who failed to perform household tasks, discipline the children, follow husbands to places of their sole choosing, or who otherwise flouted male authority.⁹⁸ For example, in one mid-twentieth-century divorce case, the court found a wife—a college graduate who intended to pursue medical school—it deemed "a very ambitious lady" to have constructively abandoned her husband because he was not satisfied with the amount of attention she dedicated to their child.⁹⁹ The court predicated its ruling on gendered prescriptions for women: "The father has a right to expect the mother to give the child that which is necessary for her development and good, as it is his duty to provide the means to effectuate that, both materially and in cooperation spiritually."¹⁰⁰ In so doing, courts adjudicating fault actively enacted and enforced family relations in ways that entrenched the traditional division of labor premised upon gender differentiation.

order to avoid financial ruin. See ROBERT GRISWOLD, *ADULTERY AND DIVORCE IN VICTORIAN AMERICA, 1800–1900*, at 21 (1986); E. Teitelbaum, *Cruelty Divorce Under New York's Reform Act: On Repeating Ancient Error*, 23 *BUFF. L. REV.* 1, 28 (1974); RHODE, *supra* note 6, at 28; Carbone & Brinig, *supra* note 61, at 997–98. For one of the more extreme cases of judicial requiring of wifely obedience, see *Fulton v. Fulton*, 31 *Miss.* 154 (*Miss.* 1858).

⁹⁶ ROBERT M. DEWITT, *REPORT OF THE BEARDSLEY DIVORCE CASE* 71, 73, 75–76 (1860).

⁹⁷ PHILLIPS, *supra* note 53, at 228 (quoting CARL DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA* (1980)). Such grounds were adultery and desertion, which were at odds with the image of the Victorian wife, as well as cruelty, drunkenness, and failure to perform domestic duties. *Id.*

⁹⁸ *Bennett v. Bennett*, 79 A.2d 513, 515 (*Md.* 1951); CATHERINE KOHLER RIESSMAN, *DIVORCE TALK: WOMEN AND MEN MAKE SENSE OF PERSONAL RELATIONSHIPS* 55 (1990) (noting that a quarter of late-twentieth-century divorced men cited their wives' failure at performing the role of a homemaker, complaining about their wives' deficient skills at maintaining the house and for being lazy, "sloppy," and "disorganized."); Teitelbaum, *supra* note 95, at 28.

⁹⁹ *Rosner v. Rosner*, 108 N.Y.S.2d 196, 200 (*Dom. Rel. Ct. Queens Cty.* 1951).

¹⁰⁰ *Id.* at 201.

Divorce courts not only imposed norms of chastity, domesticity, and dependency on women, but simultaneously held men to a set of different, yet still constraining, gender role prescriptions.¹⁰¹ Divorce trials stressed the expectations that husbands serve as providers and protectors of their wives.¹⁰² Accordingly, many state laws traditionally contained “nonsupport” or “neglect of duty” as a female divorce ground, and many courts construed cruelty to include a husband’s failure to provide financial support.¹⁰³ By complaining about their partners’ deficient breadwinning skills, numerous women—but certainly no men—won marital freedom.¹⁰⁴

In conclusion, fault divorce encouraged—even required—gender-conscious justifications for divorce that were explicitly or implicitly contingent on longstanding prescriptions about women’s normative roles. By making divorce available only when one spouse transgressed traditional marital roles and the other strictly embraced them, the judicial application of fault grounds enforced the very gendered stereotypes now repudiated by the Supreme Court’s equal-protection jurisprudence.¹⁰⁵ Further, the fault system, as we have seen, cultivated an image of feminine frailty and dependence and construed the court’s duty to protect female “victims.” The Supreme Court now understands the Constitution to forbid paternalism of this kind: the state may not use laws to “reinforce[] stereotypes about the ‘proper place’ of women and their need for special protection.”¹⁰⁶ As Reva Siegel elucidates, gender-paternalism triggers equal-protection concerns

¹⁰¹ As Cahn observed, the “ideology of masculinity served as a critical balance to the ideology of femininity; domesticity (and marriage) depended on both the husband and wife performing their roles.” Cahn, *supra* note 50, at 674–75.

¹⁰² VanSickle, *supra* note 7, at 172; *see also* Cahn, *supra* note 50, at 674–75 (explaining that the divorce cases reveal an emphasis on a husband’s economic success as a defining factor in his marital success).

¹⁰³ SUZANNE M. BIANCHI & DAPHNE SPAIN, *AMERICAN WOMEN IN TRANSITION* 141 (1986); Biondi, *supra* note 7, at 616; DiFonzo & Stern, *supra* note 79, at 14–15; Charles W. Tenney Jr., *Divorce Without Fault: The Next Step*, 46 NEB. L. REV. 24, 25 (1967) (noting that a husband’s neglect to provide “suitable maintenance” was a recognized fault ground in numerous American jurisdictions).

¹⁰⁴ *See, e.g.*, *Smedley v. Smedley*, 30 Ala. 714 (Ala. 1857) (stating that a husband’s failure to perform his legal duty of adequately supporting his wife constitutes cruelty); *see also* Cahn, *supra* note 50, at 675; Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. REV. 265, 281 (2000).

¹⁰⁵ Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 996 (2007) (noting that the equal-protection cases prohibit the use of law to entrench family roles rooted in separate spheres ideology, “not simply because this use of law restricts individual opportunity but also because it enforces group inequality”).

¹⁰⁶ *Orr v. Orr*, 440 U.S. 268, 283 (1979); *see also* *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–25 (1982).

where other forms of paternalism do not, because of the denigrating assumptions about women such legislation reflects and the injuries it facilitates.¹⁰⁷ Indeed, in the name of “protecting” women, a large body of law served to constrict female potential, limiting their involvement in the public and civic life of the nation.¹⁰⁸ The fault regime exerted the same effect; by casting women into inferior and subservient roles, fault divorce facilitated the transformation of women into “wedlocked wives” and substantially subverted gender equality in society.

B. From Past to Present: Faulting Fault Divorce in Contemporary Courtrooms

The fault grounds still on the books in the twenty-first century are, to a considerable extent, relics of the nineteenth-century legislation we have discussed—laws enacted by all-male legislatures chosen by all-male electorates that restricted women’s choices without earning their votes. Remarkably, more than half of U.S. jurisdictions feature a mixed-ground dissolution regime that offers both newer no-fault grounds as well as traditional fault grounds which still permit judges to evaluate marital misconduct and spousal wrongdoing.¹⁰⁹ For example, New York did not permit unilateral fault-free dissolutions until as late as the second decade of the twenty-first century, when the legislature supplemented the existing fault-based menu with a no-fault divorce ground.¹¹⁰ In these mixed-ground

¹⁰⁷ Siegel, *supra* note 105, at 1049. For example, in *Hogan*, the state policy of limiting nursing school to female students was constitutionally impermissible because it perpetuated a stereotypical view of nursing as the sole province of women. See Amy Eppler, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 YALE L.J. 788, 803 (1986).

¹⁰⁸ For example, a law preventing women from practicing law attempted to “sav[e]” women *because they are women* from a combative, aggressive profession” *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993) (emphasis in original).

¹⁰⁹ Evan Wright, *Agree to Disagree: Moving Tennessee Toward Pure No-Fault Divorce*, 4 LINCOLN MEMORIAL U. L. REV. 86, 97–98 (2017) (showing that only seventeen states adopted a pure no-fault divorce system); Judith Areen, *Uncovering the Reformation Roots of American Marriage and Divorce Law*, 26 YALE J.L. & FEMINISM 29, 30–31 (2014) (“[S]ome divorcing spouses prefer to rely on a fault ground Litigants and courts in most states thus still wrestle with how best to interpret and to apply divorce requirements that were formulated centuries ago.”).

¹¹⁰ N.Y. DOM. REL. LAW § 170(7) (2010). Before the 2010 reform, no-fault was possible only upon mutual consent. Given both the stringency of the proof required for establishing the fault-grounds and the ease with which defenses could defeat these grounds, a New York citizen often faced the risk of remaining chained to indissoluble marriage in the pre-reform era. See Rhona Bork, *Taking Fault With New York’s Fault-Based Divorce: Is the Law Constitutional?*, 16 ST. JOHN’S J. LEGAL COMMENT.

jurisdictions, roughly one third of divorces still proceed through the fault-based system.¹¹¹ There are still, however, two American jurisdictions which have consistently resisted unilateral no-fault divorce reform efforts, where fault grounds continue to dominate.¹¹² This is also true of covenant marriage legislation which has been passed in three jurisdictions and proposed in more than a dozen others—the first Western laws in some two hundred years to make divorce more difficult to obtain.¹¹³

Certainly, fault divorce today is no longer implemented in as stereotypical a manner as it used to be, and most judges do not consciously discriminate against women.¹¹⁴ Nevertheless, the fault regime remains susceptible to equal-protection challenges and, as this Part argues, it is still applied, at least occasionally, in ways that enforce inequitable gender relations. Mainstream equal-protection analysis subjects to rigorous judicial review not only sex-based legislative classifications, but also legislation neutral on its face yet enforced in a discriminatory manner.¹¹⁵ As the Supreme Court has

165, 168–79 (2002); *see also* J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York*, 27 PACE L. REV. 559 (2007).

¹¹¹ Karen Turnage Boyd, *The Tale of Two Systems: How Integrated Divorce Laws Can Remedy the Unintended Effects of Pure No-Fault Divorce*, 12 CARDOZO J.L. & GENDER 609, 616 (2006); *see also* Pamela Laufer-Ukeles, *Reconstructing Fault: The Case for Spousal Torts*, 79 U. CIN. L. REV. 207, 209 (2010) (“[F]ault or blameworthy conduct is persistently relevant, whether as an option in divorce statutes, as a bargaining mechanism, or to gain advantage in financial and custodial matters.”); Areen, *supra* note 109, at 31.

¹¹² These states are Mississippi and Tennessee. MISS. CODE ANN. § 93-5-2 (effective Mar. 31, 2020); TENN. CODE ANN. § 36-4-103 (effective Mar. 6, 2020).

¹¹³ *See* La. Rev. Stat. Ann. § 9:272; Ariz. Rev. Stat. Ann. § 25-901; Ark. Code Ann. § 9-11-801; *see also* Heather Flory, “*I Promise to Love, Honor, Obey . . . and Not Divorce You*”: *Covenant Marriage and the Backlash Against No-Fault Divorce*, 34 FAM. L.Q. 133, 133–34 (2000); Katherine Shaw Spaht, *Louisiana’s Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63, 107 (1998).

¹¹⁴ This is part of the decline in moral discourse in family law as chronicled in Carl Schneider’s influential articles. *See* Schneider, *supra* note 63; Carl E. Schneider, *Moral Discourse and the Transformation of Family Law*, 83 MICH. L. REV. 1803 (1985).

¹¹⁵ *See* *Shaw v. Reno*, 509 U.S. 630, 642–44 (1993) (tracing the history of equal-protection litigation to illustrate that facially neutral legislation may also be subject to strict scrutiny when applied in a racially discriminatory basis.); *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (explaining that challenges to multimember voting districts violate the Equal Protection Clause if “conceived or operated as purposeful devices to further racial discrimination”) (internal citation omitted); *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (noting that while multimember legislative districts are not per se unconstitutional, such schemes could violate the Fourteenth Amendment if their purpose were to “minimize or cancel out the voting potential of racial or ethnic minorities”); *see also* *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (“Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the . . . legislation appears neutral on its face.”); *Personnel Adm’r of Mass. v. Feeney*, 442

acknowledged, “a law nondiscriminatory on its face may be grossly discriminatory in its operation.”¹¹⁶ Insofar as fault grounds are informed by the sex-role prescriptions of the separate-spheres tradition and remain susceptible to sexist implementation, they are unacceptable even under the Supreme Court’s narrow interpretation of the antidiscrimination principle.

Indeed, there is an inherent danger embedded in a divorce regime based on evaluations of marital fault since, as Laurence Tribe cautions, laws and institutions to this day “still promote—with vast popular support—distinctive and restrictive gender roles,” such that some gender classifications are so woven into the entire social understanding of women that they reflect “what the judiciary itself still perceives as a genuine gender difference.”¹¹⁷ Especially in this psychologically loaded context of marital dissolution, “discretion permits the judge’s own bias, reflecting his own place in the patriarchy, to serve as the unexamined predicate for his decision. Divorce is governed not by law, but quite literally by the men who comprise the vast majority of family court judges”¹¹⁸

An examination of contemporary fault-based divorce cases confirms these suspicions. Divorce judges themselves candidly concede that their

U.S. 256, 272 (1979) (explaining that legislation that includes a racial classification or that is facially neutral but is “an obvious pretext for racial discrimination” will survive a legal challenge “only upon extraordinary justification”); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1483 (2d ed. 1988) (noting that the actions of state courts and judicial officers are subject to the restraints of the equal protection clause); Eppler, *supra* note 107, at 796–97 (“[E]xtreme discrimination in the administration of a facially neutral law may provide proof of discriminatory intent.”).

¹¹⁶ *Griffin v. Illinois*, 351 U.S. 12, 17 & n.11 (1956). Indeed, serious discrimination in the administration of a gender-neutral law may provide proof of discriminatory purpose. *See* *Washington v. Davis*, 426 U.S. 229, 241 (1976) (“A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate”) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)); *see also* GERALD GUNTHER, *CONSTITUTIONAL LAW* 709 (10th ed. 1980) (“[P]urposeful, hostile discrimination is inferred from data regarding administration of a facially neutral law.”).

¹¹⁷ *See* TRIBE, *supra* note 115, at 1569, 1571. This is a fair conclusion given that gender stereotypes may still affect even the nation’s highest court. *See, e.g.,* *Rostker v. Goldberg*, 453 U.S. 57, 78–79 (1981) (upholding a federal law limiting to men the duty to register for a military draft); *Michael M. v. Superior Court*, 450 U.S. 464, 466–73 (1981) (upholding a California statutory rape law punishing the young man but not the young woman for voluntary sexual intercourse); *Dothard v. Rawlinson*, 433 U.S. 321, 336 (1977) (reinforcing the stereotypic view of women as vulnerable sex objects by upholding a law forbidding women to serve as guards in a maximum security prison for men).

¹¹⁸ Barbara Stark, *Divorce Law, Feminism, and Psychoanalysis: In Dreams Begin Responsibilities*, 38 *UCLA L. REV.* 1483, 1519 (1991) (footnote omitted).

personal philosophies and prejudices affect their divorce decisions,¹¹⁹ and even female judges are known to act upon stereotyped myths, beliefs, and biases.¹²⁰ State task forces investigating gender bias in late twenty-century divorce courts have all reported that “gender bias detrimental to women permeates every aspect of marital dissolution.”¹²¹ Divorce scholars have similarly found that courts have exhibited “a double standard for women and men in fault behaviors”¹²² and are still “more willing to find fault with women than men for the same conduct.”¹²³

Many judges still adhere to dated notions of appropriate gender behavior particularly when adjudicating the financial and custodial consequences of fault-based dissolution.¹²⁴ In a 1991 case, for example, a court denied

¹¹⁹ RICHARD NEELY, *THE DIVORCE DECISION: THE HUMAN AND LEGAL CONSEQUENCES OF ENDING A MARRIAGE* 27–28, 32 (1984) (discussing how the author, a divorce judge himself, cautions that “judges are human, and their decisions are influenced by their backgrounds, experiences, and—unfortunately—prejudices”); Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 787 n.32 (1996) (noting that to this day many states attach far more consequences to a wife’s adultery than a husband’s); Kenneth L. Karst, *Woman’s Constitution*, 1984 DUKE L.J. 447, 468 (1984) (suggesting that lawmakers are influenced by the “traditional construct of woman” as wife and mother when making rules that impact gender roles).

¹²⁰ Singer, *supra* note 50, at 1119 (noting that divorce judges who are women do not typically have experience with divorce and are not immune to the gender biases of their male counterparts).

¹²¹ Lynn Hecht Schafran, *Gender and Justice: Florida and the Nation*, 42 FLA. L. REV. 181, 187 (1990); *see also* Karen Czapanskiy, *Gender Bias in the Courts: Social Change Strategies*, 4 GEO. J. LEGAL ETHICS 1, 1 (1990) (noting that every study conducted by states and state court systems exploring gender bias in the judicial system has found a need for reform in order to eliminate the impact of gender bias on judicial processes and decision-making).

¹²² Susan Hager, Comment, *Nostalgic Attempts to Recapture What Never Was: Louisiana’s Covenant Marriage Act*, 77 NEB. L. REV. 567, 582 (1998) (noting that courts more readily conclude that a woman is at fault and less able to perform parental responsibilities than men under identical circumstances); *see also* Bradford, *supra* note 58, at 634 (describing the different consequences in divorce proceedings for men and women who commit adultery); Lucinda M. Finley, *Putting “Protection” Back in the Equal Protection Clause: Lessons from Nineteenth Century Women’s Rights Activists’ Understandings of Equality*, 13 TEMP. POL. & C.R. L. REV. 429, 431 (2004) (comparing the severity of social consequences for men and women who abandon their children or bear children out of wedlock); MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 72 (1991) (concluding that judges could not as a group be trusted to protect wives and children).

¹²³ Lindsey, *supra* note 56, at 281; *see also* RIANE TENNENHAUS EISLER, *DISSOLUTION: NO-FAULT DIVORCE, MARRIAGE, AND THE FUTURE OF WOMEN* 136, 190 (1977); FINEMAN, *supra* note 122, at 72 (noting the belief among advocates of divorce reform that trial judges exhibited patterns of bias against women); Singer, *supra* note 50, at 1111 (discussing examples of women’s exposure to harsher penalties than men for the same behaviors).

¹²⁴ It should be stressed that my analysis, which espouses a unilateral no-fault right in access to divorce, is limited to the core right to marital exit but does not address the regulation of the incidents of divorce. The latter category, which introduces complexities of its own and is still a source of

alimony and provided only limited property to a severely ill and needy woman because she had begun an extramarital relationship after separating from her husband.¹²⁵ In the same vein, modern divorce courts have been often guided by double standards for sexual behavior and work priorities in resolving custody battles.¹²⁶ While women's perceived "promiscuity" may cost them custody of their children,¹²⁷ as affirmed by the U.S. Supreme Court,¹²⁸ the very same conduct from men "rarely disables" their custody

contention among feminists, is beyond the scope of this article and is analyzed in a separate work. Yefet, *supra* note 35; *see also, e.g.*, Robin Fretwell Wilson, *Don't Let Divorce off the Hook*, N.Y. TIMES, Oct. 1, 2006, at 14LL (calling for "a prudent and realistic search for new approaches to enacting our shared moral understanding of marriage"); Robin Fretwell Wilson, *Beyond the Bounds of Decency: Why Fault Matters to (Some) Wronged Spouses*, 66 WASH. & LEE L. REV. 503 (2009); Harry Krause, *On the Danger of Allowing Marital Fault Torts to Re-Emerge in the Guise of Torts*, 73 NOTRE DAME L. REV. 1355 (2003); *see also* Laufer-Ukeles, *supra* note 111 (observing that feminists still "have mixed feelings about fault divorce").

¹²⁵ Rgm v. Dem, 410 S.E.2d 564 (S.C. 1991); *see also* Woodhouse & Bartlett, *supra* note 65, at 2557–58; Ellman, *supra* note 119, at 787, n.32 ("[M]any states . . . attach far more consequence to a wife's adultery than a husband's.").

¹²⁶ *See, e.g.*, *In re Marriage of Taylor*, 274 P.3d 46 (Kan. Ct. App. 2012) (remanding, in part, decision to grant custody to father, *inter alia*, because of the mother's claims that the judge's comments and journal entry reflected "a personal and gender bias" against her; for example, the court mentioned that shortly after the divorce she became pregnant out of wedlock by a man she had not known for long while applying "a double standard of morality" that held her to a higher standard than the father); *see also* Schafran, *supra* note 6, at 42–43 (discussing how women seeking custody may be punished for life-styles and social arrangements that are acceptable for men); Schafran, *supra* note 121, at 192 (explaining that mothers are held to a different and higher standard of parenting and personal behavior than fathers). For the traditional operation of this regime, see HOMER H. CLARK JR., LAW OF DOMESTIC RELATIONS 585 (1968) ("[T]he commonest case [is], where the divorce is granted for the wife's adultery. Some courts have been unduly rigid in refusing to give the wife custody where it appeared quite clearly that the child would be better off in her care.").

¹²⁷ *See, e.g.*, *Stibich v. Stibich*, 2016 Ark. App. 251, 491 S.W.3d 475 (Ark. App. 2016) (living with a boyfriend out of wedlock warranted a change in custody); *Chastain v. Chastain*, 672 S.E.2d 108 (S.C. Ct. App. 2009) (holding that "flagrant promiscuity" is a relevant factor in determining the moral fitness of a parent—in this case the mother—to raise a child); *Ex parte J.M.F.*, 730 So. 2d 1190 (Ala. 1998) (reversing the judgment of the Court of Civil Appeals and affirming the trial court's order granting a change of custody from mother to father based on her open lesbian relationship and given that "the father and the stepmother have established a two-parent home environment where heterosexual marriage is presented as the moral and societal norm"); *Collins v. Collins*, No. 87-238-II, 1988 WL 30173 (Tenn. Ct. App. Mar. 30, 1988) (affirming the trial court's decision to award custody to the remarried father because of the mother's "gay lifestyle"); *see also* RHODE, *supra* note 6, at 189 (explaining that "promiscuity" is frequently cited as grounds for custody challenges); Bradford, *supra* note 58, at 634 (finding that courts frequently rule that women accused of adultery or promiscuity cannot provide an acceptable home for children).

¹²⁸ *See, e.g.*, *Jarrett v. Jarrett*, 449 U.S. 927 (1980) (custody was changed from mother to father because of ex-wife's subsequent nonmarital relationship).

petitions.¹²⁹ Consider the 2018 case *Cordell v. Cordell*, in which the court ordered a change of custody from mother to father based, *inter alia*, on the mother's "immoral conduct" in dating a married man.¹³⁰ The court concluded that "[i]f there's any hope that the children are raised with any morals it will have to be with . . . [the father]," notwithstanding the father's previous engagement in similar activities.¹³¹ Divorce courts have also been known to prefer fathers who admit to having been serial adulterers to mothers in stable lesbian relationships; one court even found it superior to award custody to a father convicted of murder than to a lesbian mother.¹³²

Fault determinations especially risk penalizing women who defy traditional gender paths or who lack proper housekeeping standards.¹³³ In *D.H. v. J.H.*, for instance, the court awarded custody to the father because of the mother's failure to be "a model housekeeper" given that dishes were left unwashed and laundry was left lying on furniture while the husband had to fix meals for the children because "the wife was out running around."¹³⁴ Working mothers, in particular, may still be viewed with suspicion by many family court judges.¹³⁵ Women's widespread participation in the labor force

¹²⁹ Bradford, *supra* note 58, at 634; *see also, e.g.*, *Alphin v. Alphin*, 219 S.W.3d 160, 165 (Ark. 2005) (affirming a trial court order changing custody from mother to father by relying primarily on the "illicit sexual relationship" between the mother and her new husband prior to their marriage, which the court viewed as "nothing but a ruse," while ignoring both similar conduct by the father—who married his girlfriend when she was three months pregnant with his child—and the fact that the father initiated the change-of-custody petition only after the mother sought child support from him). The Arkansas Supreme Court affirmed the decision based on the mother's "lack of stability": she moved frequently and did not have a fixed schedule because of her job which meant that on some nights only her mother was able to be home at her child's bedtime. In contrast, the Court was impressed with the father's new wife for making "a point of leaving work every day in time" to pick up the child. *Id.* at 166; *see also* RHODE, *supra* note 6, at 341 (noting an exception to this rule when the father is accused of homosexual conduct); Hanna Schwarzschild, *Same-Sex Marriage and Constitutional Privacy: Moral Threat and Legal Anomaly*, 4 BERKELEY WOMEN'S L.J. 94, 124–25 (1988) (noting that judges tend to deprive homosexuals of custody).

¹³⁰ *Cordell v. Cordell*, 565 S.W.3d 500, 506 (Ark. Ct. App. 2018).

¹³¹ *Id.* at 506.

¹³² For a description of such relatively recent cases, *see* RHODE, *supra* note 6, at 189.

¹³³ *See* Bradford, *supra* note 58, at 621; *see also* Biondi, *supra* note 7, at 611, 623–24 ("[F]ault-based divorce laws ultimately rely on inconsistent and subjective family court judges to define fault. Further, these definitions may be influenced inappropriately by biological and cultural assumptions about women and their proper social and familial roles.") (footnotes omitted).

¹³⁴ *D.H. v. J.H.*, 418 N.E.2d 286 (Ind. Ct. App. 1981).

¹³⁵ *See* Czapanskiy, *supra* note 121, at 4 (noting that judges have found mothers who work unfit for custody and sometimes require more evidence for a female litigant to prove her custodial fitness than for a male litigant).

notwithstanding, mothers who challenge traditional gender roles by appearing career-focused or relying on daycare may risk losing custody.¹³⁶ Going before divorce judges, women are in a bind: they are viewed as incapable of being good parents if they work “too much,” but as incapable of supporting their children if they don’t work “enough.”¹³⁷ Husbands, however, are seldom faulted for being “overly” committed to their careers, and they tend to be rewarded by judges “for any small effort made to participate actively in their child’s life, while [judges] view similar behavior by women as routine.”¹³⁸

The gendered faults of fault divorce do not end here. Perhaps the most troubling phenomenon in contemporary courtrooms is the minimization of domestic violence allegations in divorce proceedings.¹³⁹ Many battered women who experienced various forms of abuse were thus found wanting, and failed to surmount the court-defined barrier of “cruel and inhuman treatment” that warrants marital freedom.¹⁴⁰ In *Palin v. Palin*, for example, the wife proved that she was both physically and verbally abused by her husband yet the court deemed this marital misconduct as nothing more than

¹³⁶ See Bradford, *supra* note 58, at 634 (noting that several well-publicized custody battles have involved attempts to take children away from mothers who use daycare or who are supposedly too committed to their careers to spend “enough” time at home); see also RHODE, *supra* note 6, at 189–93 (describing cases in which mothers were denied custody because judges did not believe they could raise children and work or pursue an education); Schafran, *supra* note 6, at 56 (describing cases that show that women experienced difficulties in securing judicial permission to relocate with their children for work-related reasons while custodial fathers were generally permitted to move for job opportunities).

¹³⁷ RHODE, *supra* note 6, at 192–93; CARBONE & CAHN, *supra* note 40, at 157.

¹³⁸ Bradford, *supra* note 58, at 634–35 (explaining that the presence of a second wife, mother, or even a hired housekeeper to care for the child in the father’s life may tip the scales in his favor in a custody battle); see also RHODE, *supra* note 6, at 189–90 (noting that fathers are praised for successful careers, while mothers may be cast as selfish for taking on work outside of the home).

¹³⁹ Bryan, *Reasking the Woman Question*, *supra* note 7, at 727; see also Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN’S STUD. 133, 183 (1992) (discussing a North Carolina study finding that allegations of paternal abuse of wives or children seldom affected judicial custody decisions); Emily J. Sack, *Is Domestic Violence a Crime?: Intimate Partner Rape as Allegory*, 24 ST. JOHN’S J. LEGAL COMMENT. 535, 565 (2010) (“The belief that women make false accusations of abuse to win custody or divorce lawsuits, or simply as an act of vindictiveness, is commonplace in the justice system’s treatment of domestic violence.”).

¹⁴⁰ See, e.g., E.D. v. M.D., 801 N.Y.S.2d 233, 234 (N.Y. Sup. Ct. 2005); Cochran v. Cochran, 912 So. 2d 1086, 1090–91 (Miss. Ct. App. 2005); Ladner v. Ladner, 49 So. 3d 669, 672 (Miss. Ct. App. 2010); see also S.K. v. I.K., No. 203247-2008, 2010 WL 1371943, at *9 (N.Y. Sup. Ct. Mar. 29, 2010). For further discussion of such cases, see Lauren Guidice, *New York and Divorce: Finding Fault in a No Fault System*, 19 J.L. & POL’Y 787, 801–04 (2011).

“unpleasant.”¹⁴¹ The court also held her continued cohabitation with her husband against the wife, thereby turning a blind eye to the feminization of poverty that plagues many women's economic ability to physically separate from their abusers.¹⁴² The same fate awaited Mrs. Gross, whose husband of thirty-seven years rammed her up against the walls of the house and imposed himself on her sexually. Mrs. Gross's pleas for marital emancipation fell on deaf ears, however, since “[r]eprehensible and highly offensive behavior . . . is not necessarily sufficient to establish the cruel-and-inhuman-treatment ground for divorce.”¹⁴³ The New York Court of Appeals further added insult to injury by stressing that the lengthier the marriage, the higher the degree of proof required to set a divorce-seeker free.¹⁴⁴

Moreover, it is still a common misconception that so-called vindictive women make such allegations simply to gain an advantage in negotiation or at trial,¹⁴⁵ and judges with these beliefs sometimes deprive women of custody if they make such allegations.¹⁴⁶ Some judges also view battered women who escaped the marital home to a protected shelter as unfit mothers for abandoning their children.¹⁴⁷

¹⁴¹ *Palin v. Palin*, 624 N.Y.S.2d 630, 632 (N.Y. App. Div. 1995) (finding that the trial court erred by determining that the wife was entitled to a divorce on the ground of cruel and inhuman treatment).

¹⁴² *See id.* at 632.

¹⁴³ *Gross v. Gross*, 836 N.Y.S.2d 166, 168 (N.Y. App. Ct. 2007).

¹⁴⁴ *See id.* (reversing the lower court's decision to grant a divorce).

¹⁴⁵ Elizabeth Mertz & Kimberly A. Lonsway, *The Power of Denial: Individual and Cultural Constructions of Child Sexual Abuse*, 92 NW. U. L. REV. 1415, 1454 (1998); *see also* Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1307–08 (1993) (“[C]ustody courts routinely reject battered womans’ [sic] claims of abuse as fabrications, exaggerations, or irrelevant to the welfare of the children.”).

¹⁴⁶ Rita Berg, *Parental Alienation Analysis, Domestic Violence, and Gender Bias in Minnesota Courts*, 29 L. & INEQ. 5 (2011) (noting anti-mother gender bias in the Minnesota legal system and concluding that mothers may be unfairly prevented from attaining custody of their children when alleging domestic violence); Megan Shipley, *Reviled Mothers: Custody Modification Cases Involving Domestic Violence*, 86 IND. L.J. 1587, 1588 (2011) (describing courts’ tendencies to “disbelieve or minimize mothers’ accounts of domestic violence”); Bryan, *Reasking the Woman Question*, *supra* note 7, at 728 (discussing cases in which mothers lose custody after alleging abuse by their children’s fathers); Susan Beth Jacobs, *The Hidden Gender Bias Behind “the Best Interest of the Child” Standard in Custody Decisions*, 13 GA. ST. U. L. REV. 845, 858 (1997) (noting that courts’ failure to recognize the “inherent immorality” of fathers who abuse mothers “result[s] in an increasing number of mothers who are losing custody of their children”).

¹⁴⁷ MICH. SUP. CT., FINAL REPORT OF THE MICHIGAN SUPREME COURT TASK FORCE ON GENDER ISSUES IN THE COURTS 64, 69 (1989) (reporting task force findings showing that women who leave abusive husbands may be disadvantaged in custody proceedings); Bryan, *Reasking the Woman Question*, *supra* note 7, at 727 (“Judges sometimes deprive battered women of custody when they flee

To conclude, examining past regulatory practices can illuminate tacit forms of bias structuring present regulatory practices. Given the fault system's historical function as a form of gender-caste regulation, it is not surprising that the adjudication of fault, at least occasionally, may still be influenced by status-based reasoning about women's roles and identities. Since fault-based divorce may continue to facilitate gender-based decisionmaking, even a divorce regime that is structured around formal equality must center on a no-fault concept that does not mandate conformity to or transgression of conservative gender ideologies.¹⁴⁸ No-fault grounds, in contrast, present women with the opportunity to leave relationships that are confining and subordinating without having to confront—or profess adherence to—gender stereotypes, biases, and inequalities.¹⁴⁹ Moreover, by guaranteeing rights of exit to spouses who do not conform to dated moral standards or traditional gender roles, no-fault divorce also contributes to de-gendering marriage and affords spouses a meaningful choice to pursue egalitarian ideals during their relationship.¹⁵⁰ Finally, no-fault economic rules reconstruct the marital bargain and promote a more egalitarian sharing of marital responsibilities by withdrawing support for the traditional exchange of male support for female services and protection for obedience.¹⁵¹

the marital home without the children.”); Meier, *supra* note 145, at 1310 (noting that women involved in custody disputes are often accused of abandoning their families and denied custody as a result).

¹⁴⁸ Apart from facilitating discriminatory divorces mired with gender stereotyping, the fault system also erects substantial barriers for victims of domestic violence. See Bell, *supra* note 6. In contrast, a 2006 study of the impact of unilateral no-fault divorce found “a striking decline in female suicide and domestic violence rates arising from the advent of unilateral divorce.” See Betsey Stevenson & Justin Wolfers, *Bargaining in the Shadow of the Law: Divorce Laws and Family Distress*, 121 Q.J. ECON. 267, 286 (2006).

¹⁴⁹ See Cahn, *supra* note 50, at 695 (“Under the no-fault system in contemporary law, the norms of gendered marital behavior are irrelevant to receiving a no-fault divorce.”); see also Jana B. Singer, *The Privatization of Family Law*, WIS. L. REV. 1443, 1518 (1992) (noting that no-fault divorce is an alternative to a system that was “rife with gender stereotypes and inequalities”); VanSickle, *supra* note 7, at 174 (noting that a no-fault regime empowers women as the primary initiators of divorce).

¹⁵⁰ COTT, *supra* note 49, at 206 (explaining that no-fault divorce signifies that the state is barred from “passing judgment on performance in an ongoing marriage and allow the partners to decide whether their behavior matched their own expectations”); Elizabeth Baker et al., *Covenant Marriage and the Sanctification of Gendered Marital Roles*, 30 J. FAM. ISSUES 147, 152 (2009) (“The weakening of social norms and expectations that govern spouses’ behavior allows wives and husbands more freedom to negotiate the gendered terms of their marriages.”) (internal citations omitted).

¹⁵¹ No-fault treats women not as the dependents of male earners but as fully capable of labor force participation and supporting themselves. See, e.g., Carbone & Brinig, *supra* note 61, at 961–62

In all these ways, a no-fault path to marital emancipation operates to dismantle the gender hierarchy fostered by marriage and serves as a counterforce against the reification of sex-role stereotypes. In short, a right to no-fault divorce is a bedrock component of equal citizenship for women even given the narrow and formal confines of the antidiscrimination principle.

III. TURNING BACK THE PATRIARCHAL CLOCK: THE NEW-OLD AGENDA TO RESTRICT DIVORCE

A number of states are currently considering proposals that seek, among other restrictive regulations, to eliminate no-fault grounds and restore fault as the exclusive basis for divorce.¹⁵² Like their historical predecessors, many legislators endeavoring to reinstate fault today view liberal divorce rights as facilitating derogations of wifely duties and female obedience.¹⁵³ Put

(explaining how the no-fault movement has disrupted gender roles by “adjusting the incentives for marital behavior”); Carbone & Cahn, *supra* note 40, at 112–13 (arguing that no-fault divorce contributed to the dismantling of a marital model that enforced women’s economic dependence on men); Fineman, *supra* note 40, at 853–67. Indeed, no-fault divorce has had a “major impact” on women’s employment. See Schneider, *Moral Discourse*, *supra* note 114, at 1809; Ann L. Estin, *Economics and the Problem of Divorce*, 2 U. CHI. L. SCH. ROUNDTABLE 517, 523 (1995); Lindsey, *supra* note 56, at 280.

¹⁵² The most recent proposal, backed by the Coalition for Divorce Reform, is a South Dakota House Bill to remove no-fault divorce that was introduced by South Dakota State Representative Tony Randolph on January 29, 2020. See H.R. 1158, 2020 Leg. (S.D. 2020); see also Yefet, *supra* note 35, at ch. I. For an instructive summary of the multifaceted critiques against the no-fault divorce revolution and the calls for a counter-revolution that espouse a return to a fault-based regime, see Ayelet Hoffmann Libson, *Not My Fault: Morality and Divorce Law in the Liberal State*, 93 TUL. L. REV. 599, 607–614, 642 (2019) (calling for a “hybrid model of fault in divorce law” that assigns marital misconduct a prominent role in determining post-divorce outcomes). Lynn Wardle, writing at the beginning of the twenty-first century, elucidates:

The intensity and breadth of the dissatisfaction with the current regime of unilateral no-fault divorce is so great that it has been described as a ‘counter-revolution’ against no-fault divorce . . . [C]ommentators and politicians across the country decry the loss of ‘family values’ and urge legislative and social reform to bring back the traditional family . . . [This] very significant divorce reform in the United States at the present time . . . is likely to continue to be a major social force in the coming decade.

Lynn D. Wardle, *Divorce Reform at the Turn of the Millennium: Certainties and Possibilities*, 33 FAM. L.Q. 783, 794, 799 (2000) (internal citation omitted). Wardle further observes that “it appears that there is a significant, widespread, and growing social movement to reform unilateral no-fault divorce laws.” *Id.* at 784.

¹⁵³ Indeed, to this day, the wife who seeks divorce and walks out of “her” domestic responsibilities may be viewed as “the psychological equivalent of the mother who abandons; she is a monster.” Stark, *supra* note 118, at 1509; see also DEBORAH L. RHODE, SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY 185 (1999) (stating that sponsors of fault divorce seek to restrain “walkaway wives,” as

differently, as related by this Part, there is much evidence to suggest that legislators attempting to enact restrictions on divorce may be seeking to “save” not just marriage in general, but patriarchal marriage in particular, in violation of the constitutional guarantee of equal protection.

Though the Court has interpreted the Equal Protection Clause to prohibit government from enforcing gender-differentiated marital roles,¹⁵⁴ this vision of the family, and of government’s role in protecting it, still remains attractive to many. Opponents of divorce have recognized the connection between the right to marital freedom and the social, economic, and psychological emancipation of women, and they have linked their opposition to divorce to their support for the “primacy of the husband with regard to the wife and children, and the ready subjection of the wife and her willing obedience.”¹⁵⁵

A major backer of the contemporary movement to limit divorce is the American marriage movement, a loosely-organized coalition of conservative social critics, religious traditionalists, and academics that seek to strengthen the traditional family and enforce gender-specific marital roles.¹⁵⁶ For

women who are the ones who overwhelmingly initiate divorce). While calls to restrict divorce certainly also rest on benign and even commendable interests such as protecting the welfare of children, this is not enough to neutralize prejudiced motives. The Supreme Court unanimously rejected the proposition that the existence of an allegedly permissible motive “trumps any proof of a parallel impermissible motive.” *Hunter v. Underwood*, 471 U.S. 222, 231 (1985).

¹⁵⁴ See, e.g., Siegel, *supra* note 105, at 997 (“The case law treats laws that enforce gender-differentiated family roles, regardless of whether they purport to protect women, as enforcing an illegitimate form of stereotyping or caste resembling race discrimination.”).

¹⁵⁵ J. HERBIE DIFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* 32 (1997) (quoting POPE PIUS XI, *ENCYCLICAL LETTER: ON CHRISTIAN MARRIAGE* 21–64 (1931)); BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE: RETHINKING OUR COMMITMENTS TO MARRIAGE AND FAMILY* 105 (1998) (“Many liberal academics fear that raising concerns about the hardships of divorce for children may play into the hands of the political right. ‘Family values’ conservatives, they believe, are intent on driving women back into traditional homemaking roles and even dangerously abusive marriages, thus undermining women’s considerable progress toward freedom from domestic misery and tyranny.”).

¹⁵⁶ LINDA C. MCCLAIN, *THE PLACE OF FAMILIES* 293 (2006) (“Too often, defenses of ‘traditional’ marriage and family values regard gains in women’s equality and personal self-government as being in tension with strengthening families.”); Norland, *supra* note 33, at 322 (suggesting the American Marriage Movement was inspired in part by “political backlash against the rights of women”); Elizabeth S. Scott, *Divorce, Children’s Welfare, and the Culture Wars*, 9 VA.J. SOC. POL’Y & L. 95, 107–08 (2001) (noting that divorce reform proposals are part of a “reactionary social agenda being promoted by those who would like to return to traditional marriage and gender roles”); Singer, *supra* note 50, at 1104 (“[T]he perceived attack on no-fault divorce and on equality-based divorce

marriage movement members, divorce rights “threaten to destroy the sanctuary once provided by the father-dominated, home-centered, mother-dependent, traditional family.”¹⁵⁷ Many traditionalists thus expressly criticize no-fault for being inimical to specialization within the family—especially men’s engagement in paid employment and women’s focus on domestic and caretaking work¹⁵⁸—and couch their stance with sexist rhetoric on women’s traditional roles and the wifely duty to obey.¹⁵⁹ Accordingly, many promote limitations on divorce in order to restore the “patriarchal hierarchical structure and sharply differentiated gender roles” of traditional marriage.¹⁶⁰

Even reformers who disclaim any desire to “turn back the clock” still blame the weakening of marriage on “feminism, women’s increasing

reform threatens to reinforce old stereotypes about the proper roles of men and women and to fuel public nostalgia for a return to the ‘good old days’ (before women’s liberation) when fathers worked, mothers stayed home, and virtuous parents never got divorced.”).

¹⁵⁷ Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2017, 2091 (2000); see also MCCLAIN, *supra* note 156.

¹⁵⁸ Through reforming no-fault divorce laws into stricter laws, marriage promoters seek to reward investment in domestic activities in order to persuade women that specializing in household work and childcare is not a risky endeavor. See Maggie Gallagher, *Re-Creating Marriage*, in PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA 233–45 (David Popenoe et al. eds., 1996); Allen M. Parkman, *Good Incentives Lead to Good Marriages*, in REVITALIZING THE INSTITUTION OF MARRIAGE FOR THE TWENTY-FIRST CENTURY 69, 72–77 (Alan J. Hawkins et al. eds., 2002) (“Traditionally, spouses were reluctant to make sacrifices associated with specializing in domestic activities during marriage unless they had the expectation of a long-term relationship; marriage was associated with that expectation.”); Carbone & Brinig, *supra* note 61, at 988 (explaining that traditionalists favor a contract approach to marriage that encourages specialization within the marriage by imposing financial penalties on the spouse who initiates divorce (the “at-fault” spouse)); Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C. L. REV. 879, 889 (1988) (noting that under no-fault regimes, couples internalize the fragility of the marital partnership and act as if their marriage is fragile, which may actually cause the relationship to be fragile).

¹⁵⁹ White, *supra* note 85, at 880–81 (noting that some religions promote women’s subservience to men and discourage divorce, even when the husband is abusive). For example, some Christian and Muslim leaders, who advocate legal restrictions on divorce, instruct husbands, as the heads of their households, to employ domestic violence to discipline women rather than divorce them, and direct wives to endure the abuse and save their marriage “at all costs”; indeed, they are told that their “lack of submissive behavior” is “in part responsible for the violence.” Colleen Shannon-Lewy & Valerie T. Dull, *The Response of Christian Clergy to Domestic Violence: Help or Hindrance?*, 10 AGGRESSION & VIOLENT BEHAV. 647, 649, 651 (2005); see also Robin Fretwell Wilson, *The Overlooked Costs of Religious Deference*, 64 WASH. & LEE L. REV. 1363, 1373 (2007).

¹⁶⁰ Elizabeth S. Scott, *Rehabilitating Liberalism in Modern Divorce Law*, 1994 UTAH L. REV. 687, 712 (1994) (pointing to this tendency).

economic independence, and their higher expectations of sex equality, gender equity, and intimacy within marriage.”¹⁶¹ Moreover, the fact that most family law reformers have manifested little concern about gender inequality in marriage, despite overwhelming evidence that it destabilizes these unions,¹⁶² reinforces the conclusion that they “are seeking to strengthen not just any marriage but a particular form of marriage, and one that women will increasingly find unattractive.”¹⁶³ Tellingly, some prominent advocates of divorce restrictions explicitly reject equal responsibilities in marriage as “nonsense”¹⁶⁴ or “androgyny.”¹⁶⁵

The Natural Family: A Manifesto, a 2005 statement issued by an affiliate of the World Congress of Families, is an especially revealing example—endorsed by “prominent national leaders of the traditional family values movement”¹⁶⁶—that overtly grounds opposition to marital freedom in a vision of gender-differentiated family roles. The authors, Alan Carlson and Paul Mero, stress their traditional view of marriage and family roles as the basis for their resistance to liberal divorce, adultery, same-sex marriage, and abortion.¹⁶⁷ They celebrate the gender-differentiated family and view it as a fact of nature,¹⁶⁸ encourage state policies that regulate work and family relations to reward parents who adhere to stereotypical gender roles in

¹⁶¹ MCCLAIN, *supra* note 156, at 119 (documenting and criticizing this tendency among marriage promoters).

¹⁶² *See, e.g., id.* at 44 (“One form of inequality within marriage that may lead to instability, including divorce, is women’s disproportionate performance of caregiving and household tasks.”); *see also* JAMES Q. WILSON, *THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES* 189 (2002) (characterizing the ideal of “gender equality” as “nonsense,” that it is “a fancy of the upper middle class” and claiming that “ordinary men and women do not think that way”).

¹⁶³ Bartlett, *supra* note 5, at 842–43.

¹⁶⁴ WILSON, *supra* note 162, at 189.

¹⁶⁵ MCCLAIN, *supra* note 156, at 147; *see also* David Popenoe, *Modern Marriage: Revising the Cultural Script*, in *PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA* 247–61 (David Popenoe et al. eds., 1996) (discussing the changes in marital roles and the subsequent confusion and discord arising between spouses).

¹⁶⁶ Siegel, *supra* note 105, at 1005.

¹⁶⁷ Allan C. Carlson & Paul T. Mero, *The Natural Family: A Manifesto*, in *THE FAMILY IN AMERICA* (2005).

¹⁶⁸ *See id.* at 15 (“[T]he natural family is a fixed aspect of the created order, one ingrained in human nature,” and “legitimate governments exist to shelter and encourage the natural family”); *id.* at 29 (“[W]e humans have been defined by the long-term bonding of a woman and a man, by their free sharing of resources, by a complementary division of labor, and by a focus on the procreation, protection, and rearing of children in stable homes.”); *id.* at 16 (“Culture, law, and policy should take these [gender] differences into account. We affirm that the complementarity of the sexes is a source of strength. Men and women exhibit profound biological and psychological differences.”).

marriage, and deny women's right to participate in education and employment on equal terms with men.¹⁶⁹ While explicitly acknowledging their vulnerability to charges that they wish to subvert women's rights and reinforce patriarchal violence,¹⁷⁰ they nevertheless advocate policies designed to restore the gender-differentiated family of the 1950s.¹⁷¹

To achieve these goals, among the marriage movement's leading prescriptions is to "place the weight of the law on the side of spouses seeking to defend their marriages [and] end state preferences for easy divorce by repealing 'no-fault' statutes,"¹⁷² so as to "build a new culture of marriage,"¹⁷³ and allow husbands and wives to "be nurtured toward and encouraged in their proper roles."¹⁷⁴

Another notable example is a statement issued in 2011 by David R. Usher, the president of the Center for Marriage Policy, and Michael J. McManus, the president of Marriage Savers. Entitled "'Ten Marriage Economic Policies' to Rebuild America," this document identifies no-fault divorce laws as "a mistake that encouraged marital irresponsibility." The statement's first policy recommendation accordingly calls for a reform of divorce law by only permitting a mutual-consent divorce and restoring the fault-based regime. This new-old system would "permit divorce for defined reasons, which must be proven" while rewarding the spouse who seeks to preserve the marriage with three fourths of the marital assets. The overarching goal of this policy, according to the statement, is to return America to a marriage-based society which would "naturally resolve" the

¹⁶⁹ See, e.g., *id.* at 25–26.

¹⁷⁰ *Id.* at 24.

¹⁷¹ *Id.* ("It is true that we look with affection to earlier familial eras such as '1950's America.' We look with delight on this record and aspire to recreate such results."). Carlson and Mero admire the American family model of the 1950s, attribute its fall in part to feminism and no-fault divorce, and decry the following events as undermining the desirable social order. Coupling together a criticism of liberal divorce policies and feminist challenges to traditional gender roles, they blame the "time of moral shock and awe" that was the 1960s:

[N]ew legal challenges to successful family wage systems; conscious efforts to drive the Creator out of civic life; the rapid spread of pornography; new demands for easy divorce; attacks on the meaning of 'wife' and 'husband'; a swelling rhetoric of 'gender' and 'sexual' rights; conscious state campaigns aimed at population control; steps toward easy abortion; claims of sexual revolution; rejection of the concepts of duty and long-term commitment; and startling advances in the manipulation of human life.

Id. at 10.

¹⁷² *Id.* at 19.

¹⁷³ *Id.* at 18.

¹⁷⁴ *Id.* at 28.

“major problems of most unmarried mothers and their children” and ensure “[a] woman’s right to be supported by, cared for, and helped by her husband.”¹⁷⁵ Marriage Savers also recommends the replacement of state subsidies of cohabitation with marriage subsidies that would “[a]sk unwed mothers at the birth of their baby if they are cohabiting; if so, do not give state subsidies—unless they marry and take classes teaching conflict resolution skills.”¹⁷⁶

A bill along these lines has been proposed in at least two states. The bill designates the person who seeks to preserve the marriage as the “responsible spouse” who would get at least 70% of marital assets and half of child custody time. However, “if there is actual evidence, with high evidentiary standards” that the divorce-seeking spouse is the victim of physical abuse, adultery or abandonment, “then s/he would be entitled to the benefits of a ‘responsible spouse.’” The reform would also oblige the divorce court to divide both assets and debts since “[c]urrently, they do not have to dispose of debts, which the husband usually ends up with, an unfair pattern that often leaves him broke.”¹⁷⁷ As for child custody, the bill is predicated on the supposition that “[y]oung children need the love of a mother most, and teenagers most need the discipline a father can offer” and thus envisions a reversal of custody arrangements from mother to father as children grow older, which “would happen automatically, unless a spouse is found unfit or waives it.”¹⁷⁸

The juxtaposition of gender prescriptions and divorce restrictions allows us to infer that the “the real aim” of divorce reform proposals is to “enforce a narrow and moralistic vision of marriage”¹⁷⁹ in which women are homemakers and men head the household.¹⁸⁰ Feminists are therefore

¹⁷⁵ David R. Usher & Michael J. McManus, “*Ten Marriage Economic Policies*” to *Rebuild America*, CTR. FOR MARRIAGE POL’Y (Aug. 10, 2011), <http://marriagepolicy.org/2011/08/10-marriage-values-policies/>.

¹⁷⁶ Mike McManus, *Proposed Louisiana Divorce Reform and Cohabitation Reform*, MARRIAGE SAVERS (Feb. 5, 2013), <http://marriagesavers.org/sitems/News/News1030216Reform.htm>.

¹⁷⁷ *Id.* (detailing the bill introduced in Missouri and the bill expected in Louisiana).

¹⁷⁸ *Id.* (“[C]ustody is divided 50-50, based on the number of years till the child is 18. If he is aged 4, the mother would get custody for 7 years till age 11, then the father would have 7 years of custody till age 18.”).

¹⁷⁹ Katha Pollitt, *Can This Marriage Be Saved?*, NATION, Feb. 17, 1997, at 9.

¹⁸⁰ MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 101 (1995) (describing some tactics used by proponents of traditional marriage that include casting single mothers as “deviant”); Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225, 227 (1997) (explaining a traditionalist view that

rightfully concerned that reforms that inhibit marital freedom jeopardize women's equal status in both the family and society and lay the foundation for gender-based stratification.¹⁸¹

When the advocacy of divorce-restrictive regulations is considered in light of the gender bias that may animate it, it is clear that exit barriers being sought today offend constitutional guarantees of equal protection. Such anti-divorce laws would use the power of the state to upbear the patriarchal family structure based on constitutionally proscribed views that subordinate women to the constraining sex-roles of the separate-spheres tradition. Yet, as the Supreme Court elucidates, “[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.”¹⁸² Limitations on divorce that restrict, degrade, and endanger women violate not only the forms of dignity and decisional autonomy constitutionally guaranteed to women by the Court’s “due process equality” jurisprudence, but also by the Court’s very equal protection gender-discrimination cases. Against this backdrop, legal challenges to strict divorce laws should be properly seen as part of a larger challenge to a long legal tradition of imposing gender roles on women that limited their public and private identities to their prescribed roles as wives and mothers.

CONCLUSION

This diptych has conceptualized the right to marital freedom in a gender-equality framework. It has argued that any constitutional concept of gender equality, whether formal or substantive, must guarantee a right of exit from an institution that has long been a locus of female subordination and still leaves many women vulnerable to dependency, exploitation, and abuse. The use of law to force a woman to remain subject to her husband is a simultaneous affront to her liberty, dignity, and equality interests. It entrenches archaic understandings of marital roles the Constitution now repudiates and exposes women to systemic gender-based injuries both inside and outside marriage. All substantive visions of equal protection thus

divorce is selfish, and arguing that children have a “morally based claim to require their parents to stay together”).

¹⁸¹ Accordingly, all currents of feminism recognize resistance to the reintroduction of fault and the enforcement of the traditional marital bargain as an obstacle to gender equality. *See, e.g.,* Kay, *supra* note 157, at 76–77; Carbone & Brinig, *supra* note 61, at 1010; *see also* Vansickle, *supra* note 7, at 156, 178; Scott, *supra* note 156, at 95–96.

¹⁸² *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992).

envisage marital freedom as a remedy against state-facilitated gender subordination and dignitary harm inflicted through marriage. As a result, marital exit has naturally grown to become a sex-salient practice which disrupts group inequality and helps ameliorate certain forms of gender stratification. The law's response to the divorce question thus bears heavily on women's equal citizenship in society, influencing what opportunities women will have to participate fully in the nation's social, political, and economic life.

The antidiscrimination interpretation of equal protection, especially anti-stereotyping concerns, is also implicated in divorce laws. The historical analysis proffered in this Article reveals the lineage and function of divorce restrictions as gender-caste regulation. Oppressive marriage laws and limited rights of exit have combined to promote traditional notions of masculine domination and feminine submission and to cement the "natural" gender order. Fault grounds in particular were informed by and in turn reproduced and reinforced the separate-spheres ideology by policing the ways in which men and women performed gender within marriage. By limiting exit and simultaneously defining marital relations in ways that perpetuate status inequalities between spouses, the state has shored up the patriarchal family and denied women the equality and dignity that they are entitled to as citizens. These legislative badges of state-imposed female disempowerment must be eliminated as part of the constitutional movement towards a more just and equal society.

Moreover, the contemporary calls to reinstate a facially neutral fault scheme are also suspect according to a formal equality theory. This Article has exposed such divorce-restrictive regulations as animated, at least in part, by a constitutionally impermissible purpose. These antidivorce proposals would not only impose gender-specific burdens on women, but also reflect status-based judgments about women's capacities, roles, and destinies from which they have been emancipated by modern sex-discrimination jurisprudence. Just as importantly, because divorce restrictions coerce women to perform the work of wifehood without altering the conditions that continue to make such work a principal cause of their subordination, they are a form of status-reinforcing state action that offends constitutional guarantees of equal protection.

A unilateral right to no-fault divorce, by contrast, accords women the dignity of controlling their personal relationships and deciding for themselves, as self-governing moral agents, for how long and on what terms

to stay in marriage. A liberal dissolution right is a crucial form of self-defense against the subjugating effects of private patriarchy which enables women to disencumber themselves from stereotypes that would confine them to constraining sex role prescriptions. Finally, the unimpeded availability of marital freedom may promote gender equality as an organizing principle of family life, by giving women leverage within marriage to resist unjust marital arrangements and to establish more egalitarian unions after divorce.

All in all, a right to unilateral no-fault divorce is fundamental for women attempting to navigate the world as equals and is imperative for a constitutional democracy committed to disestablishing gender hierarchy and second-class citizenship. Marital freedom is thus not simply a legal remedy for broken hearts, but the linchpin of a social order committed to securing genuine gender equality and human dignity for all women.