

Divorce as a Gender Equality Right

The laws of marriage have long served as among the chief vehicles for cultivating women's social and economic dependency on men and inflicting status-harm on women as a class. The laws of divorce, especially the fault regime that has dominated marital dissolution laws for much of American history, have likewise functioned to maintain gender hierarchy and reify sex-role stereotypes. Even today, the egalitarian marriage is still more a myth than reality. American women in the twenty-first century routinely encounter – and struggle against – structural inequities in their marriages, which permeate all gender relations and impede women's full citizenship stature.

Because of the role marriage has played in fostering both private and public patriarchy, feminists have insisted that equality in education, politics, and the workplace cannot not be fully realized without corresponding changes in the gender hierarchy of the marital family. Accordingly, many liberal feminists have advocated egalitarian marriage, which would "encourage and facilitate the equal sharing by men and women of paid and unpaid work, of productive and reproductive labor," as a crucial step towards rectifying women's continuing subordination and economic vulnerability. More radical feminist family theorists, led by Martha Fineman, have gone so far as to call for the abolition of marriage altogether.

Neither solution, however, is adequate. The first – egalitarian marriage – is a practical impossibility for the foreseeable future: it would require abolition of gender hierarchy where it is most entrenched. The second – abolition of marriage – is misguided: it would deprive individuals and society of the recognized benefits of marriage without guaranteeing women legal protection against subordination in intimate relationships.

Instead, I develop a modest, yet essential, legal innovative construct – a constitutional right to unilateral, no-fault divorce. The substance of this right is not purely negative. I capture its affirmative dimension with the appellation "marital freedom." The right to marital freedom is imperative to combat marital subordination, one that is derived from multiple interpretations of America's constitutional commitment to gender equality. I develop the sex equality argument for the right to divorce in three Parts.

Part I presents the constitutional edifice of gender equality. It begins with the Court's conceptualization of the Equal Protection Clause in formal terms, using the "antidiscrimination" principle, and then considers several competing, substantive visions of constitutional equality, most prominent among these theories is the "antisubordination" principle.

Parts II and III examine how the substantive and formal approaches to gender equality apply to the right to divorce. Part II employs the substantive theories of gender equality to the divorce context. It analyzes how laws that effectively compel wifedom by limiting exit injure women, showing that state action is implicated even when a husband's subordination of his wife appears to be "private." First, it opens with a historical account, examining how the common law of marital status fostered the unequal position of women in marriage, how divorce restrictions served to lock women in patriarchal relationships, and how leading feminists of the era recognized the right to divorce as a substantive gender equality imperative. Second, it documents the inequalities that plague modern marriages and continue to compromise women's full

citizenship, considering sociological evidence on the division of household labor, women's lesser economic power and decision-making authority, and their heightened physical vulnerability. Third, it analyzes women's divorce accounts to establish that most women who seek marital freedom do so to escape inegalitarian relationships they find demeaning and to expose divorce as an experience that enhances women's independence and capacities for personal self-government. I conclude that the right to divorce is an important antisubordination remedy that substantially enhances women's control over their own lives, and over their status, more generally, as equal citizens.

Finally, Part III constructs a constitutional argument for marital freedom under the Supreme Court's formal, antidiscrimination-oriented jurisprudence of the Equal Protection Clause. First, I show that divorce-restrictive regulations historically were animated by discriminatory purposes and that fault grounds to this day are judicially applied in ways that raise equal protection concerns. Second, I show that the contemporary movement to restrict divorce repeats history: its impetus is to shore up the traditional family structure based on constitutionally-proscribed views that subordinate women to the roles of wives and mothers.

This makes the access to unilateral no-fault divorce a fundamental right for women attempting to navigate in the world as equals and an imperative for a constitutional system committed to disestablishing gender hierarchy.