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Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment

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EQUALITY THEORY, MARITAL RAPE, AND THE PROMISE OF THE FOURTEENTH AMENDMENT

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I. INTRODUCTION

During the 1980s a handful of state judges either held or opined in dicta what must be uncontrovertible to the feminist community, as well as to most progressive legal advocates and academics: the so-called marital rape exemption, whether statutory or common law in origin, constitutes a denial of a married woman's constitutional right to equal protection under the law.[1] Indeed, a more obvious denial of equal protection is difficult to imagine: the marital rape exemption denies married women protection against violent crime solely on the basis of gender and marital status. What possibly could be less rational than a statute that criminalizes sexual assault, and punishes it severely, unless the victim and assailant are married? What could be more obvious than the plain fact, repeatedly documented, that these state laws are derived from a sorry history of discriminatory, misogynist,

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1. *See, e.g.*, Merton v. State, 500 So. 2d 1301, 1305 (Ala. Crim. App. 1986); Williams v. State, 494 So. 2d 819, 830 (Ala. Crim. App. 1986); People v. Liberta, 64 N.Y.2d 152, 474 N.E.2d 567, 573-76, 485 N.Y.S.2d 207, 213-16 (1984); People v. DeStefano, 121 Misc. 2d 113, 163-64, 170, 467 N.Y.S.2d 506, 515-16 (County Ct. 1983); Shunn v. State, 742 P.2d 775, 778 (Wyo. 1987).

and hateful denials of a married woman's legal right to equal dignity and respect? Where could one possibly find a sharper example of a state law that explicitly insulates and protects a separate political system of subordination and violence against a group of citizens, and thereby denies those citizens protection of the laws given others? So why has not the Supreme Court held as much?

Indeed, that a number of feminist commentators[2] and a few state court appellate judges[3] felt it necessary to argue to a still skeptical and often hostile listening audience that marital rape exemptions constitute a denial of the fourteenth amendment's guarantee that no state shall deny to any group of its citizens equal protection of its law[4] evidences the degree to which women's injuries still are trivialized and rendered invisible by a pervasively misogynist legal, political, and social culture. That the arguments of these advocates met with such limited success in abolishing the exemption reveals how short a distance women have come, and how far we have yet to travel, toward full equality and the necessary result of equality: an assurance that the state will provide a modicum of safety in our private lives against sexual assault.

Some states did make limited progress in reforming marital rape law during the 1980s. A few abolished the exemption entirely[5] — but only a few. The majority continue to permit rape or sexual assault within marriage by according it a lower level of criminality than extramarital rape of sexual assault, by criminalizing only certain kinds of marital rape, or by criminalizing only first-degree rapes.[6] Some

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2. *See* Freeman, *But If You Can't Rape Your Wife, Who(m) Can You Rape?: The Marital Rape Exemption Re-Examined*, 15 FAM. L.Q. 1, 29 (1981); Note, *To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255 (1986) [hereinafter NOte, *To Have and To Hold*]; Note, 24 J. FAM. L. 87, 87-93 (1985); Comment, *For Better or for Worse: Marital Rape*, 15 N. KY. L. REV. 611, 631-34 (1988).

3. *See, e.g.*, People v. Liberta, 64 N.Y.2d 152, 163-64, 170, 474 N.E.2d 567, 573-76, 485 N.Y.S.2d 207, 213-16 (1984) (opinion by Judge Wachtler advancing the most complete argument).

4. U.S. CONST. amend. XIV.

5. For examples of judicial abolishment of the marital rape exemption, see *supra* note 1. For examples of legislative abolishment of the exemption, see ALASKA STAT. § 11.41.443 (repealed 1989); COLO. REV. STAT. § 18-3-409 (Supp. 1989); FLA. STAT. § 794.011 (1989); ME. REV. STAT. ANN. tit. 17A, § 251 (1983 & Supp. 1989); *id.* § 252 (repealed 1989); NEB. REV. STAT. §§ 28-319 to -320 (1985); N.J. STAT. ANN. § 2C:14-5(b) (West 1982); N.D. CENT. CODE § 12.1-20-01 to -03 (1985 & Supp. 1989); OR. REV. STAT. §§ 163.355-.375 (1987); VT. STAT. ANN. tit. 13, § 3252 (Supp. 1989); WIS. STAT. ANN. § 940.225(6) (West Supp. 1989).

6. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1406.01 (1989) (criminalizing sexual assault of a spouse); CAL. PENAL CODE § 262 (West 1988) (no arrest or prosecution unless spouse uses force or threat and violation is reported within 90 days, full exemption for lower degrees); CONN. GEN. STAT. ANN. § 53a-70(b) (West 1985) (first degree rape only); HAW. REV. STAT.

states, ironically in the name of reform, may have worsened the problem of marital rape by extending the exemption to include women who rape their husbands in order to make the exemptions appear "gender neutral."[7] This extension provides a false neutrality to an institution that almost invariably endangers only women's lives.[8] Other states have limited the exemption to exclude married partners who live apart[9] and, in a few cases, married partners who have begun

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§ 707-730-732 (Supp. 1989) (first through third degrees only); IDAHO CODE § 18-6107 (Supp. 1989) (only if force or threat of immediate bodily harm); ILL. ANN. STAT. ch. 38, para. 12-18(c) (Smith-Hurd 1989) (rape must be reported within 30 days; criminal action only allowed if force used); IOWA CODE ANN. §§ 709.2-.4 (West 1979 & Supp. 1989) (first and second degree only); KAN. STAT. ANN. §§ 21-3501.02, .17, .18 (1983) (husband can be charged with rape, but not sexual battery or aggravated sexual battery); MD. CRIM. LAW CODE ANN. § 27-464D (Repl. vol. 1987 & Supp. 1989) (husband can be charged with rape only if force used); MICH. COMP. LAWS ANN. § 750.520l (West Supp. 1989) (no crime for lesser degrees); MINN. STAT. ANN. § 609.349 (West 1987) (no crime for lesser degrees); MONT. CODE ANN. §§ 45-5-502 to -503 (1989) (husbands and cohabitants cannot be charged with sexual assault, can be charged with rape); NEV. REV. STAT. ANN. § 200.373 (Michie Supp. 1989) (crime of "sexual assault of spouse" available only if force or threat present); N.H. REV. STAT. ANN. § 632-A:2 (1986 & Supp. 1989) (no crime for lesser degrees); 18 PA. CONS. STAT. ANN. § 3103 (Purdon Supp. 1989) (no crime for lesser degrees); *id.* § 3126-27 (Purdon 1983); R.I. GEN. LAWS § 11-37-1-6 (1989) (husband cannot be charged with first degree rape; no crime for lesser degrees); S.D. CODIFIED LAWS ANN. § 22-22-1.1 (1988) (spouse cannot be charged with rape unless spouses are no longer cohabitating or are legally separated, spouse uses force, and complaint is made within 90 days of the occurrence); TEX. PENAL CODE ANN. §§ 21-02(a), -12 (Vernon 1989) (husbands can be charged with only "aggravated sexual assault"); VA. CODE ANN. § 18.2-61 (1988) (10-day reporting requirement; spouse can be charged only with first and second degree rape); W. VA. CODE § 61-8B-6 (1989) (first degree rape only; lesser penalty than nonmarital rape); WYO. STAT. § 6-2-307 (1989) (first and second degree only).

7. *Cf.* S.D. CODIFIED LAWS ANN. § 22-22-1.1 (1988) (recognizing spousal rape).

8. *See* Note, *supra* note 2, at 1270-72.

9. *See, e.g.*, KY. REV. STAT. ANN. § 510.010(3) (Baldwin 1989) (action only if petition filed for separation or divorce and parties living apart); LA. REV. STAT. ANN. § 14.41 (West 1986) (spouse cannot be charged unless parties living apart and offender knows that a temporary restraining order or injunction has been issued); MD. CRIM. LAW. CODE ANN. § 27-464D (Repl. vol. 1989 & Supp. 1989) (if living together, actual force, rather than threat of force, required); MISS. CODE ANN. § 97-3-99 (Supp. 1989) (spouse cannot be charged for sexual battery unless parties living apart; statute silent on rape); MO. ANN. STAT. § 566.010.2 (Vernon Supp. 1989) (husband cannot be charged unless parties living apart, pursuant to legal separation or living apart where wife has received restraining order); MONT. CODE ANN. § 45-5-511 (1989) (husbands can be charged for rape, but not sexual assault unless parties living apart); N.M. STAT. ANN. §§ 30-9-10 to -11 (1984) (spouse cannot be charged unless couple is living apart or either spouse has filed for divorce); OKLA. STAT. ANN. tit. 21, § 1111 (Supp. 1990) (spouse cannot be charged unless couple living apart petition for separation or divorce is pending or granted, and force is used); S.C. CODE ANN. § 16-3-658 (Law. Co-op. 1985) (spouse cannot be charged unless couple living apart by court order); S.D. CODIFIED LAWS ANN. § 22-22-1.1 (1988) (husband cannot be charged unless couple living apart); TENN. CODE ANN. § 39-2-610 (1982) (spouse cannot be

dissolution proceedings.[10] These restrictions on the exemption, however, are a mixed blessing. While the restrictions undoubtedly limit the application of the exemption, they further entrench the core rationale of the exemption: the protection of the privacy and integrity of the true marital relationship against legal intervention justifies whatever burden forced sex imposes on a married woman's safety and privacy. Furthermore, movements in other states to extend the marital rape exemption offset these limits. For example, some states have extended the marital rape exemption to include cohabitants and formerly married persons.[11]

This pattern of one-step-forward, two-steps-back progress on the criminalization of marital rape illustrates the general pattern of thinking in the 1980s regarding marital rape. While virtually every progressive commentator, judge, or legislator (feminist and otherwise) who seriously has considered the issue readily has concluded that these laws violate equal protection,[12] and while explicit vocal support from conservatives for the exemption almost entirely has disappeared from scholarly literature,[13] no major upheaval of the law reflects or foreshadows such progressive unanimity. No congressional action, or any Supreme Court analogue to *Brown v. Board of Education*,[14] has enshrined in the country's fundamental law the political judgment that "equal protection of the law" minimally guarantees an equal protection from the states' criminal codes and enforcement agencies against violent sexual assault, regardless of marital status. In other words, no fundamental legal reform exists to bring these laws into line with what is perceived by commentators to be a constitutional mandate. Thus, the change in social consciousness that often follows constitutionally mandated legal reform has not come to fruition. Those who under-

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charged unless couple living apart and one spouse has filed for separation or divorce); UTAH CODE ANN. § 76-5-407 (1989) (spouse cannot be charged unless couple living apart by court order).

10. *See, e.g.*, IDAHO CODE § 18-6107 (1989) (action only if separated or filing for divorce).

11. Many states include cohabitants within the scope of the marital rape exemption. *See* CONN. GEN. STAT. ANN. § 53a-70(b) (West 1985); KY. REV. STAT. ANN. § 510.010(3) (Baldwin 1989); MONT. CODE ANN. § 45-5-511 (1989); N.M. STAT. ANN. § 30-9-10 (1989); 18 PA. CONS. STAT. ANN. § 3103 (Purdon 1983).

12. *See supra* notes 1-4 and accompanying text.

13. *But see* Hilf, *Marital Privacy and Spousal Rape*, 16 NEW ENG. L. REV. 31, 43-44 (1980) (limited spousal immunity supports marital privacy rights and encourages reconciliations); Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 74 (1952) (policy of protecting reliance on behavior of others should prevail over the demand for protection of the woman's right to withhold consent).

14. 347 U.S. 483 (1954).

stand the exemption view it as an antiquated holdover from an earlier and discarded view of women.[15] But the educated public, and even the legal community, lacks general awareness that these laws not only inflict extensive damage on innumerable women's lives, but also constitute a constitutional outrage.

Later in this essay,[16] I briefly will summarize and endorse the conclusion of the feminist writers and progressive courts that have considered the issue: the marital rape exemption unconstitutionally denies married women fourteenth amendment equal protection rights.[17] That argument, however, is not the central concern of this paper. For the most part, I will assume, rather than argue, that a state's refusal to protect married women against violent sexual assault is unconstitutional. Instead, I want to use the marital rape laws and the movements directed toward their reform to raise two related issues about equal protection ideology and equality theory. The first issue is theoretical; the second is strategic.

The theoretical issue is the following: Why is it that this overwhelmingly obvious constitutional flaw in our criminal law has not, in the last ten years, attracted more attention, generated more outrage, and simply collapsed of its own unconstitutional weight? Why, after several decades of case law and academic commentary on the meaning, original intent, and political vision embodied in the equal protection guarantee of the fourteenth amendment, do we still have marital rape exemptions, the express purpose of which is to deprive married women of the state's protection against rape? My argument will be that the endurance of marital rape exemptions, despite their apparent unconstitutionality,[18] partly results from the dominant understanding of the meaning of equality and constitutionally guaranteed equal protection. This understanding, particularly as elaborated by the present Supreme Court, obfuscates the unconstitutionality of marital rape exemptions. No matter how unequal the laws are, given the current state of equal protection doctrine, no obvious, compelling argument sustains the conclusion that they are unconstitutional. Consequently, although an emerging consensus indicates that these laws surely must be unconstitutional, no widely agreed-upon argument sustains that conclusion.

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15. *See, e.g.*, Note, *To Have and To Hold*, *supra* note 2, at 1270.

16. *See infra* text accompanying notes 95-101.

17. For the argument in detail, see Note, *To Have and To Hold*, *supra* note 2, at 1267-72.

18. *Cf.* Eisenstadt v. Baird, 405 U.S. 438, 446-54 (1972) (by providing dissimilar treatment for married and unmarried persons who are similarly situated, contraception statute violated the equal protection clause of the fourteenth amendment).

The difficulty in presenting a case that demonstrates the blatant unconstitutionality of these laws, however, does not suggest that they are constitutional. Rather, it illustrates the inadequacies and ambiguities in the equality theory within which equal protection arguments must be framed. In other words, the endurance of marital rape exemptions partly is a function of the inadequacy of the dominant or mainstream political theory of equality, which informs dominant legal understandings of the constitutional mandate of equal protection.[19]

This much of the argument should not be surprising or unfamiliar to a feminist audience; feminist and progressive discontent with traditional equality theory and equal protection law reached an all-time high in the 1980s.[20] The endurance of marital rape exemptions simply illustrates the inadequacies in modern equal protection law alleged by feminists and progressives over the last decade. More specifically, however, and perhaps more controversially, I will argue that the inadequate theories of equality and equal protection that we have inherited and that have muted the force of constitutional challenges to the marital rape exemption are not solely the product of the bad faith, sexist, racist, classist, or conservative politics of the Supreme Court Justices who authored those doctrines. They also are a product of the adjudicative institutional context in which those theories have evolved. Mainstream views on the meaning of equality and equal protection respond not only to political biases, but also to the institutional constraints of their judicial origins. The Supreme Court, and therefore the rest of us, including the feminist community, generally have examined, developed, and debated the meaning of the fourteenth amendment equal protection guarantee in the particular context of judicial challenges to state classifications. This adjudicative context, I believe, has skewed and limited our understanding of equal protection and our understanding of how we should make the promise of equal protection a reality. More specifically, our confinement to the judicial forum has truncated a wide range of potential constitutional claims, including the particular claim that marital rape exemptions violate the fourteenth amendment.

This paper proposes not so much a novel approach to marital rape exemption or to the fourteenth amendment, but rather a new direction of progressive and feminist-informed constitutional arguments. I will urge that we should direct our arguments away from a hypothetical

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19. *See infra* text accompanying notes 69-93.

20. *See, e.g.*, C. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 215-37 (1989); Becker, *Prince Charming: Abstract Equality*, 1989 SUP. CT. REV. 201.

judicial audience and toward a congressional audience. If the dominant understandings of equal protection truly are inadequate, and if judicially developed law has determined the content of those inadequate understandings, then "equal protection" might take on a very different and more helpful meaning if developed in a congressional, rather than a judicial, context. That very different meaning might highlight, rather than obfuscate, the unconstitutionality of the marital rape exemptions. Congress might respond more aggressively than the Court to the unconstitutionality of marital rape exemptions, not only because of the different political compositions of the Court and Congress, but also because equal protection as a political principle guiding Congress might carry a broader meaning than does equal protection as a legal principle binding the Court.

Part II of this essay discusses three contrasting understandings of the meaning of equal protection: the Supreme Court's dominant rationality approach; Professor MacKinnon's proposed dissident "antisubordination" approach; and what I label the "pure protection" understanding, which may be closest to the original meaning of the clause.[21] Part III of this essay will then re-examine the constitutionality of marital rape exemptions in light of these competing views of the meaning of equal protection.[22] The essay will posit that even if we accept the traditional, "rationality" model of equal protection, marital rape exemptions are unconstitutional. The arguments, however, are relatively weak because of the content of the rationality model itself. Alternatively, if we understand equal protection in either the antisubordinationist sense (that no state shall participate in the social subordination of one group by another) or in the historical protectionist sense (that no state shall deny to any group of citizens the protection of its police power against criminal assault) then marital rape exemptions clearly are unconstitutional. Judicial adherence to the rationality model of equal protection, consequently, obfuscates this unconstitutionality and obstructs, or at least impedes, the abolition of these harmful exemptions.

Part IV of this essay demonstrates that the dominant but inadequate rationality view of equality is largely a product of the adjudicative context in which that theory arose.[23] In spite of the Supreme Court's rejection of them over the last few decades, the antisubordinationist and protectionist equal protection theories, from time to

21. *See infra* text accompanying notes 27-67.
22. *See infra* text accompanying notes 69-93.
23. *See infra* text accompanying notes 95-101.

time, have been understood as the primary meaning of the clause. However, their collective mandate that no state shall perpetuate, encourage, or insulate the social subordination of one group of citizens by another by withholding from the subordinated group the protection of its law historically has been met through congressional, rather than judicial, action.[24] Part V of this essay urges feminists, over the next decade, not only to continue to press the Court to rule against these laws on the basis of their irrationality, but also to urge Congress to respond to the mandate of section five of the fourteenth amendment by undertaking consideration of a "Married Women's Privacy Act."[25] The purpose of the Act would be to guarantee all women the full protection of the states' laws against criminal assault.

II. THREE THEORIES OF EQUALITY

A. *The Rationality Model*

The dominant judicial interpretation of the equal protection clause is that the clause generally seeks to ensure that legislators govern in a fair-handed and well-motivated way, rather than out of a malicious desire to hurt some groups or a biased desire to help others.[26] Of course, all legislation unavoidably burdens some groups while helping others, but the Constitution requires the legislative allocation of those burdens and benefits to be directed toward legitimate governmental ends. Accordingly, legislation must be rational, or evenhanded: legislation must not be the product of bias, malice, or differing levels of concern for some citizens over others. Rather, legislation and the classifications of legislation must be rationally related to legitimate state ends. In accord with general usage, I call this dominant view the rationality model of equal protection.[27]

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24. Examples include the Civil Rights Act of 1875, partially struck in The Civil Rights Cases, 109 U.S. 3 (1883), and the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000a to 2000h-5 (West 1982), upheld in Katzenbach v. McClung, 379 U.S. 294 (1964).

25. *See infra* text accompanying note 105.

26. For a general discussion, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-13 to -17, at 1465-88 (1988).

27. For general discussions of the rationality approach to equal protection, see J. ELY, DEMOCRACY AND DISTRUST 145-48 (1980); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-24 (1972); Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487 (1979); Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1697-98, 1713-14 (1984); Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 569-77 (1982).

The rationality model, as it has developed doctrinally, imposes three easily summarized constraints upon legislative classifications.[28] First, as the name of the model implies, legislative classifications must be rational: "like groups must be treated alike." Thus, a legislative classification that defines groups *A* and *B*, divides them, and then treats them differently must "map on to" or "mirror" a distinction in the world between groups *A* and *B* that is relevant to some legitimate state objective. If no relevant difference between groups *A* and *B* exists, then legislation that treats them differently is irrational and unconstitutional because it denies the citizens in the burdened group equal protection of the laws. For example, if a statute prohibits minors under the age of sixteen from applying for driver's licenses, some "real world" difference must exist between those under and over sixteen that correlates with some legitimate state objective. In other words, some correlation must exist between maturity and propensity to drive safely. If no such correlation exists, evidence of the irrational desire to burden young teenagers must have motivated the legislators rather than by a legitimate governmental aim. Because most of us generally accept the notion of a correlation between maturity and driving ability, the cut-off age seems to be constitutionally unassailable, at least on rationality grounds.

The rationality model imposes a second constraint on classification. The legislative classification must be relevant to a legitimate end. If the classification furthers a legitimate state objective only marginally or not at all and imposes a significant cost on the burdened class, then the legislation might be unconstitutional. Applying this requirement to the driving statute and assuming that age correlates with driving ability, the exclusion of those under sixteen from the driving population must further sufficiently the legitimate goal of driving safety in order to justify the burden placed on teenagers — the lack of mobility. Again, because most people would feel fairly confident that the exclusion does improve driving safety and because we are not terribly concerned about obstacles to teenage mobility, the driving statute passes the relevance requirement just as it did the rationality requirement.

Finally, the rationality model requires that the articulated legislative end be a legitimate one. Legislators may classify and differentially assist or burden certain groups, but only if they are doing so in the public interest or toward the vindication of some public value.

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28. For a detailed discussion of these constraints, see L. TRIBE, *supra* note 26, §§ 16-1 to -6, at 1438-54.

Moreover, the end toward which the classification is directed must be an end that legislators are permitted to pursue. Legislators may not classify for the malicious satisfaction of hurting one sector of the community while helping another. The driving statute survives this final test, for public safety surely is a legitimate legislative end. The statute, therefore, is not aimed at maliciously burdening young teenagers.

These three basic principles of rationality, relevance, and legitimacy provide the foundation for modern equal protection jurisprudence. These three constraints motivated the Court to adopt various levels of "scrutiny" for different types of legislation. The rationality, relevance, and legitimacy requirements also explain the peculiarities of Supreme Court doctrine regarding legislation that classifies on the basis of gender[29] and the "intent" requirement that facially neutral legislation that adversely impacts upon a particular group must meet.[30] A brief summary of these three doctrinal areas reveals the Court's general commitment to rationality.

First, the logic of the Court's two-tiered, or heightened versus low-level, review more or less follows directly from rationality principles. Under the rationality, relevance, and legitimacy principles summarized above, the Court has conceded that most economic or social legislation is presumptively rational, relevant to legitimate governmental ends, and, hence, constitutional.[31] After all, relevance, rationality, and legitimacy, are all relative qualities, and the Court has developed a pattern of general deference to legislative judgment in the economic and social spheres. Classifications that involve race, however, are entirely another matter. The Court generally has held that most racially explicit classifications are presumptively suspect, and, therefore, their rationality, their relevance, and their legitimacy must be strictly scrutinized.[32] Such strict scrutiny typically has resulted in the invalidation of these statutes.[33] Racial classifications presumptively fail to

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29. Craig v. Boren, 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives").

30. Washington v. Davis, 426 U.S. 229, 239-41 (1976) (statute must have a racially discriminatory purpose to violate equal protection clause).

31. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (several provisions of state statute governing opticians were rationally related to legitimate governmental ends and did not violate equal protection clause of fourteenth amendment).

32. *See* City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 720-23 (1989) (plurality opinion) (searching judicial inquiry required to determine whether racial classifications are suspect or benign); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (racial and ethnic distinctions are inherently suspect and require "exacting judicial examination"); Brown v. Board of Educ., 347 U.S. 483, 495 (1954) ("Separate educational facilities are inherently unequal.").

33. *See* Loving v. Virginia, 388 U.S. 1, 9-11 (1967) (strict scrutiny applied to determine that interracial marriage proscription statute constituted invidious racial discrimination). *But*

mirror a real distinction in the world between the classes they categorize and presumptively fail to further legitimate governmental ends. Hence, blacks and whites possess no inherent real differences, and the Court finds irrational legislative classifications that create differences between blacks and whites. Further, such classifications, whether rational or not, are relevant to no legitimate ends.[34] Thus, the Court routinely engages in a heavy presumption that racial classifications are not good-faith attempts to classify based on real world differences that are relevant to legitimate goals. Rather, the Court views these classifications as badly motivated attempts to burden already disadvantaged subordinate groups.

The Court seems to believe that gender classifications fall somewhere between economic classifications (presumptively legitimate) and racial classifications (presumptively illegitimate). According to the Court, some biological and social "real differences" between men and women do exist; consequently, some legislative classifications that distinguish men and women may be rational.[35] Further, women have not been targeted as a class in the same way as blacks have, and, therefore, the Court does not as readily presume that gendered classifications are badly motivated.[36] Unlike racial classifications, gender classifications are not necessarily irrational, and the ends toward which they aim are not necessarily illegitimate. Thus, the judicial scrutiny that the Court applies to gender classifications is higher than that which the Court applies to economic legislation, but not as strict as that which the Court applies to racial classifications. While the Court has struck down some gender-based statutes,[37] it has upheld more than a few.[38]

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see Korematsu v. United States, 323 U.S. 214, 216, 223 (1944) (strict scrutiny applied, but act upheld as not constituting invidious racial discrimination).

34. *See Loving*, 388 U.S. at 9-11 (classifications based solely on race have no legitimate purpose).

35. *See* Rostker v. Goldberg, 453 U.S. 57, 79 (1981) (gender classification requiring only men to register for draft, not invidious and not unconstitutional); Michael M. v. Superior Court, 450 U.S. 464, 468-69 (1981) (plurality opinion) (California statute punishing only males for raping females does not unconstitutionally discriminate on the basis of gender).

36. This insight explains the Court's uncertainty over whether gender-based discriminations hurt or help women, or discriminate against men rather than women. *See, e.g.*, Califano v. Webster, 430 U.S. 313 (1977) (per curiam) (more lenient formula to calculate social security benefits for women than men); Califano v. Goldfarb, 430 U.S. 199, 207-08 (1977) (plurality opinion); *id.* at 217-18 (Stevens, J., concurring in the judgment) (gender-based difference between widow and widowers for social security benefits).

37. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

38. *See, e.g.*, Califano v. Webster, 430 U.S. 313 (1977); Schesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974).

Finally, as the Court held in *Washington v. Davis*,[39] legislation that does not facially discriminate between men and women or whites and blacks, but nevertheless adversely affects the interests of persons in those classes, is not, for that reason alone, unconstitutional.[40] Rather, facially neutral legislation is unconstitutional only if the law-making body intended its adverse impact.[41] This "intent" requirement with respect to fourteenth amendment challenges to race-neutral or gender-neutral legislation also can be derived from the Court's general commitment to rationality as the goal of equal protection and irrationality as the targeted evil. Under the rationality model, a general rule applied to all equally will not be found irrational because the burden of the rule falls more heavily upon one group than upon another. Instead, a rule is irrational only if the rule treats similarly situated groups differently. Such rules will affect adversely some groups because of the differential situation of the burdened groups: the rule treats differently situated groups similarly rather than similarly situated groups differently. However, if irrationality means the differential treatment of similar groups, then even-handed treatment of different groups, regardless of its impact, is neither rational nor irrational, but simply different. Furthermore, no obvious reason compels doubt of the authors' motives of such race-neutral or gender-neutral legislation or the legitimacy of the ends the offending legislation purportedly serves. Thus, the *Washington v. Davis* holding could be restated in this way: legislation that adversely injures blacks or women, but does so in spite of its facial evenhandedness, violates neither notions of "logical rationality" (that likes be treated alike) nor norms of "ethical rationality" (that legislation be nonmalicious in its origin and general in its societal impact). Therefore, for such legislation to violate fourteenth amendment norms, the challenger must show a specific legislative intent to harm. Absent a showing of specific intent, the Court will uphold a facially neutral statute as constitutional.

B. *The Attack on Formal Equality and the Rationality Model*

The central judicial presumption of the rationality model, that racial classifications always are irrational and that gender classifications usually are irrational, rests on a theory of equality grounded in a universalist vision of our shared human nature. That vision is unquestionably noble and appealing in its aspiration. Its guiding assumption is that

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39. 426 U.S. 229 (1976).
40. *See id.* at 239, 242.
41. *See id.* at 239-41.

all persons — women, men, blacks, and whites — are more or less the same with respect to the traits and issues that affect or should affect political decisionmaking.[42] Women as well as men, and blacks as well as whites, wish to lead and can lead meaningful lives ennobled by participation in the shared, political life of the public sphere, enriched by fairly compensated and intrinsically rewarding work in the private sphere, and enlivened by stimulating, nurturant relationships in the intimate sphere. Blacks no less than whites, and women no less than men, benefit from the liberal arts and educational opportunities deepening intellectual adult life. Blacks and women, like whites and men, need and value opportunities to develop athletic potential. Many women, like many men, treasure and pursue the opportunity to enlist in the country's armed services and willingly devote their lives to strengthen the country's defense capabilities against outside aggression. Women, like men, and blacks, like whites, can be competent and fair jurors, estate executors, lawyers, and doctors. The list could be extended endlessly. Legislation that classifies on the basis of gender or race and that burdens women's or blacks' political, economic, athletic, or educational opportunities in any sphere in which women and men and blacks and whites are similarly situated is irrational, and hence, unconstitutional. The universalist vision promotes this formal or legal ideal of equality and provides the basis for the rationality interpretation of the equal protection clause. In all areas of life in which blacks and whites and women and men are the same, the legislator must treat them as the same.

During the 1980s feminist legal theorists registered increasing dissatisfaction with the rationalist model of equal protection, the formal or legal vision of equality toward which it aspires, and the universalist conception of human nature in which it is rooted.[43] Such feminist dissatisfaction with formal equality stems not so much from a suspicion that the Court's practice cannot live up to the promise of equal treatment, but from the nature of the promise itself. Formal equality — across-the-board equal treatment of women and men — would have

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42. The vision is also, in some of its forms, unquestionably feminist. For a strong defense and explication of the virtues of the model from a feminist point of view, see Williams, *Notes from a First Generation*, 1989 CHI. LEGAL F. 99.

43. In a recent article capturing both the spirit and the content of this critique, Professor Mary Becker provocatively dubbed the promise of formal equality inherent in the rationality model "Prince Charming." *See* Becker, *Prince Charming: Abstract Equality*, 1989 SUP. CT. REV. 201 (arguing that formal equality would not help and often would hurt women's actual well-being).

only a limited effect on women's lives for two basic reasons. First, women and men are not similar, the universalist premises of the rationality model notwithstanding. To summarize a great deal of recent feminist writings: women have different perceptions and experiences of the social world,[44] different understandings or moral obligations,[45] different perspectives of the biological role in reproduction,[46] different ways of assimilating knowledge,[47] different feelings toward housework and childraising,[48] different vulnerabilities toward different potential harms,[49] different life patterns,[50] and a radically different history.[51] Insistence upon the "sameness" of men and women in the face of undeniable differences between them and social subordination of women by men enshrines male attributes as the "norm" and denies the existence and value of female attributes, pursuits, and ways of life.[52] Any constitutional standard based on the theory that men and women are the same will benefit only those women *least* in need of the law's protection — women, such as the "professional women" of the 1980s, who already are most like men.[53] Formal equality will ignore or even hurt those women "least" like men: traditional homemakers and women trapped in low-paying and gender-segregated jobs.[54] Finally, formal equality is irrelevant to *all* women in those spheres of our lives in which we are most clearly unlike men: our more marked vulnerability to sexual assault, our greater involvement in childraising and housework, and our different role in the reproductive process. The rationality model fails because it rests on a false assumption of sameness and aspires toward a goal of similar treatment that will help only marginally a few already-privileged women. Its consequence will be not true equality but further harm to most women.[55]

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44. *See* Fineman, *Challenging Law*, 42 FLA. L. REV. 25 (1990); West, *The Difference in Women's Hedonic Lives*, 3 WIS. WOMEN'S L.J. 81 (1987).

45. C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

46. S. FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION (1970).

47. M. BELENKY, WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND (1986).

48. A. HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME (1989).

49. West, *supra* note 44.

50. T. OLSEN, SILENCES (1978).

51. *Id.*

52. *See generally* Littleton, *Women's Experience*, 1989 CHI. LEGAL F. 23; Note, *Toward a Redefinition of Sexual Equality*, 95 HARV. L. REV. 487, 499 (1981).

53. *See generally* C. MACKINNON, *supra* note 20, at 215-34 (critique of formal equality).

54. *See generally* Becker, *supra* note 43 (critique of formal equality).

55. *See generally id.*

This "sameness-difference" problem with the dominant rationality model has prompted several feminists, notably Christine Littleton, to advocate a modification or reform of the rationality doctrine itself.[56] Littleton has argued that equality should mean not just treating groups the same when they are the same, but also treating them differently when they are different, and doing so in such a way as to ensure a rough equality of outcomes.[57] Under this modified view of the rationality model of equality, which Littleton calls the equal acceptance model, the equal protection clause requires legislators to be "equally accepting" of men and women.[58] If women are the same as men in certain aspects, they should be treated similarly. But in aspects in which women and men differ, the law should be as equally responsive to men's and women's differing characteristics, attributes, needs, values, vulnerabilities, and aspirations. The impulse behind the "acceptance" picture of equality is strikingly feminist: the acceptance model requires legislators not only to treat like groups alike, but also to refrain from inscribing the imprimatur of "normalcy" upon male attributes, characteristics, preferences, and modes of life.

Other feminists, notably Catharine MacKinnon, Ruth Colker, and Mary Becker,[59] argue that the rationality model had a second and deeper problem that Littleton's reform, although well-meaning and even welcome, failed to address. The larger problem with the rationality model is not just that women are different from men in ways which formal equality ignores, but that formal equality itself, whether or not modified by Littleton's "acceptance" amendment, targets the wrong evil.[60] Irrationality, or treating like groups differently, should not be the target of the equal protection clause, nor should rationality, treating like groups alike, be regarded as its goal. Rather, antisubordinationists argue that the social subordination of some groups by others (women by men and blacks by whites) is the target of the equal protection clause. Hence, only substantive equality between these groups, or the end of social subordination, is its goal.[61] The rationality model fails to target the social, economic, and political differences that account for women's subordinate status. A constitutional mandate that legislation must presume a sameness between men and women in the

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56. *See* Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987).

57. *Id.* at 1296-97.

58. *Id.*

59. C. MACKINNON, *supra* note 20; Becker, *supra* note 43; Colker, *Antisubordination Above All Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986).

60. *See* Colker, *supra* note 59, at 1007-16.

61. *Id.*

face of massive inequality will be simply irrelevant to the true causes and nature of women's inequality or will backfire and harm rather than help women. Professor Becker explained the consequences of formal equality:

> Formal equality . . . can effect only limited change. It cannot, for example, ensure that jobs are structured so that female workers and male workers are equally able to combine wage work and parenthood. Nor can it ensure that social security, unemployment compensation, and other safety nets are structured so as to provide for women's financial security as well as they provide for men's. Moreover, women, especially ordinary mothers and wives, have been harmed by the changes effected to date by the movement towards formal equality. Further movement in that direction could bring additional harm. Any other satisfactory and workable general standard to be applied by judges is as yet unimagined and likely to be so for the foreseeable future.[62]

C. *Alternative Understandings of Equal Protection: Antisubordination and Pure Protection*

The critiques of the rationality model summarized above have given rise to a second, and dissident, understanding of the mandate of equal protection. Catharine MacKinnon has delineated this second understanding with great force and eloquence in her writings.[63] Often called the antisubordination model of equal protection, this view perceives the equality that equal protection guarantees as substantive, not formal. Hence, the test of legislation under the equal protection clause is not whether the legislative classification "fits" a pre-existing reality, but rather whether the classification furthers the subordination of women vis-à-vis men or attempts to end that subordination. MacKinnon explained the antisubordination model:

> [The] only question for litigation is whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status. This disadvantage which constitutes the injury of discrimination is not the failure to be treated "without regard to" one's sex; that is the injury of arbitrary differentiation.

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62. Becker, *supra* note 43, at 247.

63. *See generally* C. MACKINNON, *supra* note 20, at 215-37 (development of antisubordination theory of equality).

> The unfairness lies in being deprived because of being a woman or a man, a deprivation given meaning in the social context of the dominance or preference of one sex over the other.[64]

The antisubordination model, then, aspires not to formal equality, but to substantive equality. The goal is not a world in which state legislators treat men and women "the same," but rather a world in which men and women, whether the same or different, are social equals. The antisubordination model envisions a world in which women are no more vulnerable to asault than men are, no less valued than men are, no more underpaid than men are, no less cared for than men are, no less represented than men are, and no less participatory in the public sphere than men are. In sharp contrast to the rationality model, the antisubordination model rests not on a universalist vision of our "shared" human nature, but on a political vision of our present unequal social reality.[65] For constitutional purposes, the relevant issue is decidedly not that women are "the same" as men but are treated differently or that women are different from men and are treated the same. The relevant issue is that women are subordinate to men in the public social, economic, private, and intimate spheres. Thus, the aim of the equal protection clause should be to highlight and rectify that political reality and not to highlight and mirror similarities or differences between men and women. Legislation that promotes or encourages social equality is constitutional, but that which promotes or encourages social subordination is unconstitutional.[66]

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64. C. MACKINNON, SEXUAL HARRASSMENT OF WORKING WOMEN 117 (1979).

65. *See generally* C. MACKINNON, *supra* note 20, at 215-37 (development of antisubordination theory of equality).

66. The antisubordination model has much to commend it, not only to women's progress, but also as a constitutional rule. It is the essence of simplicity. Doctrine developed under this model would not bear the burdens of two-tiered review, suspect class analysis, the real difference doctrine, and the intent requirement. As Professor MacKinnon noted, "the *only* question for litigation" is whether the statute subordinates women, or challenges that subordination. C. MACKINNON, *supra* note 64, at 117 (emphasis added); *see also supra* text accompanying note 64. The antisubordination model of equal protection, however, also is riddled with problems, many of them pragmatic. Most importantly, because of its simplicity, the antisubordination model could be extremely difficult to apply to particular cases: it is much easier to state the standard than to ascertain whether a particular piece of legislation has met the standard. Feminist scholar and lawyer Sylvia Law explains:

> Professor MacKinnon's approach is ambitious, but it adds unnecessary complexity to the application of sex equality doctrine in a large number of cases. The determination of what reinforces or undermines a sex-based underclass is exceedingly difficult. Professor MacKinnon may overestimate judges' capacities to identify and avoid socially imposed constraints on equality. She disregards our history in which

A third possible understanding of equal protection that has received relatively little attention in either feminist commentary or cases, but which may be closer to the plain meaning, intent, and history of the clause than either the rationality or the antisubordination models, is what I call the pure protection model. To deny equal protection might mean that a state refuses to grant to some citizens the protection against private wrongdoing that it grants to others. For example, a state's refusal to protect black citizens from homicidal attacks by whites or a state's passivity in the face of widespread lynching and private violence would constitute a paradigmatic violation of the constitutional guarantee of equal protection of the law. Similarly, as Justice Bradley suggested in *The Civil Rights Cases*,[67] a southern state's refusal to grant a common law cause of action to black travelers to protect them against southern white innkeepers' refusals of service would constitute a violation of the equal protection clause.[68]

In this century, for northern as well as southern municipalities to provide less-than-adequate police protection against violent crime in poorer parts of a city might constitute a denial of the equal protection of the law under the pure protection model. Likewise, for a municipality to employ an all-white police force hostile to the concerns, fears, and interests of black neighborhoods might constitute an equal protection violation. Therefore, under the pure protection model, no less than under the antisubordination model, *Washington v. Davis* is clearly wrong. The pure protection model views the target of the equal protection clause as the denial of the state's protection to some of its citizens from private violence, aggression, and wrongdoing. The goal is a community in which all are equally protected by the state against private encroachment of rights.

One way to describe the vision behind this pure protection model of equal protection, and to a lesser extent behind the antisubordination model, is in terms of state sovereignty. The pure protection model envisions a world in which the state is the sole, legitimate repositor

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> laws justified as protecting women have been a central means of oppressing them. Most fundamentally, her proposed standard may incorporate and perpetuate a false belief that a judicially enforced constitutional standard can, by itself, dismantle the deep structures that "integrally contribute" to sex-based deprivation.

Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1005 (1984).

Even accepting Professor Law's criticism, the major problem with the model is somewhat simpler: for whatever reasons, antisubordination approaches to equal protection, regarding sex or race, have not met with judicial acceptance.

67. 109 U.S. 3 (1883).

68. *Id.* at 25.

of organized force exercised by some individuals against others. The equal protection clause would not tolerate the existence of separate "regimes" of sovereignty, backed by unchecked and private systems of organized violence. The pure protection model requires that we live under only one sovereign — the state. The white race cannot constitute a separate sphere of sovereignty over the black race, nor can men constitute a separate sovereignty over women. Only the state has the power to exercise dominion, through the use of organized violence, over its citizens. Any other exercise of violence and power by one group of citizens over another is criminal, and the state is constitutionally obligated to guard its citizens against such domination.

III. THE CONSTITUTIONALITY OF THE MARITAL RAPE EXEMPTION

Predictably, most of the scholarly commentary and virtually all of the judicial opinions that have addressed the constitutionality of marital rape exemptions have analyzed the constitutionality of marital rape exemptions under the rationality model of equality and equal protection.[69] The commentary and opinions illustrate not only the strength and sensibility of the rationality model, but also the problems and limits of its formal vision of equality, its universalist vision of human nature, and its doctrinal tests of "rationality." These arguments take several different forms, depending on whether the law under scrutiny is gender-specific (exempts wives from rape laws) or gender-neutral (exempts "spouses"). A summary of these arguments follows.

First, some states employ marital rape exemptions that are explicitly gendered: rape is defined as nonconsensual intercourse with a woman other than one's wife.[70] The two-step argument that these gender-specific statutes are unconstitutional is straightforward. First, such gender-specific statutes explicitly legislate on the basis of either gender alone or gender plus marital status. Either classification constitutes a suspect class giving rise to at least the mid-level scrutiny.[71] As the Court has noted on multiple occasions, women have been the objects of stereotypical and stultifying thinking that has seriously compromised their enjoyment of and participation in the public world.[72]

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69. *See supra* note 27 and accompanying text.

70. *See generally* Note, *To Have and To Hold*, *supra* note 2, at 1259-60, 1267-70 (discussing gender-based marital rape exemption statutes and citing states that currently have such statutes in force).

71. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

72. *See supra* note 37.

For that reason alone, legislation that treats women differently from men deserves heightened scrutiny.[73] Furthermore, although the Court never has held as much, historically oppressive treatment renders married women a suspect class. In American and English common law heritage, the law did not acknowledge a married woman's existence.[74] Thus, a law that burdens either women or married women, and marital rape exemptions can do both, should be subject to heightened scrutiny.

Second, under a heightened scrutiny, if the gender-specific legislation is to be sustained, the state must articulate an "important governmental interest" which is "substantially related" to the statutory classification.[75] This articulation, the argument proceeds, a state cannot possibly do. Proponents of the marital rape exemption typically assert that the state's important interest in promoting marital harmony and intimacy, or, alternatively, its interest in encouraging reconciliation of warring spouses, justifies the statute.[76] Yet, the state undeniably has little or no legitimate interest in protecting the harmony or intimacy of a marriage deteriorated to the point of violent sexual abuse, and it has equally as little interest in encouraging the reconciliation of spouses whose relations no longer are consensual, much less harmonious.[77] Thus, because these statutory classifications are not "substantially related" to an important governmental interest, gender-specific marital exemption laws are unconstitutional.

On the other hand, marital exemptions that define rape as nonconsensual sex with anyone except one's spouse, rather than nonconsensual sex with anyone except one's wife, are gender neutral. While these statutes avoid the heightened scrutiny triggered by gender-explicit classifications, they nevertheless also are unconstitutional under traditional rationality standards. A gender-neutral classification that adversely impacts upon women and appears to be motivated by an intention to hurt women is as unconstitutional as is a sex-specific classification.[78] Marital rape exemptions are strikingly easy to trace to misogynist roots, from Hale's infamous argument that a married woman is presumed to consent to all marital sex and, therefore, cannot

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73. *See* Reed v. Reed, 404 U.S. 71, 75-76 (1971).

74. *See* Note, *To Have and To Hold*, *supra* note 2, at 1256-58.

75. *See Craig*, 429 U.S. at 197.

76. *See supra* note 13 and accompanying text.

77. *See* People v. Liberta, 64 N.Y.2d 152, 474 N.E.2d 567, 573, 485 N.Y.S.2d 207, 213 (1984).

78. *Cf.* Washington v. Davis, 426 U.S. 229, 239-42 (1976) (discussing neutral classifications and adverse impacts in a Title VII racial discrimination context).

be raped,[79] to the common law's assumption that marriage results in the unification of husband and wife and that marital rape thus constitutes rape of oneself, a legal impossibility.[80] Whether cleansed through the filter of sex-neutral language or not, the marital rape exemption clearly is rooted in an intention to deprive the married woman of the protection of the state and to subject her to the will, sovereignty, and unchecked violence of her spouse. Because this intention serves no "important governmental interest," gender-neutral marital rape exemptions are unconstitutional as well.

Furthermore, whether gender-specific or gender-neutral, marital rape exemptions create a host of irrational distinctions that underscore their unconstitutionality: between married couples and unmarried couples who cohabitate; between married, but estranged partners still living together and married partners living apart (who often are not included in the scope of the exemption); between partners who have filed for divorce and those who have not; and between partners who have indicated their intentions to end the marital union and those who have not.[81] Apart from the effects of the marital rape exemption on women, and even granting the importance of the state's interest in protecting marital harmony, these distinctions are irrational. What rational, legitimate state goal could possibly justify the lines drawn between these groups?

Paradoxically, perhaps the strongest traditional, rationality-based argument against marital rape exemptions has not appeared in case law. This argument asserts that these statutes create an irrational distinction between married women and all other persons and that this distinction is not justified by real differences between those two groups. The classification and differential treatment of married women rests on the assumption that married women, unlike all other persons, have no interest in receiving protection from the state against violent and sexual assault. But, married women, exactly like men and unmarried women, clearly need physical security in their private spheres. Just as all human beings without the security and dignity of knowing that the state ensures their protection, women cannot lead autonomous, meaningful, and pleasurable lives. Married women need to know that sexual assault against them is criminal and punishable when committed by their husbands. For that matter, they need to know that sexual assault is as criminal when committed against them as would

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79. M. HALE, HISTORIA PLACTORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 636 (1736).

80. For a good discussion of the history of the exemption, see Note, *To Have and To Hold*, *supra* note 2, at 1255-58.

81. *Id.* at 1259-60.

be any intrafamilial crime of violence. The irrational distinction of the marital rape exemption is between the protected needs and rights of the average citizen to be safe from criminal assault and the unprotected same needs and rights of married women. The creation of a class of citizens subject to legalized violence is the core effect, if not the purpose, of the marital rape exemption. Surely, the constitutional guarantee of equal protection must guard against that effect.

Marital rape exemptions, then, are arguably unconstitutional, even under the traditional rationality model of equal protection, for reasons that are at the heart of that model's utopian vision. We do indeed share a common humanity, part of which is to need protection against private violence. Women are as much in need of that protection as are men. Like men, without that protection women are rendered vulnerable to the whim, will, sovereignty, instincts, fiat, and command of those who are stronger. And, like men, when women are rendered weak, they become incapable of living the kinds of lives the ideal liberal state is surely meant to foster: autonomous, pleasurable, productive, civic, and educated. When state passivity renders women vulnerable to private violence, women, like men, become stunted, fearful, self-alienated, childlike, and servile. Women are no more naturally suited to such servility and dominance than are their brothers, fathers, sons, and husbands.

All of these arguments, however, pose serious doctrinal problems. These problems reflect the inadequacies of the rationality model of equal protection and formal equality that have troubled feminists throughout the 1980s. Simply stated, for each argument catalogued above, a fairly obvious legal rejoinder is available, which is equally, if not better, grounded in modern equal protection doctrine. I am not using a linguistic quirk or playing a lawyer's game. My point is not the familiar indeterminacy claim that any legal argument gives rise to an equally credible rejoinder. Rather, the doctrinal and legal bases for the legal rejoinders rest on the fundamental, political reality of women's lives — the irreducible fact of women's subordination to men through unchecked sexual violence. The universalist vision and formal equality aspirations of the rationality model of equal protection simply fail to address this reality. Thus, the very existence and viability of these rejoinders evidence the limits and dangers of current understandings of the equal protection clause.

First, the argument for the unconstitutionality of gender-specific rape exemptions summarized above is anything but airtight. As noted earlier, in contrast to the impossible requirement of a compelling state interest required to sustain racially explicit legislation,[82] gender-spe-

82. *See supra* text accompanying notes 32-34.

cific legislation is constitutional if the state can articulate an "important governmental objective" substantially furthered by the gendered classification.[83] Nothing prohibits a court from determining that protection of marital privacy, insularity, and harmony is such an important state interest that protection of the husband against criminal charges of rape substantially furthers that interest.[84] The political reality that the availability of this legal rejoinder reflects is that, to the mainstream, the very sphere of private subordination that harms women and concerns feminists appears to be not only a legitimate, but also an important or even compelling state interest. This political reality also reflects a deeper social reality. The obstacles to women's equal participation in public life and enjoyment of private life are so thoroughly ingrained in our societal habits, institutions, and thought patterns that they appear not as obstacles to equality, but as the essence of private life. Surely, protecting the allure of romance, the domain of sentiment, and the pleasures of intimacy is a compelling state interest. The bottom line is that the same reality experienced by the raped wife as a daily ritual of violence, abuse, and horror strikes the feminist as unconscionable state passivity in the face of private subordination and strikes the feminist lawyer as the denial of equal protection. But it conceivably appears to the Court as a "important" or "compelling" state interest in marital privacy, marital harmony, and spousal reconciliation.

The argument for the unconstitutionality of gender-neutral marital rape exemptions also rests on shaky ground.[85] The legal uncertainty reflects not the uncertainty or indeterminacy of legal arguments generally, but rather societal ambivalence towards women's equality. Gender-neutral marital rape exemptions undoubtedly are the product of a history of discriminatory attitudes toward women.[86] Nevertheless, a court conceivably could decide that, ancient history notwithstanding, a statute recently cleansed of gender-specific language is freed of its misogynist heritage and that its recent legislative history provides the sole source of its constitutionality. Surely one could argue that gender-neutral marital rape exemptions, similar to the one in the

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83. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

84. Indeed, the "privacy" cases under the substantive due process doctrine, including Roe v. Wade, 410 U.S. 113 (1973), itself, seems to bolster such an argument. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

85. *See supra* notes 78-81 and accompanying text.

86. *See* Note, *To Have and To Hold*, *supra* note 2, at 1267.

Model Penal Code[87] endorsed in this decade, rest not on a desire to harm women, but on a desire to protect the institution of marriage.

As is evidenced by this theory, the presumption that the gender-neutral marital rape exemptions are constitutional because they respect the sameness of men and women ignores the very real differences between husbands and wives. Women and men are very differently situated within marriage. Overwhelmingly, husbands are larger, stronger, and wealthier than wives. A gender-neutral statute that treats spouses similarly by according them the same immunities from rape prosecution and hence the same vulnerability to marital rape ignores these crucial differences and perpetuates the marital subordination of women. As many feminists suggest, in the light of the societal differences between women and men, the presumption of fairness and constitutionality on universalist grounds typically accorded gender-neutral statutes may be generally unwarranted.[88] In the case of marital rape exemptions, however, the presumption of sameness in the face of life-threatening differences looks not only unwarranted but also grotesque.

Most importantly, the arguable constitutionality of all marital rape exemptions, both gender-specific and gender-neutral, vividly exemplifies the antisubordinationist reservations about the rationality model of equal protection. The rationality arguments that underlie traditional equal protection analysis not only are doctrinally unstable, they also overlook the terrifying injustice of these statutes — for precisely the reasons MacKinnon's, Becker's, and Colker's critiques of formal equality suggest. Indeed, the virtue of rationality and the vice of irrationality is worse than irrelevant to the real injustice of these exemptions. After all, rationality problems with these statutes can and sometimes have been cured by extending rather than eliminating the scope of the exception. If married couples and cohabitants cannot rationally be treated differently, the marital rape exemption should be extended to include cohabitants.[89] By the same perverse logic, if married women and unmarried women cannot rationally be treated differently, rape law should be eliminated altogether. At the extreme, if married women and all other persons cannot rationally be treated differently, the criminal sanction should be eliminated. Presumably, these arguments would and should fail, but a model of equal protection that implies their coherence is profoundly wrong.

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87. MODEL PENAL CODE §§ 213.0, .6 (1989).
88. *See supra* notes 43-64 and accompanying text.
89. *See supra* note 11.

The irrationality of marital rape exemptions is not their fundamental flaw. The evil flaw of these exemptions is not that they irrationally treat married couples differently from cohabitants, or married women differently from unmarried women, or husbands differently from rapists unacquainted with their victims, or women differently from men. The evil is that they legalize, and hence legitimate, a form of violence that does inestimable damage to all women, not only to those who are raped. In addition to the obvious violence, brutality, and terror marital rape exemptions facilitate, marital rape exemptions, like the rapes they legalize, also sever the central connection to selfhood that links a woman's pleasure with her desires, will, and actions.[90] The will of the married woman who learns to accept routinized rape is no longer ruled by or even connected to her desires. Eventually, her desires are no longer a product of what she enjoys or what she has learned to enjoy. What the victim of routinized rape within marriage does, sexually, is a product not of what the victim wills but of what her attacker demands. As an immediate consequence, her will becomes a function not of her desires but of his desires. Eventually her desires become a function not of her pleasures, but of his pleasures; she wants literally to please him rather than herself because to please herself is too dangerous. The victim of marital rape gains survival, but she sacrifices self-sovereignty. In other words, she sacrifices the ability to control her own will and to determine her own actions, pleasures, and desires free from external influence. In short, she sacrifices selfhood.[91]

To call the damage occasioned by statutes protecting this direct subordination of self to the necessity of survival an irrationality simply is wrong. The damage occasioned by these statutes is the subordination, and in many cases the annihilation, of the psychic, physical, emotional, and erotic female self. Under a rationality model this clear fact entirely escapes constitutional notice. The exemption is constitutional if rational and unconstitutional if irrational. Surely, the state acts irrationally when it complies with this profoundly personal, violent subordination. The determination of rationality depends on the Court's assessment of the importance of the state's goals. If the state wants to pursue the goal of marital privacy, harmony, and spousal reconciliation at the cost of female self-sovereignty, and if the Court decides that the goal of marital privacy is important (which surely it could),

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90. *See generally* D. RUSSELL, RAPE IN MARRIAGE (1983) (describing effects of marital rape exemptions); West, *supra* note 44.

91. *See generally* West, *supra* note 44.

then the marital rape exemption is an imminently rational, hence constitutional, way to achieve this goal. But, whether the law is rational or irrational, the state's complicity in this pervasive regime of private domestic violence is clearly unequal. It denies married women, in the most literal sense, the protection of its laws. The rationality model of equal protection quite dramatically fails to target the state's complicity in this subordinating annihilation of married women's selfhood.

In contrast, both the evil and the inequality perpetuated by marital rape exemptions become strikingly apparent under either the dissident antisubordination or historical pure protection model of equal protection. Under the antisubordination model a state action violates the fourteenth amendment guarantee if the state complies with the subordination of women by men.[92] Without question, marital rape exemptions do precisely that. The antisubordination model locates the target of the fourteenth amendment equal protection guarantee, not in the irrationality of a state's legislative scheme, but in a state's complicity in private or social subordination. When the state encourages or permits a significant increase in the illegitimate power of one social group over another, the state defies the safeguards of the equal protection clause. The marital rape exemption is an instance of state complicity in men's subordination of women through routinized violent sexual assault and the threat of violent assault. Each assault spurs self-denial, self-abnegation, and self-diminution for women and furthers political ratification of women's psychological and psychic subservience. Each assault constitutes a political act of subordination. Under the antisubordination model even state complicity, not to mention explicit state endorsement, in this private subordination clearly is unconstitutional.

Similarly, the pure protection model highlights the unconstitutionality of these statutes rather than obscures it. This model recognizes that the fourteenth amendment ensures that all citizens equally enjoy the basic terms of the social contract, that the state protects all from private assault, that the state protects all from their own vulnerability, that the state recognizes the equality of all citizens under law, and that the state assures that they live under no separate sovereign authority.[93] Only with such protection may persons construct the public, productive, responsible, autonomous lives that the liberal state and its rule of law ideal envisions. A marital rape exemption, regardless of its intent, its history, or its purported state purpose, creates

92. *See supra* notes 64-66 and accompanying text.

93. *See supra* note 67 and accompanying text.

precisely the insulated, separate sphere of sovereignty that the pure protection view of the equal protection clause forbids. With the exemption in place, a marriage becomes not a nurturant, safe haven offering shelter from the storm, but a separate political world in which the husband is sovereign and the wife subject. Moreover, her vulnerability to this organized, dehumanizing, and alienating violence is fully legitimated by the state under which she lives. Sexual force and violence within marriage is unleashed and legalized, and legalized force and violence, of course, is the precondition of political power. A marriage thus becomes a separate state of sovereignty. The marital rape exemption creates, fosters, and encourages not marital intimacy, harmony, or reconciliation, but a separate state of sovereignty ungoverned by law and insulated from state interference. Whatever other "legitimate" goals the state may thereby further, such a separate political order, under a pure protection model, precisely is what the fourteenth amendment forbids the states to tolerate.

IV. Rationality, Antisubordination, and Equal Protection: Institutional Responsibilities for Enforcement of the Fourteenth Amendment

In summary, equal protection lends itself to three different interpretations: (1) a rationality model, which targets legislative classifications that are irrational or irrelevant to legitimate state goals; (2) an antisubordination model, which targets legislation that substantively contributes to the subordination of one group by another, and (3) a pure protection model, which targets a state's failure to grant protection of its law to all citizens equally, thus failing to ensure that all citizens are subject equally to one and only one sovereign, namely the sovereignty of the rule of law. Marital rape exemptions are unconstitutional under all of these approaches. However, the argument for that conclusion under the rationality model is weak, and it obscures, rather than highlights, the most unjust features of marital rape exemptions. The antisubordination and pure protection interpretations of the equal protection clause, by contrast, precisely highlight the most offensive features of marital rape exemptions — not the irrationality of marital rape exemptions, but their legitimation of a regime of private force and organized violence that creates and encourages the male subordination of women and the insulation of a separate and sovereign political regime through which that subordination is effectuated.

These three models, however, do not stand on equal footing. The rationality model, which has without question been a mixed blessing for women, is dominant black letter law in the area of gender classifi-

cations, and the Court does not seem inclined to change that fact.[94] The antisubordination model of equal protection, although arguably closer to the Warren Court's understanding of the phrase,[95] has played virtually no role in the development of equal protection doctrine over the last twenty years and only an ambiguous role during the prior twenty years. The pure protection model has not influenced equal protection doctrine for over one hundred years. Its last judicial acknowledgement may have been in Justice Bradley's decision in 1883 in *The Civil Rights Cases*.[96] Consequently, both the antisubordination model and the pure protection model are only of limited utility. The antisubordination model aids in understanding the ambiguities and tensions in the discrimination law of the 1950s and 1960s, when it commanded some respect from the Warren Court.[97] The pure protection model provides some insight concerning the original intent of the framers of the equal protection clause. For modern purposes, however, these models clearly are dissident interpretive views. They represent what the Court could, but does not, read the equal protection clause to require.

Two questions arise. First, why has the modern Court accepted a rationality model of equal protection and rejected the other two alternatives? Second, assuming continuing judicial recalcitrance, can the alternative interpretations of the clause prevail? The answer to the first question may be that the Court may have accepted the rationality model of equal protection because only that model creates the standard, legalistic issues that courts are well suited and accustomed to answering on a practical, jurisprudential level. If this assertion is correct, then the second question answers itself. However, if the Court has settled on a rationality model simply because it facilitates judicial analysis, then other branches of government, notably Congress, may be open themselves to antisubordination and pure protection interpretations of their fourteenth amendment obligations.

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94. For the Court's most recent affirmation of its adherence to a rationality model, and rejection of an antisubordination model, see City of Richmond v. J.A. Croson, Co., 488 U.S. 469 (1989).

95. For a general discussion of the transformation in American constitutional law from a "liberal legalist" to a conservative paradigm, see West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641 (1990).

96. *See* 109 U.S. at 25.

97. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 489 (1954). For a general argument to the effect that *Brown* and its progeny should best be understood as within an antisubordination framework, see Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989).

In determining the Court's reason for accepting the rationality model, remember that the Court itself typically insists, in the course of rejecting antisubordinationist arguments, that its reasons for doing so are in large part pragmatic. For example, in *Washington v. Davis*, the most unequivocal rejection of the antisubordinationist model, the Court noted that adoption of such an interpretation of equal protection would invalidate a wide range of regulatory, social, and economic legislation that affects the average black more than it affects the average white.[98] And so it would. By so ruling, the Court clearly implied that, rightly or wrongly, it is unwilling to undertake such an intrusive restructuring of federal and state law. This unwillingness stems not from legal or moral principles, but from pragmatism. The Court itself insists that it simply cannot fulfill the antisubordinationist mandate, given its judicial identity.

Jurisprudential reasons may draw the Court to a rationality model of equal protection analysis. The rationality model requires state legislators and lawmakers to "treat like groups alike" and requires Courts to see that they do so. Any legislative classification, then, must be based upon a difference between the groups that is relevant to a legitimate state interest.[99] The Court's responsibility under the equal protection clause is to police against legislative infringement of this principle. Feminist and progressive antisubordinationist theorists, however, have identified a major defect in this interpretation: it does not challenge or change socially created inequalities between classes, genders, or races.[100] Despite this flaw, the model has an important virtue from a judicial perspective: it limits the Court's role to the familiar one of ensuring legal justice. To do justice, a Court must treat like cases alike. For the most part, appellate courts, including the Supreme Court, simply police against lower court infractions of this principle. The rationality model simply imposes an equivalent duty on legislators. Thus, while judges must treat like cases alike, legislators, who deal with groups instead of cases, also must treat like groups alike. The Court's duty under the equal protection clause, then, is to ensure that the legislature metes out equal justice to the groups before it, just as the Court's appellate function is to ensure that lower courts mete out equal justice to the individuals who appear before them. The rationality model of equal protection may be the only model

98. Washington v. Davis, 426 U.S. 229, 244-48 (1976).

99. *See supra* notes 27-36 and accompanying text.

100. *See supra* notes 55-62 and accompanying text.

that so neatly dovetails with the most traditional, and even classical, view of judicial functions and domain.[101]

By construing the equal protection clause as a source of "law" to be applied by Courts, the general legal culture may have to a considerable degree determined its meaning, not only because we have rendered it subject to the Court's own sense of the pragmatic limits of its powers, but also because of the nature of law. As long as courts interpret and enforce the equal protection clause, it should not be surprising that they interpret the clause as requiring "legal justice," or like groups must be treated alike, rather than distributive or even compensatory justice. There is no reason to think that the Supreme Court is not fully confident of its ability to oversee the quality of formal, legal justice dispensed by lower courts: that is the Court's traditional, appellate function. The rationality model of the fourteenth amendment extends the obligation of doing legal justice to legislators, but it makes absolutely no fundamental change in the Court's social role. In this area as in any other, the Court continues to oversee the quality of legal justice meted out by other institutional and governmental bodies. Consequently, the ultimate judicial embrace of the rationality model, including the formal understanding of the requirement of legal justice, the antidiscrimination principle, the intent requirement, the two-tiered or three-tiered levels of review, and the "real differences" rule in the gender cases, may have been inevitable, regardless of the political composition of the Court. The Court simply may be unable and unwilling to sustain, for any length of time, any reading of equal protection that would be less legalistic and more substantive.

The appropriate question to ask, then, may be not whether the Court will adopt a more aggressive stance toward equal protection, but whether nonjudicial enforcement of alternative meanings of the equal protection clause is possible. The answer we give to that question depends in large part upon whether we view the Court as the exclu-

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101. The subsidiary rules the Court has developed under the rationality model likewise can be understood as ensuring that equal protection law is rendered susceptible to the most traditional, legalistic, and even classical understandings of the requirements of justice. The intent requirement for race-neutral and gender-neutral classifications adversely impacting upon the suspect class most notably has the effect not only of restraining severely the reach of the equal protection clause, but also of limiting the court to traditional forms of analysis. Intent requirements run throughout the law, including tort, contract, and criminal law. The intent requirement in adverse impact cases under the fourteenth amendment has the effect of transforming constitutional questions into the most traditional, as well as narrowest, legal inquiry imaginable: who is guilty of wrong doing, with what mens rea, who was thereby hurt, and by how much?

sive, as well as the ultimate interpreter of the Constitution.[102] That is, a connection may exist between a pluralistic approach to constitutional meaning and a pluralistic approach to constitutional obligations. Let me first explain these admittedly awkward labels.

Under a pluralistic rather than unitary conception of constitutional meanings, a constitutional mandate might have several obligatory meanings. Under a pluralistic approach to constitutional meaning, the equal protection clause might require (1) that legislative classifications treat like groups alike; (2) that legislation not insulate or further the social subordination of women, blacks, or other suspect classes; and (3) that states ensure that all citizens enjoy the protection of its laws against private wrongdoing. In contrast, under a unitary approach a constitutional phrase will have only one obligatory meaning. While equal protection might logically mean a range of things, and while its meaning might change over time, only one meaning at any particular time will be binding law. To put the question formally, then, the issue is why have we embraced a unitary approach to constitutional meaning that has rendered antisubordinationist and pure protection understandings of equality dead letters

One reason may be that if the Court is the exclusive and ultimate interpreter of constitutional meaning, connotative pluralism is awkward, to say the least. Under a unitary approach to institutional obligation, which identifies the Court as the branch of government obligated to enforce it, the Constitution means that which the Court says it means and only that which the Court says it means. A unitary approach to meaning follows practically, if not logically, from a unitary approach to obligation. If, on the other hand, we expand our conception of who and what is obligated to ensure equal protection under the fourteenth amendment, then pluralistic conceptions of equal protection meaning begin to look plausible. The Court could continue to ensure that legislation treat like groups alike. However, Congress could ensure that state laws prohibit subordination. Lastly, the executive branch and Congress jointly could ensure that the state supply the fundamental benefits and burdens of the social contract to all citizens equally. The state would provide security against private violence and wrongdoing in exchange for abidance with the obligations of citizenry under a rule of law regime.

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102. There is no doubt, of course, that the Court is the ultimate interpreter of constitutional meaning. *See* Cooper v. Aaron, 358 U.S. 1, 18-20 (1958) (reaffirming that the judiciary is the ultimate interpreter of the Constitution).

If we change our constitutional habits and learn to think pluralistically about not only the potential meanings of the fourteenth amendment, but also the potential obligations the amendment imparts on all three branches of government, then we might recognize a wide range of governmental actions as instances of constitutional decisionmaking.[103] More importantly, though, if we think pluralistically not just about possible meanings, but also about possible sources of enforcement, an expansive understanding of the equality guaranteed under the fourteenth amendment might one day become a social reality.

V. A PROPOSED MARRIED WOMEN'S PRIVACY ACT

Whether or not the United States Supreme Court or state supreme courts ever rule on the unconstitutionality of marital rape exemptions, Congress has the power, the authority, and arguably the duty, to do so, under section five of the fourteenth amendment.[104] Congress could enact a federal law guaranteeing protection to all women against violent sexual assault. Consistent with rationality requirements, this law would prohibit irrational discrimination against married women in the making and enforcement of rape laws. This federal law also would guarantee, consistent with the antisubordination mandate of the fourteenth amendment, that states would not perpetuate or insulate the sexualized social, private, or intimate subordination of women by men. Lastly, consistent with the "protection" mandate of the fourteenth amendment, it would guarantee that no state would deny to women protection of the state against private criminality. The political will may or may not be sufficient to sustain such a bill, but the constitutional authority for it surely exists.

A law of this sort at least would remove the anomaly that, while the marital rape exemptions strike most concerned lawyers and legal academicians as spectacularly unconstitutional, under present doctrine, no clear-cut argument presents itself. Perhaps the main reason for this lag between consensus, argument, and action is logistic. Given a court-based system of constitutional adjudication in which courts have near exclusive responsibility for interpreting and enforcing constitu-

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103. Robert Kennedy's decision to send in the National Guard during the desegregation campaigns in the South, for example, appears to be a paradigm instance of protection-type executive enforcement of the equal protection guarantee.

104. *See* U.S. CONST. amend. XIV, § 5; *see also* Katzenbach v. Morgan, 384 U.S. 641, 650 (1966) (section 5 of the fourteenth amendment is a positive grant of legislative power authorizing Congress to exercise its discretion in determining the need for and nature of legislation to secure fourteenth amendment guarantees).

tional law, cases that properly raise issues of this sort will be extremely rare. Thus, when a rape defendant raises the issue of the unconstitutionality of the marital rape exemption — indeed, to the best of my knowledge, the only scenario to date in which the issue has been raised — he is likely to be arguing that the state's refusal to extend the exemption to him, is an unconstitutional denial of his equal protection rights.[105] A court could respond to this sort of argument by striking the exemption in its entirety.[106] However, a court faced with this argument could avoid ruling on the constitutionality of the exemption by simply rejecting the contention that the failure of the state to extend the exemption constitutes a denial of equal protection. A suit for damages under the Civil Rights Act or directly under the fourteenth amendment, the other major vehicles for bringing a constitutional infirmity to a court's attention, also lacks logistical viability. A court hardly could find any branch or agent of state government liable for failing to arrest or prosecute when no state statute criminalizing the conduct exists. State immunity doctrines, of course, would bar an action against the legislature for failing to criminalize conduct. For logistic reasons alone, the issue seems ripe for legislative, rather than judicial, constitutional decisionmaking.

The second reason for urging a congressional rather than judicial response to the unconstitutionality of marital rape exemptions lies in the fact that Congress may be more willing than the judiciary to interpret seriously the fourteenth amendment as forbidding marital rape exemptions. Congress is more likely to view marital rape exemptions as subordinating women and insulating a separate sovereignty of legitimized force, thereby denying women's rights to equal protection under law. Congress may be more open to these arguments not only because of its present political composition, but for institutional and theoretical reasons as well. Unlike the Court, Congress is not obligated to ensure that legislation rationally map on to pre-existing real distinctions. Furthermore, at least on occasion, Congress aggressively has sought to dismantle and restructure the social, private, and even intimate structures that collectively create and mask the hierarchies of daily life. Unlike the Court, Congress does not recoil inevitably at the prospect of undertaking significant reconstructions of social life. Indeed, this duty is clearly its business. The fourteenth amendment

105. *See supra* note 1.

106. The New York Court of Appeals, to its credit, has struck the marital rape exemption on this ground. *See* People v. Liberta, 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207, 219-20 (1984).

easily can be read as a constitutional norm that directs, guides, and legitimizes the political and moral direction those reconstructive efforts should take.

If we think of the fourteenth amendment as a moral and political guide for reconstructive legislation aimed at eradicating illegitimate social subordination and private spheres of insulated, violent sovereignty, marital rape exemptions surely are a sensible place for Congress to start to fulfill its constitutional obligations. A dismantling of the private regime of sexual violence against women could affect socially women's public and private lives as greatly as the dismantling of private regimes of segregation and institutionalized racism has affected blacks. As was the case with the desegregation campaign, the legal recognition of a constitutional right to protection against private sexual violence in the domestic sphere, without more, could change and expand not only women's rights, privacy, security, and safety, but also women's senses of self and others' senses of women as fully participatory, represented, acknowledged, and respected members of society. Such recognition could help rehabilitate the damage to women's self-esteem, their feelings of self-possession, and their overall sense of wholeness. Just as the constitutional assault on desegregation triggered a change in societal perception of blacks, constitutionally motivated congressional action ensuring women's rights to be protected against marital rape could trigger wide ranging changes in societal portrayals and perceptions of women's roles, rights, and public responsibilities.

Finally, the foundational and permanent recognition of women's rights to be free from forced marital sex that can come about only through constitutional decisionmaking may be a prerequisite to further progress on a range of related issues regarding women's physical and sexual security. Date rape and acquaintance rape, for example, unlike marital rape, clearly are criminal, but they may be insulated from legal prosecution and public condemnation at least in part because of their shadow resemblance to marital rape, which is still fully protected in many states and underprosecuted in virtually all. The martial exemption, in brief, is simply the most brutal of all possible expressions of the social inclination to trivialize women's interest in physical and sexual security. Until women have physical and sexual security, both their public contributions and their private lives will be stunted, not only by personal fears, but by social and legal inferiority fueled by a public perception of female personhood perverted by the deep knowledge of women's legal vulnerability. Women will not have that security until they have established their constitutional right to be equally protected against laws that encourage their psychic and sexual subor-

dination and render them subject to private states of separate sovereignty. Conversely, when the law guarantees women that security, the gains will be immense. All women, married and single, and all men might learn what it means to live in a truly democratic home, in a truly nurturant social world, transformed and inspired by a newly empowered, equally respected feminist community.