

THE FEMINIZATION OF THE OFFICE OF
NOTARY PUBLIC: FROM *FEMME COVERT* TO *NOTAIRE COVERT*

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I. INTRODUCTION

In the year 1998, there are few offices, occupations, professions, industries or career fields in which women enjoy a larger majority than in the office of notary public in the United States. Women today outnumber men in the ranks of U.S. notaries by a ratio of three or four to one. A survey¹ of state notary commissioning offices revealed the following estimated percentages of female notaries in the respective state populations of notaries:

State	Number of Notaries ² (1997)	Estimated Percentage of Women Notaries
Florida	346,548	74%
Idaho	20,000	75%
Iowa	35,000	69%
Kansas	57,000	79%
Michigan	160,000	83%
Missouri	65,000	70%
Ohio	172,000	75%

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¹ Survey by Charles N. Faerber, Editor, National Notary Association, (Feb. 26, 1997) (on file with author). The survey was based on a one-page questionnaire mailed to 50 state offices in the fall of 1997 with three queries: "(1) The estimated percentage of your state's Notaries who are female? (2) When and how women were first allowed to become Notaries in your state? (3) Were 'feme covert' laws ever in effect in your state, requiring any wife to appear before a Notary outside her husband's presence? Repealed when?" To question (1), 11 states responded with an estimated percentage; 10 other states responded that they did not know and could not estimate the percentage of their notaries who were female.

² 1997 NNA Notary Census Table, NAT'L NOTARY MAG., May 1997, at 31.

South Carolina	205,718	60%
South Dakota	16,225	50%
Vermont	21,000	75%
Wyoming	15,867	80%

Further, eighty percent of the 4700 notaries who responded to a 1988 National Notary Association (NNA) membership survey were women, as were seventy-nine percent of the 1486 notaries responding to a 1993 NNA survey. In December of 1997, seventy percent of 500 names randomly selected from the NNA membership list were female.³ One might then reasonably extrapolate that seventy to eighty percent of the NNA's over 153,000 notary members and seventy to eighty percent of the nation's 4.3 million notaries are female.

The numerical dominance of women in the notary population comes as no surprise to the NNA staff members who meet and serve notaries daily. An estimated eighty to ninety percent of the attendees at Association seminars around the nation and at the annual NNA Conference of Notaries Public are women. The several hundred voices heard daily on the NNA's member "Information Service" telephone hotline are predominantly female. What may come as a surprise to many is that the ratio of women to men in the ranks of notarial officers is almost completely reversed outside the United States.

In the civil law countries whose *notariats* are represented within the International Union of Latin Notaries, male notaries today outnumber female by an estimated ratio of at least three or four to one. For example, among France's 7500 *notaires*,⁴ ten to fifteen percent⁵ are women. That foreign *notaires* and *notarios*⁶ are prestigious and well-paid judicial officials, while U.S. notaries are unprestigious and poorly-paid ministerial—or, at best, "quasijudicial"—officials is at the root of the reversal.

The major irony of this article is that the U.S. notarial office

³ The list comprised NNA members who had recently purchased notarial supplies. Because names that did not betray a gender (e.g., "C.E. Adams") were skipped, more than 500 names were actually reviewed.

⁴ See Pedro A. Malavet, Counsel for the Situation: The Latin Notary, A Historical and Comparative Model, 19 HASTINGS INT'L & COMPAR. L. REV 380,474(1996).

⁵ Interview with Caroline Deneuille, a notaire from Paris, France (June 21, 1997). Since then, Ms. Deneuille has clarified the numbers: out of 7619 notaires, 930 are female, which constitutes 12.2% of the total figure. Id (Feb. 10,1998).

⁶ *Notaire* and *notario publico* are the respective French- and Spanish-language titles for the civil law notarial professional. In other former colonizing European nations, the office is called: *notaris* (Belgium, Netherlands), *notaio* (Italy) and *notar* (Germany).

was once inaccessible to women. As the powers of this once esteemed position attenuated and diverged more and more from those of the European civil law prototype, it became not only more open to but also very nearly the exclusive province of women. Part of the irony is that nineteenth century American feminists and suffragettes fought long and hard to achieve legal equality with men and access to every office held by men; however, in the case of the office of notary public, the prize of their campaign diminished in prestige and authority as they drew nearer to it.

American feminists also fought to free women from the legal concept of *feme covert*.⁷ Under *feme covert*, a notary was obliged to interview a wife outside the presence of her husband when the two were signing a deed. This concept was based on the assumption that the woman was under the physical and intellectual domination of the man. Yet, even with the repeal of the indignities of *feme covert* and the arguable achievement of full legal equality with males, the current status, character and constituency of the office of notary public in the United States offers evidence—as we shall see—that women’s equality on paper may not mean fullfledged equality in fact.

Women today dominate the ranks in selected other professional activities such as nursing,⁸ dental hygiene and court reporting.⁹ Based on their numeric dominance in these three fields, a superficial analysis might indicate that women are drawn to fields where hands-on nurturing or digital dexterity, or both qualities, are an asset. However, hands-on nurturing and digital dexterity are hardly attributes that one immediately associates with notaries. Indeed, it is difficult to associate any one human quality with an office of infinite hue that is almost always a sideline to a main occupation or profession and is found in virtually every corner of American society. If a vote were taken among U.S. notaries today about the human qualities that distinguish functionaries in their unique, female-dominated office, it is easy to imagine that “humility” or “patience” or even “ability to endure unwarranted

⁷ BLACK’S LAW DICTIONARY 617 (6th ed. 1990). *Feme Covert* is defined as “[a] married woman. Generally used in reference to the former legal disabilities of a married woman, as compared with the condition of a *feme sole*.” *Id.*

⁸ Interview with the Admissions Coordinator for the School of Nursing, University of California at Los Angeles (Dec. 9, 1997). The Coordinator estimated that 90 to 95 percent of any given graduating class is female. *Id.* One class, she remembered, had 5 males to almost 300 females. *Id.* The UCLA nursing class that is currently forming, she said, has so far no male applicants. *Id.*

⁹ In a review of new member lists for the National Court Reporters Association, based in Vienna, Virginia, as printed in the February, March, April, June, August/September/October and December 1997 issues of the J. OF COURT REPORTING, 529 of 628 new members (84%) were female, 64 (10%) male, and 35 (6%) had a name not revealing a gender.

abuse and pressure” might be winners.

II. HISTORY OF AMERICAN WOMEN’S ACCESS TO THE NOTARY OFFICE

In colonizing the New World, the maritime nations of the Old introduced their distinct cultures and legal systems in settlements from Newfoundland to Tierra del Fuego. Integral to colonial commerce and civil life was the office of notary public, in the various Continental civil law forms that imprinted Quebec, the Caribbean islands and Central and South America, and in the peculiar English common law embodiments found on the eastern seaboard of North America. Notaries had accompanied the daring explorations of the Spanish conquistadores from the start, to document findings and help administer the infant colonies. Indeed, returning to Spain from his first voyage to the New World, Columbus left a notary behind to command the fortress community of La Navidad in Hispaniola¹⁰—a measure of the notarial offices power and prestige in fifteenth century Latin culture.

In the English colonies, notaries had a less central and more ministerial role, having largely surrendered important land conveyancing and document drafting functions to solicitors¹¹ under British law. Still, notaries functioned as trusted official witnesses, recorders, scribes and de facto paralegals in private and public transactions. These multiple roles made them indispensable to civil life as the colonies grew. In remote areas, a local Notary might be the only representative of government within several days’ ride.

According to Raymond C. Rothman, the very early English colonists—unlike the Spanish—“had little use for the services of a Notary Public:”

Their activities and interests were directed toward developing a raw and abundantly endowed land continent.... Most agreements for

¹⁰ EDUARDO BAUTISTA PONDE, ORIGINE HISTORIA DEL NOTARIADO 337 (1967). The commander was the *escribano* Diego de Arana. *Id.* There were two kinds of *escribanos*: the *escribano reales*, a ministerial functionary, and the professional *escribano publico*, who held the title *notario publico* and the cachet *notario de reynos*. JOSE BONO Y HUERTA, *Evolucion Medieval del Notariado en Espana y Portugal*, ATLAS DU NOTARIAT 98 (1989).

¹¹ N.P. READY, BROOKE’S NOTARY 14-17 (10th ed. 1988). However, from 1373 to 1760, notary members of the Company of Scriveners enjoyed a monopoly within the City of London and a circuit of three miles from the City on the “art or mystery” of preparing all deeds, charters, and other writings which by the common law or custom of this realm required to be confirmed or at tested by a seal.” *Id.* at 14. In the case of *Harrison v. Smith* (1760), the right of solicitors to practice conveyancing in London was established. *Id.* In 1804, a statute restricted the right to convey real property to members of the legal profession, whether notaries, attorneys, solicitors, barristers or “serjeants-at law.” *Id.* 16-17.

the purchase and sale of land were made public in open court. The buyer and seller met before an official, such as a judge, to advise him of their intention to make an agreement. The judge would make the agreement official and in full force and effect simply by recording the terms in his court record. During the colonial period Notaries Public were elected or appointed in the same way as judges in each colony. However, their duties were of a ministerial rather than a judicial nature.¹² Not the least of the notary's contributions was execution of protests, particularly the maritime protest whereby damage to a ship's cargo would be verified and documented under seal to satisfy the vessel's owner an ocean away. In the age before transoceanic electronic communication, notaries engendered confidence in the integrity and reliability of seaborne commerce through their presentation of bills of exchange and drawing up of protests.¹³ Virginia, for example, appointed its first notary in 1662 because certificates and other instruments sent out of this country were not given the credit they should have received.¹⁴

While the identities and year of appointment, 1639, of the first two male notaries in the English colonies are known, their primacy still remains a matter of dispute between Connecticut and Massachusetts.¹⁵ Moreover, the identity and appointment date of

¹² RAYMOND C. ROTHMAN, NOTARY PUBLIC PRACTICES & GLOSSARY 2-3 (1978).

¹³ *R. v. Scriveners' Co.*, 10 B. & C. 511, 518-19 (1830). In *Scriveners'*, Lord Tenterden said:

[I]t is suggested that the whole business of a notary is the presenting of bills of exchange, and drawing up protests ... it is by no means correct to say that that is the whole business of a notary. A notary in the City of London has many more duties. Almost all the charter parties are prepared by notaries The ship's broker prepares the minutes of the contract; it is afterwards put into form by a notary. There is an other part of the duty of notaries, and that is to receive the affidavits of mariners and masters of ships, and then to draw up their protest, which is a matter which requires care, attention and diligence. *Id.*

¹⁴ W. W. Henning, 2 *Statutes at Large of Virginia* 136 (1662), reprinted in W. Hamilton Bryson, *Notary Public in England Since the Reformation*, 38 AM. J. LEGAL HIST. 89, 90 (1994).

¹⁵ Ronni L. Ross, *The American Notary: Celebrating A 350-Year Heritage*, NAT'L NOTARY MAG., Nov. 1989, at 10-12; Bill Ryan, *New Haven Hails Unlikely Hero*, HARTFORD COURANT, Nov. 2, 1989. In a polite disagreement, Connecticut contends that Thomas Fugill of the New Haven Colony was the first notary appointed in the English colonies. Ryan, *supra* note 15. However, Massachusetts maintains it was Steven Winthrope of the Bay Colony. Connecticut records indicate Fugill was "chosen publique notary to attend the court" on October 25, 1639, and Massachusetts' that "Mr. Steven Winthrope was chosen to record things" nearly seven weeks earlier on September 9, 1639. Ross, *supra*, at 10. The gist of the disagreement is whether being "chosen to record things" constitutes appointment as a notary. If one prefers the "rose by any other name" argument, Massachusetts wins by a nose.

the first female English-speaking American notary have yet to be definitively established. Women were generally disqualified from holding public office under Britain's common law,¹⁶ which was also the law of its colonies. Since the very name of the notarial office denoted a public position, English and colonial American women could not be appointed as notaries public. By twentieth century standards, the relationship of men to women in England and other seventeenth and eighteenth century European colonial nations was that of oppressor to oppressed. Continental law and custom generally denied women access to public life and such rights and duties of citizenship open to males as voting, serving on juries and holding public office. The rationale was that women's supposed fragile, passive and malleable nature was unsuited to the rough and tumble of the public arena. This view was advanced by Aristotle, who maintained that men alone realize themselves as citizens, whereas women realize themselves only within the confines of the household.¹⁷

The English common law distinguished between the unmarried adult woman, the *feme sole*, and the married adult woman, the *feme covert*. The *feme sole* might enjoy some of the same rights as men, such as owning and conveying property, executing contracts, belonging to a guild, and suing in the courts.¹⁸ Because there was no English law absolutely excluding women from voting until 1832,¹⁹ unmarried women who were "freeholders" (real property owners) might claim the vote in a particular jurisdiction if they fought for it in court. In *Coates v. Lyie* (ca. 1619), a judge declared that a *feme sole*, if a freeholder, could vote; in two other cases decided about the same time, the verdict was the same, "with the addition that on marriage the right to vote is conveyed to the husband."²⁰ There were also more than a few instances throughout English history of a *feme sole* freeholder occupying such a public office as sheriff²¹ or burgess,²² though the office might be inherited or, if elected, result in a challenging lawsuit. While loopholes in

¹⁶ EDWARD MILLS JOHN, JOHN'S AMERICAN NOTARY AND COMMISSIONER OF DEEDS MANUAL 9 (6th ed., 1951).

¹⁷ LINDA K. KERBER & JANE DE HART-MATHEWS, EDS., WOMEN'S AMERICA: REFOCUSING THE PAST 14 (3d ed., 1991).

¹⁸ BEATRICE WALLIS CHAPMAN & MARY WALLIS CHAPMAN, THE STATUS OF WOMEN UNDER THE ENGLISH LAW 7 (1909).

¹⁹ *Id.* at 38. Under the Reform Act of 1832, English women for the first time were absolutely excluded from the right to vote for members of Parliament. *Id.* The authors describe the male rationale for excluding women voters, "who lie under natural incapacitates and therefore cannot exercise a sound discretion, or are so much under the influence of others that they cannot have a will of their own in the choice of candidates." *Id.* at 37.

²⁰ *Id.* at 32.

²¹ *Id.* at 4.

²² *Id.* at 31.

the common law might give the bold and exceptional *feme sole* access to public office and the vote, the *feme covert* of England and the early American colonies enjoyed no such opportunities. For married women *sub potestate viri* (under the power of [a] husband),²³ the property laws were oppressive and detailed. Julia E. Johnsen refers to these statutes as the “barbaric laws of chattel slavery days.”²⁴

In her study of the *feme covert* laws of South Carolina from 1730 to 1830, Marylynn Salmon describes rules typical for all 13 American colonies:

Under the common law, a married woman (*feme covert*) could not own property, either real or personal. All personalty a woman brought to marriage became her husband’s. He could spend her money, sell her stocks or slaves, and appropriate her clothing and jewelry. He gained managerial rights to her lands, houses, and tenements He also controlled the rents and profits from all real estate.²⁵

The sole concession to the married woman under the system of *feme covert* was that no husband could convey property without the free consent of his wife;²⁶ this gave rise to laws stipulating that a married woman be examined by a judge or notary outside the husband’s presence. The demands of the American colonial wilderness and frontier had an equalizing effect on the genders. A woman who could “pull her weight” was as much respected as a man, and might take on any private occupational role normally assumed by a man. “In numerous and varied ways, women became active in colonial life. Women appeared in newspapers and court records in such occupations as shopkeepers, teachers, blacksmiths, shipwrights, tanners, gunsmiths, butchers, publishers and printers, and barbers.”²⁷ In 1775, Mary Goddard was appointed postmaster of Baltimore, one of the few public and political positions in which women could be found at that time.²⁸

As in England, the *feme sole* of colonial America enjoyed certain advantages if she were bold enough to pursue them. For example, although married women could not vote, there are records of widows with property voting in New York, New Jersey²⁹ and

²³ MARLENE STEIN WORTMAN, WOMEN IN AMERICAN LAW 50 (1985).

²⁴ JULIA E. JOHNSEN, SPECIAL LEGISLATION FOR WOMEN 131 (1926).

²⁵ Marylynn Salmon, *Women and Property in South Carolina: The Evidence from Marriage Settlements, 1730 - 1830*, 39 WM. & MARY QTLY. 655-685 (1982), reprinted in KERBER & DE HART-MATHEWS, *supra* note 17 at 40-41.

²⁶ *Id.*

²⁷ BETH MILLSTEIN & JEANNE BODIN, WE, THE AMERICAN WOMEN: A DOCUMENTARY HISTORY 6 (1977).

²⁸ *Id.* at 36.

²⁹ *Id.* at 3.

Virginia³⁰ in pre-Revolutionary times. “Suffrage was largely determined by local custom and usage.”³¹ Were there women notaries in colonial America? Resolution of that question awaits a comprehensive and methodical ad hoc search of the seventeenth and eighteenth century records of the thirteen original colonies: New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

Even with the common law ban on women in public office, it is not inconceivable that a few colonial females held the post of notary, whether by appointment or inheritance. A woman notary would almost certainly have been unmarried—a *feme sole*—and perhaps a widow experienced in business. She would have had to be highly literate and stenographically adept in order to prepare protests and transcribe oral comments into affidavit and deposition form. Although she might have been a freeholder, it is likely that a lack of income-producing personal assets impelled her to seek a position. It seems reasonable that a woman in need of income who had observed her deceased husband, father or employer conduct business as a notary, or as a merchant involved in maritime trade, might have had the best background and inclination to become a colonial notary public.

Ironically, the Revolutionary War’s effect of freeing the thirteen colonies from the British yoke restricted the rights of American women and further limited their access to the notary office.

Women played important roles in the economic, social, and political activities of the Revolutionary years. Yet at the end of the struggle they found that their legal and social roles had not changed very much. In fact, as laws were written for the new nation, women’s rights often became more limited than before. For example, women, who had occasionally voted in colonial New Jersey, could not vote there after the Revolution because the new laws restricted voting to free white males.³²

Once the former colonies, now individual states, began to adopt constitutions, female suffrage “evaporated.”³³ “Women were also excluded by the gradual shift from gender-neutral property owning requirements to near universal male suffrage.”³⁴

The constitutions of the states, growing in number, typically posed qualifications for public officers, and sometimes specifically

³⁰ EVE GARY & KATHLEEN WILLERT PERATIS, WOMEN AND THE LAW 20 (1977).

³¹ THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 328 (Kermit L. Hall, ed. 1992) [hereinafter OXFORD COMPANION].

³² MILLSTEIN & BODIN, *supra* note 27, at 36-37.

³³ OXFORD COMPANION, *supra* note 31, at 328. 34. *Id.*

³⁴ *Id.*

for notaries.³⁵ A frequent qualification was status as an elector.³⁶ Thus, the state constitutions that excluded women from the vote also excluded women from the notary office when they stipulated elector status as a qualification for that office or for any public office. Prior to adoption of the nineteenth Amendment, which gave the right to vote to all American women in 1920, statutes enacted in at least three states (Arkansas, Ohio and North Carolina) to authorize appointment of women as notaries were held invalid, because women there were not electors and, constitutionally, public officers had to be voters.³⁷

However, even in the states that posed no constitutional wall between a female and the office of notary, there was the problem of the common law ban on women in public office. Whether a state legislature had power to abolish this common law rule and provide for the appointment of women as notaries was a matter at issue in New Hampshire as late as 1917.³⁸ Generally, express legislative enactments were needed before women might be appointed as notaries in the post-Revolutionary United States.³⁹ In some states these enactments would be preceded by a constitutional amendment allowing women access to public office, if not specifically the notarial office. A close look at four states⁴⁰—Michigan, Missouri, Vermont and Massachusetts—shows the different ways American women won the legal right to serve as notaries, and reveals that there were women notaries in the United States in the early and mid-1800s in states that posed no express constitutional or statutory gender restrictions.

1. Michigan:⁴¹ “In Michigan, the appointment of and eligibility requirements for Notaries Public have been largely handled by statutory provisions. Following Michigan’s statehood in 1835, statutory language in 1838 provided: “The governor, by and with the advice and consent of the senate, may appoint one or more notaries public in each county, who shall hold their offices for the term of two years, unless sooner removed by the governor.”⁴² The 1838 language further provided that a notary public, before performing duties of the office, had to provide a bond in the amount of

³⁵ JOHN, *supra* note 16, at 9.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*, citing *In re Opinion of Justices*, 77 N.H. 621, 62 Atl. 969 (1906).

³⁹ JOHN, *supra* note 16, at 9.

⁴⁰ See *supra* note 2 and the accompanying text regarding the one-page NNA questionnaire mailed to 50 state notary-commissioning offices. Information from Michigan, Missouri, Vermont and Massachusetts came in response to question (2): “When and how women were first allowed to become Notaries in your state?”

⁴¹ Interview with Darcy F. Smith, member of the Michigan Secretary of State’s legal staff (Oct. 17, 1997).

⁴² MICH.COMP. LAWS. §3.71(1838).

one thousand dollars and also had to subscribe to an oath of office. The early language did not however identify any other qualifications (or disqualifications) for appointment, such as gender.

The question of whether early statutory language permitted (or prohibited) the appointment of women as notaries public was discussed by the Michigan Supreme Court in an 1899 case. The Court in the case of *Attorney General v. Abbott*⁴³ stated:

It is undeniable that many women have held office under state and federal governments, such as postmasters, pension agents, notaries public, deputy clerks, school officers, attorneys-at-law, etc. * * * [sic] Some courts hold that the office of notary public is not within the right of a woman to hold * * * [sic] Others hold that it is * * * [sic] In this State the right is given by statute.⁴⁴

This position was further discussed by one dissenting justice who stated that:

In this State the governor is not authorized in express terms to appoint women to the office of notary public, though the right to do so was given by implication in 1887. . . yet it is a matter of common knowledge that for years prior to 1887 many of them were appointed notaries public and discharged the duties of that office, without their right to do so having been questioned.⁴⁵ “Michigan statute by implication has permitted the appointment of women as notaries at least since 1887. However, it also appears that women were appointed notaries prior to that time and therefore were actually able to serve as notaries as early as 1838.”

2. Missouri:⁴⁶ In regard to the identity of Missouri’s first female notary public:

We wanted to confirm the information in an old newspaper notice and examined the 1855-1872 indices to Notary commissions prepared long ago by the Work Projects Administration. In very few instances was a notary’s gender in doubt and in each case we located that person in the 1860 U.S. Census to establish his gender.⁴⁷

As a result we are confident the following notice concerns the first Missouri woman to be commissioned:

“Gov. McClurg has appointed Miss Redelia Bates a Notary Public, for St. Louis County.”⁴⁸ Joseph Washington McClurg was easily Missouri’s most prominent early supporter of women’s suffrage. The above notice, published far from St. Louis County, goes to show the appointment of Miss Bates was widely reported without contro-

⁴³ 121 Mich. 540 (1899).

⁴⁴ *Id.* at 547.

⁴⁵ *Id.* at 558 (Moore, J., dissenting).

⁴⁶ Interview with Timothy R. Coughlin, Administrative Assistant to the Missouri Secretary of State from 1975 to 1982 (Oct. 12, 1997).

⁴⁷ *Id.*

⁴⁸ CANTON PRESS, April 8, 1869.

versy.⁴⁹

3. Vermont: Women won legal access to the notary office in Vermont in the year 1900, through legislative enactment of Public Act 42, amending Section 2963 of the Vermont Statutes:

The judges of the county court may appoint, in their respective counties, as many notaries public as the public good requires, to hold their offices until the expiration of the term of office of the judges appointing them, whose jurisdiction shall extend throughout the state, and women twenty-one years of age shall be eligible to such appointment. County clerks shall be, by virtue of their office, notaries public.

Approved October 26,,1900.⁵⁰

4. Massachusetts: In 1890, the Supreme Judicial Court of Massachusetts responded to the following inquiry from the state's Governor: "Under the Constitution and laws of this Commonwealth, can a woman, married or unmarried, if duly appointed and qualified as a notary public, legally perform all acts pertaining to such office?" In its resulting opinion. *In re Appointment of Women to Be Notaries Public*,⁵¹ the Court pointed out that nineteen years earlier it had ruled that women were not eligible for the judicial position of justice of the peace because "'the universal understanding' was that a woman could not be appointed to a judicial office, and that this had been the 'unbroken practical construction' of the Constitution Tor the greater part of a century."⁵² The Court admitted, however, that though notaries were appointed in the same manner as judicial officers (i.e., by the Governor), they were not judicial officers.⁵³

The Supreme Court also pointed out that it had previously ruled that nothing in the state constitution prevented a woman from being appointed to a local school committee, since that office "was one created and regulated by statute, and was a local office of an administrative character, which the common law of England permitted a woman to fill."⁵⁴ The Court further explained that Massachusetts women who were attorneys, by a legislative act of 1883, could be appointed to administer oaths and to take depositions and the acknowledgment of deeds—all notarial acts.⁵⁵ The Court, including the renown justice Oliver Wendell Holmes, Jr., then announced this unanimous conclusion:

⁴⁹ *Id.*

⁵⁰ VT. STAT. ANN. tit. 42, § 2963 (1996).

⁵¹ 23 N.E. 850, 851 (Mass. 1890)

⁵² *Id.* at 852

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* Women in the state were first permitted to practice as attorneys through a legislative act of 1882.

In the absence of any statute authorizing the appointment of women to be notaries public, we are of the opinion that the clause of the Constitution which provides for the appointment of notaries public—interpreted with reference to the history and nature of the office and the long continued and constant practice of the government here and the usage elsewhere, cannot be considered as authorizing the governor, by and with the advice and consent of the council, to appoint women to be notaries public; and that the question asked must be answered in the negative.⁵⁶

To win legal access to the notary office in Massachusetts, women had to wait until the year 1918, when an amendment to the state's Constitution was adopted that read: "Women shall be eligible to appointment as notaries public." (Change of name shall render the commission void, but shall not prevent reappointment under the new name.)⁵⁷ There was a further constitutional amendment in 1924 that struck out the words "Change of name shall render the commission void, but shall not prevent reappointment under the new name," and inserted instead: "Upon the change of name of any woman, she shall re-register under her new name and shall pay such fee therefore as shall be established by the general court."⁵⁸

The above reports citing the years when it was either possible or legal for a woman to become a notary in four states—Michigan (1838), Missouri (1869), Vermont (1900), Massachusetts (1918)—show that American women's battle to gain access to the notary office, and other public offices, was fought on different statewide fronts, with victory readily won by mid-19th century in some states and resistance continuing beyond the passage of the 19th Amendment (1920) in others. The Equal Suffrage Amendment, of course, opened the door for women not only to the voting booth but also to the office of notary in those states for which elector status was a qualification but which had not yet legislated female suffrage. Sadly, however, recalcitrant legislators and commissioning officials in a defiant handful of states continued to pose obstacles to would-be female notaries based on the ancient common law ban on women in public office. Women's unchallenged access to the notarial office in all states was not fully and legally won until over a half century after passage of the nineteenth Amendment.

The four reports also suggest—and the facts confirm—that it was the American West, the frontier meritocracy where a woman could prove herself the equal of any man, that was most sympathetic to the suffragettes and the infant women's rights movement. After the landmark 1848 convention in Seneca Falls, New York, that gave birth to the women's rights movement, it was generally

⁵⁶ *Id.* at 853.

⁵⁷ MASS. CONST. AMEND. Art. IV (1821).

⁵⁸ MASS. CONST. AMEND. Art. IV (1924).

the Western states that were the first to give women the vote and access to public office:

When the States First Gave Women the Vote⁵⁹

Wyoming 1869	Nebraska 1917
Colorado 1893	Arkansas 1917
Utah 1896	Rhode Island 1917
Idaho 1896	South Dakota 1918
Washington 1910	Michigan 1918
California 1911	Oklahoma 1918
Oregon 1912	Texas 1918
Arizona 1912	Minnesota 1918
Kansas 1912	Iowa 1919
Illinois 1915	Indiana 1919
Montana 1914	Tennessee 1919
Nevada 1914	Ohio 1919
North Dakota 1917	United States 1920

The Western state of Wyoming claims for itself many firsts, including first to grant women suffrage, first to appoint a woman justice of the peace (Esther Hobart Morris in 1870), first to appoint an all-woman jury (Laramie in 1870) and first to appoint a woman bailiff (Mary Atkinson of Albany County in 1870). In 1925, Wyoming and Texas also elected the first women governors.⁶⁰ It seems logical that sparsely populated areas such as Wyoming would value any person, male or female, willing and able to perform a needed task. Often in rural areas a capable individual might take on multiple roles, as the fabled but historical personage of Roy Bean assumed the roles of judge, notary and saloonkeeper, among others, in his Texas frontier town. Even today, federal postmasters in the vast and thinly populated spaces of Alaska are given ex officio notarial powers by state law and may use their cancellation stamps as notary seals.⁶¹

Oddly, however, the Western states that were pioneers in women's suffrage were little more likely than Eastern or Southern states to grant women access to the notary office. Indeed, as late as 1940,⁶² Colorado, Idaho, Kansas, Montana, New Mexico, Oklahoma, South Dakota, Texas and Utah were reported to offer some obstacle to women's appointment as notaries. Yet, a number of states had opened the notary office to female citizens long before

⁵⁹ Gale, *Celebrating Women's History Month Timeline*, visited 12/1/97 <<http://www.thomson.com/gale/whmtime.html>> at 9.

⁶⁰ MILLSTEIN & BODIN, *supra* note 27, at 202.

⁶¹ ALASKA STAT. § 44.50.180 (Michie 1997).

⁶² CARL LOUIS MEIER, *ANDERSON'S MANUAL FOR NOTARIES PUBLIC* 12-13 (1st ed.1940).

they gained the vote through legislative act or the nineteenth Amendment. The California Legislature, for example, granted women suffrage in 1911; but twenty years earlier it had pronounced them qualified to be notaries through an amendment of the state's Political Code that read:

Section 792. Qualifications and Residence. Every person appointed as Notary Public must, at the time of appointment, be a citizen of the United States and of this state, and twenty-one years of age; must have resided in the county for which the appointment is made for six months. Women having these qualifications may be appointed.⁶³

It should not be forgotten that numerous other federal, state, county and municipal officers in eighteenth and nineteenth century America might hold *ex officio* notarial powers—particularly the power to administer oaths, to take acknowledgments and proofs of real estate deeds and to take affidavits. Thus, there were ample other opportunities—unchronicled here—for women to exercise the powers of a notary. Two positions, in particular, merit brief mention: county court clerk and commissioner of deeds.

County clerks, who still often double as county recorders in rural areas, have been given *ex officio* notarial powers by state law through much of American history. In the early 1800s, commissioners of deeds were often appointed by a state's governor or secretary of state to notarize in a given foreign jurisdiction (e.g., city of Rio de Janeiro) documents that would be sent back to the state for filing; in this era before the U.S. Department of State had placed consuls with notarial powers in the world's major cities, each of the maritime states of the young United States virtually conducted its own foreign policy, using commissioners of deeds as "consuls." The positions of county clerk and commissioner of deeds offered opportunities for talented nineteenth century American women, though they presented the same legal hurdles to overcome as did the position of notary, since they were public offices.

While the challenge for equal rights proponents in opening the notary office to women was daunting, perhaps the greater challenge was uprooting time-worn notarial procedures that were acutely demeaning and patronizing to women as human beings. In 1892, for example, a Texas statute stipulated:

No acknowledgment of a married woman to any conveyance or other instrument purporting to be executed by her shall be taken, unless she has had the same shown to her, and then and there fully explained by the officer taking the acknowledgment, on an examination privately and apart from her husband, nor shall he certify to the same unless she thereupon acknowledged to such officer that

⁶³ JAMES H. DEERING, THE POLITICAL CODE OF THE STATE OF CALIFORNIA 199(1916).

the same is her act and deed, that she has willingly signed the same, and that she wishes not to retract it.⁶⁴

In The Notaries Manual of 1892, Benjamin F. Rex instructs the male notary on how to handle this belittling procedure:

1. He should require the husband to leave the room, if he has accompanied his wife. The object of this is to withdraw her from his personal influence; and during the examination he should not be allowed to come either within sight or hearing of her.
2. He should ask if the signature to the instrument is hers. If she answers in the affirmative, he should
3. Read and explain the instrument to her An officer does not comply with the law if he simply asks the woman if she know the contents of the deed and understands it, and accepts her answer in the affirmative as final. She may believe that she knows its contents when she does not. The object of the law is to afford her a distinct and official source of information, apart from her husband, or what he or any one else may have told her.
4. She should be asked if the instrument is her act and deed It is best to explain to her that she can retract if she wishes to.⁶⁵

As the *feme covert* notarial procedure of private examination of wives was extirpated from American statute, clearly notaries lost a responsibility (i.e., “explain the instrument to her” and ascertain her understanding of it) that might be described as judicial or quasi-judicial. The repeal of this and other notarial duties that were based on the presumption of gender inequality tended to make the notary office more ministerial. The notary’s separate examination of the wife was but one example of a type of law that early feminists labeled particularly insidious and hypocritical: statutes whose rationale was to protect women but whose effect was to suppress them. Perhaps the best known example was the Oregon law affirmed in the 1908 U.S. Supreme Court case of *Muller v. Oregon*⁶⁶ which prohibited the employment of women for more than ten hours a day. In *Muller*, “the Court unanimously concluded that [a] ‘woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence’ . . . Such a condition meant the state had an interest in protecting women’s health through appropriate leg-

⁶⁴ See BENJAMIN F. REX, THE NOTARIES MANUAL 210 (1892) (containing instructions for notaries in Arkansas, Iowa, Kansas, Minnesota, Missouri, Nebraska and Texas).

⁶⁵ *Id.*

⁶⁶ 208 U.S. 412 (1908).

isolation.”⁶⁷ The impact of *Muller* proved to be instantaneous⁶⁸ and counter to the cause of women’s rights:

State courts began to hold other forms of protective legislation for women constitutional, whether or not they involved the kind of ten-hour maximums at issue in *Muller*. Thus, eight-hour maximum work laws in a variety of professions, outright bans on night work for women, and minimum-wage laws for women were routinely upheld under the *Muller* rationale. Much of this Court-sanctioned governmental protection, however, worked to keep women out of high-paying evening jobs or positions that they desperately needed to support their families.⁶⁹

Apart from the moral argument for equal rights, the growing demand for notaries in urban areas in the late nineteenth and early twentieth centuries was an economic factor putting pressure on state legislators to open up the office to women. With such a growing demand for notaries in New York City and other burgeoning urban areas in the late 1800s and early 1900s, the economic motivation for opening the office to females became overwhelming.

The numbers of notaries in exploding major cities was growing almost exponentially. In Connecticut, for example, there were fifteen notaries in 1800, thirty-two in 1812, sixty-four in 1827, 10,789 in 1932 and 48,000 in 1990.⁷⁰ In California, no more than 405 notaries could be commissioned in 1853 to serve the entire state,⁷¹ which today has nearly 150,000 notaries. The following table shows the meteoric rise in the number of notaries that the Albany legislature allowed the governor to appoint for New York City alone:

Statutory Notary Allotment for New York City⁷²

1829: 100 total	1851: 125 total
1853: 135 total	1854: 140 total
1858: 400 (city & county)	1859: 500 (city and county)
1868: 250 additional	1871: 300 additional to county
1875: 250 additional (city & county)	1876: 250 additional
1882: 2710 plus 1 per bank	1886: 500 additional (city and county)

⁶⁷ OXFORD COMPANION, *supra* note 31, at 331.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ CONNECTICUT SECRETARY OF THE STATE, NOTARY PUBLIC MANUAL 2 (1995).

⁷¹ NAT’L NOTARY ASS’N, NOTARY HOME STUDY COURSE: CALIFORNIA SUPPLEMENT 51 (1989).

⁷² JOSEPH O. SKINNER, A HANDBOOK FOR NOTARIES PUBLIC AND COMMISSIONERS OF DEEDS OF NEW YORK 9-13 (1912).

1861: 100 additional	1862: 200 additional
1866: 100 additional	1867: 100 additional
1868: 200 additional	1890: 1 per 1000 population additional
1892: 2710 plus 1 per 1000 & 1 per bank	1893: 4 per 1000 population
1899: 5 per 1000 population	1899: 5 per 1000 population
1899: 5 per 1000 population	1905: No restriction; as many as needed

The “democratization” of the American notary office had paved the way for the “feminization” of the office. As limits on the number of notaries in given cities and counties were removed by the state legislatures, and as different occupations (e.g., county recorders, attorneys, shorthand reporters) assumed many of the notary’s responsibilities, the office became less professional and more ministerial, attenuating to its modern-day core function of impartial witness. This effectively lowered the qualifications for becoming a notary. No longer was the office open just to individuals with considerable legal training or marketplace experience. Any literate adult could qualify—though many states still required that adult to be male. The convenience to customers and employers of having an “in-house” notary in banks and corporations stoked the urban demand for notaries. By the mid twentieth century, some large U.S. cities had more notaries than entire European nations.

During the 1850s and the Civil War years, the women’s rights movement purposely directed the brunt of its energies into an all-out campaign to abolish slavery, in the belief that a rising tide of justice would raise all oppressed groups, including blacks and women, to full legal rights. They were mistaken. Just as their contribution to the American Revolution resulted in losses to the cause of women’s rights through state constitutional and statutory codification of the pre-war rules of repression, the Civil War also resulted in a step backward for their cause. The two Reconstruction Amendments—the fourteenth (1868) and the fifteenth (1870)—included the word “male” in the U.S. Constitution for the first time,⁷³ giving the vote just to members of that gender, be they

⁷³ MILLSTEIN & BODIN, *supra* note 27, at 126. In attempting to prevent interference with the voting rights of newly freed slaves, the Fourteenth Amendment stipulated, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,” particularly “male inhabitants of such State, being twenty-one years of age and citizens of the United States.” *Id.* The 15th Amendment reads, “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude . . .” *Id.* Despite feverish efforts by the suffragettes, the word “sex” was not included with “race, color, or previous condition of servitude.” *Id.*

black or white.

After this bitter setback, feminists began their ceaseless fifty year campaign to add their own suffrage amendment to the Constitution. Some of their forces were diverted into the temperance movement, producing the abortive nineteenth Amendment, because in the nineteenth century intemperance in a man was a tragedy for a woman: under *feme covert*, all of the family's money was controlled by the man.⁷⁴ The fact that male legislators and judges—most of them attorneys—more readily surrendered to women the office of notary than the more lucrative office of attorney suggests as much a male economic motive in suppressing women as it does a philosophical one.

In an 1872 decision of *Bradwell v. Illinois*⁷⁵ noted for its labeling of the suppression of women as the “law of the Creator,” the United States Supreme Court quashed an Illinois woman's attempt to practice law:

MR. JUSTICE MILLER delivered the opinion of the court:

The claim that, under the 14th Amendment of the Constitution, which declares that no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, and the statute law of Illinois, or the common law prevailing in that state, can no longer be set up as a barrier against the right of females to pursue any lawful employment for a livelihood (the practice of law included) assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation or employment in civil life.

It certainly cannot be affirmed, as a historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of a man adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social

⁷⁴ *Id.* at 74.

⁷⁵ 83 U.S. 130(1872).

state

The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

The humane movements of modern society, which have for their object the multiplication of avenues for woman's advancement, and of occupations adapted to her condition and sex, have my heartiest concurrence. But I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities⁷⁶

The strength of this "law of the Creator" sentiment and the fact that the state of Mississippi—never a hotbed of progressivism—led the way in repealing oppressive property laws that were the backbone of *feme covert*, further suggests that it was male economic motive rather than sudden philosophic conversion that accounted for much of the progress in American women's rights in the nineteenth century. "Ironically, the first married women's property acts, passed in Mississippi in 1839 and in New York in 1848, were supported by male legislators out of a desire to preserve the estates of married daughters against spendthrift sons-in-law."⁷⁷ Following are excerpts⁷⁸ from the New York State Married Women's Property Acts of 1848⁷⁹ and 1860,⁸⁰ which, along with similar acts in other states, broke the back of *feme covert* in the United States.

1848

The People of the State of New York, represented in Senate and Assembly, do enact as follows: 1. The real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents, issues and profits thereof shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female. 2. The real and personal property, and the rents, issues and profits thereof of any female now married shall not be subject to the disposal of her husband; but shall be her sole and

⁷⁶ Bradwell, 83 U.S. 130 (1872), reprinted in CAEY & PERATIS, *supra* note 30, at 6-7

⁷⁷ KERBER & DE HART-MATHEWS, *supra* note 17, at 474.

⁷⁸ MILLSTEIN & BODIN, *supra* note 27, at 113-115 (quoting New York State Married Women's Property Acts of 1848 and 1860).

⁷⁹ *Id.*

⁸⁰ *Id.*

separate property as if she were a single female. . . .

1860

The People of the State of New York, represented in Senate and Assembly, do enact as follows: . . .

2. A married woman may bargain, sell, assign and transfer to separate personal property....

7. Married women may sue and be sued . . .

9. Every married woman is hereby constituted and declared to be the joint guardian of her children, with her husband, with equal powers, rights and duties in regard to them, with the husband.

By 1860, about seventeenth states had introduced some form of legislation to change the oppressive common law rules on marital property.⁸¹ With the wave of repeals of *feme covert* property laws by the states in the late 1800s, the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission) in 1892 issued a Uniform Acknowledgments Act that extirpated a centuries-old notarial procedure integral to *feme covert*: examination of a wife by a notary outside of the husband's presence.

The second of the Uniform Acknowledgments Act's⁸² six sections stipulates: "The acknowledgment of a married woman when required by law may be taken in the same form as if she were sole and without any examination separate and apart from her husband."⁸³ Many states would soon adopt this provision in their real property codes. Michigan, for example, adopted it in 1895, replacing an 1805 law requiring a wife to be "examined privately and apart from her husband."⁸⁴ Still, the replacement laws were often couched in language hinting that the wife was a possession of the husband:

Where a married woman makes a conveyance of property situated in Iowa, Kansas, Minnesota, Missouri or Nebraska, either along or conjointly with her husband, no separate examination is required, nor need the conveyance be explained to her by the notary, without she requests it. If she joins her husband in making a conveyance, she should be referred to in the certificate as his wife as well by

⁸¹ WORTMAN, *supra* note 23, at 118.

⁸² CHARLES N. FAERBER, NOTARY SEAL & CERTIFICATE VERIFICATION MANUAL 415 (1997).

⁸³ *Id.*

⁸⁴ See *supra* note 40 and accompanying text regarding materials obtained from Michigan Secretary of State.

name, thus: ‘Personally came A.B. and C.B., his wife.’⁸⁵

Passage of the Equal Suffrage Amendment to the U.S. Constitution was the glorious unifying goal for late nineteenth and early twentieth century feminists—a goal whose attainment in 1920 many of the great suffragettes, including Susan B. Anthony, never lived to see. For over half a century, the campaign for the right to vote had been unrelenting.

To get the word ‘male’ in effect out of the Constitution cost the women of the country fifty-two years of pauseless campaign . . . During that time they were forced to conduct fifty-six campaigns of referenda to male voters; 480 campaigns to get Legislatures to submit suffrage amendments to voters; 47 campaigns to get State constitutional conventions to write woman suffrage into state constitutions; 277 campaigns to get State party conventions to include woman suffrage planks; 30 campaigns to get presidential party conventions to adopt woman suffrage; planks in party platforms; and 19 campaigns with 19 successive Congresses.⁸⁶

Yet if any feminists expected barriers to full equal rights suddenly to disappear upon adoption of the nineteenth Amendment, they were disappointed. Countless state laws continued to discriminate against women on “minimally rational grounds.”⁸⁷ Not until 1971, when the U.S. Supreme Court in *Reed v. Reed*⁸⁸ decided that sex-based differentials were entitled to scrutiny under the Fourteenth Amendment’s Equal Protection Clause,⁸⁹ was there another major breakthrough.

By the mid-nineteenth century, several prominent notary manuals recognized women as notaries. By 1928, Florien Giauque’s respected *A Manual for Notaries Public*⁹⁰ could confirm that only twenty-five of the forty-eighth states permitted appointment of women notaries, provided the appointees were at least twenty-one years of age: Alabama, Arkansas, Arizona, California, Connecticut, Florida, Georgia, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Missouri, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Virginia, Washington, Wisconsin and Wyoming.⁹¹ By 1940, Anderson’s *Manual for Notaries Public*⁹² reported that women could not become notaries in the District of Columbia nor in the states of Colorado, Delaware, Idaho, Kansas, Louisiana, Minnesota, Mississippi, Montana, New

⁸⁵ REX, *supra* note 64, at 209.

⁸⁶ MARIE BAROVIC ROSENBERG-DISHMAN & LEN V. BERGSTROM, *WOMEN AND SOCIETY* 119 (1975) (quoting Carrie Chapman Catt).

⁸⁷ OXFORD COMPANION, *supra* note 31, at 333.

⁸⁸ 404 U.S. 71(1971).

⁸⁹ OXFORD COMPANION, *supra* note 31, at 333.

⁹⁰ FLORIEN GIAUQUE, *A MANUAL FOR NOTARIES PUBLIC* 2 (1928).

⁹¹ *Id.*

⁹² MEIER, *supra* note 61, at 10-12.

Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina South Dakota, Texas, Utah, Vermont and West Virginia.⁹³

By 1955, Lawrence G. Greene's Law of Notaries Public indicated that "[a]s a result of constitutional or statutory provision, or judicial determination,"⁹⁴ women still could not act as notaries in any of the jurisdictions cited immediately above except Colorado, Kansas, New Mexico, North Carolina, Oklahoma, South Dakota and Vermont.⁹⁵

The familiar common law ban on women in public office was the persistent bugaboo preventing appointment of female notaries at mid twentieth century—or at least it was the legal justification offered by males. The sentiment against women entering arenas of business and government that had before been special male preserves ran strongest and deepest in the South. In Georgia, for example, a wife's "wages remained the absolute property of her husband until 1943."⁹⁶ Many Southern men feared the destruction of the family if women left home for the workplace; and many Southern women preferred the traditional role of being under the protection of a man.⁹⁷ As late as 1976, the Southern state of Alabama allowed women only countywide jurisdiction as notaries, perhaps with the intent of keeping them somewhat anchored to the home; only Alabama men could be appointed notaries for the state at large with legal authority to rove and act far from their home county.⁹⁸

In the states that did not contest female access to the notary office, women notaries likely attained a plurality well before midcentury. "Formerly women were not permitted to act as notaries," Richard B. Humphrey declared in 1948 in *The American Notary Manual*, "but this inhibition seems to have been withdrawn practically everywhere, and it is probably a safe bet now that there are more women than men notaries."⁹⁹ The matter of whether a single woman could retain her notary commission after marrying was surprisingly problematic for many states. As mentioned earlier,¹⁰⁰ Massachusetts addressed this issue—which might seem better

⁹³ *Id.*

⁹⁴ LAWRENCE G. GREENE, *LAW OF NOTARIES PUBLIC* 11 (1955).

⁹⁵ *Id.*

⁹⁶ WORTMAN, *supra* note 23, at 123.

⁹⁷ MILLSTEIN & BODIN, *supra* note 27, at 180.

⁹⁸ WESLEY GILMER, JR., *ANDERSON'S MANUAL FOR NOTARIES PUBLIC* 15 (5th ed. 1976). The Alabama notaries with only countywide jurisdiction were called "commercial notaries." *Id.* The law read: "Women may be appointed notaries public, who shall have the power and authority of commercial notaries only." *Id.*

⁹⁹ RICHARD B. HUMPHREY, *AM. NOTARY MANUAL* 17 (1948).

¹⁰⁰ See *supra* Part II Section 4 for a discussion of Massachusetts Constitution's Amendment that allowed women to reapply for a notary public commission after a name change.

dealt with through administrative rule—with a constitutional amendment. Other state laws and regulations differed, some stipulating that the newly married notary could continue to act signing the maiden name printed on the commission, some dictating rigorous procedures to report the change. New Jersey, for example, required as follows:

After the marriage of a woman notary public, and before she signs her name to any document which she is authorized or required to sign as notary public, she shall make and sign a statement in writing addressed to the governor, of the following tenor and effect: I, Mary Doe, a notary public of the state of New Jersey, do hereby certify that I did on the __ day of ____, 194_ inter-marry with Richard Roe, my present husband, and this statement is made to the end that I may continue to act as such notary public by the addition of my said husband's surname after a hyphen at the end of the name in and by which I was appointed and commissioned such notary public, according to the statute in such case made and provided, which statement shall be verified by both names and shall be verified by oath of the notary public and by her new name that the facts therein stated are true. The statement must be filed in the office of the governor and in the office of the county clerk.¹⁰¹

So apparently complex was the issue of whether a notary bride could retain her commission—and, likely, so laden with strong feelings in the many males who still preferred the repressions of the common law and *feme covert*—that The American Notary Manual in 1948 offered this advice: “A woman notary who changes her name while a notary should consult a competent attorney in her own state as to the course that she should pursue with reference to her notarial certificates and duties.”¹⁰² “Marry at your own risk” seemed the punitive message for single females who had been bold enough to seek and obtain a notary commission.

Not surprisingly, the authority of notarial acts performed by the growing corps of female notaries was not infrequently challenged by common law recidivists. However, by early in the 20th century, case law had developed asserting that duly appointed female notaries were “de facto officers” whose acts could not be objected to by third persons.¹⁰³ In the Notaries’ and Commissioners’ Manual for New York (1912) there appeared this discussion:

It has been held that a woman is eligible to the office of Notary Public. At least, so far as the public is concerned, after she has secured the appointment and been confirmed by the Senate, her acts cannot be attacked collaterally. Her right to exercise the office is presumed to be regular and legal until tested in an action by the At-

¹⁰¹ HUMPHREY, *supra* note 99, at 16-17.

¹⁰² *Id.*

¹⁰³ JOHN, *supra* note 16, at 10.

torney General or other person authorized by law to bring an action to test her right to exercise the functions of the office to which she has been appointed. It has been accordingly held that where a pleading was verified before a woman who, acting as Notary, administered the oath and appended her jurat, that the verification was proper, and regular on its face, and the pleading could not be returned as unverified on the ground that the Notary, being a woman, had no legal capacity to fill the office or exercise its functions.¹⁰⁴

After 1971, largely because of the above-mentioned U.S. Supreme Court decision in *Reed v. Reed*,¹⁰⁵ any sex-based differential treatment that was arbitrary and without reason would be found in violation of the Fourteenth Amendment's Equal Protection Clause. Thus, after 1971, statutes and administrative rules that barred women from the notary office for no rationally articulable reason—such as Alabama's law restricting them to countywide jurisdiction—were challenged and eliminated. In 1972, Congress passed the Equal Rights Amendment to the U.S. Constitution, long sought by feminists as the only guarantee of women's full equality with males. The Amendment reads: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." However, after over a quarter century, this Amendment has yet to win the needed approval of 38 states. By 1980, being female was no longer a disqualification for the full powers of notarial office in any state. Indeed, a public position that had once been off limits to women had virtually become their exclusive preserve. Today in several states (e.g., Arizona, Colorado, New Mexico),¹⁰⁶ even the high-ranking secretary of state office that commissions or regulates notaries has become a post virtually always filled by a woman.

Yet, the current language of state law still bears remnants of the common law's demeaning feme covert system. In 1993, for instance, Florida at last deleted the notary's duty to take a widow's relinquishment of dower. Even today, provisions survive in state codes directing the notary to take a married woman's acknowledgment "as if she were sole and without any examination separate and apart from her husband."¹⁰⁷ A source of puzzlement to

¹⁰⁴ WILLIAM L. SNYDER, *THE NOTARIES' AND COMMISSIONERS' Manual* 3-4 (1912). The acts of the officer were valid de facto, and could not be attacked collaterally. See, e.g., *Findley v. Thorn*, 1 How. Pr. (N.S.) 76, 77 (1885); *Schiff v. Leipziger Bank*, 72 N.Y.S. 513 (1901).

¹⁰⁵ 404 U.S. 71 (1971). This case was argued before the U. S. Supreme Court by American Civil Liberties Union attorney Ruth Bader Ginsburg, who would later become the Court's second female justice. OXFORD COMPANION, *supra* note 31, at 333.

¹⁰⁶ The state of New Mexico, for example, has elected 17 consecutive female secretaries of state since 1923.

¹⁰⁷ See, e.g., HAW. REV. STAT. § 502-44 (1994); LA. REV. STAT. ANN. § 35:512 (West 1994).

many notaries, these are an anachronistic reminder of our nation's sexist heritage.

III. DISCUSSION: THE U.S. NOTARIATE—A 'PINK' GHETTO?

It is imprecise to say that women today gravitate more than men to the office of notary public in the United States. More precisely, they gravitate more than men to positions for which a notary commission is a necessary adjunct. These positions include legal secretary, paralegal, administrative assistant, escrow secretary, shorthand reporter¹⁰⁸ and clerk, among others. The label "clerical" or "secretarial" would describe many of them. Very few people in modern America, male or female, make a living strictly as a notary. The handful of self-employed full-time "professional" notaries typically reside in urban areas, advertising extensively in the telephone Yellow Pages and charging for travel and their availability at odd places and hours. It would be virtually impossible to make a living as a notary just by charging for the notarial act itself.

The typically scant maximum fees for notarial acts in the United States are prescribed by state law. For notarizing one signature, these fees range from fifty cents to ten dollars.¹⁰⁹ In many states the fees are so low that notaries regularly report to the National Notary Association they do not even bother to charge. "I'm embarrassed to ask," some say. In several states, the statutory maximum fees have changed little, if at all, from those stipulated in the original notary law enacted on the heels of statehood— meaning that notarial acts and the prestige of the notarial office have effectively devalued as each year passes.¹¹⁰

"Occupational segregation" has been a major complaint of feminists in recent decades. They bemoan "the fact that eighty percent of all working women are concentrated in 20 of 411 occu-

¹⁰⁸ In several states it is not necessary for a shorthand, i.e. court, reporter to have a notary commission in order to administer oaths to deponents; reporters are given automatic oath-administering powers for depositions. See *e.g.*, CAL. CIV. PROC. CODE § 2093 (WEST 1998); MO. ANN. STAT. § 492.010 (WEST 1996).

¹⁰⁹ *Guide to Notary Fees*, NAT'L NOTARY MAG., May 1997, at 25.

¹¹⁰ In the states of Alabama, Kentucky and Wisconsin, for example, the current maximum fee a notary may charge for taking the acknowledgment of one signature is 50 cents; for executing a jurat, Kentucky permits a maximum fee of only 20 cents. Nat'l Notary Ass'n, NOTARY HOME STUDY COURSE: CALIFORNIA SUPPLEMENT 54-56 (1989). Most state maximum fees for acknowledgments and jurats are in the range of two to five dollars. Even California—now at the top of the fee scale (along with Florida and Guam) and allowing notaries to charge \$10 for an acknowledgment—had a history of suppressing notary fees: in 1860, California notaries in certain counties could charge one dollar for an acknowledgment; in 1950, the fee was still one dollar. *Id.*

pations, the vast majority working as nurses, teachers, sales women, and secretaries.”¹¹¹ The accusation of women’s rights proponents is that society’s unwritten rules, to protect the economic dominance of males, force women into pink ghettos. These rules also pay women less than men for equal work, the argument goes, and interpose a “glass ceiling” between women and the choicest executive positions. Blatant gender-based discrimination in the workplace was theoretically eradicated in the wake of the Civil Rights Act of 1964. The Act’s Title VII prohibits discrimination by private employers, employment agencies and unions because of race, color, religion, national origin or sex.¹¹²

The federal Equal Pay Act¹¹³ additionally requires that men and women receive equal pay for equal work, though employers have been known to get around this law by using different titles for women, such as “executive assistant.”¹¹⁴ At a time when women enrollees in some law and medical schools outnumber the men, the charge that too many doors to prestigious careers are still closed to women hardly seems compelling. In the military, women are now even in the cockpits of high performance fighter planes, and their placement in ground and naval combat positions seems likely to be tried out: “The active-combat roles played by women in the Gulf War in early 1991 ... could prompt the [Supreme] Court to uphold a new challenge to the discriminatory provisions of the Military and Selective Service Act previously held constitutional. . . .”¹¹⁵

Is de facto occupational segregation necessarily discrimination? Consider these three situations:

A recent best-selling nonfiction book¹¹⁶ on the lucrative but highly dangerous East Coast swordfishing industry revealed that almost all swordfishers are male. (One notable exception captained her own successful fishing vessel.) It appears that more men than women opt for a job requiring great physical strength and stamina, exposure to extremes of heat and cold, and prolonged absences at sea lasting months.

A recent article¹¹⁷ on the opening of the new Getty Center art mu-

¹¹¹ KERBER & DE HART-MATHEWS, *supra* note 17 at 20

¹¹² 42 U.S.C. § 2000e-2 (1994).

¹¹³ 29 U.S.C. § 206 (d) (1994).

¹¹⁴ MILLSTEIN & BODIN, *supra* note 27, at 274.

¹¹⁵ OXFORD COMPANION, *supra* note 31, at 334

¹¹⁶ *See generally* SEBASTIAN JUNGER, THE PERFECT STORM (1997) (discussing the gender makeup of East Coast swordfishermen).

¹¹⁷ Bettijane Levine, Reflections of a City: Looking for a Few Good Volunteers, LOS ANGELES TIMES, Dec. 11, 1997, at E1. Indeed, so many of the Getty Center museum volunteers were “white, female, over 50 and of relatively high socioeconomic status,” that the museum sought out more diversity. ““When visitors come to the Getty Center, we want them to see the true L.A. reflected here . . . ,” says Claudia Hanlon, hired two and one half years ago to recruit about 400 docents and run the docent program.”“ Id. ““We made a conspicuous choice to try and change the profile.”“ Id. As a result, the Getty recruited in Watts and East Los Angeles, in search of more docents who were male, younger and non-white. *Id.*

seum in Los Angeles revealed that the overwhelming majority of individuals applying for nonpaying positions as docents are wealthy, white, fiftyish women. Another recent article¹¹⁸ revealed that women totally dominate the ranks of casting professionals in Hollywood by a 3 to 1 ratio. "It's just the kind of work that attracts more women than men," said a spokesperson for the Casting Society of America.

There can be no denying that age, physique, experience, education, need and gender dispose certain persons toward certain positions. No one complains about the lack of wealthy, middleaged women on swordfishing boats, nor about the dearth of burly, laconic men with sealegs among casting agents. It is hard not to concede that men tend to be larger and stronger than women, though certainly some women are larger and stronger than some men; and that their size and strength dispose many men without other assets toward certain occupations. It is also hard not to concede that women tend to be more adept at social interaction and "nurturing" than men, though certainly some men are more socially adept and nurturing than some women. Women seem generally to be better person-to-person communicators than men—no doubt a factor in their domination of Hollywood's casting profession. These qualities dispose many women toward occupations such as nurse and teacher.

If women were forced into such fields as nursing or court reporting because doors were locked to prevent their entry into choicer fields, the label "occupational segregation" would be apt. But women freely flock to nursing and court reporting because they are relatively well-paying and respected activities. The question then becomes: Are women subtly channeled by society (i.e., parents, teachers, counselors, role models) into certain fields and thereby segregated by occupation in order to preserve the most lucrative and powerful positions for males? Some feminists seem to believe that such an active conspiracy exists, or that our institutions are rigged in order to produce this result.

Betty Friedan's *The Feminine Mystique*, which energized the women's movement, seems much less relevant in the 1990s than in the 1960s. Friedan's claim that women are conditioned by society to be submissive housewives and to expect no more of life than that¹¹⁹ is hardly compelling, when American women today are

¹¹⁸ Walter Scott, *Personality Parade*, PARADE MAG., Dec. 14, 1997, at 4. "The [Casting Society of America] has 315 members in the [United States] and Canada, many of whom freelance." *Id.* Two years of casting experience in film, television or theater are necessary for membership. *Id.*

¹¹⁹ MILLSTEIN & BODIN, *supra* note 27, at 252.

biting the globe as astronauts, landing F-14s on aircraft carriers occupying two seats on the Supreme Court and representing the United States as Secretary of State.

Ambitious, talented and educated women are shattering the glass ceiling, though some would claim this to be mere tokenism orchestrated by an "old boys" circle that will never surrender power. Clearly, there is festering resentment about female inroads into professions that were formerly male bastions, the bar in particular. One wonders, for instance, how much of the often apoplectic resentment of First Lady Hillary Rodham Clinton in some quarters is due to the fact that she is an aggressive, articulate and successful attorney; such qualities are threatening to men who may prefer their women more deferential.

Certainly, for women who are not particularly ambitious talented or educated the choices are narrower. And they are further circumscribed for single or married women with custody of or major responsibility for, children. A divorced woman with no college degree, a deadbeat ex-husband, little work experience and custody of two children in elementary school will not likely look for a position on a swordfishing boat, as good as the money is, nor volunteer to labor free as a museum decent. Her range of choices will not be extensive. Perhaps she might seek indoor work as a sales clerk, cashier, waitress, receptionist or administrative assistant or outdoor work as anything from a cab driver to a lumberyard laborer. More than likely, she will prefer the indoor positions.

Are women with minimal marketable skills any more "ghettoized because they are drawn to a narrower range of low-paying positions (i.e., 20 of 411 occupations) than men with minimal marketable skills who are drawn to equally low-paying positions but in a broader range of industries? This would seem to be the marketplace at work, with the bidding highest for those, male or female with the greatest skills. The fact that women, in or out of marriage, are usually the persons responsible for the care of young children is a major factor in limiting their range of occupational options. In many cases, assuming such responsibility is a personal choice. Conceding that women, for good or ill, by choice or coercion, gravitate to a relatively narrow range of occupations and dominate the lowest-paid tier of those occupations, bothersome questions remain: Why do occupants of these low-paying positions become notaries in such large numbers? Why is the notary office so often the domain of the clerk, the secretary or the administrative assistant rather than of the executive or manager?

A partial answer is that it is usually the signature of the executive or the manager that must be notarized. Since notarizing ones own signature is forbidden, someone else must serve as notary. Indeed, the notarial codes of several states helpfully specify that employees may notarize for their employers without a dis-

qualifying interest.¹²⁰ The conveniences to a business or company of having a notary or notaries “in-house” are obvious. Perhaps less obvious are the opportunities for illegal or unethical exploitation of these notaries by unscrupulous or ignorant employers.

The following excerpt from the semifinal draft of the National Notary Association’s Notary Public Code of Professional Responsibility shows the vulnerable position of the in-house notary:

IV-B-2: False Date Improper

The Notary shall not knowingly issue a certificate for a notarial act that indicates a date other than the actual date on which the notarial act was performed.

ILLUSTRATION (C): The Notary is employed as a legal secretary in a small law firm specializing in tax law. One of the firm’s partners, Henry A., introduces the Notary to a client and asks her to notarize the client’s signature on various papers related to charitable contributions and the man’s tax liability. All of the notarial certificates have been pre-prepared for the Notary, who notices that the jurat certificate on one of the documents bears a date in the previous year. When the Notary points this out to Henry A., he takes her aside and explains that his client will suffer significant financial loss unless a charitable contribution is backdated to fall on or before the previous December 31, and trusts that the Notary will cooperate in this sensitive matter.

The Ethical Imperative: The Notary declines to notarize using a certificate with a false date, since it untruthfully states that the notarization was performed on a day on which the client had not actually appeared before her.

All notaries may be asked to falsify a notarial certificate by inserting an incorrect date or the name of a signer who did not actually appear. But it is much less difficult to refuse when the requester is not one’s employer or the client of one’s employer. Counselors on the National Notary Association’s “Information Service” telephone hotline can attest that notary employees regularly are pressured, intimidated, cajoled, browbeaten or threatened with loss of a job for their hesitance in “expediting” a transaction by ignoring basic principles of notarization, if not requirements of state law. Most often the illegal request is to notarize the signature of a person—typically a client or spouse of the employer—who is not present.

The notary employee at a lower level will generally be less disposed to object to an improper request, especially one directly made by an upper level manager. Need to keep one’s job is not the only inhibitor. There is also ignorance. Employees who are di-

¹²⁰ See, e.g., CAL. GOV. CODE § 8224 (West 1997).

rected by a supervisor to obtain a notary commission tend not to understand that they will thereby become an autonomous public official whose job it is to detect and deter documentary impropriety; they tend to believe-especially the young and inexperienced employees-that the notary commission is acquired purely to facilitate the employer's business and never to impede the employer's intentions. Indeed, many such employees feel constrained to surrender their notarial seals, journals and commission certificates to the employer upon leaving for a new job; and not a few employers actually require them to do so.

It is clear that one reason for the plurality of women in lower-level office positions is that the men who still tend to dominate management positions in many organizations seem to prefer them as underlings to males. Many men view women as a better fit in an office environment, regarding them as more deferential and if younger, more malleable than males. A glimpse of what an American office might be like without the sex-discrimination protections of the Fourteenth Amendment, Title VII and the Equal Pay Act is offered today in post-perestroika Russia. The following article¹²¹ describes the "feminization of poverty" and the "low status female underclass [that] has been growing in Russia since the Soviet collapse :

The World Bank estimates that the average working woman in Russia earns 71% of what a man does an hour. Women are banned from more than 460 well-paid job categories by the Labor Ministry which considers these jobs harmful to their reproductive health. Within Russian families, most spouses have kept traditional gender-based roles, with working women shopping and cleaning and cooking while their men drive and change lightbulbs. But Soviet era child-care programs have collapsed from lack of state funding putting new pressures on women to stay home. More than 70% of the officially unemployed are women. Even in the thriving businesses of now-glitzy Moscow, few women expect equal pay for equal work. No one raises an eyebrow at job ads for women stipulating that only the young need apply, and even then only those who are leggy, scantily clad and *bez kompleksov*-without hang-ups or willing to have sex with the boss. Women who prefer to work at their workplaces must specify *bez intima* -without intimacy-and face the consequences. There are few government initiatives to help shore up women's positions in a strongly hierarchical society in turmoil and protect them from abuse. A domestic violence law has yet to go before the parliament.¹²²

In Russia today, we find capitalism without current American constitutional and statutory protections against blatant sex dis-

¹²¹ Vanora Bennett, *Russia's Ugly Secret: Misogyny.*, LOS ANGELES TIME, Dec 6, 1997, at A1.

¹²² *Id.* at A9.

crimination. In the United States of the late 1990s, gender discrimination as a rule is subtler. American courts today appear mainly to be focusing on the nuances of sexual harassment—particularly such matters as whether the telling of off-color jokes or the hanging of “girlie” calendars may constitute a hostile work environment for female employees.

This is not to belittle the dilemma of the American in-house notary, who, as we have seen, is much more likely to be a woman than a man. While this article has chronicled the welcomed passing of the indignities of *feme covert*, it must report that the indignities of *notaire covert*, the company in-house notary, persist. That many employees in the position of *notaire covert* are uninformed and thus unaware that their employers regularly co-opt their notarial authority to “certify” improper transactions makes the problem doubly insidious.

To address the problem of the *notaire covert*, the National Notary Association in its Model Notary Act of 1984 proposed a dual legislative solution for the fifty states.¹²³ First, each state must have statute language in place expressly putting employers on notice that they will be punished for requiring improper notarial acts of employees:

6-101 Liability of Notary, Surety, and Employer

(c) An employer of a notary is liable to any person for all damages proximately caused that person by the notary’s official misconduct in performing a notarization related to the employer’s business, if the employer directed, encouraged, consented to, or approved the notary’s misconduct, either in the particular transaction or, impliedly, by previous actions in at least one similar transaction

(d) An employer of a notary is liable to the notary for all damages recovered from the notary as a result of official misconduct that was coerced by threat of the employer, if the threat, such as of demotion or dismissal, was made in reference to the particular notarization or, impliedly, by the employer’s previous action in at least one similar transaction. In addition, the employer is liable to the notary for damages caused the notary by demotion, dismissal, or other action resulting from the notary’s refusal to commit official misconduct.¹²⁴

Second, each state must make it a statutory requirement that notaries take and pass a course of instruction on their duties before becoming commissioned. At present, North Carolina is the only state mandating such training at community colleges,¹²⁵

¹²³ NAT’L NOTARY ASS’N, MODEL NOTARY ACT § 6-101 (1984).

¹²⁴ *Id.*

¹²⁵ N.C. GEN. STAT. § 10A-4(b) (1991).

though several states do require applicants to pass examinations.¹²⁶

Education—of notaries and their employers—can do much to dispel and counter the ignorance and impudence that allow exploitation of the American *notaire covert*. Through mandatory specialized courses of the kind pioneered in North Carolina, American women notaries may gain an appreciation of the noble traditions and critical principles and practices of notarization, and a greater confidence in executing the duties of the office they now dominate but, sadly, too often do not control.

¹²⁶ Besides North Carolina, the states currently requiring some kind of written or oral test of notary commission applicants are: Alaska, California, Connecticut, Hawaii, Maine, New York, Rhode Island, South Dakota and Wyoming.

