



***The 19th Amendment at 100:
From the Vote to Gender Equality***

Center for Constitutional Law at
The University of Akron School of Law

Friday, Sept. 20, 2019

CONTINUING EDUCATION MATERIALS

*More information about the **Center for Con Law at Akron** available on the Center website,
<https://www.uakron.edu/law/ccl/> and on Twitter @conlawcenter*

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The 19th Amendment at 100: From the Vote to Gender Equality



Friday, September 20, 2019 (8am to 5pm)

The University of Akron School of Law (Brennan Courtroom 180)

The focus of the 2019 conference is the 100th anniversary of the 19th Amendment. Soon after the passage of the 19th Amendment in June 1919, and its ratification by the states in August 1920, the voting amendment was interpreted as a broad command for gender equality, although that trend was quickly reversed. This conference brings together scholars from law, history, political science, and women's studies to engage in a day of intensive scholarly discussion about the implications of the amendment, and its social, legal, and political context.

- 8:00am Registration and Continental Breakfast (McDowell Common)
- 8:30am Introduction, Prof. Tracy Thomas, Director of the Center for Constitutional Law
- 8:35am Introductory Speaker: Nancy Abudu, Deputy Legal Director & Voting Rights Director, Southern Poverty Law Center, *Voting Rights Today*
Introduction: Matthew Brown, Student Editor, *ConLawNOW*
- 9:15am **Panel 1: Awakening and Advocacy for Women's Suffrage**
Moderator: Bernadette Genetin (Akron Law)
Tracy Thomas (Akron Law), *More Than the Vote: From Seneca Falls to ERA*
Richard Chused (NY Law), *The Women's Suffrage and Temperance Connection*
TJ Boisseau (Purdue, History), *Fair Treatment: Pro-Suffrage Activism at American World's Fairs and International Exhibitions*
Nicole Godfrey (Denver Law), *Suffragette Prisoners and the Importance of Protecting Prisoner Protests*
- 10:30am Break
- 10:45am **Panel 2: Amending the Constitution**
Moderator: CJ Peters (Akron Law)
Kimberly Hamlin (Miami U, History), *The 19th Amendment: The Fourth Civil War Amendment?*
Ann Gordon (Rutgers, History), *The Many Pathways to Suffrage Other than the 19th Amendment*
Paula Monopoli (Maryland Law), *The Legal Development of the 19th Amendment Post-Ratification*

THE CENTER FOR CONSTITUTIONAL LAW AT AKRON

- 11:45pm **Lunch** (McDowell Common)
- 12:30pm **Keynote Speaker: Prof. Ellen Carol DuBois (UCLA, History), *The Afterstory of the Nineteenth Amendment***
Introduction: Michael Grund, Editor in Chief, *Akron Law Review*
DuBois is Professor Emeritus of History at UCLA. She is the author of the forthcoming book "Suffrage: Women's Long Struggle for the Vote" (Simon & Shuster Feb. 2020) and also the author of the seminal work "Feminism and Suffrage"
- 1:30pm Break
- 1:45pm **Panel 3: Extensions and Applications of the Nineteenth Amendment**
Moderator: Brant Lee (Akron Law)
Elizabeth Katz (Washington U Law), *Women's Suffrage & the Right to Hold Public Office*
Gwen Jordan (Bay Path U, Legal Studies), *The International Federation of Women Lawyers' Campaigns for Global and National Women's Rights, 1944-1975*
Cornelia Weiss (J.D., Independent), *The 19th Amendment and the U.S. "Women's Emancipation" Policy in Post World-War II Occupied Japan: Going Beyond Suffrage*
Shelley Cavalieri (Toledo Law), *Vestigial Coverture*
- 3:30pm Break
- 3:45pm **Panel 4: Constitutional Meaning of the Nineteenth Amendment**
Moderator: Marty Belsky (Akron Law)
Reva Siegel (Yale Law), *The 19th Amendment & the Democratic Reconstruction of the Family: Recovering a Constitutional Tradition*
Jill Hasday (Minnesota Law), *Fights for Rights: How Forgetting and Denying Women's Struggles for Equality Perpetuates Inequality*
Mike Gentithes (Akron Law), *Felony Disenfranchisement and the Nineteenth Amendment*
Mae Quinn & Caridad Dominguez, (Florida Law), *Youth, Voting Rights, and the Constitution*
Jamie Abrams (Louisville Law), *Examining Entrenched Masculinities within the Republican Government Tradition*
- 5:00pm **Reception** (McDowell Common)

Follow live Tweeting of the conference [@ConLawCenter](#) and use hashtag [#19thAt100](#)

REGISTRATION: To register, go to <https://www.uakron.edu/law/ccl/registration/> Registration is free, unless seeking CLE (7 hours), for which the cost is \$100. (We will process Ohio CLE requests, and provide documentation for self-reporting for CLE in other states).

HOTEL: Accommodations for the conference are available at the [Courtyard Marriott Downtown Akron](#), 41 Furnace St., Akron OH 44308, at the University of Akron rate of \$122 per night. [Book a hotel room here \(by Aug. 29th\)](#)

TRAVEL: Both the Akron-Canton Airport (20 minutes from law school) and Cleveland-Hopkins Airport (45 minutes from law school) provide good access to campus. A map with driving directions to campus is [here](#).

PARKING is free and available in the open lot on the south side of the law school.

More than the Vote: The Nineteenth Amendment as Proxy for Gender Equality

Professor Tracy A. Thomas *

Elizabeth Cady Stanton, pioneering leader of the women's rights movement in the nineteenth century, famously declared the right of women to vote in 1848 at a convention in Seneca Falls, New York.¹ She alone initially appreciated the importance of the vote both for women's political power and participation in the governance of the country, as well as its symbolic meaning for women's full citizenship.² Her abolitionist and religious colleagues, however, were suspicious and a bit outraged by the suffrage demand, as these moralistic reformers were opposed to politics which they viewed as fundamentally corrupt due to bribery, patronage, and abuse of power.³ Stanton's friend and co-organizer Lucretia Mott was worried the demand would make the meeting "look ridiculous" and Stanton's husband, Henry, dismissed the suffrage claim as a "farce."⁴

Nevertheless, they persisted. For seventy-two more years, women activists would fight for the right to vote by organizing annual conventions, creating associations, petitioning legislatures and constitutional conventions, writing editorials, delivering speeches, and campaigning door-to-door for what would become the Nineteenth Amendment to the U.S. Constitution.⁵

This nearly-century long movement for suffrage, however, was never, just about the vote.⁶ It originated as part of a comprehensive plan for women's equality as proclaimed at Seneca Falls in the women's Declaration of Sentiments.⁷ Stanton, the intellectual driver of the first women's rights movement, conceptualized the vote as only one of the needed rights of women to access the political process.⁸ The elective franchise was a key piece of reform, to gain women access to the right to make the laws that governed them, but it was never the sole goal. Rather, Stanton's

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¹ Declaration of Sentiments, Report of the Woman's Rights Convention, Held at Seneca Falls, N.Y., July 19th and 20th, 1848, in *THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY*, v.I at 75 (Ann D. Gordon, ed. 1998).

² SUE DAVIS, *THE POLITICAL THOUGHT OF ELIZABETH CADY STANTON: WOMEN'S RIGHTS AND THE AMERICAN POLITICAL TRADITIONS* 90 (2008); JUDITH WELLMAN, *THE ROAD TO SENECA FALLS: ELIZABETH CADY STANTON AND THE FIRST WOMAN'S RIGHTS CONVENTION*, 193 (2004).

³ DAVIS, *supra* note 2, at 66; Ellen Carol DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878*, 74 *J. AMER. HISTORY* 836, 840-41 (1987).

⁴ ELISABETH GRIFFITH: *IN HER OWN RIGHT: THE LIFE OF ELIZABETH CADY STANTON* 54-55 (1984).

⁵ AILEEN S. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920*, 5 (1965) (1981 ed.) (reporting that suffrage women conducted 480 state legislative campaigns, 277 state convention campaigns, 19 campaigns to Congress, and 41 state amendment campaigns); Marjorie Spruill Wheeler, *A Short History of the Woman Suffrage Movement in America*, 9, 9-18 in *ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT* (Marjorie Spruill Wheeler, ed. 1995); *see also* ELAINE WEISS, *THE WOMAN'S HOUR: THE GREAT FIGHT TO WIN THE VOTE* 3 (2018); ELEANOR FLEXNER & ELLEN FITZPATRICK, *CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES* vix-xi (1959) (1996 ed.).

⁶ W. William Hodes, *Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment*, 25 *RUTGERS L. REV.* 26, 49 (1970) (stating that "it is clear that much more than the right to vote was at stake--a whole new way of life was being established for women."); *see also* JOAN HOFF, *LAW, GENDER & INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN* 135 (1991); Elizabeth B. Clark, *Religion, Rights, and the Difference in the Early Woman's Rights Movement*, 3 *WIS. WOMEN'S L.J.* 29, 29 (1987) ("Historians have overstated . . . the centrality of suffrage" to the early women's rights movement).

⁷ *See infra* Part II.

⁸ KRADITOR, *supra* note 5, at 77. *See infra* at ---.

first-wave movement envisioned a full-scale reform of law and society to bring about women's freedom and equal opportunity. Change was needed, she argued, in four venues: the state, family, industry, and church.⁹ She described women's oppression as "a fourfold bondage" with "many cords tightly twisted together, strong for one purpose" of woman's subordination.¹⁰

Despite these broad equality efforts targeting multiple systems, the vote emerged as the primary demand for women's rights. The Civil War "effectively killed the initial collectivity behind the broadly based humanitarian goals of the Seneca Falls Convention."¹¹ After the war, Reconstruction and the Civil Rights Amendments focused the national conversation on federal constitutional change, and particularly on the power of the vote prioritized in the Fifteenth Amendment.¹² The Fourteenth Amendment also highlighted the issue of the vote for women by explicitly inserting gender into the Constitution for the first time by enforcing the right to vote guaranteed to "male inhabitants" and "male citizens."¹³ Women's rights advocates were drawn into this constitutional debate, forced to narrow their focus and react to the national dialogue on suffrage.¹⁴ They also challenged the systemic dichotomy established by these amendments setting race in opposition to gender and creating what Stanton called an "aristocracy of sex" subordinating women to an inferior class of citizenship.¹⁵

Women then called for a federal constitutional amendment of their own.¹⁶ Their supporter, Representative George W. Julian of Indiana introduced the first proposed Sixteenth Amendment to guarantee the right of suffrage "without any distinction of discrimination . . . founded on sex" in March 1869.¹⁷ Betrayed by male and abolitionist allies who abandoned efforts at universal suffrage regardless of race or gender, Stanton and Susan B. Anthony formed their own National Association of Woman's Suffrage, with its nominal goal of the vote, but retaining a comprehensive agenda for four-system reform.¹⁸ Lucy Stone and her husband Henry Blackwell founded a second organization, the more conservative American Association of Woman's

⁹ See *infra* Part II.

¹⁰ Elizabeth Cady Stanton, "The Degradation of Disfranchisement," Address to the National-American Woman Suffrage Association, Feb. 26, 1891, in *THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY*, vol. V, 360, 366-67 (Ann D. Gordon, ed. 2009).

¹¹ HOFF, *supra* note 6, at 143.

¹² DuBois, *Outgrowing*, *supra* note 2, 844.

¹³ ELLEN CAROL DUBOIS, *FEMINISM & SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848-1869*, 60 (1978); DAVIS, *supra* note 2, at 131. Section 2 of the Fourteenth Amendment provides:

But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives of Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the *male* inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such *male* citizens shall bear to the whole number of *male* citizens twenty-one years of age in such State.

U.S. CONST. AMEND. XIV, § 2 (emphasis added).

¹⁴ DUBOIS, *supra* note 13, at 162.

¹⁵ DUBOIS, *supra* note 13, at 60, 68-69; Introduction, *THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY, VOL. II: AGAINST AN ARISTOCRACY OF SEX*, xxii-xxiii (Ann D. Gordon, ed. 2000); Letter from Elizabeth Cady Stanton to Wendell Phillips, May 25, 1865.

¹⁶ Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 *HARV. L. REV.* 947, 970-71 (2002); HWS, v.2, *supra* note 13, at 91.

¹⁷ Siegel, *She the People*, *supra* note 15, at 970 n.61 (citing Cong. Globe, 41st Cong., 1st Sess. 72 (1869) and H.R.J. Res. 15, 41st Cong. (1869)).

¹⁸ DUBOIS, *supra* note 13, at 189-98; LISA TETRAULT, *THE MYTH OF SENECA FALLS: MEMORY AND THE WOMEN'S SUFFRAGE MOVEMENT, 1848-1898*, 31-33 (2014).

Suffrage, which prioritized its efforts on the vote, first for Negro suffrage, and then women's suffrage, while also supporting some family and economic reforms.¹⁹

Pulled into this national constitutional movement, women's rights activists utilized the demand for the vote as a proxy for greater comprehensive agenda of both equality and emancipation from oppression. As Stanton later recalled, the vote was not the central idea of Seneca Falls, but rather "the social wrongs of my sex occupied altogether the larger place" in the early movement.²⁰ Her advocacy for the vote thus came to represent full citizenship rights, defined as full equality in civil rights and emancipation from oppressive social and religious norms. As Stanton argued, "in spite of all the efforts of the most politic adherents to keep the question of suffrage distinct," it was important to "admit that suffrage for woman does mean political, religious, industrial, and social freedom—a new and higher civilization."²¹

Continuing this push for women's full citizenship rights, Stanton and her supporters adopted a second constitutional strategy after ratification of the Fourteenth Amendment in 1868, arguing that women had the right to vote under its provision granting all citizens "privileges and immunities" under the law.²² On this basis, NAWS adopted a "New Departure" strategy, departing from their focus on constitutional amendment, and calling militantly to women to demand these rights through direct action at the polls.²³ Anthony's successfully voted under this strategy in 1872, but was later arrested and criminally tried, with the trial court rejecting the constitutional argument and procedural oddities preventing her appeal.²⁴ The New Departure strategy was soon halted by the U.S. Supreme Court's decision in *Minor v. Happersett*.²⁵ The Court held that while women were national citizens, entitled to the protection of the privileges and immunities clause, voting was not a federal right of citizenship, but rather was determined by each individual state.²⁶

After the defeat in *Minor*, women's rights advocates renewed their efforts for a federal constitutional amendment enfranchising women.²⁷ They also pursued the one avenue left open by *Minor* for state rights, continuing decades of grassroots efforts to secure suffrage state by state. The first state to grant women suffrage was Wyoming in 1869, followed by other western territory of Utah in 1870, and then the states of Colorado (1893) and Idaho (1896); those were the only states, however, to enfranchise women in the nineteenth century.²⁸ By the late 1880s,

¹⁹ DUBOIS, *supra* note 13, at 198-200; TETRAULT, *supra* note 17, at 34; see also Andrea Moore Kerr, *White Women's Rights, Black Men's Wrong, Free Love, Blackmail, and the Formation of the American Woman Suffrage Association*, in ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT, 61-62-78 (Marjorie Spruill Wheeler, ed. 1995).

²⁰ Elizabeth Cady Stanton, *A Private Letter*, REV., Nov. 10, 1870.

²¹ Stanton, *Degradation of Disfranchisement*, *supra* note 10, at 367.

²² Siegel, *She the People*, *supra* note 15, at 971-72. They relied on the 1823 U.S. Supreme Court case, *Corfield v. Coryell*, which found the elective franchise to be one of the privileges and immunities protected by Article IV of the Constitution. DuBois, *Outgrowing*, *supra* note 2, at 852; HWS, *supra* note 13, at v.II, 407-11.

²³ Siegel, *She the People*, *supra* note 15, at 971; DuBois, *Outgrowing*, *supra* note 2, at 853.

²⁴ *United States v. Susan B. Anthony*, 11 Blatchford 200, 202 (1873); see RICHARD CHUSED & WENDY WILLIAMS, *GENDERED LAW IN AMERICAN HISTORY* 872-78 (2016); DuBois, *Outgrowing*, *supra* note 2, at 853, 859-60.

²⁵ 88 U.S. 162 (1874). A few lower courts had similarly rejected the privileges and immunities theory, following the lead of a 1871 House Judiciary Report by Fourteenth Amendment drafter John Bingham, that argued the amendment was not intended to grant women suffrage. DuBois, *Outgrowing*, *supra* note 2, at 857; HWS v.II, *supra* note 6, at 597-99.

²⁶ *Minor*, 88 U.S. at 165, 170-71.

²⁷ Siegel, *She the People*, *supra* note 15, at 974.

²⁸ KRADITOR, *supra* note 5, at 4; Beverly Beeton, *How the West Was Won for Woman Suffrage*, 99, 100, in Wheeler, ONE WOMAN, ONE VOTE. The next states to grant women's suffrage were Washington (1910), California (1911), Oregon (1912), Kansas (1912), and Arizona (1912).

new allegiances of the suffrage women with the socially conservative Women's Christian Temperance Union (WCTU) advocating prohibition, brought an increase in numbers, but shifted the arguments in support of the vote to traditional domesticity reasons like women's moral compass and home protection role.²⁹ The woman's suffrage movement, however, entered what has been called the "doldrums" as few victories aside from some limited municipal and school board suffrage rights were achieved, and constitutional efforts stalled as the national organization focused almost exclusively on the states.³⁰

It would take the next generation of activists under the leadership of Alice Paul and her more radical and sensationalist politics for the vote to be passed.³¹ Paul organized media events, suffrage parades, and pickets of the White House to force the issue of women's suffrage after seventy years of activism.³² She and her White House protest group were arrested and inhumanely imprisoned and force fed, creating the final public and political pressure to force President Wilson to endorse women's suffrage.³³ Congress passed what had become the Nineteenth Amendment in June 1919 on the eve of World War I. It was ratified by the on August 20, 1920. As the story goes, the definitive vote came from a young Harry Burn, a member of the Tennessee state legislature who had received a strongly worded letter from his mother urging him to vote in favor of women's suffrage.³⁴

An early promise of a broad reading of the Nineteenth Amendment by the U.S. Supreme Court as a systemic change guaranteeing women's full equality and emancipation, as the Declaration of Sentiments envisioned, was quickly abandoned. Instead, women's rights became entangled with protectionist labor politics, focused on emphasizing women's difference, weakness, and inferiority in order to support workplace protection laws.³⁵ Thus, soon after the grant of suffrage, Alice Paul and her National Women's Party immediately proposed the Equal Rights Amendment to enshrine women's full equality in the Constitution.³⁶ The original comprehensive agenda for women's rights in all venues of society was now embodied in this new constitutional proposal, and its advancement continued by advocacy for the ERA. The ERA, however, met with opposition, first from labor groups including the American Civil Liberties Union (ACLU), concerned about workplace protection laws, and after passage by Congress in 1972, from socially conservative women's and religious groups, concerned about the impact of gender equality on the family. This opposition to the ERA, continuing to the present time,

²⁹ Carolyn De Swarte Gifford, *Frances Willard and the Woman's Christian Temperance Union's Conversion to Woman Suffrage*, 117, in *ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT* (Marjorie Spruill Wheeler, ed. 1995); KRADITOR, *supra* note 5, at 67; TETRAULT, *supra* note 17, at 87-89.

³⁰ FLEXNER & FITZPATRICK, *supra* note 5, at 255; KRADITOR, *supra* note 5, at 4, 6, 9. School board suffrage was granted by Kentucky in 1838, Kansas in 1861, Michigan and Minnesota in 1875, and thirteen other states and territories by 1890. KRADITOR, *supra*, at 4. Municipal suffrage for women was granted by Kansas in 1887, but both municipal and school board suffrage based on women's caretaking role proved to be obstacles to further extension of women's right to vote. *Id.* at 6. Illinois granted women the right to vote for presidential electors in 1913. *Id.* NAWSA would not adopt a policy focusing on the federal amendment until 1916. *Id.* at 9.

³¹ See Lynda Dodd, *Sisterhood of Struggle: Leadership and Strategy in the Campaign for the Nineteenth Amendment* 189, 190-95 in *FEMINIST LEGAL HISTORY* (Tracy A. Thomas & Tracey Jean Boisseau, eds. 2011); Linda G. Ford, *Alice Paul and the Triumph of Militancy*, 277, 284 in *ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT* (Marjorie Spruill Wheeler, ed. 1995).

³² Dodd, *supra* note 38, at 190-95; see also TINA CASSIDY, *MR. PRESIDENT, HOW LONG MUST WE WAIT? ALICE PAUL, WOODROW WILSON, AND THE FIGHT FOR THE RIGHT TO VOTE*, 40, 170 (2019).

³³ Dodd, *supra* note 38, at 198.

³⁴ WEISS, *supra* note 5, at 305-07.

³⁵ Tracey Jean Boisseau & Tracy A. Thomas, *After Suffrage Comes Equal Rights? ERA as the Next Logical Step*, 227, 230, 233 in *100 YEARS OF THE NINETEENTH AMENDMENT: AN APPRAISAL OF WOMEN'S POLITICAL ACTIVISM* (Holly J. McCammon & Lee Ann Banaszak, eds. 2018).

³⁶ Boisseau & Thomas, *supra* note 47, at 230.

ninety-eight years after it was first proposed, delayed and denied the original intent of the women's rights movement for reform in all venues of law and society.

This essay first details the origins of women's political demand for the vote as part of a comprehensive social reform.³⁷ It then discusses the four strands of the comprehensive early women's rights agenda for gender equality focused on the political state, domestic family, economic industry, and religious church.³⁸ Finally, it connects the suffrage activism with demands for an equal rights amendment to realize the full civil rights of equality envisioned by and for women.³⁹ This long view of women's rights shows it was never only about the vote; rather, the vote stood as a shorthand for a complete revolution of the interlocking systems supporting women's oppression and denying women equal rights.

I. Declaring Women's Sentiments

The first political demand for women's right to vote is often cited as the Woman's Rights Convention held in Seneca Falls, New York, on July 19 and 20, 1848.⁴⁰ There, Elizabeth Cady Stanton presented her draft of the "Declaration of Sentiments" declaring men's wrongs against women and demanding seventeen specific reforms.⁴¹ A few women had previously advocated women's right to vote.⁴² Women in colonial New Jersey also briefly exercised the right to vote from 1787 to 1807.⁴³ Seneca Falls, however, brought the demand for the vote into the public, with political and mainstream newspapers reporting, and criticizing, the demand.⁴⁴

Stanton's written declaration arose out of her own dissatisfaction with her limited rights and role as a wife and homemaker.⁴⁵ A brilliant mind, Stanton was educated more than most women, attending a female seminary, but denied a college education.⁴⁶ Her father, Daniel Cady, a noted lawyer, legislator, and jurist in New York, had a close relationship with his daughter and left without a son, Cady shared his legal work with his daughter.⁴⁷ Elizabeth sat in his office while he handled client matters.⁴⁸ She observed him in court, and debated the apprentices he routinely trained in their home around the dinner table. As a young adult, Elizabeth served as a legal clerk to her father during the year he rode circuit, and "read law" with her brother-in-law in her early twenties.⁴⁹ She had a mind trained in legal analysis and debate beyond that of many lawyers of the time.⁵⁰ This training attuned her to the role of law as an institution, and as a

³⁷ See *infra* Part I.

³⁸ See *infra* Part II.

³⁹ See *infra* Part III.

⁴⁰ TETRAULT, *supra* note 17, at 4-5 (describing how Seneca Falls was later mythologized as the origins story of the women's rights movement).

⁴¹ Declaration of Sentiments, *supra* note 1; WELLMAN, *supra* note 2, at 192.

⁴² Jacob Katz Cogan & Lori D. Ginzberg, *1846 Petition for Woman's Suffrage, New York State Constitutional Convention*, 22 SIGNS 427, 429 (1997) (women's petition to the state constitutional convention for the right to vote); Gerda Lerner, *The Meanings of Seneca Falls, 1848-1998*, DISSENT 35, 38 (1998) (stating that abolitionists Sarah and Angelina Grimke advocated women's rights to vote and hold office in 1838, and feminist theorist Frances Wright did so in the 1830s).

⁴³ CHUSED & WILLIAMS, *supra* note 30, at 37-43; HOFF, *supra* note 6, at 98-102.

⁴⁴ WELLMAN, *supra* note 2, at 209-10.

⁴⁵ WELLMAN, *supra* note 2, at 188-89.

⁴⁶ GRIFFITH, *supra* note 4, at 17.

⁴⁷ GRIFFITH, *supra* note 4, at 9-13.

⁴⁸ GRIFFITH, *supra* note 4, at 11.

⁴⁹ TRACY A. THOMAS, *ELIZABETH CADY STANTON AND THE FEMINIST FOUNDATIONS OF FAMILY LAW*, 4-5 (2016).

⁵⁰ *Id.*

mechanism of both oppression and reform.⁵¹ It also trained her to “think like a lawyer,” citing legal authority in the code and case law, criticizing the reasons and implicit bias for a rule, and crafting arguments to address the strengths of the opposition.⁵²

After her marriage to abolitionist and infrequent lawyer, Henry Stanton, Elizabeth grew even more dissatisfied with the restrictions on her mind and opportunities due to her gender.⁵³ Relocated from the literary and political Boston, to the mill town of Seneca Falls for her husband’s attempted political career, Elizabeth was frustrated with her daily role as housekeeper and caregiver for, at the time, three young boys.⁵⁴ Ultimately, Stanton would have seven children, and would be delayed in her most active work until her fifties when the children grew up.⁵⁵ By 1848, Elizabeth resented Henry’s freedom to engage in political activism, think and work on deep important issues, and freedom to spend most of his time traveling away from home.⁵⁶

This frustration led to thirty-two-year-old Elizabeth meeting with her mentor, Lucretia Mott, when Mott was visiting her sister in a neighboring town.⁵⁷ Stanton was introduced to the older abolitionist Mott when both attended the 1840 World Anti-Slavery Convention in London, Stanton accompanying her husband on their honeymoon and his participation in the convention.⁵⁸ Women at the convention were denied the right to speak on the floor, confined to the upper balcony, which triggered a connection between the two women and a resolve for future action on women’s rights.⁵⁹ Eight years later, Mott and Stanton connected again on the issue. Pouring out her personal frustrations over tea with five Quaker women, Stanton’s resolve intensified, and the women decided to take action.⁶⁰ They issued a call for a convention one week later to discuss “the social, civil, and religious condition of woman,” at the Wesleyan Chapel there in Seneca Falls.⁶¹ More than two hundred people attended, including notable reformers like Frederick Douglass.⁶²

On the first day of the convention, resolutions were presented establishing the general equality of women.⁶³ “Stanton applied eighteenth-century natural rights doctrine to nineteenth-century sexual inequality,” following prevailing legal and political theory and focused on individual freedom.⁶⁴ One resolution stated that “the equality of human rights results necessarily from the fact of the identity of the race in capabilities and responsibilities.”⁶⁵ It was resolved that laws that “conflict, in any way, with the true and substantial happiness of woman, are contrary to the great precept of nature, and of no validity; for this is superior in obligation to any other.”⁶⁶ For this proposition, the resolution cited Blackstone’s Commentaries for the authority

⁵¹ *Id.* at 5, 22-23.

⁵² *Id.*

⁵³ WELLMAN, *supra* note 2, at 169-70, 177, 188-89.

⁵⁴ GRIFFITH, *supra* note 4, at 48-50; LORI D. GINZBERG, *ELIZABETH CADY STANTON: AN AMERICAN LIFE* 49-52 (2009)

⁵⁵ DAVIS, *supra* note 2, AT 63.

⁵⁶ WELLMAN, *supra* note 2, at 168-70.

⁵⁷ GRIFFITH, *supra* note 4, at 51.

⁵⁸ GINZBERG, *supra* note 66, at 34-41.

⁵⁹ GINZBERG, *supra* note 66, at 37-41.

⁶⁰ GRIFFITH, *supra* note 4, at 51; *ELIZABETH CADY STANTON, EIGHTY YEARS AND MORE: REMINISCENCES: 1815-1897*, 147-48 (1898; 2002 ed.); WELLMAN, *supra* note 2, at 177, 188.

⁶¹ Declaration of Sentiments, *supra* note 1.

⁶² WELLMAN, *supra* note 2, at 197.

⁶³ Declaration of Sentiments, *supra* note 1.

⁶⁴ KRADITOR, *supra* note 5, at 44-45; GRIFFITH, *supra* note 4, at 54.

⁶⁵ *Id.* at 77.

⁶⁶ *Id.* at 76.

that the “law of Nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other.”⁶⁷ Another resolution stated that “all laws which prevent woman from occupying such a station in society as her conscience shall dictate, or which place her in a position inferior to that of man, are contrary to the great precept of nature, and therefore of no force or authority.”⁶⁸ Further resolutions stated that “woman is man’s equal—was intended to be so by the Creator,”⁶⁹ and that women had a right to address a public audience, a right that had been denied at the London Anti-Slavery Convention.⁷⁰ The resolutions also included one very concrete statement “that it is the duty of the women of this country to secure to themselves their sacred right to the elective franchise.”⁷¹

On the second day, the convention debated the key operative document, the *Declaration of Sentiments*, prepared by Stanton.⁷² Borrowing its title from an anti-slavery track and modeled in part on the Declaration of Independence, the Declaration documented the “history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of absolute tyranny over her.”⁷³ Stanton’s *Declaration of Sentiments* itemized eighteen specific civil rights women were denied in violation of their happiness and equality.⁷⁴

The *Declaration* was organized in four parts, highlighting the four institutional arenas of needed reform: state, family, industry, and church.⁷⁵ First, in the political sphere, Stanton challenged that women had not be permitted “to exercise her inalienable right to the elective franchise.”⁷⁶ She criticized this denial of “the first right of a citizen” that compelled women “submit to laws, in the formation of which she had no voice,” and which left her “without representation in the halls of legislation” thereby oppressing women on all sides.⁷⁷ Second, as to the domestic sphere, Stanton issued a general challenge against the common law that made a married woman “in the eye of the law, civilly dead.”⁷⁸ She decried the loss of the right in property, loss of wages, to moral responsibility, to a husband’s right of domestic chastisement.⁷⁹ She challenged the laws of divorce and the guardianship of children as “to be wholly regardless of the happiness of women—the law, in all cases, going upon the false supposition of the supremacy of man, and giving all power into his hands.”⁸⁰

Third, in sphere of industry, Stanton challenged the right for women to work in the “profitable employments,” decried the “scant remuneration” women received for work, and criticized the lack of colleges for women.⁸¹ In the fourth part, Stanton challenge the subjugation of women in the church sphere, attacking women’s exclusion from ministry, exclusion from public in church affairs, establishment of a domestic sphere of action, and creation of a “false public sentiment, by giving to the world a different code of morals for men and women.”⁸² In conclusion, the *Declaration*: “[I]n view of this entire disenfranchisement of one-half the people

⁶⁷ *Id.*

⁶⁸ *Id.* at 76-77.

⁶⁹ *Id.* at 77.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² GRIFFITH, *supra* note 4, at 53.

⁷³ GRIFFITH, *supra* note 4, at 53; *Declaration of Sentiments*, *supra* note 1.

⁷⁴ *Declaration of Sentiments*, *supra* note 1, at 79-80.

⁷⁵ *Id.* at 79.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 80.

⁸² *Id.*

of this country, their social and religious degradation,--in view of the unjust laws above mentioned, and because women do feel themselves aggrieved, oppressed, and fraudulently deprived of their most sacred rights, we insist that they have immediate admission to all the rights and privileges which belong to them as citizens of these United States.”⁸³ Thus, the first women’s rights convention was about the vote, but it was also about *all* the rights and privileges of citizenship.

This overall approach establishing philosophical parameters and concrete demands drew on existing thought on women’s rights.⁸⁴ Stanton was familiar with these early feminist theories of Margaret Fuller, Sarah Grimke, and Mary Wollstonecraft.⁸⁵ Yet “Stanton was the first person to devote her considerable intellect solely to developing the philosophy and promoting the cause of woman’s rights. She essentially invented and embodied what we might term stand-alone feminism, devoting her life to challenging the ways that ideas about gender shaped women’s place in society, politics, law, and marriage.”⁸⁶ Stanton’s application of these ideals in the Declaration of Sentiments has been described as a “female legal document” of “ideological radicalism” and “collective feminist consciousness” that has “yet to be duplicated.”⁸⁷ It was a broad “equality text” seeking women’s rights of political and legal status as well as an emancipatory text proclaiming freedom from oppressive religious and social customs and restraints.⁸⁸

II. A Holistic Plan for Equality

The genius of the early women’s rights movement, historians have concluded, was its comprehensiveness in “linking rights to all the personal and political issues that affected women in the family, the church, and the state.”⁸⁹ The driving concerns for many of the early participants in the movement were economic, stemming from injustices in laws, marriage,

⁸³ *Id.*

⁸⁴ THOMAS, *supra* note 61, at 19-20; Lerner, *supra* note 54, at 37-38.

⁸⁵ While living in Boston in 1843, Stanton participated in transcendentalist writer Margaret Fuller’s small-group conversations when Fuller wrote the “The Great Lawsuit” and its expanded book form, *Woman in the Nineteenth Century* and Stanton launched similar groups in Seneca Falls.⁸⁵ MEGAN MARSHALL, MARGARET FULLER: A NEW AMERICAN LIFE 132, 134, 216, 219 (2013); Phyllis Cole, *Stanton, Fuller, and the Grammar of Romanticism*, 73 NEW ENG. Q. 553, 553-54 (2000). Fuller argued that each human soul should be allowed to achieve “fulness of being [sic],” which for women required the removal of male dominance, reform of marriage, and self-sufficiency in education and occupation. Stanton also met and corresponded with abolitionist Sarah Grimké and her sister Angelina who together ignited “the woman question” as the first women to speak to public audiences on slavery. Stanton dissected and circulated Sarah’s out-of-print feminist work, *Letters on the Equality of the Sexes* (1837) challenging women’s assumed biblical inferiority and legal disability.⁸⁵ WELLMAN, *supra* note 2, at 160; ECS to Elizabeth J. Neall, Nov. 26, 1841; ECS to Elizabeth Pease, Feb. 12, 1842; Sarah Grimké to ECS, Dec. 31, 1842. Stanton read British writer Mary Wollstonecraft’s *A Vindication of the Rights of Woman* (1792) and its assertions of women’s equal abilities and equal education. Charles J. Reid, Jr., *The Journey to Seneca Falls: Mary Wollstonecraft, Elizabeth Cady Stanton, and the Legal Emancipation of Women*, 10 UNIV. ST. THOMAS L.J. 1123 (2013).

⁸⁶ GINZBERG, *supra* note 66, at 11; THOMAS, *supra* note 61, at 19-25; *see* GRIFFITH, *supra* note 4, at xiv (“Stanton was the first person to enumerate every major advance achieved for women in the last century and many of the reforms still on the agenda in this century.”).

⁸⁷ HOFF, *supra* note 6, at 136, 139, 141.

⁸⁸ Lerner, *supra* note 54, at 39-40; *see also* The Salem, Ohio 1850 Women’s Rights Convention Proceedings 17 (Robert W. Audretsch, ed. 1976) (demand for “equality of rights”).

⁸⁹ NANCY ISENBERG, SEX AND CITIZENSHIP IN ANTEBELLUM AMERICA 1998; Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor 1850-1880*, 103 YALE L.J. 1073, 1158 (1994); Clark, *Religion*, *supra* note 6, at 29.

property, and labor.⁹⁰ In the *Declaration of Sentiments*, Stanton explained how the institutions of government, church, family, and industry were connected, four cords of oppression so tightly intertwined that “attempt to undo one is to loosen all.”⁹¹ Stanton returned to this integrative understanding of gendered reform decades later, arguing that in order to break down the systemic complexity, women must have “bravely untwisted all the strands of the fourfold cord that bound us and demanded equality in the whole round of the circle.”⁹² Only a holistic agenda that addressed all aspects of women’s lives and “happiness and development,” in addition to targeting societal factors “in all directions” would be effective to break this cord of gendered oppression. “We should,” Stanton argued, “sweep the whole board, demanding equality everywhere and the reconstruction of all institutions that do not in their present status admit of it.”⁹³ Embracing both concepts of women’s rights—civil legal rights to vote, property, education, and employment—and women’s emancipation from gender-based stereotypes and oppression, the first woman’s movement sought a transformative change of the status quo.⁹⁴

a. The State

The *Declaration*’s first, and most radical, demand was for the vote.⁹⁵ It was the most radical of the claims advanced at Seneca Falls because “it challenged the assumption of male authority over women and raised the prospect of female autonomy.”⁹⁶ Stanton declared the right to exercise the elective franchise an “inalienable right” and stated that it was the “duty” of women in the country to secure that “sacred right.”⁹⁷ The Declaration stated that the denial of the right to vote resulted in compelling women to submit to laws in which they had no voice in formation, and denied women “representation in the halls of legislation.”

The emphasis on political action was uniquely Stanton’s.⁹⁸ “She was convinced that social problems required political solutions” and “believed in using government to create legal remedies.”⁹⁹ This was at odds with Quaker and many abolitionists who viewed politics as corrupt, and chose moral suasion over political action.¹⁰⁰ As Stanton later recalled, “even good Lucretia Mott said it was an extravagant demand that would make our whole movement ridiculous.”¹⁰¹ Stanton, however, appreciated the process of politics as well as the significance of women’s shared power in that governance.

The right to vote represented more than just the opportunity for women to cast their individual opinion. Voters were part of the political power, giving women access to and

⁹⁰ HOFF, *supra* note 6, at 134; Clark, *Religion*, *supra* note 6, at 30; DuBois, *Outgrowing*, *supra* note 3, at 837-38.

⁹¹ Stanton, Degradation of Disfranchisement, *supra* note 10, at 366-67; *see also* Elizabeth Cady Stanton, “The Degradation of Disfranchisement,” BOSTON INV., Apr. 20, 1901, in *The Papers of Elizabeth Cady Stanton and Susan B. Anthony, Microfilm Collection*, reels 1-45 (Ann D. Gordon, ed. 1991).

⁹² Stanton, Degradation of Disfranchisement, *supra* note 10, at 367.

⁹³ *Id.*; Stanton Degradation (Boston Inv), *supra* note 109; Clark, *Religion*, *supra* note 6, at 29-30, 50

⁹⁴ Lerner, *supra* note 54, at 39. Women’s emancipation” is “freedom from oppressive restrictions imposed by reason of sex” such as biological restrictions like maternity or socially imposed ones like caregiving, and results in self-determination and autonomy. *Id.*

⁹⁵ DAVIS, *supra* note 2, at 56, 65; DUBOIS, *supra* note 13, at 40.

⁹⁶ *Id.*

⁹⁷ Declaration of Sentiments, *supra* note 1.

⁹⁸ DAVIS, *supra* note 2, at 90, at 57; WELLMAN, *supra* note 2, at 193.

⁹⁹ GRIFFITH, *supra* note 4, at 54.

¹⁰⁰ DuBois, *Outgrowing*, *supra* note 3, at 840.

¹⁰¹ Elizabeth Cady Stanton, *A Private Letter*, REV., Nov. 10, 1870; GINZBERG, *supra* note 66, at 61; Clark, *Religion*, *supra* note 6.

accountability from lawmakers.¹⁰² The vote also carried with it correlative political rights of public citizenship, such as the right to hold office and serve as jurors. For example, Stanton and Anthony's 1876 Declaration of Rights, written as a demonstration for the American centennial, emphasized political wrongs in "direct opposition to the principles of just government" including denial of suffrage, trial by jury, taxation without representation, abuse of judicial authority.¹⁰³ Ensuring women's participation in lawmaking was part of Stanton's wider lens of feminist power, as she appreciated the instrumentality of the law and its role in creating systems of power.¹⁰⁴

For Stanton, the vote was both the enforcement mechanism and the entry point for all women's rights.¹⁰⁵ Writing to the Ohio convention in 1850, she highlighted the importance of the right to vote, and "nothing short of this."¹⁰⁶ "The grant to you of this right," she argued, "will secure all others, and the granting of every other right, whist this is denied, is a mockery."¹⁰⁷ She went further, arguing not only that the franchise could bring more legal rights to women, but it could also bring an end to women's subordination in all realms of life.¹⁰⁸ Along with the vote, she asserted, "comes equality in Church and State, in the family circle, and in all our social relations."¹⁰⁹ With suffrage, women expected the vote to "lead to a total transformation of their lives."¹¹⁰

b. The Family

The second cord of oppression the first woman's rights movement identified was the family.¹¹¹ The so-called private sphere was not in fact segregated from women's political demands, "but instead was intertwined with the other institutional strands strangling equality."¹¹² As Stanton explained, "[t]he family, too, is based on the idea of woman's subordination, and man has no interest, as far as he sees, in emancipating her from that despotism, by which his narrow, selfish interests are maintained under the law and religion of the country."

Practically, marriage was the social institution where most women found themselves, and it was in marriage that they experience gender subordination. The family, governed by patriarchal laws and sentimental gender norms, created and perpetuated women's inferiority. Under the common law of "coverture," a married woman's legal existence was covered by that of her husband. Thus, she had no legal right to own property, earn wages, accrue debt, testify in court, or parent children. Single and widowed women retained some rights to property and devise, but were also swept within the larger umbrella of restricted rights. Stanton explained, that "[a]s woman is the greatest sufferer, her chief happiness being in the home and with her children, and

¹⁰² DAVIS, *supra* note 2, at 64-66; DUBOIS, *supra* note 13, at 42-46; KRADITOR, *supra* note 5, at 115.

¹⁰³ Declaration of Rights of the Women of the United States, July 4, 1876, in THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY, vol. III, 234 (Ann D. Gordon, ed. 2003); *see* HOFF, *supra* note 6, at 178-80, 388-92

¹⁰⁴ THOMAS, *supra* note 61, at 5, 22-23; DAVIS, *supra* note, at 63-65.

¹⁰⁵ DAVIS, *supra* note 2, at 64.

¹⁰⁶ *Id.*; Elizabeth Cady Stanton to Mary Ann White Johnson and the Ohio Women's Convention, Apr. 7, 1850, in SELECTED PAPERS, v.I, 325.

¹⁰⁷ Stanton to Ohio Convention, *supra* note 101.

¹⁰⁸ DAVIS, *supra* note 2, at 64.

¹⁰⁹ Stanton to Ohio Convention, *supra* note 101.

¹¹⁰ DUBOIS, *supra* note 13, at 15; Kraditor, *supra* note, at xiv.

¹¹¹ Declaration of Sentiments, *supra* note 1; THOMAS, *supra* note 61, at 29-35; DAVIS, *supra* note 2, at 70; Elizabeth B. Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth Century America*, 8 LAW & HIST. REV. 25 (1990).

¹¹² THOMAS, *supra* note 61, at 3.

seldom having resources of her own, prevented by family cares from doing business in her own name and enjoying the dignity of independence by self-support, she is even more interested than man can possibly be as to the laws affecting family life.”¹¹³

Stanton used the law of domestic relations to unify women as a collective group, necessary for establishing women’s appreciation of their own oppression and advocating for universal, systemic change.¹¹⁴ Women had been led to view themselves as isolated in the private sphere of the family, segregated by class, privilege, and race into a dismal mantra of what Stanton labelled, “I have all the rights I want.”¹¹⁵ Seeking to awaken women to their own discrimination, and appreciate the discriminatory effect of gender, Stanton used the laws of marriage and the family to demonstrate how women were classified together based on gender, regardless of other barriers of race or class.¹¹⁶ This commonality of gender then allowed for the collective demand for reform of gender oppressive laws and systems.¹¹⁷

As modern historians have explained: “The whole system of attribution and meaning that we call *gender* relies on and to a great extent derives from the structuring provided by marriage. Turning men and women into husbands and wives, marriage has designated the ways both sexes act in the world and the reciprocal relation between them. It has done so probably more emphatically than any other single institution or social force.”¹¹⁸

Stanton’s manifesto and the early woman’s rights movement therefore included a broad theoretical attack on the structure of coverture. They challenged coverture systemically, arguing that man had made woman “if married, in the eye of the law, civilly dead.” The *Declaration* addressed the issue of marital property and wages. It challenged women’s immunity from civil prosecution and the power of the husband to punish his wife by physical chastisement and restriction of liberty.¹¹⁹ The feminist platform include a challenge the unequal laws of divorce, and the denial of guardianship to mothers. It made the political connection between property ownership, taxation, and citizenship that had ignited the American Revolution, noting that “[a]fter depriving her of all rights as a married woman, if single and the owner of property, he has taxed her to support a government which recognizes her only when her property can be made profitable to it.”¹²⁰

These economic power concerns in fact triggered the women’s rights movement, and garnered more acceptance by both conservative and radical women at the time, unlike the more subversive claim for suffrage. As chronicled in Stanton’s *History of Woman Suffrage*, the grassroots women’s organizations that popped up after Seneca Falls in states like Ohio, Massachusetts, and Vermont, focused their lobbying and recruitment on issues of property rights. Loss of the family home and personal property, the disabilities of dower in a widow’s one-third share of her husband’s property at his death, lack of ownership of wages earned, and creditor issues filled the pages of the women’s grievances. When feminists pointed out how the law made wives financial dependents, “they made concrete the injury of disfranchisement in a way that abstract appeals to rights could not.”¹²¹ Property issues, thus, were able to recruit new members to the cause of women’s rights and to the more debatable demand for suffrage.

¹¹³ Elizabeth Cady Stanton, “National Law for Divorce,” Nov. 15, 1899, in *The Papers of Elizabeth Cady Stanton and Susan B. Anthony, Microfilm Collection*, reels 1-45 (Ann D. Gordon, ed. 1991) (hereinafter “*Stanton Papers*”).

¹¹⁴ THOMAS, *supra* note 61, at 26; Tracy A. Thomas, *Elizabeth Cady Stanton and the Notion of a Legal Class of Gender*, 139, in *FEMINIST LEGAL HISTORY* (Tracy A. Thomas & Tracey Jean Boisseau, eds. 2011).

¹¹⁵ Thomas, *Notion*, *supra* note 132, at 144.

¹¹⁶ Thomas, *Notion*, *supra* note 132, at 146-47.

¹¹⁷ Thomas, *Notion*, *supra* note 132, at 140.

¹¹⁸ NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION*, 3 (2000).

¹¹⁹ *Declaration of Sentiments*, *supra* note 1.

¹²⁰ *Declaration of Sentiments*, *supra* note 1; see THOMAS, *supra* note 61, at 65-66.

¹²¹ Siegel, *Home as Work*, *supra* note 108, at 1152.

The focus on family reform continued to be part of Stanton's advocacy for the women's movement in the decades after Seneca Falls.¹²² Her 1854 speech to the New York legislature, nominally about marital property reform, took the occasion to demand a broader gender justice for women as woman, wife, widow, and mother, seeking family equality in coverture, marriage, property, dower, and child custody, connecting these private sphere rights with the political sphere rights of the vote and jury as all intertwined with "what women want" for full emancipation the same as men.¹²³ At the Tenth National Woman's Rights Convention in 1860, Stanton elevated her concerns over equality in marriage and divorce, using the platform to emphasize divorce reform as well as suffrage.¹²⁴ From 1861 to 1872, Stanton featured family law reform on her lyceum circuit tour, traveling the country for most of the year lecturing to public audiences across the nation.¹²⁵ There, she focused on critiques of "man-marriage," feminist parenting, and women's equality in the home. Again in 1876, the symbolic Declaration of Rights featured criticism of women's inequality in coverture, child custody, sexual mores, work, and education, even as it demanded political rights.¹²⁶ For this early movement, the private sphere of the family was integral to social justice reform for women, even as it was tightly connected to the public and religious spheres.

c. Industry

The nineteenth-century women's rights movement, beginning with the *Declaration of Sentiments*, also focused on industry and employment as a venue of discrimination and needed change.¹²⁷ In the resolutions to the Seneca Falls convention, it declared: "'That the speedy success of our cause depends upon the zealous and untiring efforts of both men and women, for the overthrow of the monopoly of the pulpit, and for the securing to woman an equal participation with men in the various trades, professions and commerce.'"¹²⁸ Specifically, in articulating the wrongs of man towards woman, Stanton's *Declaration* noted that "[h]e has monopolized nearly all the profitable employments, and from those she is permitted to follow, she receives but a scanty remuneration."¹²⁹ She observed that "[h]e closes against her all the avenues to wealth and distinction, which he considers most honorable to himself. As a teacher of theology, medicine, or law, she is not known."¹³⁰ And, she noted, "[h]e has denied her the facilities for obtaining a thorough education—all colleges being closed against her."¹³¹ Her use of the term "monopoly" signaled a systemic misuse of market power, an abuse of economic power by men who improperly excluded legitimate competition from women in employment.

"Stanton's proposal for women's paid work thus clashed with engrained norms of the male provider. Man was defined by his public work, woman defined by her work and protection in the home. Stanton proposal shattered this accepted gender ideology."¹³² She understood that work was important on both the individual and systemic level, operating institutionally to integrate

¹²² THOMAS, *supra* note 61, at 29-25.

¹²³ Elizabeth Cady Stanton, Address to the Legislature of New-York, Feb. 14, 1854, at 17-18.

¹²⁴ Address of Mrs. E.C. Stanton, Proceedings of the Tenth National Woman's Rights Convention, May 11, 1860, 65, 71.

¹²⁵ THOMAS, *supra* note 61, at 13-14, 186

¹²⁶ Declaration of Rights, *supra* note 98.

¹²⁷ GRIFFITH, *supra* note 4, at 53.

¹²⁸ Declaration of Sentiments, *supra* note 1.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² THOMAS, *supra* note 61, at 211.

women into social and economic power.¹³³ At the individual level, pecuniary independence, what Stanton called “a purse of their own,” was critical for self-support and autonomy.¹³⁴ For “a right over my *subsistence*,” she explained, “is a power over all my thoughts and actions.”¹³⁵ “The coming girl,” of the next generation, she said, must be educated and engaged in market work. “There must be a money value upon her time.”¹³⁶ As she advised her college-aged daughter, “Fit yourself to be a good teacher or professor so that you can have money of your own and not be obliged to depend on any man for every breath you draw.”¹³⁷ For the reality, she repeatedly argued, was that most women would be called to rely on themselves.

Parents, she argued, must “teach their daughters trades and professions, and thus have them prepared to battle successfully for themselves, than to leave them dependent.”¹³⁸ Women should be trained as store clerks, postal workers, printers, railroad conductors, steamship captains, photographers, telegraph operators, and carriage drivers.¹³⁹ When legislatures tried to limit women’s wages by restricting them from certain industries on protectionist grounds, Stanton objected to this “crusade by men as a piece of arrant hypocrisy.” She argued that none of these industries were “more trying to health and womanly refinement than standing at the wash tub, the ironing board or over the cooking stove all day” or scrubbing floors, washing clothes in the depth of winter and operated only to impose “lower wages than she could earn in the popular industries side by side with man in the world of work.”¹⁴⁰

Stanton’s goal was not just for women to work, but to work in positions of power. “Money is power,” she said. “Now, man will not, of course, help along a cause that he blindly supposes hostile to his own interests. So, what money we have, we must make.”¹⁴¹ The way to do this, she said, was by a “by a change of employments.” “The mass of women in this country support themselves, and although they work a lifelong, and, as a general thing, sixteen hours out of the twenty-four, but very few have, by their own industry, amassed fortunes. . . . Because the employments they have chosen are unprofitable, slavish, and destructive.” Instead, she commanded women to take “what belongs to us” and “take possession of all those profitable posts, where the duties are light, which have heretofore been monopolized by man.”¹⁴² She specifically encouraged women to go into law, medicine, theology, and academia as the preferred professions of power and not to enter the professions as men “merely to follow in their footsteps and echo their opinions.”¹⁴³

Stanton’s attack on “scanty remuneration” focused not only on the individual harm to women being denied adequate work and equal pay, but also on the systemic effect of devaluing

¹³³ *Id.* at 210-12.

¹³⁴ *Id.* at 206-07; see Elizabeth Cady Stanton, “The Solitude of Self” to NAWSA Twenty-Fourth Convention, Jan. 18, 1892, WOMAN’S TRIB., Jan. 23, 1892, in *Stanton Papers*; Judiciary Committee, Jan. 18, 1892, in *Stanton Papers*.

¹³⁵ Elizabeth Cady Stanton, *How to Make Woman Independent*, UNA, Sept. 1855; First Anniversary AERA, 11-12; Elizabeth Cady Stanton, *The Disability of Sex and Marriage*, REV., Mar. 3, 1870; *Elizabeth Cady Stanton, A Short Discussion on the Modern Marriage Problem*, NY AMERICAN & J., July 13, 1902.

¹³⁶ Elizabeth Cady Stanton, *The Girls*, MILWAUKEE SENT., Apr. 18, 1877

¹³⁷ ECS to Margaret Stanton, Dec. 1, 1872.

¹³⁸ *Our Young Girls*, DAILY MISSOURI REPUBLICAN, Dec. 29, 1869

¹³⁹ Elizabeth Cady Stanton, Address, Eleventh National Woman’s Rights Convention, May 10, 1866; Elizabeth Cady Stanton to Second Convention at Worcester, in *Liberator*, Nov. 7, 1851.

¹⁴⁰ Thirty-First Convention, Feb. 10, 1900, *Woman’s Tribune*, Mar. 10, 1900.

¹⁴¹ Worcester Letter, *supra* note 158.

¹⁴² *Id.*

¹⁴³ Elizabeth Cady Stanton, *The Strong-Minded Women of the Bible*, REV., Feb. 26, 1868; Elizabeth Cady Stanton, *Why We Need Women as Physicians*, PHOSPHORUS PHREN. J. 347 (May 1871).

women's work.¹⁴⁴ The case of teachers illustrated the problem, as the profession evolved from all-male to predominantly female. "What is the reason," Stanton asked, "that to-day the majority of the teachers in all our schools are women?" "Is it because women are better teachers than men? Not at all—simply because they teach at half-price." And why were so few able and ambitious men found "in that most important of all professions" as the educators of the nation? Only one reason: "woman, by her cheap labor, has driven man out and degraded that profession."¹⁴⁵

Stanton's solution to these employment problems, in part, was to educate the next generation into equality for the workplace.¹⁴⁶ The idea was to ensure equal educational opportunity, and goal which Stanton thought would have lasting implications in both private and public spheres. Her plan began with gender-neutral social and academic education at home; teaching girls science and Greek, and teaching boys music, art, and poetry. Parents should inculcate gender neutral morals and activities in their children, allowing girls to climb trees and play sports. In her popular speeches "Our Girls" and "Our Boys" given on the traveling lyceum circuit, Stanton emphasized the importance of raising up the next generation without the limitations of gender.¹⁴⁷

Co-education at the high school and college level was then the next key to educating the sexes to work together in the public and market spheres. Girls had not been admitted to co-education colleges as the claims were that women did not have sufficient strength of mind and body, that they would lower the grade of scholarship and morals, that the sexes would be constantly flirting, and that women would make boys less manly. Conversely, Stanton argued coeducation would have the opposite effect, allowing men and women to get use to each other as colleagues, rather than paramours, and would avoid perpetuating the double sexual standard tolerating men's indiscretions. Medical experts, including the President of Harvard College, however warned that collegiate education, especially math and science, endangered women's reproductive health and that their nervous systems would be disturbed by the impossible "effort to cram mathematics into the female mind" and the demonstrably smaller brain.¹⁴⁸

Ultimately, these economic demands for education and employment were the most practical of Stanton's demands, even as she understood the systemic connections between public and private spheres. At the broad level, for example, NAWSA reiterated at its 1894 convention "[t]hat woman's disfranchisement is largely responsible for her industrial inequality and therefore for the degradation of many women, and we advocate the just principle of 'Equal Pay for Equal Work.'"¹⁴⁹ At the more specific level, Stanton understood the realities of economic deprivation and restriction that initially brought many women to the women's rights movement, and how those daily concerns of survival and sustenance often trumped all other concerns.¹⁵⁰ Her solution was a practical one – to train women to support themselves – even as she advocated systemic changes like coeducation and equal pay to strike at the barriers to this self-sufficiency.¹⁵¹

¹⁴⁴ Elizabeth Cady Stanton, *The Degradation of Woman*, REV., Jan. 15, 1868.

¹⁴⁵ *Id.*

¹⁴⁶ THOMAS, *supra* note 61, at 197.

¹⁴⁷ Elizabeth Cady Stanton, *Our Girls Speech (1872-80)* (ms.) in *SELECTED PAPERS v.III*, 484; *Our Girls*, IND. SENT., Jan. 19, 1879, in *Stanton Papers*; Elizabeth Cady Stanton, *Our Boys [1875]* (ms.), in *Stanton Papers*; *Our Boys: Lecture by Mrs. Elizabeth Cady Stanton*, CHICAGO DAILY TRIB., Feb. 15, 1875.

¹⁴⁸ Elizabeth Cady Stanton, "The Co-education of the Sexes," *Papers*, First Woman's Congress for the Association and Advancement of Woman, Oct. 17, 1873, 39-51, in *Stanton Papers*.

¹⁴⁹ KRADITOR, *supra* note 5, at 62.

¹⁵⁰ THOMAS, *supra* note 61, at 52-54.

¹⁵¹ THOMAS, *supra* note 61, at 209-12.

d. The Church

The *Declaration of Sentiments* included demands for both equality and emancipation—equality of legal right and opportunity, and emancipation or freedom from oppression.¹⁵² Such oppression from social norms and conventions of women’s inferiority were rooted in religious teachings and practices.¹⁵³ The participation of Quaker women as the Seneca Falls organizers and participants helped bring these concerns to the forefront, and these concerns were more familiar to the reform audience than the other political and legal demands.

¹⁵⁴ At the time, the so-called the “woman question” in anti-slavery circles had arisen questioning women abolitionists’ right to speak publicly, which Mott and Stanton had experienced first hand at the London Anti-Slavery convention.¹⁵⁵ These women were attuned to role of the church in silencing women’s voices in the larger society and how such religious restrictions were supporting other social and legal discriminations. .

At Seneca Falls, the resolutions and declarations challenged men’s usurpation of “the prerogative of Jehovah himself” in limiting women’s sphere of action.¹⁵⁶ They noted that “woman has too long rested satisfied in the circumscribed limits which corrupt customs and a perverted application of the Scriptures have marked out for her, and that it is time she should move in the enlarged sphere which her great Creator has assigned her.”¹⁵⁷ It cut to the moralistic double standard, “giving the world a different code of morals to men and women” but then despite that claim of women’s moral superiority, denied her the right to teach and lead religious assemblies. Applying these general principles, the *Declaration* challenged the exclusion of women from ministry, participation in church affairs, and the right to speak in public.

These early feminist criticisms acknowledged the large role of the church in creating norms of women’s inferiority. In the church, women were viewed as morally weak, responsible through Eve for succumbing to the serpent and bringing original sin into the world and tempting man, Adam, in the same downfall.¹⁵⁸ Pain in maternity was deemed a curse from God for the transgression, and domination of men the dictate to protect against such transgression.¹⁵⁹ This view of women’s moral weakness paired with the need for protection drove laws and social norms restricting women’s ability to maneuver in the world and control her own autonomy.

Stanton returned to this focus on the church and its systemic impact, and “explicitly drew the connection between religion and social and legal inequality for women.”¹⁶⁰ She became convinced of the fundamental role of the church in planting the deep roots that created and perpetuated the resistant subjugation of women in all forums.¹⁶¹

“With such lessons taught in the Bible and echoed and re-echoed on each returning Sabbath day in every pulpit in the land, how can woman escape the feeling that the injustice and oppression she suffers are of divine ordination?” “From the inauguration of the movement for

¹⁵² Lerner, *supra* note 54, at 39-40.

¹⁵³ THOMAS, *supra* note 61, at 216, 220.

¹⁵⁴ Clark, *Religion*, *supra* note 6, at 29-30; THOMAS, *supra* note 61, at 216.

¹⁵⁵ WEISS, *supra* note 5, at 45.

¹⁵⁶ *Declaration of Sentiments*, *supra* note 1.

¹⁵⁷ *Id.* at 78.

¹⁵⁸ THOMAS, *supra* note 61, at 217-18.

¹⁵⁹ THOMAS, *supra* note 61, at 217.

¹⁶⁰ THOMAS, *supra* note 61, at 216, 220; DAVIS, *supra* note 2, at 179-80; KATHI KERN, MRS. STANTON’S BIBLE 8-10 (2001).

¹⁶¹ THOMAS, *supra* note 61, at 216-17.

woman's emancipation the Bible has been used to hold her in the 'divinely ordained sphere.'"¹⁶² "Whenever," she argued "during the struggle of the last forty years we have demanded a new liberty these triune powers [state, church, and home] have rallied in opposition," citing "God's law and divine ordination."¹⁶³ Therefore, she concluded, "it is just here that our chief work for woman lies to-day, to free her from the theological bondage that is crippling all her powers."¹⁶⁴

However, by this time in 1900, the women's suffrage organizations had grown more conservative and "narrowed in on the single issue of suffrage, even as "Stanton broadened her agenda," returning to "the deep-seeded causes of beliefs in women's inferiority in religion."¹⁶⁵ Stanton's anticlerical views and attack on the church went too far for the suffrage organization, leading to outrage and Stanton's ostracization from her own movement.¹⁶⁶ Fifty years after Seneca Falls, the women's movement had forgotten its origins in religious criticism, and abandoned that challenge in favor of the clear consensus over the vote.

e. Narrowing in on the Vote

Thus, from the beginning of the American woman's rights movement, the vote was only a piece of the larger holistic agenda for reform. The vote was one operative part of the action needed, but only a political proxy for the other needed reforms in all venues of life.¹⁶⁷ It was the enforcement mechanism envisioned by Stanton as the right by which women would demand access to and accountability from lawmaking bodies. With eighteen demands in four venues, the Declaration by the early women's movement tried to address all spheres of life and achieve revolutionary reform. It reached gender subjugation on every level, seeking the eradication of unequal laws, the granting of specific rights to women, the change in philosophical and religious beliefs, and the restructuring of social institutions of the church, family, and lawmaking bodies.

Given this broad equality mission, why did the vote emerge as the main civil right demanded by women? One reason was the dominance of the vote in the parallel discourse on racial equality and the development of the Civil Rights Amendments after the Civil War. The Fifteenth Amendment isolated the vote as a citizenship right.¹⁶⁸ The Fourteenth Amendment inserted a gender-based distinction into the Constitution by specifying that congressional representation would be determined by the number of "male citizens," and thus drew challenge from women for what Stanton decried as the establishment as an "aristocracy of sex."¹⁶⁹ The national dialogue shifted to the federal constitution as the source of civil rights, and highlighted the vote as the preeminent right, thereby elevating that piece of the women's rights roadmap for equality.

A second reason for the prioritization of the vote was that marriage reform was adamantly opposed by men and elite anti-suffrage women. A main argument and fear of opponents of women's suffrage was that the vote would destroy the marital harmony of the home.¹⁷⁰ In

¹⁶² Elizabeth Cady Stanton, *Introduction*, WOMAN'S BIBLE, Pt. I, 7 (1895).

¹⁶³ THOMAS, *supra* note 61, at 220-21; Elizabeth Cady Stanton, *Has Christianity Benefitted Woman?* NO. AMER. REV. 389, 395 (May 1885); Elizabeth Cady Stanton, *Woman's Position in the Christian Church*, BOSTON INV., May 18, 1901.

¹⁶⁴ Stanton, *Christianity Benefitted Woman*, *supra* note 182; Stanton, *Woman's Position*, *supra* note 182.

¹⁶⁵ THOMAS, *supra* note 61, at 216.

¹⁶⁶ KERN, *supra* note 178, at 10. .

¹⁶⁷ Hodes, *supra* note 6, at 49.

¹⁶⁸ See DUBOIS, *supra* note 13, at 162-63.

¹⁶⁹ *Introduction*, SELECTED PAPERS, vol. II, *supra* note, at xxiii-xxv.

¹⁷⁰ KRADITOR, *supra* note 5, at 15; Siegel, *She the People*, *supra* note 15; Hodes, *supra* note 6, at 47-48; THOMAS, *supra* note 61, at 34-35.

addition, by the late nineteenth century, the suffrage movement had been integrated by socially conservative women from the WCTU.¹⁷¹ While supporting women's right to vote as a moral imperative, its members rejected calls for reforms of marriage and the family, and to the contrary, advocated a strengthening of patriarchal norms of male headship and the return to a revered domesticity for women.

Speaking to the next generation of activists in 1900, eighty-five year old Stanton warned of the narrow focus of the feminist agenda. "I would advise our coadjutors to beware of narrowing our platform." The success of a movement, she said, "does not depend on its numbers, but on the steadfast adherence to principle by its leaders." "We should not rest satisfied to sit on the doorpost of the great temple of human interests like Poe's raven simply singing 'suffrage evermore.'" "The ballot box," she said, "is but one of the outposts of progress, a victory that all orders of men can see and understand." But "only the few," Stanton said, "can grasp the metaphysics of this question, in all its social, religious, and political bearing."¹⁷²

Even with increasing numbers, it would be several more decades of wandering in the wilderness. A few more states passed suffrage. But women's suffrage overall was blocked by anti-prohibition efforts, concerned that the moralistic women associated with the WCTU and how suffrage would ban alcohol. Women gained the right to vote in some municipal and school board elections, buoyed by the notion of women's domesticity and moral leadership in issues of home, school, and the local community. The merged suffrage organization, under the leadership of Carrie Chapman Catt, continued the same, worn campaign strategies advancing both state and federal action, but focused narrowly on the vote.¹⁷³ Alice Paul would break through this ineffective status quo, incorporating her radical demonstrative politics first as the Congressional Union of the National American Woman's Suffrage Association (NAWSA) and then in her own National Woman's Party.¹⁷⁴ Paul's tactics finally pushed the political will, achieving women's suffrage in what had come to be known as "The Susan B. Anthony Amendment" (which dismissed Stanton's pioneering and philosophical efforts for the franchise).¹⁷⁵ But the question remained as to whether the vote actually accomplished any meaningful change for women.

III. From The Vote to Equality

After ratification of the Nineteenth Amendment in 1920, the question for the woman's rights movement was the logical next step to ensure women's rights. The women's suffrage organizations had achieved their goal, and now sought a new purpose. Many suffrage women formed the nonpartisan League of Women Voters, a politically neutral group that worked to enroll women voters and promote women as candidates for elected office, and quickly evolved into a "good government" rather than a feminist organization.¹⁷⁶ Other suffrage women and social feminists detoured into protective labor politics, advocating for unions and workplace protections for women like minimum wage and maximum hours.¹⁷⁷ Alice Paul's National Woman's Party gravitated to redressing sex equality across the board.¹⁷⁸ "The work of the

¹⁷¹ TETRAULT, *supra* note 17, at 87-89, 156.

¹⁷² Address by ECS, Thirty-first Annual Convention, Feb. 10, 1890; Elizabeth Cady Stanton, "The Subjection of Woman," Speech, May 1873, in *SELECTED PAPERS*, v.II, 620.

¹⁷³ MARI JO BUHLE AND PAUL BUHLE, EDs., *THE CONCISE HISTORY OF WOMAN SUFFRAGE* 414 (2005).

¹⁷⁴ Dodd, *supra* note 38, at 189-91.

¹⁷⁵ *CONCISE HISTORY OF WOMAN SUFFRAGE*, *supra* note 192, at 25, 282.

¹⁷⁶ Boisseau & Thomas, *supra* note 47, 231; Nancy F. Cott, *Across the Great Divide: Women in Politics Before and After 1920*, 353, 360-61 in *ONE WOMAN, ONE VOTE: REDISCOVERING THE WOMAN SUFFRAGE MOVEMENT* (Marjorie Spruill Wheeler, ed. 1995).

¹⁷⁷ Boisseau & Thomas, *supra* note 47, at 230-31; Cott, *Across the Great Divide*, *supra* note 195, at 354, 362

¹⁷⁸ *Id.* at 229-30.

National Woman’s Party,” Paul said, “is to take sex out of law—to give women the equality in law they have won at the polls.”¹⁷⁹ In 1921, Paul chose Burnita Shelton Matthews, later the first woman to be appointed a federal district judge, to lead a NWP committee of thirteen attorneys “charged with making a study of discriminatory laws in each state concerning women’s property rights, child custody, divorce and marital rights, jury duty, education and professional employment, and national and citizen rights.”¹⁸⁰ “Their mandate was to expose legal inequalities between men and women that were embedded in all facets of law [and] . . . proposing new legislation to counteract such inequalities.”¹⁸¹ Paul also proposed the first constitutional Equal Rights Amendment, and thus the “sunset of the women’s suffrage movement” became the “dawn of the first ERA.”¹⁸²

The National Woman’s Party worked early on to secure women’s equality in the courts, there were signs that the courts—including the United States Supreme Court—interpreted ratification of the Nineteenth Amendment as changing the foundational understandings of the American legal system. . . . [and] as a constitutional amendment with normative implications for diverse bodies of law.”¹⁸³ Two years after ratification, the Supreme Court held in *Adkins v. Children’s Hospital* that the constitutional result represented a structural overturning of coverture laws restricting women’s political and civil rights.¹⁸⁴ This contextual and historical understanding of the Nineteenth Amendment, however, was quickly abandoned, battered against judicial and political opposition by labor women and unions supporting women-only protective laws.¹⁸⁵

In *Adkins*, the Court struck down a minimum wage law for women.¹⁸⁶ The decision was written by the newly-appointed Justice George Sutherland, who had counseled Alice Paul on suffrage and the proposed Equal Rights Amendment.¹⁸⁷ An amicus brief submitted by the NWP helped the Court articulate this idea of women’s equality.¹⁸⁸ Sutherland wrote: “[T]he ancient inequality of the sexes, otherwise than physical, . . . has continued ‘with diminishing intensity.’ In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point.”¹⁸⁹ “[W]hile physical differences,” the Court held, “must be recognized in appropriate cases, . . . we cannot accept the doctrine that women of mature age, sui juris, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances.”¹⁹⁰ A contrary holding, the

¹⁷⁹ *Id.* at 226.

¹⁸⁰ *Id.* at 232.

¹⁸¹ *Id.* After a decade, the NWP identified three hundred state laws that had been changed from its efforts out of the six hundred the committee had identified. Amelia Fry, *Alice Paul and the ERA*, 8, 16, in *RIGHTS OF PASSAGE: THE PAST AND FUTURE OF THE ERA* (Joan Hoff-Wilson, ed. 1986).

¹⁸² Boisseau & Thomas, *supra* note 47, at 229.

¹⁸³ Siegel, *She the People*, *supra* note 15, at 1012.

¹⁸⁴ *Adkins v. Children’s Hospital of D.C.*, 261 U.S. 525 (1923).

¹⁸⁵ Siegel, *She the People*, *supra* note 15, at 1012.

¹⁸⁶ *Adkins*, 261 U.S. 525.

¹⁸⁷ Joan G. Zimmerman, *The Jurisprudence of Equality: The Women’s Minimum Wage, the First Equal Rights Amendment, and Adkins v. Children’s Hospital, 1905-1923*, 78 J. AM. HIST. 188, 212-13, 219-20 (1991). Sutherland was also known as one of the “Four Horseman,” four conservative Supreme Court justices who rode to work together in consultation and who opposed the liberal New Deal legislation of Franklin D. Roosevelt. David E. Bernstein, *The Feminist “Horseman,”* 10 GREEN BAG 379 (2007).

¹⁸⁸ NANCY WOLOCH, *A CLASS BY HERSELF: PROTECTIVE LAWS FOR WOMEN WORKERS, 1890S-1990S* (2015).

¹⁸⁹ *Adkins*, 261 U.S. at 553.

¹⁹⁰ *Id.* at 449.

Court stated, “would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.”¹⁹¹ Thus, the Court interpreted the Nineteenth Amendment in light of its historical context as an emancipatory change eradicating the system of coverture and thereby granting women comprehensive political and civil rights.¹⁹²

“In the immediate aftermath of ratification,” some courts then “understood the Nineteenth Amendment to redefine citizenship for women in ways that broke with the marital status traditions of the common law.” Other federal and state courts read the Nineteenth Amendment as “embodying a sex equality norm that had implications for practices other than voting,” such as criminal liability, marital domicile, and contract.¹⁹³ That equality norm did not survive in the Supreme Court, as fourteen years later its broader point was rejected in favor of women’s need for protection.¹⁹⁴ Early applications of the Nineteenth Amendment’s anti-discrimination guarantee to other political rights like office holding and jury service also ultimately failed.¹⁹⁵ The transformative potential of *Adkins*’ emancipatory understanding of the Nineteenth Amendment as a declaration of women’s broader constitutional equality was soon lost, and the narrow understanding of the amendment as a rule only about the vote emerged as the dominant understanding.¹⁹⁶

Women’s advocates, however, were working on other fronts to achieve their comprehensive agenda for equality. The same year *Adkins* was decided, Alice Paul introduced a constitutional amendment for equal rights to Congress and the public.¹⁹⁷

Alice Paul formally kicked off a campaign for an equal rights amendment on July 21, 1923, in Seneca Falls, New York.¹⁹⁸ “Well-known for her flair for political theater and use of historical flourish, Paul chose her date and venue carefully. The occasion was a commemorative celebration of the Woman’s Rights Convention held there seventy-five years prior on July 19–20, 1848, out of which had come the Declaration of Sentiments.”¹⁹⁹ Paul named her proposed equality amendment after Lucretia Mott. It read: “Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction,” and included a congressional enforcement provision.²⁰⁰ Continuing the symbolic theatrics, Paul then arranged to have her proposal introduced to the 68th Congress in December 1923 by a representative who was the nephew of suffragist Susan B. Anthony.²⁰¹

¹⁹¹ *Id.* at 553.

¹⁹² Siegel, *She the People*, *supra* note 15, at 1015.

¹⁹³ Siegel, *She the People*, *supra* note 15, at 1016. See *United States v. Hinson*, 3 F.2d 200, 200 (S.D. Fla. 1925) (wife’s criminal liability); *McCormick v. United States*, 57 Treas. Dec. 117, 125-26 (1930) (wife’s domicile for taxation); *Commonwealth v. Rutherford*, 169 S.E. 909, 913 (Va. 1933) (wife’s domicile for taxation); *Hollander v. Abrams*, 132 A. 224, 229 (N.J. Ch. 1926) (wife’s capacity to contract for property).

¹⁹⁴ *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (Sutherland, J., dissenting); see also *Radice v. New York*, 264 U.S. 292 (1923) (Sutherland, J.) (upholding women-protective night work ban); but see *Morehead v. New York ex rel Tiplado*, 298 US 587 (1936) (voiding New York minimum wage law for women and children).

¹⁹⁵ Siegel, *She the People*, *supra* note 15, at 1020-21 Jennifer K. Brown, Note, *The Nineteenth Amendment and Women’s Equality*, 102 YALE L.J. 2175, 2198 (1993).

¹⁹⁶ Siegel, *She the People*, *supra* note 15, at 1020-21; Brown, *supra* note 214, at 2202.

¹⁹⁷ See AMELIA R. FRY, CONVERSATIONS WITH ALICE PAUL: WOMAN SUFFRAGE AND THE EQUAL RIGHTS AMENDMENT 412 (1976).

¹⁹⁸ Boisseau & Thomas, *supra* note 47, at 230.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

There was immediate objection and disagreement, however, among women's rights activists over the merits of pursuing an equality amendment. Opposition came the League of Women Voters, , who were primarily concerned "with safeguarding the rights of women as enfranchised citizens whose full participation in an electoral system was still being widely questioned and even openly challenged by lawsuits such as *Leser v. Garnett*."²⁰² The Supreme Court in *Leser* quickly rejected challenges to the Nineteenth Amendment's ratification, but the suit "put former suffragists on their guard against large and small challenges to women as voters."²⁰³

A second group of opposition to a broad equality agenda came from social reformers in the labor movement.²⁰⁴ They feared formal legal equality would threaten gains made in the labor protectionist movement such as maximum hours, minimum wage, and occupational safety.²⁰⁵ These advantages turned initially on establishing women workers' need for protection in the workplace, citing women's fragility and weaker constitution.²⁰⁶ The Supreme Court had unanimously endorsed such gender-specific laws in 1908 in *Muller v. Oregon* when it upheld a maximum-hour law for women, limiting their work in factories and laundries to ten hours per day, though it had rejected such a law for men a few years earlier in *Lochner v. New York*.²⁰⁷ The Court distinguished women from men in the need for protection in "woman's physical structure and the performance of maternal functions," including smaller physical size, maternity and menstruation, and housework demands.²⁰⁸ "Differentiated by these matters from the other sex, [woman] is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained."²⁰⁹ Congress ultimately extended workplace protections to all workers when it passed the Fair Labor Standards Act of 1938, ending concerns over jeopardizing labor protection laws, but not ending the debate over the ERA.²¹⁰

The debate inside and outside feminist circles continued as a class-based opposition. Labor, unions, and working class groups opposed the ERA, while professionals and businesses endorsed it.²¹¹ However, by 1944, both Democratic and Republican national platforms supported a revised ERA providing that "Equality of Rights under the law shall not be denied or abridged by the United States or by any state on account of sex."²¹² Ongoing resistance from labor groups like the American Civil Liberties Union (ACLU) and administrators in the Department of Labor continued to stall its enactment, even after passage of the Fair Labor Standards Act extending workplace protection laws to all workers, over continued suspicion of support for the ERA from pro-business interests.²¹³ Only after the civil rights era finally realigned advocates away from a

²⁰² *Id.* at 231; *Leser v. Garnett*, 258 U.S. 130 (1922).

²⁰³ Boisseau & Thomas, *supra* note 47, at 231.

²⁰⁴ Boisseau & Thomas, *supra* note 47, at 231, 234; WOLOCH, *supra* note 207, at 160.

²⁰⁵ Boisseau & Thomas, *supra* note 47, at 234.

²⁰⁶ Boisseau & Thomas, *supra* note 47, at 235.

²⁰⁷ 208 U.S. 412 (1908); *see also* *Riley v. Massachusetts*, 232 U.S. 671 (1914) (upholding law similar to *Muller*); *Miller v. Wilson*, 236 U.S. 373 (1915) (upholding eight-hour law for female hotel maids); *Bosley v. McLaughlin*, 236 U.S. 385 (1915) (upholding maximum-hour law for female hospital workers).

²⁰⁸ *Muller*, 208 U.S. at 421.

²⁰⁹ *Id.* at 422.

²¹⁰ *United States v. Darby*, 312 U.S. 100 (1941) (upholding FLSA).

²¹¹ Boisseau & Thomas, *supra* note 47, at 237-40; Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755, 784 (2004)

²¹² Boisseau & Thomas, *supra* note 47, at 237-39; Nancy F. Cott, *Historical Perspectives: The Equal Rights Amendment Conflict in the 1920s*, 45 in CONFLICTS IN FEMINISM (M. Hirsch & E. F. Keller, eds. 1990).

²¹³ Boisseau & Thomas, *supra* note 47, at 241; Linda Greenhouse, *Who Killed the ERA?*, N.Y. TIMES, Oct. 12, 2017.

labor/business distinction toward a civil rights orientation, and with the support of both political parties already obtained, support quickly built for an equal rights amendment.²¹⁴

Congress passed the ERA in 1972, and it first appeared that ratification would be swift.²¹⁵ It stalled quickly after the Court's abortion rights decision in *Roe v. Wade* and fears of "abortion on demand," unisex bathrooms, women in combat, and gay marriage.²¹⁶ Like concerns echoed by the conservative WCTU in the prior century, these reflected a desire to return to domesticity of the home where women heads of household were protected within that homemaking.²¹⁷ The modern equality movement, like its predecessor in the nineteenth-century's comprehensive women's rights movement, was worn down by politics and infighting, as well as material opposition from women themselves.²¹⁸

Gender equality, however, came about through the courts rather than by constitutional amendment.²¹⁹ Women's rights activists developed a dual strategy of simultaneously pursuing constitutional amendment and judicial reinterpretation of the Fourteenth Amendment.²²⁰ The judicial strategy was successful, and in 1971 first resulted in the U.S. Supreme Court's applying equal protection doctrine to give heightened scrutiny to gender-based laws.²²¹ This level of judicial scrutiny is lesser than it would be under an ERA, but has operated for the most part to eradicate formal gender distinctions based on stereotype.²²²

There is a renewed political movement, however, to pass the ERA.²²³ Supporters argue that sustainable guarantees are needed for gender equality that cannot be undermined by changes in laws or interpretations of the courts.²²⁴ Enshrining gender in the constitution gives it the higher status and scrutiny of race, and symbolically establishes a constitutional commitment to gender equality.²²⁵ Proponents argue that the timeline for passage of the ERA has not yet expired, or that Congress could retroactively waive it, and thus ratification of the amendment by Nevada in 2018 and Illinois in 2019 has opened up a new conversation about the ERA.²²⁶

IV. Conclusion

²¹⁴ Boisseau & Thomas, *supra* note 47, at 243; Mayeri, *supra* note 236, at 757.

²¹⁵ Boisseau & Thomas, *supra* note 47, at 243.

²¹⁶ *Id.* at 243; Greenhouse, *supra* note 238. These changes have happened without the ERA. Susan Chira, *Do American Women Still Need an Equal Rights Amendment?* N.Y. TIMES, Feb. 16, 2019.

²¹⁷ See TETRAULT, *supra* note 17, at 87-89.

²¹⁸ See generally JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* (1986).

²¹⁹ Boisseau & Thomas, *supra* note 47, at 241, 245; Mayeri, *supra* note 236, at 757.

²²⁰ Boisseau & Thomas, *supra* note 47, at 241; Mayeri, *supra* note 236, at 757.

²²¹ Boisseau & Thomas, *supra* note 47, at 245; see *Reed v. Reed*, 404 U.S. 71 (1971); *Fronterio v. Richardson*, 411 U.S. 677 (1973); *Craig v. Boren*, 429 U.S. 190 (1976).

²²² See *Sessions v. Morales-Santana*, 582 U.S. ___, 137 S.Ct. 1678, 1689-90 (2017) (tracing history and results of equal protection cases).

²²³ Boisseau & Thomas, *supra* note 47, at 246; JESSICA NEUWIRTH, *EQUAL MEANS EQUAL: WHY THE TIME FOR AN EQUAL RIGHTS AMENDMENT IS NOW* (2015); see <https://www.equalmeansequal.org/>.

²²⁴ See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (holding that employer's religious liberty may outweigh women's right to healthcare and birth control).

²²⁵ Boisseau & Thomas, *supra* note 47, at 247-48.

²²⁶ The argument is that because the ratification deadline was contained in the preface rather than the substantive text of the ERA, it is not mandatory or it can be waived, and thus three states may still ratify, which two (Nevada and Illinois) have recently done. Tracy Thomas, [Virginia Senate's Ratification of Equal Rights Amendment Brings Three-State Strategy within Reach](#), *Gender & Law Prof Blog*, Jan. 18, 2019. The Twenty-Eighth Amendment, regarding non-retroactivity of Congressional salary increases is cited as support for this argument, as it was passed by Congress in 1789 but not ratified until almost two hundred years later. Allison L. Held, Sheryl L. Herndon & Danielle M. Stager, Note, *The Equal Rights Amendment: Why The Era Remains Legally Viable And Properly Before The States*, 3 W&M J. WOMEN & LAW 113, 115 (1997).

The penultimate goal of the ERA is the same one as the *Declaration of Sentiments* one-hundred and seventy-one years ago: comprehensive equality for women in all avenues of life. Both movements sought to establish gender equality across the board, rather than reducing it to only narrow issues. The constitutional text for women’s full equality and emancipation has changed over the centuries; first embodied in the grant of the vote as proxy for structural change, and now incorporated into the demand for “equal rights.” What is clear is that women have been consistent over time in understanding the radical idea that systems of governance, family, business, and church need dismantling and reconstructing in order to support women’s equality and emancipation.

This same platform of systemic gender justice was evidenced by the women’s movement in 1977 at the National Women’s Conference held in Houston, Texas.²²⁷ There, the organizers of the federally-funded conference drafted a modern “Declaration of the American Woman,” playing on Stanton’s original document, and crafting a comprehensive agenda for gender equality. Adopting demonstrative politics of their foremothers, Olympic-like runners carried the flame of women’s equality from Seneca Falls to Houston, and poet Maya Angelou opened the conference with a retelling of Stanton’s *Declaration of Sentiments*, connecting the first broad demand for women’s equality with the modern one.²²⁸ The Houston delegates from each state endorsed twenty-six policy resolutions calling for a wide range of measures including ratification of the ERA, equal employment, domestic violence protections, accessible child care, homemaker financial protections, elimination of discriminatory insurance and credit practices, reform of divorce and rape laws, federal funding for abortion, equal access to government contracts and grants, and access to elective and judicial office.²²⁹ These resolutions were presented in a report to President Carter; they produced little concrete results, but served as a roadmap for future grassroots reform.²³⁰

This long view of women’s constitutional history and its comprehensive agenda leads to deeper way of understanding women’s equality demands today. For neither the intent nor the context of the Nineteenth Amendment was meant to produce an “irrelevant” amendment, as some have concluded.²³¹ First, the vote was part of a holistic plan for “women’s rights” that has

²²⁷ Gillian Thomas, *Book Review*, “Four Days That Changed the World: Unintended Consequences of a Women’s Rights Conference,” N.Y. TIMES, Mar. 6, 2017 (reviewing Marjorie J. Spruill, *Divided We Stand: The Battle Over Women’s Rights and Family Values That Polarized American Politics*). “The conference was organized by the National Commission on the Observance of International Women’s Year, set up by the Ford administration in 1975 to coordinate American participation in the United Nations–sponsored Decade for Women.” Greenhouse, *supra*. Over 130,000 people, most women, took part in state-level meetings to select delegates and debate the conference’s agenda in order to come up with a national platform at the conference to present to Congress and the White House. Two thousand delegates and 20,000 observers attended the conference, with a similar number gathered across town in a conservative counter-convention organized by Phyllis Schlafly which would ignite the anti-ERA movement that would ultimately defeat the amendment. Greenhouse, *supra*; MARJORIE J. SPRUILL, *DIVIDED WE STAND: THE BATTLE OVER WOMEN’S RIGHTS AND FAMILY VALUES THAT POLARIZED AMERICAN POLITICS* 2-10 (2017).

²²⁸ SPRUILL, *supra* note, at 4; Gloria Steinem, “An Introductory Statement,” in CAROLINE BIRD, *WHAT WOMEN WANT: FROM THE OFFICIAL REPORT TO THE PRESIDENT, THE CONGRESS AND THE PEOPLE OF THE UNITED STATES* 10, 13-14, 55 (1979).

²²⁹ SPRUILL, *supra* note 252, at 6-7. The measures were later bundled as a “National Plan of Action” and presented to President Jimmy Carter in a report entitled “The Spirit of Houston.” Caroline Bird, *The Spirit of Houston: The First National Women’s Conference, Official Report to the President, the Congress, and the People of the United States*, Mar. 1978.

²³⁰ SPRUILL, *supra* note 252, at 8-10.

²³¹ David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1500 (2001) (concluding that there is “less to the Nineteenth Amendment than meets the eye”); *see also*, KRADITOR, *supra* note 5, at 63 (concluding that “the suffragists overestimated what they could accomplish with the vote”).

always been a multiple issue, multiple systems platform, even as certain issues like suffrage or abortion have come to dominate the public discourse, often driven there by opponents of gender equality. Second, this context and constitutional history of the Nineteenth Amendment support a more robust understanding of constitutional guarantees of gender equality today, interpreting “equal protection” under the Fourteenth Amendment to include both public and private spheres and reaching so-called personal rights of maternity leaves, sexual harassment, and assertions of religious liberty.²³² Finally, understanding this longer history of women’s rights “women’s rights” means not just formal, equal rights, but also removal of oppressive norms of society and religion that construct barriers against meaningful change. The modern debate has embodied itself in judicial attacks of equal protection and constitutional demands for the ERA, but it asks nothing different than women have been asking for one hundred and seventy years.

²³² Siegel, *She the People*, *supra* note 15, at 949, 951; see Hodes, *supra* note 6, at 46-47 (stating that the Nineteenth Amendment can be interpreted as an “emancipation proclamation which extends the guarantees of all three Civil War Amendments to all women”); Brown, *supra* note 214, at 2175.

Center for Constitutional Law
Conference—The 19th Amendment at 100:
From the Vote to Gender Equality
University of Akron School of Law (Sep. 20, 2019)

THE TEMPERANCE MOVEMENT'S IMPACT ON ADOPTION OF WOMEN'S SUFFRAGE

RICHARD H. CHUSED*

INTRODUCTION:

It is a truism that amending the Constitution of the United States is a difficult undertaking. Gaining a two-thirds positive vote in both houses of Congress and obtaining ratification by three-quarters of the states are often impossible hurdles to surmount.¹ Not counting the ten revisions made by the Bill of Rights, it has happened only seventeen times since 1791—two-hundred and twenty-eight years.² The difficulties became painfully obvious to those of us who lived through the failure of the Equal Rights Amendment to gain ratification. States ratifying the proposal peaked

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1 Art. V, U.S. Const.

2 Here's the list:

- Amendment XI [Suits Against a State (1795)]
- Amendment XII [Election of President and Vice-President (1804)]
- Amendment XIII [Abolition of Slavery (1865)]
- Amendment XIV [Privileges and Immunities, Due Process, Equal Protection, Apportionment of Representatives, Civil War Disqualification and Debt (1868)]
- Amendment XV [Rights Not to Be Denied on Account of Race (1870)]
- Amendment XVI [Income Tax (1913)]
- Amendment XVII [Election of Senators (1913)]
- Amendment XVIII [Prohibition (1919)]
- Amendment XIX [Women's Right to Vote (1920)]
- Amendment XX [Presidential Term and Succession (1933)]
- Amendment XXI [Repeal of Prohibition (1933)]
- Amendment XXII [Two Term Limit on President (1951)]
- Amendment XXIII [Presidential Vote in D.C. (1961)]
- Amendment XXIV [Poll Tax (1964)]
- Amendment XXV [Presidential Succession (1967)]
- Amendment XXVI [Right to Vote at Age 18 (1971)]
- Amendment XXVII [Compensation of Members of Congress (1992)]

at 35 in 1977; it did not receive the three additional positive votes needed by the originally set deadline of 1979; several states actually rescinded their votes.³ Though the deadline was extended by an act of Congress, no additional states ratified the amendment by the new (and potentially invalid) 1982 deadline. Over half a century of effort—the ERA was first introduced in Congress in 1923 at the urging of The National Women’s Party⁴—ended in failure. Contemporary efforts to revive the process also have not met with success.

That history teaches us an important lesson about altering the national charter. In the absence of a broad consensus favoring a change it probably is impossible to amend the constitution. A cross section of people favoring an amendment is required to gain approval. Traditional political, cultural, social, demographic, and economic divisions must be breached in order to succeed. The Progressive Era years between 1913 and 1920 when four amendments were ratified exemplified a remarkable historical moment when changing the Constitution was possible. The average rate of one amendment adoption every 25 years between 1789 and 1913 was buried in a flurry of activity. The 16th and 17th Amendments dealing with the income tax and direct election of Senators, were both ratified in 1913. The 18th Amendment on Prohibition and the 19th Amendment on Women’s Suffrage were ratified in 1919 and 1920 respectively. Each of the four changes arose both from an increasing recognition of the importance of the federal government in our national polity and from a sense that compulsion by a central regime was an important aspect of gaining control over business concentration, labor unrest, moral decay, international controversies, and a rambunctious, conflict ridden, and racially and ethnically divided nation.⁵ World War I had a related impact. Sending men overseas to fight, motivating the nation to go to battle, developing national industrial

3 The Equal Rights Amendment read:

Section 1. Equality of Rights under the law shall not be denied or abridged by the United States or any state on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

It was originally proposed by the National Women’s Party shortly after the 19th Amendment was ratified and first introduced in Congress in 1923. Both houses of Congress finally approved it by overwhelming votes in 1972. That resolution provided that state ratification had to occur within seven years. Only thirty-five of the required thirty-eight states did so by 1979. In 1978 Congress adopted another resolution extending the time period by an additional three years but no additional states did so. Four actually resolved to rescind their prior actions. Questions about the legitimacy of both the time period extension and the rescissions were mooted by the failure of sufficient states to ratify. The timeline is available at Equal Rights Amendment, https://en.wikipedia.org/wiki/Equal_Rights_Amendment (Visited July 17, 2019).

4 SARA M. EVANS, *BORN FOR LIBERTY* 187 (1989); RICHARD CHUSED & WENDY WILLIAMS, *GENDERED LAW IN AMERICAN HISTORY* 917 (2016).

5 RICHARD F. HAMM, *SHAPING THE 18TH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880-1920* 1-9 (1995).

strategies, and enunciating moral obligations to support the nation's armed forces each accentuated the nationalization of moral messaging and governmental authority. A cultural and political environment for national moral controls was solidly in place during the opening decades of the twentieth century.

Such dramatic shifts toward federalizing the structure of the nation required funding—the income tax. The original income tax proposals reached only the highest income brackets, making it more palatable to the nation as a whole. Direct election of Senators significantly reduced the influence of state and local governments by removing their authority over selection of Senators. It recognized the growing importance of populism on a national level rather than a local level. Suffrage and temperance arose from similar instincts, each spurred by an increasing recognition of the roles of women in American society and their importance in shaping the nature of the national political culture. And both temperance and suffrage took the leap from state control—in both cases adopting ideas already adopted in many states—to national standards.

Proposed resolutions for both suffrage and temperance amendments were first submitted to Congress in 1914—not surprising developments given the times. A resolution supporting the 18th Amendment was approved by the Senate on August 1, 1917 by a 65-20 vote. The House followed suit by a vote of 282-128 on December 17 of the same year. In both houses support was firm in both major parties. Ratification by the necessary thirty-six states occurred fairly quickly with five states passing the proposal on January 16, 1919 bringing the total to thirty-eight approvals.⁶ By early in 1922 forty-six of the forty-eight states ratified the Amendment. Support clearly was widespread, especially in rural areas.⁷ The 19th Amendment's adoption was a much rockier process. Five votes on the proposal were taken in Congress between 1918 and 1919. It failed each time on close tallies. President Wilson, a recent convert to the cause, called a special session to entertain suffrage one more time in 1919. The House passed a resolution on May 21, 1919. On June 4, 1919 the Senate, after Southern Democrats finally gave up a filibuster, approved the resolution by a 56-25 vote with many members not voting due to “pairing.”⁸ That event occurred

6 At that point there were only 48 states so approval required thirty-six rather than thirty-eight ratification votes.

7 The timeline, state ratifications, and state refusals to ratify are provided at https://en.wikipedia.org/wiki/Eighteenth_Amendment_to_the_United_States_Constitution (Visited July 29, 2019). The two jurisdictions declining to approve the amendment were Connecticut and Rhode Island. A more complete ratification story is told in a history classic, JAMES H. TIMBERLAKE, PROHIBITION AND THE PROGRESSIVE MOVEMENT, 1900-1920, at 149-184 (1970).

8 “Pairing” is the practice of two members whose votes would cancel each other out not appearing for a vote they both wish to or are willing to avoid.

only after intense lobbying and the defeat of two opposing Senators in the 1918 elections. Though ratified in about the same amount of time it took for prohibition, with Tennessee approving the new amendment by one vote on August 18, 1920, opposition was strong. Liquor interests, hoping for mild controls after the adoption of prohibition, and many conservatives fought the proposal. The Tennessee ratification story is the stuff of legend, with the deciding ballot cast by a young first time representative previously opposed casting the decisive vote in favor of suffrage after receiving a handwritten note from his mother. Without Tennessee's approval it is not clear when or if suffrage would have been ratified.⁹

While this conference gathered to mark and discuss the adoption and consequences of the women's suffrage amendment, my goals are to make a few observations about the nature of both the Progressive Era and the Prohibition Movement and to remind everyone of the important links between the sentiments giving rise to prohibition and those stimulating adoption of suffrage. Though each arose from a somewhat distinct array of reform impulses and overcame varying opposition groups, they were closely related in some ways, supported by overlapping groups of people, advanced by large numbers of women, and, in part, lifted to enactment by similar motivations. Indeed, without the support of many conservative citizens approving both amendments, it is not clear what the fate of suffrage would have been after World War I.

I. Prohibition

Adoption of the Prohibition Amendment—the 18th—is viewed by many, perhaps most, contemporary Americans as a reactionary experiment gone terribly wrong—a personally intrusive, unnecessarily oppressive, and terribly misguided effort to control miscreant behavior. While those sentiments speak volumes about contemporary notions of autonomy, individualism, and self-governance, as well as the growing reluctance to police personal behavior even if it may be unhealthy, the actual history of the prohibition effort speaks with remarkably varied, and often quite different, voices. It too was opposed by some with feelings similar to our own, but its supporters viewed it as a reform designed to reduce domestic violence, to provide women—

⁹ This story is described in a classic of women's history. ELEANOR FLEXNER, *CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES* 319-337 (1959). See also https://en.wikipedia.org/wiki/Nineteenth_Amendment_to_the_United_States_Constitution (Visited July 29, 2019).

especially middle and upper class white women—with greater control over the morality and demeanor of both the home and of society at large, to aid in controlling alcohol consuming immigrants and people of color, and to furnish a motivation for adoption of women’s suffrage.

The history of the 18th Amendment goes deep into America’s past. The temperance movement—given its name from a cultural sense early in our history that moderating risky behavior by use of moral suasion was the proper pathway both to reduction of alcohol consumption and to alteration of other actions deemed socially destructive—grew notably in the same era as the first significant women’s movement in the 1830s and 1840s. In time, the failure to gain headway in reducing alcohol use led to growth in sentiment to ban drink. In Maine, for example, The Total Abstinence Society was formed in 1815¹⁰ and the state was the first to move from temperance to prohibition by becoming dry in 1851 when the state legislature belatedly adopted legislation enforcing an alcohol ban first adopted in 1846. It barred sale of alcoholic beverages except for “medicinal, mechanical or manufacturing purposes”¹¹ to protect the morality and well-being of the state. The process in Maine certainly was not smooth. The state repealed its law in 1856 after an opposition riot seeking access to alcohol stored by the state for medicinal use. But it was readopted off and on until the state’s dry status was enshrined in its state constitution in 1885 during a period of widespread national temperance sympathy.¹²

Maine was not the only center of temperance agitation. Twelve other states adopted “Maine Laws” by 1855, though by the Civil War most had been repealed or nullified.¹³ Many of the nineteenth century radical suffragists—Anthony, Stanton, Gage and others--were also temperance people, attended temperance conventions, and created social networks in support of their beliefs.¹⁴ Though not allowed to speak at a major meeting of the Sons of Temperance in 1852, Anthony helped organize a separate women’s group the following year, only to drop out when men were given some control over the group and a falling out occurred among the leadership. But many women active in the abolitionist and women’s rights movements maintained connections with the

10 Kelley Bouchards, *When Maine Went Dry*, PORTLAND PRESS HERALD (Oct. 2, 2011), https://www.pressherald.com/2011/10/02/when-maine-went-dry_2011-10-02/ (Visited July 19, 2019).

11 An Act for the Suppression of Drinking Houses and Tippling Shops, 1851 Me. Act. 210-218.

12 Bouchards, *supra* note 10.

13 H. M. Cassidy, *Liquor Control in the United States*, in 3 *Editorial Research Reports*, CQ Press (1928), <https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1928080700> (Visited July 19, 2019).

14 RUTH BORDIN, *WOMAN AND TEMPERANCE: THE QUEST FOR POWER AND LIBERTY, 1873-1900*, at 121-123 (1990); JAMES H. TIMBERLAKE, *PROHIBITION AND THE PROGRESSIVE MOVEMENT, 1900-1920*, at 122-123 (1970); ELEANOR FLEXNER, *CENTURY OF STRUGGLE: THE WOMAN’S RIGHTS MOVEMENT IN THE UNITED STATES 185-189* (1959).

temperance cause before the Civil War.¹⁵

While the growth of the movement slowed during the Civil War, it took deep root after hostilities ended. One primary series of events, a catalyst for much of what occurred later, has drawn attention in the literature.¹⁶ During the early 1870s large numbers of religious women in southern Ohio began to sit in at bars, pubs, and drug stores¹⁷ demanding a halt to the sale of alcohol and virtually shutting down the industry in the area for a time. The trigger of the moment was a speech by an itinerant speaker—Diocletian Lewis—a believer in God, gymnastics, and temperance. He had long urged such dramatic action by women but had largely been ignored as he traipsed about the country. This time, however, he landed in fertile territory.¹⁸

Many white, middle class, Christian, southern Ohio women were ready to act. They were eager to urge a soon to open state constitutional convention to consider proposals for limiting alcohol consumption. In the post-Civil War era, they were concerned about the debilitating impact of alcohol use, especially the widening use of malt beverages like beer.¹⁹ Their interest was piqued not only because alcohol consumption was thought to be a long-standing problem, but also because a large number of German speaking and other beer drinking immigrants had arrived in recent decades and opened a raft of breweries, bars, and saloons all across the Midwest.²⁰ In addition, it

15 CAROL MATTINGLY, *WELL-TEMPERED WOMEN: NINETEENTH-CENTURY TEMPERANCE RHETORIC* 23-26 (1998).

16 The most important books are both by Ruth Bordin. RUTH BORDIN, *WOMAN AND TEMPERANCE: THE QUEST FOR POWER AND LIBERTY, 1873-1900* (1990); JED DANNENBUM, *DRINK AND DISORDER: TEMPERANCE REFORM IN CINCINNATI FROM THE WASHINGTONIAN REVIVAL TO THE WCTU* (1984); RUTH BORDIN, *FRANCES WILLARD: A BIOGRAPHY* (1980).

17 Many widely available “remedies” were filled with alcohol.

18 See Richard H. Chused, *Courts and Temperance “Ladies,”* 21 *YALE J.L. & FEMINISM* 339, 340-44 (2010).

19 Cassidy, *supra* note 13; provides historical consumption rates for various kinds of alcoholic beverages. Between 1840 and 1900 consumption of distilled spirits declined by about half, while the rate for malt liquors rose by a factor of almost twelve. This is totally consistent with an array of studies and literature. See HENRY WILLIAM BLAIR, *THE TEMPERANCE MOVEMENT: OR, THE CONFLICT BETWEEN MAN AND ALCOHOL* 214 (1888); DEPT. OF HEALTH, EDUCATION AND WELFARE, *FIRST SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL & HEALTH* (1971); Harry G. Levine & Craig Reinerman, *From Prohibition to Regulation: Lessons From Alcohol Policy for Drug Policy*, 69 *THE MILBANK QUARTERLY* 461, 469 (1991), <https://www.milbank.org/wp-content/uploads/mq/volume-69/issue-03/69-3-From-Prohibition-to-Regulation.pdf> (Visited July 18, 2019). Levine and Reinerman concluded that the total amount of absolute alcohol (rather than the volume of beverages) consumed was extremely high before 1840 but declined thereafter though the consumption of alcohol alcohol in malt beverages rose dramatically after that time. The same conclusions are reached in histories of beer. MAUREEN OGLE, in *AMBITIOUS BREW: THE STORY OF AMERICAN BEER* 151 (2006), wrote that beer consumption soared from about one gallon per capita in 1840 to fifteen by 1896. See also, AMY MITTELMAN, *BREWING BATTLES: A HISTORY OF AMERICAN BEER* 22, 34, 38 (2008). Data gathered by the Census Bureau confirms the pattern. Fermented malt liquor production grew after the Civil War. BUREAU OF THE CENSUS, UNITED STATES DEPARTMENT OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970*, at 691 (1975).

20 Half a million Germans arrived in the United States just between 1852 and 1854, just over forty percent of all immigrant arrivals in those years. Almost as many Irish arrived in the same period. BUREAU OF THE CENSUS, UNITED

was much more difficult than distilled spirits to store at home. Bottles did not begin to become common until much later.²¹ A number of women felt they were losing control over domestic alcohol consumption. In prior decades drinking had typically occurred out of (often locked) liquor cabinets at home. But by the 1870s, tales of men—both immigrant and native—coming home drunk and beating up their wives and children became standard lore.²² As a result, many white Christian women feared loss of control over both home-based alcohol consumption and cultural hegemony as drug stores, bars, and saloons dispensing alcohol proliferated. Some of the antipathy to drinking certainly came from disdain for newly arriving immigrant populations, but the fervor with which the women undertook their activities and their willingness to enter male environments typically off limits for “respectable” women spoke volumes about their level of concern and passion. By the time Maine enshrined prohibition in its state constitution in the 1880s, national women’s movements, especially the Women’s Christian Temperance Union, were at the height of their power.

As large numbers of southern Ohio women took seriously Diocletian Lewis’ call for sit-in actions to shut down bars, taverns, and drug stores in 1874, they dressed up in their Sunday best, began their efforts with prayers and singing at local churches before marching down the streets in their finery, and then boldly entered male dominated bars, saloons, and drugstores singing hymns, calling for closure of the establishments, and sending men scurrying on their way with their tails between their legs. These events were widely described and commented upon in the local press. Many articles detailed vivid stories about the activities of the women. Consider these two reports—published on January 26 and February 2, 1874—taken from a bevy of stories published in the *Cincinnati Commercial*. The first was about a gathering of women in front of Dunn’s Drug Store:

[O]n Wednesday last they called on him [Dunn], and were received very politely, but accomplished nothing. Thursday and Friday they called again, but found the door locked in their faces; thereupon they held short prayer meetings in front of his drugstore, and

STATES DEPARTMENT OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 106 (1975). See Jack S. Blocker, *Separate Paths: Suffragists and the Women’s Temperance Crusade* 10 SIGNS 460, 468-469 (1985).

21 AMY MITTELMAN, *BREWING BATTLES: A HISTORY OF AMERICAN BEER* 119 (2008). The first mass production bottling system, created at the hest of Adolphus Busch, went online in 1872. MAUREEN OGLE, *AMBITIOUS BREW: THE STORY OF AMERICAN BEER* 64 (2006). But sales of bottled rather than draft beer did not reach thirty-five percent of the market until 1935. Now the vast bulk of beer is sold in bottles or cans. *Id.* at 208.

22 SCOTT C. MARTIN, *DEVIL OF THE DOMESTIC SPHERE: TEMPERANCE, GENDER AND MIDDLE-CLASS IDEOLOGY, 1800-1860*, at 46-53 (2008).

determined that if the door was locked on Saturday, they would hold an all-day prayer meeting in front of his store. Saturday morning a bitter cold wind made it very uncomfortable on the streets, and many doubted their ability not only to carry out the determination, but of their being able to hold even a short prayer meeting. But promptly at 10 o'clock this determined army were seen coming up from the Presbyterian Church, stopping first in front of Uprig's saloon, where they held their usual prayer meeting, then after visiting the saloons of Messrs. Ward and Bales, they assembled in front of Mr. Dunn's drug store, and as the first song, with the enthusiastic chorus, "I am glad I'm in this army." rose on the air, it carried conviction to the large crowd that had gathered around that they were terribly in earnest and would endure all things until victory crowned their every effort. As prayer after prayer and song after song arose, men wondered at their persistent determination, for the wind blew so bitterly cold that men could scarcely keep warm but by constant exercise, yet those brave-hearted women kneeling on that freezing pavement utterly regardless of the cold, showed the invincible spirit that was within them, and with one accord for almost six hours kept up two prayer-meetings, one at the front and the other at the back door, showing a tenacity of purpose that excited enthusiasm in every beholder.²³

Keep in mind the awe and disbelief of some of the men watching the Dunn Drug Store gathering while reading this second newspaper vignette occurring a few days later in 1874—one I truly love reading:

A young "blood" gave me, this morning, a most amusing account of the scene when the ladies entered the first saloon. He and half a dozen others, who had been out of town, and did not know what was going on, had ranged themselves in the familiar semi-circle before the bar, had their drinks ready and cigars prepared for the match, when the rustle of women's wear attracted their attention, and looking up they saw what they thought a crowd of a thousand ladies entering. One youth saw among them his mother and sister; another had two cousins in the invading host, and a still more unfortunate recognized his intended mother-in-law! Had the invisible prince of the pantomime touched them with his magic wand,

23 J., CINCINNATI COMMERCIAL (Jan. 29, 1874). While I cannot be sure about the identity of "J." it probably was J. H. Beadle who authored many of the articles about the Crusades in the Cincinnati Commercial and wrote a book about them. J. H. BEADLE, WOMEN'S WAR ON WHISKEY: ITS HISTORY, THEORY, AND PROSPECTS (1874).

converting all to statues, the tableau could not have been more impressive. For one full minute they stood as if turned to stone; then a slight motion was evident, and lager beer and brandy-smash descended slowly to the counter, while cigars dropped unlighted from nerveless fingers. Happily, at this juncture the ladies struck up—

"O, do not be discouraged.

For Jesus is your friend."

It made a diversion, and the party escaped to the street, "scared out of a year's growth."²⁴

Though these tales may be amusing to contemporary audiences, there are very serious lessons to be drawn from them—the deeply felt sense of the women about the rightness of their cause, the powerful way these middle class, respectable, typically home-making, Christian women marshalled their widely respected reputations for virtue and morality to the service of their cause, and their willingness to enter previously male domains in the service of their high calling. Many, though certainly not all, men of the 1870s were cowed by the steadfastness, determination, and moral suasion of the townswomen many knew quite well. The willingness, nee eagerness, of the women to appear in previously male spaces was a telling and powerful shift in their social behavior—a move from the domesticity of the home to a distinctly male space. And they not only showed up in dozens of bars and drugstores but also in droves in previously all-male courtroom environments to show their support for the movement when some of the bar and drugstore owners brought injunction suits in an effort to stop the demonstrations. Their presence had a palpable impact on the courtroom drama. No injunctions ever were granted, even though one of the local judges, William Safford, who vigorously opposed the women's actions, resigned his position on the bench to take on the representation of one of the drug store owners.²⁵

A month or so after Safford's recently acquired client lost his case seeking an injunction, the one-time judge gave a speech that both demonstrated the power of the women and the disbelief of some men that demonstrators actually organized themselves rather than acted at the bidding of men.

[M]y fellow-citizens, it is against this despotism of public opinion [that I speak]; this popular furor, by which our cities and towns are disgraced; this frenzied fanaticism of the hours; this institution of a female commune; this organized subversion of law, to meet

²⁴ *Correspondence*, CINCINNATI COMMERCIAL (Feb. 2, 1874).

²⁵ The litigation story is told in some detail in Chused, *supra* note 18, at 348-366.

outside interpretation of right; so intolerant and insulting, violating law and order, disturbing the tranquility of society, trespassing upon individual right, that I for one, must earnestly protest.

* * * *

What do we see here today! Honest women who are put forward by dishonest men who are cowards themselves. I will not say anything disrespectful of the mothers, wives, sisters and daughters engaged in this crusade. They have, a great many of them, God knows, reason for making every effort to suppress the whisky trade and we can say to them that we will lend you every aid to suppress it in a legal way. And I tell them today that it was not because I am not a temperance man that I do not aid them in their present moment. This evil of intemperance which is not only the curse of this Nation, but of all Nations, I am willing to do what I can to suppress; but there is a boundary beyond which we cannot go with propriety. I am unwilling that these misguided women should place themselves in the purlieus of vice and immorality, and that [they] should visit these saloons to be remarked upon by the rabble. I am unwilling they shall get upon the streets in the ridiculous attitude of prayer, to coerce men into a compliance with their demands, and not really to supplicate the throne of the Deity.²⁶

Though Safford made a “polite” bow to the virtue of the women and to their cause, he obviously was unable to either support or to fathom the strong and deeply felt motivations behind their public actions well outside the traditional domestic sphere. And the women’s power to organize themselves, to move men to shut down bars, to stir anger in their opponents, and to attempt to move male politicians writing a new state constitution were lessons well learned by the women themselves over the course of the Ohio sit-ins and anti-liquor agitation. Most importantly for purposes of celebrating the arrival of women’s suffrage, their new-found sense of power did not simply melt away. After the praying, marching, and sitting in died down when the Ohio Constitutional Convention ended without taking significant action, many of the newly activated women did not give up their public work. They began organizing. Some helped found the Women’s Christian Temperance Union.²⁷ It grew rapidly. Frances Willard, a well known Illinois educator and reformer, joined immediately after the Ohio sit-ins in 1874, took over the WCTU’s

²⁶ *Judge Stafford’s Speech at Chillicothe*, CINCINNATI COMMERCIAL (Mar. 16, 1874)

²⁷ BORDIN, WILLARD BIOGRAPHY, *supra* note 16, at 66.

publication arm in 1876, and became its leader in 1879—a position she retained until her death almost twenty years later. Willard was an incredibly charismatic speaker and a convincing pamphleteer.²⁸

Reactions of suffragists to the crusade were intriguingly mixed! While captivated by the activism of so many women taking on new cultural roles, they were disappointed by the first Crusaders disinclination to push for suffrage.²⁹ One of the most interesting responses is reported in a letter from Miriam M. Cole that was transcribed by Elizabeth Cady Stanton, Susan B. Anthony, and Matilda Joslyn Gage and published in the HISTORY OF WOMAN SUFFRAGE well after the Crusades ended.

If the “woman’s war against whiskey” had been inaugurated by the woman suffrage party, its aspect, in the eyes of newspapers, would be different from what it now is. If Lucy Stone had set the movement on foot, it would have been so characteristic of her! What more could one expect from such a disturber of public peace? She, who has no instinctive scruples against miscellaneous crowds at the polls, might be expected to visit saloons and piously serenade their owners, until patience ceases to be a virtue. But for women who are so pressed with domestic cares that they have no time to vote; for women who shun notoriety so much that they are unwilling to ask permission to vote; for women who believe that men are quite capable of managing State and municipal affairs without their interference; for them to have set on foot the present crusade, how queer! Their singing, though charged with a moral purpose, and their prayers, though directed to a specific end, do not make their warfare a wit more feminine, nor their situation more attractive. A woman knocking out the head of a whiskey barrel with an ax, to the tune of Old Hundred, is not the ideal woman sitting on a sofa, dining on strawberries and cream, and sweetly warbling, “The Rose that All are Praising.” She is as far from it as Susan B. Anthony was when pushing her ballot into the box. And all the difference between the musical saint spilling the precious liquid and the unmusical saint offering her vote is, that the latter tried to kill several birds with one stone, and the former aims at only one.

Intemperance, great a curse as it is, is not the only evil whose effects bear most heavily

28 Id. at 67-73 for background on Willard’s joining the WCTU. The entire book provides information on her long career in the organization, enormous energy, ability to deeply affect audiences, and uncanny ability to capture cultural sensibilities in her writings.

29 See Blocker, *supra* note 20, at 69-72.

on women. * * * Tears, prayers and songs will soon lose their novelty—this spasmodic effort will be likely soon to spend itself; Is there any permanent good being wrought? Liquor traffic opposed woman suffrage, and with good reasons. It knows that votes change laws, and it also knows that the votes of women would change the present temperance laws and make them worth the paper on which they are printed. While this uprising of women is a hopeful sign, yet it cannot make one law black or white. It may, for a time, mold public opinion, but depraved passions and appetites need wholesome laws to restrain them. If women would only see this and demand the exercise of their right of suffrage with half the zeal and unanimity with which they storm a man’s castle, it would be granted. This is the only ax to lay at the root of the tree.³⁰

The desire of Cole and other suffragists for a shift in strategy among women temperance advocates was soon answered. By the early 1890s the WCTU was the largest women’s organization in the United States, as well as its largest suffrage organization—facts not commonly discussed today.³¹ Under Willard’s guidance it developed a “do everything” strategy to improve the status of women, support the union movement, control domestic violence, raise the age of consent to make it easier to convict men taking advantage of if not forcibly raping young women—all the while using anti-alcohol fervor as its primary motivation.³² The WCTU was an extremely powerful element of the Progressive Era reform movement. Willard’s primary message was contained in a remarkable pamphlet entitled *The Home Protection Manual*—published in 1879, the year she took over the WCTU. Its primary message was encapsulated beautifully in the following brief passage. And note well the ways she used a deeply religious, prohibition-based message to integrate concerns about protecting the well-being of women, safeguarding children, providing for viable means of family economic support, and supporting women’s suffrage into a few brief sentences.

But, looking deeper, we perceive that God has provided in Nature an antidote for every poison, and in the kingdom of His grace a compensation for every loss, so for human

30 Miriam M. Cole, in ELIZABETH CADY STANTON, SUSAN B. ANTHONY & MATILDA JOSLYN GAGE, 3 HISTORY OF WOMAN SUFFRAGE 500-502 (1889).

31 Id. at 153-154.

32 BORDIN, WILLARD BIOGRAPHY, supra note 16 at 129-154. She also was a staunch Christian, a socialist and a proselyte for the Social Gospel Movement. Id. at 155-175. See also IAN TYRELL, REFORMING THE WORLD: THE CREATION OF AMERICA’S MORAL EMPIRE 74-97 (2010), describing the international reach of Willard, the broader temperance movement, and other moral reform movements.

society he has ordained King Alcohol, that worst foe of the social state, an enemy beneath whose blows he is to bite the dust. Take the instinct of self-promotion (and there is none more deeply seated). What will be its action in woman when the question comes up of licensing the sale of a stimulant which nerves with dangerous strength the arm already so much stronger than her own, and which at the same time so crazes the brain God meant to guide that manly arm that it strikes down the wife a man loves and the little children for whom when sober he would die? Dependent for the support of herself and little ones and for the maintenance of her home, upon the strength which alcohol masters and the skill it renders futile, will my wife and mother cast her vote to open or to close the rum-shop door over against the home?³³

While the language of this passage (and many others she wrote and uttered in public oratory during the following two decades) surely seems quaint and out of date to most of us, it's power in the late nineteenth century cannot be gainsaid. It grabbed the souls of tens of thousands of women looking desperately for a renewed sense of security, virtue, economic well-being, and decent home life in an era wracked by depression, labor violence, class conflict, racial animosity, immigration disputes, and greed. The message was plaintive but telling. Thousands of women who had previously stayed out of major political debates eagerly joined those already in the movement. The suffrage message was strong. And note well that it was not based on a sense of equality between women and men. Willard's message was very different from the mid-nineteenth century radical suffragist and abolitionist rhetoric of equality and much more popular and acceptable to both women and men in later decades. While the reformist zeal of the Southern Ohio sit-ins was solidly ensconced in Willard's psyche, she was friendly with but not cut from the same mold as the activists of the mid-nineteenth century suffrage movement. Rather her message grew out of a sensibility that late nineteenth century women had special religious, moral, and reformist instincts desperately needed by society to facilitate badly needed reforms. She brought deep religious fervor to her life and work, believed strongly in the possibilities of moral transformation, and exerted enormous amounts of energy on an array of important issues.³⁴ Her political base was enormous.

33 FRANCES E. WILLARD, *HOME PROTECTION MANUAL: CONTAINING AN ARGUMENT FOR THE TEMPERANCE BALLOT FOR WOMAN, AND HOW TO OBTAIN IT, AS A MEANS OF HOME PROTECTION; ALSO CONSTITUTION AND PLAN OF WORK FOR STATE AND LOCAL W. C. T. UNIONS* 9 (1879).

34 For a summary of the way religion, reform, and political work meshed in her life see, BORDIN, *BIOGRAPHY*, supra note 16, at 155-174.

As the best known and most popular woman of the time, she was welcomed by huge crowds in auditoriums all over the country and much of Europe. ³⁵ As Ruth Bordin has written, “Frances Willard was a household word by 1889 and her reputation spanned the continent. Of equal importance, she had moved a social philosophy that revolved around temperance and the woman question to support of the labor movement and acceptance of Christian Socialism.”³⁶

Willard’s gradual departure from day-to-day activity with the American WCTU in the 1890s, first to organize in Europe and then from illness, led to its partial decline from its lofty status as the largest women’s membership organization in the United States. After her death in 1898, the WCTU returned primarily to a single issue, temperance organization as other groups took over much of the broader reformist messaging. The WCTU did remain a powerful organization, but others also arose to take on both prohibition and suffrage, most notably the Anti-Saloon League founded in 1893. The League continued Willard’s efforts to obtain adoption of both prohibition and suffrage. Its major national newsletter, *THE AMERICAN ISSUE*, published numerous articles on both subjects. Its pages included essays with the oft told tales of men coming home to badly mistreat their families³⁷ as well as reports on efforts to obtain suffrage and on state level attainments in the field. This article appeared in 1913.³⁸

35 When she delivered her WCTU Presidential address at the organization’s 1888 convention, she filled the then new Metropolitan Opera House with 400 delegates and 4000 other attendees. The event was widely covered in the press. *Id.* at 127. It was only one of many large crowds she spoke to during the 1880s.

36 Bordin, *id.* at 154.

37 This story appeared in a 1912 issue:

The saloon tells only a small part of the story, however. It is when one follows the victim of drink to his home, if home it may be called, that the full effects are seen. To let wife and children go hungry and naked is a small thing. That goes without saying. The man who is maddened with drink is capable of any crime. One such poor intemperate was met, as he returned home, by his four-year-old son. Had he been sober, he would have pressed him to his bosom; but he had been drinking heavily, and he took that boy by the shoulder, lifted him over his head, and threw him out of the second-story window. They picked the little fellow up with both thighs broken.

Ellsworth Olsen, *Our Responsibility*, reprinted from *TEMPERANCE REVIEW*, in 20 *AMERICAN ISSUE* 6 (September, 1912)

38 21 *AMERICAN ISSUE* 2 (Jan. 1913)

day.³⁹

The Progressive Era witnessed a profound shift in attitude about the exercise of government moral and regulatory power after the turn of the twentieth century. The early temperance fervor typically was based on persuasion not coercion—an effort to convince the population to be temperate in their consumption of alcohol. Willard herself had to convince the WCTU membership to begin moving toward more compulsory regulation during her time as President of the organization. State anti-liquor laws were sought; federal controls were not originally on the table. But the strong morality-based forces of the Progressive Era gradually gained strength. Temperance was not the only movement steeped in such motivations. Agitation for legal control of opiates and other drugs, control of white slavery, containing immigration, controlling corporate power, cleaning up slums and tenement houses, reducing vagrancy, as well as adoption of women’s suffrage, all began to move from the realms of persuasion, religiosity, and street level social services to compulsion, and for some issues from local and state control to federal regulation.⁴⁰

The Congressional debates on the Prohibition amendment displayed these trends. Much energy was spent debating whether it was appropriate to shift regulation of alcohol from local to federal control. But there also were many speeches devoted to the debilitating moral impacts of its use on society—especially on women and children. Senator William Kenyon of Iowa perhaps best summed up such sentiments. While stated with a style of censure Willard never used, she certainly would have applauded his sentiments about the need to protect children, women, and the frail.

It is a trap for the youth; a destroyer for the old; a foul spawning place for crime; a corrupter of politics; knows no party; supports those men for office whom it thinks can be easiest influenced; has no respect for law or the courts; debauches city councils, juries, and everyone it can reach; is powerful in the unity of its vote, and creates cowards in office.

It flatters, tricks, cajoles, and deceives in order to accomplish its purpose; is responsible for more ruin and death than all the wars the Nation has ever engaged in; has corrupted more politics, ruined more lives, widowed more women, orphaned more children,

39 *Anti-Rum Army at Capitol: National Prohibition Amendment Cheered in the Senate*, THE NEW YORK TIMES (Dec. 11, 1913). A firsthand description of the events may be found in *Wesley Spragg Gives His Impressions of Americans: A Flashlight on the Committee of One Thousand*, 22 *The American* Issue 4 (May, 1914).

40 The sources on this issue are legion. Here are just a few covering different areas on the impact of moral movements in the late nineteenth and early twentieth centuries. IAN TYRELL, *REFORMING THE WORLD: THE CREATION OF AMERICA’S MORAL EMPIRE* (2010); Richard Chused, *Euclid’s Historical Imagery*, 51 *CASE WESTERN RESERVE L. REV.* 597 (2001); NICOLA BEISEL, *IMPERILED INNOCENTS: ANTHONY COMSTOCK AND FAMILY REPRODUCTION IN VICTORIAN AMERICA* (1997); WALTER RAUSCHENBUSCH, *A THEOLOGY FOR THE SOCIAL GOSPEL MOVEMENT* (1918).

destroyed more homes, caused more tears to flow, broken more hearts, undermined more manhood, and sent more people to an early grave than any other influence in our land.

Its day has come. No subterfuge can long save it. It will be dragged into the open, the influences behind it stripped of their masks. A mighty public conscience is aroused, moving on rapidly, confidently, undismayed, and undeceived. Behind it are the churches of the Nation—Protestant and Catholic—schools, colleges, and homes. This public conscience is not discouraged by defeat or deceived by any cunning devices, by any shams or pretenses. Its cause is the cause of humanity, of righteousness, and God Almighty fights with it.⁴¹

⁴¹ The entirety of the 1917 debates may be found for the Senate in 55 Cong. Rec. 5636-5666 (Aug. 1, 1917) and for the House at 56 Cong. Rec. 422-461 (Dec. 17, 1917). Senator Kenyon's remarks are at 55 Cong. Rec. 5639.

II. Suffrage

Messages about the special moral roles of women in society so loftily presented to the American body politic by the vivid rhetorical presence of Frances Willard and the memory of women exercising their power and influence in southern Ohio during the Women's Crusades remained in the public consciousness for much longer than a generation. And those sentiments were critical to the eventual adoption of women's suffrage. The National American Woman Suffrage Association, headed by Susan B. Anthony upon its founding in 1890, became the largest suffrage organization during that decade. But, as already noted, some members of both suffrage and temperance groups recognized the moral force and power of women in society and favored both movements. Though the coalitions were not totally alike, the overlap among more conservative, often rural, and religious partisans ran fairly deep.

Richard Hostadter reminds us in his classic book *THE AGE OF REFORM*, that urban/rural disagreement over prohibition was serious. Urban residents tended not to favor efforts to ban distribution and consumption of alcohol, and resistance to Prohibition there was widespread.⁴² The split was obvious in a 1914 Ohio referenda on a proposal to go dry. It won handily in rural areas but lost badly in Cleveland and Cincinnati.⁴³ And much rural support for prohibition also came from nativism and the Klu Klux Klan, sentiment stimulated by World War I, antipathy to German immigrants and their widespread association with malt beverages and saloons, and post-Civil War racial animosity. Approval for prohibition was high across the country among middle and upper-class religious, conservative white women, and their male supporters. It is worth noting that the 1920 census was the first in which urban population was more than half the national total.⁴⁴ Rural political preferences largely controlled governmental actions.

The sometimes ugly and often religious and moral motivations for Prohibition also became props for support of suffrage as a weapon to douse the use of liquor or to take advantage of the ethical attributes of women. Carrie Chapman Catt, who took over leadership of the National American Women's Suffrage Association in 1915 ably tapped into both the most upstanding

42 RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 286-291 (1955). See also SARA EGGE, *WOMAN SUFFRAGE AND CITIZENSHIP IN THE MIDWEST* passim (2018).

43 *Ohio Has Gone Wet*, 21 *AMERICAN ISSUE* 11 (Nov. 1914).

44 BEN J. WATTENBERG, U.S. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, *THE STATISTICAL HISTORY OF THE UNITED STATES: FROM COLONIAL TIMES TO THE PRESENT* 11-12 (1976).

motivations of women as well as the not always attractive currents of American sentiment in the Progressive Era. Robert H. Wiebe, painting a picture of three major figures leading reform efforts during the later years of suffrage agitation—Samuel Gompers of the American Federation of Labor, Booker T. Washington of the black self-help movement, as well as Catt—described their talents well.

To emphasize their distance from lower-class life, they shaped their appeals to fit traditional values. Catt, cutting America cleanly into respectable and disreputable parts, held out prospects of a far greater respectability in public life through the elevating effects of white women's character and simple moral truths. Gompers cultivated the role of a businessman ready to deal with other businessmen, always as good as his word. Washington promoted equally familiar 19th century values: blacks, given the opportunity, would rise by dint of good habits and honest labor. The three of them wrapped their causes in attractive promises: civic virtue, economic rewards, social harmony.

All of them cultivated reputations as moderates who fending off the radicals just next to them: Washington the upstarts in the Niagara Movement and the National Association for the Advancement of Colored People; Catt the militant suffragists behind Alice Paul; Gompers the strike-minded expansionists in and around the AFL. Sublimating their anger at more obvious enemies—employers, whites, men—they bent every effort, and at least some values, to make the enemies of these enemies their enemies: Gompers the stalwart antagonist of socialism; Washington the earnest opponent of amalgamation; Catt the implacable foe of urban riffraff. The most telling moment in this record of accommodation came with the First World War, when Catt and Gompers, once pacifists, charged to the head of the military parade.⁴⁵

Ohio, the WCTU's root, provides a perfect example of the ways the rhetoric of the prohibition and suffrage movements often overlapped. From the very beginning the impact of the Crusades was felt in the state's suffrage debates. During efforts to grant women voting rights in the 1873 Constitutional Convention, for example, Mr. Alvin Voris contended that if politics were too corrupt for women, it was a bad omen "for the future, and * * * a withering commentary on man's management of our public affairs." Granting suffrage rights, he continued, would give women "additional moral force, make her influence greater and better qualify her for her mission, * * *

45 ROBERT H. WIEBE, *SELF RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* 152 (1995)

make her a better wife and mother and just as good a Christian.”⁴⁶ This interplay between notions of virtuous women and political indecorum continued unabated until suffrage finally was approved—some claiming that women would clean up the polls and others rebelling at the notion that women should step foot in the boisterous and unseemly political realm. Suffrage efforts all across the nation were strongly opposed by alcohol interests,⁴⁷ as well as those preferring to leave the issue to the states, or to those taking traditional views on the impropriety of women participating in public, governance activities. Efforts to amend the Ohio constitution to grant women the right to vote were blocked by the legislature in 1888, 1890, and 1891.⁴⁸ Agitation by liquor interests against suffrage apparently was intense.⁴⁹ Those failures led to efforts to seek more modest reform by allowing women to vote in school elections—a realm filled with women teachers and often thought of as an extension of home life. Education suffrage was finally obtained by Ohio women in 1894.⁵⁰

Efforts continued in Ohio to obtain full suffrage, including during vibrant debates on the subject at the 1912 state constitutional convention. In addition to debating prohibition, the right of women to vote took center stage. While the proposal to grant suffrage adopted at the convention went down to defeat at the polls, debate at the convention was fascinating. One of the most vociferous supporters of suffrage was Mr. Hiram D. Peck from Cincinnati. He gave long speeches on the moral, educational, and spiritual benefits of allowing women to vote. And he did so in ways that by no means commanded support for prohibition as well.⁵¹

Gentlemen, if you want clean streets in your cities let the women vote. If you want your

46 As quoted in D.C. Shilling, *Woman's Suffrage in the Constitutional Convention of Ohio*, 25 OHIO ARCHAEOLOGICAL & HIST. Q. 166, 172 (1916).

47 FLEXNER, *supra* note 14, at 188, 231, 306-309.

48 Marian Morton, *How Cleveland Women Got the Vote—and What They Did With It*, available at <http://teachingcleveland.org/category/progressive-cratom-l-johnsonewton-d-baker-19/how-cleveland-women-got-the-vote/> (Visited Aug. 5, 2019).

49 Evidence about this pops up in many places. See, e.g., *Our Columbus Letter*, DEMOCRATIC NORTHWEST AND HENRY COUNTY NEWS (April 19, 1894), where it is said that dries in the legislature vote for suffrage and wets do not.

50 An Act to secure a voice in school affairs to the women of Ohio on equal terms with men, General and Local Acts Passed and Joint Resolutions Adopted by the Seventy-Second General Assembly, 91 Ohio Laws 182 (1894). While this act was a fall back after broader suffrage rights were not obtained, legislation granting women the right to cast ballots in school elections was adopted in many states even before suffrage was an important issue. In such places, the decisions rested on education policy, a desire to allow tax payers to control the ways their funds were spent close to home, or a recognition of the role women played in educating children. See Kathryn A. Nicholas, *Reexamining Women's Nineteenth-Century Political Agency: School Suffrage an Office-Holding*, 30 J. POLITICAL HIST. 452 (2018).

51 Mr. Peck actually voted in favor of allowing the state to vote on a proposal to allow localities to license businesses to sell intoxicating beverages. 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 1808 (1912).

streets and highways kept in repair and your cities kept sanitary, let the women vote. If you want your school houses kept in order and made sanitary, let the women vote. They will keep them in order. If you want your schools run right and your school teachers kept up to the mark, let the women vote. They will take care of that. If you want playgrounds for the children, let the women look after it by their votes.

These are some of the things women will do and there are many others that I might enumerate. It is all in the one direction. There is nothing but what favors the same conclusion. Take in the matter of civics—anything that pertains to the life of the community, especially the moral welfare of the whole community. I am speaking of this with reference to the whole community; I am not speaking of it as a matter of benefit to the women. I am speaking for the benefit of the men as much as the women. Men need the women in politics just as much as the women need to vote. We want them. We want their assistance.

* * * *

[A]s a rule women habitually live on a higher moral plane than men, and we want that moral force in our politics as it is in our social life. We want to help cleanse our political life. Brethren, there is no reform on earth like an individual reform. You may reform forms of government, and change forms of government and switch them about, and have this sort of a board and that sort of a board, and this sort of an assembly and that sort of an assembly, and this sort of a court and that sort a court, but there is no reform that goes to the bottom of things like individual reform, which makes a man better and purer and more honorable, and that is the kind of reform that the introduction of women in the politics will forward, and that is the fundamental reason why I am in favor of woman's suffrage.⁵²

Like Ohio, efforts to obtain suffrage in other states were delayed, stymied or granted in a limited fashion.⁵³ But the gradual expansion of suffrage across the nation by the time the issue came

52 Speech of Mr. Peck, 1 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 614 (1912).

53 By the time the 19th Amendment was ratified, 15 states had granted full suffrage rights: Wyoming (1890), Colorado, (1893), Utah, (1896), Idaho, (1896), Washington, (1910), California, (1911), Arizona, (1912), Kansas, (1912), Oregon, (1912), Montana, (1914), Nevada, (1914), New York, (1917), Michigan, (1918), Oklahoma, (1918), and South Dakota, (1918). In a few of these, such as Wyoming, suffrage was granted earlier while the area was a territory. For those locations, the dates reflect the time of statehood. In four states voting for presidential electors was permitted: Illinois (1913), Nebraska (1917), North Dakota (1917), and Indiana (1919). Voting in primary elections was opened to women in Arkansas (1917) and Texas (1918). In thirteen others the vote

before Congress in 1919 certainly had an impact on its final approval.

The tenor of the debates over federal as well as state suffrage revealed the complexity and importance of the moral messaging, the limitations of equality rhetoric, and the importance of race and ethnicity as limitations on both. When, for example, the House of Representatives was in the midst of its final debate on the subject, Mr. Edward C. Little of Nebraska uttered one of the most arresting speeches.

They tell us that woman should not vote merely because she is a female. No other reason has been advanced except that form which says that she cannot bear arms. Every mother who bears a son to fight for the Republic takes the same chance of death that the son takes when he goes to arms. The fact that she is a woman is a reason for, not against, the utilization of every force for the advancement of society. Ninety-nine per cent of the murderers in the world are men. Ninety-nine per cent of the burglars are men. Ninety-nine per cent of the gamblers are men. Ninety-nine per cent of the counterfeiters are men. Ninety-nine per cent of all the thieves, outlaws, forgers, pickpockets, bank robbers, tram robbers, pirates, and drunkards in the world are men. Ninety-nine per cent of all criminals are men.

Ninety-nine per cent of all diseases inherited by reason of evil lives of parents come down from the male side. For every courtesan there is a seducer and panderer and a thousand customers. When one considers the character of the two sexes, he better appreciates the power of the instinct of race preservation which nature has planted in the human kind, which certainly is all that has induced women to remain on the same continent with man for 60 centuries. If the world were open and the best character of votes were the dominating factor, women would control the ballot entirely. If good character were the basis for the franchise, most of the voters would probably have been women long ago.

* * * *

Men have argued here for 50 years that woman suffrage would break up the home. But in the Western States, where we have had woman suffrage in one form and another for years, we know of no family that has ever been disrupted by quarrel over politics. We know

was granted for school or tax elections. The lists may be found at *Centuries of Citizenship: A Constitutional Timeline*, NATIONAL CONSTITUTION CENTER, at https://constitutioncenter.org/timeline/html/cw08_12159.html (Visited Aug. 5, 2019), and in the Congressional debates on the 19th Amendment in 1919. Statement of Mr. Nelson, 58 Cong. Rec. 84 (May 21, 1919).

of no fireside that has burned more dimly because of any difference of opinion about the use of the ballot. To permit the mothers of this country to express their views on important issues will not injure the homes. As I reflect now I realize that every time I followed my mother's advice I did well. Generally when I did not listen to her I lived to regret it. She was a thoughtful and prudent woman. The long and short of the whole matter is that for centuries you have treated woman as a slave, dragged her over the pages of history by the hair, and then you pretend to think she is an angel, too good to interfere in the affairs of men. Give her now a fixed, reasonable status, as becomes a rational human being like yourself.⁵⁴

It is fascinating that a great deal, probably most, of the oratory supporting the amendment did not rely primarily or entirely on equality principles. The views of Mr. Little governed the day. Issues of morality and virtue tended to take a back seat among the opposition. They mostly took the positions that the issue should be relegated to the states rather than become a national affair,⁵⁵ that women don't want suffrage,⁵⁶ or, taking a racist stance, that the proposed amendment would wrongly enfranchise half the population of black citizens.⁵⁷ Virtually all of the Senate's final debate before passage was devoted to discussion of proposed amendments to subject suffrage to state veto, effectively nullifying the proposal and subjecting it to racially motivated opposition in the south.⁵⁸

While the widely publicized parading and picketing by the equal rights oriented Women's Party, led by Alice Paul, has justifiably received credit for reviving a moribund national movement for suffrage a half-dozen years before Congress approved it, the organization was working on fertile soil seeded by the deeply felt social sensibility about the differences between men and women. Indeed, the major outrage created by the 1913 failure of police to protect a large 5,000 person march up Pennsylvania Avenue from a mob was widespread antipathy to men assaulting women. A similar binge of outrage greeted the cruel treatment of women arrested for picketing the

54 Statement of Mr. Little, 58 Cong. Rec. 80-81 (May 21, 1919).

55 See, for example, the statements during the House of Representatives of Mr. Focht of Pennsylvania and of Mr. Clark of Florida, 58 Cong. Rec. 84-86 (May 21, 1919).

56 See, for example, the statement of Mr. Focht, id.

57 See, for example, the statement of Mr. Clark of Florida, 58 Cong. Rec. 90-92 (May 21, 1919).

58 58 Cong. Rec. 615-634 (June 4, 1919).

White House in 1917.⁵⁹ The work of the Women’s Party, together with the rejuvenation of the National American Women’s Suffrage Association overseen by Carrie Chapman Catt, and the increasing success of state suffrage referenda all helped carry the day. The critical approval of suffrage in a 1917 New York referendum, breaking through the previously solid opposition in the northeast, was critical.⁶⁰

Strangely, perhaps, one of the most revealing statements made during the final suffrage campaign came not from any member of the legislature but from President Wilson—a then recent and perhaps reluctant convert to the cause in 1918. Taking a cue from the strategically wise decision of Carrie Chapman Catt and the National American Women’s Suffrage Association to support the war effort,⁶¹ Wilson began his speech by giving credit to the women for all of their support. He commented on their patriotism, their willingness to take on jobs and tasks normally performed by men, and their sensible judgments that were needed as counselors during and after the conflict. “Are we,” he said, “to ask and to take the utmost that women can give,—service and sacrifice of every kind,—and still say that we do not see what title that gives them to stand by our sides in the guidance of the affairs of their nation and ours?”⁶² And he closed with a ringing statement of support for suffrage, based not only on the war support of suffragists, but also on the special spiritual and moral influence that would benefit both the country and the world:

Have I said that the passage of this amendment is a vitally necessary war measure, and do you need further proof? Do you stand in need of the trust of other peoples and of the trust of our women? Is that trust an asset or is it not? I tell you plainly, as commander-in-chief of our armies and of the gallant men in our fleets, as the present spokesman of this people in our dealings with the men and women throughout the world who are now our partners, as the responsible head of a great government which stands and is questioned day by day as to its purposes, its principles, its hopes, whether they be serviceable to men everywhere or only to itself, and who must himself answer these questionings or be shamed, as the guide and director of forces caught in the grip of war and by the same token

59 The important role played by Alice Paul and the Women’s Party is told in FLEXNER, *supra* note 14, at 272-274, 286-303. A brief summary of the 1917 events is Sarah Pruitt, *The Night of Terror: When Suffragists Were Imprisoned and Tortured in 1917*, HISTORY STORIES (Mar. 4, 2017), at <https://www.history.com/news/night-terror-brutality-suffragists-19th-amendment> (Visited Sep. 10, 2019).

60 *Id.* at 271-303.

61 ELEANOR FLEXNER, *CENTURY OF STRUGGLE: THE WOMAN’S RIGHTS MOVEMENT IN THE UNITED STATES* 294 (1959).
62 56 Cong. Rec. 10928-10929 (Sep. 30, 1918).

in need of every material and spiritual resource this great nation possesses,—I tell you plainly that this measure which I urge upon you is vital to the winning of the war and to the energies alike of preparation and of battle.

And not to the winning of the war only. It is vital to the right solution of the great problems which we must settle, and settle immediately, when the war is over. We shall need then a vision of affairs which is theirs, and, as we have never needed them before, the sympathy and insight and clear moral instinct of the women of the world. The problems of that time will strike to the roots of many things that we have not hitherto questioned, and I for one believe that our safety in those questioning days, as well as our comprehension of matters that touch society to the quick, will depend upon the direct and authoritative participation of women in our counsels. We shall need their moral sense to preserve what is right and fine and worthy in our system of life as well as to discover just what it is that ought to be purified and reformed. Without their counsellings we shall be only half wise.

That is my case. This is my appeal. Many may deny its validity, if they choose, but no one can brush aside or answer the arguments upon which it is based. The executive tasks of this war rest upon me. I ask that you lighten them and place in my hands instruments, spiritual instruments, which I do not now possess, which I sorely need, and which I have daily to apologize for not being able to employ.

Wilson's brief speech reflected the spectrum of rationales used to support suffrage. The work of the women during the war, to the President, framed an argument based on a stilted form of gender equality. On the other hand their moral sense, their purity, their reforming sensibilities, and their wise counsel signaled the special roles that women played in the cultural life of the nation. It is the shift of these motivations from the home and the saloon to the world of politics and male bastions of power—with its roots in the Ohio Crusades half a century earlier—that was crucial for the adoption of suffrage.

Suffragist Prisoners and the Importance of Protecting Prisoner Protests

*Nicole B. Godfrey**

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INTRODUCTION

For the last several years, criminal justice reform has been a pressing political topic, and radical proposals to overhaul the criminal justice system have gained traction.¹ Nearly all of the candidates in the crowded Democratic presidential primary field have come forward with comprehensive proposals to curb (or even eliminate) mass incarceration.² The reasons for this new-found political interest in dramatic criminal justice reform are varied and complex, but we can be certain shifting public opinions on the cause and consequences of mass incarceration played some part.³ But why has the public's view of mass incarceration so dramatically shifted? Undoubtedly, public information campaigns and social justice movements have provided the average American more information about the history and present-day realities of the American criminal justice system.⁴ Studies have found that the more information provided to the average American citizen, the more likely they are to support reforms.⁵

But despite this growing interest in criminal justice reform, prisons remain “the black boxes of our society,”⁶ leaving the public struggling to understand what exactly goes on behind prison walls. Intrepid journalists seeking to shed some light on what goes on behind the walls of the thousands of prisons dotting the American landscape have published important exposés in recent years,⁷ but the voices of

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¹ See, e.g., Timothy Williams & Thomas Kaplan, *The Criminal Justice Debate Has Changed Drastically. Here's Why.*, THE NEW YORK TIMES, Aug. 20, 2019, available at <https://www.nytimes.com/2019/08/20/us/politics/criminal-justice-reform-sanders-warren.html>.

² *Id.*

³ *Id.*

⁴ Examples of such public information campaigns and movements include:

⁵ Danny Franklin, Beneson Strategy Group, *Criminal Justice System Survey Results*, Nov. 13, 2017, available at <https://www.aclu.org/report/smart-justice-campaign-polling-americans-attitudes-criminal-justice-topline-memo>.

⁶ Shaila Dewan, *Inside America's Black Box: A Rare Look at the Violence of Incarceration*, THE NEW YORK TIMES, Mar. 30, 2019, available at <https://www.nytimes.com/2019/03/30/us/inside-americas-black-box.html?smid=nytcore-ios-share>.

⁷ See, e.g., Aviva Stahl, *Force-Feeding Is Cruel, Painful, and Degrading—and American Prisons Won't Stop*, THE NATION, June 4, 2019, available at <https://www.thenation.com/article/force-feeding-prison-supermax-torture/> (describing the force-feeding tactics utilized on prisoners engaging in hunger strikes by the nation's federal supermax); Jennifer Gonnerman, *Do Jails Kill People?*, THE NEW YORKER, Feb. 20, 2019, available at <https://www.newyorker.com/books/under-review/do-jails-kill-people> (noting that the well-known New York City jail on Rikers Island “has long been notorious for its culture of brutality”); Annie Correal, *No Heat for Days at a Jail in Brooklyn*

incarcerated persons can often be lost in the conversation.⁸ Recognizing this loss, certain journalistic outlets have made a concerted effort in recent years to publish pieces written by those living inside the walls.⁹ Hearing the voices and stories of those living inside the system is crucially important to understanding the flaws of the criminal justice system and exposing illegal conditions of confinement.¹⁰ This is particularly true for those institutions that are either notoriously opaque¹¹ or

Where Hundreds of Inmates Are Sick and ‘Frantic,’ THE NEW YORK TIMES, Feb. 1, 2019, available at <https://www.nytimes.com/2019/02/01/nyregion/mdc-brooklyn-jail-heat.html> (recounting the experience of federal detainees “stuck in freezing cells” with little to no power or heat for at least a week); German Lopez, *America’s prisoners are going on strike in at least 17 states*, VOX, Aug. 22, 2018, available at <https://www.vox.com/2018/8/17/17664048/national-prison-strike-2018> (describing the work and hunger strike planned by prisoners across the country from August 21 to September 9, 2018); Shane Bauer, *My Four Months as a Private Prison Guard: A Mother Jones Investigation*, MOTHER JONES, July/August 2016, available at <https://www.motherjones.com/politics/2016/06/cca-private-prisons-corrections-corporation-inmates-investigation-bauer/> (describing cells that look like tombs, guards using force on a prisoner who just had open-heart surgery as “all part of the bid’ness,” and the reporters own priorities changing as “[s]triving to treat everyone as human takes too much energy”); Mark Binelli, *Inside America’s Toughest Federal Prison*, THE NEW YORK TIMES MAGAZINE, Mar. 26, 2015, available at <https://www.nytimes.com/2015/03/29/magazine/inside-americas-toughest-federal-prison.html> (recounting tales of self-mutilation, psychosis, and suicide at the federal supermax prison, where all prisoners are held in solitary confinement).

⁸ This lack of input from the persons living inside prison can often be attributed to lack of media access to prisoners.

⁹ See, e.g., *Life Inside*, THE MARSHALL PROJECT, available at <https://www.themarshallproject.org/tag/life-inside> (a weekly newsletter delivering “first-person essays from those who work or live in the criminal justice system,” including prisoners); *Voices from Solitary*, SOLITARY WATCH, available at <https://solitarywatch.org/category/voices/> (featuring first-person pieces from those suffering in solitary confinement in the nation’s prisons and jails).

¹⁰ See generally Laura Rovner, *On Litigating Constitutional Challenges to the Federal Supermax: Improving Conditions and Shining a Light*, 95 DENV. L. REV. 457, 460-64 (discussing the invisibility of prisons as compared to the other aspects of the criminal justice system); Andrea Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 Stan. J.L. & Pol’y 435, 462-66 (2014) (discussing the lack of transparency of penal institutions).

¹¹ See, e.g., Jeanne Theoharis, *I Tried to Tell the World About Epstein’s Jail. No One Wanted to Listen*, THE ATLANTIC, Aug. 16, 2019, available at https://www.theatlantic.com/ideas/archive/2019/08/real-scandal-mcc/596257/?utm_source=atl&utm_medium=email&utm_campaign=share

infamously brutal.¹² But despite the effort to feature incarcerated voices by some news organizations, the 2.2 million people currently confined to American prisons and jails are largely out of sight and mind for most of the public.¹³

This lack of visibility is purposeful and is perpetuated by a lack of independent monitoring of prisons and jails¹⁴ and by the leniency afforded to prison systems by the federal courts.¹⁵ In 2006, the Commission on Safety and Abuse in America’s Prisons released a report documenting troubling conditions in the nation’s prisons and jails and calling for an independent, external monitor of prison systems in order to increase transparency and accountability in the nation’s carceral institutions.¹⁶

(discussing the “hidden in plain sight” horrors of the federal prison system and the difficulty of investigating those conditions); Rovner, *supra* n. 10 at 464 (discussing the invisibility of the federal supermax—the United States Penitentiary-Administrative Maximum (ADX)).

¹² Shaila Dewan, *Inside America’s Black Box: A Rare Look at the Violence of Incarceration*, THE NEW YORK TIMES, Mar. 30, 2019, available at <https://www.nytimes.com/2019/03/30/us/inside-americas-black-box.html?smid=nytcore-ios-share> (describing photographs received by the New York times of weapons and bloody crime scenes inside the St. Clair Correctional Facility in Alabama); Gonnerman, *supra* n. 7 (noting that the well-known New York City jail on Rikers Island “has long been notorious for its culture of brutality”); Matthew Teague, *It’s a bloodbath’: staff describe life inside America’s most violent prison*, THE GUARDIAN, Oct. 21, 2016, available at <https://www.theguardian.com/us-news/2016/oct/21/holman-prison-alabama-guard-speaks-out> (describing “[t]he horrors of Holman penitentiary in southern Alabama—the stabbings, riots, fires, abuse—[that] have earned it a reputation as the most violent prison in the United States”).

¹³ Dewan, *supra* n. 12.

¹⁴ Human Rights Watch, *No Equal Justice: The Prison Litigation Reform Act in the United States*, at 3 (2009), available at <https://www.hrw.org/sites/default/files/reports/us0609web.pdf> (“Unlike many other democracies, the United States has no independent national agency that monitors conditions in prisons, jails, and juvenile facilities and enforces minimal standards of health, safety, and humane treatment.”).

¹⁵ See, e.g., *Turner v. Safley*, 482 U.S. 78 (1987) (announcing reasonable relationship standard as governing all challenges to prison regulations).

¹⁶ *Confronting Confinement: A Report of the Commission on Safety and Abuse in America’s Prisons* at 15-16, 21-22 (2006), available at https://storage.googleapis.com/vera-web-assets/downloads/Publications/confronting-confinement/legacy_downloads/Confronting_Confinement.pdf (“Corrections leaders work hard to oversee their own institutions and hold themselves accountable, but their vital efforts are not sufficient and cannot substitute for external forms of oversight.”).

Every public institution—hospitals, schools, police departments, and prisons and jails—needs and benefits from strong oversight. Perhaps more than other institutions, correctional facilities require vigorous scrutiny: They are uniquely powerful institutions, depriving millions of people each year of liberty and taking responsibility for their security, yet are walled off from the public.¹⁷

Without an external system of checking their power, prison systems across the country are free to operate with little transparency and accountability.¹⁸ This lack of external accountability allows prison systems to become “a place that is so foreign to the culture of the real world” that any attempts to self-police flatly fail and prison officials are placed under extreme pressure to “keep quiet” about any obvious problems.¹⁹

Without appropriate external oversight, public accountability of prison systems often occurs only in those rare instances where a prisoner successfully challenges a condition of his incarceration in federal court.²⁰ But a 1987 Supreme Court decision severely limits the First Amendment rights of prisoners.²¹ In that case, *Turner v. Safley*, the Supreme Court embedded into prisoner First Amendment jurisprudence a requirement that federal courts defer to the professional judgment of prison officials when considering whether a prison regulation violates a prisoner’s First Amendment rights.²² In theory, this deference was not meant to be absolute, but, in practice, *Turner* deference has allowed “corrections officials [to] abuse, with some frequency, the discretion granted to them by *Turner* and its progeny.”²³ Therefore, prisoner speech is subjected to a high-level of censorship, which limits the ability of prisoners to protest or otherwise expose inhumane conditions of confinement. Indeed, those prisoners who engage in such protected activity are often subject to retaliation, which further chills their willingness to speak out against the abusive practices of their jailers.

This Article argues for increased protections for prisoners who choose to protest the conditions of their incarceration. By strengthening the protections afforded to prisoner protests, I submit that federal courts can increase the

¹⁷ *Id.* at 77.

¹⁸ *Id.* at 16.

¹⁹ *Id.* at 79, 82.

²⁰ *Id.* at 22.

²¹ *Turner*, 482 U.S. 78.

²² *Id.* at 84-85 (“Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have. . . additional reason to accord deference to the appropriate prison authorities.”).

²³ David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972, 995 (2016).

accountability of prison officials and further the democratic and societal values embedded in the First Amendment’s free speech protections. To advance this argument, I’ve chosen to use the acts of protest utilized by the Silent Sentinels—the women jailed because of their protest activities in support of the Nineteenth Amendment—as an example demonstrating why in-prison protest is worthy of robust constitutional protections.

The Article proceeds in three parts. First, I provide the historical background necessary to understand the utility of the Silent Sentinels example. This discussion includes a description of the conditions of the prison in which the Silent Sentinels were incarcerated, an account of the type of protest speech utilized by the Silent Sentinels from within prison, and an explanation of the consequences of the women’s protest activity. From there, Part II provides a thorough analysis of the law governing prisoner protest activity, including the *Turner* standard and the limitations placed on prisoner protest activities. Part II then examines the compelling critiques of the *Turner* standard articulated by other scholars and introducing the argument that more robust protections of prisoner protest activities are both possible and necessary. Finally, the Article argues that the example of the Silent Sentinels provides a compelling lens through which one can examine the utility of protecting prisoner protest rights. By examining how the Silent Sentinels’ in-prison protest furthered critical First Amendment values, Part III concludes by comparing the Silent Sentinels’ protest to modern prisoner protest activities and arguing that the Silent Sentinels’ experience demonstrates why we should support robust protections of prisoner protest rights.

I. THE SILENT SENTINELS

On January 10, 1917, a group of women organized by Alice Paul, Lucy Burns, and the National Woman’s Party (NWP) began a two-and-a-half-year protest in support of women’s suffrage.²⁴ The first group of American citizens to picket the White House, a dozen women gathered outside the White House gates, carrying purple, white, and gold banners.²⁵ Some of the banners read, “Mr. President, what will you do for women’s suffrage?,” while others stated “How long must women wait for liberty?”²⁶ Causing a “profound stir” on that first day, the picketers returned to protest six days a week for the next several months and then more sporadically until June 4, 1919, when Congress passed the Nineteenth Amendment to the United States Constitution.²⁷

The picketing women became known as “Silent Sentinels” because, while the women held “banners with provocative political slogans or demanding the

²⁴ Doris Stevens, *JAILED FOR FREEDOM: AMERICAN WOMEN WIN THE VOTE* 21, 59 (Carol O’Hare, ed., 1995).

²⁵ *Id.* at 59.

²⁶ *Id.*

²⁷ *Id.*

right to vote,”²⁸ they stood in peaceful silence.²⁹ While the *New York Times* initially called the picketers “unladylike and ‘silly,’” most other news organizations lauded the women’s efforts.³⁰ But “[t]aking a shift as a sentinel was much harder work than it might appear. The pickets stood outside no matter what the weather, feet frozen and hands numb from holding the heavy banners, subject to taunts from young boys and bemused stares from passerby.”³¹ While the taunts and stares may have been uncomfortable for the picketers, the protests remained largely peaceful for the first several months.³² In fact, President Wilson initially seemed “amused and interested” at the women posted outside the White House gates.³³

But the President’s toleration of the picketers quickly changed after the United States entered World War I in April 1917.³⁴ The suffragists members of the NWP resolved to continue their work despite the war effort, “being unalterably convinced that in so doing the organization serves the highest interests of the country.”³⁵ This decision to continue picketing despite the United States’ entry into the war cost the NWP a sizable portion of its membership, but its strategy “succeeded in keeping the suffrage cause at the center of public debate.”³⁶

The remaining picketers were determined to underscore the hypocrisy of President Wilson’s championing democracy around the world while denying democratic participation to half of the American citizenry.³⁷ To this end, the suffragists created banners meant to embarrass the Wilson administration

²⁸ *Id.* at 21.

²⁹ Rivera Sun, *Silent Sentinels Start Suffrage Protest on Jan 10th , 1917*, RIVERA SUN, Jan. 8, 2016, available at <http://www.riverasun.com/silent-sentinels-start-suffrage-protest-on-jan-10th-1917/>.

³⁰ Lynda G. Dodd, *Parades, Pickets, and Prison: Alice Paul and the Virtues of Unruly Constitutional Citizenship*, 24 J.L. & POL. 339, 398 (2008), quoting *Silent, Silly, Offensive* (editorial), N.Y. TIMES, Jan. 11, 1917, at 4 (other citations omitted).

³¹ Susan Ware, *WHY THEY MARCHED: UNTOLD STORIES OF THE WOMEN WHO FOUGHT FOR THE RIGHT TO VOTE* 242 (2019).

³² Stevens, *supra* n. 24 at 59-66.

³³ *Id.* at 61 (“Perhaps he thought it a trifling incident staged by a minority of the radical suffragists and anticipated no popular support for it. When he saw their persistence through a cruel winter his sympathy was touched. He ordered the guards to invite them for a cup of hot coffee, which they declined. He raised his hat to them as he drove through the line. Sometimes he smiled. As yet he was not irritated. He was confident in his national power.”).

³⁴ *Id.* at 67.

³⁵ Dodd, *supra* n. 30 at 398, quoting Christine A. Lunardini, *FROM EQUAL SUFFRAGE TO EQUAL RIGHTS: ALICE PAUL AND THE NATIONAL WOMAN’S PARTY, 1912-1920*, 111-12 (1991).

³⁶ Dodd, *supra* n. 30 at 401, n. 264.

³⁷ *Id.* at 400.

whenever it hosted a foreign envoy at the White House.³⁸ This embarrassment reached a tipping point in June 1917, when a Russian envoy visited the White House.³⁹ Seeking to harken on the sentiments of the Russian Revolution,⁴⁰ the suffragettes arrived at the White House on June 20, 1917 with a banner stating

To the Russian Envoys, we the women of America tell you that America is not a democracy. Twenty million American women are denied the right to vote. President Wilson is the chief opponent of their national enfranchisement. Help us make this nation really free. Tell our government it must liberate its people before it can claim free Russia as an ally.⁴¹

An angry passerby tore down this banner, and the next day a group of boys destroyed a second, similar banner.⁴² On each occasion, police looked on without interference.⁴³ The peaceful nature of the White House protest thereafter changed, and “the local police, apparently with the tacit support of the Wilson administration, started arresting and jailing picketers for disorderly conduct and obstructing sidewalk traffic, even though they were doing nothing differently than they had for the past six months.”⁴⁴

Local police made the first arrests on June 22, 1917, arresting Lucy Burns and Katherine Morey.⁴⁵ The next day, more arrests were made, but the cases arising from each of these initial arrests were dismissed, and the women were never tried.⁴⁶ On June 26, 1917, however, local officials arrested six women for “obstructing the traffic,” tried them, and sentenced them to a twenty-five dollar fine.⁴⁷ After the women refused to pay the fine, they were sentenced to three days in jail.⁴⁸ Several arrests followed a similar pattern, but by July 17, 1917, “sixteen picketers were sentenced to sixty days at the Occoquan Workhouse in Virginia.”⁴⁹ More arrests and lengthy workhouse and district jail sentences followed, and, “[b]y October 1917, seventy women were arrested, six of them for terms as long as six months.”⁵⁰ The women courageously continued their protests from behind

³⁸ *Id.* (“In one of Wilson’s speeches, often quoted on suffrage banners, Wilson declared: “We shall fight for the things which we have always held nearest our hearts—for democracy, for the right of those who submit to authority to have a voice in their own governments.”); *see also* Stevens, *supra* n. 24, at 74.

³⁹ *Id.* at 73.

⁴⁰ Ware, *supra* n. 31 at 244.

⁴¹ Stevens, *supra* n. 24 at 74.

⁴² *Id.* at 74; Ware, *supra* n. 31 at 244.

⁴³ Stevens, *supra* n. 24 at 74.

⁴⁴ Ware, *supra* n. 31 at 244.

⁴⁵ Stevens, *supra* n. 24 at 76; Dodd, *supra* n. 30 at 404.

⁴⁶ Stevens, *supra* n. 24 at 76.

⁴⁷ *Id.* at 76.

⁴⁸ Dodd, *supra* n. 30 at 404.

⁴⁹ *Id.* at 404-05.

⁵⁰ Ware, *supra* n. 31 at 245. There are conflicting accounts as to how many women were arrested as a result of the picketing movement. *See, e.g.*, Johanna

prison walls, calling attention not just to the unjust nature of their imprisonment, but also the squalid and miserable conditions of the prison.

A. *The Occoquan Workhouse in Virginia and the District Jail*

Workhouses arose as a form of punishment in Europe in the late sixteenth century.⁵¹ The workhouse regime revolved around forced labor, wherein prisoners were expected to work ten-to-twelve hour days (with Sundays reserved for religious worship) and produce a certain fixed output of product.⁵² By the Victorian era in England, workhouses had transformed into places for the destitute rather than for felons.⁵³ These workhouses were institutions of “strict control” and a “harsh disciplinary regime,”⁵⁴ with conditions meant to deter inhabitants from returning (e.g., unpalatable food provided in only minimal amounts, hard labor, shameful uniforms, and boards rather than beds for sleep).⁵⁵

Built in 1910, the Occoquan Workhouse reflected a more rehabilitative, rather than deterrent, ideal championed by Theodore Roosevelt.⁵⁶ In contrast to their counterparts confined in the penitentiary, prisoners in the workhouse worked in trades meant to further their reform.⁵⁷ The Women’s Workhouse at Occoquan opened in 1912; it confined “poor women of color, imprisoned for crimes such as disorderly conduct and prostitution. The women of the workhouse did laundry for the facility, while others worked in the gardens.”⁵⁸

Neuman, *GILDED SUFFRAGISTS: THE NEW YORK SOCIALITES WHO FOUGHT FOR WOMEN’S RIGHT TO VOTE* 129 (2017) (“By the time all were released in November, by one estimate 2,000 American women had joined the protest line, 500 had been arrested, and 170 have been jailed for demanding the right to vote.”).

⁵¹ Pieter Spierenburg, *The Body and the State: Early Modern Europe*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY*, 45, 61 (Norval Morris & David J. Rothman, eds., 1995).

⁵² *Id.* at 64.

⁵³ Seán McConville, *The Victoria Prison: England, 1865-1965*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY*, 117, 117 (Norval Morris & David J. Rothman, eds., 1995).

⁵⁴ Patricia O’Brien, *The Prison on the Continent, Europe, 1865-1965*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY*, 178, 182 (Norval Morris & David J. Rothman, eds., 1995).

⁵⁵ McConville, *supra* n. 53 at 28.

⁵⁶ Wilson Korges, *The Lasting Legacy of Suffragists at the Lorton Women’s Workhouse*, *FOLKLIFE*, Mar. 21, 2018, available at <https://folklife.si.edu/magazine/lasting-legacy-of-suffragists-at-lorton-occoquan-womens-workhouse>.

⁵⁷ *Id.*

⁵⁸ *Id.*

The conditions of the Occoquan Workhouse likened to the conditions of the Victorian-era workhouses in England: the women confined there “were subjected to inedible food, humiliating treatment, lack of communication with the outside world, and—especially on the infamous ‘Night of Terror’ on November 15, 1917—physical intimidation and violence from prison authorities.”⁵⁹ Prison officials withheld the prisoners’ mail from them, fed them food with worms in it, and gave them blankets that had not been washed or cleaned for a year.⁶⁰

The women confined to Occoquan were also subjected to ruthless forms of punishment.⁶¹ The prison superintendent and his son beat the women, and prison officials punished certain prisoners by limiting their food to only bread and water.⁶² Prison officials exploited pre-existing racial tensions by forcing women of one race to brutally attack women of another race, threatening punishment to those who refused.⁶³ Women who disobeyed prison rules often were subjected to a form of punishment known as “the greasy pole.”⁶⁴

This method of punishment consisted of strapping girls with their hands tied behind them to a greasy pole from which they were partly suspended. Unable to keep themselves in an upright position, because of the grease on the pole, they slipped almost to the floor, with their arms all but severed from the arm sockets, suffering intense pain for long periods of time.⁶⁵

The conditions at the District Jail where some prisoners would spend some or all of their sentences were not much better than those at Occoquan. While the workhouse—aside from the solitary confinement cells—consisted mostly of open barracks, the District Jail, built in the 1870s, held conventional cells that measured six-by-nine such that the women could touch each side with their fingertips with their arms outstretched.⁶⁶ Frequently, the jail officials confined the women two to a cell, and prison officials responded to the slightest disobedience by placing the women in solitary confinement.⁶⁷ The tiny cells were infested with vermin, include rats and bed bugs, and each cell contained an open toilet, which, when combined with the prison’s practice of closing the workhouse windows from late afternoon until morning, created a stifling environment.⁶⁸

Despite these conditions and the risk of further torturous punishments, the conviction of the Silent Sentinels did not waiver, and they continued their protests from within prison walls.

⁵⁹ Ware, *supra* n. 31 at 246.

⁶⁰ Stevens, *supra* n. 24 at 96.

⁶¹ Stevens, *supra* n. 24 at 96.

⁶² *Id.* at 96.

⁶³ *Id.* at 99.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ J.D. Zhanise & Amelia R. Fry, ALICE PAUL: CLAIMING POWER 282 (2014).

⁶⁷ *Id.* at 282-83.

⁶⁸ *Id.*

B. The Silent Sentinels' Protests from Within the Prison Walls

The very fact of the first sentences to Occoquan caused quite a stir, and one should not underestimate how the imprisonment of sixteen “leading suffragists and very well-connected women” helped garner immediate public support.⁶⁹ There can be no doubt that the effectiveness of the arrests in furthering the suffrage movement is no doubt tied to the wealth and elite status of the women suddenly labelled prisoners.⁷⁰ Indeed, the outrage following the initial arrests was certainly furthered by the wealth and status of the prisoners’ husbands, and President Wilson’s quick pardon of the first group of women sentenced was in part driven by racist news coverage heralding the women’s courage in coping with Occoquan’s desegregated environment.⁷¹

But, no matter their social status and background, the introduction to Occoquan’s conditions did little to stem the conviction of the picketers, and by August 17, 1917, more picketers were arrested and sentenced to Occoquan.⁷² No pardon followed these arrests or the others that ensued in the forthcoming weeks.⁷³ Garnering no special treatment at the prison, the suffragist prisoners lived in and with conditions of “poor sanitation, infested food, and dreadful facilities.”⁷⁴

At first, the suffragist prisoners abide[d] by the routine of the institution, disagreeable and unreasonable as it was. They performed the tasks assigned to them. They ate the prison food without protest. They wore the coarse prison clothes. But at the end of the first week of detention they became so weak from the shockingly bad food that they began to wonder if they could endure a diet of sour bread, half-cooked vegetables, and rancid soup with worms in it.⁷⁵

But it soon became clear that the arrested suffragists would face longer and longer terms of imprisonment, so the women moved the protest inside the prison walls.

Claiming to be political prisoners, the women sought to intensify the pressure the picketing placed on the Wilson Administration by highlighting the injustice of their plight.⁷⁶ Lucy Burns began “quietly organizing within Occoquan

⁶⁹ Dodd, *supra* n. 30 at 405.

⁷⁰ *Id.* (“One was a daughter of a former ambassador and secretary of state. Another was the wife of a Progressive Party leader. Others were noted society figures, relatives of politicians, and high-ranking members of the NWP.”).

⁷¹ *Id.* at 407, n.299.

⁷² *Id.* at 408.

⁷³ *Id.*

⁷⁴ *Id.* at 411.

⁷⁵ Stevens, *supra* n. 24 at 95.

⁷⁶ *Id.* at 105.

for several weeks to circulate a petition among the imprisoned suffragists.”⁷⁷ Learning of her activities, the Occoquan officials placed Miss Burns in solitary confinement.⁷⁸ The first in-prison protest took the form of a petition requesting to be treated as political prisoners—“the first organized group action ever made in America to establish the status of political prisoners”—and announcing a prison work strike.⁷⁹

In addition to the request to be treated as political prisoners, the petition listed several other demands: (1) that the suffragists be allowed to congregate together and that Lucy Burns be released from solitary confinement; (2) that the suffragists be afforded the opportunity to meet with their lawyers; (3) that the suffragists be allowed to receive food from the outside; and (4) that the suffragists be provided writing material and books, letters, and newspapers.⁸⁰ The petition also explained that the suffragists did not immediately create the petition “because on entering the workhouse [they] found conditions so very bad that before we could ask the suffragists be treated as political prisoners, it was necessary to make a stand for the ordinary rights of human beings for all the [prisoners].”⁸¹ After garnering signatures, the suffragists smuggled the petition out to the district commissioners.⁸²

In response, the commissioners quickly transferred Lucy Burns and the other signatories to the district jail, placing all of them in solitary confinement.⁸³ The cells to which the women were confined had no fresh air—the windows were locked tight, and any woman who attempted to open one was physically thrown into a solitary cell.⁸⁴ The jail served food no better than the food provided at Occoquan, and the women existed on bread, water, and occasionally molasses.⁸⁵ On November 5, 1917, Alice Paul began a hunger strike to protest the women’s treatment.⁸⁶ To Paul and those who joined her, the hunger strike was “the ultimate form of protest left.”⁸⁷ Rather than heed the demands of the suffragists, however, the jail administrators began force-feeding the hunger strikers.⁸⁸

In response to the force-feeding, suffragists on the outside increased the number of picketers at the White House, leading to their arrest and eventual

⁷⁷ Dodd, *supra* n. 30 at 411.

⁷⁸ Stevens, *supra* n. 24 at 107.

⁷⁹ *Id.*

⁸⁰ *Id.* at 107-08.

⁸¹ *Id.* at 108.

⁸² Dodd, *supra* n. 30 at 411.

⁸³ Stevens, *supra* n. 24 at 108.

⁸⁴ *Id.* at 113.

⁸⁵ *Id.* at 114.

⁸⁶ Dodd, *supra* n. 30 at 411.

⁸⁷ Stevens, *supra* n. 24 at 115.

⁸⁸ *Id.* at 118-19.

sentence to Occoquan.⁸⁹ On November 11, 1917, “[f]orty-one woman suffragists from fifteen [s]tates were arrested . . . for picketing outside the White House.”⁹⁰ The women arrived at Occoquan on November 15, 1917, and their arrival ushered in what suffragists would later call the “Night of Terror” at the prison, “during which most suffered physical injuries as a result of the beatings and rough treatment by the Occoquan guards.”⁹¹

From the moment the women arrived at Occoquan, they were man-handled by the guards, thrown into dark, dirty cells with iron beds and open toilets that flushed only from outside the cell.⁹² The women were not provided food for nearly twenty-four hours.⁹³ Neither the women’s attorney nor their family members were allowed visitation with the incarcerated.⁹⁴ Many women began a hunger strike.⁹⁵ In an effort to break the will and morale of the hunger strikers, the Occoquan officials isolated them from one another, interrogated them, informed them that no one from the outside was paying any attention to them, lied to them that their attorney was no longer fighting the case, and instructed them that each of their compatriots had given up the fight.⁹⁶ The women “suspected the lies and remained strong in their resistance.”⁹⁷

The women soon filed a writ of habeas corpus, arguing that their confinement to Occoquan was illegal because they were serving sentences imposed by the District of Columbia outside the confines of the district, and the sentencing papers authorizing their imprisonment indicated they should be committed to the District Jail.⁹⁸ On November 23, 1917, Judge Edmund Waddill of the United States District Court held a hearing on the prisoners’ writ.⁹⁹ The women filed into the courtroom, “haggard, red-eyed, sick,” some too weak to walk to their seats, and some bearing “the marks of the attack on the ‘night of terror.’”¹⁰⁰ Judge Waddill “felt alarmed by the writ’s description of the women’s treatment, calling it ‘bloodcurdling’ if true.”¹⁰¹ Ultimately, the judge found “that

⁸⁹ Dodd, *supra* n. 30 at 413.

⁹⁰ THE WOMEN’S SUFFRAGE MOVEMENT 461 (Sally Roesch Wagner, ed., 2019).

⁹¹ Dodd, *supra* n. 30 at 413. *See also id.* at n. 339 (noting “forced stripping, physical violence, shackling with manacles to prison bars, and threatened use of straightjackets and gags,” citing *Accuse Jailors of Suffragists*, N.Y. TIMES, Nov. 17, 1917, at 1).

⁹² Stevens, *supra* n. 24 at 122-23.

⁹³ *Id.* at 124.

⁹⁴ *Id.*

⁹⁵ *Id.* at 124-26.

⁹⁶ *Id.* at 126.

⁹⁷ *Id.*

⁹⁸ *Id.* at 127, 130.

⁹⁹ *Id.* at 128.

¹⁰⁰ *Id.* at 129.

¹⁰¹ Zhanise & Fry, *supra* n. 66 at 294.

the suffragists had been illegally imprisoned at Occoquan (rather than the District Jail) and that they could be paroled on bail or finish their terms at the District Jail.”¹⁰² Twenty-two women chose to finish their sentences at the jail, and upon arrival, the women joined the hunger strikes of the others already confined in the jail.¹⁰³ Faced with thirty hunger-striking women, the jail decided to release all of the women on November 27 and 28, 1917.¹⁰⁴

Upon release, the women brought suit against the district commissioners, the warden of the District of Columbia jail, the superintendent of Occoquan, and a workhouse guard, requesting \$800,000 in damages for the brutality they suffered during their terms of imprisonment, particularly on the “night of terror.”¹⁰⁵

Thereafter, as Congressional movement began on the Nineteenth Amendment, the women paused their picketing protests for a time.¹⁰⁶ When it became clear that the Senate would stall the Amendment’s passage, the women once again gathered at Lafayette Monument, directly across from the White House, with their banners in tow.¹⁰⁷ Forty-eight women were arrested at the protest, charged with and convicted of “holding a meeting in public grounds” and “climbing on a statue,” and sentenced to ten (for holding a public meeting) or fifteen (for climbing on a statue) days.¹⁰⁸

To serve these sentences, twenty-six women were transported to an abandoned building that used to serve as a men’s workhouse until it “had been declared unfit for human habitation in 1909.”¹⁰⁹

This place was the worst the women had experienced. Hideous aspects which had not been encountered in the workhouse and jail were encountered here. The cells were damp and cold. The doors were partly of solid steel with only a small section grating, so that a very tiny amount of light penetrated the cells. The cots were of iron, without any spring and with only a thin straw pallet to lie upon. So frightful were the nauseating odors which permeated the place, and so terrible was the drinking water from the disused pipes, that one prisoner after another became violently ill.¹¹⁰

All but two very elderly women declared a hunger strike upon arrival.¹¹¹ Within five days, the women were released.¹¹²

¹⁰² Dodd, *supra* n. 30 at 415, n.346.

¹⁰³ Stevens, *supra* n. 24 at 130.

¹⁰⁴ *Id.* at 129.

¹⁰⁵ *Id.* at 131.

¹⁰⁶ *Id.* at 137-40.

¹⁰⁷ *Id.* at 141.

¹⁰⁸ *Id.* at 129.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 144.

¹¹¹ *Id.*

¹¹² *Id.*

In the months that followed, the women’s protests continued, and the district police made periodic arrests.¹¹³ With each arrest, conviction, and sentence, the women continued their practice of hunger striking in protest.¹¹⁴

C. Official Responses to the Suffragists’ Protests

Undoubtedly, the suffragists’ protest activities—both in and out of prison—helped advance the passage of the Nineteenth Amendment. The National Woman’s Party experienced a dramatic increase in donations after the 1918 arrests and consequent exposure to the conditions in the Occoquan workhouse and the District of Columbia jail. On September 14, 1917, a month after the second large set of suffragist prisoners arrived at Occoquan, Senator Andrieus A. Jones, the Chair of the Senate Committee on Woman Suffrage, visited Occoquan.¹¹⁵ The next day, the Nineteenth Amendment was reported out of committee, and by September 24, 1917, the House of Representatives “created a standing committee on suffrage.”¹¹⁶ By January 10, 1918, “exactly forty years to a day from the time the suffrage amendment was first introduced into Congress and exactly one year to a day from the time the first picket banner appeared at the gate of the White House,” the House of Representative passed the Amendment.¹¹⁷ While the fight to push the Amendment through the Senate lasted for an additional year-and-a-half, the will of the suffragists to continue their protest strategy was never questioned, and by March 4, 1918, the D.C. Court of Appeals invalidated the picketers’ convictions.¹¹⁸

But the consequences of the suffragists’ staunch resistance to their unjust convictions and confinement extended beyond just advancing their cause. By evading Occoquan’s censorship, and later the District Jail’s controls, the suffragists’ surreptitious messages about life in the workhouse garnered press coverage¹¹⁹ and eventually led to a Congressional investigation into the conditions at Occoquan.¹²⁰ Even the Wilson White House requested an inquiry into Occoquan’s conditions “after receiving one too many protest letters about the imprisoned suffragists’ plight.”¹²¹ While the President’s secretary and right-hand man confirmed the women’s poor treatment, the President rejected this opinion, instead tasking a district commissioner with the assignment of preparing an

¹¹³ See, e.g., *id.* at 162, 168, 172-73, 179.

¹¹⁴ *Id.* at 162.

¹¹⁵ Dodd, *supra* n. 30 at 411.

¹¹⁶ *Id.*

¹¹⁷ Stevens, *supra* n. 24 at 137-40.

¹¹⁸ *Hunter v. District of Columbia*, 47 App. D.C. 406, 410 (1918).

¹¹⁹ Zhanise & Fry, *supra* n. 66 at 370 (noting that a *New York Tribune* reporter called for an impartial investigation related to the treatment).

¹²⁰ Stevens, *supra* n. 24 at 98.

¹²¹ Zhanise & Fry, *supra* n. 66 at 288.

investigative report on prison conditions.¹²² The commissioner “did little more than interview the prison officials,” and the report ultimately kowtowed to political pressure, but the inquiry nonetheless brought a small amount of transparency to the prison that had theretofore been lacking.¹²³

II. THE FIRST AMENDMENT AND PRISON

Ostensibly, “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution.”¹²⁴ However, prisoners First Amendment rights “are especially limited in the carceral context. ‘[A] prison[er] retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penal objectives of the correctional system.’”¹²⁵ While the constitutional test that governs restrictions on prisoners’ First Amendment rights (the *Turner* standard) is not meant to be toothless, “decisions by the lower federal courts sometimes render it so . . . regulations founded on flimsy rationales get upheld frequently enough, and the reasoning is often poor enough that there is cause for alarm.”¹²⁶ “[Prisoners] are denied reading material deemed objectionable by their captors, exposed to retaliation for expressing opinions at odds with those of their jailers, refused access to the news media, punished for possessing ‘radical’ views, and rewarded for renouncing them.”¹²⁷ “Even a prisoner who has no desire to obtain, distribute, or even discuss anything objectionable faces grave impediments in pursuing his or her own intellectual star, however innocuous. A plethora of prison regulations, designed to facilitate prison administration, impose formidable restrictions of a prisoner’s access to ideas and information.”¹²⁸

The standard governing a prisoner’s First Amendment claims was announced in a 1987 Supreme Court decision called *Turner v. Safley*.¹²⁹ In this section, I explain and examine the *Turner* standard before turning to the well-documented criticisms of *Turner*’s application in the three-plus decades since the decision. After gaining an understanding of the First Amendment’s application in prison, we’ll turn back to the example of the Silent Sentinels to add to the chorus of criticisms against *Turner*, focusing particularly on the importance of protecting

¹²² Zhanise & Fry, *supra* n.66.

¹²³ Dodd, *supra* n. 30 at 413-14; *see also* Zhanise & Fry, *supra* n. 66.

¹²⁴ *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989) (quoting *Turner v. Safley*, 482 U.S. 78, 84 (1987)).

¹²⁵ Andrea C. Armstrong, *Racial Origins of Doctrines Limiting Prisoner Protest Speech*, 60 HOW L. J. 221, 223 (2016), quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

¹²⁶ Shapiro, *supra* n. 2 at 988.

¹²⁷ Ronald L. Kuby & William M. Kunstler, *Silencing the Oppressed: No Freedom of Speech for Those Behind the Walls*, 26 CREIGHTON L. REV. 1005, 1005 (1993).

¹²⁸ *Id.* at 1018-19.

¹²⁹ 482 U.S. 78, 89 (1987).

prisoner protest and curbing some of the deference afforded prison officials under *Turner*.

A. *Turner v. Safley*

--story of Leonard Safley quest to marry his in-prison sweetheart
“provides moments of high drama and led to a seminal U.S. Supreme Court decision that still governs the leading standard for evaluating prisoner” First Amendment claims¹³⁰
--reasonable relationship standard and written-in deference to prison officials
--how *Turner* naturally flowed from decision in *Jones v. North Carolina Prisoners’ Labor Union, Inc.*¹³¹ and what *Jones* means for prisoner protest speech, specifically collective protests

B. *Criticisms of Turner*

--highlight how *Turner* has become toothless and the inconsistent and rather arbitrary results in First Amendment prisoner cases

III. IMPORTANCE OF PROTECTING PRISONER PROTEST

*When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded. If anything, the need for identity and self-respect are more compelling in the dehumanizing prison environment. Whether an O. Henry writing his short stories in a jail cell or a frightened young inmate writing his family, a prisoner needs a medium for self-expression. It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy the basic yearnings of the human spirit.*¹³²

Despite the above flowery affirmation from the United States Supreme Court almost forty-five years ago, the federal courts, including the Supreme Court, have largely spent the following decades narrowing the First Amendment protections afforded to prisoners.¹³³ By refusing to afford prisoners robust

¹³⁰ David L. Hudson, Jr., *Turner v. Safley: High Drama, Enduring Precedent*, FREEDOM FORUM INSTITUTE, available at <https://www.freedomforuminstitute.org/2008/05/01/turner-v-safley-high-drama-enduring-precedent/>.

¹³¹ 433 U.S. 119 (1977).

¹³² *Procunier v. Martinez*, 416 U.S. 396, 427-28 (1974).

¹³³ See generally Shapiro, *supra* n. 23 (describing how the Supreme Court’s 1987 decision in *Turner v. Safley* gave lip-service to the idea that prisoners are not

protections under the First Amendment, we are not only stripping prisoners of pieces of their identity, but we are ignoring two key values enshrined in the First Amendment: the ability of individual citizens to check the unadulterated power of their government and the promotion of democratic values through democratic participation. While prisoners, by virtue of their incarceration, are stripped of the most fundamental way to participate in democracy—the exercise of voting rights—prisoners are not stripped of their citizenship. Therefore, as citizens, they should retain the right to protest the exercise of abusive power in the most opaque of institutions: the American prison. Yet modern First Amendment law as applied to prisoners fails to ensure the protection of these basic values.

This failure amplifies the societal harms caused by mass incarceration and the other abject miscarriages of justice that characterize our criminal justice system. Strengthening the First Amendment protections afforded to prisoners, I argue, will not only have a net positive impact on both the conditions inside our nation’s prisons and jail but will also help reduce recidivism rates. My arguments in this article are premised on the assumption that “[t]he fundamental purpose of the first amendment was to guarantee the maintenance of an effective system of free expression.”¹³⁴

While scholars have grappled with why the freedoms enshrined in the First Amendment merit special protection throughout the life of the republic, it seems clear that any justification for these particularized constitutional protections is grounded in a view that values individual participation in democratic governance.¹³⁵ Professor Marc O. DeGirolami has distilled the justifications for the protections afforded in the First Amendment into three overlapping purposes. The first justification recognizes the importance of “free discourse” to a healthy, limited, liberal democratic government.¹³⁶ Under this justification, First Amendment freedoms are necessary to hold the government to account for abusive conduct and to limit the government’s imposition of a certain morality on the polity.¹³⁷ Because prison provides an environment ripe for unchecked abuse, extending greater protection to prisoner speech would further this First Amendment purpose.

without constitutional protections behind the prison gates but, in the end, gave prisoners virtually no First Amendment protections).

¹³⁴ Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878 (1963).

¹³⁵ Marc O. DeGirolami, *Virtue, Freedom, and the First Amendment*, 91 NOTRE DAME L. REV. 1465, 1470 (2016).

¹³⁶ *Id.*, quoting Kent Greenwalt, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH 6 (1995).

¹³⁷ DeGirolami, *supra* n. 135 at 1470-71, citing, *inter alia*, Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 and James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), in RELIGION AND THE CONSTITUTION 51, 51 (Michael W. McConnell et al. eds., 2011).

The second justification Professor DeGiorlami describes is the “Millian idea of rivalry among ideas as an avenue to truth.”¹³⁸ This purpose views the First Amendment protections as a way to protect the “free trade in ideas” in order to steadily progress toward ethical and political truths.¹³⁹ In this era of criminal justice reform, as the nation struggles to determine how best to address the crisis of mass incarceration, it is critical that the voices of those most affected by the crisis are heard. Extending greater protection to prisoner speech would further these ends.

Finally, the third justification identified by DeGirolami “focuses on the importance of expressive and religious freedom for individual identity.”¹⁴⁰ This justification “is canonical for the conventional account of the First Amendment”¹⁴¹ and speaks “to the essence of what it meant to be a human person.”¹⁴² By dehumanizing prisoners, we make it easier to ignore their plight. Therefore, by strengthening their ability to express themselves and demonstrate their own identities, we further this final First Amendment value.

As discussed above, the American prison has become known as place of unspeakable violence and inhumanity, wherein prisoners are placed in cells with human waste and subjected to the screams of psychiatric patients; [] forced to sleep for two months, despite repeated complaints, on a concrete floor in a cramped cell with a mentally ill HIV-prisoner who urinates on [them]; [subjected to treatment like] urine thrown at [them] by a guard which splashed on [their] face and shirt.¹⁴³

Despite these horrors occurring daily in the nation’s prisons and jails, federal courts often largely defer to prison administrators in claims alleging constitutional violations, thereby allowing rights’ violations to go unchecked for decades. I submit that by strengthening the protections afforded to prisoner speech, and particularly prisoner protest speech, we can further these First Amendment values and allow

¹³⁸ DeGirolami, *supra* n. 135 at 1471, citing John Stuart Mill, *On Liberty*, in THE BASIC WRITINGS OF JOHN STUART MILL 3, 35 (2002) (“No one can be a great thinker who does not recognize, that as a thinker it is his first duty to follow his intellect to whatever conclusions it may lead. Truth gains more even by the errors of one who, with due study and preparation, thinks for himself, than by the true opinions of those who only hold them because they do not suffer themselves to think.”).

¹³⁹ DeGirolami, *supra* n. 135 at 1471-1472, quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

¹⁴⁰ DeGirolami, *supra* n. 135 at 1472.

¹⁴¹ *Id.* at 1473.

¹⁴² *Id.* at 1473.

¹⁴³ Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 134 (2008), citing *Harper v. Showers*, 174 F.3d 716, 717-720 (5th Cir. 1999); *Watts v. Gatson*, No. 97-0114-CB-M, 1999 U.S. Dist. LEXIS 6593, at *6 (S.D. Ala. Apr. 1, 1999); *Fackler v. Dillard*, No. 06-10466, 2006 WL 2404498, at *1 (E.D. Mich. July 7, 2006).

prisoners to join the conversation about criminal justice reform—reform that impacts their lives much more than the politicians and pundits currently pushing or opposing such reform.

In this section, I use the example of the in-prison protests staged by the Silent Sentinels to examine how those protests furthered the three First Amendment Values highlighted above. From there, I turn to examples of modern prisoner protests, highlighting both the risks inherent to engaging in such protest for the prisoners involved and the rewards of those protests that garner sufficient public attention to change the conditions inside the nation’s prisons.

A. *First Amendment Values and the Importance of the Silent Sentinels’ In-Prison Protest*

1. Checking Power and Promoting Democratic Values

Prisoners have no lesser need for the truth than free citizens, nor is the truth ascertained differently behind prison walls than across the street from them. Indeed, if one proceeds from the assumption that persons are in prison because they have erred in some way, then granting them the same tools possessed by the rest of us to search for truth is an unquestionable penological good. Free speech rights are also cherished as a vaccination against tyranny and abuse of government power. Underlying this ‘checking value’ is the well-founded suspicion that every government has a natural tendency to suppress the unpopular and maintain the status quo. Within a prison, the hand of the government is far heavier and more frequently involved in one’s daily affairs than outside the walls. The potential for abuse when one has complete control over other people needs little explanation.¹⁴⁴

--unruly constitutional citizenship

--injustice frame during wartime, attacking hypocrisy

--however gaily you start out in prison to keep up a rebellious protest, it is nevertheless a terribly difficult thing to do in the face of the constant cold and hunger of undernourishment.¹⁴⁵

--with officials continuing to deny most basic privileges to the suffragist prisoners, AP recognized ability to force their hand.¹⁴⁶

¹⁴⁴ *Id.* at 1021.

¹⁴⁵ Zhanise & Fry, *supra* n.66.

¹⁴⁶ *Id.*

“The rhetorical framing during the picketing campaign instead centered on very abstract but emotionally resonant ideals: democratic legitimacy, self-determination, and liberty.”¹⁴⁷

“Soon after her release on November 27, Paul sent out a press statement praising the picketing campaign: “How is it that people fail to see our fight as part of the great American struggle for democracy, a struggle since the days of the Pilgrims? We are bearing on the American tradition, living up to the American spirit.”¹⁴⁸

Publicity can turn the wheel of public opinion¹⁴⁹

2. Expanding the Marketplace of Ideas

3. Advancing Individual Identity and Autonomy

B. *Modern Prisoner Protest*

CONCLUSION

¹⁴⁷ Dodd, *supra* n.30 at 407.

¹⁴⁸ *Id.* at 415.

¹⁴⁹ Neuman, *supra* n. 50 at 150.

Many Pathways to Suffrage, Other Than the 19th Amendment

Ann D. Gordon

DRAFT!

This centennial has been, for me an immersion in public history—offering unusual opportunities to teach the public directly, on the one hand, and frequent encounters with bad history about voting rights, on the other hand. The centennial arrived at a perilous moment for voting rights. I can't help thinking, what might have been; the history of woman suffrage is as good as it gets for tramping through the constitutional, legal, and cultural tangles that keep voting rights unstable. There might have been some useful public education on the themes. Or, maybe some centennial agitation to move the nation closer to acknowledging, in the words of Susan B. Anthony, “a citizen’s right to vote.”¹

The notion of a straight line from Seneca Falls to the 19th Amendment that circulates in popular culture misleads the public about the amendment’s origins and its guarantees. It also limits historical inquiry. We are too grown up for that tale of clever reformers who set off in 1848 and pursued an objective for seventy-two years, tracing a perfect arc that said, we are a great nation, we fix things. No one in the Methodist Chapel at Seneca Falls imagined the 19th

¹For Anthony’s use of this phrase in her defense, see her speech “Is It a Crime for a U.S. Citizen to Vote?” in *Selected Papers of Elizabeth Cady Stanton and Susan B. Anthony*, ed. Ann D. Gordon et al. (New Brunswick, N.J.: Rutgers University Press, 1997), 2:554-583. Hereafter *Papers*.

Amendment. Suffragists explored all the nicks and crannies looking for a way into the body politic. To understand their labor, it is useful to parallel their search through laws and constitutions. I suggested taking this route because it embraced topics that I know well, like Susan B. Anthony's criminal trial and its context, but also a topic that had been trying to get my attention for years—suffragists' recurrent interest, between the mid-1880s and 1920, in something they called "federal suffrage."

I hold to the logic of splitting the history of woman suffrage at the Civil War. It is a watershed moment: on one side the Declaration of Independence, on the other side the U.S. Constitution; on one side "their sacred right to the franchise," on the other side contested definitions of "privileges and immunities."²

On the antebellum side of the mountain, overturning disfranchisement assumed a simple form: challenge men's presumption that biology made them voters and press them to delete the word "male" from state constitutions or omit it when creating new constitutions. The examples are legion. New Jersey's constitutional convention of 1844 received a petition asking that women in that state be restored to their former voting rights.³ A few women took advantage of New York's constitutional convention of 1846 to petition for the vote.⁴ At Seneca Falls, protesters moved beyond individual or neighborhood actions to create assemblies of women

²Resolutions adopted at Seneca Falls in 1848, referred to the franchise as a "sacred right." See *Papers*, 1: "Privilege and immunities" is a phrase in the Constitution of the U.S.

³New Jersey Constitutional Convention 1844, *Proceedings of the New Jersey State Constitutional Convention of 1844*, compiled by John E. Bebout and the New Jersey Writers' Project of the Works Project Administration (Trenton: n.p., 1942), 438.

⁴Judith Wellman, *The Road to Seneca Falls: Elizabeth Cady Stanton and the First Woman's Rights Convention* (Urbana: University of Illinois Press, 2004), 148-151.

weighing collective action—basic political behavior. That model was taken up first in Salem, Ohio, at a time when white men prepared to write a new constitution. Having recognized that a constitutional convention presented, in the words of the meeting’s call, “a most favorable opportunity for the agitation of this subject,” the organizers announced their goal, to discuss how “to secure to all persons the recognition of Equal Rights, and the extension of the privileges of Government without distinction of sex or color.” When the women assembled in April 1850, they drew up a memorial to the constitutional convention requesting that in the new charter “women shall be secured, not only the right of suffrage, but all the political and legal rights that are guaranteed to men.” Though whiteness and maleness survived the challenge in Ohio, the archetypal suffrage action had arrived.⁵

State campaigns to change electoral standards existed for as long as women pressed for their suffrage; consider victories in New York in 1917 or Michigan, Oklahoma, and South Dakota in 1918.⁶ If we loosen the meaning of “state” to embrace territories, the women of Puerto Rico pursued their “state” campaign until 1935.⁷ After the Civil War, state government ceased to be the only target for winning suffrage; when the door opened to possible federal pathways, the choice to focus on state action assumed various strategic and ideological meanings. A

⁵Elizabeth Cady Stanton, Susan B. Anthony, and Matilda Joslyn Gage, *History of Woman Suffrage*, 2d ed. (Rochester, N.Y.: Charles Mann, 1889) 1:103-105.

⁶For list of territories and states granting woman suffrage before 19th Amendment, see https://constitutioncenter.org/timeline/html/cw08_12159.html

⁷Ida Husted Harper, *History of Woman Suffrage* (New York: National American Woman Suffrage Association, 1922) 6:722-724; Allison L. Sneider, *Suffragists in an Imperial Age: U.S. Expansion and the Woman Question, 1870-1929* (New York: Oxford University Press, 2008), 117-134.

commitment to state action distinguished the American Woman Suffrage Association of Lucy Stone and Henry Blackwell from the National Woman Suffrage Association of Stanton and Anthony right from their beginnings in 1869. They worked different lanes of the movement. In the South, in the twentieth century, state campaigns were an assertion of state sovereignty as the dreaded 19th Amendment loomed on the horizon.⁸

Even before the war ended, suffragists were in conversations with Radical Republicans about constitutional paths to citizenship and suffrage for men and women released from slavery. They developed expertise in the basic questions of Reconstruction about citizenship and political rights. They were quite certain that all women should enjoy both. Then and there, at war's end, began years of suffragists tackling what Victoria Woodhull called "the Constitutional Question of Woman's right to suffrage."⁹ That women were already voters became a rallying cry. How to gain recognition of that fact was the question. Susan B. Anthony explained to an audience in April 1873, "We no longer petition legislature nor congress to give us the right to vote. We appeal to the women everywhere to assume their too long neglected 'citizen's right to vote.'"¹⁰ In one direction, Woodhull and others sought a Declaratory Act from Congress that would enforce the 14th and 15th Amendments. In another direction, as Anthony explained, women were told to take direct action and sue if they were blocked at registration or the polls, making courts the arbiters of this matter.

⁸For the importance of the tactic, see Paul E. Fuller, *Laura Clay and the Woman's Rights Movement* (Lexington: University Press of Kentucky, 1992) and Marjorie Spruill,

⁹V. Woodhull to Susan B. Anthony, 2 January 1873, in *Papers*, 2:549.

¹⁰See *Papers* 2:583n72.

In 1869, Francis and Virginia Minor of St. Louis presented the legal argument for direct action. The Minors started with section 1 of the 14th Amendment and its clear indication that women were citizens of the United States as well as of a state. The privileges and immunities protected in section 2, they wrote, “are national in character and paramount to all state authority.” With regard to qualifying electors, the Constitution nowhere gives states “the right to deprive any citizen of the elective franchise.”¹¹ Women had only to take what was theirs.

Test cases sprang up from Connecticut to California, most of them, like Virginia Minor’s case out of St. Louis originated in the refusal of a registrar to enroll a woman as a voter. Susan B. Anthony registered and voted; hers was not a test case but a criminal prosecution for voting in a congressional election while being a person of the female sex. But “test” it did. Her attorney built the case around Minor’s 14th Amendment argument; Associate Justice Ward Hunt, acting as circuit judge in New York’s Northern District, ruled that states had final authority to set whatever silly qualifications for electors . Francis Minor carried his wife’s case to the Supreme Court. There the justices opined, “the Constitution of the United States does not confer the right of suffrage on any one.”¹² So ended the era of women already voters. By 1876, courts, Congress, and state legislatures had met the suffragists’ challenge with resounding affirmation of men’s exclusive claim to voting rights and with narrow interpretations of the impact of the 14th and 15th Amendments.

The 19th Amendment as we know it was born in 1878, when Aaron Sargent (otherwise known as the “Senator for the Southern Pacific Railroad,”) introduced Senate Resolution 12 as a

¹¹See *Papers* 2:274-75. See also Sneider, *Suffragists in an Imperial Age*, 30-32.

¹²CITATION NEEDED: *Minor v. Happersett*

potential 16th Amendment.¹³ Anyone who reads the Constitution can recognize that its author picked up the 15th Amendment template and pasted in a new restriction on state behavior. You may think that observation is too obvious for words, but every summer, I am asked “who wrote the 19th Amendment?” Because twentieth-century suffragists dubbed it the “Susan B. Anthony Amendment” after her death, people assume Susan wrote it, whatever “write” means in this context.

Let’s complicate this story. Senator Sargent introduced the resolution on January 10. On either side of that date, Elizabeth Cady Stanton delivered a major speech that she called “National Protection for National Citizens” first to a large gathering of suffragists and the press and then to the Senate Committee on Privileges and Elections. She was talking about an entirely different text, one that dated back to 1869, when Congressman George Julian introduced it after failing to get universal suffrage in a 15th Amendment.¹⁴ Twice she read it into the records of the committee hearing:

The right of suffrage in the United States shall be based on citizenship, and shall be regulated by Congress, and all citizens of the United States, whether native or naturalized, shall enjoy this right equally, without any distinction or discrimination whatever founded on sex.¹⁵

So not only could no one at Seneca Falls imagine the 19th Amendment; Mrs. Stanton was not

¹³*Congressional Record*, 45th Cong., 2nd sess., 252; 45th Cong., 2nd sess., Resolution, S. Mis. Doc. No. 12, Serial 1785.

¹⁴41st Cong., 1st sess., Joint Resolution, H.R. 15.

¹⁵“National Protection for National Citizens,” in *Papers*, 3: 345-373. Proposed amendment appears on pp. 352 and 353.

advocating that text thirty years later.

From 1878 through 1886, Senator Sargent's 16th Amendment could not get out of committee to the Senate floor for a vote, despite elaborate campaigns by women to prove that they wanted to vote and favorable committee reports. When the Senate finally brought it to a vote in January 1887, they crushed it—16 yeas, 34 nays.¹⁶ It was a dark time. State campaigns still beckoned, but what could be done about any federal right? This became a more pressing question as the rival American and National suffrage associations began talks about merging shortly after the defeat. Would the federal pathway be blocked by advocates of state campaigns?

As if on cue, Francis and Virginia Minor updated their convictions about a federal right to suffrage in a series of articles, the first of which, "Woman's Legal Right to the Ballot," appeared in the December 1886 issue of the *Forum*. Minor revisited his brief and the Court's opinion in *Minor v. Happersett*, pointing to inconsistencies in determining whether citizenship and suffrage were joined, but he added new elements. Though he never cites the 1884 Supreme Court decision, *Ex Parte Yarbrough*, it is evident Minor had read it. He closes in on Article I, section 2, of the Constitution indicating that members of Congress will be "chosen by the people." That, he argues, establishes a personal right that "is federal in character." The section might go on to say that qualifications set by states will govern the electors, but that does not give states "power over the rights and qualifications of the federal electors." He had, shown, he wrote, "that the right to vote for federal officers is established in and by the Federal Constitution."¹⁷

¹⁶*Congressional Record*, 49th Cong., 2nd sess., 978-1003.

¹⁷Francis Minor, "Woman's Legal Right to the Ballot," *The Forum* 2 (December 1886): 351-360. Quotations pp. 357, 358.

It was no wonder that the Minors returned to this question at this time: *Ex Parte Yarbrough* directly referenced the court’s opinion in *Minor v. Happersett* and reached conclusions at variance with the earlier opinion. *Yarbrough* was, at its start, a case about violence against an African-American voter in Georgia. A group of men were convicted of federal crime and jailed. Their lawyers argued that the federal government had no authority to criminalize behavior in the matter of elections and cited the infamous phrase from *Minor*: “the Constitution of the United States does not confer the right of suffrage upon any one. Francis Minor noticed.

The Court ruled that Mr. Saunders was protected by federal law because “the function in which the party is engaged or the right which he is about to exercise is dependent on the laws of the United States.”¹⁸ At another point, “The office . . . is created by that Constitution and by that alone. It also declares how it shall be filled, namely, by election.”¹⁹ To rely on the qualifications that states imposed for their legislative elections was not at all the same thing as states controlling federal elections. In a well-crafted passage Justice Miller explained how federalism worked in this instance.

The States in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for those eo nomine. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualifications thus furnished as the qualification of its own electors for members

¹⁸CITATION NEEDED: p. 662

¹⁹CITATION p. 663

of Congress.²⁰

Francis Minor saw that, given the exclusion of those “people” identified as “female,” the Court’s opinion opened a new door to suffrage for women.

The translation from Minor’s perception to a plan for suffragists was not instantaneous. Virginia Minor did travel east for the 1889 meeting of the National Woman Suffrage Association to address the gathering on “The Law of Federal Suffrage.”²¹ In the resolutions, there is another clue that activists searched for something that might open doors after the defeat of 1887:

That it is the duty of Congress to pass a declaratory act, compelling the several States to establish a ‘republican form of government’ within their borders by securing to women their right to vote, thus nullifying the fraudulent Acts of Legislatures and make our Government homogeneous from Maine to Oregon.²²

After the meeting, in June 1889, Francis Minor published a pamphlet and circulated it widely, *The Law of Federal Suffrage: An Argument in Support of*. In this instance, Minor engaged directly with *Ex Parte Yarbrough*, including the Court’s full opinion at the start of his essay or brief. He also advised suffragists: continue to seek a 16th Amendment; seek equal rights for women in any bill introduced in Congress about *regulating* federal elections; and find a test case to bring back to the Supreme Court. Success there would “show that woman’s right to the ballot is coeval with the

²⁰CITATION p. 663

²¹Susan B. Anthony and Ida Husted Harper, *History of Woman Suffrage* (Indianapolis: Hollenbeck Press, 1902) 4: 152.

²²*History of Woman Suffrage*, 4:154-155.

constitution.”²³ When a revision of the essay appeared in *The Arena* in December 1891, Minor had sharpened his aim in giving advice. He proposed “An Act To protect the right of citizens of the United States to register and to vote for members of the House of Representatives.”²⁴ This would become a sustained element in the history of woman suffrage until 1920—woman suffrage attained via Article I, section 2, of the Constitution, sometimes in opposition to the 19th Amendment. One avid adherent wrote that bills to this or similar effect were before Congress every year.

A quick look at the immediate impact.

*** Leaders of the Illinois Woman Suffrage Association met in Chicago early in 1892, founded a Federal Suffrage Association, and invited like-minded men and women to gather in Chicago in May to complete the formalities. Some of the most senior suffragists signed on. Representatives spoke to the presidential conventions of that summer. An invitation to present one of the congresses at the World’s Columbian Exposition was procured.²⁵

*** The National-American Woman Suffrage Association, at its convention in January 1892, created a Committee on Federal Suffrage (not to be confused with its Congressional Committee) and put Clara Colby in charge of the work.

*** On April 24, Congressman Clarence D. Clark, Republican from the new state of Wyoming,

²³Francis Minor, *The Law of Federal Suffrage, An Argument in Support of* (N.p., 1889). Quotations from p. 8.

²⁴Francis Minor, “Citizenship and Suffrage: The Yarborough Decision,” *The Arena* 5 (December 1891): 68-75. Quotation p. 73.

²⁵“To All Friends of Liberty,” *Woman’s Tribune*, 23 April 1892.

introduced House Resolution 8369, modeled on Minor's text.²⁶

*** Clara Colby set to work stirring up public opinion and gathering signatures in support of Clark's bill, using her weekly paper, the *Woman's Tribune*. Her committee's petition, in circulation by the end of April, read:

Whereas, the right to vote for members of the House of Representatives is, by the Constitution of the United States, vested in the people of the United States without condition, limitation or restriction, and women are people, Therefore, we, citizens of the United States, especially request your honorable bodies to pass a bill enabling women citizens of the United States to vote for members of the House of Representatives.²⁷

All federal suffrage bills proposed thereafter did not match Minor's text. There were variants.

Why not presidential electors too? Direct election of Senators after the 17th Amendment expanded the list of federal offices for which women might be granted suffrage directly by Congress. But the idea that one might separate state and federal citizenship and along with each, separate state and federal suffrage, took hold.

As a tactical matter, this was an awkward ask: partial suffrage on a monster scale that would require states to separate their elections from federal elections. There is evidence that most of its advocates recognized the idea as a military maneuver, a way to bring down the enemy. In his 1891 article, Minor asserted that states would fold quickly, ridding their constitutions of "male" as a qualification.²⁸ Occasionally in the literature of activists who pursued Minor's

²⁶*Congressional Record*, 52nd Cong., 1st sess., 8369; *Woman's Tribune*, 16 April 1892.

²⁷"Federal Suffrage for Women," *Woman's Tribune*, 30 April 1892.

²⁸Minor, "Citizenship and Suffrage," 75.

scheme, that same domino effect is alluded to. Ida Husted Harper, a journalist with enormous sway over how we understand anything at all about the suffrage movement, opined in 1914:

It is true that the amendment would confer the full suffrage on women, and this federal act would give only a vote for members of Congress, but if women helped to select Senators and Representatives would they have to wait very long for the national amendment?²⁹

Olympia Brown, president of the Federal Suffrage Association, called federal suffrage “an opening wedge” and conceded that a federal amendment would still be necessary.³⁰

The federal suffrage tactic was frequently entangled with a degree of exclusivity. I, quite frankly, have not figured out if there is an obvious or a hidden reason. But the topic of who should *not* be voting for congressional representatives nearly always accompanies the topic of recognizing women’s federal right to vote in federal elections. Francis Minor pointed out that Missouri’s constitution, the very one that barred his wife from registering to vote, allowed non-citizen men to vote.³¹ Olympia Brown of Racine, Wisconsin, where the foreign-born made up one-third of the population and immigrants could vote without becoming citizens, could express her xenophobia in the federal suffrage plan.³² If Congress regulated the election of its own members, it could put n end to such “alien suffrage.” There were code words: the Federal Suffrage Association deployed the word “citizen” liberally and spoke of “uniformity in the election of national officers.” It

²⁹From *Washington Herald*, 5 June 1914, as quoted in Olympia Brown, ed., *Democratic Ideals. A Memorial Sketch of Clara B. Colby* (N.p. Federal Suffrage Association, 1917), 77.

³⁰Brown, *Democratic Ideals*, 73.

³¹Minor, “Citizenship and Suffrage,” 70.

³²Brown’s speech “Foreign Rule,” delivered in 1889, was published in *History of Woman Suffrage*, 4:148-149.

should come as no surprise that federal suffrage gained adherents in the South. Sallie Clay Bennett of Kentucky succeeded Clara Colby as chair of the Committee on Federal Suffrage and she kept bills flowing to Congress. Her sister Laura Clay, arguably the most powerful suffragist in the South, drew up her own federal suffrage bill in 1914. This was a compromise, in her mind, between letting the federal government dictate that women had rights to participate in federal elections and leaving the states in control of their qualifications. We'll let African Americans vote for members of Congress, but don't ask us to do the same at home, or so it sounds.

**THE LEGAL AND CONSTITUTIONAL DEVELOPMENT OF THE
NINETEENTH AMENDMENT IN THE DECADE FOLLOWING
RATIFICATION**

*Paula A. Monopoli**

As we celebrate the one-hundredth anniversary of the Nineteenth Amendment to the United States Constitution, I am struck by the recurring themes around American women and their government.¹ For example, the media has focused on the rift between the first female Speaker of the House of Representatives, Nancy Pelosi, and new member, Representative Alexandria Ocasio-Cortez. This division is reminiscent of the generational split in the suffrage movement between Carrie Chapman Catt and Alice Paul—a split that I would argue was one of several causes of the stunted legal and constitutional development of the Nineteenth in the decade following its ratification. Like Pelosi, Catt was the older of the two women and more strategically and tactically conservative than the younger suffragist, Alice Paul. Trained in the more radical tactics of the British Women’s Social and Political Union, Paul was impatient with the elder Catt’s focus on a state-by-state strategy for winning suffrage. Like Ocasio-Cortez has done vis a vis Pelosi, Paul took a more radical position than the elder Catt. In Paul’s case, that was that a federal amendment was the right way to the ballot and that civil disobedience was an appropriate tactic to achieve that result.

We also see echoes of the suffrage movement with the nativism and xenophobia currently being weaponized against women exercising political power. The same fear of immigrants that

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¹ “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 sex. Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XIX.

animated much of the discourse around women voting—with some suffragists exploiting that fear and arguing that women’s votes could cancel those of uneducated male immigrants—is still deployed for political purposes today. And women raising their voices in the public sphere still trigger visceral male reactions, as did the early suffragists who dared lecture in public. In July 2019, the President of the United States attacked four Congresswomen on Twitter, all of whom were women of color. He suggested the representatives were non-native born and should, “go back and help fix the totally broken and crime infested places from which they came.”² This extreme and unfounded attack reminds us that when women dare to exercise political power, they will still face the same threatening pushback visited on suffragists organizing and protesting for the vote prior to 1920. Finally, recent debates about whether those four Congresswomen, and some Democratic presidential candidates, are socialists evoke the attacks endured by suffragists, who were maligned as socialists and atheists. So there is much work left to be done.

The Nineteenth Amendment represented a transformational moment in American history that one might have thought would change the narrative around women exercising political power. But as we can see from contemporary politics, those themes continue. So as part of our celebration of its one-hundredth anniversary, we should ask why the Nineteenth did not have more impact on the

² Devan Cole, *Trump Tweets Racist Attacks at Progressive Democratic Congresswomen*, CNN (July 14, 2019), <https://www.cnn.com/2019/07/14/politics/donald-trump-tweets-democratic-congresswomen-race-nationalities/index.html> (“President Donald Trump used racist language on Sunday to attack progressive Democratic congresswomen, falsely implying they weren’t natural-born American citizens. Trump did not name who he was attacking in Sunday’s tirade but earlier this week he referenced New York Rep. Alexandria Ocasio-Cortez when the President was defending House Speaker Nancy Pelosi. A group of Democrats, who are women of color and have been outspoken about Trump’s immigration policies, last week condemned the conditions of border detention facilities. The group of women joining Ocasio-Cortez were Rashida Tlaib of Michigan, Ilhan Omar of Minnesota and Ayanna Pressley of Massachusetts.”).

civil, political and social status of women in our republic. As a matter of law, the post-ratification story of the Nineteenth involved big, philosophical issues like the relationship between the individual and the state, as well as political issues like the relationship between the federal and state governments. It implicated significant constitutional issues, including federalism, the scope of women's citizenship and the constitutional meaning of equality. And it was shaped by the intersection of race, gender and class. My forthcoming book, *Constitutional Orphan: Gender Equality and the Nineteenth Amendment*, offers an account of the legal and constitutional development of the Nineteenth Amendment in the decade after its ratification. I argue that the Nineteenth remained underdeveloped as a result of the abrupt pivot, after ratification, from suffrage to other agendas by both the National Woman's Party (NWP) and the National American Woman's Suffrage Association (NAWSA). Despite being abandoned by the women's organizations that had engineered its enactment, the validity and meaning of the Nineteenth were contested in state and federal courts. Yet the promise that courts might interpret the Nineteenth as having an impact beyond voting was little realized and it became a constitutional orphan, rarely cited after 1930.

The book's chapters lay out a brief history of the suffrage movement in the last years prior to ratification. They detail the split between NAWSA leader, Carrie Chapman Catt, and NWP leader, Alice Paul, about strategy and tactics. And they describe the immediate pivot of the NWP and Paul from the Nineteenth to the equal rights amendment in 1921. There was a parallel shift by NAWSA in 1920 to become the League of Women Voters (LWV). It then embraced advocacy for social welfare legislation and voter education as its primary goals. The pivot by both organizations was, in large part, responsible for their consequent failure to use their resources to flesh out the Nineteenth as law.

The pervasive effect of southern concerns about states' rights and the impact of giving African American women the vote also played a pivotal role in truncating the effect of the Nineteenth. As

always, race, gender and class have a significant impact on how law develops. The Nineteenth Amendment was no different, with race and the legacy of the Civil War playing a central role in its legal and constitutional development. Southern resistance to giving women the vote was, in large part, connected to the fear of a “second Reconstruction” and the specter of enforcement legislation akin to that passed and implemented in the wake of ratification of the Fourteenth and Fifteenth Amendments. The book documents the minimal, at best, effort by suffrage organizations to support the passage of Congressional enforcement legislation, introduced pursuant to the second clause of the Nineteenth. Those groups also failed to support the efforts of African American suffrage leaders like Ida B. Wells-Barnett and Mary Church Terrell, the National Association of Colored Women (NACW) and the National Association for the Advancement of Colored People (NAACP) to respond to voter suppression in the South after ratification of the Nineteenth.

The leadership of the NWP and NAWSA included a number of experienced women lawyers like Florence Kelley, head of the National Consumers League (NCL), who had deep roots in strategic, test-case litigation, like *Muller v. Oregon*,³ which upheld protective legislation for women workers. Both the NWP and NAWSA also had an extensive political infrastructure, developed over decades of successful lobbying of Congress and state legislatures. The NWP and NAWSA (and its successor the LWV), could have chosen to work more closely with the NAACP and the NACW to push enforcement legislation out of Congress and to bring cases in state court challenging the barriers to African American women voting. The implementation of such enforcement legislation would have provided a judicial forum in which courts had the opportunity to interpret the Nineteenth in a way that gave it a more robust meaning than simply “a nondiscrimination rule governing voting.”⁴ That interpretation, in turn, could have

³ 208 U.S. 412 (1908).

⁴ Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 945, 1022 (2002).

provided a more solid constitutional foundation for equal civil, political and legal rights for women over the following one-hundred years, one grounded in women's unique historical struggle.

While suffragist advocacy around the Nineteenth ceased after ratification, the cascade of legal and constitutional questions triggered by its ratification did not. The first of these questions was, as a matter of federalism, how much power did the national government have to dictate voter eligibility criteria? This issue was implicit in the pending Congressional enforcement legislation described above. It was also implicated in state cases that parsed the role of the federal government in traditionally state domains like the general taxing power.⁵ Determining the precise boundary lines between federal and state sovereignty in this area was at the very heart of the state litigation around barriers to voting, like poll taxes, which followed ratification of the Nineteenth.

Federalism was also at the heart of cases which sought a determination of the impact of the Nineteenth on state laws around civil and political rights like jury service and holding public office. Federal constitutional amendments, constructed like the Nineteenth, were generally presumed to be "self-executing" as a legal matter and were seen as preemptive of contrary state legislation or constitutional provisions. But the devil was in the judicial details of the widely disparate state court approaches to construction of the Nineteenth. Some courts adopted an expansive view of the Nineteenth, deciding that rights like jury service were "coextensive" with voting. Other courts, perhaps fearing the broad social change the Nineteenth might signal in the role of women generally, cabined the federal impact of the Nineteenth on state law. They adopted a constrictive interpretation of its meaning as narrowly applicable to the ballot only.

⁵ Note that while jury service is often characterized as a civil right, some scholars have argued it is more akin to a political right. *See* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 204 (1995).

The second constitutional question raised by the Nineteenth was the scope of woman's citizenship under the federal Constitution. This question was inextricably intertwined with the question above about whether voting and jury service or voting and holding public office were coextensive. The same cases in which state judges parsed doctrines like the self-executing nature of constitutional amendments also demanded resolution of the question whether the Nineteenth went beyond simply voting and expanded women's civil and political rights, like the right to serve on a jury and the right to hold public office. In the realm of defining women's place in the constitutional order, judicial views about proper gender spheres undoubtedly drove some decisions about whether such rights were coextensive as a matter of statutory or constitutional interpretation. These decisions, in turn, often limited the expansion of women's civil and political rights other than voting.

Third, ratification of the Nineteenth caused federal courts to grapple with the question of the scope of the "police power." Faced with protective labor legislation that treated women differently from men based solely on their sex, courts parsed whether the Constitution merely guaranteed a neutral or "formal" approach to equality, i.e., ensuring that women simply have the same opportunities as men. Alternatively, they considered, whether it should be interpreted to ensure "substantive" equality—similar outcomes, taking into account differences between men and women. This debate was informed not only by gender, but by class in the first decades of the twentieth century. Professional and upper-class women tended to support formal equality, a *laissez faire* view of the relationship between the State and the individual that preferred limitations on the government's power to intrude into spheres like the employer-employee relationship. Alternatively, working class women tended to embrace government intervention in such relationships, supporting laws that required minimum wages and maximum hours and that allowed for collective action on the part of employees. The particular judicial view of equality embraced by a court affected judicial outcomes.

For example, judges embracing a *laissez faire* approach were more likely to find unconstitutional those governmental regulations that interfered with or limited an individual's right to negotiate a contract with an employer.

Much of the debate that followed ratification of the Nineteenth split along these lines. That debate was centered on the potential impact of the proposed equal rights amendment, introduced into Congress in 1923, on those two different visions of constitutional rights protection. And the gridlock created by that debate explains much about why the Nineteenth never had the chance to develop a more fulsome constitutional impact on similar questions we still face today. Today's courts are still grappling with how they should interpret statutes like Title VII of the Civil Rights Act, which protects against sex discrimination in the workplace, when the case involves differential treatment based on pregnancy. These cases raise the question of whether courts should apply law as if men and women are the same (a neutrality view) or different (acknowledging that effectuating women's equality in the workplace may actually require different treatment of pregnant women.) This neutrality versus difference debate about the meaning of constitutional equality was at the heart of the battle for and against the equal rights amendment and it split former suffragist allies. The NWP's battle with leading Progressives of the time, who opposed the equal rights amendment as did the LWV, sapped the energy of the NWP to more fully develop the Nineteenth in the decade after its ratification.

We still have no federal equal rights amendment today. Had the former suffragists focused on more securely embedding the Nineteenth Amendment in the federal and state legal fabric in the decade following its ratification, later efforts to enact a new amendment and to build a constitutional jurisprudence of equality might have been more successful. In her seminal article *She the People: The Nineteenth Amendment, Sex Equality, Federalism and the Family*, Reva Siegel notes that, “[m]odern sex discrimination doctrine is built on this ‘thin’ conception of the Nineteenth Amendment—on the assumption that the Nineteenth Amendment

is a nondiscrimination rule governing voting that has no bearing on questions of equal citizenship for women outside the franchise.”⁶ Siegel goes on to describe the United States Supreme Court’s approach to sex discrimination doctrine as one that ignores the constitutional history embodied in the debates leading up to ratification of the Nineteenth. She concludes that the Court’s reliance on the Fourteenth Amendment alone signals a view that the source of constitutional law governing the scope of woman’s citizenship is derived solely from an analogy to race.⁷ Siegel concludes, “These assumptions have given rise to a body of sex discrimination doctrine that is limited in legitimacy and acuity by the ahistorical manner in which it was derived from the law of race discrimination.”⁸ My book offers an account of *how* those flawed assumptions arose—in large part because the suffragists who secured final passage and ratification of the Nineteenth Amendment turned too quickly away from it and from nurturing its potential and significance through legislation and litigation. As Vicki Schultz has pointed out in the context of Title VII, when activists stop advocating, at best, the law fails to develop and, at worst, it develops in a counterproductive way: “In areas of law where activists did not exert early influence, or where they later took a less decisive or divided stance as the women’s movement began to fade and fracture, the absence of visible, unified feminist pressure permitted judges to retain or revert back to older biased views that attribute workplace inequality to women’s difference.”⁹ Schultz suggests that it is therefore important to examine, “not only the influence of a social movement overall, but also the rise of internal divisions *within* the movement and changes in its presence,

⁶ Siegel, *supra* note 4, at 1022.

⁷ Siegel then argues for a more synthetic interpretation of the Fourteenth and the Nineteenth Amendments based on a sociohistoric reading of the suffrage amendment in American constitutional history. *Id.* at 949, 1040–43.

⁸ *Id.* at 1022.

⁹ Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1001 (2015).

visibility, and strength over time, in shaping legal developments.¹⁰ Thus, the book also explores the divisions within the suffrage movement and how those divisions shaped the legal and constitutional development of the Nineteenth in the decade after ratification. Since it seems unlikely that the equal rights amendment will become part of our Constitution in the near future, revisiting the jurisprudential potential of the Nineteenth Amendment can shed light on how we can better secure women's constitutional equality today.

¹⁰ *Id.* Some scholars have argued that a similar lack of support from women's rights organizations for the private right of action under the Violence Against Women's Act (VAWA) was, in part, to blame for its eventual demise at the hands of the United States Supreme Court. See Caroline S. Schmidt, *What Killed the Violence Against Women's Act Civil Rights Remedy Before the Supreme Court Did?*, 101 VA. L. REV. 501, 530–33 (2015).

Prof. Ellen Carol DuBois, *The Afterstory of the Nineteth Amendment*

- I. Women as voters 1920s
 - a. Pundits declare woman suffrage a failure
 - b. Initially approximately 1/3 of eligible women vote, Republican-inclined
 - c. African American women show great eagerness to vote
 - d. Southern white determination to suppress their vote

- II. Women as office holders 1920s
 - a. Parties largely closed to women office holders
 - b. The rise and fall of Ruth Hanna McCormick
 - c. Ida B. Wells-Barnett attempt at ruing

- III. 1932 realignment and women voters
 - a. Women voters turn to Democrats
 - b. First woman senator: Hattie Caraway
 - c. Mary McCleod Bethune: African Americans in FDR Administration

- IV. Postwar years
 - a. Voting rates increase, office holding does not
 - b. Margaret Chase Smith and the anti-feminist shift in the Republican Party
 - c. Women's liberation and the new Gender Gap

*The 19th Amendment and the U.S. “Women’s Emancipation” Policy in Post-World War II Occupied Japan:
Going Beyond Suffrage
(Working Draft)*

Cornelia Weiss

1.0 INTRODUCTION

As we celebrate the 100th anniversary of 19th Amendment, I write this paper to explore the influence of the 19th Amendment on U.S. military occupation policy in Post-World War II Japan. A mere 25 years after the ratification of the 19th Amendment, the 19th Amendment had become so ingrained in U.S. identity that the first demand of General MacArthur, the Supreme Commander of the Allied Powers (SCAP) to Japan was the “emancipation of women through their enfranchisement.”¹ However, unlike the U.S., “enfranchisement” under the U.S. Occupation did not stop at suffrage. Instead, enfranchisement under the Occupation incorporated the definitions of “enfranchise” (“to endow with the rights of citizenship” and “to free, as from bondage”²) to create legal reforms to actualize the “emancipation of women” (“women’s emancipation” policy). The CEDAW Committee’s General Recommendation 30, paragraph 13 contends: “Women’s rights in . . . post-conflict processes are affected by various actors, including States.” This paper focuses on the impact of an outside power -- with its own contradictory history of suppression and agitation for women’s rights -- to influence whether discrimination against women is eliminated, decreased, continued, or increased.

This paper starts by examining the orders the Occupation was expected to fulfill and the belief that to fulfill its orders that the Occupation needed to seek the “emancipation of women.” I address the resulting suffrage of women. I examine the Occupation’s proactive efforts to eradicate the “enslavement” of women -- bondage and licensed prostitution. I explore the Occupation’s drafting of a constitution that included not only women’s suffrage, but that went beyond the U.S. Constitution to provide the rights of “dignity and essential equality” for women, while expressly omitting social guarantees for women. I unravel two disparate election laws enacted under the Occupation and address their differing effect on women’s ability to vote and to be elected, as well as the Occupation’s efforts to counter psychological violence against women candidates and to provide equal opportunity for women candidates. I then turn to the Civil Code drafted under the Occupation to examine its implementation (and failures of implementation) of the constitutionally mandated rights of “dignity and essential equality” for women. I address the Labor Law drafted under the Occupation and its effect on women’s economic (in)equality. I conclude by addressing the future, the 200th anniversary of the 19th Amendment.

¹ DOUGLAS MACARTHUR, REMINISCENCES, 294 (1964).

² THE AMERICAN HERITAGE DICTIONARY, Third Edition (1997).

This paper does not address the criticisms directed against General MacArthur, be they at the time of the Occupation (“experts” expressing the view that “Japanese women were too steeped in the tradition of subservience to their husbands to act with any degree of political independence”³) or today’s implied charges of “imperial feminism.” I further do not speculate whether “but for” the Occupation if women in Post-World War II Japan would have obtained suffrage, the elimination of bondage, and constitutional equal rights.

I write this paper as a veteran of almost three decades of U.S. military service as a military lawyer (JAG), culminating at the rank of colonel. Now retired, my opinions are my own. My education, from women’s studies to war college, excluded any mention of General MacArthur’s “women’s emancipation” policy. My experiences, to include military service in FARC-era Colombia (where, had the government of Colombia not discriminated against women, Colombia arguably would not have suffered war to the extent it did⁴), have led me to question why the history of General MacArthur’s “women’s emancipation policy” is unknown and untaught in military, peace, legal, history, and gender studies. The absence of this history has impoverished our ability to grapple with, as stated by a former U.S. president and Nobel Peace Prize winner, “the most serious, pervasive, and ignored violation of basic human rights” – discrimination and violence against women and girls.⁵ I write to recover our ability to grapple with the most serious, pervasive and ignored violation of basis human rights.

2.0 ORDERS

On October 3, 1945, when the Japanese Prime Minister called upon General MacArthur, MacArthur “expressed” to the Prime Minister the following: “In the achievement of the Potsdam Declaration, the traditional social order under which the Japanese people for centuries have been subjugated will be corrected.”⁶ (By January 1, 1946, Emperor Hirohito issued an Imperial Rescript requiring “government by members of all classes of people, equality of opportunity, and equity and justice to be the yardstick of action instead of tradition.”⁷) MacArthur informed the Japanese Prime Minister: “In the implementation of these requirements and to accomplish the purposes thereby intended, I expect you to institute the following reforms in the social order of Japan as rapidly as they can be assimilated.”⁸ MacArthur’s first demand: “The emancipation of the women of Japan through their enfranchisement – that, being members of the body politic, they

³ MACARTHUR, 305.

⁴ Cornelia Weiss, *Transforming Reality: Employing International Law to End Practices that Exclude Women as Peacemakers, Peacekeepers, and Peacebuilders*, in CECILIA BAILLIET (ed.), RESEARCH HANDBOOK ON INTERNATIONAL LAW AND PEACE, 329-350, 333 (2019).

⁵ JIMMY CARTER, A CALL TO ACTION: WOMEN, RELIGION, VIOLENCE, AND POWER (2014), front inside jacket cover, regarding discrimination and violence against women and girls.

⁶ 3 OCTOBER 1945 PRESS RELEASE, MacArthur Archives, provided to me by MacArthur Archives archivist James Zobel, 1-2 pages.

⁷ U.S. DEPARTMENT OF STATE, OCCUPATION OF JAPAN, POLICY AND PROGRESS, 23 & appendix 26 (1946).

⁸ 3 OCTOBER 1945 PRESS RELEASE. See also MACARTHUR, 294.

may bring to Japan a new concept of government directly subservient to the well being of the home.”⁹ General Bonner Fellers, in his papers, notes that on 29 August 1945 (the night before their flight from Bataan to Atsugi Air Base, Japan to start the Occupation, days before the formal surrender ceremony of surrender of 2 September 1945 on the USS Missouri in Tokyo Bay), General MacArthur, on his front porch, “outlined his policy in Japan” to include “to allow women to vote.”¹⁰

To understand why a sexagenarian male military leader (General MacArthur 1880-1964) demanded the emancipation of women, we must first understand that military members seek to fulfill the lawful orders they are given. The orders to the Occupation of Post-WWII Japan required the Occupation to, in addition to eliminating militarism, promote democracy. (In addressing whether a military could impose democracy, General MacArthur stated: “Pure democracy is inherently a spiritual quality which voluntarily must spring from the determined will of the people. It thus, if it is to become firmly rooted, may not be imposed upon a people by force, trickery or coercion.”¹¹)

Two instruments comprised the orders – (1) the 26 July 1945 Potsdam Declaration and (2) the 21 September 1945 Post-Surrender Policy.

The Potsdam Declaration demanded: “The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people . . . respect for the fundamental human rights shall be established.”¹²

The 21 September 1945 U.S. Initial Post-Surrender Policy laid out the ultimate objectives for the Occupation. The Policy stated:

The ultimate objectives of the United States in regard to Japan, to which policies in the initial period must conform are:

- (a) To insure that Japan will not again become a menace to the United States or to the peace and security of the world.
- (b) To bring about the eventual establishment of a peaceful and responsible government which will respect the rights of other states and will support the objectives of the United States as reflected in the ideals

⁹ 3 OCTOBER 1945 PRESS RELEASE. See also MACARTHUR, 294. See also GENERAL HEADQUARTERS, SUPREME COMMANDER FOR THE ALLIED POWERS, ALLIED TRANSLATOR AND INTERPRETER SECTION, PRESS TRANSLATIONS, NO. 514, POLITICAL SERIES: 119, *Item 3 Present Day Government Politics - Tokyo Shimbun - 24 Dec 45*. Translator S. Ono (26 Dec 45), https://collections.dartmouth.edu/teitexts/Press_Translations_Japanese/diplomatic/political-0514-diplomatic.html (accessed 2 June 2019). “According to Supreme Headquarters' directive, issued shortly after its formation, the current Cabinet was ordered to accomplish the following . . . (1) liberation of the Japanese women through women's suffrage.”

¹⁰ PAPERS OF BONNER FELLERS, provided by James Zobel, archivist of MacArthur Archives.

¹¹ 23 APRIL 1946 MEMO SIGNED BY GENERAL MACARTHUR, 17-A-2-1.

¹² POTSDAM DECLARATION, para 10 (1945).

and principles of the Charter of the United Nations. The United States desires that this government should conform as closely as may be to principles of democratic self-government but it is not the responsibility of the Allied Powers to impose upon Japan any form of government not supported by the freely expressed will of the people.¹³

To achieve the ultimate objectives, the Policy required, in addition to disarming and demilitarizing Japan,¹⁴ that the Occupation “encourage” the Japanese people to develop a desire for individual liberties and respect for fundamental human rights¹⁵ and to “form democratic and representative organizations.”¹⁶ The Policy charged the Occupation to reform the legal systems and to “progressively influence” the legal system “to protect individual liberties and civil rights.”¹⁷ The Policy did not mandate that laws, decrees and regulations establishing discriminations on grounds of gender/sex be abrogated, repealed, suspended or amended. The Policy only mandated: “Laws, decrees and regulations which establish discriminations on grounds of race, nationality, creed or political opinion shall be abrogated; those which conflict with the objectives and policies outlined in this document shall be repealed, suspended or amended as required.”¹⁸

GENDER ANALYSIS

To fulfill its Orders, it appears that the Occupation engaged in gender analysis, adopted a “gender perspective.” Over a half-century after the Occupation, the UN Security Council, in UNSCR 1325, advocated for post-conflict “measures that ensure the protection and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police, and the judiciary.”¹⁹ Whether the Occupation of Post-World War II Japan, not the Swedish government of late 2014 to present, had the world’s first “feminist foreign policy,” I leave to others to re-evaluate.

For the first years of the Occupation, SCAP issued monthly reports on the Occupation. These “SCAP Reports” reflected the Occupation’s understanding of Japan as well as provided insight into what SCAP found to be important, or not. All of the SCAP Reports had a section that addressed “Women.”

The first SCAP Report, the Report of September-October 1945 (the beginning of the Occupation), addressed its understanding of the historical status of women in Japan, stating: “From time immemorial the great mass of Japanese women has been restricted

¹³ U.S. INITIAL POST-SURRENDER POLICY FOR JAPAN (SWNCC 150/4/A), STATE-WAR-NAVY COORDINATING COMMITTEE; POLITICO-MILITARY PROBLEMS IN THE FAR EAST: UNITED STATES INITIAL POST-DEFEAT POLICY RELATING TO JAPAN, Part I (B) (21 September 1945), http://www.ndl.go.jp/constitution/e/shiryo/01/022_2/022_2tx.html, accessed 2 June 2018.

¹⁴ SWNCC 150/4/A, PART I.

¹⁵ SWNCC 150/4/A, PART I (C).

¹⁶ SWNCC 150/4/A, PART I (C).

¹⁷ SWNCC 150/4/A, PART III (3).

¹⁸ SWNCC 150/4/A, PART III (3).

¹⁹ UNSCR 1325, UN Doc. S/RES/1325, para 8(c) (October 31, 2000).

both by custom and legislation from any form of activity which would make them appear as equal of men.”²⁰ At least one member of the Occupation contended: “There is no reason to believe that the cake of custom is so hard that it cannot be broken.”²¹ Whether the Occupation could and would break the restrictions by legislation, would remain to be seen.

As of September-October 1945, the Occupation asserted it had taken the steps of compiling “a list of laws restricting the rights of women,” giving “nationally known women leaders” the opportunity to appear on the radio, and advising officers of women’s organizations “on methods of organization.”²² Barbara Molony maintains that “soon after MacArthur arrived in Japan, Kato Ishimoto Shidzue was summoned to the Occupation Headquarters to advise the Americans about policies on women and family reform.”²³ Barbara Molony also maintains that “as early as 1945,” Occupationaire Lieutenant (Lt) Ethel Weed “had called together a number of leading feminists, including Kato, Ichikawa Fusae, Miyamoto Yuriko, and Yamakawa Kikue.”²⁴

By December 1945, the SCAP report stated: “Women are beginning to discuss the feudalistic family system and the need for removal of legal discrimination against them.”²⁵ Whether General MacArthur, when he stated that the emancipation of women was to bring to Japan a “government directly subservient to the well being of the home,”²⁶ included within his understanding of the “home,” the Japanese understanding of the “house” is unclear. What may be clearer is the relationship between Japan’s “house” system and the emancipation of women. The “house” system was a system in which immediate and extended family members, regardless of whether they lived together or not, pledged unconditional allegiance to the “head of house” in exchange for protection and financial support.²⁷ The “head” had “absolute authority over family members.”²⁸

²⁰ SCAP REPORT OF SEPTEMBER-OCTOBER 1945, 169-170, para 100

²¹ W. I. Ladejinsky, *Trial Balance in Japan*, 27 FOREIGN AFF. 104, 116 (1948).

²² SCAP REPORT OF SEPTEMBER-OCTOBER 1945, para 103.

²³ Barbara Molony, *Introduction*, SHIDZUE KATO, FACING TWO WAYS: THE STORY OF MY LIFE, xiv (1984).

²⁴ Barbara Molony, *Afterword*, SHIDZUE KATO, FACING TWO WAYS: THE STORY OF MY LIFE, xxv (1984).

²⁵ GENERAL HEADQUARTERS SUPREME COMMANDER FOR THE ALLIED POWERS, SUMMATION OF NON-MILITARY ACTIVITIES IN JAPAN AND KOREA, NO. 3, *Education, Religion, and Media of Expression*, 174, para 30 (December 1945).

²⁶ 3 OCTOBER 1945 PRESS RELEASE. See also MACARTHUR, 294. See also GENERAL HEADQUARTERS, SUPREME COMMANDER FOR THE ALLIED POWERS, ALLIED TRANSLATOR AND INTERPRETER SECTION, PRESS TRANSLATIONS, NO. 514, POLITICAL SERIES: 119, *ITEM 3 Present Day Government Politics - Tokyo Shimbun - 24 Dec 45. Translator S. Ono* (26 December 1945)

https://collections.dartmouth.edu/teitexts/Press_Translations_Japanese/diplomatic/political-0514-diplomatic.html (accessed 2 June 2019). “According to Supreme Headquarters’ directive, issued shortly after its formation, the current Cabinet was ordered to accomplish the following five items: (1) liberation of the Japanese women through women’s suffrage.”

²⁷ NAOKO TAKEMARU, WOMEN IN THE LANGUAGE AND SOCIETY OF JAPAN : THE LINGUISTIC ROOTS OF BIAS, 27 (2010). ALFRED C. OPPLER, REFORM OF JAPAN’S LEGAL AND JUDICIAL SYSTEM UNDER ALLIED OCCUPATION (n.d.), 16.

²⁸ NAOKO TAKEMARU, 27.

The “head” owned the “family property,” with the concurrent duty to “support needy members” of the house, as long as they were members of the house.²⁹ If a family member did not submit to the “head,” the “head” had the power to expel the non-submitting member from the house. The duty of support extinguished as soon as an individual was no longer a member of the house -- be it by divorce, death, or expulsion -- with dire results, to include homelessness and starvation. The Civil Code of 1898 may have created the “house” system for all of Japan.³⁰ Alfred Oppler, the Occupationaire in charge of the Occupation Legal Affairs Section during the drafting of the Civil Code, acknowledged: “Closely connected with this hierarchal set-up was the inferior role of women in Japanese society.”³¹

It appears during the Occupation, belief existed in the need to eradicate patriarchy.

- “SCAP seeks to eradicate a patriarchal system which has served to stifle liberalism and democracy, locally and nationally.”³² (Occupationaire Ladejinsky)
- “[T]he failure to achieve true democracy in Japan can be traced to this old feudalistic family system. Democracy will never become a reality, under a family system in which the rights and freedom of every member are not fully recognized.”³³ (Sunday Mainichi Magazine)
- “It is hardly necessary to say that the family is the unit and basis of all social relations. Unless it is democratized . . . one can never hope for the democratization of any social relationships, whatsoever, be it the educational system, labor relations, economics or government.”³⁴ (Sakae Wagatsuma)

3.0 SUFFRAGE

Women’s suffrage, and demand for women’s suffrage, existed in Japan before the Occupation. Marnie Anderson and Nancy Diggs Brown contend that in 1880, some Japanese women did have the right to vote at the local level and others fought for the

²⁹ OPPLER, 16.

³⁰ NAOKO TAKEMARU, 27.

³¹ OPPLER, 16.

³² William M. Gilmartin; W. I. Ladejinsky, *The Promise of Agrarian Reform in Japan*, 26 FOREIGN AFF. 312 (1948), at 319.

³³ GENERAL HEADQUARTERS, SUPREME COMMANDER FOR THE ALLIED POWERS, ALLIED TRANSLATOR AND INTERPRETER SECTION, PRESS TRANSLATIONS, NO. 1395 POLITICAL SERIES: 349, *ITEM 1 The General Election by ABE, Shinnosuke - Magazine: Sunday Mainichi (Weekly) - 20 Jan Issue. Translator: T/E Ikemura & Sugasona* (18 February 1946) https://collections.dartmouth.edu/teitexts/Press_Translations_Japanese/diplomatic/political-1395-diplomatic.html (accessed 2 June 2019).

³⁴ Sakae Wagatsuma, *Democratization of the Family Relation in Japan*, 25 WASH. L. REV. & ST. B. J. 405 (1950) at 426.

right to vote.³⁵ Sally Ann Hastings writes about the suffrage movement in Japan and states: “Even before the order from SCAP arrived, the Shidehara cabinet had already approved a decision to enfranchise women.”³⁶ Sally Ann Hastings reports that “on 25 August 1945, Ichiwara Fusae, Yamataka Shigeri, and other women leaders of the pre-war suffrage movement formed a Women’s Committee on Postwar Policy of 70 women” and that “[a]t a meeting on 24 September 1945, members of the Women’s Committee passed a resolution addressed to the political parties demanding voting rights and political equality before the law.”³⁷

While General MacArthur issued his expectation on 3 October 1945 for women to possess suffrage, it was not until 26 November 1945 that the Diet convened for 18 days, principally to address the passage of the bill revising the law for the election of members to the House of Representatives,³⁸ the Ministry of Home Affairs “Bill for Revision of Law for the Election of the Members of the House of Representatives.”³⁹ Yet as late as 30 November 1945 at least one member of the House of Peers questioned: “I understand that the Women’s Suffrage Law is ordered by the Supreme Commander, and if so, the Diet cannot disapprove of it on the ground it is premature?”⁴⁰ One of his fellow Peers responded: “The Women’s Suffrage Law is not demanded formally by the Supreme Commander, but is only a wish expressed by him. The Government, with the point of view that it would be right for the Government itself to bring about such a desired matter, has proposed the bill.”⁴¹ The proposed bill became the Election Law of 17 December 1945, which, *inter alia*, introduced a new voting system and no longer excluded woman suffrage.⁴²

Within days after ending the exclusion, women’s political power increased. By 29 December 1945, a newspaper reported a push for a women’s cabinet to govern Japan, stating: “There are many women who are amply qualified for cabinet members.”⁴³ The

³⁵ MARNIE ANDERSON, PLACE IN PUBLIC: WOMEN’S RIGHTS IN MEIJI JAPAN, 32, 28 (2010); NANCY DIGGS BROWN, STEEL BUTTERFLIES: JAPANESE WOMEN AND THE AMERICAN EXPERIENCE, 98-99 (1998).

³⁶ Sally Ann Hastings, *Women’s Professional Expertise and Women’s Suffrage in Japan, 1868-1952*, in ANDREA GERMER, VERA MACKIE AND ULRIKE WÖHR, GENDER, NATION AND STATE IN MODERN JAPAN, 191 (2014).

³⁷ Sally Ann Hastings, 191.

³⁸ SCAP REPORT OF NOVEMBER 1945, para 10.

³⁹ SCAP REPORT OF NOVEMBER 1945, 26.

⁴⁰ GENERAL HEADQUARTERS, SUPREME COMMANDER FOR THE ALLIED POWERS, ALLIED TRANSLATOR AND INTERPRETER SECTION, PRESS TRANSLATIONS, NO. 204, POLITICAL SERIES: 50, *ITEM 5 Deliberative Right of the Diet and the Allied Forces - Asahi Shimbun - 1 Dec 45*. Translator T. Okamura (December 3, 1945)

https://collections.dartmouth.edu/teitexts/Press_Translations_Japanese/diplomatic/political-0204-diplomatic.html (June 2, 2019).

⁴¹ *ITEM 5 Deliberative Right of the Diet and the Allied Forces - Asahi Shimbun - 1 Dec 45*. Translator T. Okamura.

⁴² GENERAL HEADQUARTERS SUPREME COMMANDER FOR THE ALLIED POWERS, SUMMATION OF NON-MILITARY ACTIVITIES IN JAPAN AND KOREA, NO. 3, DEC 1945, 4.

⁴³ GENERAL HEADQUARTERS, SUPREME COMMANDER FOR THE ALLIED POWERS, ALLIED TRANSLATOR AND INTERPRETER SECTION, PRESS TRANSLATIONS, NO. 572, POLITICAL

article provided ten names of women qualified to be cabinet members.⁴⁴ The article's author questioned, because Japanese men were no longer subject to being conscripted into the military as a result of Japan's loss of the war, whether it was "unreasonable to think the loss of responsibility means the loss of governing power?"⁴⁵ The author contended: "Unfortunately I have not heard of one instance in which men apologized to women, expressing their sorrow for having caused them great hardships."⁴⁶ The author of the article opined: "Men should reflect on their own failure . . . and should retire from leadership. They should help organize a women's cabinet and endeavour to co-operate with women."⁴⁷ The article addressed how in Japan, when a family becomes bankrupt, "it is not rare in Japan that . . . the master retires to be replaced by the mistress, who, by virtue of her efforts, restores the family to its former prosperity."⁴⁸

The question raged whether women were prepared to vote. In December 1945, the SCAP report stated: "The Progressive and Liberal Parties contend that the majority of women are not yet prepared to use the ballot and they predict a light vote. The Socialist and Communist Parties have taken a more encouraging view and have inaugurated extensive educational programs."⁴⁹

The announcement of women's suffrage changed the political landscape. Most of the major Japanese political parties had women candidates.⁵⁰ The Japan Women's Party formed "the first such political organization in Japan's history."⁵¹ Two thousand women attended "[a] rally of all women's organizations . . . in Tokyo [where] [a]ll political parties explained their platforms."⁵² These platforms called for the "emancipation and equality of women."⁵³

On January 12, 1946, SCAP directed the Japanese government to hold its first general elections no earlier than March 15⁵⁴ (SCAPIN 584).⁵⁵ The election was then "postponed from March 31 to April 10 to give the reorganized Japanese Home Ministry more time to

SERIES: 132, *ITEM 5 Possibility of a Women's Cabinet - Tokyo Shimbun - 29 Dec 45*. Translator: T. Kitayama, (December 30, 1945)

https://collections.dartmouth.edu/teitexts/Press_Translations_Japanese/diplomatic/political-0572-diplomatic.html (accessed June 2, 2019)

⁴⁴ The names included Shio Sakanishi; Yoshioka, Yayoi; Ickikawa, Fusae; Ya[illegible]ataka, Shigeri; Kawasaki, Natsu; Oku, Umeo; Kiuchi, Kyo; Kufushiro, Ochimi; Ka[illegible]ichika, Ichiko; Asaida, Sumiko. *ITEM 5 Possibility of a Women's Cabinet - Tokyo Shimbun - 29 Dec 45*. Translator: T. Kitayama.

⁴⁵ *ITEM 5 Possibility of a Women's Cabinet - Tokyo Shimbun - 29 Dec 45*. Translator: T. Kitayama.

⁴⁶ *ITEM 5 Possibility of a Women's Cabinet - Tokyo Shimbun - 29 Dec 45*. Translator: T. Kitayama.

⁴⁷ *ITEM 5 Possibility of a Women's Cabinet - Tokyo Shimbun - 29 Dec 45*. Translator: T. Kitayama.

⁴⁸ *ITEM 5 Possibility of a Women's Cabinet - Tokyo Shimbun - 29 Dec 45*. Translator: T. Kitayama.

⁴⁹ SCAP, December 1945, para 46, p. 176

⁵⁰ OCCUPATION OF JAPAN, POLICY AND PROGRESS, 22.

⁵¹ OCCUPATION OF JAPAN, POLICY AND PROGRESS, 22.

⁵² GENERAL HEADQUARTERS SUPREME COMMANDER FOR THE ALLIED POWERS, SUMMATION OF NON-MILITARY ACTIVITIES IN JAPAN AND KOREA, NO. 3, *Encouragement of Women's and Youth's Organizations*, 176, para 43, (December 1945).

⁵³ US DEPARTMENT OF STATE, OCCUPATION OF JAPAN, POLICY AND PROGRESS, 22 (1946).

⁵⁴ OCCUPATION OF JAPAN, POLICY AND PROGRESS, Appendix 27.

⁵⁵ SUPREME COMMANDER FOR THE ALLIED POWERS, CATALOG OF SCAP DIRECTIVES TO THE IMPERIAL JAPANESE GOVERNMENT (1947).

‘screen’ prospective candidates [running for office; candidates who may have been ineligible for various reasons under purge rules].”⁵⁶ The reason for the postponement might have also been to provide a greater opportunity for women to become candidates running for office, empowering women to vote, and for women to be elected. In December, the SCAP report opined that the “[p]ostponement of the election will give women more time to develop their plans”⁵⁷

The election was “only seven months and seven days after the surrender.”⁵⁸ General Whitney observed: “There was wide criticism in Allied capitals of MacArthur’s decision to hold a general election so soon. But these critics obviously did not realize that most of the legislators with whom MacArthur would have to deal had been practically hand-picked at the height of . . . powers in 1942.”⁵⁹ And thus, “[t]he earliest possible date for a general election was therefore all-important.”⁶⁰

One of the concerns, given the pressing needs as a result of lack of food and housing, was whether women would be able to have time to vote.⁶¹ The Japan under Occupation was devastated by war. As one author notes: “Extensive areas of the large cities were in ruins, many people still lived in air raid shelters, railway stations, and makeshift houses lacking even the elementary facilities for family life . . . the scarcity of food and the widespread lack of employment.”⁶² In addition to time constraints due to lack of food, employment and housing, travel and voting constraints also were feared to limit women’s voting. One newspaper writer stated: “The woman who is busy with the everyday affairs of life, despite the fact that she is interested in the election, will be inclined to abstain from voting because of the distance of the polling place or the complicated formalities of voting.”⁶³ The writer’s proposed solution: “To prevent this, I want to advocate a new measure. That is, a voting box, which is locked like a money savings box, would be taken from house to house by a member of the Neighborhood Association and every

⁵⁶ OCCUPATION OF JAPAN, POLICY AND PROGRESS, 20.

⁵⁷ SCAP REPORT DECEMBER 1945, 176, para 46.

⁵⁸ COURTNEY WHITNEY, MACARTHUR: HIS RENDEVOUZ WITH HISTORY, 243 (1956).

⁵⁹ Whitney, 244.

⁶⁰ Whitney, 244.

⁶¹ GENERAL HEADQUARTERS, SUPREME COMMANDER FOR THE ALLIED POWERS, ALLIED TRANSLATOR AND INTERPRETER SECTION, PRESS TRANSLATIONS, NO. 1123, POLITICAL SERIES: 276, ITEM 3 *The Importance of the Coming: General Election - Mainichi Shimbun - 3 Feb 46*. Translator: K. Murakami. (February 4, 1946)

https://collections.dartmouth.edu/teitexts/Press_Translations_Japanese/diplomatic/political-1123-diplomatic.html (accessed June 2, 2019).

⁶² Jesse F. Steiner, *Japan's Post-War Population Problems*, 31 SOC. F. 245, 247 (1953).

⁶³ GENERAL HEADQUARTERS, SUPREME COMMANDER FOR THE ALLIED POWERS, ALLIED TRANSLATOR AND INTERPRETER SECTION PRESS TRANSLATIONS, NO. 808, POLITICAL SERIES: 196, ITEM 2 *A Woman's Voice on Enabling Women to Vote - Provincial Newspaper Shinano Mainichi Shimbun (Nagano) - 14 Jan 46*. Translator: S. Sano (January 17, 1946)

https://collections.dartmouth.edu/teitexts/Press_Translations_Japanese/diplomatic/political-0808-diplomatic.html (accessed June 2, 2019)

woman could put her vote into the box.”⁶⁴ It does not appear that Japan instituted the idea.

Women candidates came from all backgrounds and ideologies. A sampling of candidates and their platforms included:

- Nishimoro Moto, a principal of the Makibi Girls' High School, contended: “Female education is vital in order to improve women's status . . . I think it is owing to American women's fairness that measures for improving Japanese women's status after defeat has been taken by the United States.”⁶⁵
- Miyai Asaka, a 40 year old leader of the Kagawa Local Committee of the Communist Party who had worked as a maid, advocated: “The extreme corruption of Japan is due to the existence of capitalists and landowners, who are sabotaging production. In order to establish the liberty of a new Japan, it is urgent to solve our problems rapidly by promoting labor unions, and overthrowing the local agricultural administration.”⁶⁶
- Tsuchiya Naraye, an official on the regular staff of the Osaka Boys' Court and the Osaka Local Court, opined: “Since we have been given suffrage, it is the only way to solve our problem and to discharge our duty, isn't it? It is time for Japanese women to test their capacity by entering current politics. I will try to use women's power to maintain peace.”⁶⁷

The platforms of women candidates included “connect(ing) daily life directly with policies,” “birth control,” “making rural women free,” “doing away with the system and tradition whereby women are treated only as trifles,” “stamp(ing) out tuberculosis,” “better conditions for women teachers,” “improv(ing) the deplorable conditions of Japanese wives and mothers,” “improvements in women's education, the raising of the standard of culture and assistance for families of deceased soldiers,” and “appeal(ing) on behalf of women's difficulties in daily life.”⁶⁸

⁶⁴ *ITEM 2 A Woman's Voice on Enabling Women to Vote - Provincial Newspaper Shinano Mainichi Shimbum (Nagano) - 14 Jan 46. Translator: S. Sano.*

⁶⁵ GENERAL HEADQUARTERS, SUPREME COMMANDER FOR THE ALLIED POWERS, ALLIED TRANSLATOR AND INTERPRETER SECTION, PRESS TRANSLATIONS, NO. 479, POLITICAL SERIES: 112, *ITEM 1 A Series of Biographies of Female Candidates - Provincial Newspaper Shinane Mainichi (Nagano) - 19 Dec 45. Translator: N. Tachibana, (December 23, 1945)*
https://collections.dartmouth.edu/teitexts/Press_Translations_Japanese/diplomatic/political-0479-diplomatic.html (accessed June 2, 2019)

⁶⁶ *ITEM 1 A Series of Biographies of Female Candidates - Provincial Newspaper Shinane Mainichi (Nagano) - 19 Dec 45. Translator: N. Tachibana.*

⁶⁷ *ITEM 1 A Series of Biographies of Female Candidates - Provincial Newspaper Shinane Mainichi (Nagano) - 19 Dec 45. Translator: N. Tachibana.*

⁶⁸ GENERAL HEADQUARTERS, SUPREME COMMANDER FOR THE ALLIED POWERS, ALLIED TRANSLATOR AND INTERPRETER SECTION PRESS TRANSLATIONS, NO. 866, POLITICAL SERIES: 210, *ITEM 4 The Whole World is Watching the Women's Suffrage in JAPAN - Mainichi Shimbum - 20 Jan 46. Translator: R. Ochiai, (January 21, 1946)*
https://collections.dartmouth.edu/teitexts/Press_Translations_Japanese/diplomatic/political-0866-diplomatic.html (accessed June 2, 2019)

Between the time that the suffrage bill passed and the first election in which women voted, two other changes occurred – the abolition of lawful enslavement of women and the drafting of the constitution.

4.0 ENSLAVEMENT

In January 1946, General MacArthur, via SCAPIN 642 “Abolition of Licensed Prostitution in Japan,” directed “the Japanese Government to abrogate all laws or ordinances permitting licensed prostitution and nullify all contracts that have the object of committing women to prostitution;”⁶⁹ that is, the “annulment of laws which permitted the enslavement for legal prostitution of thousands of Japanese women.”⁷⁰ Journalist La Cerda reported that General MacArthur “acted . . . under that part of the Potsdam Declaration guaranteeing respect for fundamental rights.”⁷¹ Occupation lawyer Alfred Oppler explained that “licensed prostitution, with its Japanese by-product of involuntary servitude by women who bound themselves to serve for a fixed period, was abolished as inconsistent with the principle of equality of the sexes and individual liberty and dignity.”⁷² The enslavement, as described by the 18 February 1946 SCAP press release, was the “‘sale’ of daughters, frequently against the girls’ wishes.”⁷³ Licensed prostitution was considered “a relic of a feudalistic system of slavery, unsuitable for a new democratic Japan.”⁷⁴ It was anticipated that “more than 10,000 licensed prostitutes throughout the country will be set free.”⁷⁵

The Women’s Christian Temperance Union (W.C.T.U.) of Japan had been working to abolish the practice of selling women and girls into prostitution since 1886.⁷⁶ Mrs. Shimada Kiyō, Chief of the Women’s Department of the Labor Union, in addressing licensed prostitution, opined: “I think the existing fact, that the men are treating the women as mere playthings by having licensed quarters as social establishments proves that they should naturally be abolished without the directive of MacArthur’s Headquarters.”⁷⁷

⁶⁹ SCAP. Catalog of SCAP Directives. Vol 1, 90 (1952)

⁷⁰ GENERAL HEADQUARTERS, UNITED STATES ARMY FORCES, PACIFIC, PUBLIC RELATIONS OFFICE, PRESS RELEASE, *Ending of Legalized Prostitution to be Commemorated*, (10:30, 18 February 1946) (courtesy of MacArthur Archives).

⁷¹ JOHN LA CERDA, CONQUEROR COMES TO TEA: JAPAN UNDER MACARTHUR, 61 (1946).

⁷² Oppler, 4.

⁷³ PRESS RELEASE, *Ending of Legalized Prostitution to be Commemorated*.

⁷⁴ GENERAL HEADQUARTERS, SUPREME COMMANDER FOR THE ALLIED POWERS, ALLIED TRANSLATOR AND INTERPRETER SECTION, PRESS TRANSLATIONS, NO. 1177 SOCIAL SERIES: 233, *ITEM 4 Abolition of Licensed Prostitution - Yomiuri Hochi - 6 Feb 46*. Translator; T. Ogawa, (February 7, 1946)

https://collections.dartmouth.edu/teitexts/Press_Translations_Japanese/diplomatic/social-1177-diplomatic.html (accessed June 2, 2019)

⁷⁵ *ITEM 4 Abolition of Licensed Prostitution - Yomiuri Hochi - 6 Feb 46*. Translator; T. Ogawa,

⁷⁶ PRESS RELEASE, *Ending of Legalized Prostitution to be Commemorated*.

⁷⁷ *ITEM 4 Abolition of Licensed Prostitution - Yomiuri Hochi - 6 Feb 46*. Translator; T. Ogawa.

In Japan, according to one Japanese lawyer, “licensed prostitution . . . was a prime source of revenue for local governments.”⁷⁸ One Japanese newspaper opined: “The existence of houses supported by the Government and protected by the police (licensed prostitution houses) seems degrading to the Americans and is the reason . . . for the slave-like position of Japanese women.”⁷⁹ (Licensed prostitution exists today in the U.S. *See* Nevada, “It is unlawful for any person to engage in prostitution . . . except in a licensed house of prostitution.” NRS 201.354.)

While licensed prostitution enriched the government, involuntary servitude, be it in or outside of prostitution, appeared to enrich fathers. Occupation lawyer Justin Williams, Sr, recounts being informed that “sometimes a young girl was sold to a ‘guardian’ but that is was more common for her to become security for a loan made to her father.”⁸⁰ Journalist La Cerda states: “No longer need the girls spend their lifetimes trying to repay that debt.”⁸¹ Mrs. Shimada Kiyō, Chief of the Women's Department of the Labor Union, asked: “Are the women guilty? They are not, I dare say. Did women willingly enter into such a life? They fell into the miserable situation on account of this system which was created by men.”⁸² Mrs. Shimada Kiyō, Chief of the Women's Department of the Labor Union maintained: “Also we must call for grave reflection by the families which want to make a living at the price of their dear daughters and to reed out such evils committed by the woman's weakness to sacrifice herself.”⁸³

One by-product of the end of selling girls and women into slavery was the rise of the 1948 Habeas Corpus Act.⁸⁴ Occupation lawyer Oppler contended: “In a country where involuntary servitude of women and children had been almost customary, the need for protection from physical restraint was undeniable.”⁸⁵ Williams found: “When a girl saw

⁷⁸ JUSTIN WILLIAMS, SR, JAPAN’S POLITICAL REVOLUTION UNDER MACARTHUR: A PARTICIPANT’S ACCOUNT, 9 (1979).

⁷⁹ GENERAL HEADQUARTERS, SUPREME COMMANDER FOR THE ALLIED POWERS, ALLIED TRANSLATOR AND INTERPRETER SECTION, PRESS TRANSLATIONS, NO. 706, SOCIAL SERIES: 189, *ITEM 1 The American Army Officers Attitude Toward Women by R. MASUMAN* - Provincial Paper Hyuga Nichinichi Shimibun (MIYAZAKI) - 4 Jan 46. Translator: H. Nishihara, 1, (January 10, 1946)*

https://collections.dartmouth.edu/teitexts/Press_Translations_Japanese/diplomatic/social-0706-diplomatic.html, accessed April 21, 2019.

⁸⁰ Justin Williams, Sr, Japan’s Political Revolution Under MacArthur: A Participant’s Account, at 10.

⁸¹ John La Cerda, 61.

⁸² *ITEM 4 Abolition of Licensed Prostitution - Yomiuri Hochi - 6 Feb 46. Translator; T. Ogawa.*

⁸³ GENERAL HEADQUARTERS, SUPREME COMMANDER FOR THE ALLIED POWERS, ALLIED TRANSLATOR AND INTERPRETER SECTION, PRESS TRANSLATIONS, NO. 1071, SOCIAL SERIES: 216, *ITEM 1 Abolition of Licensed Prostitution - Provincial Newspaper Hokkoku Mainichi (Kanazawa) - 28 Jan 46. Translator: T. Ogawa, (February 2, 1946)*

https://collections.dartmouth.edu/teitexts/Press_Translations_Japanese/diplomatic/social-1071-diplomatic.html (access June 2, 2019)

⁸⁴ Habeas Corpus Act, Law No. 199, O.G. No. 699, July 30, 1948, Alfred C. Oppler, *The Reform of Japan's Legal and Judicial System under Allied Occupation*, 24 WASH. L. REV. & ST. B. J. 290, 320, fn 91 (1949).

⁸⁵ Alfred C. Oppler. *Reform of Japan’s Legal and Judicial System under Allied Occupation*, 17.

fit to rebel against what some regarded as a form of slavery, the court always held in her favor.” However, for an individual held in bondage to be able to access the courts would have required the ability to access the courts. As Williams acknowledged, “Such cases were rare.”⁸⁶

The next question was what was next for the freed women. Miss Yamamuro Tamiko, the Director of the Welfare Bureau of the Japan Christian Brotherhood, addressed the need to “establish . . . a women’s home, where these girls can rest their exhausted bodies and souls as a shelter until they start a new life, an inquiry office for giving these girls a chance to find a decent job, and an organization to give them vocational guidance are necessary.”⁸⁷ Mrs. Shimada Kiyō, Chief of the Women’s Department of the Labor Union, urged: “We women want eagerly to emancipate these pitiful girls into a free world as soon as possible. We must give a warm welcome to those girls who have regained their freedom, give them a decent job, and lead them into a home-life upon their recovery from both mental and physical exhaustion or give them a stabilized livelihood.”⁸⁸ To ensure employment of “freed” former licensed prostitutes, the Labor Division of one prefectural government recommend transforming brothels into hotels, with hotel jobs.⁸⁹ In contrast, the Metropolitan Police, believing that, “so long as the present social situation remains unimproved,” licensed prostitution would simply convert itself into private prostitution.⁹⁰ Miss Yamamuro Tamiko opined: “As for the problems of private prostitutes it depends more on the self-respect of men than on that of women, I think.”⁹¹ The Metropolitan Police planned to address the conversion through “limit(ing) the place of business for these private prostitutes to 5 districts . . . so as to put them under control.”⁹² Miss Yamamuro Tamiko also decried that the “men who transmit the diseases from woman to woman are not the objects of control,”⁹³ the “spreading of venereal diseases.”⁹⁴ Police used the power to “control” women through charges of prostitution used against women to harass, shame, and detain. The U.S. military police (with Japanese police) would arrest women on the pretense of being “streetwalkers” (prostitutes), take them to police stations, and then test them for VD (venereal disease).

⁸⁶ Justin Williams, Sr, *Japan’s Political Revolution Under MacArthur: A Participant’s Account*, at 10.

⁸⁷ GENERAL HEADQUARTERS, SUPREME COMMANDER FOR THE ALLIED POWERS, ALLIED TRANSLATOR AND INTERPRETER SECTION, PRESS TRANSLATIONS, NO. 1177 DATE 7 FEB 46, SOCIAL SERIES: 233, *ITEM 4 Abolition of Licensed Prostitution - Yomiuri Hochi - 6 Feb 46*. Translator; T. Ogawa. (February 7, 1946)

https://collections.dartmouth.edu/teitexts/Press_Translations_Japanese/diplomatic/social-1177-diplomatic.html (accessed June 2, 2019)

⁸⁸ *ITEM 4 Abolition of Licensed Prostitution - Yomiuri Hochi - 6 Feb 46*. Translator; T. Ogawa.

⁸⁹ GENERAL HEADQUARTERS, SUPREME COMMANDER FOR THE ALLIED POWERS, ALLIED TRANSLATOR AND INTERPRETER SECTION, PRESS TRANSLATIONS, NO. 1419, SOCIAL SERIES: 268, *ITEM 2 Abolition of Licensed Prostitution in MIYAZAKI - Provincial Newspaper Hyuga Nichi-Nichi Shimbun (Miyazaki-shi) 12 Feb 46*. Translator: S. Sakata, (February 19, 1946)

https://collections.dartmouth.edu/teitexts/Press_Translations_Japanese/diplomatic/social-1419-diplomatic.html (accessed June 2, 2019)

⁹⁰ *ITEM 4 Abolition of Licensed Prostitution - Yomiuri Hochi - 6 Feb 46*. Translator; T. Ogawa.

⁹¹ *ITEM 4 Abolition of Licensed Prostitution - Yomiuri Hochi - 6 Feb 46*. Translator; T. Ogawa.

⁹² *ITEM 4 Abolition of Licensed Prostitution - Yomiuri Hochi - 6 Feb 46*. Translator; T. Ogawa.

⁹³ *ITEM 4 Abolition of Licensed Prostitution - Yomiuri Hochi - 6 Feb 46*. Translator; T. Ogawa.

⁹⁴ *ITEM 4 Abolition of Licensed Prostitution - Yomiuri Hochi - 6 Feb 46*. Translator; T. Ogawa.

Aldous recounts an example of “650-750 innocent girls and women subjected to the humiliation of being displayed to the public as prostitutes, while being taken to the police station in the MP open jeep” and “further humiliated by being subjected to an exam for VD.”⁹⁵ These women-harassing police sweeps went to far as to detain a female Diet member.⁹⁶

The outlawing of selling women and girls into prostitution did not make prostitution itself illegal. Prostitution was not made illegal until 1956, five years after the end of the Occupation. A film, Kenji Mizoguchi’s *Street of Shame* (“the heartbreaking tale of a brothel full of women whose dreams are constantly shattered by their socioeconomic realities”⁹⁷), may have brought the change. One current advertisement for the film contends that “when an anti-prostitution law was passed in Japan a few months after its release, some said the film had been a catalyst.”⁹⁸

5.0 CONSTITUTION

The Occupation saw the drafting and adoption of a new Constitution for Japan.⁹⁹ Japan’s Constitution provides universal adult suffrage (“Universal adult suffrage is guaranteed with regard to the election of public officials” -- Article 15 of the Constitution of Japan). Japan’s Constitution does not stop there. Going beyond the 19th Amendment of the U.S. Constitution, the Japanese constitutional reform resulted in articles of equal rights.¹⁰⁰ Unlike the U.S., which still does not have an equal rights amendment, Article 14 of the Constitution of Japan states: “All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.” Further, the Constitution of Japan provides: “With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes” (Article 24). In addition, the Constitution of Japan provides:

- “All of the people shall be respected as individuals.” (Article 13)
- “Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife

⁹⁵ CHRISTOPHER ALDOUS AND AKIHITO SUZUKI, REFORMING PUBLIC HEALTH IN OCCUPIED JAPAN, 1945-52 : ALIEN PRESCRIPTIONS?, 156 (2012).

⁹⁶ Aldous, reforming public health, 155

⁹⁷ Freer Sackler Films, Film: “Street of Shame,” <https://www.freersackler.si.edu/events-overview/films/#?i=1> (accessed 24 April 2019).

⁹⁸ Freer Sackler Films, Film: “Street of Shame,” <https://www.freersackler.si.edu/events-overview/films/#?i=1> (accessed 24 April 2019).

⁹⁹ For a human rights historical perspective, see Sylvia Brown Hamano, *Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights*, 1 U. PA. J. CONST. L. 415 (1999).

¹⁰⁰ The Constitution of Japan, Promulgated on November 3, 1946, Came into effect on May 3, 1947, http://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html.

- as a basis.” (Article 24)
- “All people shall have the right to receive an equal education correspondent to their ability, as provided by law. All people shall be obligated to have all boys and girls under their protection receive ordinary education as provided for by law. Such compulsory education shall be free.” (Article 26)

The process for a new Constitution began on 4 October 1944 when General MacArthur ordered Prince Koye to:

- Liberalize constitution
- Extend suffrage to women
- Have an election
- Clear militarists out of control.¹⁰¹

When the prince protested that he did not have authority to do this, General MacArthur replied: “The entire government lives by my sufferance I shall authorize all these changes – get busy.”¹⁰²

To reinforce the order for a new constitution, on 11 October 1945, General MacArthur, in his meeting with Prime Minister Shidehara, “pointedly advised that the reforms which Japan must take ‘will unquestionably involve a liberalization of the Constitution.’”¹⁰³ General MacArthur also “pointedly advised” the Japanese Minister that “[t]hese reforms are so fundamental in character that they cannot be effected by statutory legislation alone but necessitate inclusion in the Constitution in order to ensure their permanency.”¹⁰⁴

When the Japanese government submitted in January 1946 a “rewording of the old Meiji constitution,”¹⁰⁵ the press ridiculed the draft constitution.¹⁰⁶ One of the women Occupationnaires contended that thus “ordinary, everyday people – even as they were struggling for survival – were more willing than political and academic elites to discard the Meiji constitution and start afresh.”¹⁰⁷ As a result of the noncompliance by the Japanese government to draft an acceptable constitution, MacArthur decided to have the Government Section of SCAP draft a new constitution.¹⁰⁸ On February 3, 1946, General MacArthur ordered General Whitney, the head of the Government Section, to have the Government Section draft a model constitution.¹⁰⁹ General MacArthur gave the

¹⁰¹ PAPERS OF BONNER FELLERS, MacArthur Archives, provided to me by MacArthur Archives archivist James Zobel.

¹⁰² Papers of Bonner Fellers, MacArthur Archives, provided to me by MacArthur Archives archivist James Zobel.

¹⁰³ SCAP, Sept-Oct 1945, 8.

¹⁰⁴ SCAP, Sept-Oct 1945, 8.

¹⁰⁵ MacArthur, 300.

¹⁰⁶ NASSRINE AZIMI & MICHEL WASSERMAN (with a foreword by Beate Sirota Gordon), *LAST BOAT TO YOKOHAMA: THE LIFE AND LEGACY OF BEATE SIROTA GORDON*, 59 (2015).

¹⁰⁷ *Boat to Yokohama*, 59.

¹⁰⁸ *Boat to Yokohama*, 60.

¹⁰⁹ RAY A. MOORE, *SOLDIER OF GOD: MACARTHUR’S ATTEMPT TO CHRISTIANIZE JAPAN*, 75 (2011).

Government Section until February 12, 1946 to draft a constitution.¹¹⁰ The need for speed may be explained by wishing to have a constitution drafted before the Far East Commission had its meeting the end of February,¹¹¹ with the concern that otherwise the emperor would be declared a war criminal.¹¹² The content of the notes that MacArthur provided for guidance included: “1) safeguard of a dynastic but symbolic emperor representative of the people, 2) renunciation of war, and 3) dismantling of the feudal system.”¹¹³ On February 4, General Whitney sat down with his team and began the process of drafting a new constitution.¹¹⁴ The team had nine days.¹¹⁵ The writing of the constitution was in secret.

The sole woman on the Government Section charged with writing the constitution was Beate Sirota. She was 22 years old, was a graduate of Mills College, had grown up in Japan, and did not become an American citizen until 1945.¹¹⁶ Sirota, in drafting her sections, in a decimated Tokyo, found and examined constitutions from around the world.¹¹⁷

One of the areas Sirota was responsible for drafting was on women’s rights. Sirota sought to draft the “changes that would most benefit Japanese women.”¹¹⁸ She drafted provisions that included “equality in regard to property rights, inheritance, education, and employment; suffrage; public assistance for expectant and nursing mothers as needed (whether married or not); free hospital care; and marriage with a man of her choice.”¹¹⁹ Sirota draft provisions included the “rights of expecting and nursing mothers and full medical, dental, and optical treatment for school-age children.”¹²⁰ For example, a first draft of the Constitution stated: “Expectant and nursing mothers shall have the protection of the State, and such public assistance as they may need, whether married or not”¹²¹ and “Women shall has the right of access to all professions and Occupations, including the right to hold office, and shall receive the same compensation as men for equal work.”¹²²

The draft women’s rights provisions engendered fierce exchanges regarding the goals of the constitution. Sirota’s two immediate [male] co-workers fiercely defended her provisions. Lieutenant Colonel Roest claimed: “[It is] peculiarly necessary to include them [women’s rights social guarantees] here that since state responsibility for the

¹¹⁰ *Boat to Yokohama*, 60.

¹¹¹ *Boat to Yokohama*, 101.

¹¹² *Boat to Yokohama*, 101.

¹¹³ *Boat to Yokohama*, 61.

¹¹⁴ *Boat to Yokohama*, 101.

¹¹⁵ *Boat to Yokohama*, 60.

¹¹⁶ DALE M. HELLEGERS, *WE, THE JAPANESE PEOPLE: WORLD WAR II AND THE ORIGINS OF THE JAPANESE CONSTITUTION*, 581 (2002).

¹¹⁷ *Last Boat to Yokohama*, 60 and 102.

¹¹⁸ BEATE SIROTA GORDON, *THE ONLY WOMAN IN THE ROOM : A MEMOIR OF JAPAN, HUMAN RIGHTS, AND THE ARTS*, 108 (2014).

¹¹⁹ Sirota, *Only Woman*, 108.

¹²⁰ *Last Boat to Yokohama*, 62, fn 5.

¹²¹ Hellegers, 590, Article 19 of the first draft.

¹²² Hellegers, 591, Article 26 of the first draft.

welfare of its people is a new concept for Japan and demands constitutional approval to encourage its widespread acceptance, at present women are chattel here . . . and any peasant can sell his daughter if the rice crop is bad.”¹²³ Dr. Wildes went even further arguing: “We have the responsibility to effect a social revolution in Japan, and the most expedient way of doing that is to force through a reversal of social patterns by means of the constitution.”¹²⁴

Yet, in overriding these concerns and in justifying excluding women’s social guarantees, Colonel Rowell maintained: “It isn’t the Government Section’s job to establish a perfect system of guarantees. If we push hard for things like this, we could well encounter strong opposition. In fact, I think there is a danger the Japanese government might well reject our draft entirely.”¹²⁵

While individuals with more power in the drafting of the constitution stripped women’s rights, they had no hesitancy to use their power to force the Japanese government to accept the constitution written by the Occupationnaires. General Whitney, the head of the Government Section, when he ordered the drafting of the constitution by the Government Section on February 4, 1946, told the drafters that if the Japanese government “hope to protect the Emperor and to maintain political power, they have no choice but to accept a constitution with a progressive approach, namely the fruits of our current efforts.”¹²⁶ He continued: “I expect we’ll manage to persuade them. But if it looks as though it might prove impossible, General MacArthur has already authorized both the threat of force and the actual use of force.”¹²⁷

Sirota’s male bosses, before submitting the draft constitution to the Japanese government on February 13, 1946,¹²⁸ stripped the draft constitution of many of the rights for women that Sirota had written in to the draft constitution. In her testimony to the U.S. Congress decades later, she testified: “Col Kades (head of the Steering Committee) said: ‘Beate, you have given women more rights than there are in the U.S. Constitution!’”¹²⁹ Her response? “I said: ‘That’s not difficult, since the U.S. Constitution does not even mention the word woman.’”¹³⁰

The stripping were made as a result of beliefs by some of the U.S. males involved in the drafting of the constitution that women’s rights social guarantees “were not appropriate for a constitution, but belonged in the Civil Code which the Japanese would write

¹²³ Hellegers, 603-604, fn 64? Ellerman Notebook D, Michigan, Hussey Papers. Colonel Roest’s spouse, Jean-Marie Roest, was a Stanford graduate who was in Japan as a WAC working for Radio Tokyo on getting out the women’s vote. Hellegers at 580.

¹²⁴ Sirota Gordon, *Only Woman in the Room*, 116.

¹²⁵ Sirota Gordon, *Only Woman in the Room*, 116.

¹²⁶ Sirota Gordon, *Only Woman in the Room*, 116.

¹²⁷ Sirota Gordon, *Only Woman in the Room*, 105.

¹²⁸ RAY A. MOORE & DONALD L. ROBINSON, *PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR*, 104 (2002).

¹²⁹ Sirota Testimony, 162.

¹³⁰ Sirota Testimony, 162.

later.”¹³¹ Such beliefs ignored the reality that “social guarantees [were] common in the constitutions of many European countries.”¹³² The holders of these beliefs further ignored and failed to pay heed to Sirota’s insight and forecast that “the bureaucrats who would be assigned to write those statutes for the Civil Code would . . . be so conservative that they could not be relied upon to extend adequate rights to women” and that the “only safeguard was to specify these rights in the constitution.”¹³³

The Occupation then forwarded its draft to the Japanese government. On 4-5 March 1946, the MacArthur and the Japanese teams engaged in a marathon negotiating session.¹³⁴ The negotiations started at 10 a.m. on 4 March 1946.¹³⁵ Sirota acted as an interpreter for the negotiations. Sirota recounts after sixteen hours, it was “2 a.m. the next morning [and] everybody was hungry and tired.”¹³⁶ And that “Col Kades noticed that the Japanese officials were very kindly inclined towards me . . . because I was a very fast interpreter.”¹³⁷ At 2 a.m., the negotiations about women’s rights began. Sirota states: “What I remember about the discussion on women’s rights is that the Japanese didn’t want any of them.”¹³⁸ Sirota recalls that “it became an unbelievable fight about women’s rights – they felt that none of it should be in the Constitution; that it was against Japanese culture, against Japanese history, against Japanese customs – when they said all this, Col Kades said: ‘Gentlemen, Miss Sirota has been in Japan a long time, she knows the Japanese women very well, and she has her heart set on the women’s rights. Why don’t we pass them?’ And they did.”¹³⁹

What Col Kades did not disclose to the Japanese negotiators was that Beate Sirota was the author of the women’s rights provisions. During the negotiations, Sirota appeared in the role of interpreter “assisting the chief interpreter, Joseph Gordon” as the negotiators went “over the draft word by word.”¹⁴⁰ Thus, to the Japanese it appeared Sirota was “merely an interpreter, since her U.S. counterpart had kept secret [her] involvement in the writing of the draft.”¹⁴¹

The draft Constitution, after the negotiations, then went to the Japanese Diet for debate. When the Japanese government’s draft, based on MacArthur’s draft, was presented to the National Diet, Japanese women legislators of the lower house offered an amendment that was almost exactly the same as the original draft written by Sirota.¹⁴² Koseki Shoichi

¹³¹ Sirota Testimony, 162.

¹³² Sirota, *Only Woman*, 115.

¹³³ Sirota, *Only Woman*, 115.

¹³⁴ Hellegers, 673.

¹³⁵ Kyoko Sato, *A Half-Century Secret: U.S. had woman help draft Constitution*, THE JAPAN TIMES, 3 (July 4, 1995).

¹³⁶ Hugh Levinson (interviewer), *The Unsung Heroine of Women’s Rights*, THE JAPAN TIMES, 10 (April 28, 2002).

¹³⁷ Hugh Levinson, 10.

¹³⁸ Kyoko Sato, 3.

¹³⁹ Hugh Levinson, 10.

¹⁴⁰ Kyoko Sato, 3.

¹⁴¹ Kyoko Sato, 3.

¹⁴² KOSEKI SHOICHI, *BIRTH OF JAPAN’S POSTWAR CONSTITUTION*, ed and trans by Ray Moore, at 3 (1997). Koseki was not born until 1943

states: “And just as happened on the American side, their amendment was ignored by their male colleagues in the Diet.”¹⁴³ However, Koseki Shoichi maintains that free elementary education (Article 26) was made much stronger through the Diet debates than it had been in either the US or the Japanese government drafts.¹⁴⁴

One example to examine is the draft section on the family. Dale Hellegers contends that the MacArthur Draft (the draft finalized by the Government section on 13 February 1946) states, with regard to the family: “The family is the basis of human society and its traditions for good or evil permeate the nation. Marriage shall rest upon the indisputable legal and social equality of both sexes, founded upon mutual consent instead of parental coercion, and maintained through cooperation instead of male domination. Laws contrary to these principles shall be abolished and replaced by others viewing choice of spouse, property rights, inheritance, choice of domicile, divorce, and other matters pertaining to marriage and the family from the standpoint of individual dignity and the essential equality of the sexes.”¹⁴⁵ The Japanese draft countered with a section on the family system worded as: “Marriage shall be based only on the mutual consent of both sexes. Moreover, it shall be maintained through mutual cooperation, with the equal rights of husband and wife as a basis.”¹⁴⁶

Once written, the Constitution came into effect in less than two years after the beginning of the Occupation. The sequence for the Constitution then to come into existence was:

- August 24, 1946 House of Representatives adopts Constitution by a vote of 422:8.¹⁴⁷
- September 6, 1946 House of Peers adopts Constitution with “minor amendments” by a vote of 298:2.¹⁴⁸
- October 7, 1946 House of Representatives approves amended version of the Constitution.¹⁴⁹
- October 29, 1946 Privy Council approves Constitution.¹⁵⁰
- November 3, 1946 (Emperor Meiji’s Birthday) Constitution is promulgated.
- May 3, 1947 Constitution comes into effect.

The question remains what role a constitution performs in the structuring of national identity, beliefs and actions. General MacArthur acknowledged that “the drafting of an acceptable constitution does not of itself establish democracy, which is a thing largely of the spirit,” but maintained that “it does provide the design for both structural and spiritual changes in the national life, without which so fundamental a reform would be utterly impossible.”¹⁵¹ Not all of General MacArthur’s subordinates understood what General

¹⁴³ Koseki Shoichi, 3.

¹⁴⁴ Koseki Shoichi, 187?.

¹⁴⁵ Hellegers, 673?, Article 23 of the MacArthur Draft

¹⁴⁶ Dale M. Hellegers, Japanese draft Article 37, page 673 of the book?

¹⁴⁷ HARRY EMERSON WILDES, TYPHOON IN TOKYO; THE OCCUPATION AND ITS AFTERMATH, 46 (1954).

¹⁴⁸ Wildes, 46.

¹⁴⁹ KURT STEINER, LOCAL GOVERNMENT IN JAPAN, 86 (1965).

¹⁵⁰ Kurt Steiner, Local Government, 86

¹⁵¹ John La Cerda, 220.

MacArthur was trying to accomplish with an acceptable constitution. Colonel Rowell, who was part of drafting a new constitution, is quoted as stating: “You cannot impose a new mode of social thought on a country by law.”¹⁵²

6.0 ELECTIONS

While the Japanese government, during the Occupation, ended a political system that prohibited women the rights to vote and to be elected, the political system sought to maintain power. The 1946 and 1947 elections provided for different balloting systems. These different systems provided different outcomes.

6.1 Balloting System of 1946

The 1946 balloting system allowed the voter to vote for at least two individuals.¹⁵³ The 1946 system, as explained by a Japanese newspaper, “aims at, (1) prevention of a local man of influence from being elected, and election of a nationally known man by enlarging spheres of choice of electors, (2) prevention of monopolization of seats by the majority, and the opportunity for minority representation.”¹⁵⁴ Or as another newspaper explained: “As the result of the adoption of a major electorate system, traditional constituencies have been broken up, increasing the possibilities of new men's success.”¹⁵⁵ The 1946 balloting system was positive for women. On 10 April 1946 (the first election with women’s suffrage), voters elected 38 women to the House of Representatives, a body of 466 members.¹⁵⁶ At this time, the U.S. had 11 women in the House of Representatives, out of a body of 435.¹⁵⁷ Japan elected more women in its first opportunity to elect women than did the U.S., despite having more years the opportunity to vote for women. (And a potentially economically smarter vote. In the U.S., evidence

¹⁵² Sirota Gordon, *Only Woman in the Room*, 116

¹⁵³ Alfred Hussey Files, Library of Congress, 17-A-1-1.

¹⁵⁴ GENERAL HEADQUARTERS, SUPREME COMMANDER FOR THE ALLIED POWERS, ALLIED TRANSLATOR AND INTERPRETER SECTION, PRESS TRANSLATIONS, NO. 82, POLITICAL SERIES: 19, “*ITEM 3 Various Aspects of the Election System - Tokyo Shimbun - 14 Nov 45. Translator: T. Kitayama.*” 2-4, at 2, (November 24, 1945)
https://collections.dartmouth.edu/teitexts/Press_Translations_Japanese/diplomatic/political-0082-diplomatic.html, accessed April 21, 2019.

¹⁵⁵ GENERAL HEADQUARTERS SUPREME COMMANDER FOR THE ALLIED POWERS ALLIED TRANSLATOR AND INTERPRETER SECTION PRESS TRANSLATIONS NO. 446, POLITICAL SERIES: 102, *ITEM 2 Viewing the Election - Asahi Shimbun - 19 Dec 45. Translator: T. Kitayama.*, (December 21, 1945)
https://collections.dartmouth.edu/teitexts/Press_Translations_Japanese/diplomatic/political-0446-diplomatic.html (accessed June 2, 2019).

¹⁵⁶ Alfred Hussey Files, Library of Congress, 17-A-3-19

¹⁵⁷ Jennifer E. Manning, Ida A. Brudnick, and Colleen J. Shogan, *Women in Congress: Historical Overview, Tables, and Discussion*, CONGRESSIONAL RESEARCH SERVICES, (April 29, 2015), <https://fas.org/sgp/crs/misc/R43244.pdf> accessed May 10, 2018.

suggests that electing women to office is more financially rewarding for the voter than electing men to office. A 2015 CRS report finds “while controlling for numerous other factors including district-level characteristics, an empirical model demonstrates that women deliver approximately 9% more federal spending to their districts than men.”¹⁵⁸)

General Courtney Whitney reported that “nearly 50% of all women candidates were elected” as opposed to “only 15% of all men candidates.”¹⁵⁹ A SCAP analysis found “striking testimony of the independence with which the women went to the polls appears after analysis of the vote by individual prefectures, twelve of successful women candidates ran independently and were elected without the benefit of party machines and without organized support.”¹⁶⁰ Of the women elected, six were progressives, five were Liberals, eight were Socialists, one was communist, eight were from small parties and ten were independents.¹⁶¹ A SCAP election analysis opined that the 1946 voting system “contributed largely to the success of independents and small party candidates,” preventing the larger parties from “captur[ing] more than their fair share of seats,” with at least one independent candidate elected in 43 of the 46 prefectures, “a phenomenon that has never before appeared in Japan’s political history.”¹⁶²

Beate Sirota, when questioned as to whether she remembered the first general election in April 1946, replied: “I had never seen so many women in one place. I saw old women in their 80s, carrying their grandchildren on their backs, come in. I saw women very well-dressed, who were younger, who were coming to this with sort of awe.”¹⁶³ U.S. journalist John La Cerda contends: “They carried their babies with them to the polls. In one Tokyo ward, five aged women were carried to the ballot stalls in stretchers.”¹⁶⁴

Over 13 million Japanese women voted.¹⁶⁵ On April 25, 1946, General MacArthur stated: “The uncertainty as to the trend of attitude of women to their new found freedom which characterized the Japanese press prior to election was dissipated when 66 percent

¹⁵⁸ Jennifer E. Manning, Ida A. Brudnick, and Colleen J. Shogan, “Women in Congress: Historical Overview, Tables, and Discussion,” *Congressional Research Services*, 13 (April 29, 2015), <https://fas.org/sgp/crs/misc/R43244.pdf> accessed May 10, 2018.

¹⁵⁹ Courtney Whitney, 290.

¹⁶⁰ Alfred Hussey Files, Library of Congress, 17-A-3-22.

¹⁶¹ The independent women who won were Wazaki Haru, Sakakibara Chiyo, Yamashita Harue, Nomura Misu, Oishie Yoshie, Kimura Chiyo, Nakayama Tama, Tanaka Tatsu, Kondo Tsuruyo, and Yamashita Tsune, List of Successful Candidates, Alfred Hussey Files, Library of Congress, 17-A-4-1.

¹⁶² 22 April 1946, Memo for the Supreme Commander, “Election Report,” Alfred Hussey Files, Library of Congress, 17-A-3-22

¹⁶³ Hugh Levinson (interviewer), “The Unsung Heroine of Women’s Rights,” *The Japan Times*, April 28, 2002, p. 10.

¹⁶⁴ John La Cerda, 89.

¹⁶⁵ Courtney Whitney, 290.

of the eligible women cast their ballot.”¹⁶⁶ In contrast, in the U.S., women made up 35-40% of the U.S. electorate on 2 November 1920.¹⁶⁷

Japan adopted the balloting system for the 1946 elections at the urging of SCAP’s POLAD (political advisor), George Atcheson.¹⁶⁸ Then, on 27 March 1947, Japan’s Election Law Committee eliminated the 1946 system, in a 16-14 decision, that included a brawl between members.¹⁶⁹

6.2 Balloting System of 1947

The 1947 balloting system reduced the voter to being only allowed to vote for one candidate,¹⁷⁰ even though the number of candidates to be elected in each electoral district varied from three to five,¹⁷¹ “making it impossible for voters to choose both a man and a woman.”¹⁷² The 1947 balloting system, in contrast to the 1946 balloting system, aimed to “attract to the House of Councillors men, prominent in various professions who can contribute their technical experience to the legislative process and would be essentially non-partisan in outlook.”¹⁷³ It also appeared to eliminate those without financial means. The 1947 House of Councillors Election Law required a deposit of 5,000 yen, to be forfeited to the Japanese government, should the candidate not have received at least one-tenth of total votes.¹⁷⁴ The stated purpose: “[T]o eliminate candidates who have no hope of being elected, in this way the voters should be less confused by a great number of candidates and the government’s expenses for the campaign will be smaller.”¹⁷⁵ Instead, the confusion resulted in 10.37% of the ballots rejected in the 1947 House of Councillors election.¹⁷⁶

¹⁶⁶ Occupation of Japan, policy and progress, Appendix 30, 140- at 141, April 25, 1945 statement by General MacArthur.

¹⁶⁷ REBECCA BOGGS ROBERTS, *SUFFRAGIST IN WASHINGTON DC: THE 1913 PARADE AND THE FIGHT FOR THE VOTE*, 135 ().

¹⁶⁸ Williams, 176. More research is required to ascertain Atcheson’s subsequent influence, he was killed on August 17, 1947 in an aircraft accident off Hawaii. RICHARD B. FINN, *WINNERS IN PEACE: MACARTHUR, YOSHIDA, AND POSTWAR JAPAN*, 147 (1992).

¹⁶⁹ Williams, addressing 2 May 1947 “Diet report – “Filibuster on the Election Law Amendment” 177

¹⁷⁰ Alfred Hussey Files, Library of Congress, 17-B-2-8 , 17-B-2-45 Article 19 of Law for Election of Members of House of Representatives (for 1947 elections).

¹⁷¹ Alfred Hussey Files, Library of Congress, 17-B-2-8.

¹⁷² Sally Ann Hastings, *Women Legislators in the Postwar Diet*, in ANNE E. IMAMURA (ed) *RE-IMAGING JAPANESE WOMEN*, 275 (1996).

¹⁷³ United States, Department of State. Division of Research for Far East. “1947 Japanese House of Councillors Election: An Analysis of the Conduct and Results of the House of Councillors election, including a discussion of significant developments in the operation of the upper house in the post-election period.” OIR Report N. 4334, January 15, 1948, vi.

¹⁷⁴ Alfred Hussey Files, Library of Congress, 17-B-2-23, Article 55

¹⁷⁵ Alfred Hussey Files, Library of Congress, 17-B-2-24, “NOTE.”

¹⁷⁶ United States, Department of State. Division of Research for Far East. “1947 Japanese House of Councillors Election: An Analysis of the Conduct and Results of the House of Councillors election, including a discussion of significant developments in the operation of the upper house in the post-election period.” OIR Report N. 4334, January 15, 1948, 12 fn 1.

In 1947, under the new balloting system, there was a more than 50% drop in women elected to the House of Representatives (from over 30 in 1946 to 15 in 1947).¹⁷⁷ Furthermore, under the new balloting system, in the first elections for women for the House of Councillors, prefectural assemblies, city assemblies, and town and village assemblies, women won only 10; 22; 94 (including 16 in Tokyo); and 677 seats, respectively.¹⁷⁸ Women were 818 of the 232,864 officials elected to public office in April 1947;¹⁷⁹ that is, .35% of all seats went to women and over 99% of those elected were men.

In addition to an altered balloting system, the 1947 elections also had another restriction - four elections within the space of one month: April 5 (elections for the local executives, mayors, and governors), April 20 (the first House of Councillors election), April 25 (elections for the House of Representatives), and April 30 (elections for members of prefectural and municipal assemblies).¹⁸⁰ The rationale for not holding the elections for the House of Representatives and the House of Councillors on the same day was the “heavy work involved in screening the purge questionnaire of the two Houses.”¹⁸¹ Given that the House of Councillors election was not postponed by a mere five days to the same day as the elections of the House of Representatives creates doubt as to whether the election machinery was interested in facilitating voting or whether it was more interested in making it too difficult for the ordinary person in a post-war environment of deprivations to vote. The U.S. State Department opined that the lower turn-out of voters was due to (1) calling voters to the polls four times in April 1947, (2) “lack of understanding of balloting system,” and (3) “belief that the upper house was not as important as the lower house.”¹⁸² The State Department failed to address whether “handicaps of the transportation difficulties” in Japan, acknowledged in 1946,¹⁸³ still existed in 1947. The State Department, in evaluating the 1947 elections, failed to conduct any gender analysis, to include whether the changed election law and multiple elections had a disparate effect on women. The State Department failed to state the number of women voting and the number of women elected.¹⁸⁴

¹⁷⁷ Van Staavaren, 151

¹⁷⁸ Van Staavaren, 151

¹⁷⁹ Van Staavaren, 151

¹⁸⁰ United States, Department of State. Division of Research for Far East. “1947 Japanese House of Councillors Election: An Analysis of the Conduct and Results of the House of Councillors election, including a discussion of significant developments in the operation of the upper house in the post-election period.” OIR Report N. 4334, vi and 18 (January 15, 1948).

¹⁸¹ Alfred Hussey Files, Library of Congress, 17-B-2-8.

¹⁸² United States, Department of State. Division of Research for Far East. “1947 Japanese House of Councillors Election: An Analysis of the Conduct and Results of the House of Councillors election, including a discussion of significant developments in the operation of the upper house in the post-election period.” OIR Report N. 4334, 47 (January 15, 1948).

¹⁸³ Alfred Hussey Files, Library of Congress, 17-A-3-25.

¹⁸⁴ United States, Department of State. Division of Research for Far East. “1947 Japanese House of Councillors Election: An Analysis of the Conduct and Results of the House of Councillors election, including a discussion of significant developments in the operation of the upper house in the post-election period.” OIR Report N. 4334, January 15, 1948, Appendix B.

6.3 Anti-Women Politician Smear Campaigns

The U.S. State Department evaluation of the elections in Japan also failed to address the political psychological violence “smear campaigns” against women politicians.

Campaigns to “smear” women politicians extended to at least one in-person campaign to General MacArthur. General MacArthur recounts a call from “an extremely dignified . . . Japanese legislative leader,” a Harvard Law School graduate.¹⁸⁵

- Male Legislative Leader: “I regret to say that something terrible has happened. A prostitute, Your Excellency, has been elected to the House of Representatives.”
- General MacArthur: “How many votes did she receive?”
- Male Legislative Leader: “256,000.”
- General MacArthur: “Then I should say there must have been more than her dubious occupation involved.”¹⁸⁶

The April 1946 election resulted in “hundreds of unknowns . . . elected to replace the old order of the Diet, 80% of which had been handpicked by Tojo during World War II.”¹⁸⁷ Whether the Harvard Law School graduate who was the male legislative leader making the personal appeal to General MacArthur was among those handpicked is unknown.

The campaigns to “smear” women politicians were not limited to personal appeals to General MacArthur, but publicly “smeared” women in the media. A reporter noted: “Shortly after the election of April 10, 1946 . . . a Tokyo suburban newspaper proclaimed to its readers that 30 of those women [elected] were former prostitutes and mistresses.”¹⁸⁸ The response from the Occupation: “The WAC [Women’s Army Corps] censorship officer who saw the startling announcement after publication called in the editor and made him publish an apology and print extensive biographies of the women to prove he had lied!”¹⁸⁹

7.0 CIVIL CODE

The drafter of the women’s rights provisions of the Constitution, Beate Sirota, in arguing that the “only safeguard” for women’s rights “was to specify these rights in the constitution,” believed that “the bureaucrats who would be assigned to write those statutes for the Civil Code would . . . be so conservative that they could not be relied upon to extend adequate rights to women.”¹⁹⁰

¹⁸⁵ MacArthur, 305.

¹⁸⁶ MacArthur, 305; the SCAP election analysis indicates that the woman receiving the highest number of votes was Michiko Yamazaki, a Social Democrat, with an aggregate of 191, 293 votes. The male receiving the highest number of votes received 211,146 votes. 17-A-3-23, Election Report, “The Women’s Vote.”

¹⁸⁷ Courtney Whitney, 263. 17-A-2-1, Alfred Hussey Files, Library of Congress, 22 April 1946, Memo for the Supreme Commander, “Election Report.”

¹⁸⁸ John La Cerda, 142.

¹⁸⁹ John La Cerda, 142.

¹⁹⁰ Sirota, *Only Woman*, 115.

Despite the usual practice of imposing U.S. will, Alfred Oppler, the U.S. Occupation lawyer who oversaw the revision of the Civil Code, maintained that while the “new constitutional principles” regarding equal rights necessitated implementing legislation, and that “[i]t was clear that the authoritative feature of the ‘house’ system were doomed to disappear,” he stated “the Occupation was extremely reluctant to take initiative with regard to this legislation (the Civil Code).”¹⁹¹ His reasoning: “[H]ow far the system as such could be continued in a modified form was a subtle and controversial question, the decision which appeared wise to leave to the Japanese themselves.”¹⁹² He determined: “This was one of the most important instances where the Occupation exercised self-restraint.”¹⁹³

With an influential Occupation male “restraining” himself (arguably fulfilling Sirota’s fear that those drafting women’s rights legislation “could not be relied upon to extend adequate rights to women”), Japanese women exercised their power. After discussions “among the Japanese in planning committees, in the press, and in public hearings of the Diet,”¹⁹⁴ “the final decision reached was a complete abolition of the house system.”¹⁹⁵ Oppler concedes: “This outcome was considerably influenced by the vigorous arguments of leading women.”¹⁹⁶ He then explains, “It should be understood that the women are the largest group to benefit from such a radical change in the sphere of domestic life”;¹⁹⁷ an explanation that explains the exercise of power and the consequences of having the ability to exercise power, or not. The Joint Press Conference of Civil Information and Education Section and Government Section, of 1 August 1947, proclaimed:

Certainly of all the legislation which has been prepared to implement the guarantees of the New Constitution, this revision of the Civil Code has had the most penetrating and far reaching results. It has uprooted the legal “house” system under which for centuries junior members of families had been subjected to grave limitations of fundamental personal rights, and it has also recognized, as never before had been the case in Japanese law, the equality of husband and wife in all family matters, including inheritance.¹⁹⁸

The road to the Civil Code involved two codes. One was the “Bill for the Temporary Adjustments of the Civil Code Pursuant to the Enforcement of the Constitution of Japan” and the second was the “Civil Code.” The “temporary measures” were to “come into

¹⁹¹ Alfred C. Oppler. *Reform of Japan’s Legal and Judicial System under Allied Occupation*, 16.

¹⁹² Alfred C. Oppler. *Reform of Japan’s Legal and Judicial System under Allied Occupation*, 16.

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¹⁹⁴ Alfred C. Oppler. *Reform of Japan’s Legal and Judicial System under Allied Occupation*, 16.

¹⁹⁵ Alfred C. Oppler. *Reform of Japan’s Legal and Judicial System under Allied Occupation*, 16.

¹⁹⁶ Alfred C. Oppler. *Reform of Japan’s Legal and Judicial System under Allied Occupation*, 16.

¹⁹⁷ Alfred C. Oppler. *Reform of Japan’s Legal and Judicial System under Allied Occupation*, 16.

¹⁹⁸ SUPREME COMMANDER FOR THE ALLIED POWERS. [PREPARATORY MATERIAL FOR THE REVISION OF JAPANESE CIVIL LAW: PREPARED IN THE HEADQUARTERS OF THE AMERICAN MILITARY GOVERNMENT FOR JAPAN]. (1947).

force as from the day of the enforcement of the Constitution of Japan.”¹⁹⁹ The Constitution of Japan was not promulgated until November 3, 1946 and did not come into effect until May 3, 1947. The “temporary measures” were so temporary that the Bill stated: “This statute shall lose its effect on and after the 1st day of January 1948.”²⁰⁰ According to a Joint Press Conference on 1 August 1947, “In terms of the direct effect worked upon the lives and everyday activities of the people of Japan, the enforcement on May 3d, 1947, of the brief ten-article Law for the Temporary Adjustments of the Civil Code pursuant to the enforcement of the Constitution of Japan, was an event comparable to the promulgation of the Constitution itself.”²⁰¹ On the first Anniversary of the Constitution, General MacArthur issued a message providing a summary of achievements of the first year under the Constitution. On the list of achievements, he listed as number nine “important revisions of the Civil Code,” which he proclaimed “emphasized individual dignity and the essential equality of the sexes.”²⁰²

The Bill for the Temporary Adjustments of the Civil Code Pursuant to the Enforcement of the Constitution of Japan was a two-page document with ten articles.²⁰³ Its stated purpose: “[T]o provide temporary measures with regard to the Civil Code which are founded upon individual dignity and the essential equality of the sexes, pursuant to the enforcement of the Constitution of Japan.”²⁰⁴

Article 3 explicitly eliminated the “house” system stating: “Provisions relating to the head of the house and members of a house and all other regulations of houses shall not apply.”

The dismantling of the house included eliminating the applicability of “provisions which, on the ground of the individual being a wife or mother, restrict legal capacity, etc” (Article 2), that “[p]rovisions relating to the succession to the Headship of a house shall

¹⁹⁹ SUPREME COMMANDER FOR THE ALLIED POWERS. [PREPARATORY MATERIAL FOR THE REVISION OF JAPANESE CIVIL LAW: PREPARED IN THE HEADQUARTERS OF THE AMERICAN MILITARY GOVERNMENT FOR JAPAN]. *Bill for the Temporary Adjustments of the Civil Code Pursuant to the Enforcement of the Constitution of Japan*, Supplementary Provisions (1947).

²⁰⁰ SUPREME COMMANDER FOR THE ALLIED POWERS. [PREPARATORY MATERIAL FOR THE REVISION OF JAPANESE CIVIL LAW: PREPARED IN THE HEADQUARTERS OF THE AMERICAN MILITARY GOVERNMENT FOR JAPAN]. *Bill for the Temporary Adjustments of the Civil Code Pursuant to the Enforcement of the Constitution of Japan in American Military Government for Japan*, Supplementary Provisions, (1947).

²⁰¹ SUPREME COMMANDER FOR THE ALLIED POWERS. [PREPARATORY MATERIAL FOR THE REVISION OF JAPANESE CIVIL LAW: PREPARED IN THE HEADQUARTERS OF THE AMERICAN MILITARY GOVERNMENT FOR JAPAN]. (1947)

²⁰² SCAP Report May 1948, 29.

²⁰³ SUPREME COMMANDER FOR THE ALLIED POWERS. [PREPARATORY MATERIAL FOR THE REVISION OF JAPANESE CIVIL LAW: PREPARED IN THE HEADQUARTERS OF THE AMERICAN MILITARY GOVERNMENT FOR JAPAN]. (1947)

²⁰⁴ SUPREME COMMANDER FOR THE ALLIED POWERS. [PREPARATORY MATERIAL FOR THE REVISION OF JAPANESE CIVIL LAW: PREPARED IN THE HEADQUARTERS OF THE AMERICAN MILITARY GOVERNMENT FOR JAPAN]. *Bill for the Temporary Adjustments of the Civil Code Pursuant to the Enforcement of the Constitution of Japan in American Military Government for Japan*, Article 1. (1947).

not be applied” (Article 7), and that “provisions of other statutes which are contrary to the provisions of this statute shall not apply” (Article 10).

The dismantling of the house further included that:

- An adult shall not be required to obtain parental consent for his or her marriage, divorce, adoption or dissolution of adoption. (Article 4)
- A husband and a wife shall live together at a place determined by their mutual agreement. The application of provisions concerning the regulation of the property of the husband and the wife which are contrary to the essential equality of the sexes shall be excluded. In cases where there are extremely unchaste acts on the part of either spouse, the other may bring an action for divorce on that ground. (Article 5)
- Parental power shall be exercised jointly by the father and the mother. If a father and a mother are divorced or if a father has acknowledged a child, the person who exercises parental power must be determined by the mutual agreement of the father and the mother. When mutual agreement is not reached or when it cannot be reached, the court shall make the determination. The court may change the person who exercises parental power in the interest of the child. (Article 6)

The Temporary Bill also addressed inheritance (Article 8 and 9).

Numerous issues required resolution for the post-interim Civil Code. I provide here three of numerous examples to illustrate issues requiring resolution. One was the existence and degree of obligations and duties to “render mutual assistance and support” among relatives, to include non-blood relatives such as a widowed wife.²⁰⁵ A second was “The Capacity of an Illegitimate Child to Inherit.” Disputes raged as to whether “an illegitimate child is entitled to one-half of the share in his (sic) father’s estate which would go to a legitimate off-spring,” or “an illegitimate child should have no rights of inheritance,” or “he (sic) should be subject to no discrimination and should inherit a full share in his ancestor’s estate.” A third was the “Effects of Marriage on Property,” given that “the wife who normally does not hold in her own name the property acquired as a result of her participation in the family business.”²⁰⁶

In 1947, the Civil Code²⁰⁷ replaced the interim Code. Book I of Civil Code of Japan

²⁰⁵ SUPREME COMMANDER FOR THE ALLIED POWERS. [PREPARATORY MATERIAL FOR THE REVISION OF JAPANESE CIVIL LAW: PREPARED IN THE HEADQUARTERS OF THE AMERICAN MILITARY GOVERNMENT FOR JAPAN]. *Revisions of Civil Code, Joint Press Conference of Civil Information and Education Section and Government Section, Statement Made at 1100 hours on 1 August 1947 [Press release]* (1947).

²⁰⁶ SUPREME COMMANDER FOR THE ALLIED POWERS. [PREPARATORY MATERIAL FOR THE REVISION OF JAPANESE CIVIL LAW: PREPARED IN THE HEADQUARTERS OF THE AMERICAN MILITARY GOVERNMENT FOR JAPAN]. *Revisions of Civil Code, Joint Press Conference of Civil Information and Education Section and Government Section, Statement Made at 1100 hours on 1 August 1947 [Press release]* (1947).

²⁰⁷ Civil Code (Law No. 222 of 1947, Official Gazette 520, December 22, 1947). [Law No. 222 of 1947,

addresses “General Provisions.” Article 1-2 states: “This Code shall be construed from the standpoint of the dignity of individuals and the essential equality of the sexes.” Howard Meyers contends: “The Civil Code revision made such important changes in the ‘Family System’ as depriving the head of a house of his power to prevent a marriage if the member of the family is of age; cancelling his right to determine where members of the house should reside, allowing his wife to hold property in her own name.”²⁰⁸

Yet Kurt Steiner, the Chief of the Civil Affairs and Civil Liberties Branch of the Legislative Justice Division of the SCAP Headquarters, illustrates in a 1950 legal review article how the Civil Code failed women, to include, but not limited to, “voluntary” forfeiture of inheritance, “adoption” child trafficking, and “marriages on probation.”²⁰⁹ When preparing the post-interim Civil Code, one issue was whether there should exist a “Procedure for Obtaining a Consensual Divorce” to “ensure that a genuine desire for divorce is present in the minds of both parties, and that no undue or improper pressure has been applied.”²¹⁰ Consensual divorce, in “most of the cases in which the husband wanted a divorce,” were the result of “strong persuasion bordering on coercion.”²¹¹ Oppler was “aware of the danger that [divorce by consent] would continue to work to the disadvantage of the wife due to her *de facto* subordinate position.”²¹² Journalist La Cerda observed: “Divorce is easy for the man. He and his wife go to the local public registrar’s office and sign a statement of willingness to go their separate ways.”²¹³ La Cerda opined: “In bringing democracy to Japan’s womanhood, consideration should be given to a change in their divorce customs.”²¹⁴ Yet, following his policy of “self-restraint,” Oppler refused to “object to the retention of the traditional system of divorce **by** consent”

as amended by Law No. 260 of 1948 and Law No. 141 of 1949, art. 90].

²⁰⁸ Howard Meyers, *Revisions of the Criminal Code of Japan during the Occupation*, 25 WASH. L. REV. & ST. B. J. 104, 124, fn 34 (1950) (Law For Partial Amendments to the Civil Code, No. 222 of 1947).

²⁰⁹ Kurt Steiner, *Post War Changes in the Japanese Civil Code*, 25 WASH. L. REV. & ST. B.J. 286, 307 & 309 (1950).

²¹⁰ SUPREME COMMANDER FOR THE ALLIED POWERS. [PREPARATORY MATERIAL FOR THE REVISION OF JAPANESE CIVIL LAW: PREPARED IN THE HEADQUARTERS OF THE AMERICAN MILITARY GOVERNMENT FOR JAPAN]. *Revisions of Civil Code, Joint Press Conference of Civil Information and Education Section and Government Section, Statement Made at 1100 hours on 1 August 1947 [Press release]* (1947).

²¹¹ Hideo Tanaka, *Legal Equality among Family Members in Japan--The Impact of the Japanese Constitution of 1946 on the Traditional Family System*, 53 S. CAL. L. REV. 611, 625 (1980).

²¹² Hideo Tanaka, Alfred C. Oppler, *Legal Reform in Occupied Japan: A Participant Looks Back*, 9 Law Japan 144 (1976) at 146, citing page 118.

²¹³ John La Cerda, 57.

²¹⁴ John La Cerda, 57.

although he understood it harmed women.”²¹⁵

A review of the 2016 CEDAW Committee’s Observations on Japan highlights the gaps that harm women. For example, the 2016 CEDAW Committee decried the issues resulting from the absence of legislation that govern the distribution of property upon dissolution of marriage in the State party. The CEDAW Committee found that, as a result of this absence of legislation:

- Women are placed at a disadvantage because negotiations and agreements on property distribution happen outside legal regulation where power imbalances between women and men exist.²¹⁶
- Most divorcing women lack the necessary information and means to demand disclosure of their husbands' financial situation, including business and career assets, as the law does not provide any procedural tools and guidelines.²¹⁷
- Cases where no agreement is reached for paying child support, in which cases children are left destitute.²¹⁸

If the gaps identified by CEDAW Committee are a result of Japanese and Occupation “bureaucrats . . . so conservative that they could not be relied upon to extend adequate rights to women,”²¹⁹ the question for future research is how to recruit, employ, and retain bureaucrats who can be relied upon to extend adequate rights to women. The answer may be as easy as asking, during the hiring interview, the question: “How can you be relied upon to extend adequate rights for women?”

8.0 LABOR LAW

In late November 1945, the Occupation issued SCAPIN 360 “Employment Policies” of 28 November 1945. SCAPIN 360 “[d]irects Japanese Government to insure that no discrimination be exercised or permitted for or against any worker either in private or government work, in wages, hours, or working conditions by reasons of nationality, creed, or social status.”²²⁰ The November 1945 SCAPIN did not prohibit discrimination based on sex/gender. Instead, it ignored the reality of discrimination in the workplace against Japanese women.

²¹⁵ Hideo Tanaka & Alfred C. Oppler, *Legal Reform in Occupied Japan: A Participant Looks Back*, 9 LAW JAPAN 144, 146, citing page 118 (1976).

²¹⁶ para 48a.

²¹⁷ para 48b.

²¹⁸ para 48c.

²¹⁹ Sirota, *Only Woman*, 115.

²²⁰ Catalog of SCAP directives, at 48.

Sirota did not. Her draft of the Constitution stated: “Women shall have the right of access to all professions and occupations, including the right to hold office, and shall receive the same compensation as men for equal work.”²²¹ Yet by 25 June 1946, when the Diet received the draft Constitution, provisions providing right of access to all professions and occupations, the right to hold office, and the right to equal pay were eliminated. The only vestiges of this language were “Every person shall have the freedom to . . . choose his occupation to the extent that it does not interfere with the public welfare.”²²²

In February 1946, a U.S. Advisory Committee on Labor, composed of all Government officials “who were labor experts in all phases of labor problems” and a representative of the AFL (the CIO representative “was unable to make the trip”) visited Japan.²²³ The U.S. Advisory Committee on Labor issued its report in April 1946.²²⁴ The Committee was composed of twelve experts who studied Japan’s labor situation for five months.²²⁵ The sole woman expert sent was Helen Mears. The report described Helen Mears as an expert in labor legislation and “women’s problems” as well as a lecturer on Japan at the Civil Affairs Training School.”²²⁶

The U.S. Labor Delegation to Japan, contrary to the assumptions of SCAPIN 360, found that “[t]raditionally Japanese women have taken part in the economic life of Japan in very great numbers. It has been estimated that more than 80 percent of all Japanese women between the ages of 15 and 59 work for wages or in family employment.”²²⁷ The 1946 Labor Delegation further found: “Women have taken their place beside men in the farms, having dominated sericulture, have even worked at such heavy manual jobs as mining and road building, and – in the immediate pre-war period – they made up almost half of the total industrial workers in factories employing ten or more.”²²⁸ Yet the Delegation endangered women by providing recommendations that not only resulted in women being terminated from their jobs, but also reduced the earning ability of women.

The 1946 Commission opined that “restrictions on the use of women in heavy work [should be] extended,”²²⁹ “the exceptions which permit women to work underground in certain mines should be eliminated,”²³⁰ “further restrictions should be placed on the use of women for heavy work during pregnancy,”²³¹ and “an absolute limit of nine hours work per day, six days per week should be prescribed for women” while acknowledging that “provisions proposed elsewhere would permit adult males to work longer hours under certain conditions, with premium pay.”²³²

²²¹ Hellegers, 591, Article 26 of the first draft.

²²² Article XX, June SCAP report, p. 33?

²²³ OCCUPATION OF JAPAN, POLICY AND PROGRESS, 44.

²²⁴ OCCUPATION OF JAPAN, POLICY AND PROGRESS, 44.

²²⁵ Report, find exact page

²²⁶ Report, find exact page

²²⁷ Advisory committee on Labor, 93.

²²⁸ Advisory committee on Labor, 93.

²²⁹ Committee Report, p. 17.

²³⁰ U.S. Labor Committee at 94.

²³¹ At 94.

²³² At 95.

By 1951, the Japanese Management Association recognized that “protective” measures served to advantage men and harm women. The Japanese Management Association stated: “In countries with a large labor population, cumbersome though well-meant intentions of protecting the weaker sex are apt to result in increasing difficulty for women to find employment, as is now the tendency in Japan.”²³³ The Japanese Management Association opined that “protective measures in the law are desirable and necessary;” however, the “current application of these provisions without due consideration of prevailing work conditions” as well as “the complicated procedures required by regulation in employing women have made it more advantageous to employ men in many cases even when the nature of the work is best suited for women.”²³⁴

The Labor Standards Law expressly prohibited women (not men) from “dangerous” work,²³⁵ night work,²³⁶ overtime work,²³⁷ and working in underground coal-mines.²³⁸ The Occupation further eliminated the ability of unions to negotiate for overtime work and pay for its women members.²³⁹

The Occupation endangered women’s lives through these prohibitions against women workers. The Japan Management Association in 1951 found that “with the exception of a limited few cases, it is found generally impossible for Japanese industry to pay sufficiently high hourly wages enabling workers to earn a living within the restricted work day.”²⁴⁰ The government’s prohibitions against women working resulted in women losing a bonus of 25% of base wages.²⁴¹

Japanese women tried to fight back. In April 1948, the SCAP Summation No. 31 of Non-Military Activities in Japan reported on the “Niigata women stevedores, who must be released from their jobs 1 May as a result of the enforcement of the Labor Standards Law.”²⁴² The women stevedores protested the loss of their jobs and sent delegates to the Minister of Labor and the Women’s and Minors’ Bureau to request “revision of the provisions on weight lifting.”²⁴³ Instead of protecting women by fighting for women to keep their jobs rather than losing them in the name of “protecting women,” the Bureau stated that “the law must be upheld and that adjustments had been made in other ports.”²⁴⁴ In contrast, despite a law requiring equal pay for equal work, the government failed to uphold and enforce equal pay. The U.S. commission had found that the

²³³ KENZAI DOYU KAI (THE JAPAN MANAGEMENT ASSOCIATION), POSTWAR ECONOMY OF JAPAN UNDER THE ANTI-MONOPOLY LAW, TRADE ASSOCIATION LAW, AND LABOR STANDARDS LAW, 18 (1951).

²³⁴ THE JAPAN MANAGEMENT ASSOCIATION, 18.

²³⁵ Articles 63 and 49.

²³⁶ Article 62, see also the International Labor Office 1948 Night Work (Women) Convention.

²³⁷ Article 32.

²³⁸ Article 64.

²³⁹ Article 61.

²⁴⁰ THE JAPAN MANAGEMENT ASSOCIATION, 15.

²⁴¹ Article 37.

²⁴² SCAP SUMMATION NO. 31 OF NON-MILITARY ACTIVITIES IN JAPAN, 218 (April 1948).

²⁴³ SCAP SUMMATION NO. 31 OF NON-MILITARY ACTIVITIES IN JAPAN, 218 (April 1948).

²⁴⁴ SCAP SUMMATION NO. 31 OF NON-MILITARY ACTIVITIES IN JAPAN, 218 (April 1948).

“custom” of unequal pay was “not only inconsistent with sound labor policy, but also contradicts a general objective of the Occupation – the removal of legal or institutional discrimination, which tends to the subordination of women.”²⁴⁵ (In the U.S., it took until 1963 for a U.S. Equal Pay Act.²⁴⁶) Yet according to a July 1948 SCAP report, inspections by 45 labor standards offices found only nine cases “dealing with equal wages to men and women for equal work,”²⁴⁷ despite the well-known pay disparities. The U.S. Committee found: “One of the worst features of Japan’s traditional wage structure is the general practice of paying lower wages to women than to men, even when the duties of the job are identical.”²⁴⁸ As of 1948, the Occupation found that “the female wage is about 47% of that of male.”²⁴⁹ Others found the wage disparity to be much higher. A U.S. journalist exclaimed: “The disparity between female and male wages is astonishing. In most plants, men are paid 200% more than women.”²⁵⁰

The government instituted circumventions and exceptions, which did not “protect” women from dangerous work, but did grant employers the legal ability to pay women even less. The June 1948 SCAP Report revealed that the prohibition against women engaging in hazardous occupations and night work resulted in 15,000 vacancies.²⁵¹ To circumvent the prohibition, by June 1948, the government amended the Labor Standards Law Apprenticeship Ordinance of October 1947 to permit “women subject to provisions of certain hazardous occupation regulations to be employed as apprentices under specific standards.”²⁵² Another exception created a loophole for employers to have the ability to force women to work overtime in office work that involved the creation of business documents.²⁵³

The “protective legislation” harmed women who had worked as underground coal miners. As a result of the legislation, the women coal miners lost jobs as underground coal miners. The government then froze women out of re-employment as surface coal miners. As SCAP reports, “Since April 1947 there has been a surplus of surface workers in the coal mines, necessitating a cabinet order freezing coal mine employment as of 30 April 1948.”²⁵⁴

To fight against wage discrimination, some teachers went on strike. When teachers realized that the government was not going to honor its legal obligation to pay women and men equally, “(t)eachers of Hyogo and Kyoto Prefectures, including university and

²⁴⁵ SUPREME COMMANDER FOR THE ALLIED POWERS. ADVISORY COMMITTEE ON LABOR. FINAL REPORT: LABOR POLICIES AND PROGRAMS IN JAPAN, 12 (1946).

²⁴⁶ PUB. L. 88-39, 77 STAT 56 (June 10, 1963).

²⁴⁷ JULY 1948 SCAP REPORT, 224.

²⁴⁸ SUPREME COMMANDER FOR THE ALLIED POWERS. ADVISORY COMMITTEE ON LABOR. FINAL REPORT: LABOR POLICIES AND PROGRAMS IN JAPAN, 12 (1946).

²⁴⁹ MAY 1948 SCAP REPORT, 72.

²⁵⁰ John La Cerda, 131-132.

²⁵¹ JUNE 1948 SCAP REPORT, 223.

²⁵² JULY 1948 SCAP REPORT, 225.

²⁵³ Article 61.

²⁵⁴ SCAP SUMMATION OF NON-MILITARY ACTIVITIES IN JAPAN, APRIL 1948, NO. 35, 328.

college professors, went on strikes when prefectural authorities rejected their demands for . . . elimination of pay differential by sex.”²⁵⁵

Women recognized that the exclusion of women from political power negatively influenced the laws addressing women. For example, when the minimum wage law was drafted to provide men triple the amount of minimum wage as women,²⁵⁶ women addressed the exclusion of women in decision-making that affected women:

- “[W]omen's committees must be recognized in all the labor problems including the wage problem. . . I firmly oppose men's feudalistic way of handling matters which ignores women's opinions. Hitherto, women have been shut out from expressing opinions, but hereafter rightful demands are welcome.”
- "The absence of women in the Wage Committee is the main reason for a bill being written against women's interests. The proposal does not recognize any rights of working women. It is nothing but a reactionary plan to confine women to the family system as members to be supported, receiving discriminatory treatment as before for the benefit of the capitalists.”²⁵⁷

Whether U.S. should continue practices, that continue to today, of dispensing “expert” recommendations deserves to be questioned.

9.0 CONCLUSION

In 1964, General MacArthur maintained: “Of all the reforms accomplished by the occupation in Japan, none was more heartwarming to me than this change in the status of women.”²⁵⁸

As we look towards the 200th anniversary of the 19th Amendment, we must ask of ourselves whether the contention of feminist international relations scholar J. Ann Tickner that “[g]overnments are generally reluctant to make women’s human rights part of their foreign policies . . . in supporting their empowerment”²⁵⁹ will remain true. We must address whether the U.S. Occupation experience by “female personnel, to the extent that they became too closely associated with their external constituency and with women’s rights issues, ran the risk of criticism and censure from their SCAP superiors

²⁵⁵ May 1948 SCAP Report, 278.

²⁵⁶ GENERAL HEADQUARTERS SUPREME COMMANDER FOR THE ALLIED POWERS ALLIED TRANSLATOR AND INTERPRETER SECTION PRESS TRANSLATIONS, NO. 1129, ECONOMIC SERIES: 259, *Item 1 Women's Voices Against Government Wage Draft - Yomiuri Hochi Shimbun - 3 Feb 46*. Translator: R. Shibata, 2, (February 4, 1946)
https://collections.dartmouth.edu/teitexts/Press_Translations_Japanese/diplomatic/economic-1129-diplomatic.html (accessed 21 April 21, 2019).

²⁵⁷ *Item 1 Women's Voices Against Government Wage Draft - Yomiuri Hochi Shimbun - 3 Feb 46*. Translator: R. Shibata, 2 (4 February 1946).

²⁵⁸ MacArthur, 305.

²⁵⁹ J. ANN TICKNER, *A FEMINIST VOYAGE THROUGH INTERNATIONAL RELATIONS*, 145 (2014).

and of psychological harassment, in the form of malevolent joking behavior, from their male colleagues”²⁶⁰ is and will remain the norm for both women and men. As we look in the century ahead, in 2120, will discrimination and violence against women continue to be normalized or will all States (including the U.S.) have not only ratified, but also implemented, the Convention on the Elimination Against All Forms of Discrimination Against Women (and its Optional Protocol)?

²⁶⁰ OCCUPATION OF JAPAN: EDUCATION AND SOCIAL REFORM, 418.

Fights for Rights:
How Forgetting and Denying Women’s Struggles for Equality
Perpetuates Inequality

Jill Elaine Hasday*

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INTRODUCTION

In 1922, Alice Paul, the leader of the National Woman’s Party, was fresh from the triumph of winning the Nineteenth Amendment, which prohibited sex-based restrictions on voting. But she knew that women were still not equal to men under the law or in society. The *Washington Times* asked her at the end of 1922 to predict how “modern feminism” would shape “the course of history in the next 100 years.” Paul predicted that it would “not require one hundred years to elect a woman President of the United States” and that women would “comprise half of the membership of Congress” before 2023. She forecast that women and men would have the same economic opportunities by 2023. In short, she was hoping and striving for a world in which women participate “equally in the control of government, of family, and of industry.”¹ In 1923, Paul launched her campaign for the Equal Rights Amendment she had drafted.² Paul wanted the Constitution to declare that “Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction.”³

America has not reached many of the milestones that Paul thought would already be behind us. We have never had a female President or Vice President. Women currently fill less than a quarter of the House and less than a quarter of the Senate, and female membership in Congress—102 out of 435 Representatives and 24 out of 100 Senators—has never been higher. The median annual earnings for a woman working full-time and year-round in 2017 were just 80.5% of the median annual earnings for a male full-time, year-round worker.⁴ Less than seven percent of the chief executives at Fortune 500 companies are women.⁵ Women comprise only twenty percent of the equity partners in the two hundred largest law firms.⁶ After almost a century of feminist advocacy, our Constitution still does not include an explicit commitment to sex equality.

Yet Americans often do not think in these terms when reflecting on

¹ Alice Paul, *Women Will Be Real Equals in 2023*, WASH. TIMES, Dec. 28, 1922, at 24 (emphasis omitted).

² See Alice Paul, *An Approaching Anniversary*, CHRISTIAN SCI. MONITOR, June 2, 1923, at 20; *Women Adopt Form for Equal Rights*, N.Y. TIMES, July 22, 1923, at 1.

³ S.J. Res. 21, 68th Cong. (1923) (internal quotation marks omitted); see also H.R.J. Res. 75, 68th Cong. (1923).

⁴ See ARIANE HEGEWISCH, INST. FOR WOMEN’S POLICY RESEARCH, PUB. NO. C473, THE GENDER WAGE GAP: 2017: EARNINGS DIFFERENCES BY GENDER, RACE, AND ETHNICITY 1 (2018).

⁵ See Amy Cortese, *Strength in Numbers*, CRAIN’S N.Y. BUS., June 17, 2019, at 1.

⁶ See DESTINY PEERY, REPORT OF THE 2018 NAWL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 1–2, 11 (2018).

women's struggles for equality. Supreme Court Justices, politicians, textbook authors, and other commentators creating and disseminating the stories that America tells about itself tend to focus on the improvements in women's status over time, rather than what remains undone. Americans sometimes even proclaim that sex equality has already been achieved.

For example, Robert Bork drew on this tradition in his 1996 bestseller, *Slouching Towards Gomorrah*. Bork was a former Supreme Court nominee, federal appellate judge, solicitor general, and law professor.⁷ He advised women to abandon feminism because "the movement no longer has a constructive role to play; its work is done. There are no artificial barriers left to women's achievement."⁸

This Article was inspired by the upcoming centennial of the Nineteenth Amendment's ratification in 1920. It explores how America misremembers women's unfinished struggles for equal rights and considers how remembering those struggles more frequently and more accurately could help the nation make strides toward sex equality.

Influential Americans frequently exclude women's struggles for equality from the stories they tell about the United States and its history, attributing improvements in women's status to men's spontaneous enlightenment rather than women's concerted efforts to better their lives. Part I traces that marginalization through Supreme Court opinions, official and scholarly pronouncements on constitutional history and constitutional law, and the stark underrepresentation of women in national memorials.

When America does remember women's struggles for equality, the remembrances often overstate the changes over time and forget what remains undone—sometimes to the point of insisting that sex equality has already been established. This sanitization is the focus of Part II, which examines Supreme Court opinions and K-12 textbooks. These two prominent sources of America's stories about itself began announcing the achievement of sex equality before the Nineteenth Amendment was ratified and have continued that tradition. For more than a century, many of the Court's rosy pronouncements have appeared in decisions denying women equal rights. The Justices' own actions contradict their assurances that America has left sex discrimination behind. But the Court has long relied on proclamations about women's progress to defend decisions impeding

⁷ See Ethan Bronner, *A Conservative Whose Supreme Court Bid Set the Senate Afire*, N.Y. TIMES, Dec. 20, 2012, at A1.

⁸ ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 194 (1996).

that progress. If America has already achieved sex equality, then the particular obstacle that women are challenging in Court can't be so important after all.

Erasing women's struggles for equality, or assuming women have already won those struggles, supports complacency. These ways of misremembering envision sex discrimination as located in the past rather than the present. They allow us to criticize laws and practices the nation has (supposedly) abandoned, but direct our attention away from scrutinizing laws and practices that remain with us. They tell us that women should be satisfied with their lot, having received any reforms they asked for or even received rights from men without having to ask.

In fact, contestation, rather than consensus, has driven changes in women's status in the United States. Women have had to fight for equal rights and their efforts have encountered intense opposition that has limited what feminists have been able to win.

Part III demonstrates how a distorted vision of women's past warps the present, shaping both judicial reasoning and political advocacy. The Supreme Court often describes sex discrimination as "archaic,"⁹ "medieval,"¹⁰ "outdated,"¹¹ "outworn,"¹² "outmoded,"¹³ or an "old"

⁹ *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698 n.21 (2017) (citation and internal quotation marks omitted); *J.E.B. v. Alabama*, 511 U.S. 127, 131, 135 (1994) (citation and internal quotation marks omitted); *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 290 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984); *Heckler v. Mathews*, 465 U.S. 728, 739, 745, 750 (1984) (citations and internal quotation marks omitted); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725, 730 n.16 (1982); *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) (citation and internal quotation marks omitted); *Trammel v. United States*, 445 U.S. 40, 52 (1980); *Califano v. Westcott*, 443 U.S. 76, 81 (1979) (citation and internal quotation marks omitted); *Parham v. Hughes*, 441 U.S. 347, 355 (1979) (plurality opinion) (citation and internal quotation marks omitted); *Califano v. Webster*, 430 U.S. 313, 317 (1977) (per curiam) (citation and internal quotation marks omitted); *Califano v. Goldfarb*, 430 U.S. 199, 207, 211, 217 (1977) (plurality opinion) (citations and internal quotation marks omitted); *Craig v. Boren*, 429 U.S. 190, 198 (1976) (citation and internal quotation marks omitted); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975) (citation and internal quotation marks omitted); *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975).

¹⁰ *Trammel*, 445 U.S. at 44; *Dege*, 364 U.S. at 52, 54.

¹¹ *J.E.B.*, 511 U.S. at 135 (citation and internal quotation marks omitted); *Miss. Univ. for Women*, 458 U.S. at 726; *Craig*, 429 U.S. at 198.

¹² *Parham*, 441 U.S. at 355 (plurality opinion).

¹³ *J.E.B.*, 511 U.S. at 135, 139 n.11 (citation and internal quotation marks omitted); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985); *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (citation and internal quotation marks omitted).

notion.¹⁴ These terms sound like insults and serve that function from one perspective. But they simultaneously suggest that sex discrimination is a historical artifact rather than an ongoing phenomenon. Drawing on this rhetoric, the Court has used the premise that the nation has left sex discrimination behind as support for decisions upholding women's exclusion from military registration,¹⁵ sex-specific statutory rape laws,¹⁶ and a sex-specific rule governing the citizenship of nonmarital children born abroad.¹⁷ How could these policies reflect sex stereotypes if America and the Court have moved beyond such gendered reasoning?

Political movements have exploited and reinforced the American inclination to overstate the improvements in women's status over time. Phyllis Schlafly's arguments in the 1970s and 1980s against the Equal Rights Amendment simultaneously contended that the ERA was unnecessary because women already had legal, economic, and practical equality and that the ERA was a terrible idea because women needed to remain in their traditional domestic roles.¹⁸ Schlafly's campaign against the ERA resonated powerfully and helped thwart the amendment's ratification, perhaps because Americans had been telling and hearing similar stories about women for decades. Schlafly's ideological heirs, like Robert Bork and Sarah Palin, have echoed her arguments when mobilizing against feminist reform.

Part IV explores how we can learn from the past to change the future. The history of women's struggles for equality offers little reason to believe that women can win significant gains by relying on consensus, conciliation, or men's spontaneous enlightenment. Real progress has always depended on women's willingness to disrupt the status quo, make uncomfortable demands, and challenge prevailing certainties. America needs more contestation over women's status, not less. Contestation can produce change. Complacency will not. Incorporating a richer and truer history of women's struggles for equality into our collective memory can sharpen our

¹⁴ *Heckler*, 465 U.S. at 745 (citation and internal quotation marks omitted); *Parham*, 441 U.S. at 354 (plurality opinion) (citation and internal quotation marks omitted); *Orr v. Orr*, 440 U.S. 268, 279 (1979) (citation and internal quotation marks omitted); *Goldfarb*, 430 U.S. at 207, 211 (plurality opinion) (citation and internal quotation marks omitted); *Craig*, 429 U.S. at 198 (citation and internal quotation marks omitted); *Stanton v. Stanton*, 421 U.S. 7, 14 (1975) (internal quotation marks omitted).

¹⁵ See *Rostker v. Goldberg*, 453 U.S. 57, 72–75, 83 (1981).

¹⁶ See *Michael M. v. Superior Court*, 450 U.S. 464, 471 n.6, 476 (1981) (plurality opinion).

¹⁷ See *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686, 1692–94 (2017); *Nguyen v. INS*, 533 U.S. 53, 56–73 (2001).

¹⁸ See PHYLLIS SCHLAFLY, *THE POWER OF THE POSITIVE WOMAN* 29–35, 69–79, 118–19, 138 (1977).

understanding of how reform takes place, focus our attention on the battles women’s rights activists have yet to win, and fortify our determination to push for a more equal future as we shape the next chapter in this American story.

I. ERASURE: MARGINALIZING WOMEN’S STRUGGLES FOR EQUALITY

Americans often ignore women’s efforts to achieve equality when they remember American history. This gap in our collective memory is visible in official pronouncements, scholarly declarations, and our memorial landscape. The Supreme Court’s sex discrimination jurisprudence and its broader reflections on constitutional history tend to leave women’s struggles for equality unmentioned, suggesting that women’s rights have expanded over time through men’s enlightened benevolence rather than women’s striving in the face of enormous resistance. Government officials and legal scholars expounding on constitutional history and constitutional law also routinely leave women out. This inclination to exclude women from stories about our nation’s history is sometimes even expressed in physical space, through the absence or the shunting of memorials to women who fought for equal rights.

A. THE SUPREME COURT

1. *Men’s Spontaneous Enlightenment Rather than Women’s Struggle*

For more than a century after the Fourteenth Amendment’s ratification in 1868, the Supreme Court did not strike down any law for denying women equal protection. The Court first identified a case of unconstitutional sex discrimination in 1971, holding in *Reed v. Reed* that Idaho could not automatically prefer men over women as the administrators of their relatives’ estates.¹⁹ Two years later, a four-Justice plurality in *Frontiero v. Richardson* provided the Court’s first sustained explanation for why sex discrimination was a constitutional problem.²⁰ This explanation included the only discussion of women’s legal history the Court would offer for decades.

Justice William Brennan’s plurality opinion in *Frontiero* acknowledged “that our Nation has had a long and unfortunate history of sex discrimination,” but never mentioned the long history of women’s

¹⁹ See 404 U.S. 71, 71–77 (1971).

²⁰ See 411 U.S. 677, 684–88 (1973) (plurality opinion).

efforts to achieve equality.²¹ For example, the plurality noted that the Nineteenth Amendment did not become part of the Constitution until 1920, but never discussed the decades of feminist campaigning that made this victory possible or the entrenched opposition suffragists had to overcome.²²

The plurality also never looked beyond the history of privileged white women, repeatedly excluding women of color from its narrative. On the plurality's account, sex discrimination had put women "on a pedestal" that was actually "a cage." This story could only apply to white women, as contending that America had placed women of color "on a pedestal" would be wildly implausible.²³ The plurality similarly focused on white women's experiences with voting, writing as if all women "were guaranteed the right to vote" in 1920 and never mentioning the women of color who remained disenfranchised after the Nineteenth Amendment's ratification.²⁴ In fact, the plurality's comparisons between sex discrimination and race discrimination were written as if all women were white and all African-Americans were male. The plurality observed that "throughout much of the 19th century *the position of women in our society was, in many respects, comparable to that of blacks* under the pre-Civil War slave codes. *Neither slaves nor women* could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children."²⁵ The phrasing seemed blind to the possibility that someone could be simultaneously black and female.

These erasures helped the plurality present persistent limitations on women's rights and opportunities as the products of men's well-intentioned, if misguided "romantic paternalism" rather than the consequences of fervent opposition to feminist demands.²⁶ At the same time, omitting women's struggles for equality allowed the plurality to attribute improvements in women's status to men's spontaneous enlightenment rather than women's activism. Men apparently just gave women the Nineteenth Amendment.²⁷ Similarly, the plurality observed that Congress had recently passed the Equal Rights Amendment and sent the ERA to the states for ratification without acknowledging the nationwide feminist mobilization behind Congress's "increasing sensitivity to sex-based classifications." The

²¹ *Id.* at 684.

²² *See id.* at 685.

²³ *Id.* at 684.

²⁴ *Id.* at 685.

²⁵ *Id.* (emphasis added).

²⁶ *Id.* at 684 (internal quotation marks omitted).

²⁷ *See id.* at 685.

plurality framed the discussion as if federal lawmakers had acted on their own initiative in recognizing the importance of sex equality, declaring that “Congress itself has concluded that classifications based upon sex are inherently invidious.”²⁸

Indeed, the *Frontiero* plurality presented the Justices’ own decisionmaking as a product of men’s spontaneous enlightenment rather than women’s struggle. Everyone on the Supreme Court in the 1970s was male. Justice Brennan had so little self-awareness about sexism that he was still refusing to hire women as law clerks when he wrote the *Frontiero* plurality.²⁹ The Court only began to take sex discrimination claims seriously when the modern women’s movement and feminist lawyers pushed those claims to the fore. *Frontiero*, a challenge to sex discrimination in the benefits provided to members of the uniformed services,³⁰ was one of several cases the American Civil Liberties Union Women’s Rights Project litigated before the Court in the 1970s as part of a concerted strategy to educate the Justices about sex discrimination and change how they interpreted constitutional law.³¹ The ACLU’s brief—co-authored by future-Justice Ruth Bader Ginsburg—discussed the nineteenth-century woman’s rights movement, women’s long battle for suffrage, heroines like Sojourner Truth, and the feminist activism in the 1960s and 1970s that pushed lawmakers and judges to address women’s legalized inequality.³² But Brennan acknowledged none of that and wrote the *Frontiero* plurality as if the Supreme Court brethren had realized on their own that sex discrimination was an “unfortunate” problem men needed to combat.³³

The *Frontiero* plurality’s erasure of women’s struggles for equality built on a long tradition. Many of the histories and textbooks the Justices could have read when growing up and attending school either did not discuss women’s legal status, or touched on the subject very briefly, or mentioned women only to attribute improvements in women’s position to

²⁸ *Id.* at 687.

²⁹ See SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 399–401 (2010).

³⁰ See *Frontiero*, 411 U.S. at 678–82 (plurality opinion).

³¹ See Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9, 11, 14–18.

³² See Brief of American Civil Liberties Union *Amicus Curiae* at 15–18, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (No. 71-1694).

³³ *Frontiero*, 411 U.S. at 684 (plurality opinion).

men's benevolence.³⁴ Professor Arthur Schlesinger observed in 1922 that "[a]n examination of the standard histories of the United States and of the history textbooks in use in our schools raises the pertinent question whether women have ever made any contributions to American national progress that are worthy of record. If the silence of the historians is taken to mean anything, it would appear that one-half of our population have been negligible factors in our country's history."³⁵ Almost a quarter century later, historian Mary Beard noted little progress. She wrote in 1946 that "the conventional view of women as negligible or nothing or helplessly subject to men in the long past" remained dominant in "research, thinking, and writing about American history."³⁶

Perusing histories and textbooks from the decades before *Frontiero* quickly confirms these observations. Ralph Henry Gabriel, a professor of American history at Yale, published a 452-page book in 1940 on *The Course of American Democratic Thought*. By the time the book appeared, women had spent decades mobilizing for equality. The Nineteenth Amendment had become part of the Constitution just twenty years earlier. Yet Gabriel's history said nothing about women's efforts to include themselves in American democracy. The terms women, woman, female, sex, feminism, Nineteenth Amendment, suffrage, voting, family, wife, and marriage do not appear in his index.³⁷ Samuel Eliot Morison published a *History of the American People* in 1965. Morison, a retired professor of American history at Harvard,³⁸ took 1150 pages to tell his story, but spent only a few sentences on women's rights activity.³⁹

By necessity, this Article cannot provide a complete account of everything the *Frontiero* plurality omitted when it did not mention women's struggles for equality. But I can observe that adding the Nineteenth Amendment to the Constitution took seventy-two years of work after the first woman's rights convention in the United States called for female

³⁴ See, e.g., REUBEN POST HALLECK, HISTORY OF OUR COUNTRY FOR HIGHER GRADES 521 (1923); WILSON PORTER SHORTRIDGE, THE DEVELOPMENT OF THE UNITED STATES 704 (1929).

³⁵ ARTHUR MEIER SCHLESINGER, NEW VIEWPOINTS IN AMERICAN HISTORY 126 (1922).

³⁶ MARY R. BEARD, WOMAN AS FORCE IN HISTORY: A STUDY IN TRADITIONS AND REALITIES 59 (1946).

³⁷ See RALPH HENRY GABRIEL, THE COURSE OF AMERICAN DEMOCRATIC THOUGHT: AN INTELLECTUAL HISTORY SINCE 1815, at 435–52 (1940).

³⁸ See Jill Lepore, *Plymouth Rocked*, NEW YORKER, Apr. 24, 2006, at 164, 164.

³⁹ See SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 516-17, 899 (1965).

enfranchisement.⁴⁰ Another forty-five years of activism were required before African-American women in the South began to be enfranchised with enforcement of the 1965 Voting Rights Act.⁴¹

Women made the case for suffrage in the courts (to no avail),⁴² in Congress, in state legislatures, and in the streets. Carrie Chapman Catt, President of the National American Woman Suffrage Association, described the “pauseless campaign” required to win the Nineteenth Amendment. In the fifty-two years between 1868—when the Fourteenth Amendment permitted women’s continued disenfranchisement—and 1920, women seeking the vote “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.” As Catt recalled in 1923: “Hundreds of women gave the accumulated possibilities of an entire lifetime, thousands gave years of their lives, hundreds of thousands gave constant interest and such aid as they could. It was a continuous, seemingly endless, chain of activity. Young suffragists who helped forge the last links of that chain were not born when it began. Old suffragists who forged the first links were dead when it ended.”⁴³

Members of the National Woman’s Party who picketed the White House in the years before Congress passed the Nineteenth Amendment were beaten by police, attacked by mobs of men and boys, arrested while their assailants went free, brutalized in prison, and force fed.⁴⁴ Women’s enfranchisement was so contested because both sides understood the suffrage battle as a referendum on women’s place in society and status under the law.⁴⁵ Yet women’s enormous, multigenerational effort to

⁴⁰ See Declaration of Sentiments (1848), reprinted in 1 HISTORY OF WOMAN SUFFRAGE 70, 70–73 (Elizabeth Cady Stanton et al. eds., Ayer Co. 1985) (1881).

⁴¹ See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; AFRICAN AMERICAN WOMEN AND THE VOTE, 1837–1965 (Ann D. Gordon et al. eds., 1997); RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 199–223 (2004).

⁴² See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 165–78 (1875).

⁴³ CARRIE CHAPMAN CATT & NETTIE ROGERS SHULER, WOMAN SUFFRAGE AND POLITICS: THE INNER STORY OF THE SUFFRAGE MOVEMENT 107–08 (1923).

⁴⁴ See INEZ HAYNES IRWIN, THE STORY OF THE WOMAN’S PARTY 230–57, 272–74, 280–84 (1921); DORIS STEVENS, JAILED FOR FREEDOM 128–31, 184–91, 200–05 (1920).

⁴⁵ See, e.g., ALICE DUER MILLER, ARE WOMEN PEOPLE? A BOOK OF RHYMES FOR SUFFRAGE TIMES 43 (1915); STEVENS, *supra* note 44, at 342–43. For insightful discussion

achieve the Nineteenth Amendment—and the vehement, even violent and malevolent opposition suffragists had to overcome—were invisible in *Frontiero*'s account.

A picture may provide a more immediate way to understand the fierceness of the struggle that *Frontiero* ignored. American news photographers were apparently unable or unwilling to provide detailed photographs of anti-suffragist violence. But a suffragist artist captured the intensity of the opposition. Nina Allender was the cartoonist for the National Woman's Party and her work attracted widespread attention.⁴⁶ Allender's cover art for a September 1917 edition of the NWP newspaper depicts a mob of unruly men surrounding suffragist picketers to wrest the women's banners from their hands and destroy them. One delighted hooligan has ripped the word "democracy" from a woman's banner and claimed it for himself. The drawing appeared with the caption "Training for the Draft" and illustrated how women fighting for suffrage faced violent combatants.⁴⁷

of this aspect of the battle over women's suffrage, see Reva B. Siegel, *Collective Memory and the Nineteenth Amendment: Reasoning About "the Woman Question" in the Discourse of Sex Discrimination*, in *HISTORY, MEMORY, AND THE LAW* 131, 143–52 (Austin Sarat & Thomas R. Kearns eds., 1999) [hereinafter Siegel, *Collective Memory*]; Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 *HARV. L. REV.* 947, 977–1006 (2002) [hereinafter Siegel, *She the People*].

⁴⁶ See *Cartooning for Suffrage*, *SUFFRAGIST*, Mar. 2, 1918, at 8; *Cartoons Wilson*, *CHI. DAILY TRIB.*, Oct. 23, 1916, at 11.

⁴⁷ *Training for the Draft*, *SUFFRAGIST*, Sept. 29, 1917, at 1 (capitalization omitted). For the original drawing, see National Woman's Party, Nina Allender Political Cartoon Collection (copy on file with author).



The Court has now been applying equal protection principles to sex discrimination for almost half a century. In the decades since *Frontiero*, scholars have uncovered abundant material about the history of women's activism in the nineteenth and twentieth centuries that the Court could draw on if it chose. But the Justices still frequently marginalize women's struggles for equality. In 2015, the Court held in *Obergefell v. Hodges* that state prohibitions on same-sex marriage are unconstitutional.⁴⁸ Justice Anthony Kennedy's majority opinion reviewed the legal history of marriage, seeking to show that laws governing marriage had already

⁴⁸ See 135 S. Ct. 2584, 2604–05 (2015).

“evolved in substantial ways over time” and could change again.⁴⁹ Women’s rights activists have propelled reforms in marriage law, pushing judges and legislators to remove many of the disabilities the common law imposed on wives. Yet the *Obergefell* Court, like the *Frontiero* plurality before it, did not link women’s expanded rights in marriage to women’s persistent advocacy for those rights in the face of tremendous resistance. *Obergefell* just noted that “women gained legal, political, and property rights” over time. Here again, changes in women’s “role and status” appeared to come from men’s spontaneous enlightenment rather than women’s efforts. The Court reported that “society” simply “began to understand that women have their own equal dignity.”⁵⁰

The *Obergefell* majority also joined the *Frontiero* plurality in suggesting that the Court’s decision to extend equal protection to women was the product of enlightened Justices acting on their own initiative. *Obergefell* never mentioned the feminist litigators in the 1970s and 1980s who worked to transform how the Justices understood women’s constitutional rights. Instead, *Obergefell* explained that the Justices who “invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage” were “[r]esponding to a new awareness”—one the Justices had seemingly developed on their own.⁵¹

I would never contend that feminists are the only activists the Court has excluded from its opinions. But *Obergefell*’s silence about women’s struggles for sex equality is particularly striking because the opinion did discuss the social movement that mobilized to advocate for same-sex marriage. The *Obergefell* majority was eager to establish that the Court’s decision to invalidate state prohibitions on same-sex marriage was not prematurely stifling democratic processes before Americans had a chance to deliberate and debate. To make that point, the Court observed that “extensive litigation,” “referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings,” had contributed to a “societal discussion of same-sex marriage and its meaning” that “led to an enhanced understanding of the issue.”⁵²

⁴⁹ *Id.* at 2601; *see also id.* at 2595, 2603–04.

⁵⁰ *Id.* at 2595.

⁵¹ *Id.* at 2604.

⁵² *Id.* at 2605.

2. “Lochnerism” but Not “Mullerism”

Women and their struggles for equality are also frequently missing when the Court reflects on its history of constitutional decisionmaking more broadly, suggesting that the Court does not think of sex discrimination as a core problem for constitutional law. The Court continually remembers and criticizes its decision in *Lochner v. New York* (1905), which struck down a state law limiting the hours men could work.⁵³ “Lochnerism” is one of the worst insults Justices can hurl at each other’s judgments.⁵⁴ But *Lochner* was paired with another decision, *Muller v. Oregon* (1908), which held that states could restrict women’s working hours, even though states had to leave men’s working hours unconstrained.⁵⁵ *Lochner* established the constitutional rules governing male employment, prioritizing what the Court thought of as male autonomy to resist “meddlesome interferences with the rights of the individual.”⁵⁶ *Muller* announced the constitutional framework for female employment, with the Court insisting that women’s domestic responsibilities took precedence over any autonomy interest women had in working and earning more. The Court treated all women as if they were mothers and demanded that women prioritize time at home over time at work, even if women wanted to work more because they needed the additional money to support their families. As *Muller* explained, curbing a woman’s “contractual powers” operated “for the benefit of all” by enabling “a proper discharge of her maternal functions.”⁵⁷

By 1925, every state but four had imposed sex-specific limits on women’s working hours.⁵⁸ As a general matter, maximum hours laws wisely recognize that many employees lack the bargaining power to negotiate humane working conditions. *Muller* was extending to women the protections that *Lochner* should have allowed men to enjoy as well. Some progressive advocates supported *Muller* at the time because they thought protecting female workers from exploitation was better than protecting no

⁵³ See 198 U.S. 45, 52–65 (1905).

⁵⁴ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 861–64 (1992); *id.* at 957, 959–62 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 998 (Scalia, J., concurring in the judgment in part and dissenting in part); *Roe v. Wade*, 410 U.S. 113, 117 (1973); *id.* at 174 (Rehnquist, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 481–82 (1965); *id.* at 512 n.4, 514–15, 522–24 (Black, J., dissenting); *id.* at 528 (Stewart, J., dissenting).

⁵⁵ See 208 U.S. 412, 416–23 (1908).

⁵⁶ *Lochner*, 198 U.S. at 61.

⁵⁷ *Muller*, 208 U.S. at 422.

⁵⁸ See Edward Clark Lukens, *Shall Women Throw Away Their Privileges?*, A.B.A. J., Oct. 1925, at 645, 645.

workers at all.⁵⁹

But sex-specific limits on women’s working hours both assumed the primacy of women’s domestic roles and made it harder for women to thrive outside those roles. Restricting working hours for women but not men further entrenched sex segregation in employment, solidifying and legalizing the barriers to women entering the better paid occupations that men dominated. Women-only protective labor laws often protected female workers out of better jobs, higher salaries, and greater prospects for advancement. These laws helped ensure that women remained confined to the low-wage, dead-end work where exploitation was most likely.⁶⁰

Yet the Court does not discuss *Muller* often, even in cases about women’s rights.⁶¹ “Mullerism” is not a term in circulation, much less a notorious insult.

B. OFFICIAL AND SCHOLARLY PRONOUNCEMENTS ON CONSTITUTIONAL HISTORY AND CONSTITUTIONAL LAW

The exclusion of women’s struggles for equality is often similarly evident when legal scholars and government officials reflect on constitutional history and constitutional law. Many constitutional law scholars delight in compiling lists of the Supreme Court’s most important or most terrible constitutional precedents. Their lists reflect and shape conventional scholarly wisdom. These lists routinely exclude cases involving women’s rights—sometimes without mentioning the exclusion and sometimes while remarking that “[n]o sex discrimination case sits at the core of the anticanon.”⁶² Women’s absence from scholarly accounts of the constitutional canon and anticanon cannot be attributed to a paucity of

⁵⁹ See, e.g., Joan G. Zimmerman, *The Jurisprudence of Equality: The Women’s Minimum Wage, the First Equal Rights Amendment, and Adkins v. Children’s Hospital, 1905–1923*, 78 J. AM. HIST. 188, 198–200 (1991).

⁶⁰ See, e.g., ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* 212–14 (1982).

⁶¹ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 961 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (only cite to *Muller* in all the *Casey* opinions and does not discuss *Muller* as a case about women); *Roe v. Wade*, 410 U.S. 113 (1973) (*Muller* not mentioned); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (*Muller* not mentioned).

⁶² Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 470 n.583 (2011); see also *id.* at 396 n.94, 470; Akhil Reed Amar, *Plessy v. Ferguson and the Anti-Canon*, 39 PEPP. L. REV. 75, 76, 79 (2011); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018–19 (1998); Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 781–82, 790–91, 800–03 (2000); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 250–57 (1998).

candidates for inclusion. As this Article will make clear, the Court's sex discrimination jurisprudence includes many spectacularly terrible judgments and some decisions that markedly improved women's status. Instead, women's omission from the constitutional canon and anticanon suggests a widespread scholarly assumption that women's efforts to achieve equality are not central to the American constitutional project, so women's successes in that endeavor do not count as transformational moments in constitutional law and the Court's failures in this regard are not pivotal failures.

Public proclamations about the Constitution also tend to exclude women's struggles for equality, which helps government officials tell purely celebratory tales about constitutional history. By the time of the Constitution's centennial in 1887, Americans had long been arguing about women's rights and roles. Eleven years earlier, Susan B. Anthony—the foremost organizer of the nineteenth-century woman's rights movement—had appeared (uninvited) at the Philadelphia celebration of the Declaration of Independence's centennial to remind her fellow citizens that “[t]he history of our country the past hundred years has been a series of assumptions and usurpations of power over woman, in direct opposition to the principles of just government, acknowledged by the United States as its foundation.”⁶³

Nonetheless, official celebrations of the Constitution's centennial gave no hint of women's ongoing challenge to the constitutional order and offered no criticism of constitutional law. President Grover Cleveland urged the audience at the Philadelphia celebration of the Constitution's centennial to recognize “how completely” the Constitution had “met every national peril and every national need.”⁶⁴ At that point, the Supreme Court and every other male bastion of power interpreted the Constitution to permit women's disenfranchisement and women's legal subordination within marriage, at work, and all other arenas.⁶⁵ Cleveland's implication was that granting women more rights, including the vote, was not a “national need.” When Cleveland quoted Benjamin Franklin to declare that “God governs in the affairs of men,” the President seemed to mean that sex specifically—that the Constitution established a government of male citizens.⁶⁶

⁶³ 3 HISTORY OF WOMAN SUFFRAGE 31 (Elizabeth Cady Stanton et al. eds., Ayer Co. 1985) (1886); *see also id.* at 27–30.

⁶⁴ Grover Cleveland, Remarks at the Centennial Celebration of the Adoption of the Constitution, Philadelphia, PUB. PAPERS 263, 264 (Sept. 17, 1887).

⁶⁵ *See infra* Section II.A.1.

⁶⁶ Cleveland, *supra* note 64, at 264 (internal quotation marks omitted).

In fact, Cleveland opposed enfranchising women. He instructed readers of the *Ladies' Home Journal* in 1905 that “the stern, rugged” world of politics was divinely allocated to men and warned that the “clamorous leaders” of the woman suffrage movement sought “a radical and unnatural change” that would subvert “sane and wholesome ideas of the work and mission of womanhood” by taking women out of their “allotted sphere of home.”⁶⁷ On Cleveland’s view, “a good wife” was “a woman who loves her husband and her country with no desire to run either.”⁶⁸ Susan B. Anthony, by now eighty-five, was unconvinced. After one of Cleveland’s articles appeared in the *Ladies' Home Journal*, Anthony told her local newspaper that the piece was “Ridiculous! Pure fol-de-rol,” and asked: “Why isn’t the woman herself the best judge of what woman’s sphere should be?”⁶⁹ Her rebuke inspired cartoonist Charles Lewis Bartholomew to depict Anthony chasing after Cleveland with a copy of “Ladies Home Trouble” under one arm and a “Woman Suffrage” umbrella in her other hand as she tried to bop Cleveland on the head.⁷⁰

⁶⁷ Grover Cleveland, *Would Woman Suffrage Be Unwise?*, LADIES’ HOME J., Oct. 1905, at 7, 7.

⁶⁸ Grover Cleveland, *Woman’s Mission and Woman’s Clubs*, LADIES’ HOME J., May 1905, at 3, 3 (internal quotation marks omitted).

⁶⁹ *Vigorous Reply to Grover Cleveland*, EVENING TIMES (Rochester), Apr. 25, 1905, at 6 (quoting Susan B. Anthony) (internal quotation marks omitted).

⁷⁰ *What Shall We Do with Our Ex-Presidents?—Susan B. Anthony Knows.*, MINNEAPOLIS J., Apr. 26, 1905, at 1 (capitalization omitted). For the original drawing, see Library of Congress, Prints and Photographs Division (item 2016678242; copy on file with author).



The dispute between Cleveland and Anthony over women's suffrage may seem charmingly quaint. But less had changed decades later than one might imagine. The Constitution's bicentennial in 1987, like the centennial before it, took place at a time of intense feminist activity. Nonetheless, the volume that the Bicentennial Commission published to mark the occasion made almost no mention of women's status under the Constitution and discussed the history of the Nineteenth Amendment in a few sentences.⁷¹ Official speeches commemorating the bicentennial often ignored women when recounting the nation's constitutional experience, which helped speakers strike a wholly laudatory note. Warren Burger, who retired from the Supreme Court to chair the Bicentennial Commission, repeatedly praised the Founders for establishing "government by the will of the governed" without acknowledging that the Founders denied every woman

⁷¹ See *WE THE PEOPLE: THE COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, 1985–1992: FINAL REPORT* 214, 256 (1992).

and many men the right to govern themselves.⁷² President Ronald Reagan similarly marked the Constitution’s bicentennial by contending that the Founders had created a government based on the principle that all “men” were “equal.” Reagan’s account of America’s constitutional history did not mention women and could not apply to them, as women certainly did not have equal rights under the Founders’ Constitution.⁷³

C. NATIONAL MEMORIALS AND THE BRONZE CEILING

Sometimes the marginalization of women’s struggles for equality is visible in physical space. Memorials both mirror and mold the nation’s collective memories about our history and our Constitution. Millions visit memorials every year to learn about America.

Yet America’s memorials usually do not include stories about women or women’s activism. Indeed, women are barely present in our memorial landscape, and shattering that bronze ceiling will require decades of work and an exponential acceleration in the pace of change. A 1996 survey of the listings in the National Register of Historic Places “associated with significant persons” found that less than four percent of those listings were for women—approximately 360 listings out of 9820.⁷⁴ A 2011 survey of public outdoor sculptures in the United States found that less than eight percent of the sculptures of individuals depicted women—just 394 sculptures out of 5193.⁷⁵ A 2017 survey found that only nine out of 411 national park sites (2.2%) commemorated women’s history.⁷⁶

Even when women’s memorials exist, officials sometimes keep them out of the limelight and shunt them to the side. Memorials are public markers of what—and who—is worth remembering. The idea of officially

⁷² Warren E. Burger, *Tell the Story of Freedom*, A.B.A. J., May 1, 1986, at 54, 54; see also Warren E. Burger, *Address*, 1991 DET. C.L. REV. 1141, 1143; Warren E. Burger, *Foreword to CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787*, at ix, ix–x (1986).

⁷³ Ronald Reagan, Remarks at the “We the People” Bicentennial Celebration in Philadelphia, Pennsylvania, 2 PUB. PAPERS 1040, 1042 (Sept. 17, 1987); see also Ronald Reagan, Remarks at the Bicentennial Celebration of the United States Constitution, 2 PUB. PAPERS 1040, 1040 (Sept. 16, 1987).

⁷⁴ Carol D. Shull, *Searching for Women in the National Register of Historic Places*, in RESTORING WOMEN’S HISTORY THROUGH HISTORIC PRESERVATION 303, 303–05, 423 n.11 (Gail Lee Dubrow & Jennifer B. Goodman eds., 2003).

⁷⁵ See Cari Shane, *5,193 Public Sculptures. 4,799 Are Men. 394 Are Women. Why?*, WASH. POST, Apr. 17, 2011, at E1.

⁷⁶ See Maya Rhodan, *Will Women Ever Break the Bronze Ceiling?*, TIME, Sept. 4, 2017, at 28, 28.

commemorating women's struggles for equality can spark fierce and sustained opposition. Consider the odyssey of the sculpture that the National Woman's Party donated to Congress in the months after the Nineteenth Amendment's ratification.

This sculpture features three founders of the nineteenth-century woman's rights movement—Elizabeth Cady Stanton, Susan B. Anthony, and Lucretia Mott—emerging from a block of rough-hewn marble that could symbolize the constraints women were escaping and the work still to be done to secure women's equality. The sculptor, Adelaide Johnson, included a long inscription about the “Woman's Revolution” on the back, which read in part: “Woman, first denied a soul, then called mindless, now arisen, declared herself an entity to be reckoned.”⁷⁷ The National Woman's Party proclaimed that the sculpture would be “the first” memorial “erected in honor of women who served women.”⁷⁸

Many Congressmen did not want this memorial and made excuses for why Congress could not accept the sculpture.⁷⁹ Vice President Thomas R. Marshall, who had opposed giving women the vote,⁸⁰ announced that he would never support placing the memorial in the Capitol.⁸¹ But the National Woman's Party was notoriously tenacious. Alice Paul recruited the help of Christine Gillett, the wife of the Speaker of the House, and Florence Harding, the wife of the President-elect.⁸²

Congress's Joint Committee on the Library ultimately agreed to accept the sculpture and to allow women to hold an unveiling ceremony in the

⁷⁷ Several newspapers reprinted the complete inscription, with minor variations. See *Adelaide Johnson's Inscription Cut on the Suffrage Memorial*, EVENING WORLD (New York), Jan. 22, 1921, at 3; *Engrave Tribute to Pioneers on Suffrage Statue*, WASH. HERALD, Sept. 25, 1921, at 1; *Monument to Women Unveiled at Capitol*, OAKLAND TRIB., Feb. 20, 1921, at W-5; *Why Whitewashed Inscription Was Turned to the Wall*, WOMAN PATRIOT, Feb. 26, 1921, at 8.

⁷⁸ *A Woman's National Memorial*, 8 SUFFRAGIST 303, 303 (1920) (emphasis omitted).

⁷⁹ See *Suffrage Memorial Halted at Capital*, N.Y. TIMES, Feb. 9, 1921, at 28; *Suffrage Memorial May Be Declined*, CHRISTIAN SCI. MONITOR, Feb. 9, 1921, at 2; *Suffrage Statue Is Still Without a Resting Place*, N.Y. TRIB., Feb. 10, 1921, at 4; *Three Famous Suffragists Sit on the Capitol Steps All Night*, SUN (Baltimore), Feb. 10, 1921, at 1; *Women's Memorial Waits*, N.Y. TIMES, Feb. 10, 1921, at 4.

⁸⁰ See RECOLLECTIONS OF THOMAS R. MARSHALL VICE-PRESIDENT AND HOOSIER PHILOSOPHER: A HOOSIER SALAD 234–37 (1925).

⁸¹ See *The Capitol Surrendered to Militants*, WOMAN PATRIOT, Feb. 26, 1921, at 7.

⁸² See *Statues Win Capital Niche*, WASH. TIMES, Feb. 12, 1921, at 8. For Christine's first name, see *Gillett Chosen for Speakership of Next House*, N.Y. TIMES, Feb. 28, 1919, at 1.

Capitol Rotunda.⁸³ The Rotunda is the “heart of the Capitol,” the soaring space beneath the Capitol’s dome that links the House and Senate.⁸⁴ The unveiling took place on February 15, 1921, the one hundred and first anniversary of Susan B. Anthony’s birth. Representatives from dozens of women’s groups participated and the Speaker of the House formally accepted the donation on Congress’s behalf.⁸⁵

The women’s moment of glory was fleeting. The Library Committee, always unenthusiastic about the memorial, had insisted in accepting the sculpture that the piece would leave the Rotunda “immediately” after the unveiling ceremony and go to the Capitol’s lower level.⁸⁶ After the unveiling, the sculpture moved to that dark space—known as “the crypt”—which housed no other artwork.⁸⁷ Having entombed the sculpture in the crypt, Congress sought to disassociate the piece from women’s ongoing activism. The Library Committee had demanded that the sculpture’s feminist inscription be covered during the unveiling ceremony.⁸⁸ By October 1921, the committee had made sure that the inscription was painted over.⁸⁹

The sculpture remained in the crypt for seventy-six years, out of the light and out of the Rotunda—the prime space where Congress celebrates American history. A reporter observed in 1965 that the sculpture “could hardly be less prominently displayed without concealing it entirely.”⁹⁰ As late as 1996, the sculpture had no placard naming Stanton, Anthony, and Mott.⁹¹ Over the decades, Congress repeatedly rebuffed proposals to

⁸³ See *Marble Busts of Lucretia Mott, Elizabeth Cady Stanton and Susan B. Anthony: Memorandum of Action of Joint Committee on the Library Accepting the Same at a Meeting Held Thursday Feb. 10, 1921*, at 1 (archives of the Architect of the Capitol; on file with author) [hereinafter *Memorandum of Action*].

⁸⁴ THE UNITED STATES CAPITOL AND CONGRESS, S. DOC. NO. 106-24, at 2 (2001).

⁸⁵ See *Congress Gets Marble Busts of Feminists*, WASH. HERALD, Feb. 16, 1921, at 1; *Honor Pioneer Suffragists at Nation’s Capitol*, CHI. DAILY TRIB., Feb. 16, 1921, at 20; *Suffrage Statue Given to Nation*, N.Y. TIMES, Feb. 16, 1921, at 9.

⁸⁶ *Memorandum of Action*, *supra* note 83, at 1.

⁸⁷ CHARLES E. FAIRMAN, *ART AND ARTISTS OF THE CAPITOL OF THE UNITED STATES OF AMERICA* 386 (1927); see also *Put Statue in Basement*, EVENING STAR (D.C.), Feb. 17, 1921, at 2.

⁸⁸ See Marjorie Dorman, *Girl Reporter Describes White House Scenes on Wilson’s Last Day There*, BROOK. DAILY EAGLE, Mar. 4, 1921, at 2.

⁸⁹ See *Erases Inscription on ‘Suffrage Group,’* N.Y. TIMES, Oct. 15, 1921, at 6; *Pompous Title Erased from Suffrage Statue*, SUN (Baltimore), Oct. 15, 1921, at 1; *Whitewash Covers Legend on Suffrage Mother Statue*, WASH. HERALD, Oct. 15, 1921, § 2, at 13.

⁹⁰ Mary Pakenham, *About Women in Washington*, CHI. TRIB., May 15, 1965, § 1, at 5.

⁹¹ See James Brooke, *3 Suffragists (in Marble) to Move up in the Capitol*, N.Y. TIMES, Sept. 27, 1996, at A18.

relocate the sculpture,⁹² or to restore its inscription.⁹³

This 1965 photograph provides a sense of how the sculpture looked when tucked away in the crypt.⁹⁴



⁹² See S. Con. Res. 21, 104th Cong. (1995) (passed the Senate); 141 CONG. REC. 26,959–61 (1995); H.R.J. Res. 528, 72d Cong. (1932); H.R. Res. 115, 70th Cong. (1928); H.R. Con. Res. 43, 67th Cong. (1922).

⁹³ See H.R. 192, 83d Cong. (1953); H.R. 8036, 81st Cong. (1950); S. 3328, 81st Cong. (1950).

⁹⁴ Library of Congress, Prints and Photographs Division (item 97510834; copy on file with author).

The sculpture did not return to the Rotunda until 1997,⁹⁵ and its long-term prospects in that hallowed space remain uncertain. The congressional resolution authorizing the move insisted that private money finance the transfer and specified that “the Portrait Monument” would stay in the Rotunda for just one year before going to another location.⁹⁶ Securing that resolution had taken years of effort from women in and out of Congress.⁹⁷ Even so, the women’s victory was incomplete. As Representative Carolyn Maloney noted, authorizing only a temporary move to the Rotunda suggested that the suffragists’ successful battle for the Nineteenth Amendment “was not historically significant enough to merit the statue’s full-time display in the Rotunda alongside statues of our great male leaders.”⁹⁸

To date, the memorial has remained in the Rotunda—a reality some legislators have attributed to the difficulty of moving such a heavy and large piece.⁹⁹ A nearby placard names Stanton, Anthony, and Mott, but Congress has not restored the feminist inscription.¹⁰⁰

This sculpture is still the only statue in the Rotunda that depicts women. Congress added a bust of Sojourner Truth to the Capitol in 2009. Truth, a pioneering abolitionist and woman’s rights crusader, was the first African-American woman honored with a sculpture at the Capitol—233 years after the nation’s founding.¹⁰¹ Her memorial represents a long overdue step toward remembering the key roles that women of color played in both the antislavery movement and the push for women’s suffrage.¹⁰² The sculpture from the National Woman’s Party tells an incomplete story.

⁹⁵ See 143 CONG. REC. 13,020 (1997) (statement of Sen. Olympia Snowe at rededication ceremony).

⁹⁶ H.R. Con. Res. 216, 104th Cong. § 1 (1996) (enacted).

⁹⁷ See, e.g., 141 CONG. REC. 27,251 (1995) (statement of Rep. Patricia Schroeder); Raj Kamal Jha, *Cry of Liberation for Suffragists*, WASH. POST, Aug. 27, 1990, at B1; Cindy Loose, *They Got the Vote, but Not the Rotunda*, WASH. POST, Aug. 19, 1995, at A1; *Women Mark 75 Years of Voting Rights*, N.Y. TIMES, Aug. 27, 1995, at 14; Gregg Zoroya, *Ladies Who Languish in a Basement*, L.A. TIMES, May 27, 1996, at E1.

⁹⁸ 142 CONG. REC. 25,245 (1996) (statement of Rep. Carolyn Maloney).

⁹⁹ See Kevin Eckstrom, *Women’s Statue Back Among U.S. Heroes*, ATLANTA J./ATLANTA CONST., June 27, 1997, at A12 (quoting Rep. Louise Slaughter); Michael Kilian, *Out of Capitol Cellar, Statue of Feminists Returns to Glory*, CHI. TRIB., June 27, 1997, § 1, at 3 (quoting Rep. Constance Morella).

¹⁰⁰ See Photographs of Portrait Monument (on file with author).

¹⁰¹ See Neely Tucker, *Truth’s Rightful Place on the Hill*, WASH. POST, Apr. 29, 2009, at C1.

¹⁰² For a history of this advocacy, see ROSALYN TERBORG-PENN, *AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE, 1850–1920* (1998).

The piece focuses exclusively on white women's activism—as the party itself did during the campaign for the Nineteenth Amendment in an effort to win support from southern segregationists.¹⁰³ Nonetheless, Congress did not place Truth's sculpture in the Rotunda.

In sum, America's stories about itself too frequently omit women's struggles for equality. Sometimes this erasure is visible in how Supreme Court Justices, government officials, or legal scholars describe constitutional law and American history. Sometimes this erasure is manifested in physical space, through the absence of memorials to women and their activism or through the marginalization of the memorials that exist.

II. DISTORTION: SANITIZING WOMEN'S STRUGGLES FOR EQUALITY

When America does remember women's efforts to secure equal rights and opportunities, the remembrances tend to overstate what feminist activism has won—sometimes to the point of contending that sex equality has already been established. Sanitizing women's struggles for equality can serve the same function as marginalizing those struggles. Both strategies foster complacency by falsely suggesting that women have already received any reforms they asked for, or even received more from men than they thought to request. Both strategies obscure how women's status has long been the subject of conflict rather than consensus, drawing attention away from the vehement resistance that has limited what women's rights activists have been able to accomplish. This part focuses on Supreme Court opinions and K-12 textbooks to explore how these two important repositories and promulgators of the stories that America tells about itself have presented sanitized accounts of women's struggles for equality.

A. THE SUPREME COURT

Officials pontificating about women's legal status have declared the achievement of sex equality early and often. The Supreme Court has been making such pronouncements for more than a century. Sometimes Justices have even announced the achievement of women's equality while issuing judgments denying women equal rights. This approach is self-contradictory, but the Court has long relied on proclamations about women's progress to defend decisions impeding that progress. If America has already achieved sex equality, then the particular obstacle that women are challenging in Court can't be so important after all.

¹⁰³ See, e.g., *National Suffrage and the Race Problem*, SUFFRAGIST, Nov. 14, 1914, at 3.

This section first examines the Court's repeated proclamations that women's equality has been achieved, before turning to cases where the Court made such declarations in the course of restricting women's rights.

1. *Premature Proclamations of Sex Equality Achieved*

Even before the Nineteenth Amendment, the Supreme Court was already suggesting or declaring that women's legal equality had been established. These premature pronouncements appear outlandish in retrospect. But it is important to recognize that Justices issued them confidently at the time—a good reminder to be cautious about our own era's self-congratulatory proclamations.

When women went to the Supreme Court in the nineteenth century seeking support in their struggles for equality, they encountered an unwavering judicial commitment to male supremacy. The Court held in *Minor v. Happersett* (1875) that states could prohibit women from voting.¹⁰⁴ The Court held in *Bradwell v. Illinois* (1873)¹⁰⁵ and *In re Lockwood* (1894)¹⁰⁶ that states could bar women from practicing law. The Court also took for granted that the legal system should enforce common law principles of coverture, which denied married women a separate legal identity and placed wives under their husbands' control.¹⁰⁷ For example, every Justice assumed in *Barber v. Barber* (1859) that a married woman ordinarily could not have a separate legal residence from her husband—no matter where she actually lived. Coverture meant that a wife's official home was the one her husband chose for both of them.¹⁰⁸

Justice Joseph Bradley—joined by two colleagues—wrote a concurrence in *Bradwell* to explain why barring women from the legal profession fit smoothly into the coverture regime. As Bradley noted, the common law had long insisted “that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state.” Bradley observed that “many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States.” He argued that both common law

¹⁰⁴ See 88 U.S. (21 Wall.) 162, 165–78 (1875).

¹⁰⁵ 83 U.S. (16 Wall.) 130, 137–39 (1873).

¹⁰⁶ 154 U.S. 116, 116–18 (1894).

¹⁰⁷ For the classic definition of coverture, see 1 WILLIAM BLACKSTONE, COMMENTARIES *430.

¹⁰⁸ See 62 U.S. (21 How.) 582, 588–93 (1859); *id.* at 600–03 (Daniel, J., dissenting); see also *Quong Wing v. Kirkendall*, 223 U.S. 59, 63 (1912); *De la Rama v. De la Rama*, 201 U.S. 303, 307 (1906); *Kelly v. Owen*, 74 U.S. (7 Wall.) 496, 497–99 (1869).

coverture and the exclusion of women from the legal profession properly recognized that a woman should not have an “independent career.” Instead, “[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother.”¹⁰⁹

Yet less than six years later, the Court declared in *Reynolds v. United States* (1879) that America and its marriage law rejected “the patriarchal principle.”¹¹⁰ The case was a constitutional challenge to a criminal prohibition on polygamous marriage.¹¹¹ In upholding the prohibition, the Court linked “polygamous marriages” with “despotism” and “monogamous” marriages with democracy.¹¹² This claim was doubly ironic. First, the Utah territory, where many polygamists lived, was one of the most democratic parts of the nation in 1879. The territory enfranchised women in 1870,¹¹³ and Utah women voted until 1887—when Congress reinstated their disenfranchisement.¹¹⁴ Second, the Court could only describe monogamous marriage as democratic in 1879 by focusing on men and ignoring women. Monogamous marriages respected male equality—translating one man/one vote in the political arena into one man/one wife in the domestic sphere. But American marriages were not internally democratic, even if monogamous. As the Court had repeatedly insisted, husbands exercised legal dominion over their wives. Nonetheless, *Reynolds* contended that banning polygamy kept “the patriarchal principle” out of the nation’s “government,” “society,” and marriage law.¹¹⁵

The Court’s suggestions that American law already promoted sex equality became more emphatic as the battle over women’s suffrage intensified. The Court announced in *Holden v. Hardy* (1898) that “[m]arried women have been emancipated from the control of their husbands and placed upon a practical equality with them with respect to the acquisition, possession and transmission of property.”¹¹⁶ The claim was manifestly untrue in 1898. Indeed, it was not true seven decades later. As late as the 1960s, some states continued to limit married women’s property rights, including their rights to sell their property without their husbands’

¹⁰⁹ *Bradwell*, 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring).

¹¹⁰ 98 U.S. 145, 166 (1879).

¹¹¹ *See id.* at 146, 161–67.

¹¹² *Id.* at 165–66.

¹¹³ *See* An Act Conferring upon Women the Elective Franchise, § 1, 1870 Utah Laws 8, 8.

¹¹⁴ *See* Act of Mar. 3, 1887, ch. 397, § 20, 24 Stat. 635, 639.

¹¹⁵ *Reynolds*, 98 U.S. at 165–66.

¹¹⁶ 169 U.S. 366, 386 (1898).

permission.¹¹⁷

The Justices were even more inclined to pronounce women's equality accomplished in the half century between the Nineteenth Amendment's adoption in 1920 and the Court's first decision finding that a state had denied women equal protection. Restrictions on women's rights and opportunities within and outside marriage remained pervasive in this era. States continued to impose myriad constraints on married women, including limits on a wife's rights to contract, own and transfer property, conduct business, serve as a guarantor, and establish a legal residence apart from her husband.¹¹⁸ Many employers openly paid women less for the same work, used sex-segregated help wanted ads, favored men in hiring and promotion, and/or otherwise discriminated against female workers.¹¹⁹ Most states had sex-specific laws regulating women's working hours and jury service.¹²⁰

Women (and some men) sued to challenge this sex discrimination, but the Supreme Court in the decades before 1971 routinely upheld laws denying women equality.¹²¹ Even after the Nineteenth Amendment's ratification, the Court assumed the continued power of common law principles of coverture and endorsed a legal regime that treated men as regular members of civil society and women as peripheral and unnecessary participants in basic aspects of citizenship—including voting.¹²²

Consider *Breedlove v. Suttles* (1937), which upheld a Georgia law that gave women a financial incentive not to vote.¹²³ Georgia imposed a poll tax, as did many Southern states intent on disenfranchising African-Americans.¹²⁴ Georgia legislators sought to shield their invidious racial purposes behind statutory language that was facially race-neutral, but had

¹¹⁷ See AMERICAN WOMEN: THE REPORT OF THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN AND OTHER PUBLICATIONS OF THE COMMISSION 152–54 (1965); LEO KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 59–61 (1969).

¹¹⁸ See AMERICAN WOMEN, *supra* note 117, at 68–70, 152–57; KANOWITZ, *supra* note 117, at 46–99.

¹¹⁹ See AMERICAN WOMEN, *supra* note 117, at 46–48, 57, 131–32; Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 246–48 (1965).

¹²⁰ See AMERICAN WOMEN, *supra* note 117, at 55, 151.

¹²¹ See *Goesaert v. Cleary*, 335 U.S. 464, 465–67 (1948); *Radice v. New York*, 264 U.S. 292, 293–98 (1924).

¹²² See *Hoyt v. Florida*, 368 U.S. 57, 61–62 (1961); *Fay v. New York*, 332 U.S. 261, 267, 289–90 (1947); *Breedlove v. Suttles*, 302 U.S. 277, 282–84 (1937).

¹²³ See *Breedlove*, 302 U.S. at 279–84.

¹²⁴ See, e.g., STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969, at 55–85 (1976).

no compunctions about explicitly distinguishing between women and men. Georgia required state inhabitants between the ages of twenty-one and sixty (who weren't blind) to pay an annual poll tax, but exempted women if they did not register to vote.¹²⁵ *Breedlove* acknowledged that husbands might not pay the poll tax so their wives could vote, and the Court recognized that the sex distinction in Georgia's poll tax law reflected the state's commitment to coverture principles. Indeed, the Court observed that "[t]he laws of Georgia declare the husband to be the head of the family and the wife to be subject to him." However, the Court never suggested that Georgia's determination to enforce women's subordination might undermine the constitutionality of the state's poll tax law. To the contrary, the Court's argument that Georgia's poll tax law treated women "reasonably" turned on how well the statute enforced coverture's premises. As the Court explained, husbands had direct obligations to the state. They had to pay for the public education system, which the poll tax helped fund. In contrast, women's obligations were domestic. They were responsible "for the preservation of the race."¹²⁶ Given the Court's decision to endorse the constitutionality of the poll tax, I read that reference to racial preservation as focused on protecting white reproduction.

In short, the Supreme Court in the half century after the Nineteenth Amendment's ratification remained an integral component of a legal order that denied women rights and opportunities. Yet that did not stop the Justices from repeatedly suggesting that women and men were already legal equals. The Court declared in 1923 that "the ancient inequality of the sexes, otherwise than physical," has "now come almost, if not quite, to the vanishing point."¹²⁷ The Court proclaimed in 1960 that "a wife's legal submission to her husband has been wholly wiped out, not only in the English-speaking world generally but emphatically so in this country."¹²⁸ The Court in 1966 described "the peculiar institution of coverture" as "quaint" and "obsolete."¹²⁹

Unsurprisingly, the Court has continued to announce the achievement of sex equality in the decades since the Justices first identified a case of unconstitutional sex discrimination in 1971. The Court declared in 1980 that: "Nowhere in the common-law world—indeed in any modern society—

¹²⁵ See *Breedlove*, 302 U.S. at 279–80.

¹²⁶ *Id.* at 282.

¹²⁷ *Adkins v. Children's Hosp.*, 261 U.S. 525, 553 (1923).

¹²⁸ *United States v. Dege*, 364 U.S. 51, 54 (1960).

¹²⁹ *United States v. Yazell*, 382 U.S. 341, 343, 351 (1966); see also *Fay v. New York*, 332 U.S. 261, 290 (1947) (noting "a changing view of the rights and responsibilities of women in our public life, which has progressed in all phases of life").

is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being. Chip by chip, over the years those archaic notions have been cast aside so that no longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.”¹³⁰ The Court announced in 2015 that “the law of coverture was abandoned” “[a]s women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity.”¹³¹

2. *Self-Contradictory Decisions that Deny Women Equal Rights While Declaring the End of Sex Discrimination*

For more than a century, some of the Supreme Court’s rosy proclamations about women’s progress have appeared in opinions denying women equal rights. The Justices’ own actions contradict their assurances that women have nothing to worry or complain about. But these loud declarations of success help the Court deny its role in perpetuating the subordination that the Justices claim has been left behind.

Women’s rights cases are not the only ones to feature the Court’s self-contradictory declarations of equality achieved. Rejecting plaintiffs’ claims while insisting that they have nothing to complain about is a persistently appealing prospect for the Court.¹³² That said, cases denying women equal rights have long been a prominent trigger for self-contradictory pronouncements.

Muller v. Oregon (1908) subjected women to sex-specific limits on their contractual rights, while simultaneously announcing that women had equal contractual rights with men. Recall that *Muller* permitted states to restrict women’s working hours, although the Court prohibited states from treating men the same way.¹³³ *Muller* allowed Oregon to impose special disabilities on female workers on the ground that women, unlike men, needed to prioritize domesticity over autonomy.¹³⁴ Yet the Court nevertheless described women and men as legal equals in Oregon, declaring “that, putting to one side the elective franchise, in the matter of personal and

¹³⁰ *Trammel v. United States*, 445 U.S. 40, 52 (1980) (alteration, citation, and internal quotation marks omitted).

¹³¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015).

¹³² For example, *Plessy v. Ferguson* announced “the legal equality” of African-Americans and whites while upholding racial segregation in public transportation. 163 U.S. 537, 543 (1896); see also *id.* at 544–45; *Civil Rights Cases*, 109 U.S. 3, 25 (1883).

¹³³ See 208 U.S. 412, 416–23 (1908).

¹³⁴ See *id.* at 422.

contractual rights [women] stand on the same plane as the other sex.”¹³⁵

Goesaert v. Cleary (1948) announced that women’s legal status had been transformed, while leaving women’s legal subordination resolutely unchanged.¹³⁶ The case centered on a Michigan law that prohibited women from working as bartenders in cities with fifty thousand or more people, unless the woman was “the wife or daughter of the male owner” of the bar.¹³⁷ This statute was one of many legal restrictions on women’s employment that kept desirable jobs exclusively or predominantly male in the decades after *Muller*. Michigan banned women from bartending while allowing women to be cocktail waitresses,¹³⁸ probably a more dangerous occupation than pouring drinks from behind a bar. Michigan also denied female bar owners the right to employ their female relatives as bartenders, while enabling male owners to take advantage of that labor supply. Two female bar owners and their female employees challenged the statute’s constitutionality.¹³⁹ But the Court swiftly rejected the women’s arguments, as the Court had previously rebuffed many other challenges to restrictions on female employment in the years since *Muller*.¹⁴⁰ *Goesaert* argued that the Michigan Legislature could reasonably believe that “bartending by women” could “give rise to moral and social problems.”¹⁴¹ With that asserted, the Court would not “give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling.”¹⁴² After *Goesaert*, the constitutional law governing women’s labor was no different than it had been for decades. States remained free to draw “a sharp line between the sexes,” excluding women from jobs they wanted and were qualified to fill.¹⁴³ Yet *Goesaert* nonetheless declared that there had been “vast changes in the social and legal position of women.”¹⁴⁴

¹³⁵ *Id.* at 418.

¹³⁶ See 335 U.S. 464, 465–67 (1948).

¹³⁷ *Id.* at 465 (citation and internal quotation marks omitted).

¹³⁸ See *id.* at 467.

¹³⁹ See *Goesaert v. Cleary*, 74 F. Supp. 735, 737 (E.D. Mich. 1947), *aff’d*, 335 U.S. at 464.

¹⁴⁰ See *Radice v. New York*, 264 U.S. 292, 293–98 (1924); *Bosley v. McLaughlin*, 236 U.S. 385, 388–96 (1915); *Miller v. Wilson*, 236 U.S. 373, 379–84 (1915); *Hawley v. Walker*, 232 U.S. 718, 718 (1914) (per curiam), *aff’g Ex Parte Hawley*, 85 Ohio St. 494 (1912) (mem.), *aff’g* 22 Ohio Dec. 39 (Ct. Com. Pl. 1911); *Riley v. Massachusetts*, 232 U.S. 671, 678–81 (1914).

¹⁴¹ *Goesaert*, 335 U.S. at 466.

¹⁴² *Id.* at 467.

¹⁴³ *Id.* at 466.

¹⁴⁴ *Id.* at 465–66.

In *Hoyt v. Florida* (1961), the Court announced women’s “enlightened emancipation” while upholding sex-based obstacles to women’s jury service.¹⁴⁵ An all-male jury had convicted Gwendolyn Hoyt of second-degree murder for killing her husband, and she challenged the constitutionality of Florida’s jury law. That law produced overwhelmingly or exclusively male juries, by automatically including men on jury rolls while requiring women to inform the state of their desire to be included.¹⁴⁶ The Court’s explanation for why Florida’s system was “reasonable” emphasized that women’s responsibilities were domestic.¹⁴⁷ As the Court proclaimed: “Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.”¹⁴⁸ The passage is doubly striking. First, the Court attributed improvements in women’s status to men’s enlightenment rather than women’s activism. Second, the Court announced women’s “emancipation” while upholding legislation that assumed and helped produce a world in which women’s “special responsibilities” at home made them marginal participants in civic life.

More recently, *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992)¹⁴⁹ announced the end of women’s legal subordination while upholding restrictions on women’s access to abortion that reflect doubts about women’s decisionmaking capacity. *Casey* centered on a constitutional challenge to a Pennsylvania law that made it harder for women to terminate their pregnancies. Among other provisions, Pennsylvania barred women from obtaining an abortion in the state unless a woman visited a doctor, received information about abortion that the state wanted her to hear, and then waited at least twenty-four hours before returning for the abortion.¹⁵⁰ As the *Casey* plurality acknowledged, Pennsylvania’s requirement that women seeking abortions attend two separate medical appointments made accessing abortion more difficult for many women—especially women who were poor, lived far from an

¹⁴⁵ 368 U.S. 57, 61–62 (1961).

¹⁴⁶ *See id.* at 58, 61, 64. For Gwendolyn’s first name, see *Hoyt v. State*, 119 So. 2d 691, 692 (Fla. 1959).

¹⁴⁷ *Hoyt*, 368 U.S. at 61 (internal quotation marks omitted).

¹⁴⁸ *Id.* at 61–62.

¹⁴⁹ 505 U.S. 833 (1992).

¹⁵⁰ *See id.* at 881 (plurality opinion).

abortion provider, and/or struggled to get time away from employers, husbands, or other people. Practical obstacles to returning to the doctor meant that the two-visit requirement would delay some women's abortions by much longer than a day and abortion poses more risks to a woman's health as the pregnancy advances.¹⁵¹

Casey upheld this provision nonetheless, with a plurality opinion suggesting that Pennsylvania's distrust of women's decisionmaking capacity was appropriate.¹⁵² The plurality argued that Pennsylvania could constitutionally require the provision of state-approved information and impose a twenty-four hour waiting period to ensure that women's decisionmaking about abortion was "wise,"¹⁵³ "mature,"¹⁵⁴ and "thoughtful and informed."¹⁵⁵ The clear implication was that women's decisionmaking might be unwise, immature, thoughtless, or uninformed without the state's help. Indeed, the plurality wrote as if a woman who underwent an abortion without receiving state-approved information and without being forced to wait an additional twenty-four hours might not understand what she was doing, describing the Pennsylvania law as "reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed."¹⁵⁶ The plurality emphatically rejected the idea that a woman has "a constitutional right to abortion on demand,"¹⁵⁷ meaning a right to access abortion whenever she herself determines—with no one else's interference—that this is the best course of action.

This explanation for upholding the state information/waiting period requirement endorsed doubts about women's decisionmaking capacity and permitted states to restrict women's access to abortion and practical ability to decide whether they will become mothers. But the *Casey* Court nonetheless insisted that constitutional law no longer denied women equal status with men. *Casey* explained that the Court's "present understanding of marriage and of the nature of the rights secured by the Constitution" rejected "the common-law understanding of a woman's role within the family," which had placed wives under their husbands' control.¹⁵⁸ *Casey*

¹⁵¹ *See id.* at 885–86.

¹⁵² *See id.* at 881–87.

¹⁵³ *Id.* at 887.

¹⁵⁴ *Id.* at 883.

¹⁵⁵ *Id.* at 872; *see also id.* at 878, 885.

¹⁵⁶ *Id.* at 882.

¹⁵⁷ *Id.* at 887.

¹⁵⁸ *Id.* at 897–98 (majority opinion).

declared that “[t]he Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power.”¹⁵⁹

B. TEXTBOOKS ANNOUNCE WOMEN’S EMANCIPATION

The Supreme Court’s inclination to declare sex equality achieved reflects and reinforces a broader American pattern. Textbook authors have told that story to generations of elementary and secondary schoolchildren. This tale glosses over the fierce opposition that has limited what feminist reformers have been able to win. Instead, it assures young readers that America has left the problem of sex discrimination behind, suggesting that continued objections to women’s status in society are misplaced and further mobilization for change is unnecessary.

1. *Declaring Equality Before the Nineteenth Amendment*

Textbooks have been declaring the achievement of sex equality since before the Nineteenth Amendment. Roscoe Lewis Ashley’s *American History* (1907) announced the “emancipation of women” and contended that women had become “independent.” Ashley was writing more than a decade before the Nineteenth Amendment’s ratification. He acknowledged that many states denied women the franchise and took for granted that employers paid women less, but those facts did not disturb his overall conclusion.¹⁶⁰ Wilbur Gordy’s *History of the United States for Schools* (1913) was published more than a half century before many elite colleges admitted women. Gordy nonetheless contended that “[w]omen now have educational advantages equal to those of men.”¹⁶¹ Waddy Thompson’s *History of the People of the United States* (1919) ignored pervasive and legalized sex discrimination to assert that women had “secured, in nearly every state, equal rights with men in matters of property, education, and

¹⁵⁹ *Id.* at 898.

¹⁶⁰ ROSCOE LEWIS ASHLEY, *AMERICAN HISTORY: FOR USE IN SECONDARY SCHOOLS* 543–44 (1907) (internal quotation marks omitted); see also GRACE A. TURKINGTON, *MY COUNTRY: A TEXTBOOK IN CIVICS AND PATRIOTISM FOR YOUNG AMERICANS* 85 (1918); Epaphroditus Peck, *Women’s Rights in a Male-Suffrage State*, 25 *YALE L.J.* 459, 459, 466 (1916).

¹⁶¹ WILBUR F. GORDY, *A HISTORY OF THE UNITED STATES FOR SCHOOLS* 443 (new ed. 1913). On women’s admission to Ivy League colleges in the late 1960s and early 1970s, see NANCY WEISS MALKIEL, “KEEP THE DAMNED WOMEN OUT”: THE STRUGGLE FOR COEDUCATION 31–306, 441–88 (2016).

employment.”¹⁶²

2. *Declaring Equality Before Women Had Constitutional Protection from Sex Discrimination*

Proclamations that America had achieved sex equality became more common in the decades after the Nineteenth Amendment’s ratification. Restrictions on women’s rights and opportunities remained legal and widespread in this era, but that did not stop textbook authors from asserting that America had left sex discrimination behind. Rolla Tryon’s *The American Nation Yesterday and Today* (1930) declared that “the ideal of equal rights for women” had been “realized.”¹⁶³ William Hamm’s *The American People* (1938) reported women’s “economic emancipation,” insisting in an era when female workers were openly paid less and excluded from the best jobs that women had “ceased to be dependent upon some man — father or husband — for the necessities of life.”¹⁶⁴ Fremont Wirth’s *United States History* (1949) announced that women had “attained” “[e]qual political rights” at a time when *Breedlove v. Suttles* (the Georgia poll tax decision) was good law and many states treated women as marginal voters and jurors.¹⁶⁵ John Hicks’s *Short History of American Democracy* (1949) maintained that “[l]egal discriminations against women” had been “brought near the vanishing point.”¹⁶⁶

Many textbooks published in the middle years of the twentieth century identified 1920 or the 1920s as the moment when America established sex equality. These texts purported to speak about all women. But they implicitly confined their focus to white women, as many women of color remained disenfranchised for decades after the Nineteenth Amendment’s ratification. Melville Freeman’s *The Story of Our Republic* (1938) declared that the 1920s “saw women win their goal of equality,” including “not only the full privilege of voting, but freedom from old social customs and

¹⁶² WADDY THOMPSON, *A HISTORY OF THE PEOPLE OF THE UNITED STATES* 300 (1919); see also WILLIAM ESTABROOK CHANCELLOR, *HISTORY AND GOVERNMENT OF THE UNITED STATES FOR EVENING SCHOOLS* 63 (1905).

¹⁶³ ROLLA M. TRYON ET AL., *THE AMERICAN NATION YESTERDAY AND TODAY* 267 (1930).

¹⁶⁴ WILLIAM A. HAMM, *THE AMERICAN PEOPLE* 575–76 (1938); see also *id.* at 578–79; WILLIAM A. HAMM, *FROM COLONY TO WORLD POWER: A HISTORY OF THE UNITED STATES* 282, 443–46 (1947). On sex discrimination in employment, see LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890–1935*, at 192–98 (1994); KESSLER-HARRIS, *supra* note 60, at 218–19, 230–37, 249, 258–63.

¹⁶⁵ FREMONT P. WIRTH, *UNITED STATES HISTORY* 194 (1949); see also *supra* text accompanying notes 122–126, 145–148.

¹⁶⁶ JOHN D. HICKS, *A SHORT HISTORY OF AMERICAN DEMOCRACY* 652 (1949).

traditions—the right to work, play, dress, and live as they pleased.”¹⁶⁷ Leon Canfield’s *The United States in the Making* (1948) announced the “emancipation of women” and explained that “[b]y 1920 [women] had not only attained legal equality, but had won as well the right to vote and hold office throughout the United States.”¹⁶⁸ Leland Baldwin’s and Mary Warring’s *History of Our Republic* (1965) similarly reported that sex equality had been achieved in 1920, contending that “[d]uring the Gilded Age the old legal barriers were swept away and women came to have the same rights as men, except that they did not all get the right to vote until 1920.”¹⁶⁹

Textbooks often insisted that America had established sex equality through consensus rather than conflict, as enlightened men allied with reform-minded women. Eugene Barker’s *The Building of Our Nation* (1948) explained that “men and women alike” had “recognized” in the nineteenth century “[t]he injustice of” denying women equal rights and opportunities.¹⁷⁰ On Barker’s account, this shared understanding had made eradicating sex discrimination easy. Barker reported “the emancipation of women” and asserted “that almost everything which women demanded” in the nineteenth-century woman’s rights movement “has long since been granted them as matter of right.”¹⁷¹ Paul Boller’s and Jean Tilford’s *This Is Our Nation* (1961) similarly emphasized in discussing the success of the nineteenth-century woman’s rights movement that “many prominent men” had “supported the movement.”¹⁷²

Unsurprisingly, these consensual accounts of women’s legal history overlooked or underemphasized the tremendous effort required to win the Nineteenth Amendment and the impassioned opposition that suffragists had to overcome. Barker described granting the vote to women as a logical inevitability: “Since the United States wanted to be democratic—since the United States wanted to govern according to the wishes of its inhabitants—it was clear that, sooner or later, political rights would have to be extended

¹⁶⁷ MELVILLE FREEMAN, *THE STORY OF OUR REPUBLIC*, pt. II, at 306 (Eston V. Tubbs ed., 1938) (emphasis omitted).

¹⁶⁸ LEON H. CANFIELD ET AL., *THE UNITED STATES IN THE MAKING* 604–05 (1948) (capitalization omitted).

¹⁶⁹ LELAND D. BALDWIN & MARY WARRING, *HISTORY OF OUR REPUBLIC* 508 (1965); *see also* LOUIS B. WRIGHT ET AL., *THE DEMOCRATIC EXPERIENCE: A SHORT AMERICAN HISTORY* 363 (1963).

¹⁷⁰ EUGENE C. BARKER ET AL., *THE BUILDING OF OUR NATION* 263–64 (1948).

¹⁷¹ *Id.* at 660–61, 264.

¹⁷² PAUL F. BOLLER, JR. & E. JEAN TILFORD, *THIS IS OUR NATION* 259–60 (1961).

to women.”¹⁷³ Perhaps women’s eventual enfranchisement in the United States was inevitable. It is certainly easy to assume that now, given how commonsensical female voting seems today. But Barker glossed over the uncomfortable reality that many Americans at the time did not think women voting was a necessary part of democracy, which is why suffragists had to work so hard for so long.

James Frost’s *History of the United States* (1968) reported that “[t]he patriotic services rendered by women during World War I quickly broke down resistance to the idea of women voting.”¹⁷⁴ Women’s war work during World War I may have helped the suffragist cause. Carrie Chapman Catt, the President of the National American Woman Suffrage Association, certainly made that argument.¹⁷⁵ President Woodrow Wilson ultimately adopted it as well.¹⁷⁶ But many people—including many powerful male politicians—remained vehemently opposed to enfranchising women, even after World War I.

The Nineteenth Amendment passed the Senate on June 4, 1919 with just two votes to spare.¹⁷⁷ Maud Wood Park, the lead congressional lobbyist for the National American Woman Suffrage Association,¹⁷⁸ thought that the war had not swayed “a single vote” in Congress.¹⁷⁹ She concluded that the Nineteenth Amendment managed to squeak through the Senate because of the victories suffragists had already won at the state level.¹⁸⁰ Phrased bluntly, Senators from states that enfranchised women needed to support the amendment or risk being voted out of office by their female constituents.

Ratifying the Nineteenth Amendment required the agreement of thirty-six states, meaning that failure in just thirteen states would have kept the amendment out of the Constitution. Eight states had already rejected the Nineteenth Amendment by the time Tennessee became the thirty-sixth state

¹⁷³ BARKER ET AL., *supra* note 170, at 660.

¹⁷⁴ JAMES A. FROST ET AL., *A HISTORY OF THE UNITED STATES: THE EVOLUTION OF A FREE PEOPLE* 398 (1968).

¹⁷⁵ See, e.g., Carrie Chapman Catt, *Ready for Citizenship*, 20 PUB. 817, 817–18 (1917).

¹⁷⁶ See, e.g., WOODROW WILSON, *EQUAL SUFFRAGE: ADDRESS OF THE PRESIDENT OF THE UNITED STATES DELIVERED IN THE SENATE OF THE UNITED STATES ON SEPTEMBER 30, 1918*, S. DOC. NO. 65-284, at 3 (1918).

¹⁷⁷ See 58 CONG. REC. 635 (1919).

¹⁷⁸ See MAUD WOOD PARK, *FRONT DOOR LOBBY* 19, 35 (Edna Lamprey Stantial ed., 1960).

¹⁷⁹ *Id.* at 268.

¹⁸⁰ See *id.* at 268, 270–71.

to ratify.¹⁸¹ Winning Tennessee's support took a determined campaign that almost lost.¹⁸² The Tennessee House approved the Nineteenth Amendment on August 18, 1920 with no votes to spare.¹⁸³

3. *Modern Sanitized Textbooks*

In retrospect, it is easy to see how textbooks from earlier eras sanitized women's struggles for equality at a time when sex discrimination remained legal and pervasive. But many K-12 textbooks from more recent decades continue to gloss over the resistance and obstacles that women's rights activists have encountered, while emphasizing or overstating what these activists have been able to win.

Sometimes modern textbooks note continued barriers to sex equality, but provide overly optimistic estimates of when those barriers will disappear that suggest that the issue should not trigger much concern. Robert Divine's *America Past and Present* (2011) observed that "by 2004 women's wages still averaged only 76.5 percent of men's earnings," but told readers that "experts predicted" women would "reach pay equity with men" in "2018."¹⁸⁴ That year is now behind us. The latest studies on the wage gap in the United States estimate that the gap for white women will not close until 2055, the gap for black women will not close until 2119, and the gap for Hispanic women will not close until 2224.¹⁸⁵

Sometimes modern textbooks overstate the reach of women's victories. Exaggerated accounts of the Nineteenth Amendment's impact are common. Textbooks report that the Nineteenth Amendment "guarantee[d] all women the right to vote,"¹⁸⁶ "guaranteed every adult woman the right to a voice in

¹⁸¹ See SUBCOMM. ON THE CONSTITUTION OF THE S. COMM. ON THE JUDICIARY, AMENDMENTS TO THE CONSTITUTION: A BRIEF LEGISLATIVE HISTORY, S. PRINT NO. 99-87, at 57 (1985).

¹⁸² See ELAINE WEISS, THE WOMAN'S HOUR: THE GREAT FIGHT TO WIN THE VOTE 1–324 (2018); A. Elizabeth Taylor, *Tennessee: The Thirty-Sixth State*, in VOTES FOR WOMEN! THE WOMAN SUFFRAGE MOVEMENT IN TENNESSEE, THE SOUTH, AND THE NATION 53, 60–66 (Marjorie Spruill Wheeler ed., 1995); Carol Lynn Yellin, *Showdown in Tennessee*, in CAROL LYNN YELLIN & JANANN SHERMAN, THE PERFECT 36: TENNESSEE DELIVERS WOMAN SUFFRAGE 75, 81–108 (Ilene Jones-Cornwell ed., 1998).

¹⁸³ See WEISS, *supra* note 182, at 297–308; Taylor, *supra* note 182, at 64; Yellin, *supra* note 182, at 106.

¹⁸⁴ ROBERT A. DIVINE ET AL., AMERICA PAST AND PRESENT 785 (9th ed. 2011).

¹⁸⁵ See INST. FOR WOMEN'S POLICY RESEARCH, PUB. NO. Q075, WOMEN'S MEDIAN EARNINGS AS A PERCENT OF MEN'S, 1984–2016 (FULL-TIME, YEAR-ROUND WORKERS) WITH PROJECTIONS FOR PAY EQUITY, BY RACE/ETHNICITY 1 (2018); see also AAUW, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 4 (2018).

¹⁸⁶ EMMA J. LAPSANSKY-WERNER ET AL., UNITED STATES HISTORY 425 (2009).

the government of the country,”¹⁸⁷ “gave women the right to vote in all elections,”¹⁸⁸ or “guarantee[d] full voting rights to women.”¹⁸⁹ Daniel Boorstin’s *History of the United States* (1981) contended that the Nineteenth Amendment made women “first-class citizens.”¹⁹⁰ The Nineteenth Amendment did end sex-based prohibitions on voting. But the amendment did not guarantee all women the vote, much less establish sex equality more broadly. Women of color remained disenfranchised in the South into the 1960s. Restrictions on women’s rights and opportunities remained legal and widespread for decades after the Nineteenth Amendment’s ratification. Remember that *Breedlove v. Suttles* (1937) even upheld a law giving women a financial incentive not to vote.¹⁹¹

Sometimes modern textbooks stress the establishment of constitutional and statutory prohibitions on sex discrimination without discussing the judicial decisions that interpreted those prohibitions to leave many barriers to women’s equality intact. Textbooks note that the 1964 Civil Rights Act prohibited sex discrimination in employment.¹⁹² They observe that “[i]n 1971 the Court ruled that unequal treatment based only on sex violated the Fourteenth Amendment.”¹⁹³ But textbooks tend not to mention how the Supreme Court has constrained equality’s reach. To cite just two of many examples, the Court insisted in *Geduldig v. Aiello* (1974) that pregnancy discrimination is not a form of sex discrimination, exempting an important source of inequality from heightened scrutiny under the Equal Protection

¹⁸⁷ 2 JAMES A. BANKS ET AL., *UNITED STATES: ADVENTURES IN TIME AND PLACE* 588 (2001).

¹⁸⁸ SARAH BEDNARZ ET AL., *BUILD OUR NATION* 538 (1997).

¹⁸⁹ P. SCOTT CORBETT ET AL., *U.S. HISTORY* 709 (2017); *see also* JOYCE APPLEBY ET AL., *DISCOVERING OUR PAST: A HISTORY OF THE UNITED STATES* 417 (2014) [hereinafter APPLEBY ET AL., *DISCOVERING OUR PAST*]; JOYCE APPLEBY ET AL., *THE AMERICAN VISION* 204, 551, 927 (2003) [hereinafter APPLEBY ET AL., *THE AMERICAN VISION*]; ALAN BRINKLEY, *AMERICAN HISTORY: CONNECTING WITH THE PAST* 576 (14th ed. 2012); 2 EDGAR J. MCMANUS & TARA HELFMAN, *LIBERTY AND UNION: A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 353 (2014); JAMES L. ROARK ET AL., *THE AMERICAN PROMISE: A HISTORY OF THE UNITED STATES* 725 (3d ed. 2005).

¹⁹⁰ DANIEL J. BOORSTIN ET AL., *A HISTORY OF THE UNITED STATES* 473 (1981).

¹⁹¹ *See supra* notes 41, 118–126, 136–148 and accompanying text.

¹⁹² *See* APPLEBY ET AL., *DISCOVERING OUR PAST*, *supra* note 189, at 825; APPLEBY ET AL., *THE AMERICAN VISION*, *supra* note 189, at 927–28; BRINKLEY, *supra* note 189, at 845; RICHARD C. BROWN & HERBERT J. BASS, *ONE FLAG, ONE LAND* 695 (1985); CORBETT ET AL., *supra* note 189, at 866, 881; DIVINE ET AL., *supra* note 184, at 769; LAPSANSKY-WERNER ET AL., *supra* note 186, at 526, 1025; MCMANUS & HELFMAN, *supra* note 189, at 354; NORMAN K. RISJORD, *HISTORY OF THE AMERICAN PEOPLE* 752 (1986); ROARK ET AL., *supra* note 189, at 1036.

¹⁹³ BOORSTIN ET AL., *supra* note 190, at 709; *see also* MCMANUS & HELFMAN, *supra* note 189, at 354; ROARK ET AL., *supra* note 189, at 1055.

Clause.¹⁹⁴ The Court’s judgment in *Personnel Administrator v. Feeney* (1979) effectively cabined the constitutional law of sex discrimination to focus only on government action that explicitly distinguishes based on sex.¹⁹⁵ A statute phrased in sex-neutral language is essentially immune from challenge as unconstitutional sex discrimination, no matter how disproportionately the legislation harms women. Plaintiffs contesting a facially neutral law can only trigger heightened scrutiny under the Equal Protection Clause by establishing that lawmakers adopted the policy “at least in part because of, not merely in spite of, its adverse effects upon” women.¹⁹⁶ Proving such legislative malice is all but impossible.

Feeney’s narrow interpretation of equal protection has had far-reaching consequences. Consider the law governing marital rape. Women’s rights activists in the United States have spent more than a century and a half publicly arguing that wives should have legal dominion over their bodies. Indeed, the leaders of the nineteenth-century woman’s rights movement often insisted that establishing a wife’s right of sexual self-possession was even more important than obtaining the vote.¹⁹⁷ In the last quarter of the twentieth century, feminist activists finally succeeded in modifying the common law rule that had completely exempted husbands from prosecution for raping their wives. However, at least twenty-two states still treat marital rape more leniently than rape outside of marriage.¹⁹⁸ These laws have survived constitutional challenge because states have rewritten their marital rape exemptions in facially neutral language. Statutes now protect a person who rapes his “spouse,” rather than a husband who rapes his wife.¹⁹⁹

¹⁹⁴ See 417 U.S. 484, 496 n.20 (1974).

¹⁹⁵ See 442 U.S. 256, 274–81 (1979).

¹⁹⁶ *Id.* at 279 (internal quotation marks omitted).

¹⁹⁷ See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1413–27 (2000).

¹⁹⁸ See ALASKA STAT. § 11.41.432 (2018); ARIZ. REV. STAT. ANN. § 13-1407(D) (Supp. 2018); CAL. PENAL CODE §§ 261, 262 (West 2014); CONN. GEN. STAT. ANN. §§ 53a-65(2)–(3), 53a-70b(b) (West Supp. 2019); IDAHO CODE § 18-6107 (2016); IOWA CODE ANN. § 709.4 (West 2016); KY. REV. STAT. ANN. § 510.035 (LexisNexis 2014); LA. REV. STAT. ANN. § 14:93.5 (Supp. 2019); MD. CODE ANN., CRIM. LAW § 3-318 (LexisNexis 2012); MICH. COMP. LAWS ANN. § 750.520*l* (West 2004); MISS. CODE ANN. § 97-3-99 (2014); NEV. REV. STAT. ANN. § 200.373 (LexisNexis 2012); N.H. REV. STAT. ANN. § 632-A:2 (LexisNexis Supp. 2018); OHIO REV. CODE ANN. §§ 2907.01(L), 2907.02 (LexisNexis Supp. 2019); OKLA. STAT. ANN. tit. 21, § 1111 (West Supp. 2019); 11 R.I. GEN. LAWS §§ 11-37-1(9), 11-37-2 (2002); S.C. CODE ANN. § 16-3-658 (2015); S.D. CODIFIED LAWS § 22-22-7.4 (2017); VA. CODE ANN. §§ 18.2-61(C), 18.2-67.1(C), 18.2-67.2(C) (2014); WASH. REV. CODE ANN. § 9A.44.010(3) (West Supp. 2019); *id.* §§ 9A.44.050, 9A.44.100 (West 2015); W. VA. CODE ANN. § 61-8B-1(6) (LexisNexis 2014); WYO. STAT. ANN. § 6-2-307(a) (2019).

¹⁹⁹ See, e.g., *People v. Brown*, 632 P.2d 1025, 1026–27 (Colo. 1981) (en banc).

Nonetheless, the underlying conduct remains overwhelmingly sex-specific. Virtually all the people who benefit from marital rape exemptions are male, and virtually all the people left unprotected because of these exemptions are female.²⁰⁰ But once states adopted facially neutral language, *Feeney*'s holding made it unlikely that courts would consider the possibility that marital rape exemptions could be a form of sex discrimination.

In short, both *Geduldig* and *Feeney* circumscribed the reach of equal protection and left important obstacles to women's equality in place. These decisions were significant defeats for feminists and textbooks tend to ignore them.²⁰¹

III. CONSEQUENCES: MISREMEMBERING THE PAST SHAPES THE PRESENT

Omitting women's struggles for equality from our collective memory, or assuming women have already won those struggles, supports complacency. These ways of misremembering envision sex discrimination as a past practice instead of a present problem. They allow us to condemn policies the nation has supposedly abandoned, while directing critical attention away from policies that persist.

This part explores how America's distorted collective memory about women's history has had practical consequences. It begins by considering how the misperception that sex discrimination is a historical artifact rather than an ongoing phenomenon has warped the Supreme Court's constitutional jurisprudence. It then examines how Phyllis Schlafly's successful campaign to defeat the Equal Rights Amendment—and Schlafly's ideological heirs—drew on the American inclination to understand sex discrimination as a problem left behind in the past.

A. THE SUPREME COURT'S SEX DISCRIMINATION JURISPRUDENCE

The Supreme Court often describes sex discrimination as a historical phenomenon rather than a current problem. Indeed, the Court called common law coverture principles "medieval" as early as 1960.²⁰² This description sounds like an insult and in some ways it is. The Middle Ages are not remembered for their devotion to enlightened reason or their quality of life. But identifying "a wife's legal submission to her husband" as a

²⁰⁰ See Hasday, *supra* note 197, at 1494–96.

²⁰¹ For a rare exception mentioning *Geduldig* and *Feeney*, see MCMANUS & HELFMAN, *supra* note 189, at 357.

²⁰² *United States v. Dege*, 364 U.S. 51, 52, 54 (1960); see also *Trammel v. United States*, 445 U.S. 40, 44 (1980).

“medieval” concept linked women’s subordination to a period well before the founding of the United States, suggesting that this principle was foreign to the American tradition.²⁰³ In fact, a commitment to coverture principles has been a cornerstone of American law and significant aspects of that commitment remained secure in 1960. At that point, remember, the Court had yet to strike down any statute for denying women equal protection. The *Hoyt* decision upholding sex-specific obstacles to women’s jury service on the ground that women are “the center of home and family life” was still a year in the future.²⁰⁴ Coverture principles remained an important part of the American legal system in 1960. Those principles had not been left behind in “medieval” times.

The Court now acknowledges that women are entitled to equal protection, but continues to associate sex discrimination with the distant past. The Court called sex discrimination “archaic” as early as 1975, when sex discrimination was certainly not archaic.²⁰⁵ In 1975, the Court was just beginning to disrupt women’s legal subordination after almost two centuries spent promoting legalized male supremacy. Since introducing the term in 1975, the Court has described sex discrimination as “archaic” in at least fourteen other decisions.²⁰⁶ The Court also frequently uses related adjectives, calling sex discrimination “outdated,”²⁰⁷ “outworn,”²⁰⁸ “outmoded,”²⁰⁹ or an “old” notion.²¹⁰

As with “medieval,” these descriptions sound like condemnations of sex discrimination and serve that function from one perspective. They declare that sex discrimination is inconsistent with modern ideals. But these terms simultaneously suggest that the Court and the nation have jettisoned such “archaic,” “outdated,” “outworn,” “outmoded,” and “old” ways of thinking and governing. Describing sex discrimination as a historical artifact directs our focus away from exploring how sex discrimination persists. Sex discrimination is incompatible with some modern ideals, but it remains part of modern life.

The Court’s tendency to link sex discrimination to the past rather than the present is more than rhetoric. This perspective shapes the Justices’

²⁰³ *Dege*, 364 U.S. at 54.

²⁰⁴ *Hoyt v. Florida*, 368 U.S. 57, 62 (1961).

²⁰⁵ *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975).

²⁰⁶ See cases cited *supra* note 9.

²⁰⁷ See cases cited *supra* note 11.

²⁰⁸ See case cited *supra* note 12.

²⁰⁹ See cases cited *supra* note 13.

²¹⁰ See cases cited *supra* note 14.

arguments and the Court's decisions, helping to shield discriminatory policies from scrutiny and keep them in place. The Court relies on the premise that the nation has renounced sex discrimination as a reason to uphold modern laws without examining how they reflect the same gendered assumptions that the Court insists the nation has left behind.

Consider *Rostker v. Goldberg* (1981), which upheld the constitutionality of excluding women from military registration while contending that America had repudiated sex discrimination.²¹¹ Congress has never included women in military registration or conscription, but constitutional law provided few tools to challenge this exclusion for most of our history. *Rostker*, however, came to the Supreme Court after the Justices had begun applying heightened scrutiny to government action that treats women differently than men. The case focused on the reinstatement of male-only registration in 1980.²¹²

The federal government had discontinued military registration in 1975 and the draft in 1973.²¹³ After the Soviet Union invaded Afghanistan, President Jimmy Carter wanted to restart registration as a demonstration of military resolve and readiness. His February 1980 proposal to Congress sought authorization to register women along with men.²¹⁴ Congress agreed in June 1980 to fund registration for men, but refused to register women.²¹⁵ *Rostker* was a constitutional challenge to women's exclusion.²¹⁶

In upholding male-only registration, the Court emphasized that Congress in 1980 had “thoroughly reconsider[ed] the question of exempting women . . . and its basis for doing so.”²¹⁷ *Rostker* declared that the extensiveness of Congress's 1980 discussion “clearly establishes that the decision to exempt women from registration was not the accidental by-

²¹¹ See 453 U.S. 57, 83 (1981).

²¹² See *id.* at 59–64.

²¹³ See Proclamation No. 4360, 3 C.F.R. 462 (1975) (ending military registration); David E. Rosenbaum, *Nation Ends Draft, Turns to Volunteers*, N.Y. TIMES, Jan. 28, 1973, at 1 (Defense Secretary announced end of the draft); Act of Sept. 28, 1971, Pub. L. No. 92-129, § 101(a)(35), 85 Stat. 348, 353 (ending statutory authorization for the draft as of July 1, 1973).

²¹⁴ See Jimmy Carter, *Selective Service Revitalization: Statement on the Registration of Americans for the Draft*, 1 PUB. PAPERS 289, 289 (Feb. 8, 1980).

²¹⁵ See Act of June 27, 1980, Pub. L. No. 96-282, 94 Stat. 552, 552. For Carter's July 2, 1980 proclamation reinstating male-only registration, see Proclamation No. 4771, 3 C.F.R. 82, 82 (1980).

²¹⁶ See *Rostker*, 453 U.S. at 59.

²¹⁷ *Id.* at 75.

product of a traditional way of thinking about females.”²¹⁸

The Court’s premise seemed to be that gendered bias might explain the policies of long-ago Congresses, but would not infect contemporary lawmaking. Some discriminatory statutes might remain in force because legislators kept old laws on the books “unthinkingly or reflexively and not for any considered reason.”²¹⁹ But if a modern-day Congress spent time reexamining women’s exclusion from registration before deciding to reaffirm that policy, the Court could safely assume that Congress’s decision did not reflect “a traditional way of thinking about” women because contemporary lawmakers are free from such bias.

One reason *Rostker* stressed Congress’s reexamination of male-only registration is that the Court wanted to focus on legislative history from 1980 in assessing Congress’s reasons for excluding women. More specifically, the Court was eager to ignore the legislative history behind Congress’s decision to exclude women from registration in 1948. That earlier history was arguably relevant because the legislation Congress enacted in 1980 in response to Carter’s proposal was just an appropriations law, which authorized funding male-only registration pursuant to the 1948 statute that regulates military registration “in its modern form.”²²⁰ Presumably the *Rostker* Court did not want to explore the history behind Congress’s 1948 decision to exclude women from registration because the Court anticipated that this history would reveal gendered bias.

That was ironic. Justice William Rehnquist wrote *Rostker* as if the legislative history from 1980 was wholly unlike the legislative history from the 1940s. To be sure, there was an important difference between the two discussions. Virtually every member of Congress in 1948 had assumed that women’s exclusion from registration was too commonsensical to require explanation.²²¹ In contrast, Carter’s proposal to register women forced Congress to address the issue explicitly.

But Congress’s deliberations about women’s military service in the

²¹⁸ *Id.* at 74 (citation and internal quotation marks omitted).

²¹⁹ *Id.* at 72 (citation and internal quotation marks omitted).

²²⁰ *Id.* at 74–75.

²²¹ See *Hearings on Sundry Legislation Affecting the Naval and Military Establishments Before the H. Comm. on Armed Servs.*, 80th Cong. 6659–60 (1948) (discussion between Rep. Cecil Bishop, Secretary of Defense James Forrestal, and Secretary of the Army Kenneth Royall); 94 CONG. REC. 8358–59 (1948) (statement of Rep. Robert Doughton); *id.* at 8659 (statement of Rep. Robert Rich). For a rare member of Congress who appeared to question women’s exclusion from registration and conscription, see *id.* at 8385 (statement of Rep. Helen Douglas).

1940s and the 1980s overlapped more than they diverged. The Eightieth Congress—in office for 1947 and 1948—had taken for granted that women’s primary obligations were domestic. Congressmen assumed that women who volunteered for military service would end their military careers when they married to focus on wifely duties.²²² They repeatedly invoked General Dwight D. Eisenhower’s assurance that “few” women would stay in the military long enough to earn retirement benefits because (in Eisenhower’s oft-quoted words) the vast majority of women “will come in and I believe after an enlistment or two enlistments they will ordinarily—and thank God—they will get married.”²²³ Senator Leverett Saltonstall asked: “Why not make it mandatory that female personnel be separated from the service when they have children born to them while in the service?”²²⁴ Colonel Mary Hallaren, the director of the Women’s Army Corps, told him the military had already dealt with the problem.²²⁵ As Rear Admiral T.L. Sprague elaborated, military policy required discharging pregnant servicewomen because “under those circumstances, a woman’s loyalty and duty are to her family and no longer to the service.”²²⁶ Subsequent congressional discussions took the reasonableness of this policy as a given.²²⁷

Congress relied on the same mode of argument more than three decades later, insisting in 1980 that the government should exclude women from registration and conscription because women’s primary obligations were domestic. On this view, men were obligated to serve the nation on the battlefield, while women were responsible for staying home with their children.

²²² For Congressmen quoting or paraphrasing Eisenhower, see 94 CONG. REC. 4694 (1948) (statement of Rep. Paul Shafer); *id.* at 4696 (statement of Rep. Overton Brooks); *id.* at 6967 (statement of Rep. William Cole).

²²³ *To Establish the Women’s Army Corps in the Regular Army, to Authorize the Enlistment and Appointment of Women in the Regular Navy and Marine Corps and the Naval and Marine Corps Reserve, and for Other Purposes: Hearings on S. 1641 Before the Subcomm. on Org. and Mobilization of the H. Comm. on Armed Servs.*, 80th Cong. 5564 (1948) (statement of General Dwight D. Eisenhower).

²²⁴ *Women’s Armed Services Integration Act of 1947: Hearings on S. 1103, S. 1527, and S. 1641 Before the S. Comm. on Armed Servs.*, 80th Cong. 97 (1947) (statement of Sen. Leverett Saltonstall).

²²⁵ *See id.* at 97–98 (statement of Colonel Mary Hallaren); *see also id.* at 67 (statement of Colonel Mary Hallaren).

²²⁶ *Id.* at 67 (statement of Rear Admiral T.L. Sprague); *see also id.* at 98 (statement of Rear Admiral T.L. Sprague).

²²⁷ *See* 94 CONG. REC. 6968–69 (1948) (statement of Rep. Ellsworth Buck); *id.* at 6969 (statement of Rep. Overton Brooks).

The (all-male) Senate Armed Services Committee issued a report in 1980 that *Rostker* quoted or cited twenty-three times as a key guide to Congress’s reasoning.²²⁸ This report explained—in a passage *Rostker* did not quote—that “[a] decision which would result in a young mother being drafted and a young father remaining home with the family in a time of national emergency cannot be taken lightly, nor its broader implications ignored. The committee is strongly of the view that such a result, which would occur if women were registered and inducted under the administration plan, is unwise and unacceptable to a large majority of our people.”²²⁹

Individual Senators similarly emphasized in 1980 that women—unlike men—needed to prioritize domestic responsibilities. Senator Sam Nunn took to the Senate floor in June to warn that registering and conscripting women would interfere with women’s domestic obligations because in “hundreds, perhaps even thousands of cases” there would be “fathers staying home while mothers are shipped off for military service under a draft.”²³⁰ Nunn was certain that “society” was not ready for the “shock” of having conscripted women “leaving their husbands at home to take care of the children.”²³¹ Senator John Warner also opposed registering and drafting women because “a young mother” should not be “surrendering child care and going off to boot camp leaving the baby with the husband.”²³² Senator Jake Garn called the prospect of registering and drafting women “another part of the degradation of the family, taking women out of the home.” Garn could not “even conceive of that in the tradition of the American family and what it has meant to society.”²³³

Rostker assumed and asserted that Congress had abandoned gendered ways of thinking and used that contention as a reason to uphold Congress’s recent decisionmaking without exploring how Congress remained committed to stereotypes about masculine versus feminine roles. Yet legislative views about women’s place had actually changed little over the decades. The understanding that women had to prioritize domestic

²²⁸ See *Rostker v. Goldberg*, 453 U.S. 57, 60 n.1, 64–65, 68, 69 n.6, 73, 75–82, 78 n.14 (1981).

²²⁹ S. REP. NO. 96-826, at 159 (1980).

²³⁰ 126 CONG. REC. 13,894 (1980) (statement of Sen. Sam Nunn).

²³¹ *Department of Defense Authorization for Appropriations for Fiscal Year 1981: Hearings on S. 2294 Before the S. Comm. on Armed Servs.*, 96th Cong., pt. 3, at 1691–92 (1980) (statement of Sen. Sam Nunn); see also *id.* at 1694 (statement of Sen. Sam Nunn).

²³² 126 CONG. REC. 13,885 (1980) (statement of Sen. John Warner); see also *id.* (statement of Sen. Carl Levin).

²³³ *Id.* at 13,888–89 (statement of Sen. Jake Garn).

obligations was not an old-fashioned idea, now discarded. This premise continued to drive federal lawmaking.

As the *Rostker* Court noted, that case was hardly the first time the Justices had upheld a sex-based statute after insisting that sex discrimination was part of the nation's history but not its present.²³⁴ Just three months before the *Rostker* decision, a plurality of the Court in *Michael M. v. Superior Court* (1981) had relied on similar reasoning to uphold a sex-specific statutory rape law in California, which provided that only men and boys could be convicted of statutory rape and only girls could count as victims of statutory rape.²³⁵

The statute, and the Justices' response to it, both revealed the persistent power of gendered assumptions. California's choice to treat statutory rape as a sex-specific crime suggested that legislators believed female chastity was especially precious, thought girls younger than eighteen were less capable of consenting to sex than boys of the same age, and/or assumed teenage boys could not be victimized through sex.²³⁶

Moreover, gendered reasoning pervaded the *Michael M.* plurality opinion upholding the California law. The plurality argued that subjecting only male perpetrators to conviction for statutory rape made sense because "the risk of pregnancy itself constitutes a substantial deterrence to young females" contemplating having sex as teenagers. In short, a girl's capacity to conceive an unwanted pregnancy was threat and punishment enough for her. In contrast, the plurality explained that a boy or man "by nature, suffers few of the consequences of his conduct" if he impregnates a teenage girl: "No similar natural sanctions deter males. A criminal sanction imposed solely on males thus serves to roughly 'equalize' the deterrents on the sexes."²³⁷

From one perspective, the plurality was simply noting the biological reality that only women and girls can conceive and bear children. But the plurality's underlying assumption appeared to be that fathers will be much less committed to nonmarital children than mothers are. If the plurality thought men were likely to devote themselves to the decades-long responsibility of raising their nonmarital children, then it would not make sense to say that men escape "virtually all of the significant harmful and

²³⁴ See *Rostker v. Goldberg*, 453 U.S. 57, 74 (1981).

²³⁵ See 450 U.S. 464, 466–67 (1981) (plurality opinion).

²³⁶ See *id.* at 466, 470, 472 n.7; see also *id.* at 494–96, 495 n.10 (Brennan, J., dissenting).

²³⁷ *Id.* at 473 (plurality opinion) (emphasis added).

inescapably identifiable consequences of teenage pregnancy.”²³⁸ If a man escapes those consequences, it is not because of nature or biology. It is because he does not undertake the arduous work of parenting his child to adulthood.

Nonetheless, the *Michael M.* plurality maintained that sex discrimination had been left behind in the past. That was a starting premise, rather than a conclusion reached by scrutinizing the legislation at issue. Indeed, the plurality relied on that premise as a reason not to scrutinize. One of the arguments the plurality advanced for upholding the statutory rape law was that the California Legislature had recently “considered and rejected proposals” to rewrite the statute in sex-neutral terms. The plurality contended that this recent reconsideration was evidence that the sex-specific statute did not reflect “a traditional way of thinking about females.”²³⁹ Here again, the Justices assumed and insisted that contemporary legislative decisionmaking had jettisoned “outmoded” ideas about women and “the baggage of sexual stereotypes” that might have distorted the judgments of long-ago lawmakers.²⁴⁰ With that asserted, the Justices allowed modern lawmakers to treat women differently than men.

Two years after *Rostker*, Justice Lewis Powell similarly argued for skepticism about a woman’s allegations of workplace bias by contending that sex discrimination had already been eradicated. Elizabeth Hishon had been an associate at King & Spalding, a large law firm in Atlanta, from 1972 to 1979. She charged that the firm denied her partnership because of her sex.²⁴¹ Her suit went to the Supreme Court in 1983 on the question of whether a law firm’s decisions in selecting partners are subject to Title VII of the 1964 Civil Rights Act, which prohibits sex discrimination in employment.²⁴²

The accuracy of Hishon’s allegations of bias was not an issue before the Court.²⁴³ However, even a cursory review of the situation provided ample reason to suspect that sexism might have infected King & Spalding’s decisionmaking. The firm was founded in 1885, but had hired only one female attorney before Hishon. King & Spalding’s first female lawyer was never promoted to partner and spent thirty-three years “as the firm’s only

²³⁸ *Id.*

²³⁹ *Id.* at 471 n.6 (citation and internal quotation marks omitted).

²⁴⁰ *Id.* at 471 n.6, 476 (citation and internal quotation marks omitted).

²⁴¹ See *Hishon v. King & Spalding*, 467 U.S. 69, 71–72 (1984).

²⁴² See *id.* at 71–73.

²⁴³ See *id.* at 73.

‘permanent associate.’”²⁴⁴ King & Spalding paired the near-absence of female attorneys with a culture that assumed and perpetuated women’s marginalization. The firm held its annual gala at the Piedmont Driving Club. Many of the firm’s partners belonged to this club, which barred Jews and African-Americans from joining and admitted “women only by inheritance.”²⁴⁵ Even in 1983—when King & Spalding was in the media spotlight because Hishon’s suit was before the Supreme Court—a firm outing included a “bathing-suit competition” featuring “stunned” and “humiliated” female summer associates.²⁴⁶

Nonetheless, Powell suggested that courts should be skeptical of Hishon’s claim that she had experienced sex discrimination. Why? Had Powell examined specific evidence undercutting Hishon’s contentions? No. Powell’s doubts about Hishon’s allegations were not based on evidence from Hishon’s case. Those doubts preceded the presentation of evidence and told Powell that courts should approach Hishon’s evidence with skepticism. Powell’s doubts were rooted in his foundational assumption that discrimination against women was a historical problem now overcome. The Justice reportedly had “a look of incredulity on his face” during oral argument.²⁴⁷ Powell announced from the bench that he could not “imagine a law firm deliberately discriminating against somebody” based on sex. He was certain that elite law firms and the nation had left sex discrimination behind decades ago, when “20 or 30 years ago . . . people had lots of prejudices they don’t have now.”²⁴⁸ Powell made this pronouncement at a time when women constituted just five percent of the partners in the country’s hundred largest law firms.²⁴⁹ Indeed, Powell himself had spent his career before joining the Court as a named partner at a prominent Virginia law firm where every partner was a white man.²⁵⁰ Three and a half decades after Powell spoke, a 2018 survey found that women were still only twenty percent of the equity partners in the two hundred largest law

²⁴⁴ Brief of Petitioner at 3, *Hishon v. King & Spalding*, 467 U.S. 69 (1984) (No. 82-940).

²⁴⁵ David Margolick, *Sex Bias Suit Perils Law Firms’ Methods of Picking Partners*, N.Y. TIMES, Apr. 23, 1983, at 1.

²⁴⁶ James B. Stewart, *Fairness Issue: Are Women Lawyers Discriminated Against at Large Law Firms?*, WALL ST. J., Dec. 20, 1983, at 1.

²⁴⁷ Tony Mauro, *Yes, Law Firms Do Discriminate*, USA TODAY, Nov. 1, 1983, at 10A.

²⁴⁸ Transcript of Oral Argument at 24, *Hishon v. King & Spalding*, 467 U.S. 69 (1984) (No. 82-940).

²⁴⁹ See Kathleen Sylvester, *Minorities in Firms: Women Gaining, Blacks Fall Back*, NAT’L L.J., May 21, 1984, at 1.

²⁵⁰ See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 503 (1994); *Powell Denies Hiring Bias Against Blacks*, L.A. TIMES, Oct. 24, 1971, at B4.

firms.²⁵¹

The Court ultimately held in *Hishon v. King & Spalding* (1984) that Title VII applies to a law firm’s decisions in choosing partners.²⁵² However, Powell wrote separately to describe sex discrimination as a past practice rather than an ongoing problem. Hishon could pursue her suit, but Powell was confident that law firms like King & Spalding fully embraced principles of sex equality. He contended that “[i]n admission decisions made by law firms, it is now widely recognized—as it should be—that in fact neither race nor sex is relevant.”²⁵³ King & Spalding was perhaps less confident that its decisionmaking had been unbiased. After the Supreme Court announced its holding, the firm promptly settled Hishon’s suit for a “substantial” sum.²⁵⁴

The insistence that sex discrimination is part of America’s past, but not its present, continues to shape the Court’s judgments. *Sessions v. Morales-Santana* (2017) considered the constitutionality of legislation governing when nonmarital children born abroad can acquire United States citizenship.²⁵⁵ Federal law imposed more onerous parental residency requirements on the children of citizen fathers compared to the children of citizen mothers. A citizen father could convey his citizenship to a foreign-born nonmarital child only if the father had lived in the United States for at least five years before his child’s birth, including at least two years after the father turned fourteen. In contrast, a citizen mother could transmit her citizenship to a foreign-born nonmarital child so long as she had lived in the United States for at least one year before her child’s birth.²⁵⁶

The Court struck down this sex-based distinction.²⁵⁷ As Justice Ginsburg’s majority opinion observed, the sex-specific parental residency requirements reflected gendered assumptions that mothers are committed to their nonmarital children, while “unwed fathers care little about, indeed are strangers to, their children.”²⁵⁸

Morales-Santana called these stereotypes about maternal responsibility

²⁵¹ See PEERY, *supra* note 6, at 1–2, 11.

²⁵² See 467 U.S. 69, 78–79 (1984).

²⁵³ *Id.* at 81 (Powell, J., concurring).

²⁵⁴ James B. Stewart, *Sex Bias Suit that Led to Partnership Ruling Is Settled by Law Firm*, WALL ST. J., June 15, 1984, at 13 (internal quotation marks omitted).

²⁵⁵ See 137 S. Ct. 1678, 1686 (2017).

²⁵⁶ See *id.* at 1686–87.

²⁵⁷ See *id.* at 1686, 1700–01.

²⁵⁸ *Id.* at 1695; see also *id.* at 1692.

and paternal unreliability “stunningly anachronistic” and an “obsolescing view.”²⁵⁹ The opinion emphasized that the sex-differentiated rules governing parental residency requirements “date from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are.”²⁶⁰

Assumptions that women are more likely than men to care for nonmarital children do have a long history, but they are not anachronistic or obsolete. To the contrary, such assumptions remain present and powerful in American society and law—including in the Supreme Court’s own decisionmaking. Indeed, *Morales-Santana* simultaneously contended that gendered assumptions about disengaged nonmarital fathers were out-of-date and protected a legal regime resting on those assumptions.

While *Morales-Santana* struck down sex-based parental residency requirements, the Court’s opinion endorsed the continued constitutionality of another sex-based rule governing the citizenship of foreign-born nonmarital children—without exploring how that latter rule also rests on sex stereotypes. *Morales-Santana* made clear that the Court’s decision in *Nguyen v. INS* (2001) remains good law.²⁶¹

Nguyen upheld a federal requirement that citizen fathers seeking to convey citizenship to a foreign-born nonmarital child must formally acknowledge paternity before the child turns eighteen—by either legitimating the child, declaring paternity in writing and under oath, or obtaining a court order establishing paternity.²⁶² Citizen mothers of foreign-born nonmarital children are exempt from this requirement.²⁶³ As with the sex-based parental residency rules, the paternal acknowledgment requirement reflects gendered expectations that mothers are naturally dedicated to their nonmarital children, so proof of women’s commitment is unnecessary—while fathers are less inclined to be involved, so evidence of men’s commitment is needed.

Indeed, the paternal acknowledgment requirement not only reflects gendered assumptions about paternal disengagement, it makes distant relationships more likely. The requirement can separate fathers and children who would otherwise be closer, by denying children citizenship

²⁵⁹ *Id.* at 1692–93.

²⁶⁰ *Id.* at 1689.

²⁶¹ *See id.* at 1694.

²⁶² *See* 533 U.S. 53, 59, 62, 71–73 (2001).

²⁶³ *See id.* at 59–60, 62.

because their fathers failed to establish legal paternity in time. Tuan Anh Nguyen's American father raised him in the United States from age five. But Nguyen nonetheless did not acquire United States citizenship and was subject to deportation because his father did not obtain a judicial order establishing paternity until after Nguyen turned eighteen,²⁶⁴ presumably because the family was unfamiliar with the intricacies of citizenship law.

The paternal acknowledgment requirement can also help less committed fathers evade responsibility. Suppose a father does not want to support his foreign-born nonmarital child and/or hopes to keep the child's existence secret.²⁶⁵ The paternal acknowledgment requirement makes it very difficult for a child to become a United States citizen with the right to live here unless the child has her father's timely cooperation.

Nguyen's judgment upholding the paternal acknowledgment requirement protected and perpetuated the same gendered assumptions about paternal irresponsibility that the Court declared "anachronistic" in *Morales-Santana*. Moreover, the *Nguyen* opinion appeared to reason within those assumptions. *Nguyen* emphasized that "[o]ne concern in this context has always been with young people, men for the most part, who are on duty with the Armed Forces in foreign countries." *Nguyen* then presented statistics suggesting that many citizen fathers were in the military when their foreign-born nonmarital children were conceived. The Court observed that 1,041,094 members of the military were stationed abroad in 1969—the year Nguyen was born—and 252,763 were stationed abroad in 1999.²⁶⁶ Why would the Court stress that point in defending the statutory scheme? The paternal acknowledgment requirement did not turn on whether the citizen parent was enlisted at the time of conception. However, societal expectations about paternal disengagement with nonmarital children may be especially strong when the pregnancy began while the father was stationed abroad in the military. *Nguyen* appeared to be highlighting the prevalence of soldiers among the male citizens fathering children abroad as a way of asserting that Congress was right to assume that many citizen fathers will not develop relationships with their foreign-born nonmarital children.

The majority coalition in *Morales-Santana* included Justice Kennedy, who had written for the majority in *Nguyen*.²⁶⁷ *Morales-Santana* cast no doubt on the *Nguyen* opinion and emphasized that *Nguyen's* holding

²⁶⁴ See *id.* at 57.

²⁶⁵ See JILL ELAINE HASDAY, *INTIMATE LIES AND THE LAW* 160–61 (2019).

²⁶⁶ *Nguyen*, 533 U.S. at 65.

²⁶⁷ See *id.* at 56; *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1685 (2017).

remains good law.²⁶⁸ Indeed, *Morales-Santana* seemed to discount the harm that the paternal acknowledgment requirement inflicts. *Nguyen* had described that requirement as a “minimal” barrier “to the acquisition of citizenship.”²⁶⁹ *Morales-Santana* agreed, contending that the paternal acknowledgment requirement could “fairly be described as minimal.”²⁷⁰ This was a remarkable way to characterize a sex-based, unwaivable deadline that prevents some children of citizen fathers from acquiring the United States citizenship they could have claimed if their citizen parent was female.

After *Morales-Santana*, parental residency requirements for foreign-born nonmarital children are the same regardless of the citizen parent’s sex. The Court decided that the more onerous parental residency requirements long imposed on the children of citizen fathers will now also apply to the children of citizen mothers.²⁷¹ But citizenship law continues to subject the nonmarital children of citizen fathers to other obstacles that the nonmarital children of citizen mothers do not confront, including the paternal acknowledgment requirement *Nguyen* upheld.²⁷² The same *Morales-Santana* opinion that declared gendered presumptions about men’s lesser commitment to nonmarital children “stunningly anachronistic” simultaneously protected a legal regime perpetuating those very presumptions. The Court’s language—which seemed to condemn stereotypes of paternal disengagement by associating them with the unenlightened past—obscured how the Court was helping to preserve those stereotypes in the present.

In short, the Court’s rhetoric and decisionmaking have frequently reflected the assumption and insistence that America has left sex discrimination behind in the past. Indeed, the Court sometimes protects and perpetuates gendered bias while describing sex discrimination as a historical artifact. The Court relies on the contention that sex discrimination has been abandoned to uphold modern policies without exploring how those policies reflect the same gendered reasoning the Court assures us is long gone. Exaggerating the success of women’s struggles for equality can help the Court criticize practices the nation has purportedly abandoned, while shielding policies that remain with us.

²⁶⁸ See *Morales-Santana*, 137 S. Ct. at 1694.

²⁶⁹ *Nguyen*, 533 U.S. at 70.

²⁷⁰ *Morales-Santana*, 137 S. Ct. at 1694 (citation and internal quotation marks omitted).

²⁷¹ See *id.* at 1698–701.

²⁷² See *Nguyen*, 533 U.S. at 59–60.

B. PHYLLIS SCHLAFLY AND HER HEIRS

Political movements have built on the American inclination to overstate improvements in women's status and overlook or underemphasize continued sources of inequality. Consider Phyllis Schlafly's successful campaign to keep the Equal Rights Amendment out of the Constitution. Schlafly argued against feminist reform and for preserving the status quo by contending that America had already established sex equality.

Alice Paul and other members of the National Woman's Party had begun advocating for an Equal Rights Amendment soon after winning the Nineteenth Amendment because they recognized that sex discrimination would survive the Nineteenth Amendment's ratification.²⁷³ Paul's allies first proposed the ERA in Congress in 1923.²⁷⁴ Representative Daniel Anthony, Susan B. Anthony's nephew, introduced the resolution in the House.²⁷⁵

Feminists mobilized on the amendment's behalf for decades.²⁷⁶ But women could not get the ERA through Congress until March 22, 1972, when the Senate approved the ERA five months after the House had done so.²⁷⁷ The amendment Congress sent to the states provided that: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."²⁷⁸ After congressional approval, the ERA needed ratification by at least thirty-eight states to become part of the Constitution.

Schlafly was a conservative activist within the Republican Party, known for her bestselling book endorsing Barry Goldwater's 1964 presidential run.²⁷⁹ She turned her attention to the ERA a month before the Senate vote, devoting the February 1972 issue of her newsletter, the *Phyllis Schlafly Report*, to explaining "What's Wrong with 'Equal Rights' for Women."²⁸⁰ According to Schlafly, the issue "drew the biggest response in

²⁷³ See Paul, *supra* note 2, at 20; *Women Adopt Form for Equal Rights*, *supra* note 2, at 1.

²⁷⁴ See H.R.J. Res. 75, 68th Cong. (1923); S.J. Res. 21, 68th Cong. (1923).

²⁷⁵ On the relationship between Susan B. Anthony and Daniel Anthony, see *Daniel R. Anthony*, '88-'89, '91, 38 MICH. ALUMNUS 47, 47 (1931).

²⁷⁶ See, e.g., *Equal Rights Amendment to the Constitution: Hearing Before the H. Comm. on the Judiciary*, 68th Cong. 1-41 (1925); EQUAL RIGHTS FOR MEN AND WOMEN, S. REP. NO. 88-1558, at 1-3 (1964).

²⁷⁷ See 118 CONG. REC. 9598 (1972). For the House vote, see 117 CONG. REC. 35,815 (1971).

²⁷⁸ H.R.J. Res. 208, 92d Cong., 86 Stat. 1523 (1972).

²⁷⁹ See PHYLLIS SCHLAFLY, A CHOICE NOT AN ECHO (1964).

²⁸⁰ *What's Wrong with "Equal Rights" for Women?*, PHYLLIS SCHLAFLY REP., Feb. 1972.

the five-year history of this newsletter.²⁸¹ With that encouragement, Schlafly launched a multiyear attack on the ERA, waged in monthly newsletters,²⁸² endless public appearances,²⁸³ and a book-length antifeminist manifesto, *The Power of the Positive Woman* (1977).²⁸⁴ Indeed, Schlafly and the organizations she founded and led—Stop ERA and Eagle Forum—became the driving forces behind opposition to the amendment.²⁸⁵

This 1977 photograph shows Schlafly leading an anti-ERA demonstration in front of the White House.²⁸⁶



Schlafly's attack on the ERA emphasized two central arguments

²⁸¹ *The Fraud Called the Equal Rights Amendment*, PHYLLIS SCHLAFLY REP., May 1972, at 3.

²⁸² See, e.g., sources cited *infra* notes 285, 287, 290–292, 295, 297–299, 302, 310.

²⁸³ See, e.g., *A Heated Debate on the ERA*, WASH. POST, Mar. 17, 1977, at D17; Louise Solomon, *Schlafly, MacKinnon Debate Women's Rights*, STAN. DAILY, Jan. 27, 1982, at 1.

²⁸⁴ SCHLAFLY, *supra* note 18.

²⁸⁵ See, e.g., JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 110 (1986); Donald T. Critchlow & Cynthia L. Stachecki, *The Equal Rights Amendment Reconsidered: Politics, Policy, and Social Mobilization in a Democracy*, in *THE CONSTITUTION AND PUBLIC POLICY IN U.S. HISTORY* 157, 165 (Julian E. Zelizer & Bruce J. Schulman eds., 2009). On the founding of Stop ERA in 1972 and Eagle Forum in 1975, see *A Short History of E.R.A.*, PHYLLIS SCHLAFLY REP., Sept. 1986, at 1.

²⁸⁶ Library of Congress, Prints and Photographs Division (item 2011648744; copy on file with author).

against changing women's rights and roles. She insisted that the ERA was unnecessary because America had already achieved sex equality and she warned that the ERA was a bad idea because women's lives should remain centered around domesticity. Schlafly drew on these two themes to oppose a constitutional prohibition on sex discrimination, while simultaneously declaring that she supported sex equality.

On Schlafly's account, sex discrimination had been wholly eradicated. In 1972—just three months after the Supreme Court began applying equal protection principles to sex discrimination—Schlafly announced that “the American woman is the most privileged” out “[o]f all the classes of people who ever lived.”²⁸⁷ By 1977, she was reporting that women's “educational and employment options are unlimited” and “[t]here is no law that discriminates against women.”²⁸⁸ An American woman with a “Positive” attitude had “a near-infinite opportunity to control her own destiny, to reach new heights of achievement, and to motivate and influence others. Her potential is limited only by the artificial barriers erected by a negative view of herself or by the stultifying myths of the women's liberation movement.”²⁸⁹

Schlafly contended that powerful men, rather than feminist women, were responsible for establishing sex equality. She constantly stressed that Congress had prohibited sex discrimination in employment, education, and credit, with statutes like the 1963 Equal Pay Act, the 1964 Civil Rights Act, the 1972 Equal Employment Opportunity Act, the 1972 Education Amendments, and the 1974 Equal Credit Opportunity Act.²⁹⁰ Schlafly insisted that this legislation meant that “[e]qual pay for equal work is guaranteed” and that women had “[c]omplete protection against discrimination” in employment.²⁹¹ Indeed, she proclaimed that “[f]ederal legislation is already more than adequate to assure women of everything they could reasonably want. Women are fully guaranteed equality in

²⁸⁷ *What's Wrong with “Equal Rights” for Women?*, *supra* note 280, at 1.

²⁸⁸ SCHLAFLY, *supra* note 18, at 35, 138.

²⁸⁹ *Id.* at 29.

²⁹⁰ *See id.* at 34–35, 69–70, 118–19; *The Right to Be a Woman*, PHYLLIS SCHLAFLY REP., Nov. 1972, at 3; *ERA Won't Help Women in Education*, PHYLLIS SCHLAFLY REP., Sept. 1973, at 1; *HEW Regulations About “Sexism” in the Schools*, PHYLLIS SCHLAFLY REP., Aug. 1974, at 1; *E.R.A. Means Abortion and Population Shrinkage*, PHYLLIS SCHLAFLY REP., Dec. 1974, at 2; *How E.R.A. Will Hurt Men*, PHYLLIS SCHLAFLY REP., May 1975, at 2; *Big Money and Tough Tactics to Ratify E.R.A.*, PHYLLIS SCHLAFLY REP., June 1975, at 1; *The Hypocrisy of ERA Proponents*, PHYLLIS SCHLAFLY REP., July 1975, at 2; *Women's Magazines Promote ERA -- But Deny Equal Rights*, PHYLLIS SCHLAFLY REP., Dec. 1979, at 3; *A Short History of E.R.A.*, *supra* note 285, at 2.

²⁹¹ *The Right to Be a Woman*, *supra* note 290, at 3 (internal quotation marks omitted).

educational opportunities, admissions, and employment.”²⁹² When Schlafly pointed to federal civil rights laws as establishing women’s equality, she chose not to mention her work for Goldwater—who had voted against the 1964 Civil Rights Act and the 1972 Equal Employment Opportunity Act and campaigned for President on his opposition to federal prohibitions on employment discrimination.²⁹³

Schlafly also never mentioned how feminists within and outside Congress had pushed for these statutory prohibitions on sex discrimination, presumably because discussing that advocacy could mean acknowledging the positive contributions of feminist mobilization.²⁹⁴ Instead, Schlafly wrote as if male lawmakers had acted on their own initiative.

While Schlafly praised male politicians, she insisted that male inventors and capitalists had been even more crucial in securing women’s liberation. Schlafly maintained that legal reforms were less important for women than the advent of home appliances that enabled women to do their housework with less time and effort. In her words: “The real liberation of women from the backbreaking drudgery of centuries is the American free enterprise system which stimulated inventive geniuses to pursue their talents -- and we all reap the profits. The great heroes of women’s liberation are not the straggly-haired women on television talk shows and picket lines, but Thomas Edison who brought the miracle of electricity to our homes to give light and to run all those labor-saving devices -- the equivalent, perhaps, of a half-dozen household servants for every middle-class American woman.”²⁹⁵

²⁹² *ERA Won’t Help Women in Education*, *supra* note 290, at 1.

²⁹³ See 118 CONG. REC. 4948 (1972) (Goldwater’s vote on 1972 Equal Employment Opportunity Act); 110 CONG. REC. 14,511 (1964) (Goldwater’s vote on 1964 Civil Rights Act); *id.* at 14,318–19 (Goldwater explains his 1964 vote); Richard L. Lyons, *Rights Law Is Intrusion, Barry Says*, WASH. POST, Oct. 17, 1964, at A1 (Goldwater’s campaigning).

²⁹⁴ For Congresswomen’s advocacy for adding a prohibition on sex discrimination in employment to the 1964 Civil Rights Act, see 110 CONG. REC. 2578 (1964) (statement of Rep. Frances Bolton); *id.* at 2578–80 (statement of Rep. Martha Griffiths); *id.* at 2580–81 (statement of Rep. Katharine St. George); *id.* at 2582 (statement of Rep. Catherine May); *id.* at 2582–83 (statement of Rep. Edna Kelly). For advocacy from women outside Congress, see *Civil Rights: Hearings on H.R. 7152 Before the H. Comm. on Rules*, 88th Cong. 125 (1964) (statement of Rep. Howard Smith discussing letter received from the National Woman’s Party); *Meet the Press* (NBC television broadcast Jan. 26, 1964) (transcript at 9; on file with author) (journalist May Craig interviewing Smith); *Meet the Press* (NBC television broadcast Mar. 8, 1964) (transcript at 9–10; on file with author) (Craig interviewing Sen. Hubert Humphrey).

²⁹⁵ *What’s Wrong with “Equal Rights” for Women?*, *supra* note 280, at 2; see also SCHLAFLY, *supra* note 18, at 30–31.

This argument embraced the premise that housework—like hairspray—was women’s responsibility, but contended that domestic labor was no longer taxing or time-consuming because of the men who invented, manufactured, and sold vacuums, washing machines, and dishwashers. Here again, Schlafly denied that women’s activism had helped improve women’s lives. She told the American middle class that “Militant women’s liberationists did not produce automatic washers and dryers. It was the American competitive system that manufactured appliances cheap enough for the average American family to afford.”²⁹⁶

Schlafly’s second major argument against the ERA fit with her odes to home appliances. If the ERA was unnecessary because women already had legal, economic, and practical equality, the ERA was a terrible idea because the amendment would take women out of their traditional domestic roles and “deprive the American woman of her most cherished right of all -- the right to stay home, keep her baby, and be supported by her husband.”²⁹⁷ Schlafly charged that “[t]he women’s libbers are radicals who are waging a total assault on the family, on marriage, and on children.”²⁹⁸ She warned that the ERA would force women to work outside the home, taking “away a woman’s present *freedom of choice* to take a job — *or* to be a full-time wife and mother. In short, it will take away the right to be a woman.”²⁹⁹

Schlafly’s case against the ERA had deep internal tensions. She was using the contention that America had already embraced sex equality as a reason *not* to include a commitment to sex equality in the Constitution. She was declaring that “[t]here is no law that discriminates against women” while simultaneously applauding states for giving husbands rights their wives did not have.³⁰⁰ Schlafly praised “laws that give the husband the right to establish the domicile of the marriage and to give his surname to his children” as “good laws designed to keep the family together.”³⁰¹ She argued that these laws were wise because they upheld male supremacy in marriage. In her words: “Every successful country and company has one ‘chief executive officer.’ None successfully functions with responsibility

²⁹⁶ SCHLAFLY, *supra* note 18, at 32.

²⁹⁷ *The Fraud Called the Equal Rights Amendment*, *supra* note 281, at 4.

²⁹⁸ *What’s Wrong with “Equal Rights” for Women?*, *supra* note 280, at 3.

²⁹⁹ *The Right to Be a Woman*, *supra* note 290, at 4; *see also* SCHLAFLY, *supra* note 18, at 70–79; *The Precious Rights ERA Will Take Away from Wives*, PHYLLIS SCHLAFLY REP., Aug. 1973, at 1–4; *Effect of ERA on Family Property Rights*, PHYLLIS SCHLAFLY REP., Jan. 1974, at 1; *Why Virginia Rejected ERA*, PHYLLIS SCHLAFLY REP., June 1974, at 1–2; *The Legislative History of ERA*, PHYLLIS SCHLAFLY REP., Nov. 1976, at 2.

³⁰⁰ SCHLAFLY, *supra* note 18, at 138.

³⁰¹ *Id.* at 50.

equally divided between cochairmen or copresidents. . . . If marriage is to be a successful institution, it must likewise have an ultimate decision maker, and that is the husband.”³⁰² But if the law enforced wives’ subordination, didn’t that suggest that women lacked equal rights after all?

Schlafly’s anti-ERA campaign also confronted some uncomfortable facts, such as women’s persistent underrepresentation in political leadership. *The Power of the Positive Woman* declared “that the Positive Woman in America today faces a future in which her educational and employment options are unlimited.”³⁰³ But if Schlafly wanted to address the arguments of ERA supporters, she had to admit “that women hold only a small minority of seats in Congress, state legislatures, and national, state, and local boards and commissions.”³⁰⁴ Schlafly sought to explain away the disconnect between her account of the world and the inconvenient facts by contending that women’s political marginalization reflected their own free choices and failure to work hard enough. She argued that “[t]he fact that there may be only 18 women out of 535 members of Congress does not prove discrimination at all.”³⁰⁵ Instead, “[t]he small number of women in Congress proves only that most women do not want to do the things that must be done to win election.”³⁰⁶ But if women really faced no discriminatory barriers, wouldn’t more women seek and win political office? Some feminists asked this question about Schlafly’s own career.³⁰⁷ If sex discrimination no longer circumscribed women’s opportunities, why were Schlafly’s efforts to secure an important post in the Reagan Administration unsuccessful—despite a record of accomplishment few men could match?³⁰⁸

Schlafly’s arguments nonetheless resonated broadly enough to stop a constitutional amendment that needed supermajority support to succeed. Her attack on the ERA built on and reinforced a long tradition of declaring women’s equality achieved—often in the course of denying women equal rights. Congress had imposed a seven-year deadline for ratifying the ERA,

³⁰² *Id.*; see also *id.* at 54–55; *How E.R.A. Will Hurt Men*, *supra* note 290, at 2–3.

³⁰³ SCHLAFLY, *supra* note 18, at 35.

³⁰⁴ *Id.* at 38.

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 39.

³⁰⁷ See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 29–30 (1987).

³⁰⁸ For archival evidence of Schlafly’s efforts to be appointed, see Randall Balmer, *Opinion, Pursuit of High Office*, *L.A. TIMES*, Sept. 8, 2016, at A13.

later extended until 1982.³⁰⁹ When that extended deadline passed, only thirty-five of the required thirty-eight states had ratified. The ERA did not become part of the Constitution. Schlafly claimed credit for the ERA's defeat.³¹⁰ Many ERA supporters and scholars agreed that the amendment would have been ratified if Schlafly had not mounted her opposition campaign.³¹¹

Indeed, Schlafly's arguments against the ERA were so potent that prominent conservatives have continued to rely on them when arguing against feminist reform in the years after the ERA's defeat. Robert Bork's *Slouching Towards Gomorrah* (1996) exemplifies this lasting influence. Like Schlafly, Bork insisted that sex equality had already been accomplished, asserting that "[t]here are no artificial barriers left to women's achievement."³¹² Bork also agreed with Schlafly that "feminists, radical or otherwise, actually had little to do with the progress of women in the latter half of this century."³¹³ Technological advances that made "shopping, food preparation, laundering and much else . . . dramatically easier" had been more important than legal or social change in securing women's liberation in the second half of the twentieth century.³¹⁴ In his words: "For women the new choices are available largely because of technology, for blacks because of the success of the civil rights movement."³¹⁵ Bork wrote as if a person could not be simultaneously black and female, he took for granted that housework was women's responsibility, and he contended that activism in support of women's rights had not been central to improving modern women's lives. In fact, Bork explicitly advocated complacency, advising women "to drop the word 'feminism' altogether since the movement no longer has a constructive role to play; its work is done."³¹⁶

Sarah Palin similarly contended that women's equality had already been achieved when she opposed further feminist reform. In 2008, Palin

³⁰⁹ See H.R.J. Res. 208, 92d Cong., 86 Stat. 1523 (1972). For the deadline extension, see H.R.J. Res. 638, 95th Cong., 92 Stat. 3799 (1978).

³¹⁰ See *A Short History of E.R.A.*, *supra* note 285, at 1; Elisabeth Bumiller, *Schlafly's Gala Goodbye to ERA*, WASH. POST, July 1, 1982, at C1; Megan Rosenfeld, *Hits from the Mrs.*, WASH. POST, Mar. 23, 1979, at C1.

³¹¹ See, e.g., MANSBRIDGE, *supra* note 285, at 110; Critchlow & Stachecki, *supra* note 285, at 165; Alan Wolfe, *Mrs. America*, NEW REPUBLIC, Oct. 3, 2005, at 32, 32 (book review).

³¹² BORK, *supra* note 8, at 194.

³¹³ *Id.* at 195.

³¹⁴ *Id.*

³¹⁵ *Id.* at 228.

³¹⁶ *Id.* at 194.

was Alaska's governor and John McCain's running mate in the presidential election.³¹⁷ She declared "that women certainly today have every opportunity that a man has to succeed and to try to do it all anyway." With that premise asserted, Palin campaigned against proposed federal legislation to extend the statute of limitations for wage discrimination lawsuits, arguing that the bill was unnecessary.³¹⁸ Palin's 2009 memoir, *Going Rogue*, proclaimed: "we consider ourselves more liberated than some women's rights groups would have us believe we are."³¹⁹

In sum, America tends to forget the history of women's struggles for equality. When we do remember those struggles, we often overstate the changes in women's status and forget what feminist activism has been unable to accomplish in the face of entrenched resistance. These failures of our collective memory have practical consequences, on the Court and off. Political movements have taken advantage of them, assuring us that sex equality has already been established and that further reform is unnecessary.

Let's turn now to thinking about how a better understanding of the past can help us build a more equal future.

IV. HOPE: LEARNING FROM THE PAST TO CHANGE THE FUTURE

The contours of our collective memory can constrict our collective imagination. When Supreme Court Justices, government officials, or national memorials recount America's history without including women's striving for rights and opportunities, they treat sex equality as unimportant. When Justices, political activists, or textbook authors sanitize women's struggles for equality, they imply or declare that sex discrimination is a problem already solved. Both strategies promote complacency. They tell us that women should be satisfied with their lot, having received everything they asked for—or even more than they thought to request. They suggest that any right or opportunity women do not have, they do not want.

Bringing women's struggles for equality into the stories we tell about our nation and its Constitution makes clear that sex discrimination is a persistent problem in the United States and fierce debates over women's rights and roles are a central part of American life. Adding a richer and

³¹⁷ See Michael Cooper & Elisabeth Bumiller, *Alaskan Is McCain's Choice*, N.Y. TIMES, Aug. 30, 2008, at A1.

³¹⁸ *Behind the Scenes with Sarah Palin* (CBS television broadcast Sept. 30, 2008) (quoting Sarah Palin). For the enacted law, see Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

³¹⁹ SARAH PALIN, *GOING ROGUE: AN AMERICAN LIFE* 30 (2009).

truer account of women's struggles to our collective memory can provide us with a clearer sense of how reform takes place, a sharper focus on what women's rights activists have yet to achieve, and a renewed determination to bring the nation closer to equality between women and men.

A. FIGHTS FOR RIGHTS

Women's status under the law and in society has long been the subject of conflict rather than consensus. Women seeking to improve their lives have not been able—or willing—to wait passively for men's enlightened benevolence. Male-dominated society did not spontaneously or naturally recognize the problem of women's subordination. Instead, women have secured new rights and opportunities by identifying grievances, demanding change, and fighting against powerful opponents intent on blocking feminist reform.

Winning the Nineteenth Amendment took seventy-two years of work after the first woman's rights convention called for female enfranchisement. The campaign required committed activism, nationwide mobilization, and ultimately the formation of a mass movement.³²⁰ Even then, the suffragists' victory was hard-fought and close because the resistance was so fierce.³²¹ After the ratification of the Nineteenth Amendment, forty-five more years of dedicated activism were required before the passage of the 1965 Voting Rights Act began to address the systematic disenfranchisement of African-American women and men.³²² The enactment of statutory prohibitions on sex discrimination similarly depended on women's mobilization in and out of Congress.³²³ The Supreme Court, in turn, did not identify a single case of unconstitutional sex discrimination until the modern women's movement coalesced and feminist litigators strategized to teach the Justices about sex discrimination and change how they interpreted the Constitution.³²⁴

This history provides little reason to believe that women can achieve significant gains by relying on consensus, conciliation, and men's spontaneous enlightenment. Real progress has always required women's willingness to disrupt the status quo, make uncomfortable demands, and battle prevailing assumptions about how the world should work. Frederick Douglass's insight is as true today as it was in 1857: "If there is no struggle

³²⁰ See *supra* text accompanying notes 40, 42–47.

³²¹ See *supra* text accompanying notes 177–183.

³²² See *supra* note 41 and accompanying text.

³²³ See *supra* note 294.

³²⁴ See *supra* text accompanying notes 19, 31–32.

there is no progress.”³²⁵ We need more conflict about women’s status, not less. Conflict can produce change. Complacency will not.

B. PROGRESS IN PROGRESS

Incorporating the history of women’s struggles for equality into America’s stories about itself makes plain that women’s progress remains partial, incomplete, and in progress. Supreme Court Justices, textbook authors, and politicians have long declared sex equality achieved, but such pronouncements remain premature. Exploring the history of women’s striving for equal rights and opportunities can make Americans more attentive to present inequalities that we might otherwise take for granted because they are so ubiquitous.

Recall Alice Paul’s predictions that the nation would be transformed by 2023. In some ways, of course, America has been. But we have still not reached many of the milestones that Paul thought would already be behind us. Paul—like many other feminists before and since—was hoping and working for the day when “the world will be no longer a man’s world, but a woman’s and man’s world with each sex participating equally in the control of government, of family, and of industry.”³²⁶ That day has yet to arrive.

The law’s commitment to countering sex discrimination also remains limited. The Supreme Court often excludes women from its broader reflections about its constitutional decisionmaking, suggesting that the Court does not understand sex discrimination to be a core constitutional problem and sex equality to be a core constitutional value. When the Court’s attention does turn to women, the Justices have long been eager to attribute improvements in women’s status to men’s benevolence and to declare sex equality achieved.³²⁷ Those pronouncements have sometimes come in the course of denying women equal rights.³²⁸ Even after the Court finally extended equal protection to women, the Justices have still relied on the premise that sex discrimination has been eradicated as a reason to uphold sex-based distinctions in the law without exploring how those distinctions perpetuate gendered assumptions.³²⁹

Moreover, the Court has defined the problem of sex discrimination very narrowly. The Court will not scrutinize facially neutral statutes under

³²⁵ TWO SPEECHES BY FREDERICK DOUGLASS 22 (Rochester, C.P. Dewey 1857).

³²⁶ Paul, *supra* note 1, at 24.

³²⁷ See *supra* Sections I.A, II.A.

³²⁸ See *supra* Section II.A.2.

³²⁹ See *supra* Section III.A.

the Equal Protection Clause—even when the legislation inflicts enormously disproportionate injuries on women. The Court’s decision to constrain the scope of equal protection predictably protects laws that accommodate men’s concerns while disregarding women’s experiences. For example, this restriction on the reach of equal protection helps explain why at least twenty-two states are still able to treat marital rape more leniently than rape outside of marriage. Marital rape exemptions became insulated from constitutional challenge once states rewrote them in sex-neutral language.³³⁰

The limits of our national commitment to sex equality are revealed perhaps most visibly in the constitutional text itself. After almost a century of feminist advocacy, our Constitution still does not include an Equal Rights Amendment. The only recognition of women’s rights in the nation’s foundational document appears in the Nineteenth Amendment, which courts have refused to interpret as a source of sex equality principles beyond women’s right to vote.³³¹ No part of the Constitution’s text specifically and explicitly commits the nation to advancing sex equality and to countering sex discrimination.

C. BUILDING ON THE PAST TO SHAPE THE FUTURE

Our collective memory helps shape our conceptions about what is possible and what is necessary. The history of women’s struggles for equality can be sobering, but it is also inspiring and motivating. We can build on this history as we work towards a future where women have the same rights and opportunities, and the same respect and dignity, as men.

We can seek reform by making legal arguments in court, by advancing political arguments for legislation, and by pursuing constitutional change. In court, we need to counter the judicial tendency to ignore women’s struggles for equality and to describe sex discrimination as a past problem now vanquished. Helping courts recognize that sex discrimination persists into the present—despite years of activism striving for equality—is an important step towards changing the future. We cannot control judicial modes of reasoning, but we can try to influence them. Feminist lawyers and activists should avoid describing sex discrimination as archaic, medieval, anachronistic, antiquated, outdated, outworn, outmoded, or an old notion,

³³⁰ See *supra* text accompanying notes 195–201.

³³¹ See, e.g., *Fay v. New York*, 332 U.S. 261, 290 (1947); *Breedlove v. Suttles*, 302 U.S. 277, 283–84 (1937). For an early contrary suggestion, see *Adkins v. Children’s Hosp.*, 261 U.S. 525, 553 (1923). For insightful discussion of how courts came to interpret the Nineteenth Amendment narrowly, see Siegel, *Collective Memory*, *supra* note 45, at 152–68; Siegel, *She the People*, *supra* note 45, at 1006–1022.

because those terms suggest that sex discrimination is a historical artifact rather than an ongoing concern. Our language as well as our arguments should emphasize that sex discrimination is part of America's present along with its past. Moreover, we should directly attack the contention that politicians' recent endorsement of a policy is grounds for assuming the policy does not reflect gendered bias.

We can also build on the history of women's struggles for equality in arguing for legislative reform at the federal, state, and local levels. The fact that laws remain on the books is insufficient reason to assume that women have no objection to them.³³² Vehement resistance has often limited what feminist reformers have been able to win. For example, women's rights activists in the United States have been fighting to give wives rights of sexual self-ownership for more than a century and a half. The persistence of laws treating marital rape more leniently is not proof of women's complacent acceptance of the status quo. It is evidence that feminists have faced intense opposition that has thus far succeeded in cabining the scope of change.³³³

Moreover, we can build on the history of women's struggles in making the case for including an explicit commitment to sex equality in the Constitution. Feminists can learn from Phyllis Schlafly's tactical brilliance, even if they find her normative arguments unappealing. One way Schlafly defeated the ERA was by invoking a vision of women's history that was untrue, but deeply rooted in America's collective memory. Schlafly contended that sex discrimination had already been eradicated through men's enlightened benevolence, so further reform to improve women's lives was unnecessary. She recognized the power of this historical narrative to shape how contemporary Americans understood the present and thought about what needed to change and what did not.

Where Schlafly drew on a misremembered past to support her case for preserving the status quo, feminists can draw on women's actual struggles for equality in pushing for constitutional change. Women have long strived to improve their status, including almost a century spent working for the ERA. Those efforts have not always been successful, however, because of impassioned resistance from opponents of feminist reform. Women's place in American society was, and remains, the subject of ferocious debate. The forces arrayed against the ERA contended that women's real responsibilities

³³² For an argument relying on that assumption, see *United States v. Virginia*, 518 U.S. 515, 567, 569–70, 575–76 (1996) (Scalia, J., dissenting).

³³³ See Hasday, *supra* note 197, at 1413–505.

and true roles were domestic and warned that the ERA would take women out of their homes.³³⁴ We have seen this argument many times. It undergirded common law coverture, female disenfranchisement, legal restrictions on women's right to work, and legal obstacles to women's jury service.³³⁵ It lay behind the Supreme Court's decision in 1937 to uphold a statute giving women a financial incentive not to vote and Congress's decision in 1980 to exclude women from military registration.³³⁶ Indeed, the Court relied on a version of this argument in the twenty-first century to uphold sex-based regulation of the citizenship of foreign-born nonmarital children.³³⁷

The ERA's defeat in the 1970s and 1980s is not evidence that the problem of sex discrimination had already been solved. It is evidence that sex discrimination was so entrenched—that gendered assumptions about women's place remained so powerful—that feminists were unable to overcome those assumptions, at least in a context where they needed supermajority support to ratify a constitutional amendment.

Enriching our collective memory with the stories of women's struggles for equality—some triumphant and some thwarted by determined opposition—makes clear that sex discrimination is a foundational problem in American life and sex equality is an essential value that the nation needs to endorse as powerfully as we can. It is long past time to add a commitment to women's equality to our constitutional text, indelibly declaring that women and their struggles for equality are central to America's past, present, and future. The language of our Constitution should recognize sex equality as a core constitutional principle and sex discrimination as a profound violation of constitutional requirements.

History tells us that this victory will not be easy to accomplish. But progress never is. The stories of women's struggles for equality should leave us both impatient with the pace of change and prepared for a long fight. We can take courage, energy, and hope from the many champions of women's rights who preceded us.

³³⁴ See *supra* text accompanying notes 295–299.

³³⁵ See *supra* text accompanying notes 57, 104–109, 133–135, 145–148.

³³⁶ See *supra* text accompanying notes 123–126, 228–233.

³³⁷ See *supra* text accompanying notes 255–272.

FELONY DISENFRANCHISEMENT & THE NINETEENTH AMENDMENT

*Michael Gentithes**

For the last decade, voting rights across America have contracted.¹ Using new legislation that “range[s] from strict photo ID requirements to early voting cutbacks to registration restrictions,” fully half of the states have implemented restrictions on the franchise since 2010.² The trend was exacerbated when, in *Shelby County v. Holder*, the Supreme Court found the Voting Rights Act’s coverage formula unconstitutional, thereby gutting the preclearance system that required states with a history of discriminatory voting laws to seek preapproval for voting rule changes that could affect minorities.³ In *Shelby*’s aftermath, several states previously subject to preclearance began aggressively purging names from their voter rolls.⁴ Add in the Supreme Court’s recent finding that extreme partisan gerrymandering—with its effects on legislative stagnation and underrepresentation for citizens in packed and cracked voting districts⁵—is a

* Many thanks to the University of Akron School of Law for hosting this wonderful event, and to Professor Tracy Thomas, the John F. Seiberling Chair of Constitutional Law and Director of the Constitutional Law Center, for inviting me to participate.

¹ In the 2018 election, “voters in at least eight states [faced] more stringent voting laws than they did in the last federal election cycle in 2016. Voters in 23 states [faced] tougher restrictions than they did in 2010. The most common restrictions involve[d] voter ID laws, but they also include[d] additional burdens on registration, cutbacks to early voting and absentee voting, and reduced voting access for people with past criminal convictions.” Wendy Weiser & Max Feldman, *The State of Voting 2018*, BRENNAN CENTER FOR JUSTICE, at 5 (2018).

² BRENNAN CENTER FOR JUSTICE, NEW VOTING RESTRICTIONS IN AMERICA, July 3, 2019, <https://www.brennancenter.org/sites/default/files/legal-work/New%20Voting%20Restrictions.pdf> (“Overall, 25 states have put in place new restrictions since then — 15 states have more restrictive voter ID laws in place (including six states with strict photo ID requirements), 12 have laws making it harder for citizens to register (and stay registered), ten made it more difficult to vote early or absentee, and three took action to make it harder to restore voting rights for people with past criminal convictions.”).

³ 570 U.S. 529, 550-57 (2013).

⁴ “For the two election cycles between 2012 and 2016, jurisdictions no longer subject to federal preclearance had purge rates significantly higher than jurisdictions that did not have it in 2013. The Brennan Center calculates that 2 million fewer voters would have been purged over those four years if jurisdictions previously subject to federal preclearance had purged at the same rate as those jurisdictions not subject to that provision in 2013.” Jonathan Brater et al., *Purges: A Growing Threat to the Right to Vote*, BRENNAN CENTER FOR JUSTICE, at 1 (2018).

⁵ See Michael Gentithes, *Gobbledygook: Political Questions, Manageability, & Partisan Gerrymandering*, 105 IOWA L. REV. (forthcoming).

non-justiciable political question,⁶ and the picture of voting rights in America seems quite bleak.

On the one hundredth anniversary of the Nineteenth Amendment's passage, and with the 2020 election looming, trends that contract voting rights must be combated wherever possible. This Article considers one particularly ripe opportunity: felony disenfranchisement laws. The Nineteenth Amendment and the history of the women's suffrage movement can offer a compelling argument against such laws. The exposure of flaws in the logic behind efforts to preclude classes of citizens from choosing our next political leaders can offer persuasive reasons to end felony disenfranchisement in America today.

Across the country, felony disenfranchisement laws leave some six million citizens unable to vote.⁷ They do not simply restrict voting for those currently imprisoned; as of 2018, 4.7 million citizens could not vote because they lived in one of 34 states that prohibited the franchise for a mix of those on probation, parole, or even those who completed their sentence.⁸ In twelve states that restrict voting rights for the latter category, citizens who were convicted but already served their time “make up over 50 percent of the entire disenfranchised population.”⁹ And because most felony disenfranchisement laws apply irrespective of offense type, many of these citizens lose the vote for committing crimes wholly unrelated to the political process—a sanction that can follow them for a lifetime outside the prison's walls.

Though felony disenfranchisement laws have an outsized effect on young minority men, they increasingly threaten a century of gains in female enfranchisement. In the last quarter century, rates of female incarceration have exploded. Since 1980, the growth rate for female imprisonment has more than doubled that of men, leading to a total increase of more than 750% by 2017.¹⁰ Today, more than 225,000 women are behind bars in prisons and jails, representing approximately one tenth of the total number of incarcerated Americans.¹¹ When those on probation or parole are included, women

⁶ *Rucho v. Common Cause*, 588 U.S. ____ (2019) (slip op., at 30) (“We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.”).

⁷ Morgan McLeod, *Expanding the Vote: Two Decades of Felony Disenfranchisement Reform*, THE SENTENCING PROJECT, at 3 (2018).

⁸ Morgan McLeod, *Expanding the Vote: Two Decades of Felony Disenfranchisement Reform*, THE SENTENCING PROJECT, at 3 (2018).

⁹ THE SENTENCING PROJECT, *FELONY DISENFRANCHISEMENT: A PRIMER*, at 2 (2018).

¹⁰ THE SENTENCING PROJECT, *INCARCERATED WOMEN AND GIRLS*, <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/> (June 6, 2019).

¹¹ By the end of 2017, federal and state correctional authorities held approximately 1,378,000 male prisoners and 111,000 female prisoners. Jennifer Bronson & E. Ann Carson, *Prisoners in 2017*, U.S. DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS,

constitute nearly one fifth of the total corrections population in the United States.¹²

This growth in the female incarceration rate has caused rapid disenfranchisement for female felons under state law. Research suggests that approximately one million women are disenfranchised under current felon disenfranchisement legislation,¹³ a number poised to grow as the proportion of women in the nation's corrections population increases over time.¹⁴ Furthermore, women are more likely than men to be imprisoned for drug or property offenses.¹⁵ Thus, an increasing number of women are losing their ability to vote based upon non-violent offenses with no relationship whatsoever to politics or government.

The trends in female felon disenfranchisement are especially incongruous with the Nineteenth Amendment's history, the passage of which we have gathered to celebrate. The Amendment was the culmination of an historical shift in the way our nation understood the importance of voting rights in representative democracy.

Arguments to disenfranchise subsets of the population sound in paternalism: some citizens simply cannot be trusted to exercise the vote responsibly. Frederick Douglas quipped that depriving some citizens of suffrage "affirm[s their] incapacity to form intelligent judgments respecting

<https://www.bjs.gov/content/pub/pdf/p17.pdf>, at 3, tbl. 1 (April 2019). Additionally, county and city jails held roughly 632,000 male inmates and 114,000 female inmates. Zhen Zeng, *Jail Inmates in 2017*, U.S. DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/content/pub/pdf/ji17.pdf>, at 5, tbl. 3 (April 2019); see also THE SENTENCING PROJECT, INCARCERATED WOMEN AND GIRLS, <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/> (June 6, 2019).

¹² Email from Morgan McLeod, Communications Director, The Sentencing Project, to Michael Gentithes, Assistant Professor, University of Akron School of Law (March 29, 2019 11:56 AM) (copy on file with Professor Gentithes).

¹³ Email from Morgan McLeod, Communications Director, The Sentencing Project, to Michael Gentithes, Assistant Professor, University of Akron School of Law (March 29, 2019 11:56 AM) (copy on file with Professor Gentithes).

¹⁴ "If these trends continue, we will see more and more women who lose the right to vote in addition to other rights/privileges that are lost with a felony conviction. . . . The tendency is to put a male face on the issue, but it impacts women and children at alarmingly high rates." Melanie Mignucci, *Why Felony Disenfranchisement is a Feminist Issue*, BUSTLE.COM, Aug. 18, 2017, <https://www.bustle.com/p/why-felony-disenfranchisement-is-a-feminist-issue-77456>.

¹⁵ "Twenty-five percent of women in prison have been convicted of a drug offense, compared to 14% of men in prison; 26% of incarcerated women have been convicted of a property crime, compared to 17% among incarcerated men" THE SENTENCING PROJECT, INCARCERATED WOMEN AND GIRLS, <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/> (June 6, 2019).

public measures,” thereby “brand[ing them] with the stigma of inferiority.”¹⁶ In opposition to the Nineteenth Amendment, anti-suffragists “routinely emphasized that women were specially suited and exclusively destined for the work of family maintenance.¹⁷ Anti-suffragists contended that “women lacked the capacity for managing public affairs, and the very effort would distract them from their obligations as wives and mothers.”¹⁸ This view reflected those of the founders, who believed that “only citizens who had the requisite degree of independence to vote their own judgment, rather than the interests of those to whom they might be beholden, had the capacity to exercise the franchise responsibly.”¹⁹

The Nineteenth Amendment, and the suffragist movement supporting it, represented a profound reaction against such thinking. Suffragists challenged the idea of coverture—that male voters in the household could sufficiently protect the interests of the women in their homes—and argued instead that “women had a right to direct relations with the state, independent of their mate or brood.”²⁰ According to suffragists, “men could not and did not represent women. Suffragists drove this point home by pointing to women’s subordination in the family and the market, and asserting that the record uniformly demonstrated men’s incapacity to represent fully and fairly women’s interests.”²¹

Suffragists, especially in its early years, also emphasized the fundamentality of the right to vote for all citizens. Elizabeth Cady Stanton’s 1848 “Declaration of Sentiments and Resolutions” expressed “as its central idea protest against the denial to women of ‘this first right of a citizen, the elective franchise, thereby leaving her without representation in the halls of legislation, . . . oppressed on all sides.’ ”²² Some twenty years later, Stanton elaborated that “suffrage is a natural right—as necessary to man under government, for the protection of person and property, as are air and motion to life,” and thus suffragists would “point out the tyranny of every

¹⁶ Frederick Douglass, *What Negroes Want*, in 4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 159–60 (Phillip S. Foner ed., 1955) (quoted in Eli L. Levine, *Does the Social Contract Justify Felony Disenfranchisement?*, 1 WASH. U. JUR. REV. 193, 195 (2009)).

¹⁷ Reva Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 979 (2002) (citations omitted).

¹⁸ Reva Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 979 (2002) (citations omitted).

¹⁹ Reva Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 979 (2002) (citations omitted).

²⁰ Reva Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 987 (2002) (citations omitted).

²¹ Reva Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 991 (2002) (citations omitted).

²² ELLEN CARROL DUBOIS, *WOMAN SUFFRAGE AND WOMEN’S RIGHTS* 85 (1988).

qualification to the free exercise of this sacred right.”²³ In her 1872 trial for attempting to vote, Susan B. Anthony testified that “ ‘[y]our denial of my citizen’s right to vote is the denial of my consent as one of the governed, the denial of my right of representation as one of the taxed . . . therefore the denial of my sacred right to life, liberty, and property.’ ”²⁴ Suffragists thus exposed the factual inaccuracy and moral incoherence of anti-suffragist’s paternalistic arguments.²⁵

The history of felony disenfranchisement has many parallels to the history of excluding women and minorities from the polling both. Felony disenfranchisement has its roots in ancient Greek and Roman society, where criminals were denied the right to vote, along with many other civil rights and privileges.²⁶ Felony disenfranchisement took hold in colonial America as well, where colonists precluded former criminals from voting,²⁷ though often only for “certain offenses related to voting or considered egregious violations of the moral code.”²⁸ In the first 50 years after independence, “eleven states eliminated voting rights for specified crimes thought to have some relationship to the electoral process.”²⁹ Over time, however, more and more states began to pass disenfranchisement laws applicable to all felons, irrespective of the nature of the underlying crime. “By 1868, twenty-nine states enshrined some language into their constitution depriving felons of voting rights.”³⁰ Southern states in particular “tailored their

²³ ELLEN CARROL DUBOIS, *WOMAN SUFFRAGE AND WOMEN’S RIGHTS* 91 (1988) (citing *HISTORY OF WOMAN SUFFRAGE*, vol. II: 1861–1878, 185 (Elizabeth Cady Stanton, Susan B. Anthony, and Matilda Joslyn Gage, eds., 1881)).

²⁴ Eli L. Levine, *Does the Social Contract Justify Felony Disenfranchisement?*, 1 WASH. U. JUR. REV. 193, 194 (2009) (quoting JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELONY DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 3 (2006) (quoting The Trial of Susan B. Anthony, in *THE STRUGGLE FOR WOMEN’S RIGHTS: THEORETICAL AND HISTORICAL SOURCES* 133 (George Klosko & Margaret G. Klosko eds., 1999))).

²⁵ Not all suffragist arguments emphasized the commonality of men and woman and the universality of the right to vote. For instance, as Ellen Carol DuBois has noted, in the wake of the Fifteenth Amendment’s passage suffragists began to argue that women should have to vote to ensure that a distinctly female perspective on morality and politics entered the public sphere. See ELLEN CARROL DUBOIS, *WOMAN SUFFRAGE AND WOMEN’S RIGHTS* 94-98 (1988).

²⁶ Eli L. Levine, *Does the Social Contract Justify Felony Disenfranchisement?*, 1 WASH. U. JUR. REV. 193, 196-97 (2009).

²⁷ Eli L. Levine, *Does the Social Contract Justify Felony Disenfranchisement?*, 1 WASH. U. JUR. REV. 193, 197 (2009) (summarizing criminal disenfranchisement laws in the colonies of Virginia, Maryland, Plymouth, Connecticut, and Rhode Island).

²⁸ THE SENTENCING PROJECT, *FELONY DISENFRANCHISEMENT: A PRIMER*, at 3 (2018).

²⁹ Eli L. Levine, *Does the Social Contract Justify Felony Disenfranchisement?*, 1 WASH. U. JUR. REV. 193, 197-98 (2009). However, Levine also notes that “many states also disenfranchised for other crimes not related to the electoral process.”

³⁰ Eli L. Levine, *Does the Social Contract Justify Felony Disenfranchisement?*, 1 WASH.

disenfranchisement laws in order to bar black male voters, targeting those offenses believed to be committed most frequently by the black population.”³¹

Modern arguments in favor of felony disenfranchisement also take on a paternalistic tone. They offer an added avenue, aside from incarceration itself, through which lawmakers can prevent a selected group of individuals from harming society—though the alleged harm, the election of undesirable political leaders, is not itself an illegal result.³² For example, such arguments featured prominently in the opposition to a 2002 Senate bill that would have secured federal voting rights for ex-felons. Senator Mitch McConnell “warned of terrorists, rapists, and murderers voting, and of jailhouse blocs banding together to oust sheriffs and tough-on-crime government officials.”³³ Then-Senator Jeff Sessions argued “that a person who violates serious laws of a State or the Federal Government forfeits their right to participate in those activities of that government [because] their judgement and character is such that they ought not to be making decisions on the most important issues facing our country.”³⁴ Senate George Allen then took to the floor to argue against the amendment, which would allow a former felon to “feel like a full-fledged citizen again,” on State’s rights grounds.³⁵ Similar arguments arose around Florida’s recent Amendment 4, which was to restore the right to vote for most Floridians with prior felony convictions once they finish their sentences, including parole and probation.³⁶ Critics of the bill suggested that felons should only be permitted the right to vote once they have proved to be a “valuable member of society” worthy of society’s trust to exercise that right responsibly.³⁷

U. JUR. REV. 193, 198 (2009).

³¹ THE SENTENCING PROJECT, *FELONY DISENFRANCHISEMENT: A PRIMER*, at 3 (2018).

³² ““Outside of incarceration, disenfranchisement can be seen as a supplementary form of incapacitation; by preventing criminals from participating in the democratic process, disenfranchisement laws stopped criminals from further harming society.” Eli L. Levine, *Does the Social Contract Justify Felony Disenfranchisement?*, 1 WASH. U. JUR. REV. 193, 215 (2009).

³³ Eli L. Levine, *Does the Social Contract Justify Felony Disenfranchisement?*, 1 WASH. U. JUR. REV. 193, 212 (2009).

³⁴ 148 CONG. REC. S 802 (daily ed. Feb. 14, 2002)

³⁵ Eli L. Levine, *Does the Social Contract Justify Felony Disenfranchisement?*, 1 WASH. U. JUR. REV. 193, 212 (2009) (citing 148 CONG. REC. S 802 (daily ed. Feb. 14, 2002)).

³⁶ FLA. CONST. amend 4.

³⁷ James Call, *Amendment 4: Restoring felons' voting rights is hardball politics or the right thing to do*, TALLAHASSEE DEMOCRAT, Oct. 30, 2018, <https://www.tallahassee.com/story/news/2018/10/30/amendment-4-florida-2018-debate-hardball-politics-versus-right-do/1822919002/> (quoting lobbyist Barney Bishop). Amendment 4 has its own checkered history after passage. After amendment 4 passed with a two-thirds majority as a ballot measure in November of 2018, Republican lawmakers passed a bill which “specified that a felony sentence is not complete, and therefore a felon

Claims like these suggest that a specific group of citizens—in this case, convicted felons—cannot be trusted to exercise the franchise responsibly. That group might, after all, elect political leaders that more closely resemble themselves than incumbent politicians. But voting poorly is not itself illegal. Thus, the argument also requires an accusation that convicted felons are somehow lesser—that they are something short of full-fledged citizens. While society might be prepared to tolerate the poor political choices of such full-fledged citizens, it cannot (and should not) withstand the political mistakes of convicted felons.

If this line of thinking sounds familiar, it should. The same strands of argument arose when opponents of the Nineteenth Amendment subtly denigrated female voters as incapable of voting responsibly, or when anti-suffragists suggested that female citizens belong to a subordinate social class whose poor political choices would be an unnecessary headwind for society at large. These arguments similarly proceeded in two parts. First, they distinguished a group of citizens as lesser and likely to exercise the vote in irresponsible ways. Second, they maintained that those “poor” voting choices can and should be disregarded by the rest of society. Just as Anthony predicted during her trial, “ ‘if we once establish the false principle, that United States citizenship does not carry with it the right to vote in every state in this Union, there is no end to the petty freaks and cunning devices that will be resorted to, to exclude one and another class of citizens from the right of suffrage.’ ”³⁸

I do not claim that felony disenfranchisement laws are unconstitutional. Indeed, the Supreme Court has rejected arguments that the denial of the franchise to felons is an Equal Protection violation, relying in part upon language in Section 2 of the 14th Amendment that appears to sanction disenfranchisement “for participation in rebellion, or other crime.”³⁹ But I do suggest that the history of debate over women’s suffrage sheds light upon the flaws in felony disenfranchisement legislation as a matter of public policy and political philosophy. In fact, many of the same retorts used to defeat paternalistic anti-suffragist arguments undermine similarly paternalistic arguments to disenfranchise felons.

not eligible to vote, until all fines, fees and restitution are paid in full.” Sue Carlton, *The Florida governor's bold move on Amendment 4. Or is that against Amendment 4?*, TAMPA BAY TIMES, Aug. 13, 2019, <https://www.tampabay.com/opinion/columns/the-florida-governors-bold-move-on-amendment-4-or-is-that-against-amendment-4-20190814/>.

However, because many felons are unable to pay such fines, they will not be eligible to vote despite Amendment 4’s passage. *Id.* The issue is currently being litigated in Florida courts, with the 2020 elections rapidly approaching.

³⁸ ELLEN CARROL DUBOIS, *WOMAN SUFFRAGE AND WOMEN’S RIGHTS* 105 (1988) (quoting *United States v. Anthony*, 24 F. Cas. (C.C.N.D.N.Y. 1873) (No. 14, 459)).

³⁹ *Richardson v. Ramirez*, 418 U.S. 24, 41-56 (1974); U.S. CONST. amend. XIV, § 2.

That history provides two particularly powerful arguments against felony disenfranchisement. First, it explains why higher-class citizens cannot paternalistically suggest that some groups are inherently incapable of bearing the responsibility that the fundamental right to vote entails. Such a divide-and-conquer strategy is premised upon a false distinction between the responsible votes of some groups and the irresponsible (and likely incorrect) votes of others. Our constitutional tradition, informed by the suffragist movement, does not admit of such distinctions. There is no constitutionally cognizable difference between “good” and “bad” votes, or “good” and “bad” voters. Efforts to suggest that some votes will be misguided often assert that they will go contrary to mainstream beliefs that have placed the very powerful people arguing against expanding the franchise in their current position of power. Instead, our constitutional tradition established that the right to vote is a fundamental one for all citizens, irrespective of how they might exercise it.

Second, our history culminating in the Nineteenth Amendment itself forcefully rejects any legal regime that presents unnecessary hindrances to female voting rights. Felony disenfranchisement laws are a rapidly-growing challenge for female voters. Widespread disenfranchisement of female felons is offensive to the tradition the Amendment represents, especially where the loss of voting rights is a consequence for crimes wholly unrelated to the political process. That result is offensive to the historical struggle that preceded the Nineteenth Amendment’s enactment.

Though courts have not traditionally read the Nineteenth Amendment to have normative implications for areas of law outside of voting,⁴⁰ its implications for voting rights itself can still be tapped, especially in today’s political debate about contractions in voting rights. In Reva Seigal’s words, “[w]e invoke the aspirations, values, choices, commitments, obligations, struggles, errors, injuries, wrongs, and wisdom of past generations of Americans as we make claims about the Constitution, and this appeal to the experience and concerns of past generations of Americans shapes the claims we make on each other about the Constitution’s meaning in the present.”⁴¹ Today, the Nineteenth Amendment’s significance should be celebrated, not downplayed. And in the course of that celebration, we should recognize the value that the history of the movement for women’s suffrage has for legal

⁴⁰ “[J]udicial acknowledgment of women’s enfranchisement as a break with traditional understandings of the family was short-lived. Soon after ratification, the judiciary moved to repress the structural significance of women’s enfranchisement, by reading the Nineteenth Amendment as a rule concerning voting that had no normative significance for matters other than the franchise.” Reva Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1012 (2002).

⁴¹ Reva Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1032 (2002).

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FELONY DISENFRANCHISEMENT

9

regimes that restrict voting rights for disfavored groups, including the millions of former felons across the country who have been wrongfully disenfranchised.

**YOUTH SUFFRAGE IN THE UNITED STATES:
MODERN MOVEMENT INTERSECTIONS,
CONNECTIONS, AND THE CONSTITUTION (Working Title)**

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Abrafi Osei-Kofi,⁴ and Carlye Owens⁵*

What follows are excerpts from our draft work in progress:

The 100th anniversary of the Nineteenth Amendment to the United States Constitution is an appropriate moment to reflect on the history – and consider the future – of the right to vote in the United States.⁶ Public schools and college classes cover the nation’s suffrage story as a cornerstone of our country’s heritage.⁷ Some constitutional law courses also focus on voting rights as foundational knowledge for the legal profession.⁸

But the evolution of the right to vote is generally recounted as an adult-centric, dualistic narrative that goes something like this: In the beginning white men alone were allowed to vote in this country, suffrage was expanded to African American men in 1870, and women finally won the franchise in 1920.⁹ The 1960’s might be included, too. But usually it is a kind of constitutional footnote, when civil rights activists took on southern states that continued to disenfranchise Black voters and women began to call for an Equal Rights Amendment to protect against sex-based discrimination.¹⁰ Either framing makes binary categories the central concern. That is, the focus is supposedly immutable characteristics – being Black not white; woman and not man. And in all such classifications, adulthood of those impacted is assumed....

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⁶ We are pleased to be invited by The Center for Constitutional Law at Akron and to contribute this article to its School of Law’s symposium, THE 19TH AMENDMENT AT 100: FROM THE VOTE TO GENDER EQUALITY.

⁷ See, e.g., Voting Rights Readings and Lessons, Civil Rights Teaching Website,; <https://www.civilrightsteaching.org/voting-rights>;

⁸ See, e.g., Constitutional Law Course Syllabus, Professor Jack Balkin, Yale Law School Fall 2016, available at: <https://jackbalkin.yale.edu/balkin-con-law-fall-2016-syllabus> (apparently covering race and voting, women and voting – but not youth and voting).

⁹ See *Elections...The American Way Webpage*, LIBRARY OF CONGRESS WEBSITE <https://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/elections/voting-rights-african-americans.html> (providing separate page links for discussions of “the founders and the vote,” “Voting Rights for African Americans” under the Fifteenth Amendment, and “Voting Rights for Women” under the Nineteenth Amendment, without a similar page about youth voting rights and the Twenty Sixth Amendment). See also U.S. CONST., AMEND. XV (1870); U.S. CONST., AMEND. XIX (1919).

¹⁰ See, e.g., *Reading Like A[n] Historian Curriculum*, STANFORD EDUCATION HISTORY GROUP WEBSITE, available at: <https://sheg.stanford.edu/history-lessons>.

* * *

Youth as voters are left out of such categorical accounts,¹¹ regardless of their race or sex.¹² We seek to add to the literature surrounding suffrage in the United States, documenting two different youthful right to vote movements in the modern era. In doing so we add layers to the nation’s legal history of enfranchisement and encourage rethinking the voting rights story in the days ahead. We analyze some of the intersections and connections among the different voting rights movements that have occurred in this country and offer more complex constitutional understandings of capacity for purposes of full political participation.

The first modern youth voting rights movement involved the development over several decades of the 26th Amendment, which was ratified in the 1970’s, finally allowing young people between the age of 18 and 21 to cast their votes at the polls. The second modern youth voting rights movement is still very much evolving, with many American youth advocates now calling for suffrage to be extended to American citizens as young as sixteen years of age. Although decades apart, both movements challenge boundaries and seek to redefine important categories....

* * *

I. FIRST MODERN U.S. YOUTHFUL VOTER RIGHTS MOVEMENT AND IMPLICATIONS

The story of how African-American men received the right to vote with the 1867 ratification of the 15th Amendment has been extensively analyzed in historical texts, legal scholarship, and popular media.¹³ The same can be said about women’s suffrage and the 19th Amendment of 1920.¹⁴ As other have noted, the constitutional enfranchisement of youth has

¹¹ To be sure, others are elided by this telling as well – including Native American women who were not given the right to vote following the passage of the 15th or 19th Amendments.

¹² See *id.*; Julia Rose Kraut, *An Introduction to Civil Rights and Civil Liberties Law and History*, HISTORICAL SOCIETY OF NEW YORK COURTS WEBSITE, <http://www.nycourts.gov/history/academic-center/documents/HSNYC%20Middle%20School%20Curriculum%20-%20J.Kraut.pdf>; see also THE AMERICAN JOURNEY, RECONSTRUCTION TO PRESENT (2010)(popular middle and high school textbook offering overview on the Vietnam Era without any mention of the 26th Amendment or youth voting rights): http://glencoe.mheducation.com/sites/0078653991/student_view0/unit10/chapter30/chapter_overviews.html.

¹³ WILLIAM GILLETTE, POLITICS AND PASSAGE OF THE 15TH AMENDMENT (1965); SUSAN BANFIELD, THE FIFTEENTH AMENDMENT AND AFRICAN-AMERICAN MEN’S RIGHT TO VOTE (1998); Akil Reed Amar, *The Fifteenth Amendment and “Political Rights,”* 17 CARDOZO L. REV. 2225 (1996); Gabriel J. Chin, *The “Voting Rights Act of 1867”: The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV.1581 (2004); see also BRUCE WATSON, FREEDOM SUMMER (2010)(providing detailed account of continuing efforts to advance Black enfranchisement during the 1960’s); Edieth Y. Wu, *Reparations for Black Americans, The Only Remedy for the U.S. Government’s Failure to Enforce the 13th, 14th, and 15th Amendments*, 3 CONN. PUB. INTEREST L. J. 403 (2004)(describing continuing problems of Black voter suppression).

¹⁴ See, e.g., AILEEN KRADITOR, THE IDEAS OF THE WOMEN’S SUFFRAGE MOVEMENT: 1890-1920 (1981); Sandra Day O’Connor, *The History of the Women’s Suffrage Movement*, 49 VANDERBILT L. REV. 657 (1996); BERNADETTE CAHILL, ALICE PAUL, THE NATIONAL WOMEN’S PARTY, AND THE RIGHT TO VOTE (2015); see also KEN BURNS AND PAUL BARNES, DOCUMENTARY - NOT FOR OURSELVES ALONE: THE STORY OF ELIZABETH CADY STANTON AND SUSAN

received far less coverage or consideration.¹⁵ Only one published book appears to be entirely dedicated to the subject. It was written by education expert, Wendall Cultice, more than 25 years ago.¹⁶

Since then, neither youth suffrage generally, nor the 26th Amendment in particular, have received ongoing, in-depth attention in constitutional jurisprudence, election law, or other legal scholarship.¹⁷ For instance, while many recent law school symposia have focused on the topic of voting rights, none have really addressed youth voting and the 26th Amendment.¹⁸ Interestingly, however, the subject is one that has captured the attention of several law and PhD students, who have added significantly to the literature in the last decade or so.¹⁹

A. *Adoption of the Twenty-Sixth Amendment*

The following section provides a brief history of the voting age in the United States. It provides context for the ratification of the 26th Amendment in 1971, which expanded suffrage to teens as young as 18. In doing so it offers particular focus on the early and middle 1960's, a period that has been largely overlooked as important to the youth voting rights movement – and only relevant to African American voting rights....

B. ANTHONY (PBS 1999); Brent Staples, *How the Suffrage Movement Betrayed Black Women*, N.Y. TIMES, July 28, 2018 (warning against blindly “commemorat[ing] a movement in which racism clearly played a central role”).

¹⁵ See, e.g., Stephen Wermiel, *Heroes of the Struggle for Voting Rights*, 39 HUMAN RIGHTS 26 (Winter 2012)(describing how “Women, African Americans, American Indians, and immigrants” had to fight to win the vote – without any mention of youth); see also JENNY DIAMOND CHENG, UNCOVERING THE TWENTY-SIXTH AMENDMENT (2008 U. of Michigan) (“To say that the Twenty-sixth Amendment has been of limited interest to the scholarly world is a wild understatement.”), https://deepblue.lib.umich.edu/bitstream/handle/2027.42/58431/jdiamond_1.pdf.

¹⁶ WENDELL W. CULTICE, YOUTH’S BATTLE FOR THE BALLOT: A HISTORY OF VOTING AGE IN AMERICA xi (1992) (noting in Preface that the text is “probably the first full treatment of the issue [of youth suffrage] aside from a compilation of references produced nearly a half-century ago...”).

¹⁷ One particularly notable exception to this is Vivian Hamilton’s *Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority*, 77 BROOKLYN L. REV. 1447 (2012). See also Joshua Douglas, *In Support of Lowering the Voting Age*, 165 U. PA. L. REV. ONLINE 63 (2017) (short essay in support of lowering the voting age, relying heavily on the unpublished PhD thesis of Jenny Diamond Cheng).

¹⁸ See, e.g., The Right to Vote: Examining Election Law, 2016 Kansas Journal of Law and Pub. Pol’y Symposium, <https://news.ku.edu/law-school-symposium-explore-election-law-and-voting-rights>; Voting Rights Symposium, 2012 Rutgers Law Review, <https://electionlawblog.org/?p=41845>; Voting Rights Symposium, 2007 Houston Law Review, <https://houstonlawreview.org/section/1179-voting-rights-symposium>.

¹⁹ Cheng’s unpublished 2008 PhD thesis, UNCOVERING THE 26TH AMENDMENT, provides an excellent analysis of the context for the 26th Amendment as reflected in congressional documents. She concedes other texts from the era might shed further light on the youth voting movement. *Id.* at 12. And Professor Cheng, now a law professor, has recently returned to the issue of youth voting rights in her scholarship. See Jenny Diamond Cheng, *Voting Rights for Millennials: Breathing New Life into the Twenty-Sixth Amendment*, 67 SYRACUSE L. REV. 653 (2017); see also Note, Caitlin Foley, *A Twenty-Sixth Amendment Challenge to State Voter ID Laws*, 2015 U. CHICAGO LAW FORUM 585; Comment, Nancy Turner, *The Young and the Restless: How the Twenty-Sixth Amendment Could Play a Role in the Current Debate over Voting Laws*, 64 AM. U. L. REV. 1503 (2015); Note, Sarah Fearon-Maradey, *Disenfranchising America’s Youth: How Current Voting Laws Are Contrary to the Intent of the Twenty-Sixth Amendment*, 12 U.N.H.L. REV. 289 (2014); Note, Eric Fish, *Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168 (2012).

* * *

I. *Context and Early History*

As Wendell Cultice describes, English common law generally held that both men and women reached “full majority and discretion” once they turned 21 years of age.²⁰ Many claim this was tied to British customs around the required age for knighthood and serving the crown – and little else.²¹ Yet it was used to establish the voting cut-off age for men in Great Britain.²² And that practice was, by and large, continued in colonial America – where only white men could vote.²³ But as early as 1819, states began to consider the possibility of lowering the voting age to 18. Here again, the motivation seemed to be tied to official government service. In this instance it was the return of soldiers from the War of 1812.²⁴

During the Civil War, only men age 20 or older were legally eligible for conscription.²⁵ Yet many teens fought on both sides of the war, which again generated discussion about giving younger men the right to vote when they returned from the battlefield.²⁶ Nevertheless, such proposals did not gain ground at the time. Instead, when the Fourteenth Amendment was passed in 1868 as part of the Civil War Amendments, it provided states were prohibited preventing male citizens age 21 or older from voting.²⁷

As the women’s suffrage movement took hold at the turn of the last century, lowering the voting age was not a part of its official platform either.²⁸ However, women’s involvement in the first World War may have helped pave the way for their franchise.²⁹ Although they did not participate in battle, women served as military nurses and supported the war effort at home by working in factories and taking on other jobs previously held by men.³⁰ Thus it is not surprising that shortly after World War I, in 1920, many women were provided with the right to vote by way of the 19th Amendment.³¹

²⁰ Cultice, *supra* at 2-3.

²¹ *Id.*; *But see* CHENG, UNCOVERING THE TWENTY-SIXTH, *supra* note ___ at 37 (claiming this is an “unsubstantiated historical tidbit” that “became accepted wisdom”).

²² Cultice, *supra* at 2-3; F. Brewer, *The Voting Age*, EDITORIAL RESEARCH REPORTS, VOL. II at Note 2 and accompanying text (CQ Press, Washington, D.C., 1944).

²³ Cultice, *supra* at 2-3.

²⁴ *Id.* at 7 (describing how Connecticut, in 1819, Missouri, in 1820, and New York, in 1821, all considered allowing white men to vote at age 18 during state constitutional convention discussions).

²⁵ Cultice, *supra* at 12-13.

²⁶ *Id.*

²⁷ *Id.* at 14; *see also* U.S. CONST. AMEND. XIV, Sec. 2.

²⁸ Cultice, *supra* at 16.

²⁹ *Id.* at 16.

³⁰ *Id.* at 16-17; *see also*

³¹ Cultice, *supra* note ___ at 16-17. Native American men who served in the war were also granted full citizenship. *See id.* at 16.

In contrast, those under the age of 21 – even those who served on the front lines when draft registration age was dropped to 18 – could not participate in elections.³² It was not until World War II hit, and more young men were sent to fight, that calls for reducing the voting age to match lawful battle age got louder and increased in number.³³ In this way, the first modern youth suffrage rights movement began to take hold.

Wendell Cultice asserted that over a thirty-year period, starting with World War II, “young people would virtually shoot their way into the voting booth.”³⁴ In her more recent work, Jenny Diamond Cheng agrees that the mantra of “young enough to fight, young enough to vote” was prevalent and persuasive during this period. However, Cheng argues that ratification of the 26th Amendment was more of a “top-down event driven by a small group of federal legislators whose motivations and rationales were quite complex and not necessarily fully understood by young sympathizers.”³⁵ Others have also claimed young people were not involved in the early years of the first modern movement for youth suffrage.³⁶

To be sure, the road to ratification of the 26th Amendment did have many twists and turns between the 1940’s and 1970’s.³⁷ For instance, in 1943 Georgia amended its constitution to permit those age 18 and up to vote in state elections.³⁸ Kentucky lowered its state voting age to 18 in 1954.³⁹ And towards the end of the 1950’s, both Alaska and Hawaii adopted lower voting ages as they became states; Alaska using age 19 while Hawaii enacted 20-years-old as the legal cut-off.⁴⁰ Yet on the federal level the ballot box remained opened to those 21 and over only, despite several failed efforts to expand youth suffrage to age 18 nationwide.⁴¹

Nevertheless, from the beginning of this period, young people played a significant role in advocating for voting rights expansion. For example, the United States Student Assembly, comprised of college students from around the country, passed a resolution in 1943 urging a

³² Cultice, *supra* at 16-17. The British “granted the franchise to men of 19 and 20 years who served in World War I.” Brewer, *supra* at Note 4 and accompanying text.

³³ *Id.* at 18-21.

³⁴ *Id.* at 18.

³⁵ CHENG, UNCOVERING THE TWENTY-SIXTH, *supra* at 5.

³⁶ *See, e.g.*, Hamilton, *Age of Electoral Majority*, *supra* at 1464-65 (asserting “[t]he nation’s youth did not begin to mobilize until the early 1960’s, when the nation’s efforts in the Vietnam War galvanized their efforts”).

³⁷ Obviously, not all such issues can be addressed in this article.

³⁸ Cultice, *supra* at 24-27; *see also* Brewer, *supra* (“extension of the franchise to the 18–20 year age group by this state in the heart of the Solid South is only one of many evidences of a growing movement to grant voting rights to the generation which is now playing an important role in defense of democracy on the field of battle”).

³⁹ Cultice, *supra* at 55-56.

⁴⁰ Cultice, *supra* at 58-60;

⁴¹ *See* Cultice, *supra* at 82-83 (summarizing decades of efforts to lower the federal voting age); Brewer, *supra* (recounting seven separate attempts, between 1942 and 1944 alone, to lower the voting age on the national level); CHENG, UNCOVERING THE TWENTY-SIXTH, *supra* at 11 (asserting that “eighteen-year-old voting proposals were more or less stymied by the implacable opposition of Representative Emanuel Celler (D-NY), who chaired the House Judiciary Committee continuously from 1955 to 1972”).

reduced national voting age.⁴² The College Federation of Young Republicans and the Young Democratic Club of Americas also demanded the franchise for those eighteen and up.⁴³ High school students in many parts of the country were also involved in calls for change. During the 1940's, students publicly lamented lack of concern for youthful viewpoints. They claimed they were being ignored by an older generation of voters that was growing given extended lifespans.⁴⁴ During the 1950's reports continued that the nation's high school students overwhelmingly supported teen voting, with one 17-year-old-girl explaining, "because boys and girls of today have had more experience and schools are better than they used to be . . . they are old enough to know the importance of voting and to know how and what to vote for."⁴⁵

This said, evidence also suggests that at the outset, many young people were not particularly concerned about their voting rights.⁴⁶ For instance, one study from the 1940's found that a majority of teens opposed, or were neutral on, youth voting rights because they felt unready for such a weighty responsibility.⁴⁷ And adult-led groups did seem to be the most vocal during the first decades of the initiative.⁴⁸ The National Education Association (NEA) and American Association of School Administrators (AASA), purporting to align themselves with the desires of students, declared their support for extended franchise.⁴⁹ Military groups like the Veterans of Foreign Wars (VFW) also claimed to stand with young people, advancing the theory that suffrage for service was an appropriate quid-pro-quo.⁵⁰

⁴² See generally Brewer, *supra*; see also Cultice, *supra* at 51 (describing high school and college student support for lowering the voting age to 18).

⁴³ See, e.g., *College GOP Group Backs Vote for 18s*, ARGUS LEADER, Dec. 6, 1954 at 15; *Iowa Young Demo Challenge to GOP*, COUNCIL BLUFFS NONPAREIL, May 28, 1954 at 12.

⁴⁴ See, e.g., Phyllis Stauffer, *Lower Voting Age to 18 Years, Medford High School Student Suggests in Journal Editorial*, MEDFORD MAIL TRIBUNE, March 23, 1948 at 6; see also Brewer, *supra* ("A declining birth rate and longer life span among the people of this country is tending, it is pointed out, to give the aged an added influence in political affairs, which may prove detrimental to the building of a new postwar world, and which would be offset by the addition of young citizens to the voting population.")

⁴⁵ See Virginia Simkins, *Members of the Senior English Class at Southside School in Agreement*, THE ROBESONIAN, Oct. 30, 1957 at 7 (quoting Ester Moore in support of suffrage at age 18); see also Eugene Gilbert, "Lower Voting Age," *Say Teen-Agers*, THE ROBESONIAN, Oct. 30, 1957 at 7 (President of Gilbert Youth Research Company reporting on group's study, showing over 90% support of teens nationwide for reducing voting age).

⁴⁶ CHENG, UNCOVERING THE TWENTY-SIXTH, *supra* at 5.

⁴⁷ See, e.g., H.H. Remmers and Associates, *Many High Schoolers Say They're Not Ready to Vote*, TAMPA BAY TIMES, Aug. 1, 1948 at 43 (article by Remmers Group of Purdue University about its study, showing that 45% of teens supported lowering the voting age, 46% opposed the change, and 9% were undecided); see also Harry Shaw, *Now the 18-Year-Olds Can Vote, How Many Are Actually Voting?* COURIER-JOURNAL, May 24, 1959 at 68 (reporting that 75% of college students in Kentucky able to vote were doing so, while many fewer high schools students age 18 and up exercised the right).

⁴⁸ See generally CHENG, UNCOVERING THE TWENTY-SIXTH, *supra* (analyzing complex landscape of teen voting rights supporters and their arguments).

⁴⁹ Brewer, *supra* (NEA); M. Packman, *Eighteen-Year-Old and Soldier Voting*, EDITORIAL RESEARCH REPORTS, Vol. I (CQ Press, Washington D.C. 1954) (AASA). But unlike students who declared their education and experience already made them as qualified as full-grown citizens, the education groups said voting would help students to further develop into effective civic agents. See Stauffer, *supra* (also arguing that students were more mature in the 1940's than in earlier generations and "the strategic time for persons to start voting is during this period when they are being instructed on the serious responsibility of voting" in civics classes and other high school programs).

⁵⁰ Cultice, *supra* at 50.

Of course, one of the most significant adult voices was that of the president. During his 1954 State of the Union Address, former U.S. Army General Dwight D. Eisenhower declared: “For years our citizens between the ages of 18 and 21, in time of peril, have been summoned to fight for America. They should participate in the political processes that produce this fateful summons. I urge Congress to propose to the states a constitutional amendment permitting citizens to vote when they reach the age of 18.”⁵¹ Thus it seemed Eisenhower, a fellow veteran, also believed those old enough for battle earned this privilege – apparently regardless of race or sex. On the other hand, politics and the road to further Republican victories was surely in Eisenhower’s mind, too.⁵²

President Harry Truman, a Democrat who previously supported 18-year-old suffrage, changed his position during the 1950’s. In response to Eisenhower’s suggestion, Truman declared young citizens were not sophisticated enough to meaningfully utilize the voting process.⁵³ Other Democrats, such as Senator John F. Kennedy, expressed concern that expanding the franchise for youth was really a state rights issue.⁵⁴ Thus Eisenhower’s call for constitutional amendment, which required approval by two-thirds of each house before state ratification could be sought, was thwarted by such direct and indirect opposition.⁵⁵

Yet in the end, somewhat ironically, John F. Kennedy was directly and indirectly instrumental in helping to lower the voting age. Winning the Democratic Party nomination and voted into office in 1960 as the nation’s youngest president, Kennedy was automatically seen by many as aligned with young peoples’ progressive causes.⁵⁶ President Kennedy did not live to see the enactment of the 26th Amendment. But a range of actions by his family, and other advocates throughout the 1960’s, helped lead to its ratification in 1971.

⁵¹ Cultice, supra at 56.

⁵² See Packman, supra (reporting that “Republicans believe that a majority of the soldiers who were able to vote in 1952 cast their ballots for Gen. Eisenhower and that younger citizens would have done likewise”).

⁵³ See *id.*; see also Cultice, supra at 53, 64-65.

⁵⁴ See Cultice, supra at 65; Packman, supra (noting that in 1954 that “[a]rdent supporters of states’ rights oppose federal action on the voting age as unwarranted invasion of the prerogatives of the states in determining the makeup of their electorates”);

⁵⁵ See Thomas Neale, *The Eighteen Year Old Vote: The Twenty-Sixth Amendment and Subsequent Voting Rates of Newly Enfranchised Age Groups*, CONGRESSIONAL RESEARCH SERVICE, May 20, 1983 at 5 (recounting failure of federal youth suffrage effort during Eisenhower years); see also Packman, supra (describing the ratification process, which ultimately required approval by three-fourths of the states).

⁵⁶ See generally BILL ADLER, JOHN F. KENNEDY AND THE YOUNG PEOPLE OF AMERICA (1965)(compilation of letters written to President Kennedy by children and teens, along with the President’s responses); CATHERINE C. ANDERSON, JOHN F. KENNEDY: THE YOUNG PEOPLE’S PRESIDENT (1991)(biography written for youth).

2. *Sixties and Black Youth Activism as Central to the Story*

Many accounts of the ratification of the 26th Amendment begin in the 1970s. Others simply jump from the 1950's to the late 1960's with few details about the years in between.⁵⁷ But the movement for Black voting rights during that period, driven in large part by youth, is very much relevant to the youth suffrage story.⁵⁸ President Kennedy took office in 1961 in the wake of the United States Supreme Court's decision in *Boynton v. Virginia*, which expanded earlier holdings prohibiting racial discrimination in connection with interstate travel.⁵⁹ Young people from around the country – largely students of color – drove a range of public actions to test Boynton's promise of equal treatment.

For instance, the Student Non-violent Coordinating Committee (SNCC) – a group of young activists, mostly Black, many under 21 years of age – built a highly organized structure to deploy students across the country to press for racial justice.⁶⁰ Starting with a small group in 1961, SNCC was hundreds strong by the mid-1960's – with many members and volunteers leaving college entirely to move to the deep south and work towards equal citizenship for Black America.⁶¹ Students from Spellman and Morehouse, divinity schools, and elsewhere came together to lead marches and sit-ins in places like Atlanta, Georgia, where 80 students from Black colleges were arrested during one such demonstration.⁶² They also partnered with local youth groups, such as Baltimore's Jackie Robinson Youth Council of the NAACP, to protest discrimination in employment and otherwise.⁶³

SNCC's work also inspired demonstrations by other youth in their teens and early 20's. For instance, in the fall of 1961 the Student Committee Against Demonstration – comprised of mostly young white men – organized a boycott of businesses along Route 40 between Delaware and Maryland that refused to admit Black patrons. Distributing flyers throughout the region entitled “Am I My Brother's Keeper?” the students shared the names and addresses of all the restaurants that failed to serve African Americans.⁶⁴ One of the group's leaders, University of

⁵⁷ See, e.g., Cheng, *Breathing New Life*, supra at 670 (“From the mid-1950s through the late 1960s, the minimum voting age remained a low-level but perennial issue”); see also *The 26th Amendment Webpage*, HISTORY.COM WEBSITE (July 15, 2019) (essentially jumping from the Eisenhower years to the late 1960's), <https://www.history.com/topics/united-states-constitution/the-26th-amendment>; DAVID L. WRIGHT, *THE TWENTY-SIXTH AMENDMENT AS A TEACHABLE MOMENT: YOUNG ADULT VOTER TURNOUT IN U.S. ELECTIONS, 1972-2006* at 21-22 (Columbia U. 2013)(unpublished PhD thesis)(same).

⁵⁸ Cf. CHENG, *UNCOVERING THE TWENTY-SIXTH*, supra at 80-82 (suggesting that the United States lived through a period of optimism until the late 1960's, when “racial tensions” were on the rise and youth actions against injustice became more prominent).

⁵⁹ *Boynton v. Virginia*, 364 U.S. 545 (1960)

⁶⁰ See, e.g., SNCC Meeting Minutes, Louisville, KY, June 9-19, 1961 (outlining groups short and long term plans, and concluding with election of South Carolina State College student Charles McDrew as temporary chairperson), available at: https://www.crmvet.org/docs/6106_sncc_min.pdf

⁶¹ See HOWARD ZINN, *SNCC – THE NEW ABOLITIONISTS* 3 (1967).

⁶² See id. at 39.

⁶³ See Minutes SNCC Committee Meeting, Baltimore, MD, July 14-16, 1961, available at: https://www.crmvet.org/docs/6107_sncc_minutes.pdf.

⁶⁴ Flyer - JFK Library (on file with author).

Delaware student James White, wrote to President Kennedy to inform the administration of their concerns and efforts.⁶⁵ Harris Wofford, Special Assistant to the President, responded in writing a few weeks later to thank White, note the State Department’s support of such actions, and urge the students to provide updates on their progress.⁶⁶

SNCC’s students also played a major role in the 1961 “Freedom Rides” sponsored by the Congress of Racial Equality (CORE), a racial justice advocacy group founded by James Famer in the 1940’s. Black and white students boarded interstate buses heading to southern states to demand integration and equal rights for Black citizens. These actions, too, were largely met by arrest of the youths and their mistreatment.⁶⁷ At some points President Kennedy’s brother, Robert Kennedy, as head of the United States Department of Justice (DOJ), intervened to provide at least some limited protection and assistance to Freedom Riders.⁶⁸ The Kennedy administration supported the efforts of the youth and their allies in other ways, too, particularly as they turned to the issue of Black voting rights in the south.

For instance, in 1961 Attorney General Kennedy began collaborating with the National Association for the Advancement of Colored People (NAACP) to investigate African-American voter suppression and intimidation in southern states.⁶⁹ Two years later President Kennedy established the *President’s Commission on Registration and Voting Participation*, which he referred to as “one of the most important assignments given to any group of citizens.”⁷⁰ But rather than direct the Commission to focus on racial discrimination in southern voting practices, or even the issue of youth voting rights, President Kennedy offered a relatively white-washed directive to kick off the Voting Commission’s work.

Publicly he lamented that United States voting numbers stood in stark contrast to international election returns, including the 90% voter turnout reported in Italy.⁷¹ Thus he declared the Commission was established to study the issue of political engagement and voter apathy

⁶⁵ Letter of James L. White, University of Delaware, Sept. 26, 1961 – JFK Library (on file with author).

⁶⁶ Letter of Harris L. Wofford, White House, Nov. 14, 1961 – JFK Library (on file with author).

⁶⁷ *Freedom Rides*, STANFORD’S MARTIN LUTHER KING JR. RESEARCH AND EDUCATION INSTITUTE WEBPAGE, <https://kinginstitute.stanford.edu/encyclopedia/freedom-rides>; *The Freedom Rides*, CORE WEBSITE, <http://www.core-online.org/History/freedom%20rides.htm>.

⁶⁸ *See id.*

⁶⁹ *See* Press Release, Justice Department Commemorates 50th Anniversary of Robert F. Kennedy’s Swearing in as Attorney General, Department of Justice Office of Public Affairs, Jan. 21, 2011, <https://www.justice.gov/opa/pr/justice-department-commemorates-50th-anniversary-robert-f-kennedy-s-swearing-attorney-general> (describing 57 voting rights lawsuits filed by Kennedy’s Department of Justice, in addition to efforts undertaken to protect freedom riders).

⁷⁰ *See* Office of the White House, Remarks of the President – Commission on Registration and Voting Participation in the President’s Officer, May 8, 1963 Press Release, <https://www.jfklibrary.org/asset-viewer/archives/JFKPOF/044/JFKPOF-044-007>;

⁷¹ *See Small Voter Turnout Puzzles JFK*, DEMOCRAT AND CHRONICLE, May 9, 1963 at 3; *see also* CHARLES E. JOHNSON, NONVOTING AMERICANS at 8 (U.S. Dep’t Commerce 1980)(explaining that Kennedy’s close presidential victory, involving the highest number of voters historically, still meant he was supported by only 31% of the electorate).

generally, without mentioning the word race.⁷² Obviously, however, the Voting Commission’s work was also intended to help take on active intimidation and disenfranchisement of Black voters in the south – even if somewhat under cover.⁷³ But given its somewhat muted messages and seeming discomfort with directly addressing racism, the Kennedy administration was criticized by Thurgood Marshall and other racial justice leaders for failing to move quickly and decisively on the civil and voting rights front.⁷⁴

Indeed, as the Voting Commission gathered data over the course of eight months, racist acts of violence continued to endanger Black lives. Army veteran and NAACP voting rights activist Medgar Evers was shot and killed outside of his Mississippi home in June 1963.⁷⁵ Four children lost their lives in a Ku Klux Klan bombing attack on a Baptist Church in Alabama in September 1963.⁷⁶ And three weeks after his brother promised to punish southern establishments that ignored *Boynton*⁷⁷ – President Kennedy was assassinated in Dallas, Texas.⁷⁸

Just a few weeks later, on November 28, 1963, the Presidential Voting Commission released its findings. They were publicly announced and lauded by Lyndon B. Johnson as one of his first official acts as Commander in Chief, elevated to the position following Kennedy’s death.⁷⁹ The Commission called for an end to poll taxes and other state-level practices that caused “involuntary nonvoting” in Black communities.⁸⁰ It also recommended reducing the voting age to 18 for all persons across the country, regardless of race or sex.⁸¹

⁷² See Remarks of the President, May 9, 1963, *supra*.

⁷³ See CHENG, UNCOVERING THE TWENTY-SIXTH, *supra* (acknowledging public documents from the 1940s to 1970s may not reflect the true feelings and motivations of politicians around the issue of voting rights).

⁷⁴ See *id.* (further noting critiques of the Kennedys offered by Thurgood Marshall and other racial justice leaders); see also Candace Allen, *How John F. Kennedy’s Assassination Spurred the Drive for Racial Equality*, THE GUARDIAN, Nov. 13, 2013 (opining that Kennedy administration was extremely cautious to the detriment of Black America, slow walking its civil rights agenda for fear of alienating political supporters).

⁷⁵ See Mae C. Quinn, *Missouri @#?!*@, Too Slow*, 62 ST. LOUIS LAW JOURNAL 847 (2016)(recounting the horrific homicidal attack on Evers and protests that followed, including Nina Simone’s performance of Mississippi, Goddamn at Carnegie Hall).

⁷⁶ Robin Young, *et al.*, *4 Little Girls Died in the 16th Street Baptist Church Bombing in 1963. A 5th Survived*, HERE AND NOW – WBUR, April 30, 2019, <https://www.wbur.org/hereandnow/2019/04/30/16th-street-baptist-church-bombing-survivor>.

⁷⁷ Marian Smith Holmes, *The Freedom Riders, Then and Now*, SMITHSONIAN MAGAZINE, February 2009 (recounting Attorney General Kennedy pressed the Interstate Commerce Commission to enforce desegregation of southern businesses through fines).

⁷⁸ Rachel Siegel, *JFK in the “City of Hate”*: How Dallas Earned its Ugly Label Before the Assassination, WASHINGTON POST, Nov. 22, 2017 (describing history of conservative hostility directed towards Kennedy).

⁷⁹ REPORT OF THE PRESIDENT’S COMMISSION ON VOTING RIGHTS AND REGISTRATION (1963); see also Cultice, *supra* at 80-85.

⁸⁰ Somewhat remarkably, the Commission did not reach a unanimous decision about elimination of literacy tests. *Id.* at 51-60.

⁸¹ *Id.*

Perhaps as a feature of the country’s own discomfort with tackling racial injustice issues head on, the Commission’s youth franchise proposal drew more far more press attention than the others.⁸² In addition Johnson’s embrace of the findings, just days after Kennedy’s death and as a continuation of his legacy, surely had some impact on the thinking of both the public and politicians regarding suffrage generally and youth voting in particular.⁸³ So did other events during Johnson’s five-year administration. This included not just the deaths of countless soldiers in Vietnam, but the life-threatening dangers encountered by those advancing Black voting rights on United States soil. Indeed, both groups included persons who had not yet reached age 21.

But again, most accounts spend little time considering how civil rights actions of the early-to mid-1960’s impacted youth suffrage. Some have suggested the desire to end discriminatory voting practices in the south served as a separate but parallel position from which politicians could analytically argue for expanded youth suffrage.⁸⁴ More than this, however, demonstrations and voter registration campaigns led by Black students and other young activists throughout the south, covered by nearly every newspaper and television station in the country, raised the profile of young people as empowered and engaged citizens.⁸⁵ The nation was also impacted by witnessing violent attacks on these young people and their allies, as well as their strength and determination in the face of such injustice.⁸⁶ And their fortitude clearly generated fear in segregationists.⁸⁷

⁸² See Cultice, *supra* at 85; see also, e.g., *Study Group Scores Poll Tax, Wants 18-Year-Olds to Vote*, NORTHWEST ARKANSAS TIMES, Dec. 20, 1963 (describing Johnson’s presentation of the report from the White House); *Minimum Age for Voting is Proposed*, HUNTSVILLE TIMES, Dec. 20, 1963 (reporting on Census Director Richard Scammon’s declaration that “the recommendation applied both to state and federal elections”).

⁸³ See Matthew Weil, *JFK’s Contribution to Election Modernization*, BIPARTISAN POLICY CENTER WEBSITE, Nov. 20, 2013 (outlining ways in which the impact of Kennedy’s Voting Rights Commission continued long after his death); see also Cultice, *supra* at 83-85.

⁸⁴ See Eric Fish, *supra* (offering that “the civil rights movement drew political attention to the issue of voting rights and provided advocates of a lower voting age with a morally powerful analogy”); see also CHENG, UNCOVERING THE TWENTY-SIXTH, *supra* at 78 (describing congressional floor arguments that denying 18 years olds the right to vote was the “morally and legally equivalent to denying blacks or women the right to vote”).

⁸⁵ See, e.g., Crary Pullen, *Freedom Riders: Bruce Davidson on His Awakening*, TIME, May 24, 2011 (describing the work and experience of a news photographer who documented for TIME magazine the early 1960’s protest activities of young Freedom Riders in their trip south); see also *Court Explores Federal Role in Freedom Rides*, NEWS JOURNAL, June 1, 1961 at 27 (Delaware newspaper reporting on actions of CORE, seeking to “swamp” the jails of Jackson, Mississippi with student Freedom Riders from around the country, and university faculty support for the student efforts); Hugh Mulligan, *Neither Side Lets Up in Freedom Riders Dispute*, ROCKY MOUNT TELEGRAM, July 16, 1961, at 4 (North Carolina newspaper reporting on non-violent student protest activities, including those of 20-year-old Black divinity student Bernard Lafayette, which were met with mob violence).

⁸⁶ See, e.g., *Congress and the Voting Rights Act of 1965*, CENTER FOR LEGISLATIVE ARCHIVE WEBPAGE - NATIONAL ARCHIVES WEBSITE (“News cameras filmed the violence in what became known as ‘Bloody Sunday.’”), <https://www.archives.gov/legislative/features/voting-rights-1965>; William G. Thomas III, *Television News and the Civil Rights Struggle: The Views in Virginia and Mississippi*, SOUTHERN SPACES, Nov. 3, 2004 (analyzing television news coverage of civil rights activities of the 1960’s including its impact on opinions in the south).

⁸⁷ See, e.g., Dixie Birdsong, “Freedom Riders are Red,” SAN FRANCISCO EXAMINER, June 30, 1961 (quoting General T.B. Birdsong, head of the Mississippi Highway Patrol, as declaring the Freedom Riders were “directed, planned and inspired by known Communists”).

These efforts also generated in youth themselves a greater understanding of the power of the ballot and their power as political agents.⁸⁸ SNCC’s herculean efforts, leading voter education and registration efforts in Mississippi during the “Freedom Summer” of 1964, despite resistance by violent racists, both traumatized and energized its members.⁸⁹ On the education side, SNCC tutored Black adults to try to help them pass literacy tests administered by Mississippi voting administrators.⁹⁰ They also set up “Freedom Schools” to offer Afro-centric coursework and summer activities for Black youth, who otherwise faced discrimination and dangers on a daily basis.⁹¹ Thousands, including high school students who had been expelled for engaging in racial justice activities, flooded these make-shift classrooms set up in church basements and other temporary settings across Mississippi.⁹²

What is more, SNCC and its work managed to capture the attention of two different White Houses.⁹³ Most notably, the June 21, 1964 disappearance of three SNCC volunteers – two of whom were younger than 21 when they joined the effort – resulted in significant federal intervention.⁹⁴ But it was not their status as young people that produced such reaction. Two of the missing volunteers were also white. On August 4, the bodies of all three were found. And as the historical marker in Neshoba County, Mississippi indicates, their horrific death at the hands of Ku Klux Klan members seems to be what finally led to the passage of the nation’s Civil Rights Act.⁹⁵

The following year, as SNCC and youth activists continued to demand full citizenship for Black America in the fact of racist violence and backlash, Johnson also signed into law the 1965 Voting Rights Act, considered by some to be “the most significant statutory change in the relationship between the Federal and state governments in the area of voting since the Reconstruction era.”⁹⁶

⁸⁸ See generally, e.g., WATSON, FREEDOM SUMMER, supra (recounting how in 1964 college students and other young Americans from around the country joined forces with those in the south to register voters and create “Freedom Schools” to advance and support Black citizenship and empowerment); Holmes, *The Freedom Riders*, supra (recounting that most of the 300 Freedom Riders who were arrested in the south were college students, representing 40 different states, with no singular race or and gender).

⁸⁹ See BRUCE WATSON, FREEDOM SUMMER (2010)(describing the work of SNCC volunteers, including some as young as 18 years old).

⁹⁰ See *id.* at 173-74; see also HOWARD ZINN, SNCC: THE NEW ABOLITIONISTS at 66-67 (1965)(recounting how SNCC would prepare Black voter registrants to be tested on obscure sections of the Mississippi Constitution).

⁹¹ See *id.* at 227.

⁹² *Id.*; see also Zinn, supra at 75-76.

⁹³ See *id.* at 226 (Johnson referring to SNCC’s efforts, to establish a new Freedom Democrat caucus for the national Democratic convention, “a ticking time bomb”); Stacey Chandler, “*When it Was So Rough You Couldn’t Make It*” – Voting Rights in the Early 1960’s, NATIONAL ARCHIVES’ REDISCOVERING BLACK HISTORY WEBPROJECT, April 12, 2016 (documenting direct communications of Julian Bond, a founder of SNCC, with the White House).

⁹⁴ See WATSON, FREEDOM SUMMER, supra at 74-211.

⁹⁵ See Goodman, Chaney, Schwerner Murder Site Marker, Historical Marker Database, available at: <https://www.hmdb.org/Marker.asp?Marker=93139>

⁹⁶ See *Congress and the Voting Rights Act of 1965*, CENTER FOR LEGISLATIVE ARCHIVE WEBPAGE - NATIONAL ARCHIVES WEBSITE, available at: <https://www.archives.gov/legislative/features/voting-rights-1965>.

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II. EMERGING U.S. YOUTHFUL VOTER RIGHTS MOVEMENT AND IMPLICATIONS

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A. *A Glimpse at the Youth Friendly International Front*

Youth suffrage is present in many countries. Throughout Latin America, 16- and 17-year-olds have had the right to vote for many years. Millions of Brazilian 16 and 17-year-olds, from Sao Paulo to the Amazon, turned out to vote in 2014.⁹⁷ These young voters make up 2.3% of the Brazilian electorate on average, even though, unlike Brazilians aged between 18 and 69, they are not legally required to vote.⁹⁸ Similarly, voting is obligatory in Argentina for people aged 18 to 70, but is optional for those aged 16 and 17.⁹⁹ As long as they are not mentally disabled or imprisoned, all citizens over the age of 16 in Cuba can vote in the elections for the municipal assembly, the provincial assemblies and the national assembly; there are no presidential elections.¹⁰⁰

Europe has increasingly extended voting rights to youth. 16 year-olds can vote in the German states of Brandenburg, Bremen, and Hamburg; the Swiss canton of Glarus; and the semi-autonomous UK semi-autonomous territories of the Isle of Man, Jersey, and Guernsey.¹⁰¹ In some countries 16-year-olds can vote if they're employed or married. For example, in Hungary if someone gets married at 16 they become an adult with all the attached legal rights and responsibilities – including the right to vote.¹⁰² Furthermore, British billionaire Richard Branson began arguing after Britain's 2016 #Brexit vote (which younger voters overwhelmingly opposed) for lowering the voting age to 16, because young people are more “interested, motivated and informed” than ever before, and often “on the right side of history.”¹⁰³

B. *Some Local Developments as Evidence of Direction of Change*

Many do not realize that some parts of the U.S. have already moved towards expansive youth suffrage. Cities in California and Maryland currently give 16- and 17-year-olds the power to vote. For instance, in 2013 Tacoma Park, Maryland lowered its voting age for local elections.¹⁰⁴ This caused a ripple

⁹⁷ See Mike Macnevin, *Millions of 16- and 17 years olds vote in Brazilian Presidential Election, but no President Elected*, FAIRVOTE (Oct. 23, 2014), available at <https://www.fairvote.org/brazilian-election-2014>

⁹⁸ See *id.*

⁹⁹ See *Argentina voting age lowered from 18 to 16*, BBC NEWS (Nov. 1, 2012), available at: <https://www.bbc.com/news/world-latin-america-20164573>

¹⁰⁰ See *What Are Voting Rights in Cuba?*, ANYWHERE, available at: <https://www.anywhere.com/cuba/questions/people-economy-government/what-are-voting-rights>

¹⁰¹ See John Nichols, *Lower the Voting Age to 16*, THE NATION (Feb. 23, 2018), available at: <https://www.thenation.com/article/lower-the-voting-age-to-16/>

¹⁰² See George Arnett, *Votes for 16- and 17-year-olds – where else outside Scotland?*, THE GUARDIAN (Jun. 18, 2015), available at: <https://www.theguardian.com/politics/datablog/2015/jun/18/votes-for-16--and-17-year-olds-where-else-outside-scotland>

¹⁰³ See *id.*

¹⁰⁴ See Timothy Male and Rob Richie, *In Takoma Park, starting the voting habit early*, THE BALTIMORE SUN (Jun. 2, 2013), available at: <https://www.baltimoresun.com/opinion/bs-xpm-2013-06-02-bs-ed-voting-age-20130531-story.html>

effect throughout other cities in Maryland. Hyattsville followed suit in 2015.¹⁰⁵ Greenbelt has now become the third city in Maryland with a voting age of 16.¹⁰⁶ Each city has seen positive results with 16- and 17-year-olds turning out at higher rates than the overall electorate.¹⁰⁷ This effort will likely continue to grow as a fourth town, Kensington, is considering making the same change as its neighboring areas.¹⁰⁸

California has also introduced expansive youth suffrage. In Berkeley, California, 16- and 17-year-olds were granted the right to vote in school board elections in 2016.¹⁰⁹ Neighboring areas are looking into introducing this provision in their cities. The Los Angeles Unified School District board voted unanimously to approve a resolution directing the superintendent to report on the feasibility — including costs — of a 2020 ballot measure that would lower the voting age to 16 in school district elections.¹¹⁰ The efforts to encourage younger citizens to vote in California has paid off, with more than 200,000 teenagers preregistered in the state before their 18th birthdays since 2016.¹¹¹

This effort to politically mobilize teenagers does not end with these two states, however. Twenty-two states already allow those who are 17 but will be 18 by the general election to vote in primaries.¹¹² This is clearly a nationwide movement, and politicians have taken notice....

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¹⁰⁵ See *It's official. Greenbelt, md lowers its local voting age to 16*, VOTE16USA, available at: <https://vote16usa.org/its-official-greenbelt-md-lowers-its-local-voting-age-to-16/>

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ See Michelle Basch, *Effort to lower local voting age to 16 takes next step in Kensington*, WTOP (May 15, 2019), available at: <https://wtop.com/montgomery-county/2019/05/effort-to-lower-local-voting-age-to-16-takes-next-step-in-kensington/>

¹⁰⁹ See *Berkeley, California, School Director Election Youth Voting, Measure Y1 (November 2016)*, BALLOTPEDIA, available at: [https://ballotpedia.org/Berkeley,_California,_School_Director_Election_Youth_Voting,_Measure_Y1_\(November_2016\)](https://ballotpedia.org/Berkeley,_California,_School_Director_Election_Youth_Voting,_Measure_Y1_(November_2016))

¹¹⁰ See Sonali Kohli, *L.A. students are already activists. Now they want to vote at 16*, THE LOS ANGELES TIMES (Apr. 23, 2019), available at: <https://www.latimes.com/local/education/la-me-edu-laUSD-teen-voting-20190423-story.html>

¹¹¹ See David de la Fuente, *Lower the voting age to 16 for federal elections?: Today's talker*, USA TODAY (Mar. 18, 2019), available at: <https://www.usatoday.com/story/opinion/2019/03/18/lower-voting-age-16-federal-elections-talker/3201283002/>

¹¹² See *Primary Voting at Age 17*, FAIRVOTE, available at: https://www.fairvote.org/primary_voting_at_age_17